Doing what doesn't come naturally. On the distinctiveness of comparative legal research
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I. ‘DOING’ LAW IS IMMUTABLY COMPARATIVE . . .

Comparison is inseparably connected with doing research in the humanities and social sciences. Nearly any claim we make as lawyers, as well as every distinction we draw, will implicitly or explicitly be set against another situation. A legal arrangement can only be qualified as satisfactory or good because there is another arrangement by which it can be measured; such an arrangement is never good in and of itself. When judges are looking for principles to help decide an unprecedented or unregulated situation, they tend to rely on analogical reasoning, i.e., they apply a rule for a comparable situation, be it a real or hypothetical one, to the situation at hand. Also, ordering and classifying cases in a specific field or legal domain — call it the pursuit of coherence — is very much a comparative activity: it is an exercise which can only be done because there are a number of cases that can be situated against each other. Comparing, in other words, is a fundamental principle of legal research; it even provides the inevitable and inescapable frame of reference for scientific activity. ‘Thinking

1 For the purposes of this contribution, I use the phrases ‘comparative law’ and ‘comparative legal research’ as synonyms.

2 This contribution grew out of a comment I made as a designated discussant at the Tilburg colloquium of which this book is the product. The accompanying discursive style is maintained here. Dick Broeren of Tilburg Law School was most helpful in preparing the text. I benefited from the comments of the participants and from John Griffiths (University of Groningen).

3 On this, see for example B Bix, ‘Law as an Autonomous Discipline’ in P Cane and M Tushnet (eds), The Oxford Handbook of Legal Studies (Oxford, Oxford University Press, 2003) 975–87 and Ch McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 Law Quarterly Review 623–50. The discussion on whether legal scholarship can and should only be considered part of what are usually called the ‘humanities’ or also of the social sciences goes, in my opinion, to the heart of what the Tilburg colloquium was about.

without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research.  

It could therefore be argued that there really is nothing very special about doing comparative law. To be sure, legal research has some distinctive features, but comparativeness is not one of them; that quality is part and parcel of all research.

From this it follows (almost naturally, it would seem) that it makes perfect sense to assert, as John Bell does in his contribution to this volume, that:

[In] major respects, comparative law is an instance of the more general form of legal research [which is according to Bell hermeneutic, interpretive and institutional, MA]. The way in which it attempts to reconstruct both the foreign and the researcher’s own legal systems is similar to general legal research on either of those systems.  

II. . . ‘AND YET IT MOVES!’

If all of this is true, why deliberate on the question of whether there is something special about doing comparative legal research? Why not simply refer to what doing legal research amounts to, and then add a few words of warning on the choice of countries, the dangers of translation, and so on?

The reason for this is of course that the foregoing cannot fully account for what happens in what is generally termed ‘comparative law’. As I will explain there is indeed something special or distinctive about doing this kind of research – and Bell is very much aware of it. For why else would the phrase ‘comparative law’ proudly carry the term ‘comparative’ in its banner? If it does not want to be dismissed as a pleonasm – ‘Thinking about the law is by definition comparative, silly!’ – research of this kind should at the very least pose some specific challenges other than the problems lawyers and legal researchers routinely face.

One of the main reasons why there is something special or distinctive about doing comparative legal research, something that calls for a specific approach and specific methods, is that legal comparatists must, among other things, immerse themselves in a foreign and therefore strange legal system. Such an ‘involved’ activity does not come naturally because legal comparatists have to deal with one or more legal systems whose ‘language’ (metaphorically understood) they do not speak, ie systems with different institutions and unexpressed codes, their

5 GE Swanson, ‘Frameworks for Comparative Research’ in I Vallier (ed), Comparative Methods in Sociology (Berkeley, University of California Press, 1971) 141. Also quoted by Palmer ‘From Lerotholi to Lando’ (2005) 261. The anthropologist Clifford Geertz formulated the same view somewhat more subtly: ‘Santayana’s famous dictum that one compares only when one is unable to get to the heart of the matter seems to me . . . the precise reverse of the truth; it is through comparison, and of incomparables, that whatever heart we can actually get to is to be reached.’ C Geertz, Local Knowledge (New York, Basic Books, 1983) 233. More direct is J Hall, Comparative Law and Social Theory (Baton Rouge, Louisiana State University Press, 1963) 9: ‘[T]o be sapiens is to be a comparatist.’

6 See J Bell’s contribution in chapter nine, ‘Legal Research and the Distinctiveness of Comparative Law’.

own histories, ideologies and self-images, systems they have not normally been trained, educated or disciplined in, and with which they are therefore not naturally or intimately connected. This process of trying to understand foreign legal systems (or some of their elements) with an eye to subsequent comparison, manifests particular problems because it goes far beyond mere fact-finding and the regular (ie national) way of legal interpretation, where lawyers engage the just mentioned social context as an almost natural given when determining the meaning of the law. The problems the law addresses and the solutions which it intends to provide are very much connected to the socio-cultural environment that gave rise to them. This environment should be actively and consciously engaged for meaningful comparison to become possible.

Thus anyone, for example, who wants to know what the Belgian rules on euthanasia mean, will find that this is to a large degree determined by the institutional structure and legal culture in which they are embedded. A good example of this is the debate about the alleged existence of a right to euthanasia. Article 14 of the Belgian Euthanasia Act clearly provides that a medical doctor may refuse to perform euthanasia on grounds of conscience. This suggests that there is no such thing as a right to euthanasia in the sense that a patient can demand euthanasia from a specific doctor. Yet opinions differ among lawyers and doctors on the meaning of this provision.

Proponents of an enforceable right to euthanasia argue that because the Belgian Euthanasia Act explicitly requires that euthanasia be performed by a doctor, it must be considered ‘normal medical behaviour’. Since it is ‘normal medical behaviour’, doctors are under an obligation to perform it if the extensive conditions listed in the Belgian Euthanasia Act are met.

Opponents of such a right to euthanasia, on the other hand, rely heavily on a reconstruction of the legal context in which the Euthanasia Act should be placed, situating the supposedly applicable legal norms in the wider context of health care legislation. From a legal point of view, the opinion that euthanasia is ‘normal medical behaviour’ cannot be correct, so the opponents argue, because under Belgian law medical behaviour that for non-doctors would constitute a criminal act can only be legally justified under the Royal Decree concerning the practice of health care professionals. This Decree provides, among other things, that a doctor has an obligation to treat a patient when there is a medical indication for the treatment – subject to the consent of the patient, of course. This legal justification (and the doctor’s connected obligation) does not, however, cover behaviour of physicians for which there is, apart from exceptions, no medical indication, such as abortion, removal of an organ for transplantation, non-therapeutic medical

8 As was among many other things the case in J Griffiths, H Weyers and M Adams, Euthanasia and Law in Europe (Oxford, Hart Publishing, 2008).
research and euthanasia. In other words, so these opponents argue, to justify these medical activities explicit legalisation is required. It is the Euthanasia Act itself that creates a specific legal justification for euthanasia, but not a right to it. To the opponents the distinction between medically-indicated treatment and medical behaviour that is legal but not medically indicated clearly implies that euthanasia cannot be considered ‘normal medical behaviour’.\(^{11}\) As a result there cannot be an enforceable right to it.

Differences of opinion continue to date, but the key to understanding this matter lies in the political and societal context, and ultimately revolves around the mainly ideological question of whether Catholic hospitals may prohibit doctors in their employ from performing euthanasia: if euthanasia is not an enforceable right, they might do so. The answer to this question is not merely academic, since about 80 per cent of the hospitals in Flanders (the region that accounts for more than half of Belgium in terms of number of inhabitants and geographical size) are associated with Catholic organisations. Awareness of this political and societal context is the natural habitat of Belgian lawyers – indeed, of the population at large – when interpreting the legal norms; they will have no difficulty in recognising and understanding the interests at stake. Nevertheless, in legal literature the matter is translated into (some would say ‘disguised as’) an almost exclusively legal dispute. That single fact makes the issue even more difficult for outsiders to understand. Not only do they have to grasp all the political and societal interests concerned, merely identifying them or even establishing that these are relevant issues at all is extremely difficult for them.

What especially complicates matters for a comparatist is that in the Netherlands the idea that euthanasia cannot be considered a form of ‘normal medical behaviour’ has been discussed in similar terms (and there is general consensus that it is not), but for quite a different purpose. The Dutch discussion has focussed not on the matter of the existence of an enforceable right (for which there is little support) but rather on the question whether a criminal control regime for euthanasia is necessary and wise, or whether control could be left, at least in first instance, to the profession itself (as is largely the case for ‘normal medical behaviour’). Here the discussion has not been so much ideologically inspired (at any rate far less so than in Belgium) as it has been policy driven: what form of control can best meet the need for safety and public confidence, once euthanasia is made legal?\(^{12}\) So what we see is two countries using similar legal arguments in a seemingly similar debate but with quite different implications and a completely different cultural and political drive behind the debates.

As this example shows, of the many challenges that confront the comparatist the question as to the meaning of foreign legal ‘facts’ – how should they be interpreted and understood, or their existence explained? – is prominent. How

\(^{11}\) The distinction was accepted by the Belgian Council of State in its advice on the pending euthanasia Bill. *Parliamentary Proceedings, Senate* (1999–2000) 2-244/21.

can one uncover, in a foreign legal system, the ‘truth’ behind the legal rules and other legally relevant facts that first catch the eye of a researcher? In a sense, this is easier if the legal facts concerned are exotic and plainly require further attention. It is especially when they seem familiar or even self-evident that the comparative researcher can be led to draw ‘obvious’ but in fact superficial or misleading conclusions as far as similarities and differences are concerned.

In any case, trying to answer questions of this type raises very specific problems regarding the qualification of features of foreign law in a way not normally required for doing research within the boundaries of the home legal system. It is this situation that begs the question how to do research in such a way that reliable knowledge of the legal or legally relevant phenomena of one or more foreign legal systems can be acquired. In short, how can researchers engage in and understand the self-evidencies of another legal system so that meaningful comparison becomes possible, i.e., comparison which can identify real similarities and differences, relate them to each other, and explain them? It is this problematic, and the methodological problems it poses, which I believe justifies calling comparative law a discipline in its own right. That is not to say that these are the only problems of doing comparative legal research, but I believe that it is this feature that makes comparative law particularly specific or distinctive.

The foregoing implies that these problems of doing comparative legal research are particularly manifest when comparatists attempt to focus on the stage of information gathering and juxtaposing the findings (presenting the materials found), i.e., the stage which must precede the process of explicit comparison. Here, comparatists should try to ‘simply’ gather as much information as possible about a foreign legal system and present it as best they can in the way it is understood by those internal to the legal system, i.e., those who are working from within and who experience the rules and institutions as daily realities and as reasons for action.

This preliminary phase of comparative legal research of course sets the stage for the subsequent explicit comparison. To avoid misunderstandings, I am not implying that this information gathering and reconstruction phase is utterly devoid of comparison. To the contrary, even ‘just’ studying a foreign legal system will unavoidably, albeit implicitly and maybe even unconsciously, cause jurists to refer to and reflect on their native legal system. Comparison

13 It is, by the way, also not the false dichotomy of ‘objective description/juxtaposition’ versus ‘subjective analysis’ I am talking about. Far from it, indeed, because every description is always a personal interpretation as well.

14 This point of view is in line with how some comparatists perceive their own activities, judging at least from how they talk and write about them. An example of this is the debate on the use of foreign law by national judges, an activity which might also be called Auslandrechtswissenschaft since it usually is not geared towards explicit comparison as such. Even so, the literature on this topic often speaks of judges doing comparative law. For example, T Koopmans, ‘Comparative Law and the Courts’ (1996) 45 International and Comparative Law Quarterly 545–56; G Canivet, M Andenas and D Fairgrieve (eds), Comparative Law Before the Courts (London, British Institute of International and Comparative Law, 2004); B Markesinis and J Fedtke, ‘The Judge as Comparatist’ (2005) 80 Tulane Law Review 11–168, and A Barak, The Judge in a Democracy (Princeton, Princeton University Press, 2006) 198–204. Yet, it
in this sense may also steer the choices the comparatist makes when attempting to describe the foreign object of research. This is due to the fact that when this interference occurs, it inevitably does so with the ‘home’ system in mind as a frame of reference. It is this very propensity which can be highly hazardous because it may all too easily result in the other legal system being described or analysed within a framework which is characteristic of the researcher’s own legal system (ethnocentrism!). The lack of acknowledgement and consideration of this fact often brings on misguided, misleading or erroneous conclusions, steering the research into the direction of the search for similarities rather than similarities and differences.¹⁵ Be this as it may, the point here is that while explicit comparison is evidently not without potential pitfalls, it is the informational phase where methodological problems come to the fore in a prominent manner.¹⁶

At this point, it would not be incorrect to say that I do not necessarily disagree with Bell in the sense that comparative legal research can indeed be seen as an instance of general legal research; it is institutional and interpretative too. However, these qualities do not make it less distinctive, because, as I have argued, the juxtaposition and interpretation of foreign material calls for making explicit and trying to understand the institutional and socio-cultural context of the law. The trouble of being able to do this is always very prominent and demanding in comparative legal research.

To do justice to John Bell – whom I have, admittedly, quoted selectively above – I must refer to him again here. After having concluded that comparative law is an instance of general legal research, he also writes:

[to]here are peculiar challenges in comparative legal research. The first is to understand the full institutional setting out of which the legal issues and solutions arise: the organisation of the legal system, its legal concepts, presuppositions and mental map of the relationships between legal institutions, its legal procedures, and the broader social and cultural context and assumptions. In one’s own system, much of this is tacit knowledge. In relation to a foreign system, the researcher needs to acquire more explicit knowledge, and also to make the tacit knowledge of his or her own system more explicit. Second, the hermeneutic approach requires the comparatist to adopt the internal point of view of the systems compared, but not necessarily to believe either of them is right, fair or just. Third, the comparatist is not reporting an internal point of view that comes as clearly packaged, even if he or she makes use of questionnaires.

is also true that the judge who looks abroad for techniques to address a home legal question will surely, and at the very least implicitly, reflect in a comparative manner on what he or she finds.

¹⁵ A mistake Zweigert’s and Kötz’s version of so-called functionalist comparative legal research has many times been accused of, and rightly so. See for this critique most prominently G Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26 Harvard International Law Journal 411–55. To be sure, the problem seems to me not to be functionalism as such. For important nuances of functionalism, see J Husa, ‘Farewell to Functionalism or Methodological Tolerance?’ (2003) 67 Rabels Zeitschrift für ausländisches und internationales Privatrecht 419–47, and also Husa’s contribution to this volume. Also J De Coninck, ‘The Functional Method of Comparative Law: Quo Vadis?’ (2010) 74 Rabels Zeitschrift für ausländisches und internationales Privatrecht 318 50.

addressed to national lawyers. The comparatist has to interpret the systems to enable a dialogue between them. Each law is something that has to be reconstructed in order to provide intelligible results to people from another legal system. Finally, there is presentation in language and ideas that will be understood by lawyers in the home legal system. At each stage the potential for going wrong is great, not least in the institutional and interpretative features. However, that is why there is strength in the rigour of comparative research.17

Here it becomes fully clear that one of the main challenges that thrust itself at the comparatist is indeed to make explicit the broader social and cultural context and assumptions of a foreign legal system or legal concepts, as they are understood by the people working from within the system. It is exactly this endeavour that doesn’t come naturally to comparative lawyers.

III. EXPLANATORY COMPARATIVE LAW AND INTERDISCIPLINARITY

Samuel, in his contribution to this volume, claims that the traditional interpretative method that lawyers use is hardly conducive to progress in the legal domain.

Does a modern doctrinal lawyer, epistemologically speaking, actually know more about law as a discipline than say Ulpian, Bartolus, Domat or Savigny knew? In the natural sciences, Newton, despite his enormous contribution to knowledge, would, if brought back to life today, not be able to recognise the models now employed by his successors. A Post-Glossator, in contrast, would have few problems in understanding a law lecture in a common law faculty and Domat would probably have little difficulty with the French agrégation.18

What is the added value of using the traditional approach in comparative law, as Samuel identifies it? The answer to him is clear: ‘[I]f domestic methods as governed by the [traditional] authority paradigm are to be the tools of comparative law, it will result in nothing more than superficial scientific reductionism.’19 ‘This [authority paradigm] is one where the primary scheme of intelligibility is hermeneutics operating in respect of a text (legislation, court judgment) whose authority is never put into question.’20 More specifically, Samuel seems to find fault with the type of research that focuses exclusively on legal concepts and on issues of legal coherence and consistency (internal logic), ie legal research that filters out the inevitable normative and other dimensions that are reflected in the law and legal choices. Samuel is scathing about the chances of scientific progress when mere interpretative doctrinal research methods are used, and ipso facto about the

17 See J Bell’s contribution in chapter nine, ‘Legal Research and the Distinctiveness of Comparative Law’.
18 See G Samuel’s contribution in chapter 10, ‘Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?’.  
19 ibid.  
20 ibid.
shallowness of comparative legal analysis based on these methods. Ultimately, Samuel’s contribution is an ardent plea for interdisciplinarity and external perspectives in legal research, comparative or otherwise.

In a way, law has never been a fully autonomous discipline and legal research is ever interdisciplinary. The regulation of social order through the interpretation of a variety of authoritative texts has always, albeit often unconsciously, gone through the sluice of the techniques and content of other disciplines. Legal interpretation will thus bring into play certain of the lawyers’ conceptions and ideologies of social reality, and comparative law, as I argued in the previous section, asks for heightening these conceptions and ideologies. Neither Bell nor Samuel denies this, although the latter holds a plea for a type of research that builds explicitly on the external perspectives of the social sciences, an approach which contrasts with the more interpretative approaches Bell stresses. The reason for doing so is that Samuel wants to come up with a type of research that increases knowledge about law as a social reality. For Samuel interdisciplinarity is an aim in itself because it can better enhance our knowledge of social reality, at least when compared to doctrinal legal research. Comparative law for him is a kind of social laboratory.

I tend to agree with Samuel about the shallowness of rigid rule-centred (comparative) legal research, ie research that only describes and systematises legal rules of different legal systems vis-à-vis each other (but really, how much of that still exists?). The problem with this type of comparative legal research is that it contributes little to progress or innovation. (Which, of course, is not to say that it is easy to do this type of traditional research; it, too, can be intellectually demanding.) As an academic discipline comparative law should, I believe, also strive for progress and innovation. External legal perspectives have a role to play in this, but not necessarily so. Let me expand on this a little more.

To me, all scientific work begins with a question, either of a ‘what’/‘how’ (facts) or of a ‘why’ (theory) sort. Research questions always go before research methods and without specifying the question no sensible discussion of any specific methodology is possible. I believe that trying to find a methodology for doing comparative legal research (or trying to decide what counts as similarities or differences, or trying to overcome a gap between goals and methods, and so forth) in the abstract, not connected to some kind of concrete question is like chasing a will-o’-the-wisp. This is also the main reason why it is impossible to speak of the methodology of comparative law: trying to find a methodology for something that is not a question – such as ‘comparative law’ – is not of any service. Comparative law is a collection of methods that may be helpful in seeking answers to a variety of questions about law.

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21 KM Sullivan, ‘Interdisciplinarity’ (2002) 100 Michigan Law Review 1220–21. Sullivan adds that this does not make law less of a discipline in its own right. ‘If you have any doubt that legal method is distinctive, try reading a non-lawyer’s attempt to state the holding of a judicial opinion’ (p 1219).
Given all this, I would for the purposes of comparative legal research, rather than differentiate between external and internal perspectives on the law, make a distinction between what I would call *descriptive* comparative law and *explanatory* comparative law. The former typically asks traditional legal questions: what is the law in at least two jurisdictions and how do they compare? The applicable legal norms in the different jurisdictions have to be identified and described with an eye to their subsequent systematisation and the identification of similarities and differences. All of this can be done with typical or traditional legal research means. The explanatory type of comparative law, however, aims not only to identify and describe legal differences and similarities between different jurisdictions and relate them to each other, but also wants to account for or explain them. It is here that progress can be made. Despite their differences, I think it is in this latter approach that Bell and Samuel find each other because both seem to hold a plea for this type of comparative legal research, which readily calls for an interdisciplinary approach.

If all this is indeed true, to me the most material question would be: how much or what type of interdisciplinarity or externality is needed for answering explanatory questions about the law? In his contribution, however, Samuel pays scant attention to this. What does it mean to include interdisciplinary and/or external perspectives? From a practical point of view, this issue is relevant because depending on the mode or intensity of interdisciplinarity or externality, lawyers may experience fewer or more difficulties while doing research.

The answer will of course depend on the aim of the research: the aforementioned explanations can be given from many different perspectives (economic, sociological, historical, etc.). Even so, some general observations can be made. Van Klink and Taekema have made an interesting and helpful classification of interdisciplinary legal research into four types, based on the extensiveness of the input from the other, non-legal discipline. In the *first type* of interdisciplinary research they identify, the non-legal discipline is used merely heuristically.

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22 The distinction is merely analytic, since knowledge collected in the context of research is in a way *always* descriptive. Yet depending on the research question, descriptive information can be obtained which can also be used to *explain* situations. On this B van Fraassen, *The Scientific Image* (Oxford, Clarendon Press, 1980) 157. Thus, the question ‘How did bigger States arise after 1775?’ will yield descriptive knowledge that does not easily serve the purpose of explanation. The question, ‘How can it be explained that bigger States arose after 1775?’ will more likely generate a description that can also function as an explanatory theory. I am grateful to my late colleague H Oost for referring me to Van Fraassen and discussing the example with me.

23 cf D Nelken, ‘Comparative Law and Comparative Legal Studies’ in E Örüçü and D Nelken (eds), *Comparative Law: A Handbook* (Oxford, Hart Publishing, 2007) 16: ‘To go from classification to theoretical understanding and explanation requires greater engagement with other disciplines. Comparative law cannot do its work alone. But it might be more exact to say that it never did. What is at stake . . . is the possible replacement or supplementation of legal, historical and philosophical scholarship with concepts and methods taken, for example, from economics, political science, sociology, or anthropology.’

and possibly arbitrarily. The perspective of the research as such remains firmly within the legal framework, and the other discipline has no argumentative force of its own and is not necessary to answer the research question. It is, moreover, the legal discipline itself that provides the problem definition and research question, but in answering it the researcher also looks at other disciplines for material. In the *second type* of interdisciplinary legal research, the other discipline is not just used additionally but also constructively. Again, it is the legal researcher that provides for the problem definition and the research question – the legal perspective is dominant – but in order to be able to answer the research question, the input of another discipline is necessary. If, for example, a researcher wants to know why in jurisdiction X constitutional review by the judiciary is introduced and designed in a specific way, and why it is not introduced in jurisdiction Y, he or she has to rely on knowledge generated in political science. The *third type* is coined ‘multidisciplinary research’. Two or more disciplines, including the legal, are being used as equally important perspectives. As a result, the legal perspective no longer prevails, and each of the disciplines provides a definition of the central problem to be researched. The core of such research is a study in which the transfer of knowledge is not one-way but at least two-way: each of the disciplines involved is both source and target domain. This type of interdisciplinarity asks for a fuller command of the disciplines being drawn on. In the research project on the regulation of euthanasia, for example, one of the things we wanted to find out was the social working\textsuperscript{25} of the rules on euthanasia, and we analysed this comparatively with an eye to trying to explain this. This contribution is not the place to go into the theoretical difficulties of a simplistic instrumentalist approach to the ‘effectiveness’ of law, one that treats legal rules as direct (potential) causes of behaviour.\textsuperscript{26} However, looking at the place that euthanasia law plays in the social practice of euthanasia does afford a wonderful opportunity to consider how complex the relationship between rules and behaviour can be. From the perspective of the idea of the social working of legal rules, it is obvious that it is not enough to look at what the rules are and how they came to be that way; it is also essential to take stock of what happens to them on the ‘shop floor’ of everyday life. How, when and why do people use the rules? Do the rules make a difference in social interaction? If so, what is it? To what can this difference be attributed and how does this come about? Comparison here provides an essential angle to test hypotheses and theories. To be able to answer questions like this, we, for example, had to rely heavily (though not exclusively) on empirical social-scientific research done by others and funded by the Dutch and Belgian government and research authorities. In other words, we did not have to do the original empirical work ourselves, although being competent – as, importantly,


\textsuperscript{26} See AL Stinchcombe, *Constructing Social Theories* (New York, Harcourt, Brace & World, 1968) for an unusually careful analysis and discussion of the circumstances in which such an approach may be appropriate.
one of us was – in the ins and outs of this type of research used was necessary to be able to judge and use the available materials. Two disciplines, including the legal, were thus being used as equally important perspectives; the legal perspective no longer dominated the scene, and the social-scientific analysis necessarily built on the more legally oriented part of the research project. The fourth type of interdisciplinarity Van Klink and Taekema identify fully integrates two or more research perspectives. It starts with an integrated problem definition and research question and ends with conclusions that are justified for all the disciplines that are being used in the research project.

Of course, each of these approaches has its challenges, opportunities and limitations. The more extensive the input from the non-legal discipline, the more potential problems there will be for the legal scholar; not just in integrating the different disciplines (the problems will be multiplied), but also in terms of ability: the researcher has to be knowledgeable in more than one discipline, and possibly even able and versatile in doing non-legal research himself. But in any case, in order to be able to account for or explain the similarities and differences between legal systems, an interdisciplinary approach might well be indispensable. And depending on the aim of the research an external approach might even be used. On pragmatic grounds I would argue in favour of moderate types of interdisciplinarity or externality, one of them being to prevent the (comparative) legal researcher from becoming a ‘jack of all trades (and a master of none)’. This is not a plea for excluding strong interdisciplinary or external perspectives altogether, but realistically that might well require group work.

To sum up, I believe it to be required for explanatory purposes to deliberately step out of the legal domain, but not necessarily to such an extent that the comparatist has to become fully versatile in another academic discipline. If the aim of comparative legal scholarship is to explain, then even measured forms of interdisciplinarity can generate information that helps answering explanatory questions.

IV. TO CONCLUDE

Engaging in comparative law can be considered distinctive because comparative legal researchers have to be able to reconstruct the meaning of legal rules that are foreign to them. That capacity does not come naturally, at least not in the same way as doing research in the context of the home legal system does; trying to reconstruct the meaning of foreign law calls for actively engaging its socio-cultural

27 Moreover, we have to realise that Van Klink’s and Taekema’s division of interdisciplinary perspectives is an analytic one; there seem to be other ‘in between’ positions or classification that are feasible. As a dynamic and analytic tool their division nevertheless provides a helpful yardstick to qualify and classify research projects, including comparative ones. See for another classification eg M Siems, ‘The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert’ (2009) 7 Journal of Commonwealth Law and Legal Education 5–17.
context and, depending on the aim of the research at hand, for a lesser or greater degree of interdisciplinarity and/or external perspectives. What to me seems to be particularly material in the context of comparative legal research, is the type of information that will be needed in 2011 and beyond, as well as the type of questions we should ask to gather this information. In my view, comparative law should, more than it has done before, self-consciously and explicitly encompass explanatory angles to supplement the customary perspective lawyers are used to. This does not mean that comparative legal researchers need to be fully versatile in other disciplines besides their own, at least not in terms of being able to do the type of research that is typical of these other disciplines. But they must at least be able to build on these other disciplines. In this way, in an increasingly interdependent era which makes ever greater demands on our ability to explain and understand the (legal) world with which we are confronted, comparative law can be of tangible benefit. As a result, comparative law might be even more ‘distinctive’. 