

P. Wautelet

The Use of Empirical Methods in Private International Law



The Hague Academy of 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
 - Required reading : Cuniberti, '*The International Market for Contracts*' 34 *Northwestern J. Int'l & Business*, 2014, pp. 455-517
 - 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



American Economic Journal: Applied Economics

American Economic Journal: Applied Economics publishes papers covering a range of topics in applied economics, with a focus on empirical microeconomic issues.

[Read more about the AEJ: Applied Economics >](#)



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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



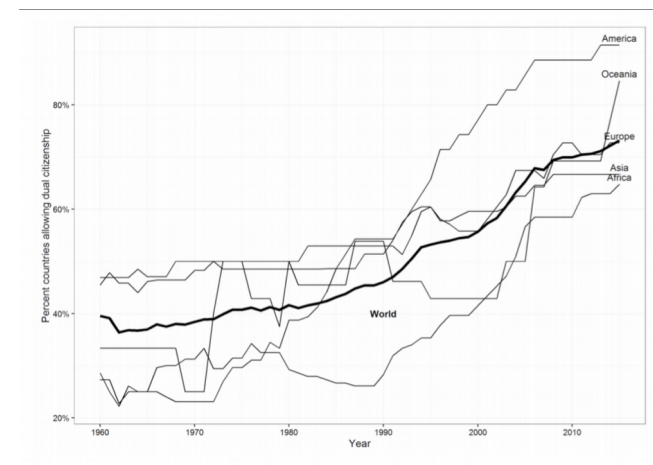
A broad view of empiricism

- 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

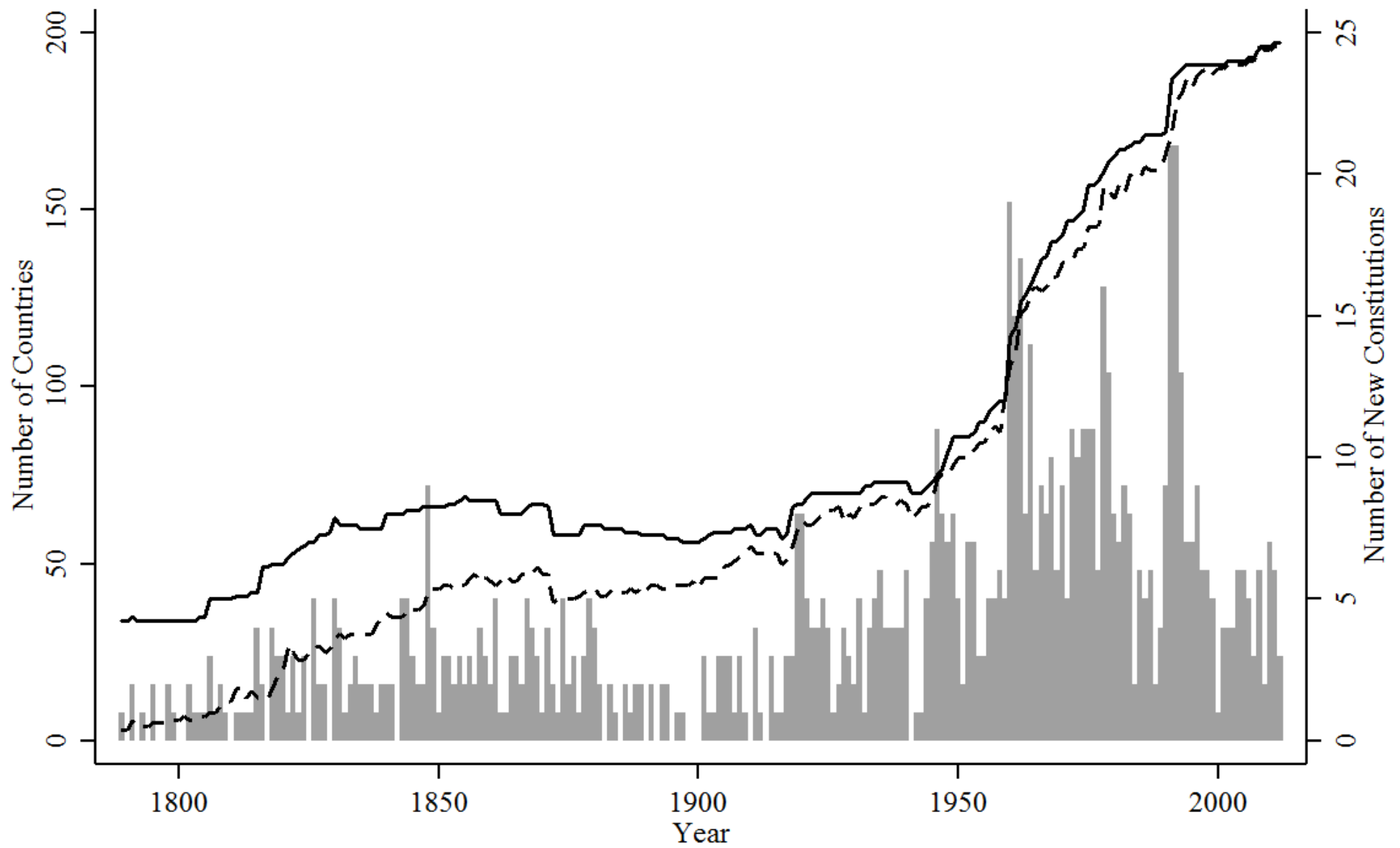
- *e.g.* litigation or arbitration in transnational disputes? (Whytock 2008)
 - *Theory* : troubled relationship between arbitration & litigation in cross-border business disputes
 - *Hypothesis* : test whether arbitration takes precedence over litigation
 - *Data* : US Federal Courts / Arbitral institutions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



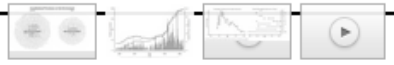
Step 2 – Collecting data

- 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





Countries in Existence
 Countries with Constitutions
 New Constitutions



Step 3 – Analyzing data

- Step 3 – Analyzing data
 - Statistics (frequency, etc.) / interpretation
 - Do not be afraid to recognize lack of results
 - Going back to data...



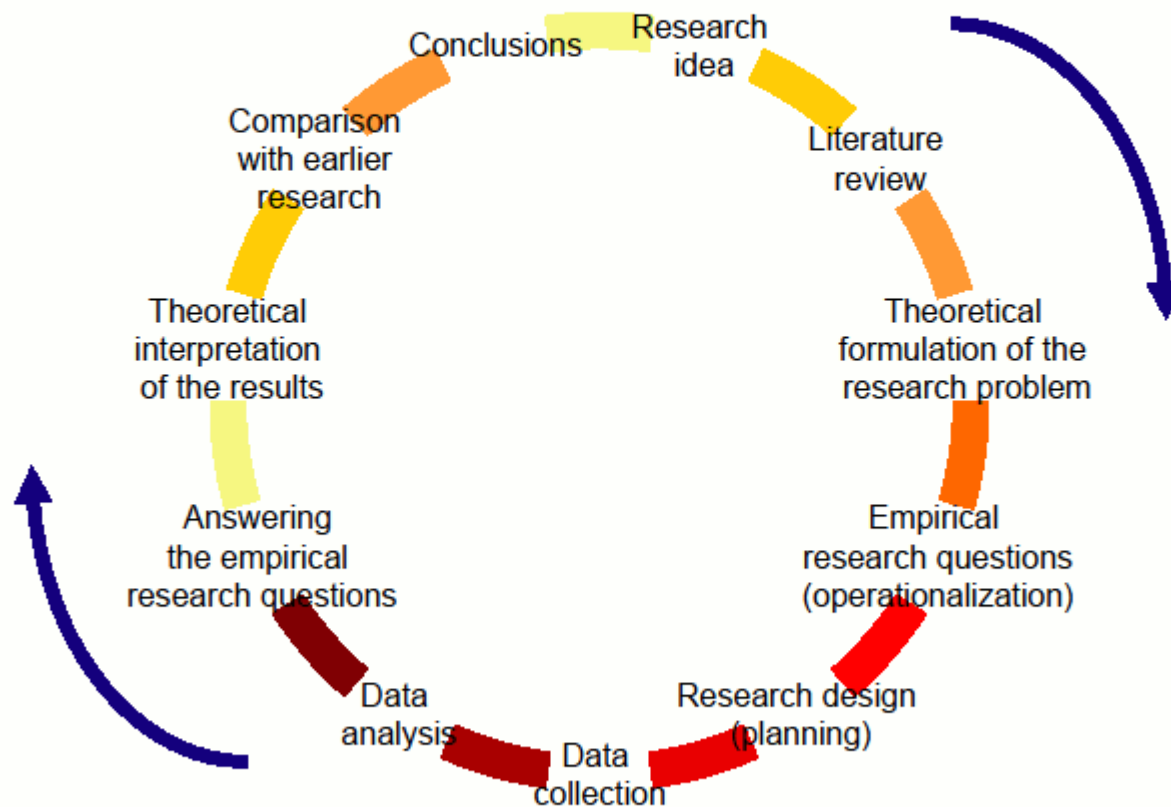
Step 4 – Presenting results

- Step 4 – presenting results
 - Confronting hypotheses with results
 - Theory confirmed or falsified?
 - Follow up questions?



Research cycle

The research process



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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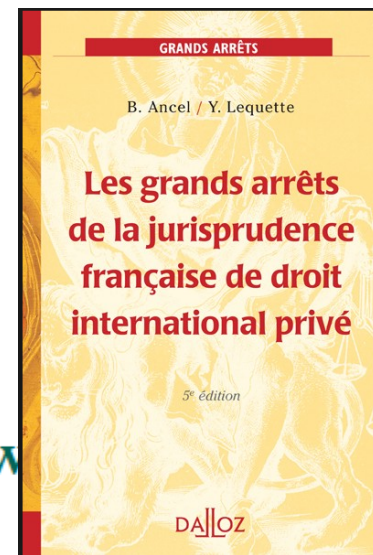
Two classic tools used by legal scholars

- 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’)
 - ...



Die deutsche Rechtsprechung
auf dem Gebiete des
Internationalen Privatrechts
im Jahre 2015

Bearbeitet von
RAINER KULMS

Max-Planck-Institut
für ausländisches und internationales
Privatrecht

Mohr Siebeck



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



UNILEX

on

CISG & UNIDROIT Principles
International Case Law & Bibliography



Global Sales Law

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CISG
nordic

CISG Turkey

CISG-Japan Database

CISG France

Applications jurisprudentielles de la Convention de Vienne en France

CISG-BRASIL
.NET

CISG CANADA



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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



Research design → data collection

- 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?



Research design → data collection

- 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



Research design → data analysis / coding

- 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



TABLE 2. ALPHABETICAL LIST OF STATES AND CHOICE-OF-LAW METHODOLOGIES FOLLOWED

States	Traditional	Significant Contacts	Restatement (Second)	Interest Analysis	<i>Lex Fori</i>	Better Law	Combined Modern
Alabama	T+C						
Alaska			T+C				
Arizona			T+C				
Arkansas		C				T	
California				T			C
Colorado			T+C				
Connecticut			T+ C?				
Delaware			T+C				
D. of Columbia				T			C
Florida	C		T				
Georgia	T+C						
Hawaii							T+C
Idaho			T+C				
Illinois			T+C				
Indiana		T+C					
Iowa			T+C				
Kansas	T+C						
Kentucky			C		T		
Louisiana							T+C



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 (2nd) and other not?
No answer using a descriptive framework
 - Jump from what the law *is* → what the law *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?

	Percents of Row Totals			
	unique	successif	simultané	Totals:
non	16.67%	33.33%	50%	100%
siège	37.5%	12.5%	50%	100%
activ.	12.5%	37.5%	50%	100%
Totals:	22.73%	27.27%	50%	100%

Fig. 15



Towards an empirical approach?

- 2nd part of the analysis : ‘simulation’
- Experiment with new regime (1980 Rome Convention) – applied to 45 decisions analyzed
- Question : will new regime modify courts’ decisions?



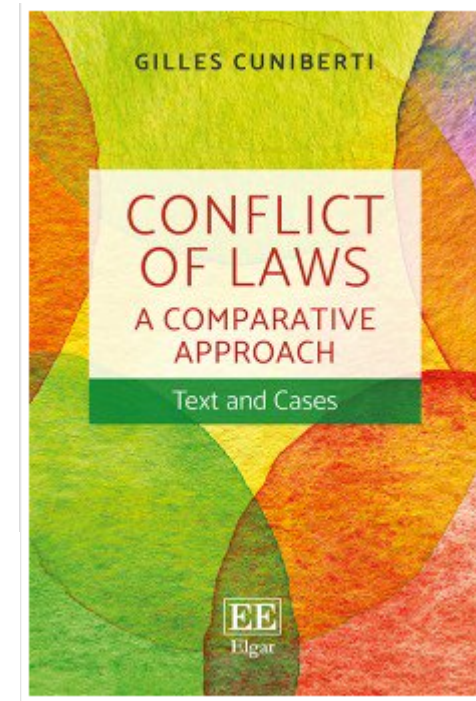
Towards an empirical approach?

- 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



THE CONFLICT OF LAWS

A Comparative Study

by

ERNST RABEL

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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”



Research design → data collection

- 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?



Research design → data analysis

- 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: *measurement*
 - Data : directly or indirectly expressed in numbers
 - Analysis : domination of (descriptive) statistics
- Relevance if *small population*? (*e.g.* study of application of foreign mandatory rules under art. 9 Rome I Reg.) <> large samples (*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 \leftrightarrow 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:
 - US perspective (Eisenberg/Miller 2006, 2007, 2009; Cain & Davidoff 2012; Sanga 2014; Chen & Co 2016)
 - 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?



Data?

- **Actual contracts** (Eisenberg/Miller 2008 : 2.865 contracts; Sanga : 500.000 contracts; Cain & Davidoff : 1020 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?

- 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)

$$R(s) \equiv \frac{p(L = s)}{p(H = s)}$$



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



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

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



Foblets : Moroccan women in Belgium

- 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.)



Kulk : Navigate between borders (2013)

- 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' :
 - Divided court practice in non Islamic countries – Contract law? Marriage law? Spousal assets? Substitute for post divorce maintenance? Gift?
 - 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



Mehdi : Mahr in Danish practice

- 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’)



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

- 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 ?***



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 → 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
 - ...



Future of empirical private international law?

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

