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Frans L. Leeuw with Hans Schmeets

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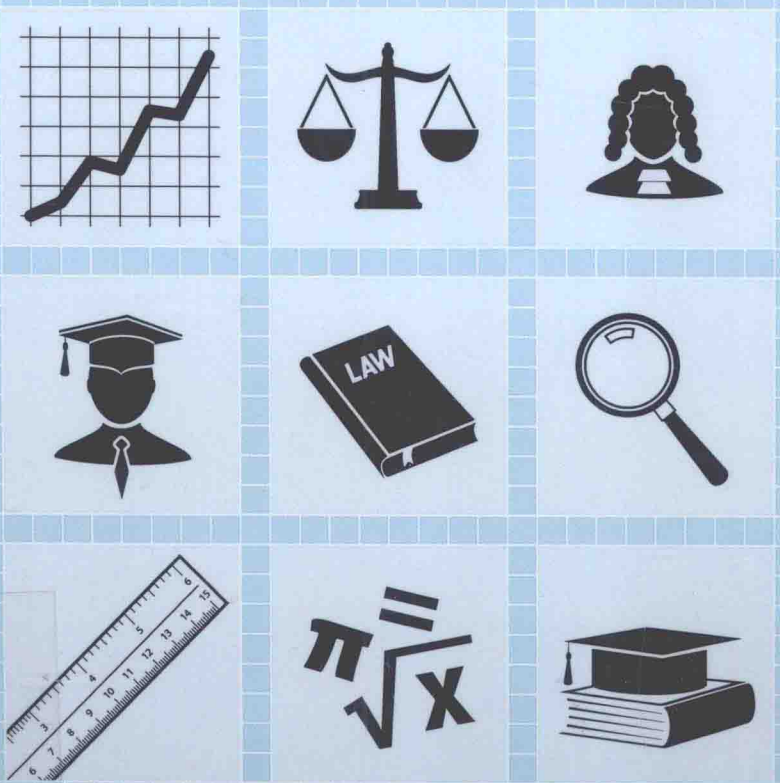
A Guidance Book for Lawyers, Legislators and Regulators



Empirical Legal Research

A Guidance Book for Lawyers, Legislators and Regulators

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1.1 AN APPETIZER

Characterizing empirical legal research (abbreviated as: ELR) for lawyers, legislators and regulators is not that easy. One reason is the difference between the way lawyers and 'empiricists' *think*.

> While both modes of thinking are grounded in rigorous analysis, lawyers and empiricists often have different goals and approaches. Legal analysis places a premium on argumentation and appeals to authority, is frequently geared toward proving a particular view, is often focused on the particulars of an individual case, and is directed at reaching a definitive conclusion. In contrast, empirical analysis places a premium on observation, challenges assumptions, is oriented toward the testing of hypotheses, is usually focused on describing patterns that operate in the aggregate, and is a continuing enterprise in which new work builds on that which came before and generates even more questions for further investigation. (Lawless, Robbennolt and Ulen, 2010:10)

Although this contrast is exaggerated, there are notable differences between the two types of work.

A second reason why a characterization is difficult is that ELR makes it necessary to consider topics that students, scholars and practitioners of law are often not *acquainted* with. When you hear about empirical legal research, you probably think about data and how the data was collected. You will wonder how the (legal or societal) problem at hand was 'translated' into a research(able) problem. One of your colleagues may ponder the design of the study and the relationship between the 'legal' (normative) part and the 'social sciences' part. Can they be bridged? It would not be bad guesswork to think that discussions were held on what the 'units of analysis' are (offenders, victims, business contract partners, judges, civil servants, courts, asylum seekers, or internet service providers) and whether or not 'we will work with a sample and use statistics'. The same goes for the researcher-jurist who is given the task to find relevant research evidence from the past. Finally, on a dog's day afternoon, there is that young assistant visiting Wikipedia, trying to understand the role of 'theories' in the current project, probably wondering what is meant by the word. Purely by

accident she stumbles upon 'legal Big Data' and 'disruptive legal technologies' (and sends a message to her colleagues that she's a bit lost).

These topics are all relevant and 'in-need-of-being-known' for anyone planning to *do* ELR, to *commission* ELR and/or to *use* (and *evaluate*) it. However, they are also fragmented and miss an overarching characterization of what *empirical legal research* basically is.

This guidance book is dedicated to prepare and present such an overarching perspective. Its goal is to give guidance to students, scholars and practitioners, be they lawyers, legislators, regulators, policy makers, commissioners of research, prosecutors or judges. A complete 'menu' of what empirical legal research entails will therefore be offered.

Good dinners start, according to the norms of *haute cuisine*, with an *amuse bouche*. Several of these are now served as well as the concept of the 'empirical cycle'.

1.1.1 'Law in the Books versus Law in Action'

Empirical legal research (ELR) covers all major fields of law, as the *Oxford Handbook of Empirical Legal Research* (Cane and Kritzer, 2010) shows. The chapters include family law and penal law, access to (civil) justice, evidence law, contract law and international law, but also police activities, naming and shaming, regulatory impact assessments, the role of law and regulation with regard to topics such as bankruptcy and financial markets and consumer protection.

Empirical legal research, however, is *not* primarily or only interested in *laws* (or any other legal arrangement) *in the books*, but in *law(s) in action*, to quote Pound:

> If we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one. (Pound, 1910: 15)

Llewellyn (1930), a few decades later, distinguished between 'paper rules' and 'real rules' or 'working rules'. Laws and rules can exist everywhere, although they are often 'seen as a body of rules that . . . are determined and enforced by the state' (Shavell, 2002: 227).

In this book we broaden this concept in two ways. First, because there are more organizations than states producing rules, regulations and related interventions like 'private regulatory regimes' (Aviram, 2003), 'legislative Marktinterventionen' (Hosemann, 2014: 45), publicly declared (corporate) codes (as binding promises) (Beckers, 2015) and international treaties and

protocols. Second, because as Howarth (2013) highlights, the legal world designs 'social structures and devices [like] contracts, companies, trusts, constitutions, and statutes . . . A successful contract is one that gets the job done of facilitating a deal between the parties. A contract that results in litigation is unsuccessful – it has failed to do its job'.[1]

In this book we use different terms to describe the object of empirical legal research: *(legal) arrangements*, *devices*, *interventions*, but we will also refer to *laws*, *legislation* and *regulation*. All these 'legal arrangements' aim at influencing individuals and organizations, codify and/or regulate (to some extent) their functioning, create restrictions and opportunities for them and can be enforced with various degrees of involvement of the state.[2] Westerman (2011: 106–107) adds that 'many rules nowadays prescribe in a fairly direct manner the goals that should be attained' and calls this the 'ongoing instrumentalisation [that] has led to different demands on both the legislator and judge'. Verbruggen (2014: 79) sees 'commercial contracts [becoming] increasingly important vehicles for the implementation and enforcement of safety, social and sustainability standards in transnational supply chains'.

ELR thus addresses developments and actions in the 'real (social) world'[3] as relating to legal arrangements, either to influence this world, to facilitate it, or to legalize what has been the 'usual' practice.

One of the backgrounds of ELR has been the critique, articulated decades ago, on legal formalism; some even referred to the construction of a 'heaven of legal concepts' far removed from social reality, and disregarded the ways in which law is produced by and operates within society (Cohen, 1935). Although this statement is an exaggeration and causes unnecessary skepticism about *any* role formal laws and rules play in reality, differences between the 'legal reality' and the 'social (empirical) reality' cannot be denied.[4] The distinction between doctrinal (legal) research and non-doctrinal studies is related to this point.

Doctrinal research asks what the law is on a particular issue. It is concerned with an analysis of the legal doctrine and how it has been developed and applied (McConville and Chui, 2007). This approach, according to Hutchinson (2013: 9) 'lies at the heart of any lawyer's task because it is the research process used to identify, analyze and synthesize the content of the law . . . Doctrine has been defined as a synthesis of rules, principles, norms, interpretative guidelines and values, which explains, makes coherent or justifies a segment of the law as part of a larger system of law'. McCrudden (2006: 634) adds that 'doctrinal analysis takes [the] form, in which the writer attempts to argue that this or that is the "best" solution to a particular problem, "best" meaning having the best fit with which already exists'. Non-doctrinal research is legal research that employs methods taken from

other disciplines to generate empirical data to answer other research questions. It can focus on a problem, its causes and consequences, a policy, a law or any other legal arrangement while institutions and organizations can also be studied.

ELR focuses on 'empirical'. In line with the editors of *The Oxford Handbook on Empirical Legal Research*, this 'involves the systematic collection of information ("data") and its analysis according to some generally accepted method. Of central importance is the systematic nature of the process, both of collecting and analysing the information' (Cane and Kritzer, 2010: 4–5). Epstein and Martin (2014: 3) use a more informal terminology: data is 'just a term for facts about the world', sometimes numerical (or quantitative), sometimes non-numerical (or qualitative).

How does empirical legal research work look in practice? A few examples: Smits (2011) studied mandatory rights of withdrawal in *consumer contract law* and what consumers think about these rights. Withdrawal rights allow the consumer to terminate the contract within a set 'cooling-off period'. Smits made a comparison between statutory withdrawal rights in Europe and in the United States. He presented results of a 'modest survey' of the voluntary use of withdrawal rights in general conditions of retailers. He also studied the usefulness of mandatory withdrawal rights.

Ruiter et al (2011: 135) investigated the *(penal) sentencing preferences* of the general public versus those of judges in the Netherlands. 'Given the opportunity, how would the Dutch public sentence perpetrators of different types of crime? To what extent are these verdicts related to characteristics of the criminal act (e.g. offender characteristics, type of crime, victim characteristics)? Does the verdict depend on characteristics of the citizen who issues a sentence (e.g. young/old, male/female)? And does information about sentencing options (i.e. the costs involved and rates of recidivism) affect verdicts decided by members of the general population?'

Increasingly the impact of regulation and other (legal) arrangements is studied from an experimental or quasi-experimental perspective: individuals, groups or organizations are compared, over a certain period, while some get a 'treatment' (the (legal) intervention, program, sanction, piece of legislation, contract) and others do not. Interventions like Hot Spots Policing (Braga et al, 2012) are studied along these lines, but there are many other examples in the field of private and administrative law.

ELR also covers studies of a different nature: studies describing, analysing and comparing ways in which – as an example – nation states safeguard the *rule of law* or *freedom rights*. The 'World of Justice' project (Agrast et al, 2014: 2) presents a set of empirical indicators on the rule of law from

the perspective of the 'ordinary person'. It examines practical situations in which a rule of law deficit may affect the daily lives of those interviewed. The project provides data on 10 dimensions, such as order and security, absence of corruption, regulatory enforcement and access to justice. McMahon (2012) is one of the authors behind the *index of human freedom* which combines country data on the freedom of movement, freedom of expression, and freedom of relationships. It also covers data on government's threat to freedom (the occurrence of political imprisonment) and society's threat to freedom (like human trafficking, homicide and female genital mutilation).

1.1.2 The Functioning of Organizations and Institutions in the Legal Field

ELR is not only focused on *laws and regulations (in action)*, but also on the *functioning of organizations and institutions in the legal field*. What they do, how they do it, what the consequences are of their work and what they cost are topics of interest. The legal field is characterized by large numbers of organizations and institutions. National and international courts, prosecutors, prisons and probation services, but also ombudsman institutions, human rights organizations, bailiffs and notaries, and their professional organizations, including what Jansen and Michaels (2007) call private law beyond the state (multinational companies creating systems of rules and imposing them on their suppliers and customers; examples are standardization and accreditation organizations and transnational governance networks).

Van Dijk et al (2009) studied one such institution, the *Netherlands Ombudsman*. They used the *Ombudsman's complaints database*, which contains information from over 140,000 dossiers covering 25 years. They applied a mix of conventional database techniques and a data mining algorithm to scan and map this database and were able to detect paths in the handling of complaints that were not known before.

Posner and de Figueiredo (2004) present a second, rather different example. They studied the International Court of Justice (ICJ) which has jurisdiction over disputes between nations. Its defenders argue that the ICJ decides cases impartially and confers legitimacy on the international legal system. Its critics argue that the members of the ICJ vote in the interests of the states that appoint them. Prior empirical scholarship is 'ambiguous', as Posner and de Figueiredo (2004) showed, which urged them to undertake a new empirical investigation. They studied theories on judging behavior and tested the charge of bias using statistical methods on voting behavior of Court members.

1.1.3 Evaluating Laws, Regulations and Other Legal Arrangements like Interventions and Sanctions

Doing ELR often implies asking and answering *evaluative questions*. Cummings (20135: 186) refers to the 'challenges of evaluation' that empirical legal researchers face. 'How to study the impact of law is a question that has confronted scholars since the 1960s. There are questions about which types of impacts to study and the proper methodology for doing so'. Hage (2010: 6) refers to 'evaluative legal science which can take the shape of passing value judgments on actual or hypothetical (proposed) regulations or of the selection of the "best" regulation from a set of alternatives'.

Evaluation is the more so important because, as Howarth (2013: 15; 17; 67ff) argued, lawyers in fact are (transaction-costs-) engineers: they make devices for others that try to reduce or prevent transaction costs, conflicts and other problems (Gilson, 1984).[5] Devices are 'contracts, conveyances, wills, trusts, regulations, statutes and constitutions, and companies' (i.e. their legal structure).[6] However, between ambition and reality can be discrepancies, and evaluators are 'designed' to monitor and explain them.

Evaluators also study the predictions (of public and semi-public organizations) about the consequences of policies, rules, legislation and other 'tools of governments' (like information campaigns and incentives), sometimes before they are even implemented. This is known as *ex ante evaluation* or 'prospective evaluation'. The European Union refers to these activities as *regulatory impact assessments*.[7] A US GAO (1996) study trying to find out what the impact on teenage pregnancy would be if law A or law B would be implemented, is a (classic) example.

Evaluations also address the way in which legal arrangements are implemented and what difficulties are experienced during this process (*process evaluations* or *implementation evaluations*). A related approach is known as *compliance (or regularity) auditing*. Here the empirical investigation describes the extent to which natural and corporate actors behave in compliance with protocols, rules and regulations.

And there are studies (often ex post) on the *effects, consequences or impacts* of legal arrangements and interventions on the behavior of persons and organizations (*impact* or *effectiveness evaluations*). A rather old example is Aubert's study done in the early 1950s. He wanted to find out the 'extent to which behavior (of housemaids) conformed to the rules laid down in the (Norwegian) Law on Housemaids of 1948'. The purpose of this law was to protect the interests of domestic help. Aubert used a sample of some 200 housewives and 200 housemaids in Oslo and interviewed them about their conduct, level of knowledge, and attitudes and motives, in so far as these related to the law. 'It has to be concluded that the law was, at least for

some years, ineffective in the sense that actual conditions of work remained at variance with the norms laid down' (Aubert, 1969:121).[8]

Interventions in the world of penal law not only refer to regulations and sanctions (for example with regard to the role they play in reducing recidivism), but also include (cognitive-behavioral) programs used by prisons and probation organizations to alter attitudes and behavior of (re)offenders. Examples are ETS ('Enhanced Thinking Skills') and ART ('Aggression Regulation/Replacement Training'), which are regularly evaluated (Cornet et al, 2014).

Since the introduction of the internet, laws, regulations and (other) policies are confronted with and directed at the digital world. Evaluating the impact of (digital) sanctions to help prevent or reduce digital piracy (illegal copying of music, movies, 3-D printing designs and e-books) is only one example; others deal with evaluating the governance (structure) of the internet, e-law enforcement, circumvention policies and digital surveillance activities (Leeuw and Leeuw, 2012).

Evidence-based regulation, wherein results from social science research including behavioral economics are used to help law makers draft regulations that have a (fair) chance of realizing their set goals, is a blossoming field. Sunstein (2013: 1) states:

> In recent years, social scientists have been incorporating empirical findings about human behavior into economic models. These findings offer important insights for thinking about regulation and its likely consequences. They also offer some suggestions about the appropriate design of effective, low-cost, choice-preserving approaches to regulatory problems, including disclosure requirements, default rules, and simplification.

Parts of this approach are the so-called design studies and pilots. Alternative dispute resolution activities, for example, are developed and tested before being implemented at a broader scale. The Hague Institute for the Internationalization of Law[9] shares examples of how research is related to modernizing justice.

Throughout this book, examples of legal evaluations are on the menu, including the designs that are used and why, what the role of 'intervention theories' are, how data is collected and analyzed and how evidence from legal evaluations can be visualized in a modern way.

1.1.4 Big Data, Technology and the Law: Legal Predictions, Machine Learning and Computational Legal Studies[10]

Big Data and *technology* (artificial intelligence, machine learning and the internet) are strongly related. Big Data consist of (call) logs, mobile-banking

transactions, online user-generated content such as blog posts, social media, sensor apps, online (Google) searches, satellite images and the data one holds in emails, blogs, intranets, extranets etc.[11] The *Internet of Things* refers to the ability of everyday objects to connect to the internet, allowing these devices to gather, send and receive data. Examples include wearable technology, such as watches and fitness bands or smartphones but also thermostats that know when we are home and cars that monitor our driving habits (O'Neill, 2015). The more (historical) paper documents like wills, contracts, treaties and other legal case materials, as well as books and newspapers, become digitized, the larger 'legal Big Data' becomes.

Susskind (2008; 2013) refers to these and other technological developments as *disruptive* (for the legal world). Examples are *automated document assembly* (disruptive, because widespread use can greatly reduce the time that lawyers expend on document drafting and production); *relentless connectivity* (he uses this term to describe how the use of hand-held devices with wireless broadband access, powerful video, high processing speed and nearly endless storage capacity will create expectations among clients for 24/7 lawyer availability) and *online legal guidance* (systems that provide legal diagnoses, generate legal documents, assist in legal audits and provide legal updates).[12] With regard to Big Data, Süsskind (2013: 48–9) suggests that 'in due course they will be of profound significance for legal practice and scholarship'. A question like 'what legal issues are troubling communities can very easily be answered, while by collecting and analyzing huge bodies of commercial contracts and exchanges of emails, we might gain insight into the greatest legal risks that specific sectors face'. Online dispute resolution (ODR) is materializing[13] while social media can help in finding out which public perceptions exist about magistrates.

Also for ELR Big Data are important. One reason is that (a new form of) *legal analytics*, including *legal prediction* is possible. McGinnis and Pearce (2014: 3052) put it as follows:

> Law, with its massive amounts of data from case law, briefs, and other documents, is conducive to machine data mining (machine learning)[14] that is the foundation of legal analytics. Legal data include fact patterns, precedents, and case outcomes. For instance, one form of legal analytics would use fact patterns and precedents to predict a case's outcome, thereby better equipping lawyers to assess the likely result of litigation.

Nelson and Simek (2013:1) refer to 'using Big Data to *evaluate* (law) firms'. Another application is that Big Data will stimulate *transparency* of the legal world. Katz and Bommarito (2013: 3–4) studied how complex legal rules are (in the USA). Big Data may also facilitate *legal practice/legal aid.* Empirical researchers doing pattern recognition in legal advice, complaints

and electronic transcripts of court procedures and know-how can play an important role in aid processes. In criminal investigations, tax fraud detection and detecting money laundering already play such a role. Finally, Big Data can deliver *new evidence* in court. Several American examples indicate that big data collected and analyzed from public data sets can be admitted as evidence. Although the legal sector has always been a 'data-driven industry', until recently all that data stayed offline (i.e. on paper).

Some of these examples come from the USA, and indeed, the Big Data movement in law seems to be more developed than in Europe. However, it can be expected that, as has happened in other fields (marketing and business analytics), the European legal world will soon catch up. One reason is that digitization does not stop at the frontier. Another reason is that while in the justice domain many organizations, such as the police, public prosecution, courts and prisons have their *own* data and information systems, society expects empirical insights *throughout this domain* on *overarching* items like judiciary efficiency, case load, elapsed time and privacy risks.[15] These insights can only be produced when judicial data space systems are available, covering the diverse organizations' own data and making domain-wide analysis of the 'enterprise of law', including legal logistics possible.

1.1.5 Explaining what is Happening: the Role of Theories

Observing that legal arrangements make a difference (or do not) is something; to explain what has happened is something else. *Explanatory questions* have to be asked, like what are the underlying causes that lead some legal arrangements to trigger behavior(al changes), while others are falling dead on the ground? An example is MaCaulay's (1963) study on (non-) contractual relations in businesses. He found that in the USA, contract law is often ignored in transactions, which he tried to explain by using insights from sociological and behavioral theory. Since this path-breaking study, a research program has developed, investigating under which conditions 'contractual behavior' occurs (see Chapter 10).

Explaining why wrongful convictions occur is a second example. Technical mistakes during police investigations and incorrect eyewitnesses are one aspect of such an explanation, but cognitive biases of officials like tunnel vision, yeah-yeah-saying, hindsight bias, and the fundamental attribution error[16] also help explain the occurrence of erroneous convictions.[17]

A third example has to do with explaining a (lack of) compliance with rules and regulations. It is known that some people and organizations are more focused on compliance than others. A Dutch study showed that with regard to the introduction of cognitive-behavioral interventions like

Enhanced Thinking Skills (ETS) into the Dutch penitentiary system, around half of the interventions were not implemented in accordance with procedures and protocols agreed upon (Nas et al, 2011). Insights from *public choice theory* help to explain this. One such insight is that there is competition inside bureaucracies about (the number of) clients to be 'treated' ('by me'). In particular, when numbers of clients are small (or decreasing), bureau-politics and bureaucratic firefighting pop up as factors causing implementation problems[18] (while the bill is paid by taxpayers).

To explain why individuals differ in levels of compliance with the law, *rational choice theory*, sometimes in connection with *biosocial theories*, is used.

Bio-social theories – in this example – point to differences in cognitive and emotional capacity ('agency') of persons to perceive and experience threats of being caught. Fearlessness theory, low arousal theory and other theories from endocrinology, neurosciences and genetics are important points of reference (Raine, 2013). These insights are also used to explain what the impact of behavior modification programs is on (re)offenders (Cornet et al, 2014).

We have outlined five important characteristics of ELR, and used the word 'empirical' rather often. What is it and what is the empirical cycle?

1.2 THE EMPIRICAL CYCLE

What is 'empirical'? The editors of the *Oxford Handbook on Empirical Legal Research* describe 'empirical' as 'the systematic collection of information ("data") and its analysis according to some generally accepted method' (Cane and Kritzer, 2010: 4–5; Lawless, Robbennolt and Ulen, 2010: 7). 'Systematic data-collection and analysis' and 'accepted methods' are important elements. What this entails will be discussed in the following chapters. However, we emphasize that ELR is much more than data-collection and analysis. It includes research problems, theories, systematic literature reviews, research designs and knowledge transfer.

A *second characteristic* is that the empirical cycle *includes both quantitative research and qualitative research*. This may seem an entirely superfluous remark, but it is not. Some of you remember or have heard about 'paradigm wars'[19] between approaches (in the latter part of the twentieth century). Although these times are behind us, there remain epistemological and methodological differences. While quantitative research often employs experimental designs and quantitative measures to test hypotheses and emphasizes the measurement and analysis of causal relationships between variables, qualitative research uses a more naturalistic approach that seeks