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Some observations on the integration of empirical legal studies in mainstream legal practise
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1.1 Confidence in the judiciary

In November 2020, during a hard lock down in the Netherlands due to the COVID19-pandemic, I was inaugurated as the first female president of the Supreme Court of the Netherlands. My maiden speech was about confidence in the judiciary,[1] that is to say the trust in the judiciary as a state institution and the trust of an individual in other people, judges included. In my perception, both the legal rules themselves and the way they are interpreted and applied affect the level of confidence in the judiciary. In the Netherlands, trust in the judiciary has been stable at a high level for a number of years. Compared to other European countries, trust in other people and institutions is equally high in the Netherlands. Confidence in the judiciary is an essential part of a rule of law based democracy, in which human rights and human dignity are safeguarded by all branches of state power.

In the Netherlands, legal provisions are part of a legal system that is in the essence based on confidence. This basis of trust is important for people's ability to live freely in legal relationships, to develop themselves, to strive for social, economic and sustainable well-being. In every area of Dutch law, there are legal provisions by means of which the legislature wants to encourage behaviour based on good will and reasonableness, even though in all areas of law sanctions are provided in case of violation of certain legal provisions.

1.2 Judicial decision making

Legal provisions have an impact on society, for instance on the living conditions within a society. Conversely, society has an impact on the law. From a legal perspective, the role of the judge in dealing with the law means doing justice on the basis of legal rules, interpreted and applied in the circumstances of the case. The trust of people in the judiciary requires continuous attention, at least of those who are professionally involved in judicial decision making, and constant observation of current issues that may affect resilient confidence in the judiciary. It is essential that professionals within the judiciary are familiar with their role with regard to the furthering and maintaining of the confidence which the courts in a democratic society must inspire in the public.[2] In my opinion, it is a condition for trust in the judiciary that court members may be perceived as impartial and independent, competent, careful and benevolent legal professionals.

[1] The speech is published on the website of the Hoge Raad.
[2] E.g. EHRM (GC) 15 october 2009, Micallef/Malta, nr. 98.

1.3 Empirical legal studies

My curiosity for empirical legal studies is inspired by my interest in the functioning of the law system in the living situation of individuals and in a trust based society, more specific in the impact of the interpretation and application of the law by the judiciary. Some years ago, I participated in the steering group of the National Incentive Action of the Dutch Research Council (NWO)[3] to further empirical legal studies in the Netherlands. Empirical legal studies is well suited to providing legal practitioners with facts and knowledge about the effectiveness of legal rules and procedures. Empirical legal studies provide a research methodology in which questions of law are being asked, empirical data are being used to answer these questions, and responses are legally relevant.[4] Empirical legal studies concerns research on the assumptions, the functioning and the impact of the law. Results of such research may give a court for instance more insight in the social impact of the law, or in the extent to which the aim of a legal provision is achieved. Empirical legal studies may contribute to developing more evidence-based legal provisions, and may generally support the better understanding how to use evidence-based research results adequately in practising law. It is a pleasure to contribute at this 2022 ELS Conference in Amsterdam to exploring opportunities for shaping a more evidence-based law system. In this speech, my observations on this topic will circle around the perspective of judicial decision making.

2. Empirical legal studies and judicial decision making

I would like to provide some examples to show that on the one hand courts take an open stance towards the use of such results and on the other hand the availability and recognition of results of empirical legal studies within the judiciary is not yet far advanced.

2.1 First example: a legal provision based on fear and complaints

I would like to start with an example from my own court. It concerns the application of law based on perceptions of human behaviour that are not objectified by observational research.

The Hoge Raad der Nederlanden, in English: the Supreme Court of the Netherlands, is a court of cassation. The Hoge Raad decides on cases which have usually already been handled by two layers of jurisdiction: a court in first instance and a court of appeal. The function of being a court of cassation means that the Hoge Raad does not establish the facts of a case anew, but reviews whether the previous court interpreted the law correctly, followed the right procedure, and sufficiently substantiated its judgment. Hence, a court of cassation like the Hoge Raad does not assess the facts, but concentrates on the legal aspects of a case. For a cassation court, results of empirical legal studies may for instance be relevant to assess the substantiation of a judgment of a court in previous instance, or to assess the level of realism or proportionality of the applicable law.

[3] Nieke Elbers, Marijke Malsch, Peter van der Laan, Arno Akkermans en Catrien Bijleveld, Nationale Stimuleringsactie NWO Empirical Legal Studies, NSCR, July 2018.
[4] Catrien Bijleveld e.a., Nederlandse Encyclopedie Empirical Legal Studies, Den Haag: Boomjuridisch 2020, p. 12.

In a judgment of 27 May 2022,[5] the tax chamber of the Hoge Raad assessed a case of a private company against the State about Dutch taxation of the sale and import of passenger cars and motorbikes. The Hoge Raad ruled that the complaints of the company about the merits of the taxation were unfounded. However, the company successfully complained that the reasonable time for resolving the dispute on appeal was exceeded. To that extent, the appeal in cassation was well-founded. As a result, according to applicable law - which was not an act of parliament, but a so called general administrative order - the State had to be ordered to reimburse the costs of professional legal aid of the company.

Until 1 July 2021, the criteria for assessing the level of costs were the same for all cases. The Hoge Raad hence assumed that until then, the legislature considered all cases to be identical, irrespective of the nature of the decision contested. This means that, if cases are nevertheless dealt with differently, article 1 of the Dutch Constitution requires an objective and reasonable justification for the difference.

As of 1 July 2021, the level of compensation of professional legal aid costs became higher for all cases except for those concerning the Valuation of Immovable Property Act and the taxation of the sale and import of passenger cars and motorbikes. The legislature based the new distinction on complaints and fears, in particular on the part of municipalities. Municipalities complained that the compensation of professional legal aid in this type of cases was too simple a business model for agencies providing legal aid on a no-cure-no-pay basis. Municipalities feared that a higher compensation level would lead to even greater recourse to the administrative courts by no-cure-no-pay agencies.

The Hoge Raad ruled that this explanation lacked indications on the basis of which the reality of those complaints and fears can be assessed, as far as the costs are concerned. The Hoge Raad said that the requirement of an objective and reasonable justification for the distinction does not mean that the correctness of an assumption on which the distinction is based must have been established empirically or must subsequently be established factually. However, in order for such an assumption to constitute an objective and reasonable justification, the assumption must be so realistic that the legislature may reasonably base the law on the assumption. The Hoge Raad concluded that the law violates the prohibition of discrimination laid down in Article 1 of the Dutch Constitution, because the distinction in the law made as of 1 July 2021 lacks an objective and reasonable justification.

In this judgment, the Hoge Raad does not require the use of empirical data in the making of the law, but it clearly limits the legislature to base an inequality in a legal provision on perceptions of human behaviour that are not objectified by empirical evidence. One may perceive this as an attitude that takes an open stance towards the opportunity to make use of evidence-based research results.

2.2 Second example: review of substantiation of a judgment

The second example concerns a judgment of the European Court of Human Rights in Strasbourg (EctHR) that provide an example of the use of evidence-based research results

[5] Supreme Court of the Netherlands, Judgment of 27 May 2022, ECLI:NL:HR:2022:752.

for the interpretation of legal provisions in health matters and for the review of the substantiation of a judgment of a national court.

In the case of Vavřička and others v. the Czech Republic, the applicants complained about the consequences of non-compliance with a legal duty to ensure routine vaccination of children. In its assessment of the case, the ECtHR had, amongst others, to determine whether the vaccination measures were an interference to article 8 of the European Convention on Human Rights (ECHR) that could be regarded necessary in a democratic society. In this determination, the Court considered that a certain margin of appreciation is available to domestic authorities with regard to interferences to article 8 ECHR.

The Court assesses that the breadth of this margin of appreciation depends, more generally, on a number of factors, such as the human rights at stake, whether there is consensus between the contracting states on the interests at stake and protection thereof, and whether debated national regulations result from a democratic decision-making process.[6] Furthermore, in the same determination, the Court examines whether there have been relevant and sufficient reasons for the interference, and the proportionality of the interference. In this context, the ECtHR takes into account whether there was relevant data from national and international experts on the subject, and whether the state's policy has been based on scientific evidence.

Several of these factors show that the significance of empirical legal studies for the interpretation of legal provisions is expressively acknowledged by the ECtHR. With regard to the substantiation of the contested judgment, the ECtHR took into account that the Czech Constitutional Court had concluded that the relevant data from national and international experts in the matter justified pursuing the policy at stake.

2.3 Third example: a European Union law perspective

The future will show us if court judgments will acknowledge results of empirical legal studies more often as part of the sources of interpretation and application of legal provisions. It would for instance be interesting if such results were available for the interpretation of the term "average consumer" in EU consumer law. More broadly, the EU law principles of equivalence and effectiveness seem to offer a wide area in which empirical data could help to further the confidence of people and member states in legal provisons of EU law. Within advisory opinions of advocates-general one may find quite some examples in which they mention empirical evidence as part of a legal argument. The arguments in the judgments of the CJEU often do not show if the CJEU takes such information into account. The settled case-law about how to define the so-called average consumer show that the CJEU does not shy away from a rather traditional attitude towards the custom of judges to assess situations by making use of personal observation and experience. As to whether a national court is entitled to seek an empirical expert opinion on the point of view of the average consumer or whether that point of view is merely a 'conceptual perspective' not amenable to the gathering of evidence, the CJEU takes the view that (i) EU law does not preclude a national court which is experiencing particular difficulty in that appraisal from seeking, under the

[6] ECtHR 8 April 2021, *Vavřička and Others v. the Czech Republic*, 47621/13, ECLI:CE:ECHR:2021:0408JUD004762113, paras. 273-280; 285-309.

conditions laid down by its national law, an expert opinion as guidance for its judgment, but that (ii) the national court is, in general, capable of appraising the point of view of the average consumer through its own knowledge.[7]

3. Empirical legal studies and legislation

Courts are not the only institutions for which an evidence-based approach of the law could be helpful to fulfill their legal tasks in the interest of the individual, the public and society. Other branches of state power, like the legislature and the executive, may also benefit from this approach.

The Dutch legislature is criticised regularly about the limited extent to which results of research by way of empirical legal studies are utilised.[8] The so-called "integrated impact assessment framework for policy and legislation"[9], a normative source of information for the drafting of proper regulation, established by the Dutch government, does not describe the use of evidence-based information in drafting legislation.[10] Researchers of the University of Twente recently found a limited use of scientific knowledge at the Dutch Ministry of Justice and Security. They concluded that hardly any of the employees who participated in the survey works from an evidence-based perspective.[11]

4. Towards a position of empirical legal studies in mainstream legal education and research

The trust of the people in the law and the law system partly depends on what people experience of the well-functioning of the law in their living situations, of the social, economic and sustainable impact of the law. From here, it is a small step to assume that legal provisions should be logic, deliberate, fair and reasonable, even if they are mainly policy-based. Likewise, the interpretation and application of legal provisions in court judgments should contribute to the relevance of the impact of the law in the living situations of individuals and for society as a whole.

In this respect, the availability of evidence-based information about the functioning of the law system and specific legal provisions is of major importance. Empirical legal studies offers opportunities to make such information available and better accessible in daily law practice.

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[7] Court of Justice of the European Union, Judgment of 9 September 2021, Phantasialand, C-406/20, ECLI:EU:C:2021:720, paragraphs 46 and 47, with reference to judgments of 16 July 1998, Gut Springenheide and Tusky, C-210/96, EU:C:1998:369, paragraphs 31 and 32, and of 28 January 1999, Sektkellerei Kessler, C-303/97, EU:C:1999:35, paragraph 36.

[8] See for instance Nienke Doornbos, Nieke Elbers, Marleen Kragting & Marijke Malsch, Laat wetgever empirische kennis beter benutten!, Nederlands Juristenblad 2020, afl. 43, p. 3298-3299.

[9] See https://www.kcbr.nl/sites/default/files/iak_english_incl_corrections_02-11-2017.pdf, or, in Dutch, https://www.kcbr.nl/beleid-en-regelgeving-ontwikkelen/integraal-afwegingskader-voor-beleid-en-regelgeving#Kabinetsbeleid.

[10] See for instance E. Niemeijer en Dr. P.W. van Wijck, Werkzame en toekomstbestendige wetgeving, *Regelmaat*, 2019/3.

[11] R. Torenvlied e.a., Rapport "Naar meer evidence-based beleid binnen JenV", University of Twente, maart 2022, with a summary in English.

This conference is a key opportunity to explore the current state of the impact of empirical legal studies within the law system and society. Sometimes results of empirical legal studies do not reach representatives of legal institutions. How to bridge the gap between the researchers and the lawyers in practice? Sometimes results are not adequately perceived by representatives of institutions like the legislature, the executive or the judiciary. How to improve their ability to deal with such results? And how to generate more evidence-based data about the functioning of legal provisions and the law system? Sufficient researchers should be familiar with the methodology of empirical legal studies and should be able to identify relevant research opportunities. According to research of Gijs van Dijck et.al. in 2018, the share of empirical legal studies in legal research was limited.[12] Jan Gooijer concluded more or less the same in 2019 within the area of tax law.[13] The Dutch Encyclopedia Empirical Legal Studies,[14] published in 2020, gathers information from 25 years of empirical legal research in the Netherlands and provide an impressive departure point for those who want to explore opportunities for empirical legal studies within legal research.

The National Incentive Action of the Dutch Research Council (NWO) was followed by the so-called Sectorplan Rechtsgeleerdheid. Nowadays, a lot of Dutch law faculties acknowledge the necessity of training students and researchers to master empirical legal studies as a methodology. These faculties are in the process of integrating empirical legal studies as a research method into traditional legal education and research. The integration of empirical legal studies in mainstream legal theory and practise will probably be an adequate path towards a society in which legal, social, economic or sustainable needs and expectations of individuals, organisations and administrative bodies will ultimately be more precisely incorporated in the shaping, interpretation and application of legal provisions. On the one hand, one should take enough time to let empirical legal studies grow into this mainstream role. On the other hand, as I said, there is a lot of work to do to get there.

I wish you an inspiring conference. Thank you for your attention.

[12] Gijs van Dijck, Shahar Sverdlov & Gabriela Buck, Empirical Legal Research in Europe: Prevalence, Obstacles, and Interventions, ELR november 2018, No. 2, doi: 10.5553/ELR.000107.

[13] J. Gooijer, Where is the evidence? Een korte verkenning van empirisch fiscaal-juridisch onderzoek, NDFR 2019/2716.

[14] Catrien Bijleveld e.a., Nederlandse Encyclopedie Empirical Legal Studies, Den Haag: Boomjuridisch 2020.