

Who needs the European Society for Empirical Legal Studies?

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Introduction: ESELS

The European Society for Empirical Legal Studies (ESELS) was established on 1 September 2022, in Amsterdam. Its goal is to promote a constructive conversation among legal scholars involved in empirical legal research (in the broadest sense), primarily relevant to Europe and European jurisdictions, and organize an annual conference. The first conference was held on the same date. The call for papers invited scholars to submit their work using qualitative and/or quantitative methods about the assumptions, the functioning, and the impact of the law.¹ The aim of the conference was to create a unique place for empirical legal scholars to engage, present, and discuss their results. For full disclosure, I delivered one of the plenary addresses and I am one of the founding members.

In this short editorial, I reflect on ESELS's commitment to foster a methodologically pluralist, intellectually open, and disciplinary inclusive academic culture, and, in connection with that, wonder about the character of European empirical legal research. The former gives legal scholars a unique opportunity to reinvigorate their discipline under one label. The latter intrigues me, particularly on the question of whether ESELS can develop a healthy relationship with its mother discipline – the doctrinal legal research, and whether it will promote or frustrate the fledgling and ongoing conversations between law and economics, law and political science, and so on. These relationships, I sense, might be the key determinants of ESELS's institutional and scientific success.

The topic(s) (re-)occur to me at the time when ESELS's contemporary, the extremely successful Society for Empirical Legal Studies (SELS), is holding its 16th Annual Conference at the

*I thank J v H Holtermann for engaging in long debates about the epistemological foundations of empirical legal research. His work grounds much of my thinking about law and methodology. I am grateful to Daniel Naurin for a conversation about empirical legal studies and its effects on the bilateral conversations between law and political science. Last but not important, many thanks to the editorial board of this journal for their invite to contribute the editorial and their feedback to an earlier draft.

1. 'Call for papers: 2022 International Empirical Legal Studies Conference!', *Universiteit Leiden* (2022), <https://www.universiteitleiden.nl/en/news/2022/04/call-for-papers-2022-international-empirical-legal-studies-conference>.

University of Virginia, Charlottesville (CELS).² Because SELS, established in 2006, inspired the first conferences dedicated to empirical legal studies in Europe (CELSE) but stopped short of ‘institutionalization,’ I take it as a template against which to consider ESELS’s uniqueness and added value.

ESELS, the second coming of empirical

From the outset, I would like to highlight that I see ESELS as a timely and valuable initiative to create Europe’s own empirical research infrastructure rather than a belated European recreation of SELS, a sort of catching up with the avantgarde.

Dame Hazel Genn, who opened the Amsterdam conference, spoke of a growing black hole of European empirical legal research. She argued that Europeans have been asking substantively different questions than their American peers. There was, moreover, a genuine space and a momentum for the initiative in the post-COVID world. To demonstrate its value, ESELS should, according to Dame Genn, adopt a European outlook on societal problems and processes, investigating how they pan out in European jurisdictions. Empirical research will bring the necessary new understanding of the law (new knowledge, my interpretation), able to assist governments and policymakers struggling to overcome societal challenges.

A key element of the ‘European outlook,’ I believe, is methodological and disciplinary tolerance. ESELS is disciplinary inclusive, opting for a deliberately wide definition of empirical.

The draft statute of ESELS states that ‘the term Empirical Legal Studies (ELS)’ refers to all scholarly, scientific, and professional knowledge concerning the assumptions about the real world on which law is based, the operations of the legal system and the effects of law and legal procedures, from a variety of disciplinary viewpoints and a variety of methodological approaches. 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 this context.’

In other words, ESELS welcomes methodologically shy and methodologically savvy scholars, believers and sceptics. It does not define law and legal science away nor reduces the law to an applied social science, an epiphenomenon. Compared to the first generation of empirical legal scholarship and the global SELS movement, ESELS engages with the questions of how to determine the characteristics and the application of valid law (along with the societal implications of this process) as two equally valid and interesting research questions.

Can this ever work? It could.

On the one hand, ESELS inherits a thick epistemological foundation from European legal sociology (Weber, Ehrlich...) and Scandinavian realism (Ross) offering a solid ground for the development of non-normative approaches to the analysis of valid law. ESELS comes at a time where a new generation of scholars is practising empiricism, albeit at times without the decorative empirical jargon. It capitalizes on the European Union’s ‘law in context’ outlook.³ Importantly, it institutionally unites empirical research that has been gaining momentum (and a critical mass) in Europe with institutions like iCourts and Pluricourts, or the fledgling empirical jurisprudence (Leuven), too often

2. ‘The 16th Annual Conference on Empirical Legal Studies’, *CELSUVA2022* (2022), <https://www.cels2022.com/>.

3. A wonderful conversation about methods continues for the second cycle in Marseilles/Aix: ‘Cycle de séminaires Controverses sur les méthodes en droit de l’Union européenne’, *CERIC* (2023), <https://dice.univ-amu.fr/fr/dice/ceric/cycle-seminaires-controverses-methodes-droit-lunion-europeenne>.

published/publishable outside Europe.⁴ On the other hand, ESELS inherits the methodological bickering and enters the conversations that reproduce old intradisciplinary divides and institutional resistance. It steps in the pond of relationships that legal scholars have established with political scientists, economists, historians, sociologists, and others.

If history is any guide, things can go both ways.

Before ESELS, SELS had a similar ambition as ESELS, that is, 1) Encourage and develop empirical and experimental scholarship on legal issues; 2) Stimulate ongoing conversations among scholars in law, economics, political science, criminology, finance, psychology, sociology, health care, and other disciplines; and 3) Convene an annual conference of scholars on empirical legal studies. (Apologies for the acronyms galore.)

The editorial of the first issue of JELS – The Journal of Empirical Legal Studies (JELS), the official journal of SELS – stressed the need to fill ‘a gap in the legal and social science literature that often leaves scholars, lawyers, and policymakers with false or distorted impressions about the legal system.’⁵ The goal of the journal remains to ‘encourage, promote, and provide an impetus for the careful collection of empirical data and the dispassionate, rigorous testing of empirical hypotheses with a clear purpose to contribute to policy debates, hinging on empirical assumptions.’

The first conference of SELS in 2006 featured ‘original empirical and experimental legal scholarship by leading scholars worldwide, from a diverse range of fields.’ Successive and highly successful conferences⁶ aimed at bringing together ‘scholars from law, economics, political science, psychology, policy analysis, and other fields who are interested in the empirical analysis of law and legal institutions’ and discuss ‘papers that engage empirical and experimental scholarship on legal issues spanning all areas of empirical legal studies.’⁷ The latest SELS Annual Conference in Charlottesville brings together ‘over 200 scholars interested in the empirical analysis of law and legal institutions. Participants include scholars with backgrounds in economics, political science, psychology, policy analysis, and other fields. The legal field aka law has been reduced to other fields. This is disconcerting (even if it was a slip of the pen⁸) but not entirely surprising to anyone that has been hanging out at SELS.

European scholars interested in empirical legal research have been presenting their work at SELS conferences,⁹ which expanded to Europe, Asia, and Latin America.¹⁰ Given the number of scholars flocking to the first European conference of empirical legal studies (CELSE), also held in Amsterdam in June 2016 (I was there, too), the European outlet was missing. Dame Genn is entirely correct. CELSE departed from the same premise as its American counterpart, responding to the ‘increasing pressure as well as growing demand—from research funding institutions, policymakers and legal practitioners—for European academic lawyers to investigate the

4. F. Snyder, ‘New Directions in European Community Law’, 14 *Journal of Law and Society* (1987).

5. T. Eisenberg et al., ‘Editor’s Introduction’, 1 *Journal of Empirical Legal Studies* (2004).

6. ‘First Annual Conference on Empirical Legal Studies’, *The University of Texas School of Law* (2006), <https://law.utexas.edu/conferences/cels2006/>.

7. ‘Annual Conference on Empirical Legal Studies 2017’, *Cornell Law School* (2017), https://community.lawschool.cornell.edu/wp-content/uploads/2021/03/2017-CELS_Cornell-Program.pdf.

8. ‘The 16th Annual Conference on Empirical Legal Studies’, *CELSUVA2022* (2022), <https://www.cels2022.com/>.

9. An example is here: G. Silsby and H. Hamann, ‘14th Annual Conference on Empirical Legal Studies’, *LAW’S/EMPIRICS* (2020), <https://legalempirics.com/post/14th-annual-conference-on-empirical-legal-studies/>.

10. Academia Sinica in Taipei hosted the conference in 2022: ‘2022 Conference on Empirical Legal Studies in Asia (CELSA)’, *Institutum Iurisprudentiae Academia Sinica* (2022), https://www.ias.sinica.edu.tw/en/seal_post/1443?class=66.

empirical foundations of their theoretical claims and to explain how legal rules emerge from social interactions and shape social outcomes.’ It sought to bring together ‘academics from law and other fields who embrace the empirical turn and seek to develop empirical accounts of law and legal institutions in Europe’.¹¹

The organizers of the second CELSE conference in 2018 in Leuven defined the term ‘empirical’,¹² clarifying that ‘empirical analysis is understood to encompass any systematic approach to quantitative or qualitative data analysis, including statistical analysis, machine learning, experiments, text mining and network analysis techniques.’¹³

There was no third CELSE after COVID and I often wondered whether it was because of its global rather than European outlook or due to its relationship with the mother discipline (among a thousand different reasons).¹⁴ Most papers presented at SELS and CELSE conferences and the articles published in JELS leave lawyers with the impression that the knowledge about the law is inseparable from a rigorous methodology, hypothesis testing, and high quality data. Rigor is always commendable and the aim to render empirical research credible and share data of high quality is a welcome development.¹⁵ The JELS standard(s), one nonetheless fears, might be overly exclusive. On the one hand, they invite a clear separation from doctrinal legal research, and the idea of legal science as non-rigorous. Embracing the empirical turn appears to be a necessary condition for participation. On the other hand, they build a trench between empirical legal research and the law in context, law and society and sociolegal studies with a different idea of methodological rigor. The walls are high, and the traditions are strong. Including the latter and not excluding the former in the call for papers and the conference program seemed natural, and almost easy for ESELS.

The hard part for ESELS is to *remain* in a productive conversation with doctrinal scholarship and support the ongoing interdisciplinary conversation. Just like legal positivism and legalism enable legal realism and critical legal studies, and the attitudinal and the strategic model of judicial behaviour are built in the opposition to the legal model, empirical legal research owes its premise to doctrinal legal research. Not as its antithesis but as its complement. ESELS is an institutional newcomer,¹⁶ who might proceed wisely and garner the support of more ‘traditionally minded’ European legal scholars, harvesting their passion for problem-solving, actuality, their deep concern for the rule of law, and a commitment to economic, political, and social reality. This stance comes from the realization that doctrine will always be indispensable for internal criticism but will not offer external criticism.¹⁷ As one of the cofounders of ESELS helpfully reminds us (because we obviously need constant reminding), not only positive law and its norms and values (law in the books) but also how the law applies in society and the impact it has (law in action) belong to the discipline called law.¹⁸

11. ‘First Conference on Empirical Legal Studies in Europe’, *Amsterdam Center for Law & Economics* (2016), <https://acle.uva.nl/content/events/2016/06/conference-on-empirical-legal-studies-2016—21-and-22-june-2016.html>.

12. ‘CELSE 2018’, KU Leuven (2018), <https://www.law.kuleuven.be/pub/en/cltej/CELSE>.

13. *Ibid.*

14. E.g. an argument for bifurcation in A. Dyevre, W. Wijnvliet and N. Lampach, ‘The Future of European Legal Scholarship: Empirical Jurisprudence’ 26 *Maastricht Journal of European and Comparative Law* (2019).

15. This year’s pre-conference workshop is dedicated to the credibility of empirical legal research.

16. M. Bartl and J.C. Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar Publishing, 2022).

17. E.g. J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press, 1993).

18. E.S. Pannebakker et al., ‘Empirical Legal Studies in the Law School Curriculum in the Netherlands: What Is the State of the Art and Where Do We Go from Here?’ 56 *The Law Teacher* (2022).

To be continued...

ESELS has the mindset, the funding, and the energy to initiate debates, which will reinvigorate the legal discipline with new knowledge, methods, and partnerships.

I will (for now) avoid the logical next question whether ESELS will succeed in its goals of becoming a global academic player and a valuable interlocutor to national and European policy-makers. This depends on its gravitational pull and intellectual appeal. I dare hope for the best, judging from the success of the conference in terms of geographical, gender, and disciplinary representation. No less important is the financial aspect. ESELS is funded by the Dutch Ministry of Education, Culture and Science (OCW) as one of the themes of the multi-year Sector Plan Social Sciences and Humanities (SSH). The project is coordinated by the Leiden University, VU Amsterdam, Utrecht University, Erasmus University Rotterdam, and the University of Groningen.

I hope to have informed and intrigued the readers of this journal to keep an eye on ESELS's events. I also hope to have convinced a handful of them that ESELS is a welcome initiative offering law and lawyers new research opportunities and an exciting pan-European (while non-Eurocentric) research agenda.