Chapter 11

Conclusion: some generic methodological issues

11.1 The particular setting of empirical legal research

In this last chapter we briefly discuss two take-home messages. As we said in chapter 1, empirical legal studies are an 'awkward' field. When we conduct empirical legal research, we study the context, operations and impact of law (in its broadest sense). In doing so, we however do not use methods common in legal research, but methods that are essentially foreign to doctrinal research, and methods that very few legal scholars have been trained in.

It is quite a challenge for a lawyer to operate in this field. Empirical research methodology harbours different schools, statisticians are associated with 'lies, damn lies and statistics', and research methodology has become highly specialized. How can a lawyer, trained in doctrinal analysis, master empirical methods such that s/he can authoritatively conduct empirical research? Many lawyers profess that such research should perhaps be carried out by empirical researchers, not lawyers. Maybe lawyers and empirical researchers could collaborate.

We believe it is imperative that lawyers themselves do empirical legal studies. Only lawyers understand the law and operations sufficiently deeply and practically that they can interpret findings. And only lawyers can envisage the feedback that empirical findings can or should have on the law and the legal system. If empirical legal research were done by psychologists or economists only, it is likely that the findings would impact little on legal practice or on law: they would be a subfield of either, and law would continue to do its doctrinal thing as usual. Only when empirical legal knowledge and studies become part and parcel of legal training, and only when lawyers internalize some of the principles of empirical research, can empirical legal studies impact the law itself, a feedback loop be envisaged, and empirical research 'feed' the law.

Until law curricula train law students in research methods, only a few legal scholars will do empirical legal research, often in collaboration with interested empirical scholars. And of course, even if law students were to have training in empirical research

methods, they would never have as extensive a training as psychology or sociology students: after all, they must be trained to be lawyers. But lawyers who understand the basics of the empirical language would see a wide world opening up to them and they will be able to enrich the legal discipline, and perhaps transform it.

11.2 Correlation is not causation

Perhaps the most fundamental take-home message is in the header of this section. It is the most often made mistake among all empirical researchers: mistaking correlation for causation. As explained extensively, correlation is a *necessary* but not a *sufficient* condition for causality. If X causes Y, then we would expect to find a correlation between X and Y. But that does not mean that the reverse applies too, that if we find a correlation, we may therefore conclude that X is the cause of Y.

This logical error is very often made. Researchers are often overoptimistic about the strength of their empirical evidence. They overgeneralize (declare that the findings can be generalized beyond their sample, declare that the same conclusions would be drawn in different settings). And they do not heed the rule that says that only when no third factor can explain the association between X and Y can we conclude that X is cause of Y. Researchers can only confidently make causal claims if they have been able to conduct an experiment in the methodological sense of the word. They must then have had full control over who was administered X and who was administered an equivalent placebo. This is rarely the case, especially not when we want to study the law in its naturalistic settings. This is not to say that this would be impossible; it is just not very easy to do. Just like criminologists, empirical legal scholars face the strict procedural rules of the law. They cannot, like medical researchers do, test the impact of medicines in clinical settings. While doctors are – under certain ethical guarantees – in control of the administration of medicines or procedures, legal scholars are not in control of the meting out of sanctions, or judges' decisions, or decisions reached by parties in a conflict. Independent bodies administer the law, and the legal scholar is more observer than in control.

Chance at times helps scholars, by creating settings that may function as a natural experiment, and in some cases the legal profession is eager to test procedures. But often researchers have to test hypotheses using observational designs. Caution and restraint are then appropriate when it comes to causal conclusions.

11.3 Replication, triangulation and mixed methods

Related to the above, history will show that just as in psychology, sociology and criminology, empirical legal scholars will also have to replicate studies and repeatedly deliver the same conclusions to build a knowledge base. We cannot rely on just one study to conclude that a law does or does not function, or that plaintiffs would be more content with outcomes if procedures were organized differently. When we work with samples in quantitative research as well as when we do in-depth qualitative research, we are always liable to chance, or to uncovering idiosyncrasies.

Researchers should therefore firstly very clearly report how they carried out their studies, what instruments they used, and preferably publish not only their article but also their data, so that studies can be independently replicated. Secondly, they should not rely on just one particular method or setting. Triangulation is immensely important also for this reason: for ensuring that findings have generality over different methods and setting and researchers. Progress in science does not rise from lightning-like flashes of insight, but from repeated studies with well-founded evidentiary claims that all point in the same direction.