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Empirical Legal Research in Action

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Empirical Legal Research in Action

Reflections on Methods and their Applications

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8. A traditional lawyer's perspective on the importance of ELS for legal scholarship

Jan Crijns, Ivo Giesen and Wim Voermans*

INTRODUCTION

Over the past few years, the attention devoted to – in broad terms – empirical study of the legal system has been increasing;[1] the present volume adds to that growing body of literature. That 'empirical manner' of approaching the law has internationally become known as 'empirical legal studies' (ELS) or 'empirical legal research', two concepts which we will use interchangeably in this chapter. To be sure, this contribution is not aimed at discussing the phenomenon of empirical legal research as such, or the different streams of thought within ELS; nor is it about the relationship between ELS and 'classical' sociology of law; equally, it is not our goal to elaborate on the different methods and techniques used

* We would like to thank Lonneke Stevens for her comments on drafts of distinct parts of this paper.

[1] See, for some recent Dutch examples, van Boom's inaugural lecture (W.H. van Boom, *Door meten tot weten* ['Measuring is Knowing' (BJu 2015)), the special issue of *Justitiële verkenningen* on 'Empirisch-Juridisch Onderzoek' ['Empirical Legal Research'] (*JV* 2016/6), and Leeuw's textbook (see F.L. Leeuw, with H. Schmeets, *Empirical Legal Research* (Edward Elgar Publishing 2016)), each with many further references to other valuable contributions. See also M.V. Antokolskaia, 'Opkomst van Empirical Legal Studies: een vloek, een zegen of allebei?' ['The Rise of ELS: a blessing (in disguise)?'] 3 (2016) *Tijdschrift voor Privaatrecht* 423–32 and M.A.H. van der Woude, *Chain Reactions in Criminal Justice: Discretion and the Necessity of Interdisciplinary Research* (Eleven International Publishing 2017). Another signal of the increasing role of empirical legal research might be the existence of mandatory empirical courses in the education programs for PhD candidates in several law schools: see for instance the mandatory courses 'Qualitative Research Methods' and 'Empirical Research Methods in Law' in the Leiden PhD training program.

within ELS.[2] What we wish to do here is answer, to the extent that it is possible, the rather large question of what the importance is or could be of some of the empirical research methods as discussed in this volume to the research that is currently being done within the legal domain – especially within private law, criminal law and constitutional and administrative law – and which constraints and limitations are then to be taken into account.

In order to deal with that question properly we need first to reflect, albeit briefly – as we will do in the next section – on the question of what actually constitutes ELS or empirical legal research, and why the more classical research methods used in law (analysing words and texts, the system as such, the rationales of rules, weighing arguments, and so on) are usually not considered to be empirical in nature. For instance, which conditions, if any, need to be fulfilled to mark a case law review as empirical? Also important is knowledge of whether qualitative methods, such as observations, interviews and focus groups, are included in the definition of empirical methods. To spoil any surprise: we think they are (or should be), but it might not be an open and shut case. The importance of answering that specific question positively is huge, if we may assume – as we do, albeit without empirical backup – that the average lawyer or legal scholar will feel much more confident to engage in and conduct qualitative empirical research over quantitative research, even though both methods require thorough methodological knowledge on the part of the researcher.

Having dealt with that broader aspect of the discussion, we will focus on the use (its importance and possible drawbacks) of empirical methods within three legal domains (private, constitutional and administrative law and criminal law), taking the starting point for each section from among the collected papers included in the present volume. In the final section we will offer some concluding observations by trying to grasp at least some of the overarching results that might be drawn from dealing with those three different legal domains.

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[2] On those aspects, see for example Leeuw (n 1); L. Epstein & A.D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014), and R.M. Lawless, J.K. Robbennolt & T.S. Ulen, *Empirical Methods in Law* (Aspen 2010).

LEGAL SCHOLARSHIP AND EMPIRICAL RESEARCH

Introduction

When confronted with the question of what ELS' contribution to legal scholarship (and thus also: legal practice) in general might be, one is almost immediately diverted to a scholarly debate with even 'higher stakes', as it were – that is, the question as to the scientific status of legal scholarship, of studying law, as such. That being the case, we will pick up on that debate in the remainder of this section, and will add a few tentative remarks of our own.

A vulnerable kind of science ...

'Legal scholarship: venerable and vulnerable' is the well-chosen title of a chapter in Carel Stolker's 2014 book *Rethinking the Law School*.[3] In this chapter he discusses one of the most controversial questions in legal scholarship: is 'law' a science? Some argue adamantly that it is; others firmly insist it is not.[4] It is hard to tell who is right here, especially since the legal discipline and legal research are rapidly changing. However, there are – perhaps due to the particular characteristics of legal research and legal scholarship – few who would label the work of academic legal researchers 'legal science'. (We use the somewhat more indefinite term 'legal scholarship' instead, to indicate the yield of academic legal research.) This is most probably due to the lack of certainty offered by legal scholarship when it comes to answering hard questions about the law, or testing hypotheses, if this is done. For other scientific disciplines the near impossibility of providing 'right', 'falsifiable' answers and the divergence of conclusions on a single hypothesis in law is proof of its nonscientific nature. As Posner – quoted by Stolker[5] – puts it:

> What is missing from the law are penetrating and rigorous theories, counter-intuitive hypotheses that are falsifiable but not falsified ... precise instrumentation, an exact vocabulary, a clear separation of positive and normative inquiry, quantification of data, credible controlled experiments, rigorous statistical inference, useful technological by-products, dramatic interventions

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[3] Carel Stolker, *Rethinking the Law School* (Cambridge University Press 2014) 200 ff.

[4] See Stolker (n 3) 92.

[5] See Stolker (n 3) 202.

> with measurable consequences, and above all and subsuming most of the previous points, objectively assessable – and continually reassessed – hypotheses.[6]

A very gloomy outlook perhaps, but Posner follows this cloud with a silver lining, saying: 'In law there is the blueprint of shadow of scientific reasoning, but no edifice.'[7]

One might add to that: 'as of yet'. Because it is *not* that legal scholarship *cannot* produce sound theories, or falsifiable and falsified (tested) hypotheses, but simply that we *are not used to it*. Traditional legal research and the scholarship that emanates from it predominantly takes place in a 'closed' arena of discourse privy to legal scholars. Legal scholars are academically trained to traverse this arena and recognize 'law', 'legal authority' and 'relative weight of legal argument'. The boundaries, rules of engagement and dynamics of this argumentative arena are very difficult to understand for outsiders and are very rarely articulated. When lawyers speak of 'the' legal system, its underlying principles, the basic theories of 'justice', its historical roots, its consistency, they refer to this arena and its liturgy. That legal system is not visible or tangible in the real word, but is rather a shared belief. The law is an imagined order.[8] That is something very different from a mere fairy tale – imagined orders, such as our economic and financial system or our legal system, are very powerful and persistent. They allow us to trust each other, enable mass cooperation and bring peace. They are, however, very difficult to study, because they rely on and appeal to our most inner emotions and even our most basic instincts. And to add to this, in law we are not used to looking at the legal world like that, let alone to studying it in this way. Scholars and practitioners alike do not tend to view the law as an imagined reality, but rather more as something real and tangible. To most lawyers, the law exists in the empirical world; it is perceived as real and a part of reality, not a mere common belief, something predominantly existing in people's minds. So in this regard, the case for empirical

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[6] Richard A. Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 431–2.

[7] Posner (n 6) 432.

[8] In his bestseller *Sapiens* (Vintage 2014), Yuval Noah Harari states: 'We believe in an imagined order not because it is objectively true, not because it is scientific fact, but by believing in this imagined reality, it enables us to cooperate effectively and to forge (…) societies. Imagined orders are not mere stories or useless (…) in any way, as they are the only way that large numbers of humans can cooperate effectively. They are necessary. However, this doesn't mean that they are objectively true.'

study of the law, the many institutions of the law and its theoretical underpinnings has been a long time coming.

The case for (increasing) the empirical study of the law

If studying the law in fact equates to studying the imagined order of the law, it is indeed hard to imagine where the facts and data to be studied would figure. One could, of course, study the shadow cast by this imagined order – how is behaviour affected by the imagined order of the law; what kind of institutions does it bring forth? In some forms of sociolegal research this actually happens. But most of the time, that is where projections on the relevance of empirical study of the law stop. 'For the legislature in particular, empirical research may be relevant', Stolker argues – struggling to find examples.[9] And indeed, legislatures around the world have nowadays embraced the idea of evidence-based law legislation, but this is not the same as introducing a new way of studying the law on the basis of facts and data. It is rather more a "buzz concept" calling for more evidence and allowing for counterevidence on positions and arguments in policymaking processes that, ideally, lead to better informed legislative decisions.In fact, however, empirical research of and in the law is still often (arrogantly) neglected, according to Stolker because:

> most legal academics in the civil law tradition much prefer analysis-based methodologies to the data-centred analysis of the social sciences. They do not like interviewing and compiling statistics. As a result, in most law schools outside the US, professors of jurisprudence or Roman Law greatly outnumber the professors of socio-legal studies. Most legal academics in the non-common law countries simply hate socio-legal studies with its empirical baggage, considering it totally irrelevant.[10]

There is, however, great potential for empirical legal studies. Traditions in law and legal scholarship are changing, not only because we as lawyers seem to be opening up more to other disciplines, but also because the amount of researchable data is increasing dramatically (an example being the debate on the use of 'big data'[11]).

What is more, from a normative stance we firmly believe that traditions *should* also be changing, because it would, in our view, be a real waste (of intellectual rigour, time and resources) not to engage more

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[9] Stolker (n 3) 112.

[10] Stolker (n 3) 112–13.

[11] See for example Leeuw (n 1), for several remarks throughout the book in this regard.

frequently in empirical legal scholarship, or at least use the results thereof. It is our firm belief that incorporating more empirical scholarship into our 'regular' legal scholarship would be the logical next move.[12] But why? Is there actually a need to shift the focus? In our view, there is indeed such a need. We are fully aware, to be sure, that Smits has stated that lawyers should not overestimate the meaning of empirical work for the law, warning legal scholars that 'the relationship between the normative question of what the law ought to be ... and the empirical question whether something "works" is not completely clear'.[13] And he is, indeed, totally right in emphasizing that the relationship between law and extralegal insights is not an easy one. But even if that is the case, one should not close one's eyes to what is currently happening in the legal research world, which is that empirical scholarship is growing fast and becoming more important. We can see that both the international discourse and the national debates are becoming more and more multidimensional, more empirical in orientation.

This is exemplified by the ongoing national debate in the Netherlands on law as a scientific discipline, which we touched upon above. That debate concentrates on legal methodology, or rather the proclaimed lack thereof. And since empirical scholarship could be helpful in this respect, there seems to be a tendency among legal scholars and (the Deans of) law schools to steer legal scholarship somewhat more towards an empirical approach. On a more down to earth level, any research group could probably use such an upgraded, modernized focus in the standard peer review assessments that are needed every few years; this will help to safeguard the future of such a research group. In the same vein, one can point to the ever growing need to find external funding for research, and the growing competitiveness in this regard. A new focus – a new 'profile' – might make succeeding in this competition somewhat easier.

Last but not least, if a research group wants to remain attractive to young and bright future scholars, it needs to prepare for the state of the art in research in the near future. And surely, any ambitious group of

[12] The three paragraphs that follow are a slightly amended version of part of an earlier contribution by one of the present authors: see I. Giesen, 'Towards a Ius Commune 3.0?!' (2013) 20 *Maastricht Journal of European and Comparative Law* 2 161–2.

[13] J.M. Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing 2012), 16.

researchers would want to remain interesting partners for these youngsters. Further, any research group should strive to deliver newcomers on the research front who are better researchers than those who trained them.

But what is ELS anyway? And do lawyers know it when they see (do) it?

In their book *An Introduction to Empirical Legal Research*, Epstein and Martin do not dwell on the broad horizons and large potential of empirical research on or in the law; they just give a very hands-on definition of empirical research as research based on observations of the world or data, which is simply another term for facts about the world.[14] Facts about the world – data – can take many different forms: cases, gender, age, motives, words, numbers, and what have you. Empirical research data can be interpreted, organized into categories or used to identify patterns or relations. All this qualifies as empirical research, because – as Epstein and Martin point out – empirical evidence (that is, data) can be numerical (quantitative) or nonnumerical (qualitative). This is 'despite some tendency in the legal community to associate empirical legal work solely with "statistics" and "quantitative analysis". The truth of it is, neither is any more empirical than the other.'[15] They follow this with detailed advice about designing research with an empirical component, collecting and coding data, analysing data and communicating data and results. Their bottom-line message, however, is 'just do it'.

The fact of the matter remains, though, that most lawyers are not used to doing empirical research (and many do not like it, perhaps fearing that excessive emphasis on the empirical part of legal research may be detrimental to the 'poetry of legal argument'). Moreover, when they actually do it, they are not used to labelling what they have done as empirical legal research, even if it is in fact empirical in nature. For instance, lawyers who engage in comparative law, comparing legal systems or solutions of different countries, will not be very likely to label elements of other legal systems they study as 'data'. And most of the time, legal comparative work by legal scholars is not an analysis in search of patterns, of differences between elements of systems, and so on, but rather a debate as to what is the best solution or the 'best practice' – that is, a doctrinal exchange of arguments substantiated by

[14] Epstein & Martin (n 2) 3.
[15] Epstein & Martin (n 2) 3.

anecdotal evidence. So while empirical legal research is in fact being performed, it is not always recognized as such.

To summarize: where does legal scholarship stand now?

A preliminary wrapup tells us that the relationship between ELS and legal scholarship is a multifaceted one, and an awkward one at that. The current position of legal scholarship (in general) in relation to ELS is one of tensions and a search for a new status quo. These tensions concern the fact that ELS is viewed, on the one hand, as a means – and an intellectually challenging one at that – to enhance the credibility of legal scholarship as a 'real' form of science (whatever that may be). But on the other hand, ELS is also perceived as something of a threat to what we as legal scholars used to do, and is thus confronted with some anxiety – that is, fear regarding what (problems) legal scholars are taking on board by really engaging in it, but also threats to age-old traditions of legal scholarship and, perhaps, (partly) leaving behind what we used to do. And as with all life-changing events, finding a new status quo comes with ups and downs, with heated debates and quarrels, with disagreements and with individual choices (weighing pros and cons) that need to be made. That is where we seem to stand now.

THE POSSIBILITIES OF ELS IN PRIVATE LAW

Introduction

In this section we will highlight some of the characteristic features of the use of empirical legal scholarship in the domain of private law, first by looking back on the (one) private law contribution in this volume – written by Reinders Folmer – then by offering an critical appraisal of his plea in support of the use of experimental methods, and finally by taking a somewhat broader look at the current use of empirical data in the field of (Dutch[16]) private law.

Reinders Folmer and the Use of Experiments in Legal Research

As is evidenced from his contribution to this volume, Chris Reinders Folmer is clearly a strong proponent of the use of experiments in (and

[16] This section concerns Dutch private law only, as will be explained in more detail below.

for) legal research.[17] While wholeheartedly acknowledging the value and strengths of other methods (he mentions doctrinal and comparative research, anecdotal evidence, interviews, surveys) to gain more (better) insights into the specific phenomenon he describes (that is, the value of apologies in personal injury cases), he also informs us systematically of all of their (largely well-known) disadvantages, thereby implicitly 'guiding' us towards the method he is actually (admittedly, in a highly nuanced way) advocating: *experiments*.

In a legal research setting, experimental approaches (plural, indeed) 'aim to simulate actual litigation contexts in controlled circumstances, or to experimentally modify actual litigation practice in the field', according to Reinders Folmer. Why? Because 'experimental approaches provide a powerful tool for legal scholars and policy makers to counter' what he calls in his chapter abstract 'the inherent variability of cases in legal practice'. This variability places heavy constraints on what one can conclude from looking at cases actually being litigated in the real world. The experimental approach advocated here allows for the so-called key features (in this case the presence or absence of apologies) to be varied systematically, while variability on other factors (Reinders Folmer mentions variations between types of tort, level of harm and so on) can be kept to a minimum. 'Thereby, the researcher can therefore *isolate the unique effects* of particular actions, initiatives, or features that cannot be separated in legal practice – or which have not yet been implemented there' [our emphasis], a result which is not attainable by using any of the other methods described. And in doing so, according to Reinders Folmer, these 'experimental approaches provide unique insight that can enrich and advance legal scholarship and practice, by providing causal evidence that speaks to the validity of the assumptions and presumptions on which legal theorizing and policy are based'. He stresses the fact that experiments can be used to test phenomena that currently seldom occur in practice (such as apologies), or that have not yet been implemented (there is no legal rule as yet obliging one party to apologize to another).

Reinders Folmer speaks – as stated, in plural – of experimental approaches, which for him include experimental vignettes, laboratory experiments and field experiments. He discusses existing examples of all of these types, and provides the reader with valuable insights into their

[17] See C.P. Reinders Folmer, 'Experimental Approaches to Private Law: The Case of Redressing Personal Injury', in this volume. All of the following quotes from Reinder Folmer are taken from his chapter in this volume. On experiments in law, see also K. van den Bos & L. Hulst, 'On Experiments in Empirical Legal Research' (2016) *Law and Method* 2016, DOI: 10.5553/REM/.000014.

uses and limitations. For example, a vignette often relies on a simplified representation of an actual dispute or case, while the greater complexity of a real-life situation might alter the actual outcomes vis-à-vis the predicted outcomes. Representativeness is thus an issue here; also, vignettes tend to show preferences, and do not provide predictions. The same danger of (over)simplifying is present in laboratory experiments as well, as Reinders Folmer himself admits. Also, the samples used here are fairly often drawn from student populations, and these students may differ from real-life victims as regards age, level of education, and so on.

As to field experiments, these are in fact conducted in actual litigation contexts, whereby treatment is varied; in some of the litigated cases a certain treatment is introduced, but not in others (an apology, for example). In essence, one can then directly examine the impact of the treatment, the manipulation, in question. Apart from ethical or legal (in Reinders Folmer's words) restrictions – can you consciously apply the law differently between different groups of people, offering an apology to one group and not to another? – these field experiments (which seems to be rare, by the way) have less control over variability, making them vulnerable to differences between cases.

Is this the way forward for private law?

What can we learn from this single chapter for the discipline of private law? Probably not a lot, but still some lessons might be worthy of consideration.[18] First, Reinders Folmer is to be commended for his nuanced chapter, not only highlighting the advantages but also clearly explaining the limitations of these experimental approaches. Second, to a large degree, we would wish for his view on legal research to become somewhat more dominant, since these experimental methods nicely flesh out what people believe to be their reaction to certain possible legal changes and can assess proposed legal reforms in advance by testing

[18] See also N.A. Elbers, 'Empirisch-juridisch onderzoek – toekomstmuziek of werkelijkheid?' [ELS: The Future or Reality?'] (2016) 6 *Justitiële Verkenningen* 43–59, focusing on PhD theses that were defended in the past couple of years. Lessons on 'doing ELS' are also offered in a collection of papers in the 2016 volume of *Law & Method*: see G. van Dijck & S. Taekema, 'Introduction, Special Issue: Stumbling Blocks in Empirical Legal Research' [2016] *Law and Method*, DOI: 10.5553/REM/.000021. We will not deal here with the specific lessons that Reinders Folmer teaches as regards the substantive part of his paper, that is, the value of apologies in private law litigation. On that aspect, see also G. van Dijck, *MoneyLaw (and beyond)* (Eleven International Publishing 2017) 51–8, with further references.

them. This will bring valuable knowledge to the field, even if we do not get to the 'causal evidence' testing of legal theories that Reinders Folmer promised in his introduction (but did not deliver on in his conclusions).

For several reasons, however, we are not overly optimistic about the future reception of experiments in private law. First, ELS is usually strongly tied in with policy making and evaluating and possibly changing policies, and 'policy making' is not the basic function or idea that private law scholars would primarily connect to their field of law. Private law is a systematic collection of (sometimes very old) rules and doctrines and not a regulatory instrument, such as administrative law.

Second, and for practical purposes, not many (civil) lawyers – we are speaking from personal experience (anecdotal evidence) here – will have the guts, the time, the skills and/or the methodological training to set up and conduct experiments. Of course, collaborations, as Reinders Folmer also suggests, might overcome these hurdles to some extent – but still we remain doubtful, because even those legal scholars who truly believe in ELS usually confine themselves to qualitative empirical work, such as conducting interviews. Surveys (at least, largescale ones) are a rather rare phenomenon in (private) law, and so are experiments.

There is also the legal or, probably even more important, ethical element of doing field experiments: an experiment can, ethically, never be conducted using an actual, real-life, as yet undecided case in a real-life courtroom, and treating that differently from the next (same/similar) case. Especially for legal scholars, conducting such an experiment would probably be asking too much, if the university ethics committee would even allow it.

Fourth, practical experiments in a legal context seem to be particularly in order where one would want to test a phenomenon that seldom occurs in practice, or that has not yet been implemented. In the first case, it may not be wise to spend a lot of time on that topic; in the second, there is the practical aspect that the legislator will usually not wait for the experiment to finish (so one needs to start as soon as plans are presented, hoping for the best[19]) – and the judiciary (which is even more important when it comes to adjusting and changing the rules of private law) does not even announce that it will be changing the rules (the judge just decides so, in a given case, at the time that a case is handed down).

More positively, however, we do think that *experimental vignette* studies as described by Reinders Folmer might have a bright(er) future

[19] Which might then even change halfway through the process because of discussions in Parliament or among experts.

once that concept and its methodology become more familiar within the domains of the law. We think so because this is a method that is close enough to interviews to not scare every lawyer off immediately, but also has a sense of 'hardcore empirics' surrounding it, since it scratches the surface of 'real' experiments (that is, randomized trials), the Holy Grail of all research. This might, for instance, lead to a situation where nonlawyers also become enthusiastic and grants might be awarded, or cooperative efforts might be set up. That time has not yet come, however, as we can learn from the next section.

The state of the art of ELS in private law?

Since this volume only contains one chapter on private law, it seems wise to broaden the horizon and to see what is happening outside of the book as regards the use of ELS/empirical methods in private law. Over time, however, many, many ELS or 'ELS-like' studies have been conducted and published that fall within the large domain of private law. These studies have not been done only in the Netherlands, of course, but also across Europe, and especially in the United States. Thus, it is impossible to even begin to summarize what was gained (or not) by (some of) those studies. How to proceed, then?

What is helpful here is that one of the present authors has been working on a paper, jointly with one of the editors of this volume, which aims to flesh out the state of the art of empirical legal scholarship in private law in the Netherlands over the past few years.[20] Since a worldwide overview of empirics in private law is unattainable and the Netherlands private law domain seems to hit 'middle ground' here – Dutch private law is certainly not at the forefront of ELS, but nor is it lagging behind – it might be instructive to get an overview of what seems to be happening there.

From that paper, we now take the following five aspects as noteworthy developments, characteristics and/or trends. First, it seems that a significant number of 'ELS studies' are being published. By scanning the 2008–16 volumes of all journals in the Dutch *Rechtsorde* database, followed by fine tuning that search within five important legal journals with a private law focus, we found some 50 articles that might be

[20] See W.H. van Boom & I. Giesen, *Tien jaar civilologie: hoe ver staan de luiken open?* ['Ten years of civilology: have the curtains been drawn?'] (in press, to be published in 2018).

classified as ELS studies. We thus neglected all the books, dissertations, edited volumes, case notes, reports and so on that might also contain ELS material.

Second, it was found to be useful to make a distinction between 'primary' and 'secondary' ELS studies, that is, between those studies that report on data generated for that study by the authors themselves (primary ELS) and those publications that make use of the insights others have found based on empirical evidence (secondary ELS).[21] If we were to look only at primary ELS studies, we would certainly miss out on many examples of empirical data being (able to be) of influence on private law matters, albeit in a rather indirect way. A recent publication in which the psychological phenomenon of 'authority bias' and its possible influence on the use of expert opinions by civil judges is analysed by using the already existing psychological studies in that domain is a fine example of what secondary ELS can bring.[22]

Third, the authors conclude that not all studies are outstanding in their methodology or in the use of previous materials and sources ('standing on the shoulders of one's predecessors'), which is of course a danger for the future reception of ELS ('it's just not to be trusted'). But then again, this might also be a mishap that occurs in regular legal research as well, or might be qualified as a 'beginner's mistake'. But then *again*, that might be an overly optimistic view of things.

A fourth noteworthy aspect is that within secondary ELS, the use of psychological insights is very popular; since psychology is, like private law, about (steering) human behaviour, and since it is rather accessible, we think this is not really surprising. A fifth and final aspect worth mentioning from this Dutch review is that ELS puts pressure on what was previously the regular review process used by (most) Dutch legal journals: they use an editorial board that reviews papers, rather than using external peer reviewers. However, the private law specialists on these editorial boards are not always able to review ELS contributions.

Again, the way forward?

To conclude: Dutch private law scholarship is at a crossroads, or so it seems. There are some empirically orientated scholars who, despite their

[21] Examples of both types can be found in Van Boom (n 1) (primary ELS) and I. Giesen, *Handle with Care!* (BJu 2005) (secondary ELS).

[22] See M.J.C. Schröder, 'De invloed van de authority bias op het waarderen van deskundigenbewijs' ['The Influence of the Authority Bias on Weighing Expert Evidence'] 11 (2016) *Nederlands Tijdschrift voor Burgerlijk Recht* 75–84.

training as private law scholars, go one way ('the ELS path'),[23] while others continue to travel the well-trod path of classical doctrinal research in private law.[24] The first ('new') route comes with hurdles and obstacles, as we have seen, but also holds exciting promises for those who succeed (that is, more knowledge and information on how private law actually works in the real world). The second road is, as a result of our collective past experiences, a smooth stretch of asphalt – still leading to important insights as well, of course, but of a different (somewhat narrower) nature. Given the current move towards 'the ELS path' within legal scholarship as a whole, private law scholarship will probably also be geared in that direction – at least to a certain extent – but it would not surprise us if this change were a relatively slow one, for the reasons dealt with above.

THE POSSIBILITIES OF ELS IN CONSTITUTIONAL AND ADMINISTRATIVE LAW

Introduction

Constitutional and administrative law is the second domain of legal research to be discussed. These legal domains differ from private law because the focus is on government–citizen relations: the law and relations covered have a distinct and different character. And even though there is already a modest tradition of ELS legal scholarship in constitutional law (and administrative law, to a lesser extent), it has taken a distinctly different path than that of, for example, private law scholarship. This all has to do with 'vicinity'. Constitutional law and administrative law take their theory predominantly from other disciplines (political science, regulatory theory,[25] public administration, sociology and so on). For instance, when the administrative law giant Paul Craig signals that most contemporary scholarly debates on administrative law are 'rights based', he acknowledges that the grounding theory comes from constitutional theory, which in its turn is based on the theory of unitary democracy and the concept of ultra vires (continental scholars would say

[23] A recent example is the research agenda in Van Dijck's inaugural lecture (n 18) at 59 ff. To be sure, Van Dijck has been at the forefront of ELS in the Netherlands for a longer period of time than this.

[24] Of course, there are some scholars that (try to) do both; for argument's sake, we will only look at the two opposing positions.

[25] See for instance Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press 2007).

legality).[26] These theories are mostly taken for granted by scholars in administrative and constitutional law. They are, most of the time, not tested by them: empirical evidence or empirical studies are, mostly, like theories 'taken from the shelf'. While, in his contribution to this volume, Julien Etienne notes that the empirical literature, particularly on regulation, has expanded remarkably in recent years, many scholars in administrative law will not recognize this trend – not because they do not know of it, but because they will label it differently. The empirical studies on regulation (including some case studies), inspections or regulatory processes in environmental law (especially on impact assessments) – such as those presented by Melissa Rorie, Sally S. Simpson and Breanna Boppre in this volume – are predominantly perceived as belonging to a different discipline, in this case regulatory studies. Regulatory studies – for good reason – is considered to be a standalone discipline,[27] but a field of study (including the methods) that is adopted into the study of administrative law or constitutional law itself. In brief: legal scholars in administrative and constitutional law will experience studies such as these as 'foreign'. It is to the merit of Etienne, Rorie, Simpson and Boppre that they show that the methods and approaches they use can contribute to the study of administrative (and even constitutional) law, but the big question is why most legal scholars in administrative law and constitutional law – with a field that is so suited – do not seem to do that.

To understand this better, and to get to the root of it, this section is set up a bit differently from the previous one. First, we will take a look at the research tradition in this field – a tradition that tends to borrow the theory and research at the basis of constitutional and administrative legal research from other social sciences, and – as a consequence – outsources a lot of the empirical research there too.

The Outsourcing of Theory and Research in Constitutional and Administrative Law

As disciplines, constitutional law and administrative law are very suitable domains for ELS, albeit that there are only limited examples and studies that make use of them. The promises and potential of ELS in these disciplines remain largely unfulfilled and are not used to their full extent. There are some good reasons for this. First, the base theory for

[26] Paul Craig, *Administrative Law* (8th edn, Sweet and Maxwell 2016) 1–15.

[27] See Robert Baldwin, Martin Cave & Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010).

constitutional law and administrative law is rooted in political theory and theory elaborated in the social sciences and economy. Constitutional and administrative law draws from these wells, sometimes even inadvertently. For example: many notions regarding the effects of present-day government interventions using the law (or legislation) in order to protect 'freedom' (predominantly perceived as a core legal value by constitutional lawyers) stem from economic theory on government intervention. Most modern-day constitutional lawyers will, however, most likely not be able to reproduce the theoretical debate (its arguments and evidence) on freedom by Hayek and Keynes, even though it is vital to an under standing of constitutional law of modern (welfare) states. Theory and law are or have become detached – even more so in administrative law, where there is rarely debate on underlying ideas and theories regarding what administrations are, what they do, how they relate to politics and society at large and what kind of powers are best suited to achieve the aims of government in free market states governed by the rule of law.[28] That does not mean that administrative law is theory-free. Not at all. It only means that the elaboration, checking and testing of theories and theoretical notions underlying law – the fundamental research – is taken care of by disciplines other than administrative lawyers. ELS is undertaken without the 'L' itself being present. That is not a problem in itself – as Grootelaar and Van den Bos prove in this book (with experiments and surveys in the field of administrative justice). Sociolegally schooled scholars are, most of the time, much better placed and better skilled to perform empirical studies and experiments than lawyers. Detachment of theory, empirical studies and constitutional law and administrative law is not a problem as such. It can even be quite productive and efficient to do things separately as long as detachment does not become estrangement. Constitutional lawyers and administrative lawyers need to be familiar with theory and research in their own field, but also with relevant (empirical) research and theories stemming from other academic disciplines – especially of the social sciences. This can prove quite difficult nowadays,[29] however, due

[28] A notable exception is the book by C. Harlow & R. Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009). See for example on the Dutch tradition of detachment of base theory and administrative law, W. Voermans, 'Besturen met regels, volgens de regels' ['Governance with Rules, According to the Rules'], *Preadviezen Vereniging voor bestuursrecht* (VAR-reeks 2017) 158.

[29] One of the classics of constitutional law is the *Federalist Papers*, a collection of 85 articles and essays written in 1787 and 1788 by Alexander Hamilton, James Madison and John Jay promoting the ratification of the United

to the different traditions and training in disciplines, even leading to sometimes hostile attitudes from lawyers towards sociolegal studies, economic studies or the fruits of social sciences as a whole.

A second reason for not using ELS to its fullest extent in constitutional law and administrative law is that there is a relatively long tradition of qualitative research ending in moral appraisals of the findings. For instance, if present-day constitutional or administrative law scholars study constitutions or administrative law in a comparative way, a typical constitutional or administrative comparison would consist of three or four cases from a few countries that are analysed and compared. Comparative studies such as these also typically end up as discussions of what is a 'good' system, this rated in line with rather subjective lists of legal values. The Aristotelian model of constitutional and administrative law comparison based on moral judgements is still very much with us as lawyers in public law, even after almost two and a half thousand years.

Legal Transplants?

A vivid illustration of this tradition can be found in the debate on the possibilities of legal comparison and legal transplants. The big question underlying a lot of comparative legal research is: can law bring about changes for the better to societies and their political systems? Closely connected to this is the question: can 'foreign' or 'transnational' legal concepts and law successfully add to the transformative power of (domestic) law? In his 1974 book *Legal Transplants*, Alan Watson articulates this theory and argues that, because legal rules are largely autonomous from the larger social and cultural surroundings, legal concepts and rules – whole systems, for that matter – can successfully be borrowed from or transferred between (other) jurisdictions even where the circumstances of the host or recipient are different from those of the donor.[30] Watson's liberal approach was fiercely rejected by an opposing

States Constitution. The three authors had a firm grasp on philosophy (ranging from Aristotle to Montesquieu) and constitutional theory, and used a lot of 'cases', that is, examples of – for instance – experiences of republics such as Venice and the Netherlands, to mirror their 'experiment' of an independent Republic-to-be. This is a textbook example – albeit more than 200 years old – of the case-study approach that Irene van Oorschot and Peter Mascini deal with in their contribution to this volume.

[30] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University Press of Virginia 1974), as cited by Vlad Perju, 'Constitutional Transplants, Borrowing and Migrations' in Michael Rosenfeld and András Sajó

school of thought with Robert Seidman as one of its most famous and articulate advocates.[31] These opponents believed – as was quite fashionable in the heyday of postcolonialism – that it was simply impossible to transpose (or 'impose') legal solutions from one system to another without context. To date the two main positions remain in their trenches, with Pierre LeGrand as one of the most vocal adversaries of the idea of legal transplants,[32] but the heated debate largely remains one fought on the basis of principles and moral judgements rather than on evidence subtracted from (comprehensive sets of) data or facts.

The moral-centred tradition in comparative constitutional and administrative law

The debate on legal transplants is relevant in constitutional and administrative law as well. Tom Ginsburg, for one, has pointed out that contemporary practices of constitution making mostly originate from acts of purposive institutional design involving borrowing, learning and accommodation, and even with moments of creative innovation and experimentation.[33] Since the early days of modern constitutionalism, the 'making' of constitutions has always conveyed that they are 'not found'[34] – they neither fall from heaven nor are revealed in a mysterious way to founders.[35] Instead, they are – as Ginsberg observes – drafted, framed, created, constructed and, yes, designed.[36] 'Design implies a technocratic architectural paradigm that does not easily fit the messy realities of social institutions, especially not the messy process of constitution making.'[37] However, a lot of constitutional scholars (and indeed administrative law

(eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1304–27.

[31] Robert B. Seidman, 'Law and Development: A General Model' (1972) *Law and Society Review* 6.

[32] P. Legrand, 'The Impossibility of Legal Transplants' 4(111) (1997) *Maastricht Journal of European and Comparative Law* 111.

[33] T. Ginsberg (ed.), *Comparative Constitutional Design* (Edward Elgar Publishing 2012) 1.

[34] H. Pitkin, 'The Idea of a Constitution', 37 (1987) *Journal of Legal Education* 167, 168.

[35] See G. Frankenberg, 'Comparative Constitutional Design (book review)' 11 (2013) *International Journal of Constitutional Law* 537–42.

[36] Frankenberg (n 35).

[37] Ginsberg (n 33).

scholars) will not hear of this, most of the time on moral grounds and due to legal principles.[38]

In the *Oxford Handbook of Comparative Constitutional Law*, Michel Rosenfeld observes that the debate among scholars concerning the legitimate scope of comparative work in constitutional law centres on three broadly defined positions.[39] Supporters of the first position claim that in fully fledged constitutional democracies the *problems* of constitutional law, as well as the constitutional *solutions* to those problems, are by and large the same (or ought to be the same) in these systems. Hence, these problems and solutions can be more or less objectively studied and compared and lessons may be learned, irrespective of the specific wider context of the systems under study. Proponents of the second position agree that the problems of constitutional law are the same for all, but the solutions to the problems are likely to differ from one constitutional polity to the next, this making it highly difficult even to learn from constitutional solutions in other systems, let alone to transplant and adopt them. Analysis and comparison departing from this second position will be poised to highlight the differences between systems and try to place them in their proper context, thus possibly resulting in an understanding of why it is that constitutional systems differ from one another. Supporters of the third and final position assert that neither constitutional problems nor their solutions are likely to be the same for different constitutional systems. Comparisons, according to this last position, are most likely to be ultimately arbitrary, and comparatists' choices and analysis are for that reason prone to be driven by ideology.[40] Whatever position one would care to take, the methodological challenges for constitutional comparison are substantial. The fact that one-on-one comparison is difficult and that there are risks involved in simple transplantation of constitutional solutions into different settings and contexts does not rule out, however, that inspiration can be drawn from elements of other constitutions.

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[38] See Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' [2009] *University of Melbourne Law Research Series* 25, and (for the debate) Anne Peters, 'The Globalization of State Constitutions', in Janne Nijman & André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 251–2.

[39] Michel Rosenfeld, 'Comparative Constitutional Analysis in United States Adjudication and Scholarship', in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 41 ff.

[40] Rosenfeld (n 39) 41.

Be that as it may, and whatever preference for whichever position one may hold, comparative constitutional law is affected by the undeniable convergence in constitutional law and constitutional law arrangements, especially over the course of the past 30 years. In Saunders' view:

> there has been and is likely to continue to be a significant degree of convergence of constitutional arrangements themselves, affecting text, institutional design, interpretation, and, somewhat more speculatively, values. This is not a phenomenon that is peculiar to the 21st century, but there are features of our times that have accelerated the process. Convergence contributes further to the ease of constitutional comparison and thus is useful for present purposes.[41]

She follows up with a warning:

> It is not an unqualified good, however. The world of the 21st century has not attained a peak of perfection in the design and operation of constitutional arrangements, in terms of either acceptance or performance. There are advantages in a diversity of approaches to constitutional government and in a degree of competition between them; this, indeed, is one of the reasons for seeking a more global approach to comparative constitutional law. And as the circumstances change with which Constitutions must deal, constitutional innovation is required.[42]

So, as with comparative legal study, successful comparative constitutional scholarship is also controversial to a greater or lesser degree. The issue is, as in comparative law, framed in rather normative and very operational questions, such as: is it possible to actually compare constitutions and constitutional systems, and learn from them – even to adopt elements in another constitutional system to improve it?

Using data and finding patterns in comparative constitutional law

If we look at the facts regarding (the development of) constitutions in the world around us, a different picture emerges from the moral debate on the possibility of constitutional borrowing and transplants. Of the 196 officially recognized countries in the world, today 192 have a written constitution,[43] and four have a constitution albeit not laid down in a single constitutional document.[44] Why do so many countries have a

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[41] Saunders (n 38).

[42] Saunders (n 38).

[43] According to the Constitute.org website. Last consulted 10 January 2018.

[44] United Kingdom, Israel, New Zealand and Saudi Arabia. Slightly inaccurately, we say that these countries have an *unwritten* constitution, but this is not

constitution? Various explanations come to the fore. One of these is ideological, perhaps even a bit messianic. The peoples of the world have become increasingly aware – almost as an inevitability of the course of history – of what their *natural* rights are, and that these rights are to be acknowledged and respected by national authorities. Also, the importance of democracy and its consequent right to self-determination are the apparently automatic result of a linear progression in human reason. The best place to anchor these achievements is in a constitution: a sacred fundamental document in which members of a political society make solemn promises to each other and usually entrench these in a complicated amendment procedure so that simple political majorities cannot hastily change the content. This explanation for *constitutionalism* (the form of a state which is based on a constitution) is sometimes reversed: not only are there many constitutions, but a nation *ought* to have a constitution (and preferably one with certain content). In recent years, we have come across many true *constitutional missionaries* in Eastern Europe and the Middle East, who, without a trace of irony, present the American constitution as the highest accomplishment in the history of mankind. To certain people, constitutionalism is indeed a kind of religion.

There are also somewhat more secular explanations for the increase in the number of constitutions in the world, although they do not feature very prominently in constitutional research. Constitutions affect the economic growth of countries. The majority of these effects are indirect, but even so. One of these indirect effects is that constitutions can contribute to increased political stability in a country. The most recent constitutions do this not just by anchoring democracy, but also through constitutional guarantees for the legality of administrative action, the separation of powers and access to independent courts for the settlement of disputes. Democracy checked in this way has shown itself to be a demonstrable,[45] and proven, recipe for political stability[46] – in other words, the opportunity to peacefully and periodically be able to change government. By entrenching this institutional balance in an amendment and revision procedure that requires supermajorities for constitutional revision or even several procedural steps or readings, a political system

always completely true. In the UK, for example, much constitutional law is indeed laid down in Acts of Parliament and Orders.

[45] See Robert Cooter, *The Strategic Constitution* (Princeton University Press 1999).

[46] Torsten Persson & Guido Tabellini, *The Economic Effects of Constitutions* (MIT Press 2003).

becomes less sensitive to disturbances, and minorities – always a vulnerable group in majority systems – are better protected. Political stability lessens uncertainty, increases the probability of 'return on investment', and as a result increases the possibility of economic growth. Constitutions and the institutions they create (in particular an independent judiciary) provide an answer to the problem of 'credible commitments'. If political leaders want to stimulate long-term economic growth, they will have to convince and reassure national and foreign investors. Two critical factors for economic growth, after all, are the existence of transparent foreseeable laws and regulations, on the one hand, and a judicial regime that permits capital accumulation and protects property rights, on the other.[47] Market discipline therefore contributes to the establishment of democratic and constitutional administrations defined/secured by modern constitutions. That is not to say, though, that once political systems have a constitution they strictly adhere to the rules laid down in it. This would explain why national constitutions are in such demand and also – in part – why, in so many countries throughout the world that are not dependent on market discipline (because of great mineral wealth or a mainly self-supporting economy), liberal, that is, democratic constitutions governed by law are not so easily or quickly established.

To be sure, the increased number of constitutions is actually a relatively recent phenomenon. A total of 88 per cent of all 192 constitutions throughout the world came into existence after 1950, and 69 per cent after 1975. See Figures 8.1 and 8.2.[48]

The pattern illustrated in the diagrams follows – though with some delay – the path of development of the global recognition of the 'rule of law' and human rights (including the right to self-determination) that gained momentum soon after the Second World War: that of decolonisation and the great surges of democratisation. This raises a lot of new questions – questions that, most likely, can only be answered by relating the data to other data. For instance: do nations adopt (similar) constitutions to be better off economically and/or create political stability? If so, do constitutions or constitutional constructs promote economic welfare

[47] R. Hirschl, 'The Political Origins of the New Constitutionalism' (2004) *Indiana Journal of Global Legal Studies* 82.

[48] Two 'constitutions' dating back to before 1787 have been included in the calculation. These, however, are not constitutions in the modern sense, but rather so-called charters and the like. They do not affect the period after 1787, in which the US Constitution is the oldest.

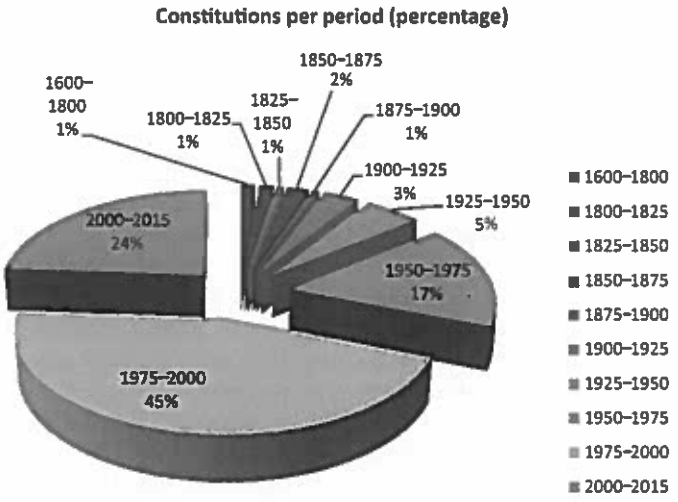

Figure 8.1 Percentage of national constitutions still in existence by period of time

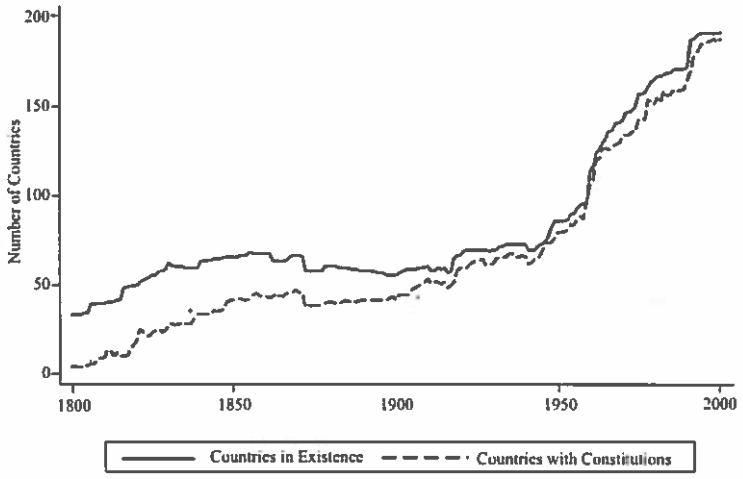

Figure 8.2 Increase in the number of national constitutions from 1775 onwards

and/or political stability?[49] It is these kinds of questions that a new generation of constitutional lawyers – such as Elkins, Ginsberg and Melton – are looking into, and doing so with a keen eye for data and statistical relationships. They use an ELS lens, as it were.

The interaction between constitutional and administrative law, the dynamics of markets and (globalizing) societies, is an exciting field of study, especially in an age where hypotheses, theories and models can be fed, underpinned and/or tested with or against large bulks of data.[50] In his contribution to this volume, Etienne rightly notes a remarkable trend in administrative law literature: more and more empirical studies seem to have come to the fore in this area. One needs to bear in mind, though, that most of these studies have to do with (administrative) *regulation* and regulatory theory – studies that have a legal ring to them, but represent a long tradition in economics and economic theory. Regulation theory was and is more or less a synonym for (market) intervention theory, which is very relevant for regulation by way of intervention with legal instruments (legislation), but not the same thing entirely. Legislation and regulation (theory) are different fields with different approaches. This often causes unproductive confusion and misunderstanding.[51]

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[49] A truly new and recent insight is that a demonstrable relationship exists between welfare and the age of a constitution. Recent American research on the age of national constitutions shows that a static positive correlation exists between the age of a constitution and GDP per capita, the democracy *and* the political stability in a country. Secondly, it showed a static noticeably negative correlation (be it only slight) between the age of a constitution and the probability of a political or economic crisis. See Z. Elkins, T. Ginsberg & J. Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) 30.

[50] See, for a recent study on the relevance and use of economic models for legal research, Emanuel V. Towfigh and Niels Pietersen (eds), *Economic Methods for Lawyers* (Edward Elgar Publishing 2017).

[51] See W. Voermans, 'Regulation and Legislation', in H. Xanthaki & U. Karpen (eds) in cooperation with Luzius Mader and Wim Voermans, *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017).

THE POSSIBILITIES OF ELS IN CRIMINAL LAW

Introduction

In this section we will focus on empirical legal scholarship in the domain of criminal law (including criminal procedure). First, we will comment on the findings of the two contributions on criminal law in this volume, written by Engel (focusing on the use of experiments) and by Van Oorschot and Mascini (focusing on the use of case studies). Then we will take a brief (and inevitably incomplete) look at the current situation regarding ELS in the field of criminal law. Of course, in this section we will particularly discuss the relation between criminal law scholarship and criminology, the latter traditionally being the discipline par excellence when it comes to the empirical study of issues of crime and criminal justice. At the end of this section we will try to answer the questions of whether more empirical legal research is the way forward for criminal law scholarship, which empirical research methods may be the most favourable for research on criminal justice issues and what the answers to both latter questions mean for the future relationship between criminal law scholarship and criminology.

The Use of Experiments and Case Studies in Criminal Law Research

This volume contains two contributions on the use of specific empirical research methods in the field of criminal law. Engel focuses on the use of experiments in criminal law research, while Van Oorschot and Mascini demonstrate the use of case studies in sociolegal research on criminal law.[52] We start with a few remarks on Engel's contribution, after which we will address Van Oorschot and Mascini's chapter separately.

Engel shows in his well-documented contribution that a huge body of experimental evidence on criminal justice issues already exists, leading him in closing to encourage criminal law scholars to use this body of literature more intensively to underpin their normative choices. In addition, he notes that the existing empirical evidence gathered by experimental research also highlights 'how many of the empirical claims that underlie legal argument have not been tested, at least not with rigorous experimental methods'. From this point of view, it cannot be surprising

[52] All quotes in this section are from the chapters by Engel and van Oorschot and Mascini in this volume.

that he stands up for more empirical research in the field of criminal law, more specifically by advocating the use of experiments in criminal law research. Of course, in his contribution he also shows awareness of the limitations of the use of experiments, for instance, and most importantly, when it comes to the external validity of experiments.[53] Engel notes in this regard: 'Extrapolating from the experiment to the problem in real life that motivated the project always requires a leap of faith.' However, 'artificiality is the price one has to pay if one wants to be sure about cause and effect'. And it is especially this that experiments have to offer, according to Engel: methodologically reliable insights into causes and effects. From this starting point he shows us a variety of experimental methods and examples of experimental research, at the same time showing that 'there is no such thing as a perfect experiment'. And in addition to this, he acknowledges some practical constraints of experiments (for instance the time-consuming and pricey character of this research method). Notwithstanding these constraints and limitations, he concludes that the outcomes of experimental research can be valuable for criminal lawyers.

It is hard to disagree with the latter conclusion. It goes without saying that the existing and future body of literature gathered by means of experimental research can be of great interest for criminal law scholarship and legal practice, despite the abovementioned constraints relating to external validity. In terms of the distinction previously made between primary ELS and secondary ELS, we may easily conclude that there is and should be a bright future for secondary ELS when it comes to experiments. However, as already substantiated above in relation to private law, we are less optimistic about the future reception of experiments by legal scholars themselves (primary ELS), although we may nuance this in relation to criminal law since criminal law scholars have the major advantage of being able to develop joint research projects with criminologists in which experiments can definitely play an important role.

A look at the contribution of Van Oorschot and Mascini might indicate more support for primary ELS by legal scholars. In their contribution, Van Oorschot and Mascini demonstrate the use of the case study for sociolegal research on criminal law. They start their contribution by pointing out that the case study is to be understood not as a single research method, but as a research approach in which a variety of research methods and sources can be used. As examples of research

[53] See also our discussion of Reinders Folmer's contribution on the use of experiments in private law research.

methods used in their own case study on the question of how judges in a Dutch magistrate's court arrive at their decisions as a matter of everyday work, they mention interviews, observations and document analyses. The qualitative nature of the research methods involved within the context of a case study might contribute to the expectation that the case study will have a relatively bright future as an empirical research approach to be embraced by legal scholars themselves, regardless of which legal domain they focus on. However, the apparent attractiveness of the case study as a means of empirical legal research should not lead to underestimation of the methodology of and within this research approach. In their contribution, Van Oorschot and Mascini clearly show several difficulties and loopholes involved in the case study, for instance relating to the questions of how to choose a suitable case for a case study, how to safeguard the objectivity of the case study and how to achieve (to a certain extent) generalizable results by means of a case study. Although the authors note that their contribution is not to be read as 'a set of hard and fast rules for doing a case study, but rather as a realistic and practical demonstration of one of its possible applications', Van Oorschot and Mascini's contribution is without doubt a valuable resource for legal scholars considering conducting a case study themselves.

The State of the Art of ELS in Criminal Law

At first sight it seems a bit strange to reflect on the use of ELS in criminal law, since the empirical study of criminal law already has a long and rich history, witnessed by the existence of criminology as the preeminent academic discipline for studying crime and criminal justice empirically.[54] For this reason, reflecting on the use of empirical research methods in criminal law scholarship almost inevitably leads to reflections on the relation between criminal law scholarship and criminology. By means of all kinds of quantitative and qualitative empirical methods, criminology has delivered a huge amount of empirical data relating to crime, perpetrators and victims of crime and the administration of criminal justice.[55] In this regard, one might say that criminal law scholarship is far ahead of other disciplines of law when it comes to its empirical basis. Another possible explanation for this leading position of criminal law scholarship, as compared to other legal domains, when it

[54] See, for the development of criminology in Western Europe and the United States, C. Fijnaut, *Criminology and the Criminal Justice System: A Historical and Transatlantic Introduction* (Cambridge, Intersentia 2017).

[55] See, for numerous examples, Engel's contribution in this volume.

comes to empirical legal research might be that criminal law is increasingly being used for instrumental reasons and as a means for policy making (criminal law as crime control). When this is the case, one of course needs insight into the way the criminal justice system functions, its successes and its flaws, the effects of creating new criminal offences, the effects of imposing criminal sanctions, and so on, which also leads to a strong need for empirical research.

This does not mean, however, that criminal law scholarship has always fully reaped the benefits of this leading position when it comes to the use of empirical research methods. Criminal law scholarship and criminology may share the same research object – rendering an inherent relation between both academic disciplines – but criminologists and legal scholars in the area of criminal law have also long had a tendency to conduct their research separately from each other (at least in continental Europe), with a focus on either (almost) strictly empirical research questions or (almost) strictly normative research questions, publishing their results in their own journals (mostly international for criminology, mostly national for legal scholars on criminal law). With hindsight, one might suggest that legal scholars in the area of criminal law were inclined to leave empirical research methods aside, knowing that the empirical part of academic research into criminal justice matters was in the good hands of criminologists and leaving room for legal scholars to stick to the normative questions with which they were familiar. In a certain sense this led to a situation in which criminologists and criminal law scholars each dealt with their own research questions without any great consideration of whether they could mutually enrich their research by doing interdisciplinary research on shared research topics, and sometimes even to a situation in which (answers to) research questions were hardly relevant for the other discipline. However, in recent years this situation has seemed to be improving, slowly but surely. Criminal law scholars and criminologists increasingly join forces in their research projects, while at the same time criminal law scholars increasingly apply empirical research methods in their own research (albeit with a preference for qualitative research methods such as interviews and focus groups).

In line with the previously mentioned development of criminal law into an increasingly policy-driven legal domain, several relevant factors for the increase of interdisciplinary research and ELS in the field of criminal justice can be mentioned. An important factor seems to be that current societal and legislative questions on criminal justice simply ask for more empirical research. When legal scholars blame the legislator and policy makers for making laws and policy in the field of criminal justice which seem to be driven more by emotion and political motives than by

evidence-based rationales,[56] they also take up the responsibility to support their own claims through empirical research. In this regard, the growing need for empirically based legal research might be considered an answer to the complaints about 'fact free politics'. But there are other external factors that may account for the increase in empirical legal studies – for instance, the fact that, to an increasing extent, the interdisciplinary character of the proposed research is relevant in the quest for internal and external funding (for example, the personal grants of the Netherlands Organisation for Scientific Research). Most research projects commissioned by the Research and Documentation Centre of the Dutch Ministry of Security and Justice also have a strong empirical component – sometimes quantitative, sometimes qualitative – indirectly inducing legal scholars to leave their comfort zone of purely doctrinal research.

Although at most Dutch universities, criminal law scholarship and criminology still function as two distinctive disciplines with their own traditions, methodologies and publication cultures, there is a growing body of interdisciplinary/empirical legal research on criminal justice matters. Decisions on sentencing and pretrial detention as well as effects of imprisonment turned out to be especially fruitful themes for empirical legal research,[57] but we can also find some very interesting examples of empirical legal research in the field of discretion and decision-making by enforcement agencies such as the national police and the military police.[58] Another interesting example is an observational study on how public prosecutors conceive of and fulfil their duties.[59]

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[56] See further on the need for evidence-based legislation J.P. van der Leun, 'Strafbaarstelling en evidence vanuit criminologisch perspectief' ['Criminalization and Evidence from a Criminological Perspective'], in C.P.M. Cleiren and others (eds), *Criteria voor strafbaarstelling in een nieuwe dynamiek* [*Criteria for Criminalization in a New Dynamic*] (Boom Lemma 2012) 25–37.

[57] See for example the various publications of the Prison Project of Leiden University, the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) and Utrecht University (www.prisonproject.nl), and J.H. Crijns, B.J.G. Leeuw & H.T. Wermink, *Pre-Trial Detention in the Netherlands: Legal Principles versus Practical Reality* (Eleven International Publishing 2016).

[58] See for example M.A.H. van der Woude, *Chain Reactions in Criminal Justice: Discretion and the Necessity of Interdisciplinary Research* (Eleven International Publishing 2017) and J. Brouwer, M.A.H. van der Woude and J.P. van der Leun, 'Border Policing, Procedural Justice and Belonging: The Legitimacy of (Cr)immigration Controls in Border Areas' (2017) *British Journal of Criminology* 1–20, https://doi.org/10.1093/bjc/azx050.

[59] See J.M.W. Lindeman, *Officieren van justitie in de 21 eeuw. Een verslag van participerend observatieonderzoek naar de taakopvatting en taakinvulling*

Is ELS the Way Forward for Criminal Law?

For us, it goes without saying that criminal law issues should not be addressed solely from a normative or dogmatic perspective. Normative claims on criminal law should be underpinned by empirical data to the greatest extent possible, and there are plenty of opportunities to do so. Criminal law has the advantage that relevant statistical data are relatively easy to gather, in the sense that most relevant actors within the criminal justice system are centralized entities (for example the public prosecution service or the judiciary). Although sometimes these institutions seem to be overwhelmed by the amount of requests for data, surveys, interviews and focus groups they receive, they are generally willing to cooperate. Another question, however, is whether criminal law scholars are the right people to do the (empirical) job. When it comes to more qualitatively orientated empirical research methods such as interviews and focus groups (and the research approach of the case study), the answer is likely to be positive, also bearing in mind that criminal law scholars might be best equipped to fully recognize subtle nuances in their respondents' answers – at least, when these are criminal law professionals themselves. However, when it comes to more quantitative research methods the best way forward is to increase the development of joint research projects with criminologists, in the knowledge that using these kinds of research methods themselves would be a bridge too far for most criminal law scholars. When criminologists and criminal law scholars genuinely join forces and work in solid cooperation with each other, they have the opportunity to really benefit from the possibilities raised by their various research methods.

To conclude this section, there is still a lot of work to be done when it comes to empirical legal research in the field of criminal law – or, as Christoph Engel notes in his contribution to this volume, 'most of the empirical claims underlying criminal law doctrine are still uncharted territory'. To give just one example, there is a large body of available literature on sentencing in criminal cases, but this primarily focuses on sentencing by the judge. Much less is known about sentencing by the public prosecutor by means of a punitive order, and by administrative bodies, such as the Authority for Consumers and Markets, by means of

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van officieren van justitie [*Dutch Public Prosecutors in the 21st Century: An Account of Participant Observation on How Public Prosecutors Conceive of and Fulfil Their Duties*] (BJu 2017).

imposing an administrative fine. Although the legitimacy of these methods of sanctioning has been discussed frequently in recent years, empirical data on the practice of these instruments is still scarce. Notwithstanding the fact that sanctioning by anyone other than the judge is a relatively new phenomenon, the time has now come to enrich this debate with empirical data on sentencing by administrative bodies (including the Public Prosecution Service).[60]

SOME TENTATIVE CONCLUSIONS IN FOUR STEPS

What is to be concluded from the foregoing? In addition to the conclusions at the end of the previous sections, we have gathered four more elements that we think are important enough to share.

First and probably foremost is a reminder to us all that even though these different domains of law are in fact intrinsically different in character, when it comes to the use of empirics they are rather similar, in the sense that such added empirical knowledge is (to be) welcomed in all three areas of law – even though this may cause some tension for a while – but also as all three domains have not fully reaped the possibilities and benefits of (doing) ELS. The reason for this 'harmonized' take on the importance of empirics is in essence rather simple: more information (knowledge) about the actual workings of the law, its reception in practice, and so on allows for better informed or educated decisions as to the preferred state of the law or the direction law should take in the future. This is even the case if the legal entity making the decision decides not to follow the direction in which the empirical evidence points; there might be good reason to deviate from that empirically preferred direction, based on other (normative, legal, comparative) arguments (see below).

This relates strongly to our second point, which starts from the premise that the main use of ELS – its primary importance for law, so to speak – lies in generating (first- or secondhand[61]) data (or insights) to add to the existing legal scholarship, because, as stated, such added knowledge results eventually in better law (in the sense of 'better thought of'). A related question that springs to mind for us, then, is whether some

[60] For this reason one of the authors of this contribution is involved in an interdisciplinary research project on the way the punitive order functions in practice.

[61] We previously mentioned the distinction between 'primary' ELS and 'secondary' ELS.

subterrains within law 'need' or even 'demand' more empirical evidence, and/or whether some legal domains are perhaps more reluctant to accept empirics. A new hypothesis in this regard could be that those legal areas that are more geared to (or used to) policy-orientated reasoning (think family law, administrative law, criminal law) are more receptive towards empirical evidence then those areas of the law that are less prone to everyday hands-on policy making, responding to current needs – areas that are less instrumental in nature, maybe. Think of private law in general, and property law specifically, which has been little touched upon by empirical scholars – whereas tort law, more policy orientated and instrumentally used these days, has been developing in a more empirical direction. The same may also be true, however, for constitutional law (focusing on the system with a longer time frame in mind). Testing this hypothesis would require thorough research – of course, research of a type we have not been able to carry out for the purposes of this chapter, but which would certainly be interesting.

A third point we would like to raise is that the legal domain with the closest traditional link to empirical research – that is, criminal law, as related to criminology – has not been able to take full advantage thereof, or so it seems: these days, criminal law scholarship does not (or does no longer) seem to be more empirically minded than other areas of law, such as (parts of) private law. An explanation might be that criminal lawyers assumed, erroneously, that it would be safe to leave the empirics to the neighbouring criminologists – as explained above, a discipline that was 'invented' as an aid to criminal law. While criminology then went its own separate way as an independent, internationally orientated academic discipline (with practitioners focusing on staying in tune with other social sciences, becoming methodologically separated from legal scholars, no longer being lawyers themselves as well, and sometimes even losing interest in rules), the criminal lawyers forgot to check regularly whether the criminologists were still asking the proper questions from a criminal law frame of mind. Can this explain Engel's observation, quoted above, that 'most of the empirical claims underlying criminal law doctrine are still uncharted territory'?[62] We think this might well be the case and, without casting any blame whatsoever on either side, invite both criminologists and criminal lawyers to prove us wrong and/or to correct this state of affairs as soon as possible. In this regard it is encouraging to see that in recent years criminal law scholars and criminologists have

[62] See also Engel's contribution to this volume.

increasingly developed joint research projects, mutually benefiting from their respective research methods.

A fourth observation (but consisting of three steps) is that, starting from the acknowledged usefulness of (or even need for) ELS, one must also face up to the challenges it brings and the impossibilities that remain. Next to the inherent impediments of all types of empirical methods, whether qualitative or quantitative in nature,[63] one must also highlight that: (1) lawyers have a 'tool kit' (filled with argumentative skills) to decide cases, but usually have no blueprints (hypotheses) to follow as to how to go about doing so, which strongly hinders any kind of (ex post or ex ante) evaluation of what has been done; while (2) anything a (traditional) legal scholar does in his research is supposed to be useful for legal practice as well, which is not always the case with ELS.[64] To add to this, one may not forget that, once within the legal domain, (3) empirical research and its results are in fact (no more than) arguments, to be used rhetorically as any other legal argument is used to (try to) convince others of the soundness of one's reasoning. For example, and without reverting to case-specific details, in the so-called *Imagine* case the Dutch Supreme Court used the 'availability of insurance coverage' argument to deny liability in certain circumstances; however, the insurance argument had been left out of the equation (since there were no data supplied to support the argument) in the earlier and, from a legal point of view, very similar *Hammock* case.[65] These cases illustrate the more general point that empirical data that only carry argumentative force in law can also be denied, left out, forgotten about, if convenience dictates. To be sure, this is not always or necessarily a bad thing, because the legal judgment is a normative judgment that can rate certain values higher than others, and even higher than proven countervailing empirical

[63] To which we may note, as a more general reflection, that there seems to be a strong preference among lawyers for the use of qualitative over quantitative methods when engaging in ELS, for obvious reasons (that is, ease of use).

[64] This last position of course ignores the intrinsic value that the accumulation of more knowledge (using empirical data) has for legal science, as is our belief (see above).

[65] See HR 29 January 2016, ECLI:NL:HR:2016:162; *NJ* 2016/173 (Imagine) and HR 8 October 2010, ECLI:NL:HR:2010:BM6095; *NJ* 2011/465 (Hammock) respectively.

facts. This is so because in law the 'leap' from facts to norms, from 'Sein' to 'Sollen', is not an automatic one (and is indeed a very difficult one).[66]

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[66] For details, see I. Giesen, 'The Use and Incorporation of Extralegal Insights in Legal Reasoning' (2015) *Utrecht Law Review* 1–18; Leeuw (n 1) 226–33; and Giesen's blogpost at http://blog.ucall.nl/index.php/2016/06/the-great-divide-facts-versus-values/.

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