Researching law in action: just do it!

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Introduction

- Who am I and what am I doing here?
- EU Horizon 2020/Marie Sklodowska Curie Global Fellowship
  - Aim: identify the main elements of a regulatory framework that enables, facilitates and stimulates the transition of conventional farm practices toward 'climate smart' practices in the EU (2016-2017)
  - Main topic this year: evaluating experiences CFI/ERF Australia
- Today's "presentation" (stimulate discussion) on the usefulness of empirical legal research and on how to do it, and on getting it published
- My own experiences (not a lecture on socio-legal research, I have no background in research methodology!)
- Short introduction into why empirical legal research & two examples:
  - Does environmental law stimulate or obstruct innovation?
  - What are the experiences with the CFI/ERF in Australia?

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Law in books – law in action (Pound 1910)

- Legal researchers
  - generally, have been trained as lawyers
  - usually, focus on 'law in books'
    - methodology: desk study of legal documents and case law
    - result: a fairly narrow view on reality
  - What are the consequences of the mobilisation of law in everyday life?
  - Research of law in action is left to socio-legal researchers, who often have a background in sociology

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Law in books – law in action (Pound 1910)

- My hypothesis:
  1. Research aimed at assessing the impact of law (success or failure?) or at designing new or improved legal rules and policies benefits from using an empirical methodology *too*
     - Not just in areas for which this seems obvious (e.g., environmental law: does it work?), but in all areas of law (e.g., constitutional law, see: Ch. Rothmayer-Allison, Law in Books Versus Law in Action: A Review of the Socio-legal Literature, in: Imbeau & Jacob (eds.), Behind a Veil of Ignorance? Power and Uncertainty in Constitutional Design (Springer 2015)
  2. Every legal researcher can do this, provided you are aware of your limitations
     - Small scale qualitative research is more doable than large scale quantitative research (hire professionals for the latter!)
     - Methodology: limited number of case studies, stakeholder interviews
     - Starting from law in books (firm doctrinal basis)

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Example 1 - Does environmental law stimulate or obstruct innovation?

- Project commissioned by Dutch Ministry of Infrastructure and Environment
- First desk study
  - Literature on relationship regulation and innovation: what characteristics should environmental legislation/regulation have in order to stimulate innovation?
    - Focus on continuous improvement instead of adopting specific technology, leave little room for uncertainty, apply mix of instruments (focus on economic instruments, esp. environmental taxes), plus wider industry policies (patent law, subsidies, training programmes etc.)
    - Technology forcing by setting unattainable goals
  - Review of current environmental law at EU and domestic level against these characteristics

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Example 1 - Conclusions desk study

- Current environmental legislation, generally, does not have these characteristics. It is aimed at gradual improvement of environmental performance, and does not rely much on financial instruments, let alone environmental taxes. Technology forcing is almost never used (exception: EU end-of-life vehicles directive, 100% take back duty & 80-95% reuse or recycle duty)
- Some exceptions:
  - EU Industrial Emissions Directive enables authorities to 'set stricter permit conditions than those achievable by the use of best available techniques'
    - No evidence of use of this provision
  - Dutch legislation has an 'experiments provision' that allows to set aside existing rules for a limited period of time, so as to achieve eco-innovations
    - Evaluations show that this provision is hardly used

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Example 1 - Methodology case studies (1)

- Case selection
  - Quick scan of long list (100+) held by Ministry
  - Short list discussed with major stakeholders
  - Short list tested against 5 criteria to ensure representative sample: type of innovator (public/private), type of environmental issues at stake, different governance levels (municipal, regional, water authorities), nature of innovation (regional development, zero emissions, product innovation), different outcome (success, failure)
- Data collection
  - Documents and files (including letters and e-mails) studied
  - Face to face interviews with major players (representatives of businesses involved and of various government bodies)

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Example 2: Methodology case studies (2)

- Some practicalities and other issues
  - Research assistant (get the documents, plan meetings with stakeholders, make notes during interviews and draft interview reports)
  - Unstructured, open interviews with some fixed elements (due to different nature of cases, see selection criteria)
  - Another option would have been:
    - Focus groups
      - Pro: respondents can answer and build on each other's responses, improving the richness of data being gathered
      - Con: results may not fully represent the opinion of the larger target population, facilitator must be able to handle complicated situations that may arise from the focus group interaction

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Example 1 - Practice: non-legal barriers

- Non-legal barriers: socio-political and administrative barriers
  - Local decision-making that drags on for years, sometimes resulting in the entrepreneur to give up
    - Usually caused by resistance by small group of local residents backed by one or two local politicians
      - Mismatch larger economic & environmental benefits and localized risks
  - Lack of knowledge and expertise at local level
  - Mismatch between various government levels
  - Completely different awareness of time
    - Entrepreneur sees market opportunity, wants his plan to materialize tomorrow
    - Officials (esp. lawyers!) think of procedures and potential pitfalls, lose sight of the benefits that may be achieved by the plan

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Example 1 - Practice: legal barriers

- Legal barriers
  - Regulators focus on most common situations, 'best available techniques'
    - When in already overburdened area, even tighter rules
  - Positive, flexible and open mind, creativity, smartness required to fulfil the legal requirements
  - Innovations always come with some uncertainty
    - E.g.: long term health impacts?
    - More reports required, yet 100% certainty hard to get
  - Experiments provision in Dutch legislation hardly used

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Example 1 - Conclusions practice: Success factors (1)

- The attitude of persons involved
  - *Every eco-innovation can be blocked using current environmental law, and every eco-innovation can be realized under current environmental law* (CEO multinational corp.)
  - Innovation needs to be developed and thought through in a transparent process together with all relevant stakeholders, including local residents.
  - Legal procedures should only start after project broadly accepted by everyone. These procedures, again, have to be transparent and with participation of stakeholders.

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Example 1 - Conclusions practice: Success factors (2)

- The level of collaboration or coordination between the various government bodies involved
  - Agreements must be made on coordination
  - Complex projects have to be coordinated by higher than local level
  - The higher level needs to have legal or political power to force collaboration
  - One person, with great communication skills, needs to be the central contact person for everyone ('case manager')
- Note that many of our findings or "non-legal"
- The interplay between the legal and the non-legal is particularly relevant

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Q&A

Example 2 - What are the experiences with the CFI/ERF?

- Part of a bigger project into developing regulatory framework aimed at stimulating farmers to adopt climate smart agriculture practices and technologies
- Goal of this part: find building blocks that have proven to be successful
- Started with desk study into legislation and related documents, including policy documents, as well as existing evaluations, legal literature
- Then empirical phase:
  - Case studies (original plan too ambitious…..)
  - Stakeholder interviews (generic level)

Example 2 - Research into experiences: methodology

- Case studies of selected CFI/ERF-projects
  - Goal: better understanding of projects, back ground info for interviews
- Interviews with key players within different stakeholder groups:
  - Government (CER, Dept. of Environment)
  - Farmers (NFF, Australia Pork)
  - Consultants (Carbon Farmers of Australia, Corporate Carbon, Climate Friendly)
  - Financial and accountancy (Rabobank, Baker & McKenzie)
  - NGOs (The Climate Institute)

Example 2 – Findings empirical research (1)

- Successful, but only after 2015 change of policy (long term government funding instead of carbon market):
  - 630 projects, most on vegetation, most on agricultural lands, 143 million tonnes of CO_2-e abatement
  - stimulated farmers to move to climate smart agriculture
  - advanced knowledge (soil carbon for instance)
  - many co-benefits: economic, resilience, biodiversity
  - regulatory framework is robust and ensures integrity
    - real reductions (monitoring)
    - additional reductions (beyond business as usual, projects wouldn't have happened otherwise –mostly…–)
    - high level of compliance (auditing system works well)

Example 2 – Findings empirical research (2)

- Improvements needed:
  - Lack of accepted methods for many branches in the sector
  - The large majority of small farms is not involved (economy of scale)
    - "aggregation" practiced, but has several problems
    - 'whole of farm'-method needs to be developed
  - High overhead costs, for government and farmers
    - Complexity is so big that farmers need consultants
    - Automated monitoring and reporting systems needed
  - Government budget alone can never fund sector wide transition to CSA: private funds have to come in, linking to ETS, or carbon tax
  - Questionable whether CSA will solve all problems (production increase may offset reductions achieved): dietary changes?

Q&A

- Getting empirical legal research published
- ?
- ?