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# The European Advantage in Empirical Comparative Law

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**Abstract**

Empirical legal studies in Europe lag behind developments in the US. By contrast, comparative law is a prominent field of research and teaching in many European countries, while it plays a more limited role in the US. Thus, as we combine empirical studies and comparative law (a.k.a. "empirical comparative law"), European legal scholarship may have at least a partial advantage over its US counterpart. In this paper, a content analysis of working papers and journal articles provides evidence of a stronger propensity of European scholars to include a comparative dimension in work of empirical legal studies. The paper also categorises the different methods with which Europe scholars have already conducted research in empirical comparative law. Doing so also shows how expertise in comparative law is crucial in making full use of this form of empirical legal research. Thus, despite some challenges, this paper suggests that European research in empirical comparative law should have a promising future.

## 1 Introduction

According to the sociologist Swanson (1971: 145) "thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research." Similarly, statements in legal scholarship emphasise the value of comparison: in the words of Adams (2011: 229–30) "(n)early any claim we make as lawyers, as well as every distinction we draw, will implicitly or explicitly be set against something else" and thus "comparing, in other words, is a fundamental principle of legal research". It is also evident that research in empirical legal studies can be phrased as being interested in forms of comparison: for example, regression analysis compares the explanatory power of different models, and experiments compare treatment and control groups.

Comparative law as a sub-field of legal research is not about any comparison related to law. Yet, it is today accepted that it has a relatively wide application. Traditionally, comparative law mainly compared the laws of countries in a particular area of law (e.g., a comparison between English and French contract law), but today comparatists also allow further topics, for example, that legal systems of the past, subnational laws, and informal forms of dispute resolution can be units of comparison (Siems 2019a). As far as the methods of comparative

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law are concerned, there is also a trend to widen the scope. Even some of comparative law's traditional methods were borrowed from (other) social sciences (Villanueva Collao 2023: 57), while there is now also a greater push for "interdisciplinary comparative law" (Husa 2022).

This paper's main idea is that empirical research of comparative law can be particularly appealing for empirical legal studies in Europe. While empirical legal studies in Europe may lag behind developments in the US, comparative law is said to be a prominent field in many European countries, whereas it plays a more limited role in the US.[1] Thus, as we combine empirical studies and comparative law, a.k.a. as "empirical comparative law", European legal scholarship may have at least a partial advantage. This paper therefore suggests that, if certain challenges can be overcome, empirical comparative law should become an important element of empirical legal studies in Europe.

The structure of this paper is as follows: Section 2 elaborates on the literature on a transatlantic divide in empirical legal studies and comparative law. Based on a content analysis of law journals and working papers, Section 3 presents descriptive data on this divide, as well as the use of empirical comparative law in both Europe and the US. Section 4 categorises the different methods with which authors based in Europe have already conducted research in empirical comparative law. Section 5 discusses the limitations, challenges and next steps of this research, followed by the conclusion of Section 6.

## 2 Empirical Legal Studies and Comparative Law: A Transatlantic Divide?

In the book "Rethinking Legal Scholarship: A Transatlantic Dialogue", van Gestel et al. (2017) start the introduction with the sentence "European and American legal scholarship have tended to function as two self-contained traditions (mediated in some cases by Britain)…." Other researchers have elaborated on this divide. For example, according to Bartie (2010: 367), "(…) in America there is a growing band of scholars who proclaim that the discipline can abandon its link with the profession and should boldly shape its interdisciplinary studies to meet broader conceptions of the law". From a European perspective, Hesselink (2001) describes the "typical first reaction of the European who opens an American law journal is that it contains hardly any articles on 'law'" while then also stating that European legal culture has remained "largely formal, dogmatic and positivistic." This latter focus is said to typically exclude empirical methods. According to the poignant critique by Engel and Schön (2007):

> [German legal scholars] "… are epistemologically naïve. They do not draft models. They do not use mathematics. They do not falsify hypotheses. They do not use statistics. They do not carry out interviews. They do not conduct experiments. There are exceptions to each of these statements. But this is a fair description of the large majority of German legal scholarship."

Elaborating on empirical legal studies in Europe, it is worth considering fields akin, but not identical, to it, such as legal realism and law & society (Bijleveld 2023: 8). In the 20th century, forms of legal realism have played at least some role in European legal thought (Bétaille, in this issue; Šadl 2022: 644). Indeed, both in Europe and the US, the history of modern legal thought may be presented as a somehow parallel evolution with black-letter approaches being gradually challenged by innovative methods (for the US see Kennedy and Fisher 2006;

[1] For references and data see Sections 2 and 3, below.

for a comparative evaluation see Siems and Mac Síthigh 2012 and 2017). However, as far as empirical research in law is concerned, these trends went further – or at least faster – in the US, notably with the first issue of the Journal of Empirical Legal Studies in 2004.

Considering differences in legal education, it is not surprising that empirical legal scholarship has emerged more quickly in the US than in Europe. While in Europe aspiring legal scholars study law as an undergraduate degree and then continue with a doctorate in law, US law professors have an undergraduate degree and sometimes also a PhD in another field and, thus, are often exposed to the empirical skills prevalent in these latter fields.[2] This difference also finds some empirical confirmation. A quantitative comparative study on publications in mainstream journal publications in the US, the UK and France by Dibadj (2017) found that in the US, but not the UK and France, a considerable number of articles use the empirical method. The analysis of articles in major law journals from Europe between 2008 and 2017 by van Dijck et al. (2018) also did not find an increase in empirical work. Some of the research reported below will also show a US/Europe divide in the prevalence of empirical legal research.

With respect to comparative law, it may seem tempting to simply present the situation as the reverse. Starting with the US, there is widespread dissatisfaction among US-based comparative lawyers with the status quo of comparative law in the US. Mattei (1998, 2002), Upham (2014) and Calboli (2017) write that there are no mandatory and few optional JD courses on comparative law, that few US law schools advertise entry positions with expertise in comparative law and that this field lacks in prestige compared to (allegedly) more innovative approaches such as law & economics and critical legal studies. It has also been suggested that the status of comparative law in the US suffers from the view of "American legal exceptionalism" (Minow 2010: 10).

However, one could make the case that there is at least some enthusiasm for comparative law in the US. The American Society of Comparative Law is very active, the American Journal of Comparative Law is well-established and several US law schools have law reviews with a focus on comparative law.[3] Elite US law schools often have at least some faculty members trained in another jurisdiction (Roberts 2017: 81, for international lawyers), and some of them have schemes to attract international visiting faculty.[4] For the situation elsewhere – including Europe – it is also possible to argue that the status quo is rather mixed. In most countries, academic careers in law are typically only open to domestically trained lawyers,[5] and much of legal education is concerned with teaching domestic law in the local language. Thus, while there may be the wish that "we are all comparatists now" (Twining 2000: 255), in most countries the main focus of legal education and research is on the respective domestic law.

[2] A similar point has been discussed in the literature on the role of law and economics in Europe and the US; see e.g. Lanneau 2014; Garoupa and Ulen 2008; Dau-Schmidt and Brun 2005. Despite attempts to promote law and economics in Europe (e.g. through the series on "Economic Analysis of Law in European Legal Scholarship" edited by Klaus Mathis and others), a recent review article confirms that European countries still lag behind the US in terms of per capita law & economics journal publications (Kantorowicz-Reznichenko and Kantorowicz 2024: Table 3).

[3] See https://ascl.org/, https://academic.oup.com/ajcl and https://managementtools4.wlu.edu/LawJournals/ (a search for "comparative law" and "US" leads to 20 hits).

[4] E.g. https://www.law.nyu.edu/global/globalfaculty. But see also https://opendoorsdata.org/data/international-scholars/major-field-of-specialization/ (showing that law lags behind most other disciplines).

[5] For the exception of the UK, see Siems 2021. In other European countries, universities rarely seek to recruit legal scholars who only teach specialised programmes in English (not domestic law); yet, this happens occasionally in the Netherlands via https://www.academictransfer.com/en/jobs/.

For Europe, however, there is also the view that there has been an "ascent of comparative law teaching" since 1976 when a European Conference of Law Faculties recommended mandatory classes on comparative law together with foreign training and inter-university exchange programmes (Demleitner 2019: 335–7). Such a recommendation can be tied to the fact that law is taught as an undergraduate degree in Europe, which, in principle, may be less concerned about the training towards the career path of a practicing lawyer than legal education in professional schools (e.g. US law schools[6]). Today, some European countries do indeed have mandatory classes in comparative law (notably, Italy[7] due to the influence of professors such as Rodolfo Sacco and Mauro Cappelletti, cf. Gardella Tedeschi 2024; Ferraria and Graziadei 2024),[8] and the same is the case for some universities with a distinct international focus.[9] With respect to the role of the Europeanisation process as stimulating comparative law, Reimann (2002: 693) suggests that this has merely happened at the level of doctrinal private law. By contrast, Micklitz (2017) argues that the fragmented nature of EU law and domestic laws makes it a laboratory involving critical but also comparative thinking. Indeed, it can well be argued that any teaching and research on EU law inevitably makes law students and legal scholars compare it with their respective domestic legal order.

In conclusion, while there are good reasons to assume that comparative law plays a larger role in Europe than in the US, it can also be argued that this seems a good case where empirical data would be needed. It is, however, not entirely straight-forward to measure the importance of comparative law across countries. A previous paper (Siems 2007) used two mainstream journals from the US and Germany – the Harvard Law Review and the NJW – to assess how often terms referring to "comparative law" (and the equivalent German term) as well as foreign legal systems (such as "French law") have been mentioned across time. The problem with such an approach is that these frequencies may vary for reasons other than the importance of comparative law, for example, idiosyncratic choices by the editors and the emergence of new journals.

A tempting further strategy may be to rely on Google Ngram Books, specifically to search the corpora of different languages. For example, doing this for the term "comparative law" in the English corpus and the equivalent German, French, Italian and Spanish terms in the respective corpora,[10] shows that the English term has constantly been used less frequently than those of other languages. However, despite some uses of Google Ngram in legal scholarship (e.g., Shackell and De Vine 2022), at present, there remains the concern that its coverage of books may be uneven across languages and thus be biased towards certain topics in some of the languages.[11]

[6] In the US, however, there is also the criticism that law schools have become too detached from legal practice, see e.g. Hoffman 2012; Newton 2010.

[7] Since the decreto ministeriale 11 febbraio 1994, Gazzetta Ufficiale n. 148 del 27 giugno 1994 (specifically the new "tabella III").

[8] The now slightly dated website http://www.europaeische-juristenausbildung.de also mentions the examples of Belgium and Finland.

[9] For example, Jamin and van Caenegem (2016: 29) refer to IE Law School in Spain and Maastricht University in the Netherlands.

[10] Specifically at https://books.google.com/ngrams/: comparative law:eng_2019, Rechtsvergleichung:ger_2019, droit comparé:fre_2019, diritto comparato:ita_2019, derecho comparado:spa_2019.

[11] Of course, this could change in the future; for example, the Francophone site "Gallicagral", https://shiny.ens-paris-saclay.fr/app/gallicagram, already provides better ways to control for the inclusion or exclusion of particular databases.

Thus, rather than relying on the nationality of journals or Google Ngram, the following section provides other empirical sources in order to compare the use of comparative law, as well as empirical legal studies and empirical comparative law, in Europe and the US.

## 3 Analysis of Data from European and US Publications

Based on a content analysis of law journals and working papers, this section analyses the focus of European and US publications. It starts with a brief comparison of the general fields of comparative law and empirical legal studies before turning to differences in the popularity of empirical comparative law.[12]

Tables 1 and 2 are based on papers included in the SSRN series on "comparative law" and "empirical legal studies".[13] Of course, not all legal scholars are active on SSRN; notably, black-letter legal scholarship of domestic law is less prominent on SSRN than other approaches to legal research. Thus, the findings of these tables need to be read as (simply) referring to the population of legal scholarship as available on SSRN.

**Table 1**. SSRN papers in series "comparative law" and "empirical legal studies"[14]

| | All papers | "Europe" | "Germany" | "France" | "Italy" |
|---|---|---|---|---|---|
| (a): Comparative Law | 14,898 | 273 | 143 | 91 | 63 |
| (b): Empirical Legal Studies | 8,784 | 31 | 13 | 5 | 13 |
| (c): Percentage of (a) | | 0.42% | 1.83% | 0.96% | 0.61% |
| (d): Percentage of (b) | | 0.15% | 0.35% | 0.15% | 0.06% |
| (e): (c) / (d) | | 2.86 | 5.19 | 6.49 | 10.73 |

Table 1 displays how often words associated with Europe are used in the comparative law and empirical legal studies SSRN series. It is likely that these terms are used more often by authors based at European universities (for an evaluation of the precise affiliations see Table 2). Thus, the comparison between the two SSRN series in the final line suggests that European authors are more frequently represented in the comparative law than in the empirical legal studies series (while also noting that US authors account for around 2/3 of the SSRN papers[15]).

For the purposes of Table 2, the most recent 100 papers in these two series have been hand-checked for the authors' affiliations. The final column compares how often papers (co-)authored by authors from Europe or the US are present in these series. It can be seen that, compared to US scholars, Europe-based authors are twice as present in the comparative law than in the empirical legal studies series.

[12] Further information about the sources of the data considered in Tables 1 to 7 is available at https://drive.google.com/file/d/1b49ffYANPyMUREZCeCRbdLamQzHCcJfn/.

[13] Series available at https://www.ssrn.com/link/Comparative-Law.html and https://www.ssrn.com/link/Empirical-Studies.html.

[14] Information collected on 20 February 2024.

[15] Having taken a sample of the 100 most recent papers on SSRN (as of 10 February 2024), 67 were (co-)authored by US-based scholars.

**Table 2**. Evaluation of the most recent 100 papers in SSRN series "comparative law" and "empirical legal studies"[16]

| | At least one author based in | | |
|---|---|---|---|
| | (1) Europe | (2) the US | (1) / (2) |
| (a) Comparative Law | 31 | 41 | 0.7560 |
| (b) Empirical Legal Studies | 25 | 65 | 0.3846 |
| | | | In this column (a)/(b): 1.9657 |

Thus, according to this data, comparative law plays a more significant role in Europe than in the US. Does this also extend to the use of *empirical* comparative law? The subsequent Section 4 presents examples of empirical comparative law from European scholarship (and, thus, there is at least some anecdotal evidence that comparative information about European countries is examined with empirical methods). In order to provide a quantitative comparison between European and US scholarship in the uptake of empirical comparative law, the remainder of this section uses various forms of content analysis. The data displayed in the subsequent Tables 3 to 7 are each based on relatively small numbers of observations; yet, overall, they confirm that empirical comparative law indeed plays a more prominent role in Europe than the US.

Table 3 displays an analysis of citations to the article by Spamann (2015) as this article was the first detailed analysis of empirical comparative law (though limited to quantitative empirical research, see Section 4, below). A search with Google Scholar shows 61 citations of Spamann's article.[17] Removing duplicates, there are 57 citations which, for the purposes of Table 3, were classified according to two characteristics: first, the place in which the author (or at least one of the authors) is based; second, the substantive focus of their specialisation. As the core interest of this paper is in the role of comparative law, the latter merely distinguishes between empirical legal studies and/or law & economics,[18] comparative law, other law (i.e. legal scholars not classified as belonging to empirical legal studies/law and economics or comparative law) and authors who are not legal scholars but, for example, economists or political scientists.

The data show that Spamann's article is most frequently cited by empirical/law & economics scholars; yet, with some variations – namely by 75% for the US-based but only 41% for Europe-based scholars. For scholars with main expertise in comparative law, Europe follows closely behind with 31% while this is only 7% for US-based scholars. The individuals that fall under the intersection of comparative law and Europe are only a small number (and they only derive from a small number of European countries: Italy, Germany and the UK). Still, these findings give a first indication that empirical comparative law may have some appeal to comparative lawyers in Europe than in the US.

[16] Information collected on 10 February 2024.

[17] Some non-Anglophone legal datasets are not covered by Google Scholar; yet, these are unlikely to include many citations. This was checked for the German database Beck Online (two citations) and the Italian database DeJure (one citation).

[18] Both of these fields are distinct, see Bijleveld 2023: 9–11. Yet, as law & economics becomes increasingly empirical, empirical studies of comparative law & economics may often also said to belong to empirical comparative law, see Garoupa and Ulen 2021 and Garoupa 2022.

**Table 3**. Citations of Spamann's "Empirical Comparative Law" by authors from different countries and fields of specialisation[19]

| | | | At least one author based in … | | |
|---|---|---|---|---|---|
| | | Total | Europe | the US | other countries |
| | Total | 57 | 29 | 24 | 12 |
| At least one author from … | Empirical Legal Studies and/or Law & Economics | 29 | 12 | 18 | 6 |
| | Comparative Law | 13 | 9 | 2 | 3 |
| | Other Law | 14 | 7 | 6 | 4 |
| | Non-Law Discipline | 10 | 5 | 4 | 3 |

The analysis of the subsequent three tables uses information from journals that specialise in topics of empirical legal studies (broadly understood). It starts with the Journal of Empirical Legal Studies (JELS). It then also examines publications in Law & Society Review (LSR) and Law & Social Inquiry (LSI), as these journals also include more qualitative empirical legal publications than JELS. It was also considered to further include the Journal of Law & Society but, as it has few publications by US-based scholars, it would not provide sufficient information to compare Europe and US-based scholars. For the same reason, it would not be feasible to include journals published in languages other than English (and, thus, the population of the data of the subsequent tables is, by their very nature, limited to empirical and socio-legal journal articles published in English).

**Table 4**. Analysis of intersection of articles in JELS since 2004

| | (1) Articles with "comparative law" or "comparative legal" | (2) Articles before and after (1) | Percentage of (1) | Percentage of (2) |
|---|---|---|---|---|
| Only US authors | 8 | 22 | 50.00% | 68.75% |
| At least one European | 4 | 4 | 25.00% | 12.50% |
| Other | 4 | 6 | 25.00% | 18.75% |
| Total | 16 | 32 | | |

For the purpose of Table 4, JELS – published the first time in 2004 – was searched for articles that mention the terms "comparative law" or "comparative legal". The articles found with such search may not necessarily deal with empirical comparative law, but at least they show awareness, and thus the potential, that comparative law can be relevant for empirical legal studies. Table 4 then divides the articles in a manner that, if one author of a paper is based in Europe, it is hypothesised that comparative law plays a larger role than if a paper only has US-based authors. To provide a comparison with other publications in JELS, it was examined whether the authors of articles of the same issue before and after the article that include a

[19] As of 10 February 2024. Note that the "Total" is not simply the sum of the individual categories, as the latter numbers also include some co-authored papers.

reference to comparative law were from the US, Europe or elsewhere;[20] this approach was chosen to accommodate for possible changes in the prevalence of authors from Europe in JELS over the last twenty years.

**Table 5**. Analysis of intersection of articles in LSR since 2004

| | (1) Articles with "comparative law" or "comparative legal" | (2) Articles before and after (1) | Percentage of (1) | Percentage of (2) |
|---|---|---|---|---|
| Only US authors | 18 | 39 | 66.67% | 72.22% |
| At least one European | 3 | 5 | 11.11% | 9.26% |
| Other | 6 | 10 | 22.22% | 18.52% |
| Total | 27 | 54 | | |

The analysis of Table 5 of LSR follows the same approach as the one for JELS. Although the origins of the LSR go back to the year 1966, the analysis here also starts in 2004 to provide a comparison with JELS.

**Table 6**. Analysis of intersection of articles in LSI in 2023

| | (1) Articles with "comparative law" or "comparative legal" | (2) Articles before and after (1) | Percentage of (1) | Percentage of (2) |
|---|---|---|---|---|
| Only US authors | 4 | 26 | 30.77% | 64.71% |
| At least one European | 5 | 9 | 38.46% | 11.76% |
| Other | 4 | 12 | 30.77% | 23.53% |
| Total | 13 | 47 | | |

For the analysis of the LSI in Table 6, a similar approach was applied as done for JELS and LSR. However, as there were more than 200 hits for "comparative law" or "comparative legal", it was decided only to examine the publications of the year 2023 by hand. This was then done for all articles of this year (thus note the different column (2) in Table 6 as compared to Tables 4 and 5).

In all three Tables 4 to 6, articles (co-)authored by Europeans which mention comparative law exceed the proportion of other articles (co-)authored by Europeans. The result for articles only authored by US scholars is the reverse: here, these other articles always have higher proportions than articles that mention comparative law. There are some differences between the three journals, notably that for LSR the Europe/US divide is less pronounced. However, given the relatively low number of observations, it would be difficult to draw conclusions regarding the differences in the results between these three journals.

[20] If the article mentioning comparative law was the first or last one of the issue, the two subsequent or previous two articles were chosen. The same approach was applied if the previous or subsequent article also mentioned comparative law.

**Table 7**. Analysis within SSRN series on "empirical legal studies"[21]

| | At least one author based in | | |
|---|---|---|---|
| | (1) Europe | (2) the US | (1) / (2) |
| (a) Empirical Legal Studies & "comparative" in title | 17 | 25 | 0.68 |
| (b) Empirical Legal Studies in general sample | 25 | 65 | 0.39 |
| | | | In this column (a)/(b): 1.74 |

Finally, Table 7 follows up from the analysis in Tables 1 and 2, making use of the SSRN series on empirical legal studies. Here, the search for all papers with the word "comparative" in the title (61 hits in total)[22] can be compared with the general sample of papers, distinguishing between European and US-based authors. Table 7 shows that Europeans are almost twice as likely to be authors than US-based scholars if there is "comparative" in the title of a paper.

To conclude, European legal scholarship is traditionally said to analyse law from a perspective internal to law (Bétaille, in this issue). Thus, this may explain a general reluctance to engage in empirical legal studies in Europe. However, if we start with the case of comparative law, the outlook can be more optimistic. Comparative lawyers are used to adopting an external perspective as they examine one legal system from the perspective of another one. Applying empirical methods may thus be complementary (and not substitutive) to comparative legal methods. There is also evidence that forms of interdisciplinarity are rising in the comparative law literature (Siems 2019b; see also Husa 2022). Thus, this line of reasoning supports the intersection of empirical legal studies and comparative law into empirical comparative law. Moreover, following the more pronounced role of comparative law in Europe, it is indeed plausible that empirical legal research based in Europe has a greater propensity to engage in empirical comparative law than its counterpart in the US.

## 4 Categories and Examples of Empirical Comparative Law

Who coined the term "empirical comparative law" and what exactly does it include? Its first use seems to go back to the year 1963 when Jacob Beuscher from the University of Wisconsin gave a talk at the former *Istituto di Diritto Agrario Internazionale e Comparato* in Florence entitled "Agriculture in a multi-state world: a plea for empirical comparative legal studies" (Beuscher 1963). However, empirical comparative law as a term then only (re-)emerged five decades later when Spamann (2015) wrote a critical review article about quantitative research which, since the mid-1990s, aimed to show causal inference from comparative legal data. Yet, while Spamann's article has been path-breaking in being critical of such studies, empirical comparative law is not only about studies aiming to show causal links. Thus, as one applies a broader view of empirical legal studies (e.g. Šadl 2022: 644; for a review of other positions see Bijleveld 2023: 4–5), studies from (sub-)fields such as socio-legal and numerical

[21] Information collected on 27 February 2024. The information in (a) is based on the search https://papers.ssrn.com/sol3/JELJOUR_Results.cfm?page=1&sort=0&term=comparative; the information in (b) is from Table 1, above.

[22] One duplicate was excluded; it was also checked whether there may have been uses of the term "comparative" not related to comparative law.

comparative law (Siems 2022), as well as comparative law and society and comparative sociology of law (Clark 2012) also need to be considered.

This section has a dual purpose. It will outline six categories of empirical comparative law, accepting that there is a plurality of empirical legal methods with their respective advantages and disadvantages.[23] Moreover, drawing on examples from European legal scholarship,[24] this section aims to show how expertise in comparative law is crucial in making full use of this form of empirical legal research. Thus, it argues that the relative strength of (empirical) comparative law in Europe is indeed a reason why European scholarship may, in this regard, have an advantage in conducting such research.

First, empirical comparative law can be based on interviews and related qualitative fieldwork methods such as participant observation in different countries. For example, Arrighetti et al. (1997) conducted sixty interviews on contracts between manufacturers and suppliers in Germany, Italy and the United Kingdom. It identified variations between countries, for example, the prevalence of long-term cooperation, but also variations between individual firms, as expressed by direct quotes from interviews. Van Dijck et al. (2020) conducted interviews with insolvency judges and practitioners in Italy, the Netherlands, Poland and Portugal to understand the strategic behaviour of practitioners and their interactions with judges. The findings refer to some country differences but also mention some typical responses that transcend the specificities of individual countries.

Such studies of comparative empirical law are usually "small n" studies. This is shared by most of non-empirical comparative law. Thus, one topic where comparative law can provide guidance is the choice of countries (or other units) and how this may determine the findings. In the words of Huxley (1997: 1924–25), "while a comparison of chalk with cheese must necessarily highlight the question of edibility, a comparison of chalk with marker pens will focus on legibility". This quote illustrates that the decision about the units of interest already needs to anticipate the possible findings of the research, for example, whether it may want to draw general conclusions (e.g., with the anticipation of common European rules) or emphasise differences. Comparative lawyers have also discussed how many units may usually be compared, whereby it is frequently suggested that three may be a good number: just choosing two may overemphasise the contrast between these legal systems, whereas with three the comparatist may be effectively able to show what determines both similarities and differences (Siems 2022: 17).

Second, surveys that make use of questionnaires can potentially cover more countries, but it is also possible to focus on relatively few units. For example, a project by academics from Scotland and the Netherlands from the 1980s (reported in Örücü 2007) used questionnaires to explore the views on EEC law (now EU law) in the legal profession of these two countries. The expectation of the survey was that Scottish lawyers would be more sceptical towards and less involved in the European project than their Dutch counterparts, which then was indeed confirmed in most of the answers. Gerner-Beuerle et al. (2016: 65–99) is an example of a survey conducted as part of a study for the EU Commission.[25] Its general aim was to explore whether the EU would benefit from uniform conflict of laws rules applicable to

[23] See e.g. Epstein et al. 2024: "The choice of data and methods should be guided by the research questions, theory, and hypotheses—not by a belief that some are per se superior or preferable".

[24] In some cases, with co-authors from other disciplines.

[25] In addition, national governments often conduct surveys; see, e.g., CEPEJ 2022: 109 (reporting that 37 Member States of the Council of Europe survey court users or legal professionals in order to assess the functioning of the judicial system).

companies. The survey of lawyers from all Member States therefore asked (and then confirmed) the view that, despite some case law of the Court of Justice, there are still many practical obstacles to corporate mobility in the EU.

Insights from comparative law can enter in various ways in the drafting process of surveys. For example, when it comes to legal terms which need to be translated for the countries in which the survey is conducted (or if the same term has different connotations in different legal systems), insight from comparative law on the contextual understanding of foreign legal terms may be helpful (Husa 2018: 151). A further question is the possible scope of respondents. Here, Sacco (1991)'s view of "legal formants" can come into consideration: it suggests that, even in the same country, the living law on a particular issue is not uniform but that it contains diverse elements shaped by different actors (legislator, courts, citizens etc). Thus, not only sociologists and psychologists but also comparative lawyers would argue that surveys should not only be interested in the aggregate results but also the individual responses.

Third, descriptive comparative statistics can concern many themes related to law. A popular field has been the evaluation of topics related to courts and litigation. Key studies from Europe were conducted by Blankenburg and colleagues in the 1980s and 90s (see Blankenburg 1998), often with a focus on differences in litigation rates between Germany and the Netherlands, but also some other continental European countries. Specifically, these studies noted large differences in litigation despite similar procedural rules. Recent information on litigation and other comparative empirical statistics on courts, lawyers and related topics reference can be found in the biannual studies of the European Commission for the Efficiency of Justice (most recently CEPEJ 2022), established by the Council of Europe. The CEPEJ studies are also important for the EU Member States as the European Commission incorporates these data into its so-called "justice scoreboards".[26]

Insights from comparative law can contribute to the interpretation of such comparative data. The debates about the Blankenburg studies offer a good illustration. For example, based on findings that Dutch and Germans have fairly similar views about obeying the law (Gibson and Caldeira 1996), the differences in litigation were regarded as something puzzling and in need of an explanation. Thus, this view relates to the topic of "functionalism" in comparative law, namely that legal systems respond to similar functional questions with, more or less, similar or different tools. A modern counterview is, however, critical of such a functionalist assumption as it cannot be assumed that all societies face the same social problem, and that law is simply a problem-solving tool (see e.g. Hyland 2009: 69–73). Thus, research from this line of comparative law may also challenge the comparability of cross-national statistical data (e.g., Fabri 2017 for the CEPEJ data).

Fourth, comparative leximetric studies aim to measure the law itself. Various leximetric papers have been published as part of projects at the Centre for Business Research (CBR) of the University of Cambridge. They include non-European countries, but it is also possible to focus on European countries: for example, having coded the strength of shareholder protection law on a scale of 0 to 10 for the years 1990 to 2013, this can show that the legal systems of Central and Eastern European countries have gradually converged to the laws of Western European countries (see chart in Siems 2022: 219).[27] A further example, unaffiliated with the CBR research, is by Goanta (2016) who constructed an index of variables in order to measure

[26] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

[27] It is also possible to make further use of such leximetric data, for example, employing tools of network analysis (Siems 2016) or machine-learning methods (Ho et al. 2024) in order to examine the relevance of legal families.

the legally converging effect of EU directives of consumer protection in seven Member States.[28]

Despite the law-focus of these leximetric measures, its most well-known studies are financial economists, starting with a paper by La Porta et al. (1998) on shareholder and creditor protection in 49 countries. These studies are mentioned here as subsequent research by comparative legal scholars has found their measurements of the law to be fundamentally flawed (e.g., Spamann 2010). In a nutshell, the problem was that the financial economists were over-confident that the complexity of many laws could easily be translated into simple numbers (which they then used for econometric operations). Thus, the contribution of comparative law to these and other studies is crucial as comparative lawyers who are not simply dismissive of quantifications of law are likely to be at least aware of the challenges of such "comparative legal metrics" (Bussani et al. 2023, for a recent book with this title). As a result, in such studies, it can often be helpful to involve scholars from different disciplines, notably legal scholars who can advise "to get the law right", while other social scientists can explain to lawyers how even complex phenomena, such as the law, can be presented in a numerical form.

Fifth, empirical comparative law can use comparative information in order to explore associations between legal and non-legal variables. In this category, such research does not claim to prove a causal link between these variables, though the motivation of this research may well be that such a link is seen as plausible. For example, Gerner-Beuerle et al. (2018) present data on incorporations of foreign businesses in the commercial registers of each EU Member State. It also finds that countries which have a clear-cut version of the incorporation theory attract more incorporations than countries which have retained elements of the real seat theory; yet, as these data are of a cross-sectional nature, the paper cannot claim causal proof of this association. In this regard similar is the study by Siems (2023): here, the data are 2,984 cross-citations between the private law supreme courts of the EU Member States.[29] Having examined this network of citations with tools of regression analysis, the paper finds that variables of a common native language and language skills are better able to explain these data than a variable on legal families.

While these two examples do not claim a causal link, the use of regression analysis means that one or more variables are tested for statistical significance. In other words, statistical significance is understood as showing a strong association among variables, with the explanation of this association being provided by the authors. Technicalities of regression analysis are largely unfamiliar to traditional comparative lawyers. However, insights from comparative law are crucial for the design of these studies. It has been observed that such studies require a coherent theory of law that can support the empirical investigation of law's impact (Schnyder et al. 2021). Thus, this need for theory refers to the choice of variables but also the relationship between them. Indeed, for empiricists, there may always be the temptation to simply choose variables for which data are available, while comparative lawyers are likely to suggest that different legal systems may have diverse pathways to the same non-economic outcome (which may therefore also point towards other empirical methods, such as (fs)QCA; see further Section 5, below).

Sixth, empirical studies that truly aim to prove causal relationships would ideally be based on experiments. In the present context, an example of an experiment that draws on a divide

[28] The reasons for differences in convergence were further analysed in Goanta and Siems (2019), using the method of a fuzzy-set Qualitative Comparative Analysis (fsQCA).

[29] For further analysis of these data see also D'Andrea et al. 2021 and De Witte et al. 2024.

between common and civil law is by Engel and Freund (2017): noting that common law countries conventionally have damages and civil law countries specific performance as the main contractual remedy, the experiment conducted with German students found that without specific performance the participants traded less. Other causal examples are "quasi-experiments" which use observational data that enable researchers to distinguish between treatment and control groups. Here, Braun et al. (2013) is an example of a difference-in-difference study that evaluates the effect of changes to minimum capital requirements in the law of private companies in Spain, France, Hungary, Germany and Poland, using the unchanged law of public companies in these countries as a control group. The impact of such rules has also been confirmed for incorporations of foreign firms in the UK (Gelter 2024, using time-lags as well as a difference-in-difference design).

The contribution of comparative lawyers to these studies may mainly concern their normative implications. Most comparative lawyers endorse the idea that comparative insights can be used to evaluate "what the law ought to be" (Smits 2012: 7). Doing so, they often refer to the role of the context of the law. In empirical terms, this is akin to the idea of external validity; for example, in the experiment described in the previous paragraph, a comparative-law view may challenge the use of German students for a behavioural assessment of the common law. More fundamentally, comparative legal scholars argue that different countries may pursue different normative outcomes (e.g., Nelken 2007: 124–5 referring to "different popular ideas in different countries about the purposes of law and what is to be expected from it"). Thus, comparative law can clarify that the finding about the way a particular rule "works" can (only) contribute to an assessment of the assumptions that underly certain normative arguments.

To conclude, this section has illustrated how, in the various fields of empirical comparative law, insights from comparative law can play a key role. In other words, empirical comparative law should be a sub-field of empirical legal studies but also comparative law. However, as the following section will show, we also need to consider a number of limitations and challenges.

## 5 Limitations, Challenges, Next Steps

Even before empirical legal studies became institutionalised through the Society of Empirical Legal Studies and the corresponding journal, Epstein and King (2002) published a long article on some of the methodological problems such research needed to overcome (but often did not). Sceptical views have continued; recent publications include, for example, Chin and Zeiler (2021) on replicability and Bavli (2022) on data fishing in empirical legal research. It is not the aim of the section to revisit these general debates. Rather, the focus of the following analyses are some of the specific limitations and challenges of empirical comparative law and possible next steps.

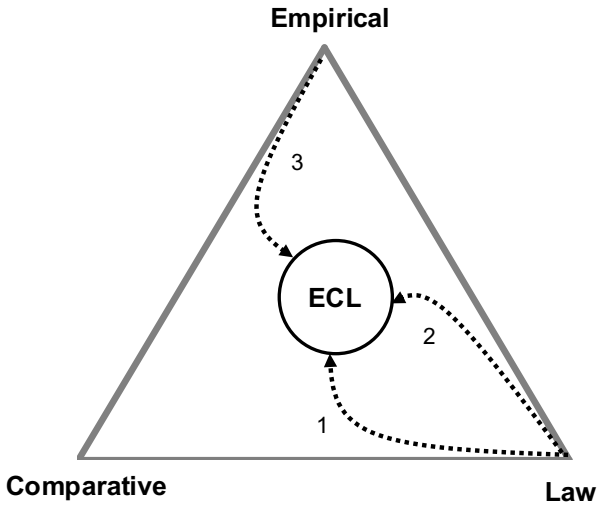


**Figure 1.** Ternary plot of Empirical Comparative Law (ECL) and its components.

The ternary plot of Figure 1 illustrates the position of empirical comparative law as a combination of empirical, comparative and legal research. The general challenge is therefore that it needs to be sensitive to all three elements: it needs to get the law right, employ sound empirical methods and be aware of key debates in comparative law (further discussion of Figure 1, including the dotted lines, follows below). Some of the prior literature has specifically focussed on quantitative causal research in this field (Spamann 2010; Villanueva Collao 2023; Siems 2024). By contrast, it is the aim of this section to present some general points of contention which, with variations, apply to all of the variants outlined previously (Section 4, above).

To start with, empirical comparative law faces the challenge that the context of laws is often highly country-specific. To be sure, it may be precisely the aim of an empirical and comparative project to make use of this variation, for example, to examine how socio-economic differences are related to legal differences (or to different attitudes about the law, differences in enforcement etc). But, then, all these differences usually come in "bundles" which is likely to make it difficult to disentangle precise connections. For example, if a researcher conducts interviews or collects data on courts in a small number of countries, the finding may simply be that there are many reasons why there are differences between the countries. In other words, qualitative empirical scholars are likely to suggest that deep fieldwork research is needed, but then such details may mean that a "comparison remains an unsystematic juxtaposition of accounts of differences" (Mahy et al. 2024: 127). There is also the more practical problem of conducting such deep comparative research: in the words of a recent paper, "conducting robust fieldwork in more than one location is time-consuming, expensive, and practically difficult (including often involving cross-cultural and multiple language issues)" (Mahy et al. 2024: 114).

Moreover, it may not be clear whether law is the reason why certain facts are as they are – or whether these facts are rather determinants of the law. In regression analysis, this possibility of reverse causality is an example of the problem of endogeneity, while in qualitative research it may be unsatisfactory if the conclusion of a study is simply that causalities are complex. For empirical comparative law in particular, this problem of possible reverse causality is even more challenging as it is possible that the causal arrow goes in one direction in

some countries while it goes in the opposite direction in others. For example, it can be the case that, in some circumstances, high protection of investors stimulates stock markets, but there are also cases where only an increased relevance of stock markets has led to better investor protection (Siems 2023: 197–9).

Quantitative research based on a large number of observations can face further challenges due to the role of differences in context. Such research usually starts with a hypothesis, but this raises the challenge that, "to put the issue plainly, there is no accepted theory of law that applies to every legal system and to which legal scholars in every country can appeal in explaining the particular institutions or rules of their own systems" (Ulen 2002: 896). There is also the limitation that the number of countries in the world provides a limited number of observations. Thus, as the complexities of socio-legal relations may often give rise to a large number of possible explanations, even data from all countries of the world may not be sufficient to robustly answer questions about certain causal links. Applied to European countries, their relatively small number may pose a problem for quantitative studies that aim to establish causal connections. In particular, this may be the case as European countries are relatively diverse as compared to, for example, the US states. Alternatively, if one adds more countries from other parts of the world, there are likely to be even more possible explanations and thus the need for more explanatory variables.

Another consideration that is relevant for many studies of empirical comparative law is that countries are not independent units of analysis. This is often known as "Galton's problem". It derives from a disagreement between Sir Edward Tylor and Francis Galton at an event in 1888: Tylor presented his anthropological research in order to show deep commonalities between cultures, but Galton objected that these similarities could equally be due to cross-cultural borrowing (see Naroll 1965). This also applies to law, as demonstrated by the large literature on legal transplants (recently e.g. Cohn 2024; Caffera et al. 2024). Thus, quantitative studies of empirical comparative law face the problem of spatial autocorrelation as standard errors need to be independent of each other. It can also be a challenge for qualitative research as these studies may use multiple units as test cases to examine socio-legal relations, which would not work if, due to transplants, "n" is just "1".

These limitations and challenges are worth considering for the choice to conduct projects of empirical comparative law. However, there are also a number of constructive suggestions that can accommodate some of these concerns.

First, as regards the challenge of too diverse units, the typical response of a comparative lawyer (for the following: Siems 2022: 31–8, 149–50) would be that the *tertium comparationis* of a comparative project can tie together the diverse elements. For example, this can be the common function that diverse rules in different countries pursue, or some other commonality that transcends these differences. Some comparative lawyers also take the view that comparison can be a means to identify legal concepts that are (relatively) universal; thus, this would help quantitative research that aims to test general theories. From the perspective of qualitative research, it has been suggested that a possible *tertium comparationis* can also be identified in the process of the comparative legal research, rather than as its starting point (Mahy et al. 2024: 129).

Second, the question about the direction of causality can also invite various responses. In quantitative research, the conventional response is to use panel regressions with lagged variables or forms of quasi-experiments, such as difference-in-difference estimations (for examples from empirical comparative law: Siems 2024: 166–71). However, recent years have also seen the emergence of new tools and methods. For example, it is possible to apply the tool of "Granger causality", which aims to identify the likelihood of the direction of causality (for an example: Deakin et al. 2018). It may also be the case that the actual test of causality

derives from (quasi-)experimental findings while comparative empirical data help to generalise their external validity (Spamann 2015: 143). More generally, mixed method approaches can often be helpful to gain insights about causal relations. For example, Qualitative Comparative Analysis (QCA, including the variant of fsQCA) uses Boolean algebra but also the expert knowledge of the researcher on plausible causal combinations (for an example: Goanta and Siems 2019). A further mixed method is that of "process tracing" which scrutinises how precisely causal mechanisms have contributed to a particular outcome (for a comparative example: Pavone and Stiansen 2022).

Third, the relatively small number of observations due to the country-focus of comparative research can invite various responses. Methodologically, the aforementioned mixed-method approaches of QCA and process tracing do not require a large number of observations. In principle, this is also not a problem for the use of Bayesian statistics; yet, it requires the availability of informative priors, which can be difficult to achieve (see e.g. Engel 2018: 16). Another response is that other units, such as regions or cities, can also be considered in comparative law (see already Section 1, above). Moreover, there are studies that have used large datasets of firms or individuals and have related such data to legal differences between countries and legal families (Hornuf et al. 2019; Renneboog et al. 2017). In qualitative research, it is also said that it can be helpful to consider the laws of other units, following on from the view that approaches of legal pluralism mean that such research would also want to consider "legal and nomic spaces, that is spaces within which cultural norms or living law may develop" (Mahy et al. 2024: 122).

Fourth, the problem that countries (or other units) are not independent of each other can also invite multiple responses. In econometrics, there are means to detect and address spatial autocorrelation, such as spatial lag or spatial error models. There are also examples of empirical comparative law that address the relationship between legal systems as a network whereby the individual nodes are not independent of each other, here too with special econometric methods (e.g., Eidenmüller et al. 2015: gravity model; Siems 2023: quadratic assignment procedure). A further empirical response is that legal transplants (or related forms of policy diffusion) can be the object of empirical research themselves; here too there are a number of examples, and here too (as in Section 4) methods can vary from mainly qualitative empirical methods, such as interviews (Ghezelbash 2018), to mixed approaches, including experiments (Linos 2013), to quantitative panel data analysis (Goderis and Versteeg 2014).

Fifth, it is worth considering the pathways to empirical comparative law, notably the role of other disciplines. The dotted lines in Figure 1 indicate three origins. It can derive from legal scholars who, after their initial education in domestic law, become first interested in comparative methods and then in empirical legal studies. The latter two can also be in the reverse order, i.e. the case of empirical legal scholars who then also conduct empirical comparative projects. A further pathway is that empiricists from other disciplines move their interest to comparative and then legal topics. The literature cited in this paper already considered some publications from journals in other fields (economics: Arrighetti et al. 1997; Schnyder et al. 2021; European studies: Braun et al. 2013; Hornuf et al. 2019; political science: Pavone and Stiansen 2022; sociology: Naroll 1965; business studies: Renneboog et al. 2017; finance: Spamann 2010), but there is further potential to increase the interactions with other comparative disciplines. Details depend on the topic of the study,[30] as well as the type of research that is conducted (i.e. the categories of Section 4): for example, comparative fieldwork may

[30] See e.g. https://www.clawsandlaws.org/ and https://www.clawsandlaws.info/ for a project on "law and biodiversity conservation" which includes disciplines such as law and ecology.

interact with anthropology, experiments with cross-cultural psychology, and quantitative methods with econometrics and statistics.

## 6 Conclusion

Ho et al. (2024: 178) suggest that "Comparative law should go empirical". Similarly, it is suggested here that research in empirical legal studies should go comparative. At present, empirical legal studies and comparative law have interacted in some instances, as this paper has shown. However, there is further potential for a promising future, in particular if we can assume the growing importance of empirical legal studies.

More specifically, this paper has suggested that there may be a European advantage in empirical comparative law, compared to the situation in the US. Comparative law plays a more profound role in Europe. This paper also analysed data on current research in *empirical* comparative law: it found that journals and working papers that deal with empirical legal studies, including related fields such as law & society, are more likely to employ a comparative dimension if authors are based at European universities. Thus, relatively speaking, there is greater interest in empirical comparative law in Europe. Subsequently, this paper classified empirical comparative law into six categories, referring to examples from European legal scholarship. It also explained the role of comparative law in these studies and, thus, why the relative strength of comparative law in Europe is indeed a reason why European scholarship can have an advantage in conducting research in empirical comparative law.

Finally, this paper discussed several limitations that concern many variants of both qualitative and quantitative research of empirical comparative law. These concerns are, however, not insurmountable. Often, a combination of various strategies can be the most viable way forward. Thus, as empirical comparative law asks us to strengthen the cooperation between empirical legal studies and comparative law, often it may be helpful to combine different forms of empirical legal research. Moreover, research on empirical comparative law often has close links to comparative fields in other disciplines (e.g. comparative economics, comparative politics, comparative sociology): thus, it is also suggested here that future research of these studies would benefit from closer cross-disciplinary interactions.

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