Chapter 1

Empirical legal studies

1.1 Introduction

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

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

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

1.2 Various definitions of empirical legal studies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In summary, empirical legal studies can be defined as comprising three pillars or areas of study:

(1) *the assumptions about the real world on which laws are built*

(2) *the operations in the real world of the legal system*

(3) *the effects of the law in the real world*

The pillars should not be regarded as disconnected, as we said, and in fact they are also empirically intrinsically related. If the assumptions on which laws are built are incorrect, or if tradition or lack of intrinsic support for new rules stand in the way, then it is very unlikely that the laws would have their desired effect. If the assumptions are correct, but if the law would not be applied as planned (for instance, cases take extraordinarily longer to process, judges do not understand new rules), it is also unlikely that the foreseen effect would materialize. The three pillars form in that sense a trias ELSica.

1.3.1 Positioning of ELS vis-à-vis other disciplines

As we stated in section 1.1, empirical legal studies is not a traditional field of study, although it is more and more recognized as a subdiscipline or even an integral part of the legal discipline. As we also said, there are similar areas of research denoted as '(new) legal realism', 'law in action' or 'legal sociology' for which it is perhaps not immediately obvious how these would differ from empirical legal studies as we defined it. In fact, the attentive reader may have noted us also using the terms 'empirical legal studies' and 'empirical legal research' interchangeably. We do so because we do not believe that there are differences between these two that are significant for the purpose of this book.

Areas of study denoted by 'legal realism' or 'new legal realism' resemble empirical legal studies or empirical legal research. Legal realism was a movement that started in the 1930s in the US, and that aimed to test hypotheses about the (workings of the) law using large-scale quantitative datasets. With a slightly different focus, the new legal realism movement attempts the same. It appears that the focus in both is mainly on quantitative research, a choice which severely limits the scope of methods that can be employed, and a choice that we do not consider fruitful.

The Law and Society Association (`lawandsociety.org/history.html`) publishes a journal that aims to publish original work on the relationship between society and the legal process. Its focus is quite broad, as it aims to further theoretical and empirical understandings of law, legal decision making by individuals and groups, and the impact of specific reforms and behaviour of people and institutions with regard to the law, but also "the operations of law as a perspective for understanding ideology, culture, identity, and social life". Its disciplinary outlook is predominantly socio-legal.

We have so far regularly mentioned legal sociology, a fairly broad field that does use social science methods and focuses on the empirical workings of the law. In that sense, one could ask, is legal sociology perhaps empirical legal studies under a different name? Opinion is divided here. While some regard legal sociology as a part of

empirical legal studies, others regard it as a subspecialization of sociology, and others again regard it as a separate discipline wedged in between law and sociology.

Either way, we believe that legal sociology differs from ELS in that the focus of legal sociology studies is essentially mono-disciplinary: the theoretical framework of sociology is applied to study the law. This means that legal sociology can at the least not fully overlap with empirical legal studies, as empirical legal studies is not particular to one social science paradigm: there is no inherent reason why empirical legal studies would not also employ theories from psychology, economics, anthropology or even neurosciences. In fact, much of the rich and extensive literature on perceived (procedural) justice employs theories and methods from social psychology.

A similar reasoning can to a certain extent be applied when asking about (sub)disciplines such as criminology or legal psychology. Criminology focuses on one particular kind of behaviour: criminal behaviour. It studies the prevalence of crime, the causes of crime, the manner in which society responds to crime, and victims. Surely the last two could be said to fall under the scope of empirical legal studies too? Or consider legal psychology, which focuses on all the ways in which psychology plays a role in the operations of the law: examples are psychological factors in sentencing decisions or the reliability of witness testimony. Those surely could be regarded as fitting in our second pillar? Several such subdisciplines do indeed fit to some extent in our definition of empirical legal studies. All have however a narrower scope than empirical legal studies as we defined it. The scope is narrower either because the types of data and analyses are limited to quantitative (e.g. legal realism), or because one disciplinary vantage point is employed (e.g. sociology). For instance, 'law and economics' seeks to explain phenomena such as the manner in which humans respond to legal rules employing an economic theoretical vantage point, that of rational choice. One could argue that these subdisciplines in a sense partially overlap with empirical legal studies: some empirical legal studies may be labelled as 'criminology' or 'legal sociology', but empirical legal research is broader. Also, not all criminology or all 'law and economics' is empirical legal research.

Regardless of such partial overlap, we believe that there is one important element that distinguishes empirical legal studies from subdisciplines such as criminology, law and economics, or legal sociology. In empirical legal studies the goal is to describe and explain the workings of the law and the legal system in a broad sense. So, where legal sociology or law and economics are essentially about testing sociological theories or economic theories – for which the law is ancillary – in empirical legal research this is the opposite. Here, the central focus is the law and the various disciplines are the tools. Empirical legal research is therefore essentially multi-disciplinary: any disciplinary focus or theory may be used and the field is not particular to any paradigmatic viewpoint.

A second aspect is important to position empirical legal studies. For example, jurimetrics is defined as the application of science to the law, in the sense of measuring by mathematical and statistical methods the outputs of the legal system or the system itself, or as computer-assisted legal research, or even, very broadly, as the study of science and the law (for an overview see `legal-dictionary.thefreedictionary.com/jurimetrics`). An important subarea of study within jurimetrics is for instance how statistics can be used to support judicial decision making. Examples are

studies into statistical aspects of the use of DNA evidence, or into the manner in which Oslo confrontations should be set up to deliver as much evidentiary value as possible. Such jurimetric studies, which generate findings to be used in the actual processing of cases or the legal decision making process, however, differ from our description of empirical legal studies in an important respect. Empirical legal research is namely involved with studying the legal system, in a sense, *from the outside*: empirical legal research observes the workings of and in the system, its impact, empirical facts underlying rules and regulations. While its findings may be useful for lawyers as background information, empirical legal scholars will hardly be called to assist in individual legal cases or judicial decision making. The information that empirical legal studies generates about the law is, one could also say, *indirectly* of use.

To clarify our point, take again as an example jurimetrics, which we just introduced. Jurimetrics generates knowledge and gives clear rules that are useful for actual legal practice: jurimetric knowledge will tell practitioners how to use DNA or fingerprint evidence in court. Similarly, legal psychology will provide judges with information on the reliability of a certain witness's statement. It is indeed not uncommon that a legal psychologist is called to testify about the scientific merit of a certain piece of evidence, just like a forensic psychologist may be called in to testify about the psychological state of a defendant. Findings from the examples we gave about empirical legal studies, on the other hand, would generally not advise individual cases.

Empirical legal studies provides information on legally relevant topics in a *generic* sense. As such, ELS may very well influence judicial outcomes, but not in the sense that it aids by giving guidance in a specific case. Rather, ELS findings may advise judges about the general properties of cases such as the current case, trends in the interpretation of legal norms, or on the effectiveness in general of measures such as may be chosen from. Phrased differently, empirical legal research focuses more on the *context* of the law and its general application, but will hardly ever be used to determine evidentiary value in a particular instance, or a recommended intervention in an individual case.

Finally, there is a third important difference. This has to do with the fact that not all criminology or all 'law and economics' and not all sociology of law is empirical legal research. In empirical legal studies, the aim is to describe and explain the functioning of law and the legal system in a broad sense. So, referring back to the first point we made, where the goal in sociology of law or legal economics is essentially to test sociological theory or, respectively, economic theory – where the legal examples function as indeed no more than illustration or a specific area within which disciplinary questions are addressed – in empirical legal research the opposite is the case. In ELS the *law* is the focus of attention. An ELS researcher is fundamentally and exclusively interested in law. The ELS researcher conducts research to advance the legal discipline. To illustrate our position in this we should perhaps write 'empirical-legal': the dash between 'empirical' and 'legal' would then indicate that ELS is a particular type of *legal* research. The questions asked are about the law, and the answers generated by this research are relevant for law.

Before we proceed to a summary, we must admit that in order to make our case, we have sometimes (considerably) simplified and even exaggerated. For example, legal psychological research may in some cases also be seen as ELS, for example when it

comes to psychological processes that play a role in judicial decision making, or the willingness of consumers to take collective action under the influence of the coverage of legal expenses insurance. And the same goes for some types of jurimetrics or studies labelled as 'law and economics'.

In summary, empirical legal studies is that field of study in which the assumptions about the real world on which laws are built, the operations of the legal system and the effects of laws and legal procedures are studied, using a variety of disciplinary viewpoints and a variety of methodological approaches. The primary and ultimate focus of interest is the law. As such, empirical legal studies describe and explain the context within which the law is applied, the application itself of the law, and the impact the application of laws and regulations has on the empirical world. Having said this, many (sub)disciplines have partial overlaps with empirical legal studies and it is impossible to demarcate the field exactly.

1.4 Methods for empirical legal research

Thus far, we have discussed various definitions of empirical legal research, and attempted to outline, sketchily, the domain of empirical legal studies. This book does not deal with empirical legal research as such, however, but rather with the *research methods* employed for such studies. In this section, we will briefly sketch an overview of these research methods as they can be used in empirical legal research.

Our previous definitions told us that certain research types and their methods do not belong in empirical legal research. A first prominent one is doctrinal analysis, a method that in a sense does not use empirical data. We might be tempted to conclude that all methods that make use of empirical data therefore belong in the toolkit of empirical legal scholars. This is also not the case, as historical methods, given history's idiosyncratic paradigm, are excluded as well. Given these exemptions, we again move to inspect what textbooks tell us about empirical legal methods.

Lawless, Robbennolt, & Ulen (2009, p. xxi), in their seminal volume, define empirical *methods* in law as "the entire process of posing an empirical research question, deciding on the method or methods by which to pursue that research question, gathering and coding the data, analyzing the data, and then communicating one's results – with an emphasis on legal research". A little further on in their book they state that the research in which these methods are used is "empirical research based on observation (...), oriented towards testing hypotheses (...), concerned with aggregate effects (...), an incremental and ongoing process" (2009, pp. 10–15). All in all, Lawless et al. define the methods of empirical legal research as comprising the posing of the research question itself, the choice of method, the data collection procedure and coding of the data, analysis and reporting. In the second quote that we just gave, they limit the scope of empirical legal research to those questions that are quantitative and that can be answered by testing ("testing hypotheses"). This would seem a reductionist view of empirical legal studies that not all scholars, including this author, ascribe to. In fact, the *Oxford Handbook on Empirical Legal Research* explicitly includes many examples of studies that are of a more exploratory nature, where no hypotheses were tested. It even features an entire chapter on qualitative methods for empirical legal research (Cane &

Kritzer, 2010, chapter 38). Kritzer (2021, chapter 1) defines empirical legal research as research that employs methods of collecting information to examine, in some way, legal phenomena.[1] Van Dijck & Hagenaars (2017, chapter 1) explicitly mention that the methodology of empirical legal research is "much and much more" than statistics. They state that many types of empirical legal studies exist in which statistics do not play a role at all, for instance because they focus on a small sample or when questions are more of an exploratory or qualitative nature.

In empirical legal research, we therefore find the entire gamut of methods that are employed in those disciplines that study empirical facts. These are the social science methods – albeit not always originally so. As we will see in some chapters below, the social sciences have also at times borrowed methods designed in other disciplines when social science data resembled the formal structure of such 'foreign' data. A good example is the use of survival analysis techniques from epidemiology to analyse how long court cases 'survive' until they can be considered dealt with (either because they were withdrawn, a settlement was reached or a judge decided what the outcome was). Even though the formal structure is not exactly the same as the data structure we have when studying actual physical survival of people (people only die once and cannot 'resurrect' as court cases in a sense may do on appeal; all people die eventually while some cases are simply never dispositioned), the technique of survival analysis is very well usable for ELS. It can be used to investigate the shelf life of court cases (and to investigate what particulars of the cases or the courts predict a long shelf life) or to assess whether prison sentences are associated with more recidivism than community service orders. Criminologists have often used techniques from anthropology, such as participant observation, when they wanted to learn more about segments of society that they were unfamiliar with, such as drug or street gangs. Similar to a 'classical' anthropologist, they would first attempt to become acquainted with their research subjects, live like them, participate in their lives, witness their daily hassles, chores and moments of joy, to be able to understand why gang members make the choices they make, or feel forced to live in a certain way.

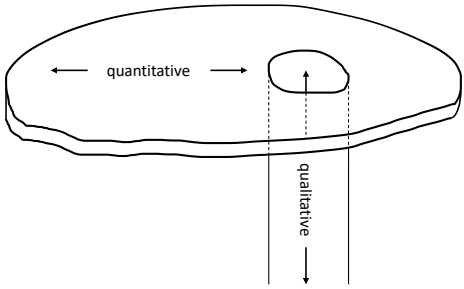
All in all, methods for empirical legal studies comprise the starting point of empirical research, such as phrasing the research question, defining what exactly needs to be measured, what data need to be collected, how the data will be processed and analysed, and how findings are reported. The methods used for empirical legal research comprise therefore those methods used in the empirical, social sciences. In line with what we discussed above in section 1.3, it is pivotal that, given the fact that the focus of empirical legal studies is on the law and the legal system, articles and research reports reflect not only on the findings as such, but also, importantly, on their implications for laws, legal norms and the legal system.

1.4.1 Qualitative and quantitative methods

An often-used categorization of research that we already briefly touched upon, is that into qualitative and quantitative studies. Formulated a bit simplistically, we can characterize the two as follows: while quantitative studies aim to measure the volume or

[1] The book by Kritzer contains a nice, somewhat US-centred history of ELS.

Figure 1.1: Abstract representation of quantitative and qualitative research



quantity of some variable of interest, qualitative studies are geared towards finding out the *quality*, 'nature', 'why' or 'how' of phenomena.

In a study that uses quantitative methods, we would want to find out *how often* something occurred, such as: 'How often are cases of domestic violence acquitted?', or 'What percentage of citizens have trust in the criminal justice system?', or 'How many citizens with a certain type of legal problem take their case to court?' Quantitative studies typically follow a fairly strict format (the empirical cycle), in which hypotheses are formulated and where statistical testing is employed to investigate these. Also, in quantitative research, samples are generally large, and standardized instruments (such as questionnaires or web surveys) are often used. An explicit aim is to generalize findings from the sample that was studied to a larger universe or a population.

Qualitative methods are used, on the other hand, if we want to understand *why* things happened or *how*, or explore new phenomena. Examples of questions we would pose then are: 'What are the reasons for taking or not taking a business conflict to court?', or 'Under what circumstances are domestic violence filings settled through mediation?', or 'What deliberations do judges make in divorce procedures when one parent has accused the other of sexual abuse?' Qualitative studies are generally much less strictly formatted beforehand than quantitative studies. Hypothesis testing is rare, and statistics is therefore used much less often. Qualitative designs differ from quantitative methods: in general smaller, not necessarily representative samples are used. Open interviews and observation are common, and analytic methods less prescribed and more exploratory, often spread over several iterations.

Quantitative research generally produces a broad, generalizable, quantitative summary of a phenomenon. Qualitative research gives a rich understanding of a particular problem within a particular context. As the two are different methods for answering seemingly different kinds of questions, neither is superior to the other. We do not use the adverb 'seemingly' without purpose, however, as many questions can be addressed using either quantitative or qualitative methods. The approach may then be different, depending on what type of methods one uses, and the type of answers generally are as well.

In qualitative research, the aim is much less to produce generalizable quantitative statements, but to unravel a number of mechanisms, to *understand* what happened, or to understand the meaning that the research subjects give to phenomena that are being studied. This is why the inherent juxtaposition of qualitative and qualitative research is often (slightly simplistically) portrayed as in Figure 1.1. As qualitative scholars work from the assumption that "everything is contextual", they tend to study phenomena, and understand phenomena, only within the given, particular context. This makes qualitative research inherently non-generalizable.

A quantitative study as portrayed in Figure 1.1 gives a broadly generalizable result, but it is like a pancake: it is shallow. In a quantitative study one usually investigates but a few factors or variables. Contextual effects are generally not investigated but seen as a nuisance: quantitative researchers attempt to separate out such factors, control for any contextual factors that might distort the picture. Examples of such studies are experimental studies into the effectiveness of medicines. One then has a group of patients and administers among the group – at random – the medicine-to-be-tested and a placebo. Any differences between the group that received the medicine and the group that received the placebo are then attributable to the medicine and to the medicine only. In such a design, the medicine is 'isolated', and the impact of any contextual effects (such as the expectations patients had, any other medical conditions patients have, gender, personality) evened out by the randomization.

In summary (and admittedly leaving out nuances), a qualitative study picks a small part of the population of interest, but it delves deep, it goes to the bottom of things and generates a rich and contextual understanding – but we cannot be sure whether the same result would have been found elsewhere as the findings apply only within that particular context. A quantitative study studies but a few aspects of the problem at hand but does so broadly, and tries to find the impact of factors regardless of any particular context. That makes the findings of a quantitative study more easily generalizable across contexts, but as it largely disregards context it investigates only a limited number of aspects of the problem at hand.

Why is it important to already touch upon this distinction in our first chapter? Because the two 'traditions' or paradigms use partially different methods. Qualitative studies rely more on open interviews, legal texts, observations, immersing oneself in the context to be studied. Samples are generally small. Studies can be planned only to a certain extent as one is unsure what one will encounter. Analysis is generally lengthier and iterative. Quantitative studies on the other hand rely more heavily on pre-designed measurement instruments such as programmed questionnaires or web surveys. Extensive piloting is necessary. Samples are generally larger, and testing, model building and statistics are common.

Many students prefer qualitative methods to quantitative, assuming that qualitative research – without maths and formulas – is easier. The latter is however generally not the case. Qualitative research requires strong theoretical skills, hard and good analysis, perseverance, and constitutes more often than not a substantive investment (and may entail much more – tedious – work than quantitative research). Whether the outcomes are useful is also often more uncertain beforehand. A solid qualitative study is a feat that requires extensive training, and is much harder to learn through textbook recipes, such as can be used for teaching quantitative skills. We will return to the difference

between quantitative and qualitative methods in chapter 2, where we will also detail why a combination of the two types of methods is – when possible – the preferred approach. We will in chapter 7 illustrate how the two can also be regarded as situated on a spectrum, where they regularly encounter each other.

1.5 Outline of this book

In chapter 2 of this introductory part of the book, we will first introduce and discuss some concepts and issues that are important for empirical research, such as reliability and validity, macro-, meso- and micro-level studies and primary and secondary data.

Next, part II of this book deals with data collection. In three chapters, which discuss sampling (chapter 3), measurement (chapter 4) and design (chapter 5), we will discuss data collection methods for both qualitative and quantitative research.

In part III, we discuss analysis methods, separately for quantitative and qualitative data. In chapter 6 we discuss analysis methods to describe the properties of quantitative data, using statistics such as the mean and correlation coefficients and other association measures. In chapter 7, we discuss methods for the analysis of qualitative data, focusing on the coding of texts and textified material, and on content analysis. The next two chapters are more technical. In chapter 8 we introduce statistical testing, and in chapter 9 we move on to more complex quantitative multivariate data analysis.

Towards the end of the book, we set out a number of worked examples to show how all the dry, abstract methodological notions are applied in practice. The first of these, in section 10.2, regards a study on recipients of social assistance benefits and the impact of employment status on both the experienced meaningfulness of their often-tedious tasks as well as protection against arbitrary power exercised by case managers and work supervisors. With data from 42 qualitative interviews, it showcases the various stages and intricacies of qualitative coding strategies, and illustrates how open coding can reveal unexpected viewpoints. The second example (section 10.3) details systematic legal analysis. In this study, a large number of judicial decisions in civil and disciplinary cases were systematically sampled and coded, and the legal arguments by parties analysed to investigate to what extent apologies implied admitting legal accountability in practice. In the third example, in section 10.4, multivariate analysis was used to investigate to what extent international sentencing at the International Criminal Tribunal of the former Yugoslavia could be considered consistent, combining both perpetrator and crime characteristics in one model to predict sentence length. In our final chapter (chapter 11) we summarize some general issues that those who wish to use empirical methods to study the law should be particularly aware of.

Chapter questions

1. What three elements characterize empirical legal research? (section 1.2)
2. What types of research focused on the law are generally not regarded as part of empirical legal studies? (section 1.2)

3. What are the three pillars that constitute the trias ELSica? (section 1.3)
4. What is an ex-ante evaluation? (section 1.3)
5. Give an example of how the three pillars are interconnected (section 1.3)
6. What two features distinguish empirical legal studies from subdisciplines such as criminology, legal sociology or legal psychology? (section 1.4)
7. In what respects does qualitative research differ from qualitative research? (section 1.4.1)