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The Use of Empirical Methods in Private International Law
Outline

• General introduction - Empirical Approach to Law: How and Why?
• On Two Classic Tools Used by Lawyers: Case Law Analysis and Comparative Law
• Quantitative Approach to Private International Law: Choice of Law as a Testing Ground
• Qualitative Approach to Private International Law: the Example of Family Relations of Migrant Families
• What is the Future for Empirical Private International Law?
Seminar

• Focus on choice of law in cross-border contracts
  – Instructions & questions
Two classic issues

- Cross-border insolvency → where’s the COMI? Crucial role of concept of COMI (Art. 3 Insolvency Reg. 2015/848 and 1997 Uncitral Model Law)
  - Lack of definition → unpredictability?
  - Plastic nature → (abusive) forum shopping?
Two classic issues

- Foreign law in domestic courts
  - When and how do courts apply foreign law?
  - Obligation or possibility?
  - How do courts learn about content of foreign law?
  - How far do courts go in uncovering content of foreign law?
A second look

- COMI : Mevorach *JPriv.IntlLaw* 2010
  - Analysis of 96 cases (filtered out of dataset of 252 decisions – 2002-2009)
  - Decisions coded (factual/legal data) – analysis of results:
    - >80% cases : presumption rebutted
    - Operational head office as key element in rebuttal
A second look

- Foreign law: Verhellen 2012:
  - 99 court decisions in parentage matters
  - Analysis of 567 requests for advice (NGO)
  - Semi-structured interviews with 16 judges
- Results?
  - Foreign law applied in 50% cases
  - Who’s in charge of finding foreign law?
    - No conclusive evidence in case law
    - Interviews: lawyers do the job!
An empirical approach?

- Empirical science → backing up claims with evidence from testing
- Roger Bacon (c.1214-c.1292), *Opus Majus*: ‘theories supplied by reason should be verified by sensory data, aided by instruments, and corroborated by trustworthy witnesses’
Development of empirical approach

• Exact sciences → experimental model dominates
  – ‘Gold standard’: randomized experiment (random selection of population; random assignment of treatment; controlling conditions etc.) → experimental data
  – Quasi-experimental design: natural experiment (picked from real life, non random selection of treatment group) → observational data
Development of empirical approach

- Social sciences:
  - The appeal of the empirical model (legitimacy/funding)
  - In some fields: use of experimental design (e.g. experimental psychology)
  - In other fields: quasi-experimental design / observational data (e.g. sociology)
Experimental | observation

• On the Inability to Ignore Useless Advice – A Case for Anchoring in the Judge-Advisor System

• Impact of Attending a School with High-Achieving Peers: Evidence from New York City Exam Schools
Experimental vs empirical

- **Experimental**: based on experimental/quasi-experimental design/data
- **Empirical**: mindset → drawing inferences from observation of phenomena (whether data drawn from experiment, quasi-experiment, etc.) <> theoretical (argumentative/speculative)
Rise and fall of empiricism

- Empirical approach: a contested model
  - Decomposing social interactions in small units – ignoring interactions and reciprocity
  - Perils of experimentation:
    - Lab v real world
    - Hidden confounding variables
  - Fallacies of causation
  - Objective truth <> Reality is socially constructed / researcher is part of reality
  - Technical approach <> normative/political choices
A broad view of empiricism

- Empirical approach: an *umbrella* - systematic investigation of facts by either a quantitative or a qualitative method, or both
  - *Quantitative* approach
    - Data: numerical (measurement)
    - Method for analysis: (frequency/Bayesian) statistics
    - Emphasis on causation/inference → prediction
  - *Qualitative* approach
    - Data: social facts (any feature)
    - Collecting data? Observation, (semi-structured) interviews, etc.
    - Methods: discourse/document analysis, case study, grounded theory etc.
    - Emphasis on interpretation, contextualization, etc. → explanatory generalizations
Multiple citizenship

- Qualitative: Betty de Hart → Analysis of public debates (Parliament, press, court, etc.) in USA, Germany and Netherlands on dual nationality (1945-2012) + 35 interviews

- Quantitative: de Groot, Vink & Luk – Global Dual Citizenship Database → analysis of 200 countries
A broad view of empiricism

- Different modes of research
  - Descriptive research
  - Explanatory/inferential research
  - Exploratory research
    → qualitative/quantitative suitable for all types of questions
I. Empirical approach?

- Looking at empirical approach in more details:
  - Step 1 – Designing research
  - Step 2 - Collecting data
  - Step 3 – Analyzing data
  - Step 4 – Discussing results
Step 1 – Designing research

• Research design
  – Hypothesis - conceptual nature
  – Theory
  – Hypothesis-testing framework – observable implications
  – Reliability and validity
Step 1 – Designing research

- *e.g.* litigation or arbitration in transnational disputes? (Whytock 2008)
  - *Theory*: troubled relationship between arbitration & litigation in cross-border business disputes
  - *Hypothesis*: test whether arbitration takes precedence over litigation
  - *Data*: US Federal Courts / Arbitral institutions
  - *Result*: uncovering trend, but unsure about causality

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Step 2 – Collecting data

- Public sources – usually requires compiling/formatting - e.g. comparativeconstitutionsproject.org
- Generating data: interviews, survey, observation, etc. - e.g. Kruger *Intl Child Abduction 2011* : interviews with 25 parents of abducted children & 20 practitioners + 2 focus groups
Step 3 – Analyzing data

- Statistics (frequency, etc.) / interpretation
- Do not be afraid to recognize lack of results
- Going back to data...
Step 4 – Presenting results

• Step 4 – presenting results
  – Confronting hypotheses with results
  – Theory confirmed or falsified?
  – Follow up questions?
The research process

1. Research idea
2. Literature review
3. Theoretical formulation of the research problem
4. Empirical research questions (operationalization)
5. Research design (planning)
6. Data collection
7. Data analysis
8. Answering the empirical research questions
9. Theoretical interpretation of the results
10. Comparison with earlier research
11. Conclusions

The research cycle
A question for you!

- What’s your top 5 must read in private international law scholarship?
- Select one piece and reflect upon potential additional value of empirical perspective
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Two classic tools used by legal scholars

- Case law analysis - courts as labs
- Comparative law - foreign law as experiment

→ The lawyer’s answer to the empiricist?
Is case law analysis empirical?

- Method of choice for scholarly research
- Many different formats
  - Case note
  - ‘Leitentscheidungen’ / ‘Grands arrêts’
  - Review of case law (‘year in review’)
  - …
An empirical method?

- Traditional case law analysis is *not* empirical
- What is lacking? Research design:
  - Research question/hypothesis
  - Selection of data
  - Analysis of data
→ analysis excluding case notes
Research design → defining research question (hypothesis)

• Case law analysis – formulation of research hypothesis is often deficient – e.g.
  – What did courts decide in 2016?
  – How do courts stand towards cross-border surrogacy?

→ generic question
Research design → defining research question (hypothesis)

- Issue with generic question
  - Not precise enough to tailor data collection
  - Leads to ‘casual observation’ (no variables) → potential bias

- Tailored question
  - Descriptive question - ‘do courts of various M.S. apply Art. 17 Rome II the same way?’
  - Causal/relational question - ‘are decisions on public policy influenced by origin of applicable law?’
Research design → data collection

- If research question sufficiently tailored → next issue: data collection
- How to ensure that data allows to answer question (make inferences, etc.)?
- Work easier with advent of databases
Research design → data collection
Research design → data collection

• Selection of data:
  – Systematic collection of data (census) or sample?
  – If sample: how do we ensure that it is representative?
  – Difficulty: no clear idea of the ‘population’
    • Published decisions <> all court decisions
    • Published decisions:
      – Who decides on publication?
      – Only most contentious/interesting decisions published? Outliers and unusual decisions published more often? Sample bias
Sample bias – *e.g.* COMI analysis

Mevorach: majority of decisions rebut presumption in favor of statutory seat (> 80%):

- *Selection bias* because decisions not rebutting will not be published?
- How to control?
Non-probabilistic sample to avoid sample bias?

No easy alternative at hand – e.g. snowball sampling, quota sampling, modal instance sampling (typical case) etc.

Solution: convenience sample – and factor in limitations!
Research design → data analysis

• Analysis of data:
  - Hypothesis → selection of relevant features (‘variables’) to be observed
  - Systematic (<> casual) observation of variables → coding data
Research design → data analysis / coding

• Perils of coding:
  – Identification of relevant variables
    • Factual variables (quantitative - captures a number)
    • Categorical variables (captures a quality of observation) - coding requires some judgment
  – Coding as such - how to minimize influence of individual coder’s subjective judgment (reliability)
    • Systematic procedures (clear and detailed definition of each variable, range of values, contours of each category)
    • Difference within-coder consistency / between-coder variability
Challenges of coding case law - 2 examples

- *Implicit decision* - decision of court *prima facie* based on X & Y, but court also influenced by Z, which is not mentioned or only in passing...

- *Multi-variables decision* : decision of court based on several variables, but not all of them have same weight – *e.g.* FNC practice of English courts
Towards an empirical approach?

- Current scholarship → predominantly ‘landscape presentation’ : presenting data (frequencies, relevant trends, etc.) - no further operation on data

- Landscape analysis:
  - Fine to deal with descriptive questions
  - Not enough to establish causation/correlation
Towards an empirical approach?

- **Case study 1**: Symeonides – American Choice of Law Revolution
  - Hunch: where do US courts stand on methodology, 30 years after US ‘revolution’?
  - 30 annual surveys of US court practice (AJCL) + 2002 Hague Course
  - Focus on methodology – pil in tort
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Towards an empirical approach?

• Descriptive study: very valuable - if only because we need to know where the law stands

• Next questions:
  - Why do some courts stick to Restatement (2\textsuperscript{nd}) and other not? No answer using a descriptive framework
  - Jump from what the law \textit{is} \rightarrow what the law \textit{ought to be}: descriptive framework not operational

• Symeonides:
  - The revolution went too far (‘too much flexibility’)
  - Exit strategy: issue specific rules + escape clauses
Towards an empirical approach?

- **Case study 2**: Fallon – Analysis of Cross-Border Employment contracts (1988)
- Starting point: many different theories on how judges determine law applicable to cross-border employment contracts (pre-1980 Rome Convention)
Towards an empirical approach?

• Analysis?
  - 45 court decisions (Belgium – 1964-1987)
  - Coding decisions – 69 variables
    • Factual variables
    • Variables relating to analysis by court (e.g. one factor / multi factor analysis; application of mandatory rules or not, etc.)
  - Analysis
    • Descriptive statistics (landscape, frequency etc.)
    • Correlation between different variables
Towards an empirical approach?

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Fig. 15
Towards an empirical approach?

- 2\textsuperscript{nd} part of the analysis: ‘simulation’
- Experiment with new regime (1980 Rome Convention) – applied to 45 decisions analyzed
- Question: will new regime modify courts’ decisions?
Towards an empirical approach?

- Conclusion: from case law analysis to ‘jurimetrics’? (Movement post WWII – application of experimental methods to legal research – coupled with IT)

- Requirements
  - Research design
  - Systematic analysis
Comparative law as experiment?

- Comparative law as lab for lawyer?
- Favorite method for private international law – *e.g.*
  - Ernst Rabel 1945
  - Gilles Cuniberti 2017
Research design → defining research question (hypothesis)

• 1 - What’s the hunch?
• Comparative law aimed at
  – Analytical approach : comparing… to find commonalities
    • usually exploratory, descriptive account of the law – *e.g.* How do countries rules on third party assignment and is it comparable?
    • → focus on understanding foreign legal systems and at most finding commonalities – not an experimental design!
  – Prescriptive side : comparing linked to a larger project – *e.g.*
    • *Ernst Rabel* : “total reconsideration of the international purpose and the undeveloped resources of this branch of law”
    • *Ius Commune Casebook* : work towards the “emergence of a common law of Europe”
• 2 – How is research organized?
• Sample issues - choice of countries
  – Often : result of cognitive limitations (language issue; network effect)
  – Selection bias : choice informed by results?
  – Large sample as the answer?
3 – The problem of comparison: how to obtain answers to the same question

Stage 1: Länderbericht/country report...

Stage 2: the rise of the questionnaire - functional comparative method to design questions (e.g. ECFL)

Stage 3: facts-base comparison – e.g. common core project (Schlesinger/Trento)
Research design → data analysis

- 4 – Analysis of data answers the question?
- Finding common core → research design adequate (but common core could be minimal or finding that two opposite trends...)
- Suggesting common core is a better solution? Gap for normative approach
Empirical comparative law?

- Rise of *quantitative* comparative law to solve methodological conundrum?
  - Explicit hypothesis-testing framework
  - Cross-country legal data
  - Test causal theories

- Examples
  - Law & Finance (La Porta etc.) : measuring investors protection in 49 countries → linking level of protection to legal traditions → Legal Origin Theory (hypothesis of efficiency of the common law)
  - Diffusion and legal transplants : cluster analysis of citations to foreign courts → cluster within legal families (Gelter/Siems Am J Comp Law (2014))
  - Etc.
Empirical comparative law?

- Perils of quantitative work – e.g.
  - *Measurement* – measuring cross-country data → countries may be highly heterogeneous
    - Conceptual clarity of measured concept
    - Look not at the rule but at a paradigmatic case?
  - *Endogeneity* issue problem: measuring impact of variable on social phenomenon using a variable which may be linked to phenomenon
  - Normative shortcoming: *tertium comparationis* = efficiency
Food for thought

- Pick the main legal databases in your country
  - Do you know what they cover (selection/universal coverage; selection criteria)
  - Do you know who decides on coverage
  - Would you consider these databases as reliable source for a research project?
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Numbers rule the world?

- Prevalence of quantitative method – dominance of ‘quanti’ in social sciences
- Economics: only 5% of articles published in top 10 economic journals lack statistical analysis of data and mathematical expressions (Sutter/Pjesky *Econ Journal Watch* 4(2) 2007)
- Link with ‘evidence-based’ policy
Distinctive flavor of quantitative research

- Central theme of quantitative approach: \textit{measurement}
  - Data: directly or indirectly expressed in numbers
  - Analysis: domination of (descriptive) statistics

- Relevance if \textit{small population}? (\textit{e.g.} study of application of foreign mandatory rules under art. 9 Rome I Reg.) $<>$ large samples (\textit{e.g.} contracts, marriages, etc.)
Measurement and law

• Measurement of law/legal phenomenon? → Translate conceptual ideas in measurable indicators

• *e.g.* influence of forum on outcome of litigation - divorce in France or in England?

• Measurement at macro-level: cross-country analysis
  - Identify elements which could be impacted by forum: applicable law, available relief, time frame for proceedings etc. (→ literature on forum shopping)
  - Define measurable variables which translate elements [reliability & validity]
    • Numerical variables – value follows directly from measure
      - Time frame (first instance, appeal, etc.)
      - Costs of proceedings (court fees, attorneys, fee shifting, etc.)
    • Non numerical variables – value does not follow directly from measure
      - Court’s discretion to grant relief or not → create own scale and give value to each application of every variable (discretion : 1; no discretion : 0)
      - Which mechanism to prevent concurrent proceedings? Antisuit injunction / lis alibi pendens? - how to scale?
      - Size of the award? Scale 1 to 10?

• Grade each country - compare global results
Perils of numbers

(1) Reliability data collection:
- Need for **nuance** - large brush strokes to be avoided - *e.g.* LaPorta & Co <> Spamann et al. (antidirector’s index)
- Need for **human judgment** - *e.g.* Trimmings 2013 - EU Child Abduction law: return application filed, but access granted
  - Refusal?
  - Or withdrawn application?
Perils of numbers

• (2) Measuring indicators <> demonstrating hypothesis
• Difference probabilistic (correlation) – deterministic (causation)
• e.g. where to sue for divorce: index shows
  – Whether forum has an effect on outcome of proceedings in general - Yes
  – Magnitude of effect in general – Uncertain
  – Effect of forum in individual case - No
Case study: choice of law in cross-border contracts

- Choice of law in contracts: universally accepted principle
- Current research agenda:
  - Extension to family law?
  - Side issues – non state law, implicit choice of law
  - Theoretical inquiry:
    - Choice as expression of neo-liberal turn (Muir Watt/Pontier) or party autonomy as fundamental right (Basedow)?
    - Does choice lead to competition among States?
Case study: choice of law in cross-border contracts

- What is *reality* of choice of law in cross-border contracts?
  - Do parties make use of this freedom?
  - If yes, which law(s) are most often selected?
  - What are *dynamics* of choice – negotiating power, transactions costs or something else?
  - How do countries react to choice? Delaware effect?
Case study: choice of law in cross-border contracts

- Pattern of empirical research:
  - European perspective (Vogenauer 2013)
  - Global perspective (Voigt 2008; Cuniberti 2014)
  - Asian perspective (Cuniberti 2016)
  - Latin America (Cuniberti 2017)
  - Sales contracts (Meira Moser 2015, 2016)
Hypothesis?

• Hypothesis? *e.g.*
  
  – *Cuniberti 2014*: the attractiveness of a given contract law can be assessed by determining the number of cases in which it was chosen as the third-state law
  
  – *Voigt 2008*: if common law countries offer rules more suited for business transactions, the laws of these countries should be chosen more frequently in int’l transactions

  – *Eisenberg/Miller 2008*: does incorporation in Delaware have an effect on choice of law for M&A agreements?
• **Actual contracts** (Eisenberg/Miller 2008: 2,865 contracts; Sanga: 500,000 contracts; Cain & Davidoff: 1,020 merger agreements) – *Edgar* (equivalent?)

• **Arbitral awards** (Cuniberti 2014: 4,427 awards; Voigt: 580 awards)

• **Practitioners’ views** (2005 Oxford Survey; 2010 Queen Mary Survey; Meira Moser 2015 & 2016)

• **Recommendations** in Handbooks for practitioners (Kieninger 2002)

• ...
Data issues?

- **Representativeness** – *e.g.*
  - Eisenberg/Miller: contracts which are ‘material’ to publicly held company → companies will care extra about choice of law since important transaction?
  - Meira Moser 2015: 228 respondents invited by author (in and outside counsels with “significant experience in int’l sales contracts”)

- **Heterogeneity** – *e.g. Sanga*: financial contracts, licensing, settlements, etc. → could it be that parties’ choice dependent on matter at hand? (demonstrated by Eisenberg/Miller...)
Analysis?

- Queen Mary Survey: landscape - presentation results
- Eisenberg/Miller: relation between law chosen & 3 ‘core’ variables (place of business/incorporation/attorney) + regression analysis
- Cuniberti: link law chosen and parties’ nationality → which law is most popular as ‘third’ law?
- Sanga: ‘relative use of law’ (normalize the distribution of choice of law by the extent of contracting activity in each state)
Results?

What we know

- **US:**
  - NY & Delaware law are the most popular – but variation in time
  - Minority of contracts include choice of forum

- **Global analysis:**
  - English & Swiss law very popular
  - 20/30% of contracts without a choice of law

- **Surveys (Meira Moser/Queen Mary, etc.):**
  - Major drivers choice for a law: legal certainty, freedom of contract and flexibility to design rights & obligations
  - Choice of law not considered on its own – part of global analysis with dispute resolution and other factors
Results?

- What we do *not* know
  - Is it worth it for States to invest in quality of their law/courts to attract choice of law?
  - Who’s in the driver seat for choice of law – business or lawyer?
  - To what extent do parties engage in close analysis when choosing a law (difference between parties’ preferences and actual practice) – choice driven by extrinsic or intrinsic factors?
The Limits of Data

- Difference between picture of a situation and pattern/trend over long period - *e.g.*
  - *Eisenberg/Miller* 2006: flight from Delaware to NY in M&A agreements
  - *Chen & Co* 2016: analysis of new data → flight not confirmed + major factor explaining choice of law = choice of forum (not incorporation)

Transient nature of data!
The Limits of Data

• What we cannot learn from data:
  – Determinants of choice: why is English/NY law so popular? Speculation
    • Cuniberti 2014: external factors (e.g., seat of arbitration; colonial history) / internal factors (intrinsic features of law not decisive)
    • Sanga: lock in effect and positive network effect to explain clear trend in convergence towards use of law of NY and Delaware?
  – Why do 30% of contracts (Cuniberti) not include a choice of law / 61% of contracts (Miller/Eisenberg) not include a choice of forum?
Quali + quanti

- Qualitative research?
  - Dietz 2010: 31 qualitative interviews with business managers (software development contracts)
  - Low 2014 Psychology of Choice of law
  - Kostritsky 2015 - ‘Context Matters’
    - Interviews with 16 M&A lawyers
    - Survey of 852 M&A lawyers

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Up to you!

• Where/how would you find cross-border contracts in your jurisdiction?
• How would you measure a law’s attractiveness?
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Empirical qualitative work?

• Qualitative approach in a nutshell:
  - Plurality of methods to gather data (observation, document analysis, interviews, etc.)
  - Aims: deeper understanding – beyond rationality and superficiality → finding ‘meaning’ (even if subjective)
  - Analysis: open-ended, very few conventions (<> statistics), many different styles
Gathering data through interviews

- Different types of interviews: structured, semi-structured, unstructured, focus groups, etc.
- Main difference: amount of control of interviewer on encounter – e.g.
  - **Structured interview**: fixed list of questions; large number of participants; recording questions based on predefined coding; no interpretation of questions; requires that interviewer already has good idea about subject
  - **Semi-structured interview**: interviewer works with an outline/interview guide; open-ended questions; requires preliminary work (observation) to develop understanding of field
Gathering data through interviews

- Conducting the interviews:
  - Finding the interviewees...
  - Ethical concerns
  - Practical issues – language, cultural differences, confidentiality, recording and transcription, etc.
  - Methodological concerns - *e.g.* engagement or not?
Gathering data through interviews

• Analysis of data:
  - Various methods: content analysis, discourse analysis, grounded theory etc.
  - Key: coding/indexing – in order to uncover commonalities, themes, links, sequences, patterns, etc.
  - From a *quasi-quantitative* (counting, frequency, finding relationships etc.) to a *purely qualitative analysis* (using descriptors and codes to develop interpretation)
  - Code: manual or using software (Atlas TI / NVivo / MaxQDA ...)
  - Analysis: from day one or at the end of the interviews?
Case study

- **Case study**: family relationships in migrants’ families
- ‘Classic’ legal research – *e.g.*
  - Nationality / domicile / party autonomy?
  - Limits of ‘tolerance’ (public policy, fundamental rights etc.)
  - Mobility/migration divide / impact of migration law on cross-border family law
- Sociological/anthropological research on migration and family relationships – very extensive (*e.g.* ‘gate control’ by civil servants in case of migration through marriage etc.)
- How to bridge the 2?
Foblets : Moroccan women in Belgium

- 1\textsuperscript{st} example : Foblets 1998
  - Situation of Moroccan women in Belgium
  - 2-fold approach :
    - Semi-structured interviews
      - 60 men/women with migration background & family disputes – 1\textsuperscript{st}, 2\textsuperscript{nd} & 3\textsuperscript{rd} generation
      - 51 practitioners (lawyers/judges)
    - Case law analysis

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• Analysis of data? Interpretation
  – Some results are *fragile* – *e.g.* role of consulate: do they actively mediate? Do they take side with husbands? Mixed results
  – Other results are more *robust* – *e.g.*
    • Why/when do people in migration situation call upon courts in country of residence or country of origin?
    • Role played by lawyers:
      – Strong desire to avoid foreign law (costs for clients!)
      – Strategic use of conflict of laws rules to reach result
  – Interviews also used as foundation for policy suggestions
Kulk: Navigate between borders (2013)

- Large project (3 PhD’s: ‘Law in the Everyday Lives of Transnational Families’)
- Investigate position of children in families whose life is situated between Netherlands and Morocco/Egypt
- What is role of parents in shaping their children’s legal status and how to account for it?
Kulk: Navigate between borders (2013)

• Theoretical framework:
  – Legal rules are only one part of people’s status → everyday life also counts
  – Legal consciousness
  – Transnational studies
Kulk: Navigate between borders (2013)

- How?
  - Classic doctrinal analysis (rules, case law etc.)
  - Analysis of legal documents (birth & marriage certificates, administrative acts etc.)
  - Semi-structured interviews
    - 36 parents (NL/MAR/EGY)
    - 39 officials (civil servants, judges etc.)
Findings? Interviews shed light on reasons for behavior which had been documented in migrant communities (marry twice, declare or not birth to consulate etc.) - e.g.

- Marriage: choice to marry in country of residence/country of origin (or both): predominantly based on wish to confirm family bonds + limitation arising out of practical reasons (travel costs etc.)

- Choice of child’s surname: influenced by
  - Need to have a surname adapted to 2 cultures
  - Choice influenced by most limiting law (e.g. only one surname in muslim tradition)
Mehdi: Mahr in Danish practice

• ‘Mahr’:
  - Extensive scholarship on adaptation in Western law (Fournier, Yassari etc.) - legal perspective
Mehdi: Mahr in Danish practice

- Mehdi 2003: investigation of Mahr practice in Pakistani community in DK (+/- 30.000 out of 6 Mio)
  - Exploratory research - What does Mahr mean for bride and bridegroom and its function in Denmark?
  - Two avenues:
    - Analysis of marriage contracts provided by Pakistani/Muslim centers
    - Interviews with 30 couples permanently resident in DK, at least one from Pakistan

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Findings?
- Model contracts defective (no distinction between prompt / deferred Mahr, etc.)
- Interviews?
  - Mahr included in all marriage contracts
  - Amount varied (symbolic/very high)
  - Patterns from provinces in Pakistan repeated (eg higher mahr for couples from Punjab/Sindh)
  - Migration impacts mahr practices (eg if bride/bridegroom comes from Pakistan, large mahr agreed as protection against divorce or because bridegroom is seen as ‘investment’)

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Mehdi : Mahr in Danish practice

**Findings?**

- → enforcing Mahr post-divorce very difficult (either through Danish courts or social pressure in community)
- → combining Mahr (and Pakistani law) with Danish law (community of assets) : problematic – *e.g.* if wife requests divorce, she loses right to Mahr...
Qualitative approach: benefits?

- Qualitative approach grants researcher access to territories unexplored by traditional legal research
  - *Beyond the law* – *e.g.* fate of women after repudiation recognized/not recognized
  - *Outside the law* – *e.g.* how is estate divided in migrant families, in particular real estate in country of origin?
  - *Underneath the law* – *e.g.* how do civil servants act in contact with migrant families – development of ‘street level bureaucracy’?
Qualitative approach: benefits?

- Interface qualitative research/law:
  - May lead to *better application* of the law – *e.g.* work on Child Abduction Convention showing motives for abduction may help to better apply the exceptions to return principle
  - Foundation for critique – *e.g.*
    - Gap formal law – practice (Verhellen: legal rule not applied)
    - Legal rule not adapted to context (*e.g.* enforcement of Mahr in Nikah: Bano 2011 showing how little women are involved in Nikah negotiations/discussions)
Qualitative approach: drawbacks?

- Interpretation of data → fragility
- Interface social science/law → too often research *on the law*, but not *within the law* - research explores field covered by legal rule but without direct link with the rule
Outline

- On Two Classic Tools Used by Lawyers: Case Law Analysis and Comparative Law
- Quantitative Approach to Private International Law: Choice of Law as a Testing Ground
- Qualitative Approach to Private International Law: the Example of Family Relations of Migrant Families
- **What is the Future for Empirical Private International Law?**
Empirical private international law?

- Private international law as ‘law of methods’ – not suited for empirical analysis?
- Law is always about politics/power – even if legal rule expressed formally
- Every rule may be investigated empirically → need to find angle/ fit
Goals of legal research

- What is legal research?
  - What is the law? *Descriptive* approach
  - What ought the law to be? *Normative* approach
  - What is law? *Theoretical* approach
Empirical approach & descriptive legal research

1) Mapping the law – describing what the law is
   - From intuition to more precise measure
   - Help systematize our view of the law
Empirical approach & descriptive legal research

2) Observation *beyond* the law – context and circumstances

e.g. Hague Abduction Convention 1980: from abduction by parents who do not have primary care (frustration/fear to lose access) to abduction by primary care takers (multiple reasons)
Empirical approach & descriptive legal research

3) Describe effects of the law
   - Direct – e.g. victims of cross-border environmental damage may choose law which is more beneficial (art. 7 Rome II Reg.): which law is chosen by plaintiffs?
   - Indirect – e.g. choice by victim of cross-border pollution → any deterrent effect on polluters?
   - Unintended/collateral effects – e.g. conflict of laws rule leads to businesses moving out
Empirical approach & normative legal research

- Empirical method → answer to what the law *ought* to be?
- Too simple!
- Empirical research does *not* preempt normative choice
Empirical approach & normative legal research

- Empirical research does not preempt normative choice
- *e.g.* COMI – presumption – rebuttal: if research reveals that presumption rebutted in 80% of the cases
  - Gives information on how rule operates
  - Could reveal that rule is flawed (benchmark?)
  - Does not predict how rule should be changed: other presumption? Stronger presumption? No presumption?

- Normative assessment predicated on normative benchmark → empirical method does not command benchmark
Empirical approach & normative legal research

• Most research designs only *indirectly* leading to normative assessment – *e.g.*
  - Are courts biased against foreign law?
  - If foreign law applies, does it affect quality of justice?
• Research design *directly* linked to normative question? → will not avoid normative discussion!
• *E.g.*: matrimonial property regime spouses married without agreement: habitual residence at the time of marriage or divorce? → first need to define normative benchmark (legitimate expectations, interests of third parties etc.) → normative judgment not preempted by empirical testing
Empirical approach & normative legal research

• Empirical method: not *as such* positivist or critical → depends on research question

• *e.g.* foreign law in domestic courts/access to law
  - ELS confirms/gives more details on difficulty of working with foreign law and strategies used by actors to sidetrack foreign law
  - Solution? Several solutions → normative choice
    • Facultative choice of law?
    • Provide tools for judges/lawyers etc.
  - These solutions could be investigated using ELS
  - Once solutions have been explored, normative choice to be made...
    → there will remain a gap between findings on ‘Is’ and ‘Ought’
Which role for empirical approach?

• ELS → tool in addition to other methods of legal research (doctrinal research, socio-legal studies, legal history, comparative law, critical legal methods etc.) → methodological pluralism
Which role for empirical approach?

- Law: argumentative discipline
- ELS $\rightarrow$ provides additional/other arguments
- ... provided one takes into account limitations of empirical approach
Limitations empirical approach

- Whether descriptive/normative mode:
  - Only provides answer to research hypothesis
  - Caution when interpreting results – *e.g.* Whytock 2008: “the evidence is not inconsistent with the hypothesis that arbitration is replacing litigation as a method of transnational dispute resolution”
  - Empirical is usually about *aggregate results* – law is also about individual cases
  - Each methodology (qualitative/quantitative) comes out with important limitations – *e.g.* survey: overuse of ‘do not know option’ if too readily available
  - ...

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Future of empirical private international law?

- Niche or mainstream?
- Dominant or in combination with other methods?
- Leading to revolutions or confirming existing paradigms?
- ...