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The law and economics of comparative corporate law

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The authors wish to thank for their helpful comments Marco Corradi, Fernando Gómez-Pomar, Assaf Hamdani, Amir N. Licht, the seminar audiences at the Fordham Law School's Workshop on Elgar's Research Handbook on Comparative Corporate Governance and specially the editors, Martin Gelter and Afra Afsharipour.

Abstract

In this paper, we explain the methodological shifts that have occurred over time in the study of company law. Our hypothesis is that comparative company law has developed and evolved as a bridge between two extremes. On the one hand, the doctrinal, black-letter law approach to company law, dominant in academic commentary at the domestic level. On the other hand, the instrumental, analytic approach of the law and economics view of company law. As we will see, the evolution of the comparative approach to company law has seen frequent rebranding, from comparative corporate law, to comparative corporate governance, to law and finance and to theory and empirics of comparative corporate law. These re-branding waves have taken place as new questions, in need of different levels of analysis and methodological approaches, arose. Interestingly, in a two-way road, the comparative perspective has also enriched the L&E view of company law.

Keywords: company law, comparative legal studies, law and finance, law and economics

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Abstract

In this paper, we explain the methodological shifts that have occurred over time in the study of company law. Our hypothesis is that comparative company law has developed and evolved as a bridge between two extremes. On the one hand, the doctrinal, black-letter law approach to company law, dominant in academic commentary at the domestic level. On the other hand, the instrumental, analytic approach of the law and economics view of company law. As we will see, the evolution of the comparative approach to company law has seen frequent rebranding, from comparative corporate law, to comparative corporate governance, to law and finance and to theory and empirics of comparative corporate law. These re-branding waves have taken place as new questions, in need of different levels of analysis and methodological approaches, arose. Interestingly, in a two-way road, the comparative perspective has also enriched the L&E view of company law.

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1. Introduction

The study of company law is usually categorized into one of two extreme and opposing views: the doctrinal approach and the law and economics (L&E) approach.[1] But a third approach, based on a comparative perspective, combines the best elements of both extreme views to offer a richer view of the cathedral from various perspectives.

In this paper we will explain the different methodological approaches characterizing the doctrinal, the L&E, and the comparative views. We will emphasize how comparative company law has developed as a bridge between the two extremes and how it has enriched the L&E view of company law. As we will see, now-a-days, the best L&E analysis of corporate law benefits from a comparative perspective to inform policy recommendations. We will refer to this view as the L&E of comparative company law.

It seems that the only common feature of the methodologies used by doctrinal analysis and L&E analysis is that they are non-comparative. Doctrinal analysis studies one jurisdiction in isolation and searches for a detailed understanding and explanation of the law in the books. L&E studies, at a general level, alternative arrangements for corporate matters in order to determine the best solution to ensure an efficient allocation, using tools borrowed from economics. Comparative views of corporate law, however, combine the in-depth study of legal rules and institutions in various settings with economic insights to analyse specific rules across jurisdictions. The methodologies used by comparative studies (comparative corporate law, comparative corporate governance and law and finance) have changed to be able to address different questions and, as we will see, these changes have sometimes led to a re-branding of the comparative endeavour under different labels. All the successive brands refer to comparative studies of corporate law, but each of them embraces knowledge and tools used by the two extreme views – doctrinal and pure L&E – to a different degree. In this sense, there is an unresolved tension throughout the comparative analysis between, on the one hand, offering a detailed and very specific explanations of different legal rules and doctrines and, on the other hand, providing an abstract and generalized knowledge of the functioning of corporate law.

This tension is one of the reasons, we believe, why the comparative study of company law has experienced frequent rebranding episodes, from comparative corporate law, to comparative corporate governance, to law and finance. Rebranding has been useful to attract people from different backgrounds to the study of corporate law and to bring about methodological changes, both from legal scholarship and from economic scholarship, while avoiding resistance from the status quo at any given moment. However, this rebranding has also resulted in the creation of parallel academic niches each defending its own methodology and advancing criticism on others, rather than in all scholars interested in corporate law embracing new methodologies over time. This makes it particularly important to state clearly what one interprets as comparative company law, because different researchers in the field may be talking about very different methodological perspectives to study the same issue in company law.

The rest of the paper proceeds as follows. In the next section we compare and contrast traditional doctrinal – often called dogmatic in some Continental European tradition – studies of company law with the comparative perspective and explain how comparative knowledge

[1] Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, *in* COMPARATIVE LAW AND ECONOMICS (T. Eisenberg & G. Ramello eds., 2016); Kristoffel R. Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31(1) HASTINGS INT'L & COMP. L. REV. 295 (2008).

overcomes important limitations inherent in dogmatic analysis. In Section 3 we discuss how the comparative perspective was broadened by the comparative corporate governance studies that focused on the relative efficiency of corporate law across jurisdictions to combat managerial agency costs. Section 4 explains how this analysis was enriched by the discussion on causality introduced by the law and finance literature. Finally, Section 5 argues that there is a mutual reinforcement between comparative knowledge and the L&E approach to the study of company law. Conclusions are presented in Section 6. Throughout the paper, we use the topic of minority expropriation to exemplify the differences in key issues and methodologies across these different comparative approaches.

2. From doctrinal company law to comparative company law: establishing functionality.

Traditionally, the study of corporate law has been conducted in each jurisdiction at the domestic level with the objective of producing doctrines and "technical" notions and concepts to guide thinking through legal materials and problems and, in particular, to fill the blanks of incomplete or obsolete laws and regulations, and to adapt the Law to the emergence of new situations. This requires a very detailed knowledge of the corporate law materials (laws, regulations, case law) of a given jurisdiction, and is considered the most important asset for lawyers, courts, and firms doing business in that country.

This approach uses dogmatic analysis as its methodological toolbox. The core of this methodology is to study company law as a "system," highlighting all its complexities and inter-relationships and its ultimate internal coherence.[2] This methodology focuses on the coherent design of law in the books and therefore uses hermeneutics and exegesis to analyse the meaning of legal texts. The way dogmatic analysis views corporate law is as a collection of the different rules that regulate the life of the company from its inception until its death, and the law is the system that governs completely the functioning of this "living" entity. Because company law is understood as a closed system, and therefore, a self-referential and self-explained system, the typical research question in this literature is the categorization of a specific part of this system and the creation of concepts that explain those categories. As a result, the legal community might end up convinced that a meaningful categorization and a persuasive conceptualization solve all legal problems in real life.

An important weakness of this methodology is that dogmatic analysis dispenses with issues of enforcement and with the consequences of law in action. Notice, moreover, that the law is analyzed as an auto-referenced system, with its own mechanism of interpretation and updating of its meaning. Although real world considerations may enter into historical and teleological interpretations, efficiency considerations coming from social, political or economic forces are all but ignored. In addition, there is no study of the socio-economic consequences of the rules being discussed. In other words, the legitimacy of a doctrine or the interpretation of how the provisions of a law interplay with other pieces of the system relies in the rhetorical power of the arguments and their capacity to offer a conceptual fit. Whether the proposed solution generates efficient allocations is not a major concern, mainly because this methodology does not count with the tools and instruments to assess allocations and results, other than common sense guessing. Moreover, logical thinking has important limits. While logical thinking produces correct reasoning, it only discusses the validity of the arguments, offering the correct

[2] KARL LARENZ & CLAUS-WILHEM CANARIS, METHODENLEHRE DER RECHTSWISSENSCHAFT (1st ed. 1995).

relationship between premises and conclusions. But, logical thinking does not attempt to establish the truth of the premises or determine the relevance of the conclusions.[3]

To illustrate these methodological issues, we consider here, and in all the subsequent sections of the paper, the problem of minority expropriation as an important and illustrative example. Conflicts of interests between controlling shareholders and minority shareholders are probably the most important corporate governance problem that controlled companies face.[4] Nevertheless, this problem has not attracted the attention of legal academics in many European jurisdictions (where controlled firms are prevalent or at least widely present). Moreover, the introduction of MOM rules and other schemes trying to reallocate control rights regarding related party transactions[5] have encountered heavy resistance among doctrinal academics. Why? There are two reasons why a dogmatic analysis of company law does not favour this reallocation of control rights.

First, seen through the lens of dogmatic analysis, "shareholder status" is based on the ownership of shares vested with voting rights and this categorization of the concept of shareholder does not permit or justify any mechanism that undermines their – by hypothesis legitimate – voting power. So, as a general rule, the individual right to vote of the shareholder should be upheld. Therefore, blockholders can vote their shares even if they are a conflicted party in a business transaction with the company.[6] In addition, if blockholders are not allowed to vote their shares, the voting power of the minority increases, along with the risk of hold up. As the minority increases its voting power through these reallocations, the outcome of the voting mechanism differs more markedly from the original aggregated interest according to the pure shareholder status rule.[7]

Second, because dogmatic analysis sees law as a closed system and does not consider enforcement issues, there is a presumption that each legal system is already equipped with adequate tools to prevent minority expropriation (such as standards against disloyal behaviour of managers and controlling shareholders). Germany is a paradigmatic case. The standard view among German scholars is that the fiduciary duties of shareholders are developed well enough to protect minority shareholders from expropriation.[8] This is probably true as to law in the

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[3] NOSON S. YANOFSKY, THE OUTER LIMITS OF REASON: WHAT SCIENCE, MATHEMATICS, AND LOGIC CANNOT TELL US (1st ed. 2016).

[4] Empirical studies show that expropriation in European jurisdictions is higher than in the US. Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537, 551 (2004); Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. FIN. ECON. 325 (2003). For examples of how European jurisdictions allow tunneling see Simon Johnson, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Tunneling*, 90 AM. ECON. REV. 22 (2000). For a taxonomy of tunneling practices, see V Atanasov, BS Black & CS Ciccotello, *Law and Tunneling*, 37 J. CORP. L. 1 (2011).

[5] At the EU level the introduction of a MOM rule (majority of the minority shareholders' approval) has been watered down to disinterested approval at board level, Art. 9 c Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC.

[6] Corporate Law in many jurisdictions consider some restricted cases of conflict of interest that prevent shareholders from voting, but they are of a different nature than business transactions. *See* Germany § 136 AktG; Spain, art. 190 LSC.

[7] Precisely because of this, more emphasis is usually placed on the dangers of minority hold up than on the threat of minority expropriation. María Gutiérrez-Urtiaga & Maribel Sáez-Lacave, *Strong Shareholders, Weak Outside Investors*, 18(2) J. CORP. L. STUD. 277 (2018).

[8] W-G Ringe, *Changing Law and Ownership patterns in Germany: Corporate Governance and the Erosion of Deutschland AG*, 63(2) AM. J. COMP. L. 493, 504 (2015) ("For the most part, these loyalty duties apply to majority shareholders, thus making the principle an important tool of minority protection, and responding to the prevalence of blockholders in the German corporate landscape.").

books, in view of the enormous bibliography written on the matter. However, as law in action shows, the effectiveness of ex post litigation tools to limit controlling shareholder's opportunism seems far from effective.[9]

This example highlights a clear contradiction in the dogmatic approach between, on the one hand, the presumed sophistication and complexity of the legal doctrines applied, and on the other hand, the lack of tools to contrast and refute different views. Without these refuting tools, dogmatic analysis rests on little more than "ad hoc" categorizations, rhetoric abilities and personal intuitions to defend them.[10] Nevertheless, it is important to notice that at the domestic level there is only one observation to study (that particular jurisdiction) and this inhibits questioning and testing the causes, consequences and efficiency of the legal solutions in a given system. These types of questions can only arise when more than one domestic system is analysed. Adding further to this problem, comparability is limited due to language barriers. As doctrinal analysis is conducted at the domestic level and based on law in the books, it is largely dominated by the language of the country, which extends to citations of literature.

The move from traditional company law to comparative company law arises naturally in a global economy. Even from a practical and domestic point of view, foreign company laws become important since many large firms have branches and subsidiaries operating in other jurisdictions. The increasing number of cross-border cases turned out to be challenging for companies that are facing global competition. In this context, there are many different reasons for the interest in looking simultaneously at company law in different jurisdictions. First, now-a-days, practitioners, regulators and courts will have to analyse many international cases that will require the knowledge of different national laws and regulations. Second, the need to develop common principles and rules at the European level must start by considering simultaneously the different national laws that are being harmonized.[11] European company law and the case law of the European Court of Justice became a fruitful ground for legal analysis.[12]

The practical need to learn at least the rudiments of corporate law codes different from one's own necessarily implies some degree of comparison. This comparison is interesting not only for practitioners (lawyers, advisors) and even law-makers, but also for academics. This may be considered the initial push for the relevance of comparative law. This also becomes clear when we notice that the early comparative literature was targeted to scholars from one country interested in learning the rules and solutions of other countries. Finally, this ultimately explains why comparative papers were initially written in the home country language of the researchers. Many of these works were mere descriptions of company law in foreign jurisdictions.[13]

Interestingly, from an academic perspective, once we have reached the point where we are looking at different national solutions to the same problem, the question of why these national solutions are similar or different arises in a natural way. This broader perspective was

[9] María Gutiérrez-Urtiaga & Maribel Sáez-Lacave, *A Contractual Approach to Disciplining Self-dealing by Controlling Shareholders*, 2(1) J.L. FIN. ACCT. 173 (2017).

[10] Jan M. Smits, *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research*, *in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE (Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin eds., 2017).

[11] Klaus J. Hopt, *Comparative Company Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[12] STEFAN GRUNDMANN, EUROPEAN COMPANY LAW (1st ed. 2011); MICHEL MENJUCQ, DROIT INTERNATIONAL ET EUROPÉEN DES SOCIÉTÉS (1st ed. 2001).

[13] HANNO MERKT & STEPHAN R. GÖTHEL, US-AMERIKANISCHES GESELLSCHAFTSRECHT (1st ed. 2006).

more suited to an international audience on comparative matters,[14] and this was also reflected in the generalization of the use of English language as "lingua franca."

The similarities are to be found in the functional method that studies – albeit in an informal way – the economic problems that all these national corporate laws are trying to solve.[15] And this already leads to an instrumental view of company law which is characteristic of the L&E approach. Nevertheless, traditional comparative company law uses functional analysis of the economic goals of company law as an abstract justification or starting point, which is not necessarily incorporated further in the comparison between countries. From that point onwards, the essence of the comparative law exercise is to produce a detailed description of commonalities and differences across different jurisdictions. These are put in the context of legal families or traditions.[16] Moreover, comparative analysis emphasizes the importance of law in action over law in the books and how the law is applied and enforced.[17] But all this is performed with an explicit rejection of any evaluation in an attempt to preserve the neutrality of the analyst.

This rejection is founded on three reasons. First, the complexity of the domestic law codes precludes comparability. Because the various domestic codes differ in so many respects, one can always find a specific issue with they address better than other codes. Moreover, because the analysis starts from a functional view, to the extent that all the different domestic laws perform the same function, they must be equivalent or of equal value. Second, any attempt at determining which law is "better" will be tainted by home bias. The knowledge of domestic law is almost always superior to the knowledge of any foreign law and this creates a bias in academics to find that the law of their country is superior to others. And third, the observed differences across countries are attributed to different histories, politics and socio-economic characteristics. These differences make legal transplants likely to fail, and therefore they also make relative evaluation futile. [18]

To illustrate this point, let us examine the comparative perspective going back to our example concerning controlling shareholders and minority protection, discussed above at the country level. The way this problem is treated in the comparative literature is illustrated by Conac et al. (2007).[19] Their paper describes how three major continental European countries (France, Germany, and Italy) regulate controlling shareholders' self-dealing, looking at all the possible rules, doctrines and remedies available in each country. From a comparative perspective, the research idea here is to acknowledge the problems of asset diversion by insiders -the functional approach-, and show that the doctrines and remedies are far from uniform across jurisdictions.[20] By adopting a comparative point of view, the study portrays a complete picture

[14] See, as an example, A. CAHN & D. DONALD, COMPARATIVE COMPANY LAW: TEXT AND CASES ON THE LAWS GOVERNING CORPORATIONS IN GERMANY, THE UK AND THE USA (1st ed. 2018).
[15] Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006).
[16] KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (1st ed. 1998).
[17] Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765 (2009).
[18] *Id.* at 787.
[19] PH Conac, L Enriques & M Gelter, *Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy*, 4(4) EUR. COMPANY & FIN. L. REV. 491 (2007).
[20] *Id.* at 494 ("It is in fact tempting to compare corporate laws by taking one benchmark jurisdiction, typically the US, and to assess the quality of other countries' corporate law systems depending on how much they replicate some prominent features of US law, such as for example Delaware Courts' emphasis on approval of self-dealing transactions by a majority of the minority shareholders. This approach may provide a distorted picture of the effectiveness of other corporate laws, because it might

of the variety of legal tools available to tackle self-dealing in each country, which may be familiar to legal academics and practitioners in each jurisdiction, but probably alien to scholars from other legal system. The study assumes that, as far as these (major) jurisdictions have articulated some kind of legal response to the problem, all doctrines and remedies deserve attention.[21]

Comparative company law has a long tradition and remains a fruitful and active area of research.[22] This literature has proved to be very good at identifying and updating the core problems or matters of interest in the company context. Because of this, its main advantage is that it provides an overview of the hot topics regarding company matters across countries, and reliable information about the law, doctrines and remedies in some relevant jurisdictions. Nevertheless, comparative company law has always been very cautious regarding the evaluation of the solutions across jurisdictions,[23] and this reluctance to identify superior legal solutions to specific functional problems has limited its influence on policy design.

3. From comparative company law to comparative corporate governance: solving the agency problem in the firm

Corporate governance can be broadly defined as the study of company law through the lens of the agency conflicts that arises in corporations. Berle and Means provided the initial intuition.[24] But the formalization of the analysis arises in the economic literature.[25] And the language, grammar and reasoning in this analysis was later taken up by legal scholars dissatisfied with the solutions provided by American company law to the agency conflict between managers and shareholders. Comparative corporate governance (CG) emerges when these legal academics, together with regulators and companies, started searching for inspiration for solutions to agency problems by looking at other jurisdictions.

Initially, comparative CG was narrowly concerned with the study of the conflict of interest between dispersed investors and management. However, it has now grown to encompass the general study of corporate law as the set of rules governing the control of the company and the relationships and conflicts among all different stakeholders in the corporation. In this sense, one can argue that comparative CG is in fact a rebranding of the traditional study

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fail to account for legal strategies and enforcement tools that, while unknown to the US corporate governance regime, allow countries to tackle self-dealing differently, but no less effectively, than the US, or, in other words, to achieve functional as opposed to formal convergence.").

[21] *Id.* at 527 ("It is far from easy to tell what jurisdiction among the three has the most effective rules, and it is even harder to evaluate how well they fare compared to US or UK law.").

[22] As an example of a recent significant contribution to this literature, see C GERNER-BEUERLE & M SCHILLING, COMPARATIVE COMANY LAW (1st ed. 2019).

[23] The prevalent view seems to be that efficiency comparisons cannot be made when the law is shaped by tradition or cultural factors. Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative law and Economics*, 14 INT'L REV. L. & ECON. 3, 11 (1994) ("Comparative law and economics has always made clear that divergences in different legal systems do not necessarily imply inefficiencies. From its very beginning it was admitted that different legal traditions may develop alternative solutions for the same legal problem that are neutral from the stand point of efficiency."). On the reluctance of comparative scholars to evaluate, see also Ralf Michaels, *supra* note 16, at 785 ("Comparative lawyers have become cautious in evaluating one law as better than another. Some object to any evaluative comparison on the basis of incommensurability. Yet, even those who see value in it are hesitant, and for a reason: if both laws are functionally equivalent they are by definition of equal value with regard to that specific function.").

[24] A BERLE & G MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1st ed. 1932).

[25] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

of company law using modern economic theory and departing from the dogmatic or doctrinal perspective on control and decisions in corporations.

Moreover, it is also interesting to notice that comparative CG is the logical evolution of comparative corporate law. This may seem surprising at first. From one point of view, comparative CG is clearly opposed to comparative company law, because it explicitly arises from a search for the best solutions to address agency problems. This is precisely the reason why the new comparative literature was rebranded as comparative corporate governance and why many scholars consider the two as separate literatures. But, from another point of view, it is clearly a natural coming of age for the comparative company law literature: it breaks its perceived ceiling and gains relevance in policy decisions with far-reaching economic consequences.[26]

The best example of comparative CG is the seminal work of Mark Roe.[27] Roe draws from both literatures, the comparative corporate law and the CG literature. From the comparative law literature, he takes the idea that American company law is the result of different forces outside the law and, particularly of political forces. From the CG literature, he borrows the idea that the agency conflict is key to understanding the functionality of corporate law. Roe is in fact focusing on the narrow issue of the conflict of interest between dispersed investors and management, and he is searching for best solutions to these conflicts. Notice that his methodology starts to differ from the standard methodology of comparative company law. His approach is empirical, even if informally so. He compares the US to Germany and Japan in terms of both economic outcomes and corporate law. Interestingly, this was done at a time when economic growth was stronger in Germany and Japan. This naturally led to the idea that this was the result of better law. With the benefit of hindsight, it is of course easy to see that the problem with this analysis was that correlation was interpreted as causation.[28] Nevertheless, it was tremendously influential. Comparative scholars started to identify the singularities of their home country governance systems and began to treat institutional differences as having competitive consequences and therefore, an influence on corporate performance. This resulted in many fruitful lines of research.

Probably the most important line of debate in this literature has been the convergence versus path dependence of corporate law. Some authors have argued that corporate governance systems across the globe will inevitably converge to the Anglo-American model, due to globalization and market pressures that force the regulator to adopt shareholder-oriented corporate governance practices.[29] Other authors consider that there is path dependence in corporate governance and that globalization pressures are not strong enough to overcome laws and regulations that serve the interests of powerful domestic actors.[30] Additionally, if there is

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[26] See Theodor Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the U.S. and Germany*, 17(4) J. APPLIED CORPORATE FIN. 44 (2005), for an example of the new methodology.

[27] MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1st ed. 1994).

[28] Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102(8) YALE L.J. 2021, 2022 (1993) ("The central lesson to be drawn from Roe's research in comparative corporate governance is that there is no compelling evidence to support a preference for German or Japanese organizational forms and hence for their adaptation to U.S. firms.").

[29] John C. Coffee, *The future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641 (1999); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

[30] Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Governance and Ownership*, 52 STAN. L. REV. 127 (1999) (arguing that path dependence is largely driven by the self-interest of those who benefit from existing structures).

convergence, it may be formal or merely functional.[31] Functional convergence can happen without changes to company laws in a market with free movement of capital where firms can move across jurisdictions.[32] On the other hand, formal convergence requires regulatory intervention.[33] But, when market forces allow companies to shop around, there is a market for legal rules, corporate law becomes a product to be designed in a competitive market by the regulators and this leads to another very ample line of research which has to do with regulatory competition.[34]

Interestingly, the topic of minority expropriation that we are using as our general example has not been an important line of research in the comparative corporate governance literature.[35] This is because in comparative CG, the features of controlled firms are analyzed

[31] Ronald Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49(2) AM. J. COMP. L. 329 (2001).

[32] A good example of these mechanisms is the debate about cross-listing. Cross-listing allows firms in any given jurisdiction to opt out of the local corporate law and into the corporate law of an alternative jurisdiction. When firms decide to list on US exchanges to access US financial resources, they are compelled to follow the US Securities and Exchange Commission's (SEC) rules. By doing this, the foreign company selects voluntarily US corporate governance rules in preference to those of its own jurisdiction. John C. Coffee, *Racing Towards the Top? The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102(7) COLUM. L. REV. 1757 (2002). But, other authors have challenged this bonding hypothesis on cross-listing. Amir N. Licht argues that more stringent regimes deter issuers, and there is evidence that insiders behave opportunistically with regard to the cross-listing decision. Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141 (2003).

[33] Katharina Pistor, Martin Raiser & Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 ECON. OF TRANSITION, 325 (2000) (providing empirical evidence for transition economies that have experienced *de jure* convergence through regulatory intervention). Nevertheless, they show that these advances in *de jure* convergence have failed to increase the availability of external finance in these countries because *de facto* convergence of the effectiveness of legal institutions has not been achieved.

[34] In the US, where company law is state law, the leading position of Delaware as incorporation state has fuel the debate over "raise to the bottom" or" raise to the top". In Europe, the argument is about whether companies should be subject to the laws of the jurisdiction of incorporation, regardless of the physical location of their business, operations and activities (the incorporation theory), or whether they should be subject to the rules of the jurisdiction of the main place of business of the corporation (the seat theory). This debate has been progressively made clear through the case Law of the European Court of Justice that has established the scope of the right of establishment. *See, e.g.*, F Munari & P Terrile, *The Centros Case and the Rise of an EC Market for Corporate Law*, *in* CAPITAL MARKETS IN THE AGE OF EURO: CROSS-BORDER TRANSACTIONS, LISTED COMPANIES AND REGULATION (G. Ferrarini, KJ Hopt & E. Wymeersch eds., 2002); E. Wymeersch, *Centros: A Landmark Decision in European Company Law*, *in* CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW, LIBER AMICORUM RICHARD M. BUXBAUM (T. Baums, KJ Hopt & N. Horn eds., 2000); J. Rickford, *Current Developments in European Law on the Restructuring of Companies: An Introduction*, 15(6) EUR. BUS. L. REV. 1225 (2004); WG Ringe, *No Freedom of Emigration for Companies?,* 16 EUR. BUS. L. REV. 621 (2005); WH Roth, *From Centros to Ueberseering: Free Movement of Companies, Private International Law, and Community Law*, 52 INT'L & COMP. L. Q. 177 (2003); W. Schön, *The Mobility of Companies in Europe and the Organizational Freedom of Company Founders*, 3(2) EUR. COMPANY & FIN. L. REV. 122 (2006); M. Siems, *SEVIC: Beyond Cross-Border Mergers*, 8 EUR. BUS. ORG. L. REV. 307 (2007); E. Werlauff, *Using a Foreign Company for Domestic Activities*, 10 EUR. BUS. L. REV. 306 (1999).

[35] In its beginnings, this literature was very focused on developed economies, and scholars in these major jurisdictions were not very much confronted with the idea of minority expropriation. Interestingly, scholars in other jurisdictions have paid more attention to these issues. *See* Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 NW. J. INT'L L. & BUS. 335 (2009); Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21(1) NAT'L L. SCH. INDIA REV. 1 (2009).

through the lenses of standard agency costs.[36] The analysis under this perspective shows that concentrated ownership structures provide a natural solution to the Berle and Means corporations. According to this view, controlling shareholders are seen as a very effective monitoring device to reduce managerial agency problems. This is not to say that this literature is not aware of the risk of expropriation of public investors by the insiders in controlled firms. But, as long as the benefits of having a controlling shareholder are greater than the costs in terms of private benefits extraction, public investors are better-off with controlling shareholders than without them.

In this literature, private benefits are "rewards" to controlling shareholders for the costs they bear associated with holding an illiquid large stake in the company and exercising a monitoring function that generate gains for all shareholders. According to this argument, in the absence of private benefits, no block-holder would have the incentives to play a monitoring role[37] for the benefit of all shareholders. This perspective reinforces the general view that concentrated ownership structure is a clear strength of the German and Japanese models.[38] The interplay of large corporations, corporate groups and financial institutions results in a successful form of industrial organization.[39] Controlling shareholders are not perceived as a problem, but as part of the solution. Moreover, the alignment of interest of the controlling shareholders with other long-term non-diversified stakeholders, such as workers or banks is viewed as an advantage and not considered as detrimental of the interests of market investors.[40] Therefore,

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[36] Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003).

[37] Andrei Shleifer & Robert M. Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461, 463 (1986). For the authors that emphasized the dark side of private benefits and the negative effects on capital market development, see Lucian A. Bebchuk & Luigi Zingales, *Ownership Structures and the Decision to Go Public, in* CONCENTRATED CORPORATE OWNERSHIP (Randall K. Morck ed., 2000); Lucian A. Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q. J. ECON. 957 (1994); Lucian A. Bebchuk, *A Rent Protection Theory of Corporate Ownership and Control* (NBER Working Paper No. 7023, 1999), http://www.nber.org/papers/w7203.

[38] Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 271 (1993). For the German case, see Tobias H. Tröger, *Germany's Reluctance to Regulate Related Party Transactions*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS (Luca Enriques & Tobias H. Tröger eds., 2019).

[39] *See* Masahiko Aoki, *Toward an Economic Model of the Japanese Firm*, 27 J. ECON. LIT. 1 (1990); Masahiko Aoki, *The Japanese Firm as a System of Attributes: A Survey and Research Agenda, in* THE JAPANESE FIRM: THE SOURCES OF COMPETITIVE STRENGTH (Masahiko Aoki & Ronald Dore eds., 1994). *But see* Yoshiro Miwa & Mark J. Ramseyer, *The Myth of the Main Bank: Japan and Comparative Corporate Governance*, 27 L. & SOC. INQUIRY 401 (2002) (challenging this view); Yoshiro Miwa & Mark J. Ramseyer, *The Fable of the Keiretsu*, 11 J. ECON. & MGMT. STRATEGY 169 (2002). For a respond to the critics, see Curtis J. Milhaupt, *On the (Fleeting) Existence of the Main Bank System and Other Japanese Economic Institutions*, 27 L. & SOC. INQUIRY 425 (2002).

[40] The presence of these stakeholders on the board of directors is also viewed as positive. *See, e.g.*, M. Gelter, *The Dark Side of Shareholder Influence: The Connection between Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 129 (2009) (arguing that "given their costs, laws aiming at the protection of stakeholders - such as codetermination and restrictive employment laws - may be normatively more desirable in the presence of stronger shareholder influence, particularly under concentrated ownership."). On the particular case of mandatory two tier boards including worker representatives, see RH Schmidt & G Spindler, *Path Dependence and Complementarity in Corporate Governance*, *in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

this literature paid little attention to corporate governance mechanisms that try to reduce controlling shareholder opportunism[41] and to foster capital market development.[42]

As a general conclusion, we can say that the underlying idea inherent in comparative CG analysis is that law matters, and it shapes economic outcomes, with better solutions to the agency problem causing better economic outcomes. Nevertheless, comparative CG fails to prove this central idea because the methodology is based on identifying correlations among a small number of observations. Proving that law matters requires establishing causality. The search for this causal link between law and economic outcomes is the beginning of the law and finance literature. A literature that unlike comparative CG would be initially dominated by economists that came in with a new and provocative methodological toolbox.

4. From Comparative Corporate Governance to Law and Finance: the search for causality.

The law and finance literature studies the causal link between company law and economic outcomes, which was taken for granted in the previous literature dominated by legal scholars. As more economist became interested in the comparative corporate governance that was being conducted by legal scholars, and started doing empirical analysis in the field, proving causality became a precondition for any attempt to compare the efficiency of alternative regulatory regimes and solutions.

The main problem to prove causality is endogeneity. This problem was in fact already present in the comparative company law tradition and cited as one of the reasons for not engaging in the evaluation of the laws of different countries, since the observed differences across countries can be attributed to different socio-economic characteristics. The novel, striking and ingenious idea that started the law and finance literature was to find the solution to this apparently intractable problem precisely in the work of the comparative company law scholars and their taxonomy of different legal traditions. This idea, and the key papers in the law and finance literature, was developed by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny (usually refered to as LLSV).[43]

In their earliest papers, LLSV show that different legal measures of investor protection – and the indexes that they build aggregating these measures – vary in a systematic way depending on the legal origin of the jurisdiction. Moreover, they show that these legal variables

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[41] Theodor Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 AM. J. COMP. L. 31 (2005) (highlighting that a comparative perspective shows that Germany already had strong minority rights). This view has been challenged by other authors. *See* Gutiérrez-Urtiaga & Sáez-Lacave, *supra* note 7.

[42] Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, *in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 1, 128 (Jeffrey N. Gordon & Mark J. Roe eds., 2004) (arguing that "[t]he bank centered capital markets of Germany and Japan allowed executives to manage in the long run.").

[43] Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 71 (1999); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Andrei Shleifer & Robert Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997). The general implications of their work are clearly summarized by the authors. *See* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

are correlated to economic outcomes both at country level (capital market development) and firm level (ownership concentration and firm value). To prove that there is a causal relationship running from the law to these economic outcomes, LLSV use legal traditions and families as an exogenous predetermined variable for law. This solves potential endogeneity concerns because legal origins – unlike other characteristics of the law – are fixed, they do not change with changing cultural or socioeconomic factors and they do not respond to changes in economic outcomes. Therefore, if one finds a significant relationship between a legal tradition and a battery of economic outcomes, this relationship can be interpreted as a causal impact of the law on the economy.

The initial results from LLSV papers supported the superiority of the economic outcomes produced by common law over civil law in terms of capital market development and firm value. Two explanations were given for these results. One explanation asserts that common law can adapt faster to capital markets and investors changing requirements because it is developed through case law rather than through legislation that takes longer to respond to market innovation.[44] Alternatively, common law may also be more business friendly because judges are said to be more independent from the government in common law systems than in civil law systems and less likely to be captured by interest groups.[45]

Whatever the ultimate explanation, LLSV made a strong statement that law matters, which was hugely influential. The influence extended not only to researchers but also – and unlike the previous comparative literature – to real world policy through the recommendations of the World Bank. For an institution focused on promoting reform in developing countries the idea that law matters, that it can be changed and that it can be measured through indexes is clearly very attractive. The indexes summarize and quantify the legal complexities of different countries in a simple measure with a proven causal relationship to economic outcomes and, therefore, can inform policy recommendations. This got started the Doing Business project that collects annual legal data on many different areas of business laws and regulations that affect the functioning of companies in each country. It covers issues such as the ease of registering property, getting credit, the protection of minority investors and so on. This has been a very influential project, with the World Bank making recommendations to countries in response to their advancement within the index. But it has also received extensive and powerful criticism. The most obvious one is that LLSV were able to prove the impact of legal origins, but this is the one thing that is not easy to change in the corporate law of the country. In response to criticisms the World Bank has improved methodology, but the index will surely continue to be challenged also for other reasons.[46]

For legal scholars, the idea that law matters was already obvious.[47] But LLSV confronted them with the limits of traditional methodologies. Interestingly, many scholars in comparative corporate governance responded by identifying the limits of LLSV methodology.[48] In particular, their indexes seem *ad hoc* because they only look at some specific legal tools (such as cumulative voting) and not others (such as the availability of nullification suits). Moreover, the indexes were

[44] Thorsten Beck, Asli Demirguc-Kunt & Ross Levine, *Law and Finance: Why does Legal Origin Matter?*, 31 J. COMP. ECON. 653 (2003).

[45] Raghuram G Rajan & Luigi Zingales, *The Great Reversals: the Politics of Financial Development in the Twentieth Century*, 69(1) J. FIN. ECON. 5 (2003).

[46] Holger Spamann, *Empirical Comparative Law,* 11 ANN. REV. L. & SOC. SCI. 131 (2015).

[47] As R. Michaels suggests, this view was uncontroversial to legal scholars who believed that what matters about the law is its functionality. Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 768 (2009).

[48] Mathias Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 MCGILL L.J. 55 (2007).

criticized for placing too much emphasis on law in the books[49] and for using wrong measures.[50] But, the most serious criticism is likely that legal origins are not really exogenous or fixed, which undermines any causal effect.[51] LLSV have responded to all of these criticisms and still argue their initial thesis is correct. Nevertheless, they concede that legal origins can be better understood as "a style of social control of economic life",[52] which goes back to the problem of the correlation between the law and other political and social forces.

But, in spite of all the criticism, the idea of translating law into numbers and indexes has been a great success among legal scholars that have responded to the simple categorization into common and civil law by creating alternative indexes capturing better the legal nuances of the different domestic laws and regulations.[53] Clearly, the search for these new indexes reflects the tension between detailed knowledge of domestic laws and the need for general and abstract classifications of law. Legal scholars working on this field tend to put more emphasis on the former, while economists usually are biased towards the latter. Moreover, the development of indexes has also been a confirmation of the dangers of home bias that were expressed by scholars of traditional comparative company law as a major reason to avoid evaluation. European scholars have usually amended the initial indexes in directions that make civil law systems score higher on the alternative rankings. Finally, developing good indexes has proven very difficult and it is an ongoing effort, because it requires a meta-analysis of law that goes beyond law in the books to encompass many different factors in each jurisdiction that affect the reach and enforcement. [54]

We now turn again to the specific topic of minority protection. This has been a major discussion in the law and finance literature. In fact, LLSV's work highlighted that concentrated ownership structures are much more common around the world than dispersed ones, and therefore elevated the problem of minority expropriation at least at the same level of importance as that of the traditional shareholders-manager conflict. The previous comparative literature saw large shareholders as a potential solution to reduce managerial agency costs, and private benefits as a necessary compensation for the supervision effort. But the central idea

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[49] John C. Coffee, *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229 (2007).

[50] Holger Spamann, *The Anti-Director Rights Index Revisited*, 23 REV. FIN. STUD. 467 (2010).

[51] *See* John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, 57(9) AM. J. COMP. L. 591 (2009); Holger Spamann, *On the Insignificance and/or Endogeneity of La Porta et al.'s "Anti-Director Rights Index" Under Consistent Coding* (2006), http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_7.pdf.

[52] La Porta et al. (2008) (n 43, page 286).

[53] In this regard, it is worth to notice that the reaction of European legal scholars to this literature was very confrontational because it touched on widely- and deeply- held beliefs about the quality of European company law. LLSV papers ranked shareholder protection in many European jurisdictions lower than expected. The common perception was that minority protection and shareholders' rights across Europe were a cornerstone of the legal system, and furthermore, that European economies were highly competitive despite having smaller capital markets. A potential reason for this discrepancy has to do with the ad hoc nature of the indexes developed by LLSV that arbitrarily took into account some specific rules but not others. *See*; Conac et al., *supra* note 19; Udo C. Braendle, *Shareholder Protection in the USA and Germany—On the Fallacy of LLSV* (May 24, 2005), http://ssrn.com/abstract=728403; Robert Schmidbauer, *On the Fallacy of LLSV Revisited—Further Evidence About Shareholder Protection in Austria and the United Kingdom* (Feb. 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=913968. LLSV tried to address this criticism by developing a more systematic anti self-dealing index. *See* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88(3) J. FIN. ECON. 430 (2008).

[54] Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture, Law, and Corporate Governance*, 25 INT'L REV. L. & ECON. 229 (2005); Holger Spamann, *Legal Origin, Civil Procedure, and the Quality of Contract Enforcement*, 166(1) J. INSTITUTIONAL THEORETICAL ECON. 149 (2010).

introduced by LLSV is that existing ownership structures are an equilibrium response to the legal environment. And, in particular, concentrated ownership structures are much more common in civil law countries because their laws do not provide sufficient protection to market investors. This insufficient protection has two consequences. First, it hinders the development of large and liquid capital markets and forces companies to raise money from large shareholders and debt markets. Second, insufficient protection implies that controlling shareholders will fix their stakes at the minimum that allows them to maintain control and this will result in low firm value and high minority expropriation.[55] Therefore, in LLSV low minority protection by a legal system is the cause of both ownership concentration and significant expropriation.

But, in line with the general criticisms that we have discussed, the LLSV measure of minority protection has also been criticized for various reasons. In particular, it has been argued that some measures considered as desirable for minority protection are not very effective,[56] that appropriate measures can be introduced via contractual arrangements,[57] and that controlling shareholders do also appear in countries with well-functioning legal protections of minority interest and produce efficient outcomes.[58]

All these different criticisms point out the ultimate failure of the law and finance literature to explain the causal link between legal variables and complex economic outcomes (like GDP growth or stock market development). The indexes are like a black box that only allows us to observe a legal input and an economic output, but not the workings in-between. Causality arguments will only be successful in changing policies if one can clearly explain the mechanism through which a specific regulation affects complex economic aggregates.

Because of this, the new literature has set itself a more modest goal that allows for a causal interpretation of results and for more detailed policy recommendations: the analysis of the impact of very specific norms on immediate outcomes.

5. From law and finance to the law and economics of comparative company law: implications for policy.

L&E can be understood as the study of the relationship between law and social welfare either from a positive or from a normative perspective (Posner, 1979).[59] This literature identifies the optimal legal rules for specific problems -ranging from taxation, to contract enforcement and even to family law- making use of economic theory models and/or state of the art empirical research.

This approach is particularly well suited to the study of company law. Nevertheless, the L&E literature on corporate law has mainly focused on US law and the problems faced by US companies. It has not been comparative to a large extent, probably because Europe has lagged behind the US in this discipline.[60] But, recently L&E analysis of company law has been enriched by the introduction of serious comparative input. Interestingly, this has happened in two different but complementary ways using two different methodologies. As we will see, the first

[55] Lucien A. Bebchuk & Mark Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).
[56] *See* Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 142-60 (1994).
[57] *See* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990).
[58] Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006).
[59] R.A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8(1) J. LEGAL STUD. 103 (1979).
[60] Martin Gelter & Kristoffel R. Grechenig, *History of Law and Economics*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS (J Backhaus ed., 2014).

methodology draws from the comparative CG studies, while the second is the natural continuation of the law and finance literature.

The book "The Anatomy of Corporate Law" is the first major work to introduce the comparative perspective into the L&E analysis of corporate law.[61] The methodological approach of the book is intuitive, non-formal/non-mathematical and, following the comparative tradition, it focuses on functionality.

The book identifies the underlying economic problems of the corporation in the abstract and examines how different legal frameworks offer alternative solutions to these problems. The starting point is that company law across jurisdictions addresses the same three basic agency problems: (1) the opportunism of managers vis-a-vis shareholders; (2) the opportunism of controlling shareholders vis-a-vis minority shareholders; and (3) the opportunism of shareholders as a class vis-a-vis other corporate constituencies or stakeholders, such as corporate creditors and employees. Then, the authors consider a set of legal strategies to address these agency problems (ex-ante, ex-post, self-regulation, etc.). The third step -and the book's central claim- is that company forms are fundamentally similar across countries. The book illustrates how a number of core jurisdictions pick among the same range of legal strategies to address the three basic agency issues. This book has been very important in changing the views of academics outside the US regarding company law matters and L&E analysis, especially in Europe. It has been key to make L&E analysis that was traditionally tied in the eyes of many European scholars to US law, more interesting and accessible to non-US scholars. Nevertheless, it also exemplifies the tension between the search for optimality of the L&E tradition and the attention to detail and rejection of evaluation of the comparative tradition. In the new editions of the book, the examination of different domestic laws has increasingly gained weight, and has broadened the scope of coverage to new jurisdictions, putting more weight in a standard comparative (and informative) analysis and less in the analysis of relative efficiency.

The second wave of recent studies that incorporate comparative knowledge to the L&E analysis of corporate law uses a very different approach. This new approach is formal/mathematical and mainly empirical, using sophisticated econometric methods. The idea here is to determine the design of the best regime using both micro-economic models and empirical validation of the theoretical results using data and detailed knowledge of the laws across different jurisdictions. In this literature comparative knowledge is key to achieve rigorous causal inference, which usually requires quasi-natural legal experiments[62].

Consider three recent papers that exemplify this comparative L&E. Becht, Polo and Rossi (2016)[63] study whether the UK rule that forces an ex-ante shareholders' vote on M&A operations is effective in preventing empire building and prevents managers from completing value destroying operations. To establish causality, the outcomes of UK mergers are compared to the outcomes of similar US mergers that did not require shareholders' approval using a regression discontinuity analysis that supports a causal interpretation.

Armour, Black, Cheffins and Nolan (2009) study the impact on stock market development of the differences in ex-post enforcement of fiduciary duties in the US and the UK,

[61] R. KRAAKMAN, P. DAVIES, H. HANSMANN, G. HERTIG, K. HOPT, H. KANDA & E. ROCK, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (1st ed. 2004).

[62] The basic idea is to identify a quasi-random non-anticipated change in laws or exogenous and ad hoc threshold for the application of some particular regulation. Notice that the LLSV papers do not satisfy these stringent requirements for causal inference.

[63] Marco Becht, Andrea Polo & Stefano Rossi, *Does Mandatory Shareholder Voting Prevent Bad Acquisitions?*, 29 (11) REV. FIN. STUD. 3035 (2016).

finding that, contrary to common perceptions, these differences in private enforcement do not seem to have a significant impact.[64]

Christensen, Hail and Leuz (2016),[65] in turn, studies how the transposition of the MAR directive across all EU states as a natural legal experiment. Surprisingly, the higher protection offered by the new law did not improve the liquidity of the markets that had the lower initial protection levels. In fact, the initial differences in liquidity where reinforced after the harmonization of market abuse laws. This proves that investors only value the level of protection offered by the law on books if it goes hand in hand with a higher quality of enforcement.

This new research is deeply grounded in the L&E tradition but it also makes use of two characteristics typical of the law and finance literature. First, the policy orientation, meaning an intention to offer guidance for better regulation of companies. Second, the use of detailed comparative knowledge. Nevertheless, comparative knowledge is no longer used as an end in itself. Rather, it is used as a tool to establish causality. This focus on comparative knowledge is in fact the clear distinction between this new comparative law and economics study of company law and mainstream L&E studies, which are more theoretically abstract or more narrowly focused on US law. The difference with the previous approaches is in the focus on very specific rules and regulations rather than on broad characteristics of legal families, indexes or general differences across regimes or maximalist approaches. This focus on specific rules is necessary because policy recommendations must be workable and based on solid causal empirical evidence. State of the art methodologies allow the researchers to establish these causal relationships only in the context of specific norms and intermediate outcomes. This is not to say that broader views are not necessary or inspirational. But, because of the methodological problems with cross country panel data, we know that most implications from broad analysis cannot be empirically proved and therefore are not good guides for policy makers.

Finally, this new line of research can also be exemplified with recent papers on the topic of minority expropriation. The starting point is the empirical evidence that concentrated ownership produces expropriation irrespectively of legal origin[66] and the proposition that CG solutions necessary to address this problem are different from measures designed for companies with dispersed ownership.[67] Form this starting point different authors go on to determine the impact of very specific rules on the extent of expropriation establishing the causal link using comparative data across jurisdictions.

Consider two examples of the type of rules that are discussed. Bebchuck and Hamdani (2017)[68] analyse the particularities of the nomination of independent directors in controlled firms. The traditional solution of having the shareholders nominate independents clearly is better suited to non-controlled companies. But for controlled companies, the conflict of interest arises between controlling shareholders and market investors. In this context, if the controlling shareholder has the power to nominate the independents, little monitoring can be expected from the independents in the board. Bebchuck and Hamdani study the different monitoring outcomes that can be expected across different jurisdictions depending on the power of the

[64] John Armour, Bernard S. Black, Brian R. Cheffins & Richard C. Nolan, *Private Enforcement of Corporate Law: An Empirical Comparison of the UK and US*, 6 J. EMP. LEGAL STUD. 687 (2009).
[65] Hans B. Christensen, Luzi Hail & Christian Leuz, *Capital-Market Effects of Securities Regulation: Prior Conditions, Implementation, and Enforcement*, 29(11) REV. FIN. STUD. 2885 (2016).

[66] Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537 (2004).
[67] Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263 (2009).
[68] Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271 (2017).

controller to nominate, re-elect and remove directors. As a second example, consider the analysis of pre-emptive rights as a measure to limit minority expropriation presented by Fried and Spamann (2019).[69] This issue, of little relevance for US law, has been and continues to be a cornerstone in minority protection across European jurisdictions. Fried and Spamann offer a L&E analysis of pre-emptive rules that identifies their limitations rules when there is asymmetric information and also emphasizes how its effectiveness can change across jurisdictions depending on the finer details such as the requirement of simple majority or the introduction of a MOM rule to approve transactions.

6. Conclusions

In this paper, we develop an overview of the comparative corporate law literature arguing that comparative analysis is a natural bridge between the seemingly irreconcilable approaches of the dogmatic analysis and the L&E analysis of company law.

We have seen how comparative corporate law was initially developed to overcome the limitations of the scope and the methodology of traditional and dogmatic domestic analyses of corporate law. Over time, it gained more and more weight relative to that tradition as it embraced new questions and new methodologies. Now-a-days comparative knowledge has become a key tool for the most sophisticated L&E analysis and particularly to guide policy decisions. And this is true whether we consider the more intuitive, less formal type of L&E analysis or whether we consider the formal/mathematical/empirical version of L&E studies. This is the L&E of comparative company law.

[69] Jesse M. Fried & Holger Spamann, *Cheap-Stock Tunneling Around Preemptive Rights* (ECGI – Law Working Paper No. 408, 2018), https://ssrn.com/abstract=3185860.

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