Prolegomena to the method and culture of comparative law

Adams, M.; Heirbaut, D.

Published in:
The method and the culture of comparative law

Publication date:
2014

Document Version
Peer reviewed version

Prolegomena to the Method and Culture of Comparative Law

Maurice Adams and Dirk Heirbaut

I. Setting the Scene

In May 2014, Mark Van Hoecke will retire from his Research Chair of Legal Theory and Comparative Law at Ghent University in Belgium. Those who know him will realize that a purely celebratory *Festschrift*, followed by the traditional practice of some festivity for handing it over, would be out of the question; for Mark Van Hoecke, legal science is about content, not form. So, to 'mark' the occasion, we have chosen another formula: a publication on a theme that has occupied his thinking over the last two decades or so, and which is of ever growing importance to academic lawyers all over the world.

Throughout his academic career, including the years as a university administrator, Mark Van Hoecke has been interested in many legally relevant topics, but legal theory, comparative law, and method and methodology of law stand out.[1] This volume brings together several authors working at the crossroads of these themes: the method(ology) and culture of comparative law.

Mark Van Hoecke has, from the start of his career in the 1970s, been a scholar with a truly international outlook. It is nevertheless fair to say that this volume continues an intellectual voyage that began somewhat later with a publication (with Francois Ost) that advocated, already in 1990 (!), a truly European legal education.[2] Comparative law was, of course, part and parcel of that. Legal education had to change from a merely local approach to a more integrated one, ie one that could make more sense of legal diversity and that put perspective - possibly subversive perspective[3] - onto national law, or which called this national law into question.[4] This was a plea for a comparative law, broadly defined. Today,

---

[1] As a university administrator he has successively and successfully been Dean and Rector Magnificus of the (then) Catholic University of Brussels, infusing into the curriculum of its Law School international and transboundary elements. He has also, significantly, established with Francois Ost the *European Academy of Legal Theory*, which offers a Master Degree in Legal Theory (which from 2014/15 onwards will be hosted at the Goethe-University in Frankfurt/Main), and with which Mark is still much involved. See: www.legaltheory.net

[2] F Ost and M Van Hoecke, 'Naar een Europese rechtsopleiding' (1989-90) *Rechtskundig Weekblad* 1001. The article was a real early bird, and has been translated in Danish ('Pa vej mod en faelles euopaeisk jurisdisk uddannelse' (1991) *Ugeskrift for Retsvaesen* 161), German ('Für eine europäische Juristenausbildung' (1990) *Juristenzeitung* 911), French ('Pour une formation juridique européenne' (1990) *Journal des Tribunaux* 105), and Italian ('Per una formazione giuridica europea' (1990) *Rivista Trimestrale di Diritto Publico* 629).

[3] G Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 *The American Journal of Comparative Law* 683; H Muir Watt, 'La fonction subversive du droit comparé' (2000) 52 *Revue internationale de droit comparé* 503.

[4] Interesting later proposals and ideas can be found in C Valcke, 'Global Law Teaching' (2004) 54 *Journal of Legal Education* 160; M Reimann, 'From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum' (2004) 22 *Penn State International Law Review* 397; J Husa, 'Turning the Curriculum Upside Down' (2009) 10 *German Law Journal* 913, and S Chesterman, 'The Evolution of Legal Education: Internationalization, Transnationalization, Globalization' (2009) 10 *German Law Journal* 877-888. See also the *Global Law Issue* of the *Tilburg Law Review* (Volume 17/2, 2012 (edited by S Musa and E de Volder, with quite some attention for the educational dimension of globalization).

we are still struggling to bring such an approach into the regular law school curriculum.

The just mentioned short, but seminal piece was followed up with several articles and books, written or (co-)edited, on comparative law and legal research, some of which have become classics in this domain. To mention but a few: 'Hohfeld and Comparative Law'[5], 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law'[6]; 'Western and Non-Western Legal Cultures'[7]; *The Harmonization of European Private Law*[8], *Law as Communication*[9]; 'Legal Orders between Autonomy and Intertwinement'[10]; *Epistemology and Methodology of Comparative Law*[11]; 'Deep Level Comparative Law'[12]; 'European Legal Cultures in a Context of Globalisation'[13]; 'Islamic Jurisprudence and Western Legal History'[14]; *Methodologies of Legal Research. Which Kind of Research for What Kind of Discipline*[15]; 'Family Law Transfers from Europe to Africa: Lessons for the Methodology of Comparative Legal Research'[16]; 'Do "Legal Systems" Exist? The Concept of Law and Comparative Law'[17]; 'Legal Culture and Legal Transplants'[18] and 'Methodology of Comparative Legal Research'[19].

Many others of Mark's publications could have been listed[20], but the ones mentioned seem to be the most directly relevant to the theme of this volume. The ability to contribute to this theme lay foremost in our selection of contributors. What counted was not just friendship to the colleague we wanted to honor (albeit that too was certainly applicable to quite a number of the contributors), but especially amity to the academic endeavor Mark stood for and continues to stand for, thus contributing to the further development of the academic debate we all hold dear.

II. Method and Culture: Approach and Object

In each of the aforementioned publications, Mark Van Hoecke's professional interest and

[5] In (1996) 9 *International Journal for the Semiotics of Law* 185.
[6] In (1998) 47 *International and Comparative Law Quarterly* 495 (with M. Warrington).
[7] In W Krawietz and C Varga (eds), *On Different Legal Cultures, Premodern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* (Berlin, Duncker & Humblot, Sondernheft *Rechtstheorie*, 2002) 197.
[8] Oxford, Hart Publishing, 2000 (edited volume, with F Ost).
[9] Oxford, Hart Publishing, 2002.
[10] In KH Ladeur (ed), *Public Governance in the Age of Globalization* (Farnham, Ashgate, 2004) 177.
[11] Oxford, Hart Publishing, 2004 (edited volume).
[12] In M Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Oxford, Hart Publishing 2004) 165.
[13] In T Gizbert-Studnicki and J Stelmach (ed), *Law and Legal Cultures in the 21st Century (Plenary Lectures for the 23rd IVR World Congress, Diversity and Unity : Plenary Lectures*) (Warszawa, Wolters Kluwer, 2007) 81.
[14] In JS Nielsen and L Christoffersen (eds), *Shari'a as Discourse: Legal Traditions and the Encounter with Europe* (Farnham, Ashgate, 2010) 45.
[15] Oxford, Hart Publishing, 2011 (edited volume).
[16] In J Gillespie and P Nicholson (eds), *Law and Development and the Global Discourses of Legal Transfers* (Cambridge, Cambridge University Press, 2012) 279.
[17] In S Donlan and L Heckendorn (eds), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Farnham, Ashgate, 2014), forthcoming.
[18] Forthcoming.
[19] Forthcoming.
[20] Up to date his publication list comprises some 170 publications. See the bibliography at the website of Ghent University: https://biblio.ugent.be/person/802000325893.

research focus are combined: he always writes about comparative law from the angle of method and methodology. This observation invites for some elaboration about the title of this volume: *The Method and Culture of Comparative Law*.

The word 'culture' in the title might denote at least two meanings here: it might, on the one hand, refer to one of the natural *objects* of comparison, ie legal cultures, where the identifying elements of such cultures range from 'facts about institutions' to 'various forms of behavior', or 'more nebulous aspects of ideas, values, aspirations and mentalities.'[21] On the other hand, it might also refer to what researching this implies or entails in terms of the research *approach* – ie the method and methodology[22] - when dealing with legal cultures, whether they are national or transnational, which, at least at first instance, are strange to the researcher. In other words, the title of this volume also refers to the culture of actually *doing* comparative legal research, something that is also prevalent in most if not all of Van Hoecke's work in comparative law.

These two meanings of the word culture cannot, in this context, be neatly separated. The reason for this is that an 'involved' activity like doing comparative law, precisely because it deals significantly with legal cultures, does not come naturally to a researcher. Comparative lawyers have to find a way with, and convey information about, legal cultures or traditions whose 'language' (metaphorically understood) they do not necessarily speak; cultures and traditions with specific institutions and unexpressed codes; with their own history, ideology or ideologies and self-image(s); cultures the researcher has not normally been trained, educated or disciplined in and with which (s)he is therefore not naturally or intimately connected.[23] The process of trying to understand this 'otherness'[24] (or some of its elements), and the task to convey its intricacies to the reader, demands a particular - 'deep level'[25] - research approach that goes far beyond mere fact-finding and the regular (ie purely national) self-evident way of interpreting and understanding the law. Therefore, comparative law *explicitly* calls for using a research methodology that makes it possible to engage in the cultural context of the topic or issue that is being studied, and do so in a way that is comprehensible to the reader.[26] Seen from this point of view, the phrases 'Method' and 'Culture' in the title of this volume do, even in their multiple meanings, refer to each other.

---

[21] D Nelken, 'Defining and Using the Concept of Legal Culture' in E Örücü and D Nelken (ed), *Comparative Law. A Handbook* (Oxford, Hart Publishing, 2006) 113 (including an excellent treatment of the methodological problems and questions that come with employing a concept, in the context of comparative legal research, like legal culture). Highly critical about the concept of legal culture is R Cotterrell, 'Comparatists and Sociology' in P Legrand and R Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003) 149; R Cotterrell, 'The Concept of Legal Culture' in D Nelken (ed) *Comparing Legal Cultures* (Aldershot, Dartmouth, 1997) 33, and R Cotterrell, *Law, Culture and Society. Legal Ideas in the Mirror of Social Theory* (Aldershot, Ashgate, 2006).

[22] A word of caution is in place here because, as Hage notes in his contribution to this volume, the terms 'method' and 'methodology', although conceptually separable, are many times conflated. On this, see also the next section of this chapter.

[23] In a similar vein, also Ost in this volume.

[24] See too Millns in her contribution to this volume.

[25] Van Hoecke, 'Deep Level Comparative Law'.

[26] On this J Bell, 'Legal Research and the Distinctiveness of Comparative Law' in M Van Hoecke (ed), *Methodologies of Legal Research* 155, and M de S-O-l'E Lasser, 'The Question of Understanding' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions (*Cambridge, Cambridge University Press, 2004) 197.

III. Three Main Topics

In line with this general theme, the contributions to this volume might be categorized into: a) method and methodology, b) globalization (or Europeanization, internationalization), and c) context and interdisciplinarity. However, even if many of the chapters have a focus on one of these topics or categories, most, if not all, also consist of important elements evident in the other categories. Therefore, we have chosen not to make this categorization explicitly visible in the *Table of Contents*; this could detract the reader from valuable and interesting aspects of chapters that do not at first sight fall into the category that seems most relevant for their purpose. Nonetheless, it makes sense here to dwell a bit on each of these categories (and its chapters mentioned in this introduction), thereby cross-referencing to the other less obvious, yet relevant ones.

A Method and Methodology

Academic lawyers today face one of the greatest challenges ever. For centuries they have continued to work in the same way. If a medieval law professor were to be revived and to teach and do research in a contemporary law school, he would probably not find it that hard to adapt.[27] True, instead of Latin, today's law professors speak in a vernacular, they moreover use computers and projectors, and more than half of their audiences are young women. However, all of these changes have not affected what is by many still perceived to be the essence of legal education and research, ie to work in line with what Geoffrey Samuel in his contribution to this volume calls the authority paradigm. This is the idea that practitioners and academics working within the legal discipline are governed ultimately not by enquiry – the results of which in the end may force those working within the paradigm to abandon their theories in the face of empirical reality – but by textual authority as expressed in statutes and court decisions (rules); texts, moreover, whose authority as such is never put into question. A revived Bartolus would possibly have some catching up to do, but he most probably could function adequately with the method he had already mastered: textual interpretation.

The situation is completely different in other sciences. One cannot imagine a medieval medical doctor to be as well prepared for our times. For that the disciplines that make up the medical and natural sciences have seen too many paradigm shifts. This is also true of the much younger social sciences. In any case, this has led to a situation of, save some exceptions, profound methodological unawareness among academic lawyers. As a result, both method and methodology of law are still in their infancy.

Samuel, in his chapter, makes clear that a comparative lawyer may encounter many questions, which are at heart epistemological (what is meant by comparison? what is meant by 'law'? what is it to have *knowledge* of law?), making epistemology and comparative methodology conjoined twins. In exploring their link, Samuel enunciates some ideas that are relevant for any comparatist. Legal epistemology, just like comparative law, is concerned with similarity and difference and it operates in a context with different 'knowledges' of law, rooted in the work of theorists and in the ideas of practicing lawyers. To understand them we

[27] See in a similar vein also Samuel in this volume.

have to understand their past and to really comprehend them we have to learn from the epistemology of other sciences, which can boast a considerable literature. Doing this is quite a challenge, but Samuel also shows a glimpse of what we could achieve, ie an 'escape, from the arid past of comparative law, from legal positivism and, above all, from the authority paradigm.' Ultimately, Samuel's contribution might be understood as a plea for interdisciplinarity and external perspectives in legal research. Comparative law, if it is prepared to leave the authority paradigm and its accompanying focus on rules, can indeed be of particular value here, especially if it is to serve as a tool that brings to the fore epistemological issues concerning the technique of comparison, the description of law (ie what is meant by it) and the 'objectivity' of facts.[28]

This invites for an interesting observation, because what is also at play here, so it seems to us, is that the comparatist's understanding of what law is, is not simply one question among others within a comparative method, but relates to a set of background assumptions and conceptions that inform nearly everything comparative lawyers do.[29] If it is indeed true that theories of law play such an important (albeit many times implicit) role in comparative projects - ie that views on what law is, means and does, and on what is interesting about what law is, means and does, inform methodological choices on all levels of the comparative exercise - then it is possible that at least some of the prevalent unease about comparative method may have to be traced back to unease or disagreement about these underlying theories.[30]

Hage makes a sharp distinction between method and methodology of comparative law and legal research. The former referring to the actual way(s) of conducting a more or less specific research project (and also to the standards by which the relevance of arguments found in specific research can be evaluated), whilst the other is mainly of an epistemological nature. He asks two questions: is comparative law a method for legal research as such, and does it have a proper method of its own? The first can be answered positively, as Hage shows (eg by using examples in the realm of harmonizing European private law): comparative law can be of benefit for evaluating potential or actual rules of law, or explaining its content. In answering the second question, Hage formulates what may well be seen as the common creed of the authors in this volume, and which we readily confirm: there is no royal road to comparative law!

Indeed, trying to find *a* method for comparative law in the abstract, not connected to some kind of concrete question is like chasing a will-o'-the-wisp: trying to find a method 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 an

[28] Van Hoecke, 'Deep Level Comparative Law'

[29] In many a chapter in this volume this point is being made implicitly or explicitly. See, eg, Brownsword, Donlan, Samuel. On this, too, see M Adams and JA Bomhoff, 'Comparing Law: Practice and Theory', in M Adams and JA Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge, Cambridge University Press, 2012) 8.

[30] A conclusion that in turn should temper hopes that the key to sounder comparative law methodology can be found exclusively in developing better understandings of the logical operations involved in the 'act of comparing' (*cf* M Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 *American Journal of Comparative Law* 690).

almost endless variety of questions about law (broadly defined).[31] Thus, diversity in method is not a curse, but a blessing, because it allows a researcher to choose the methods that fit their data, research questions and personal inclinations.

Turning away, for now, from the most fundamental theoretical questions, a second set of questions is in need of an answer: what actually is method in comparative law? How to actually conduct comparative legal research? Jaakko Husa makes clear that as the goal(s) of the comparative lawyer is (are) mostly different from that of other scientists, so, too, is his method different from the method of other sciences. Husa identifies a selection of basic research-designs for comparison, which have to be made before the research starts or during it. Comparative law is from a methodological point of view mainly heuristic, Husa concludes. But as a result of the constant and intertwining choices either of a technical or a theoretical nature, the specific methods (or combination thereof) a researcher will use, can differ. Reading Husa's article will help many fellow travelers to see more clearly the paths opening up for them and the need of enunciating their choices, which constantly evolve and will be revised as the investigation unfolds.[32]

Comparison has many faces and this book tries to present some of them. In this, comparison is like translation, which is also the subject of François Ost's contribution. The 'penetration of the external by the internal' (European and public international law, private international law, bilingual legal systems), means that no lawyer can escape from comparison and translation. Translation (and comparison) would also occur, and to a certain extent is inevitable, in the situation of a completely isolated, pristine legal system, as jurists would still look to the past, and would also look at one branch of law from the perspective of another. Jurists would therefore benefit from the practice of translation theory, most of all because translation, like comparison, is not limited. It includes more than just words in one language being placed in, or translated, into another[33], it is also translating different legal cultures. The difficulty that translation thus brings, implies ethical responsibility: it is always accompanied by the task of recognition of the difference of the 'other', and of the wish to undertake with him an interaction on the basis of the reciprocal admission of the limits of each other's own language.

Maurice Adams elaborates on this topic, and also upon a point explicitly made by Valcke and Grellette (see below): attaching labels to unfamiliar notions (including elements of foreign legal cultures) can do as much harm as good. They may point the researcher in the right direction, but just as much make him stray from the right path. The researcher is in any case not neutral when he or she applies a label by which it becomes possible to actually compare at least two legal cultures. Confronted with the challenge of comparing legal cultures, one can decide to come up with a completely independent signifier (a 'language without a national home'), or one can apply more broadly known existing labels (such as ones from Roman or English law). A pragmatist would possibly plead for the last alternative, as it

[31] Also M Adams and J Griffiths, 'Against 'Comparative Method': Explaining Similarities and Differences' in M Adams and JA Bomhoff (ed), *Practice and Theory in Comparative Law* 279.

[32] About this last point, see also Adams, and Valcke and Grellette in this volume.

[33] But see also Millns in this volume, who advises that one should avoid literal translation as much as possible in the context of comparative law, because it might result in a poor understanding of the other legal culture.

would make his or her work more accessible than using a narrative that is neutral to any legal system or culture.

Whatever the choice may be, any translation involves a kind of treason towards the original concept. At worst, it leads to deception of the reader and even a displacement of the original concept that one wants to compare, especially if its legal culture does not have a strong enough voice of its own. Adams proposes a way out of this dilemma. Admitting that complete neutrality is a holy grail, which one can quest for, but never find, he defends controlled comparison: one can use the terminology of an existing system, but a comparatist should constantly work in a 'spirit of conceptual tentativeness'. The researcher can start with familiar existing terms, but should be aware of their limitations and constantly revise them in light of the evolving research and growing insight.[34] As the researcher grows into the subject, the terms of comparison should be changed for ones that fit better the research project at hand.[35]

Ideas of functionality and of functional equivalence (still) play a prominent role in contemporary comparative scholarship. This may come as something of a surprise given the fact that critical scholarship has long taken issue with views of comparative law as the comparison of 'solutions' to 'problems' that are supposedly clearly identifiable and more or less identical across systems.[36] But it seems that, to some degree at least, while critical *theoretical* writing on comparative law often consists of broad-based attacks on functionalist premises – especially in the form voiced by Zweigert and Kötz[37] – many *practical* efforts at comparison are instead concerned with incrementally refining and supplementing functionalist ideas, and with navigating creatively functionalism's acknowledged limitations.

Given the central place functionalism occupies in comparative law, Catherine Valcke and Matthew Grellette have put it under their microscope. Their analysis of the propositions

[34] A similar conclusion (ie comparison is never neutral, but the tendency to measure jurisdictions by one's own familiar standards can be somewhat mitigated) is reached by Millns in her contribution.

[35] According to Karl Popper, *The Logic of Scientific Discovery* (London, Hutchison, 1972) 31-2, the scientific process is such that the starting point may be constantly revisited as the investigation unfolds. See also Valcke and Grellette in this volume.

[36] In the social sciences, 'functionalism' generally refers (whether or not explicitly and consciously) to the idea that 'the *consequences* of some behavior or social arrangement are essential elements of the *causes* of that behavior' (see AL Stinchcombe, *Constructing Social Theories* (New York, Harcourt, Brace & World, 1968) 80, for a still careful analysis and discussion of the circumstances in which a functional explanation may be appropriate).

[37] K Zweigert and H Kötz, *An Introduction to Comparative Law* (Oxford, Oxford University Press, 1998) 34ff. Glendon et al not only state that the principle of functionality in comparative law is now recognized to have wide applicability, but also that it is 'probably comparative law's principal gift to twentieth century legal science'. MA Glendon, MW Gordon and PG Carozza, *Comparative Legal Traditions (in a Nutshell)* (St Paul, West Group, 1999) 9. The first full-scale criticism of this sort of functionalism in comparative law is G Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411. See, too: P Legrand, *Fragments on Law-as-Culture* (Deventer, Tjeenk Willink, 1999), and R Hyland, 'Comparative Law' in D Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory* (Cambridge, Blackwell, 1996) 184. For a critical overview article, see M Graziadei, 'The Functionalist Heritage', in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2004) 100, and R Michaels, 'The Functional Method of Comparative Law', in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006), 381. For important qualifications, see J Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 419, and J De Coninck, 'The Functional Method of Comparative Law: *Quo Vadis*?' (2010) 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 318.

behind the functionalism of Zweigert and Kötz should be obligatory literature for any functionalist researcher. The same holds for their analysis of the critics of Zweigert and Kötz's functionalism. Valcke and Grellette are also critics, though of the best kind. They show the weak points, but not to demolish the comparative legal building. Instead, they propose an amended model, a kind of functionality 2.0 as it were, thus bringing the work of both Zweigert and Kötz and the latters' critics to a synthesis. First of all, for identifying materials for a comparison, legal labels can be misleading to the extreme. Using legal functions for identification ensures that the researcher does not compare quite different phenomena. Function is, according to them, also useful for analyzing the materials selected, as a functionalist comparison aiming at the actual operation of the law would give more visibility to legal formants, which have hitherto been less visible. Putting two systems side by side would inevitably lead to some previously obscured formants coming out of the woodwork.

Like thinking about method and methodology of comparative law, thinking about the method and methodology of comparative legal history is still in its infancy.[38] Some comparative legal historians, like Matt Dyson, have focused on what they can learn from comparative law.[39] Martin Löhnig, in his contribution, goes the other way, since he moves beyond historical comparative law that compares legal concepts. Instead, he argues for attention to the social processes of transformation behind these concepts. Even traditional national legal history is now no longer possible without comparison. Comparison can help to fill in gaps if not enough historical sources are available. It can help to go from an isolated empirical result to a more general theory, or to test a theory based on limited research, eg for one country. In short, the methodology of comparative legal history can learn from comparative law, but it also has something to offer in return, which might well explain the relatively high number of contributions from comparative law's sister discipline in this book.

B. Globalization

H. Patrick Glenn has aptly and repeatedly observed that for a long time comparative law and comparative legal scholarship have generally been marked by constructivist purposes: as a means for state building and local law reform.[40] In this sense, comparative law lent support to the idea of law being an exclusively national phenomenon: an instrument in the nationalization of the law. Looking at the region where the editors of this volume come from, ie continental Europe, up until the nineteenth century, when the nation state was in formation

[38] See, eg, the special 2013 issue of *Rechtskultur* on methodology, or A Musson and Ch Stebbings, *Making Legal History: Approaches and Methodologies* (Cambridge, Cambridge University Press, 2012).

[39] See, eg, M Dyson, 'Divide and Conquer: Using Legal Domains in Comparative Legal Studies', in G Helleringer and K Purnhagen, *Towards a European legal culture* (forthcoming).

[40] See, albeit in passing, Glenn's contribution to this volume. But see also HP Glenn, 'The Nationalist Heritage', in P Legrand and R Munday (eds), *Comparative Legal Studies Traditions and Transitions* (Cambridge, Cambridge University Press, 2003) 76-99 and HP Glenn, 'A Transnational Concept of Law' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 839-862. In what has arguably for a long time been the most influential handbook of the discipline, this constructivist approach is very much promoted: K Zweigert and H Kötz, *Introduction to Comparative Law* (Oxford, Oxford University Press, 1998): 'In its *applied* version, comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances. (p. 11; similar statements can be found throughout the introductory and methodological chapters of the book). See also M Adams, 'Comparative Law in a Globalizing World: Three Challenges' (2013) 17 *Tilburg Law Review* 263 (on which this section is partly based).

for some time already[41], there were quite some legal sources available which interacted or competed with each other for prominence: eg canon law, local statutes, custom, case law, Roman law (the overarching and unifying source), and, yes, the Bible (the latter the most ´binding´ of all!). It was more specifically the ideal of codification - prominently entering the legal scene in the wake of the French revolution[42] - which demanded to put an end to this situation: law was identified exclusively with *written* and *national* law.[43] National codified law was on the one hand to be the exclusive source of law, identifiable through a local *Grundnorm* or *rule of recognition*[44], and, on the other hand, was to contain the solution for about every situation conceivable (law's adequacy).[45] As a result, legislative positivism became the ideal, and systemic closeness the result. So, although paradoxically, the content of national law was the result of the mining of comparative sources[46], extra-national inspiration was not really a necessity anymore once the funnel of codification had been applied to it. National law was thought to be self-supporting, and the legal system was predominantly understood as an entity in which '*demos*', law creation and a specifically delineated area were intimately bound.[47] Since the nineteenth century it was: *La Nation, la loi*, (and possibly) *le roi* - in that order. As a result, comparative law 'withered' in the margin, both in terms of the law school's curriculum and in terms of research[48]; an intellectual pastime if ever there was one.

In recent years comparative law has witnessed a revival, especially as a result of globalization, which Twining loosely describes as the developments and interactions which are making the world more interdependent with respect to ecology, economy,

[41] The rise of the nation state is of course a complex, dialectic development. Usually one is referred to the Peace of Westphalia (1648) as the starting point, although the concept of the state as such has developed from the thirteenth century onwards. For nuance and details we refer to M van Creveld, *The Rise and Decline of the State* (Cambridge, Cambridge University Press, 1999) and H Spruyt, *The Sovereign State and its Competitors: an Analysis of Systems Change* (Princeton, Princeton University Press, 1994). On the term state and its use, see A Guéry, 'The State. The Tool of Common Good' in P Nora (ed), *Rethinking France. Les lieux de mémoire, I*, (Chicago, University of Chicago Press, 2001) 1.

[42] Just as the concept of the nation state, the concept of codification has older roots than the French Revolution and Napoleon (with whom it is generally associated). For nuance and details, see, inter alia, J Vanderlinden, *Le concept de code en Europe occidental* (Brussels, ULB Editions de l'Institut de sociologie, 1967); F Wieacker, *A History of Private Law in Europe with Particular Reference to Germany* (Oxford, Clarendon Press, 1995), and P van den Berg, *The Politics of European Codification. A History of the Unification of Law in France, Prussia, the Austrian Monarchy and the Netherlands* (Groningen, Europa Law Publishing) 2006.

[43] It even suffered, as Gény said, from a 'fétichisme de la loi écrite codifiée.' F. Gény *Méthode d'interprétation et sources en droit privé positif: essai critique*, I (Paris, Librairie Génerale de Droit et de Jurisprudence, 1919) 70.

[44] These terms of course come from H Kelsen and HLA Hart respectively. On the neglect of Hart of comparative legal scholarship see the (posthumously published) monograph by AWB Simpson, *Reflections on 'The Concept of Law'*, Oxford: Oxford University Press, 2011, 157ff. The universalistic aspirations of his concept of law did not seem to really invite Hart for comparative observations. It could and should have, though.

[45] However, the reality fell far from the ideal of a code without gaps excluding all other legal sources (see, eg, G Weiss, 'The Enchantment of Codification in the Common Law World' (2000) 25 *Yale Journal of International Law*, 11-13), as codifiers could not foresee everything and in some cases did not even want to try to do so.

[46] See HP Glenn, 'The Nationalist Heritage' 84.

[47] Rousseau's thinking has been of great influence here. See J Miller, *Rousseau. Dreamer of Democracy* (New Haven, Yale University Press, 1984). A similar development as just described with regard to the process of codification in continental Europe could be witnessed in the common law through the evolution of the doctrine of *stare decisis*, which was only firmly rooted in the English legal system by the end of the nineteenth century. On this J Evans, 'Change in the Doctrine of Precedent during the Nineteenth Century' in L Goldstein (ed), *Precedent in Law* (Oxford, Oxford University Press, 1987) 35-72.

[48] A comparative approach in any case sometimes seems to be more a matter of being *en vogue*, instead of really bringing useful insights to the issue being researched. MC Ponthoreau, 'Le droit comparé en question(s). Entre pragmatisme et outil épistémologique' (2005) 57 *Revue internationale de droit compare* 9.

communications, language, politics, etc.[49] Comparative lawyers now also have to adapt their analytical and educational toolkits to other than constructivist purposes, and also to the realities of a largely fragmented and fluid regulatory landscape.[50] Quite some challenges stand out, especially because a lot, if not most, of comparative law is still typically concerned with traditional legal questions: what is the law in at least two national jurisdictions and how do they compare in terms of similarities and differences?

To avoid misunderstandings: the issue for comparative law is not so much whether or not the nation state will sooner or later fade away. We do not think it will, at least not in the foreseeable future. Let it also be clear that depending on the topic to be dealt with, it is to a greater or lesser extent still possible and sensible to engage in traditional multi-jurisdictional state-centred comparative law. So, too, will the long established purposes and aims of comparative law continue to be relevant for many years to come (including its constructivist purposes).[51] Globalization is nevertheless challenging state-centred approaches to comparative law; globalization is a very complex and hybrid phenomenon, and law is no longer fully parochial, but usually also not fully cosmopolitan.[52] But whatever it may be, in a globalizing world, comparative law, in order to avoid becoming too restricted in scope and becoming insufficient for new challenges[53], should also self-consciously and explicitly encompass a dynamic approach to supplement its customary and more static perspective, to be able to answer questions such as: how do the societal changes that occur as a result of globalization impact on the configuration of legal traditions or culture; how do these adapt or maintain their distinctiveness; how is law used in relation to other legal cultures and traditions; how do new legal configurations become assimilated, rejected or refashioned in a host legal system, etc.?[54]

---

[49] W. Twining, *Globalisation and Legal Theory* (Cambridge, Cambridge University Press, 2000) 4.

[50] P Zumbansen, 'Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance', in M Adams and JA Bomhoff (eds), *Practice and Theory in Comparative Law* 189-190.

[51] The European unification process is for example very much built on the traditional constructivist ambitions of comparative law. For a concise overview of the aims of comparative law, see G Dannemann, 'Comparative Law: Study of Similarities or Differences?' in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 416.

[52] As Twining puts it: 'it includes empires, spheres of influence, alliances, coalitions, religious diasporas, networks, trade routes, migration flows, and social movements. It also includes sub-worlds such as the common law world, the Arab world, the Islamic world and Christendom, as well as special groupings of power such as the G7, the G8, NATO, OPEC, the European Union, the Commonwealth, multi-national corporations, crime syndicates, cartels, social movements, and non-governmental organisations and networks. All of these cut across any simple vertical hierarchy and overlap and interact with each other in complex ways. These complexities are reflected in the diversity of forms of normative and legal ordering.' W Twining, 'Globalisation and Comparative Law' in E Örücü and D Nelken (ed), *Comparative Law. A Handbook* 70.

[53] See also NHD Foster, '*The Journal of Comparative Law:* A New Scholarly Resource' (2006) 1 *Journal of Comparative Law* 4.

[54] H Muir Watt, 'Globalization and Comparative Law', in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* 589 (with further references). See, too, Demleitner, who states that in its 'classic' form comparative law is restricted in scope and insufficient for the needs of the present situation, consisting mainly of an introduction to legal systems focusing on the common law/civil law divide, and the domestic systems of a few Western jurisdictions, such as France and Germany, together with comparisons between certain areas of private law (particularly obligations) in those systems.' N Demleitner, 'Combating Legal Ethnocentrism: Comparative Law Sets Boundaries' (1999) 31 *Arizona State Law Journal* 737. This is what Twining calls the 'Country and Western' tradition of comparative law, contrasting especially between the 'parent' civil and common law systems, and mostly dealing with private law. W Twining, *Globalisation and Legal Theory* 185ff. Similarly, Pihlajamäki, in this volume, argues for less focus by legal historians on the

These questions are prominently present in this volume, in the chapter by comparative legal historian Heikki Pihlajamäki for example.[55] Comparison of law can be synchronic, but it can indeed just as well be diachronic. The latter is traditionally the hunting ground of the legal historian. Legal historians used to be *national* legal historians, but they are increasingly becoming *comparative* legal historians.[56] Quite a few problems that confront comparative law, do also impact comparative legal history. In the latter's case, an additional dimension can make the comparison more complicated. A legal historian can compare past legal cultures in the context of a common era, or he or she can work completely diachronically with a comparison of legal cultures in different eras. Paradoxically enough, this may actually make the comparison less complex if the situation at one place at one time corresponds better with that at another place at another time than with a contemporary. This lesson is one which many comparative lawyers have already, albeit unconsciously, taken to heart, as they delve into the goldmine of legal history.

Pihlajamäki argues that national legal history is out. Leading legal historians see their discipline as European, and the next enlargement is already visible with pleas for a global legal history.[57] No one can deny the attraction of a global legal history, but one may wonder whether the time has yet come for it. Legal historians are still trying to get a grip on regional and national legal histories[58] and European legal history is still quite young as a discipline. Pihlajamäki pleads for a European legal history, but does not want to get rid of national (or regional) legal history. The latter is still valuable, but the researcher should be aware of the international context, since legal institutions move over borders. Moreover, even if no interaction with the outside world would exist, identifying similarities and differences between legal systems would still be helpful in finding explanations. In short, a national framework is not anathema, as long as the researcher places it within a European context. Pihlajamäki strongly suggests that we should not stop there and that we should also try to look for an even broader context, the global setting of European legal history, ie one that is not confined to nineteenth-century nationalism and positivism, but one that compares larger units to other larger units. Pihlajamäki stresses that comparative consciousness is for a legal historian necessary, because it helps the researcher to test hypotheses and prove or falsify them. He or she also needs to think comparatively at least as much in order to find out how legal influences, transfer, translations or transplants move from one legal order to another. Without a consciousness of legal transfers, one is, according to Pihlajamäki, completely at a

---

standard stories of European legal history (especially with a focus on Germany). An excellent and full-scale analysis of the relation between globalization and (national) law has recently been published by H Lindahl, *Fault Lines of Globalization. Legal Order and the Politics of A-Legality* (Oxford, Oxford University Press, 2013).

[55] See also the chapter by Löhnig.

[56] Pihlajamäki being a case in point, as he is the articles editor of a new review *Comparative Legal History* (the name says it all), published by Hart.

[57] See T Duve, 'Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive' (2012) 20 Rechtsgeschichte, 17. See also T Duve, 'European Legal History - Global Perspectives. Working Paper for the Colloquium European Normativity - Global Historical Perspectives', *Max Planck Institute for European Legal History Research Paper Series*, 2013-6 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292666.

[58] See, eg, the *Oxford history of the laws of England*. A majority of its volumes is still awaiting publication. General surveys of regional legal history, like K. Kroeschell, *Recht unde Unrecht der Sassen. Rechtsgeschichte Niedersachsens* (Göttingen, Vandenhoeck & Ruprecht, 2005) are still rare.

loss in attempting to explain changes in a particular legal system. This is not only true for peripheral legal systems, but for larger ones as well.

In his chapter, Matthias Siems is precisely picking up this challenge, and builds on the legal transplants debate in order to revive it in a new direction. To date, this debate has been framed, on the one hand, in the language of the pessimists, who claim that legal transplants are at least disruptive to the incoming legal and socio-cultural system, and maybe even impossible. On the other hand, optimists acknowledge and support lawmakers in copying foreign rules, often admitting that in not all instances legal transplants work as smoothly as in the origin country. Siems analyzes a third type of reaction, namely, that legal transplants work even 'better' in the transplant country than in the original one. Borrowing from statistics, he calls these 'overfitting legal transplants'. The success depends on the specifics of the case, and Siems can be credited for identifying some of these specifics (illustrated by examples). Let it be clear though, that the quest for overfitting legal transplants is not about finding quick 'silver bullets', but about carefully understanding why domestic and foreign laws differ and how a subsequent legal transplant may affect an existing legal system.

In his chapter on *Ius commune*, Alain Wijffels, just like Pihlajamäki a legal historian and comparative lawyer, addresses comparative lawyers by making clear in a few pages what it was and what it was not. We refer the reader to his article for clarification on that issue, but would like to emphasize here that the *ius commune* existed in a context of pluralism and, thus, of some comparison. In his chapter, he emphasizes that the Roman-canonistic *ius commune* tradition provided a theoretical and methodological pre-requirement for handling legal complexity, which included a diversity of both particular and common laws, including creating a comparative basis for those different systems; and also that, as a matrix and practical instrument of public governance developed in the Middle Ages, it retained a degree of the common foundations of public law and especially fair governance in diverging political systems during early-modern times. These are some lessons for the contemporary comparative lawyer, for example for those that are working in the context (or at the service of) of European unification: the history of *ius commune* indeed shows that basic values of a legal culture can be transmitted to an era where that legal culture has undergone a wholesale metamorphosis, under the condition that they are carried and defended by jurists who remain at the center of public governance: in the courts, but also at the heart of government.

Sean Donlan, in his chapter, battles the use of concepts that fail to catch the normative reality within which legal norms function, and which has always been much broader than law proper. Thus, the Western idea of law as 'state law' is itself such a concept. By turning it into the standard, the researcher relegates non-Western or non-standard forms of normativity to a place in the shadows. However well intended his intentions may be, the researcher thus becomes guilty of conceptual colonization. Donlan stresses that state legality is actually just one type of legality, and legality itself only one form of normativity. There are no great 'Chinese Walls' between them, and 'there is no single legal norm', Donlan states, that can be encapsulated 'in a coherent and neatly hierarchical system'; the reality is too complex for that. Therefore, we need the language of hybridity to catch it. The comparative lawyer should not stick to a shallow concept of law, but go for capturing 'a thicker image of normative legal hybridity'. To better illustrate this, Donlan delves into his own research on Louisiana and the complex hybrid there. Adding William Ewald's 'law in minds' to the traditional distinction of

law in the books and law in action[59], he also emphasizes the importance of research into the normative and legal hybridity of the practice and the consciousness of norms. Ultimately, normative and legal hybridity is part of a wider context, as the generation, application and interpretation of norms also receives external influences of politics, economics and ideologies.

C. Context and Interdisciplinarity

In line with all of this, comparative law requires a renewed research agenda, fitting, among other things, the type of questions identified in the previous paragraph (B). According to Örücü, the community of comparative lawyers has responded to the criticisms of the 'old order', which focused heavily on legal doctrine and black letter law, in four strands of research: comparative law and legal philosophy (comparative jurisprudence); comparative law and legal history (comparative legal history); comparative law and culture (comparative legal cultures); and comparative law and economics.[60]

In this volume, the second and third strands Örücü identifies are prominent. It is these approaches that indeed might be able to signal the deeper cultural context of law and legal - or legally relevant - institutions. As Donlan writes in his chapter, 'the insistence on context significantly problematizes the concept of closed and discrete systems of rules.' A contextual approach however calls for resort to other disciplines than the law. The question then arises as to how much context is needed for answering the type of questions that were identified in the previous paragraph (B). Or to put it differently: are we looking for 'law in context' or for 'context in law'?[61] Is it about using context to explain the form or content of law, or is it about revealing what the context itself is?

The answer depends, we would say, on what one wants to know, on the aim(s) of the comparative research project in other words. In this sense context as such can refer to many different things: how a legal rule relates to other legal rules, or to its social, political, economic, religious etc. environment? But however vague it is or can be, there is nonetheless something more to say about this: it is possible to make a general and broad division between projects that implement a turn towards jurisprudence and those that look rather towards the social sciences or the study of culture. The first cherishes the merits of an internal perspective for comparison, designed to develop an understanding of foreign legal systems on their own terms.[62] In many of its manifestations, this turn towards jurisprudence, or the elaboration of an

---

[59] W Ewald, 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?' (1994-1995) 143 *University of Pennsylvania Law Review* 1889.

[60] E Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (June) *Electronic Journal of Comparative Law* at section 1.2 (http://www.ejcl.org/41/art41-1.html). See, too, NHD Foster, 'The Journal of Comparative Law' 5.

[61] D Nelken, 'Comparative Law and Comparative Legal Studies' in E Örücü and D Nelken (ed), *Comparative Law. A Handbook* 21.

[62] An approach used in the work of Mitchell Lasser and Catherine Valcke. See especially M. de S-O-l'E Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparancy and Legitimacy* (Oxford, Oxford University Press 2004); See, eg, C Valcke, 'The Different Rhetorics of the French and English Law of Contractual Interpretation' in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Oxford, Hart Publishing, 2008), 77ff; C Valcke, 'Convergence *and* Divergence among English, French, and German Conceptions of Contract' (2008) 16 *European Review of Private Law* 29, and C Valcke, 'Comparative History and the Internal View of French, German, and English Private Law' (2006) 19 *Canadian Journal of Law & Jurisprudence* 133. See also JC Reitz, 'How to Do Comparative Law' (1998) 46 *American Journal of Comparative Law*, who somewhat exaggeratingly states that 'the primary task for which comparative lawyers are

internal perspective on foreign law, relies heavily on insights drawn from hermeneutics and the humanities more generally.[63]

However, it is when a shift is made, from efforts at understanding foreign law and legal institutions, to attempts at measuring or explaining the emergence, development or effect of foreign law (an external perspective), that an even greater engagement with other disciplines becomes necessary. What is at stake here, as David Nelken has pointed out, is the possible replacement or supplementation of legal, historical and philosophical scholarship with concepts and more empirical methods taken from the social sciences.[64] And although contributions that clearly fall into this last category are not available in this volume, it is worthwhile to make the reader aware of what challenges this poses. To be sure, each of the aforementioned approaches has its challenges, opportunities and limitations. But the more extensive the input from the non-legal discipline (or the non-hermeneutic disciplines), 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 (being able to build on it), and possibly even able and versatile in doing non-legal research himself.[65]

H. Patrick Glenn, in his chapter, indeed analyzes the phenomenon and development of comparative law as joint efforts with other sciences (philosophy of law, sociology and anthropology of law, law and economics). The recurrent theme is that comparison is always present, though its level and intensity may vary. The variation is itself actually a manifestation of a notion underlying all these comparisons: the objective pursued invariably determines the method and depth of the comparison. Consequently, there is, as Glenn notes too, no 'one size fits all method' of comparative law. This does not mean that 'anything goes', only that researchers can choose and tailor their methods of research to fit very different objectives. In fact, this has also allowed comparative law itself to constantly evolve with the times. In the early modern era, before the term comparative law even existed, it served to construct national legal systems.[66] That task achieved, comparative law set itself to the taxonomy of new national legal systems. Once again, this was only a transient stage, as national legal systems moved from autonomy to interdependence. Glenn's overview illustrates Samuel's thesis that in order to know (comparative) law we have to know what it has been. To understand the changes of comparative law today, we have to also look at the changes

---

prepared by their training and experience is to compare law from the interior point of view (…).' (628). See, too, M Adams and JA Bomhoff, 'Comparing Law: Practice and Theory' 9ff.

[63] In making clear what this amounts to, the work of HLA Hart is of course still of prime inspiration (which itself again builds on P Winch, *The Idea of a Social Science* (1958)). See especially HLA Hart, *The Concept of Law (*Oxford, Oxford University Press, 1961) 97ff. One of the more constructive interpretations of this perspective is to be found in DN MacCormick's *Legal Reasoning and Legal Theory* (Oxford, Oxford University Press, 1978) 275ff, and his *H.L.A. Hart (L*ondon, Edward Arnold, 1980) 36ff. See in the context of comparative law too: V Grosswald Curran, 'Cultural Immersion. Differences and Categories in US Comparative Law' (1998) 46 *American Journal of Comparative Law* 43.

[64] D Nelken, 'Comparative Law and Comparative Legal Studies' 16.

[65] Realistically that might well require group work (see also Pihlajamäki in this volume, and D Heirbaut, 'A tale of two legal histories', in D Michalsen (ed), *Reading Past Legal Texts* (Oslo, Unipax, 2006) 91). For a helpful overview of dimensions of interdisciplinary legal research, see BMJ van Klink and HS Taekema, 'On the Border. Limits and Possibilities of Interdisciplinary Research', in BMJ van Klink and HS Taekema (eds), *Law and Method. Interdisciplinary Research into Law* (Tübingen, Mohr Siebeck, 2011) 7.

[66] A theme which is also prevalent in the chapter by Wijffels.

comparative law underwent in the past.

As context is a crucial element of any meaningful comparative exercise, Roger Brownsword analyzes it through the angle of what he calls the regulatory environment. In a way, he is following up on Donlan's plea for normative and legal hybridity. Brownsword makes us aware that, just as is the case with those who contest a state-centric concept of law, there is a debate going on amongst those specialized in regulation about how to understand 'law'. A regulator can use a normative register, eg by forbidding something, but he also has a non-normative register at his disposal. Using technological instruments, a regulator can ensure that the 'regulatees' no longer have the possibility of acting in an undesired way (think, for example, of an alcohol ignition interlock in a car; it eliminates the problem of drunk driving because the drunk can no longer drive). The wider moral issues this confronts us with are worthy of more research. For the comparative lawyer, the main lesson is that he should look at the regulatory environment in all its normative and non-normative manifestations and the place of a particular law within it.

As we noticed, 'the' context does not exist, or rather, it is impossible for the researcher to completely grasp the context in all of its riches and complexity. He can only try to get a handle on one or more of its aspects from the angle he chooses. Brownsword's perspective promises to be highly rewarding for today's societies. Others are valuable too. There is no single exclusive method for comparative law and neither is there a single, exclusive angle for grasping the complex realities of a legal system for the purposes of comparison, as the latter varies itself all the time. For John Bell, the institutional context is the soil in which legal rules are rooted, and which can particularly explain differences between legal systems. A researcher wanting to understand and not just describe legal rules has to study the institutions that formulate, interpret and apply them. Bell pays particular attention to the organisations, procedures, personnel and ethos that play a part in the operation of the law. As legal institutions are not free from the influence and pressure of non-legal, eg political institutions, the latter also belongs to the institutional context. Bell broadens the context to be studied considerably. However, he also offers a way to narrow it down again. Institutions, their actors and their relationships change over time. Consequently, the institutional context is one of evolution. This means that the professions behind them, in particular the legal professions, have to be a prime subject of research.

Context and institutions are also central to Jørn Øyrehagen Sunde's ideas on legal culture. Legal culture has an intellectual element, ie ideas and expectations shaping law, which is made operational by its institutional element (institutions for conflict settlement and norm production). Making a legal-cultural analysis is no longer obligatory only for scholars, as the internationalization that law brings has given law a new dimension and every practicing lawyer has to cope with it. Øyrehagen Sunde illustrates this with examples from his homeland Norway. If Norwegian lawyers have to deal with law produced outside their borders, they need, not just a knowledge of the outside legal cultural context, but also of their own because sometimes different countries have to apply law in the same way. This means that every country has to de- and re-code it so that this will happen. Thus, paradoxically, even when the goal is the element of the inside legal cultural context, a thorough understanding of the latter in comparison to the outside element is still necessary. Norway is not a member of the European Union, yet the dominating outsider in many cases is the European Union. To

Øyrehagen Sunde, its influence is even more pervasive than that of the European Court on Human Rights.

If, in Norwegian law, the EU has become a major player, it is hard to overestimate its impact on the legal systems of the EU member states. Currency crises, austerity measures and a political backlash against the EU, as described by Joxerramon Bengoetxea, have led to some soul searching. In Europe, the time of the old nation-state as the great forum has passed. Europeans need to find a new identity, and the challenge is to accommodate the pluralism of regional identities within Europe and remain open to the cosmopolitan legal order. Bengoetxea does not yet present us with an answer as to what exactly the comparative lawyer may contribute. Nevertheless, it should be clear that the old way of just working on unifying the legal systems of Europe is not enough.

If European lawyers are willing to accept a global framework, this will also make it possible for others to help them. Luke Nottage and Souichirou Kozuka, scholars from Australia and Japan respectively, have analysed the politics of recent contract law reform in Japan. As they have indicated, there are parallels with contract law reforms in France and Germany, or the Common European Sales Law in the EU. Going global may mean a heavier burden for the European comparatist, but also more hands to reduce that workload. The specific micro-politics of contract law reform in Japan are fascinating in themselves. Building on Sacco's legal formants, Nottage and Kozuka analyse the power play amongst various interest groups and individuals within them, which ultimately determines the success of the reform and its content. Their analysis is not just a variant of Sacco's analysis, but also an application of Bell's institutional approach, as propagated in this volume. The dominating players in the Japanese legal world are the judges of the Supreme Court and the Ministry of Justice. The law professors are only the sidekicks of this bureaucratic coalition, if only because professors are bound to disagree somewhat amongst themselves. On the other hand, if law professors can present a 'global standard' this is not without some influence. In this sense, the human fallacy of a thirst for recognition also haunts Japanese law scholars. Some foreign and international rules did make it into the reform, even though their practical application in Japan remains doubtful. Nonetheless, at least the academics championing them scored.[67]

Toon Moonen reminds us that, at least in the Western world, the context of comparative law is democracy and the rule of law. If, however, majority view (and accompanying decision making) and fundamental human rights protection clash, constitutional courts face the challenge of legitimating their constitutional review. Methodology in this case is not just a scholar's tool; it is also useful for convincing legal professionals, and the society at large, of the reasonableness of their decisions. Given the important role of supranational courts, comparative law even has a prominent role to play. On the one hand, these courts have to keep in mind a diversity of national audiences, but on the other hand national constitutional courts have to strive for acceptance of their decisions at a national, but also at a transnational level. Due to the international dimension, the deliberative approach Moonen pleads for, confronts the judges with an enormous challenge. After all, 'the

[67] Like Nottage and Kozuka, Alain Wijffels wants scholars to appraise conflicting interests in an analysis of legal formants. He also reminds us that an analytical framework is already available, the *Interessenjurisprudenz*. In applying it, the scholar should distinguish between the comparisons the scholars and practitioners which one studies, apply, and one's own methods to assess their achievements.

responsibility of the judge goes as far that it is her duty to consider if all democratically rational approaches and solutions are on the court's discussion table, especially if for some reason they were not (adequately) represented in court, and even if she feels not particularly attracted to it.' Consequently, the judge has to be a comparatist, who does not just look at the debates in his or her own country, but also those outside it. He or she has to be capable of decoding their legal-cultural context, but also of encoding his own decisions for an optimal communication to national and foreign audiences.

Finally, Susan Millns in her chapter notices a lack of consensus as to the aims and methods for effective comparative law. But whatever aim is pursued by it, she firmly concludes that without any consideration for the contexts in which the law is applied (with particular attention for legal cultures and traditions, and for charting differences), comparison cannot sensibly be carried out. Just like many others in this volume, she thinks that textual analysis of legal norms is insufficient to explain for differences between legal cultures. After identifying some difficulties the European public lawyer might face, she proceeds by making a case for more comparative law in the realm of public law, thus setting out a research agenda. One of the key questions for research in European comparative public law is the extent to which fundamental rights, in the light of technological and scientific progress and of potential assaults upon both physical and mental integrity, are protected in equal measure across Europe; and what can explain differences between jurisdictions as far as this is concerned.

IV. Rounding Up

If comparative law does not want to fade away into oblivion, we have to rethink its role as a scholarly discipline. In an increasingly interdependent era that makes ever-greater demands on our ability to understand the (legal) world with which we are confronted, comparative law can be of tangible benefit and a centrepiece of legal education and research. All this of course makes the task of comparative law even more complex than it already was: integrating new challenges into the comparative discipline raises questions of feasibility and practicality, of what still should/can be national in legal education, of how much non-law should be part of the curriculum, of making lawyers sensitive of the non-orderly world of borders and non-borders, etc. The challenges are formidable indeed, but they cannot be ignored. The chapters in this volume are witness to this challenge.

Having said all this, the many contributions to this volume, and especially the sheer diversity they collectively represent, also reveal a feature of comparative law that according to us we have to continue to cherish: comparative law is about much more than generating truth claims, about suggesting solutions to specific problems, about the efficiency of norms, about practical applications, etc. It is all these things, but it is in the end also about bringing 'something to light' (as Heidegger would have it): an activity that is specialized in imagination, because in all its diversity it reveals many different valuable ways of looking at the law and its role in society; a way of possibly understanding at least a little bit of the multiple reality the law represents.

In line with this, one final question may be on the lips of many readers of this book: is all this attention for methodological issues, especially in the context of comparative law,

really necessary? Can a comparatist not just go ahead without letting these issues drag him or her down? Is comparative law, at least from a quotidian perspective, not something researchers simply *do,* whenever they look at foreign legal systems to answer one or more of a range of questions about law, whether these questions are doctrinal, economic, sociological, etc. And is, after all, in the race for EU funding, comparative law's place not quite humble?

As far as the last question is concerned: according to Rob van Gestel and Hans Micklitz, in their chapter, comparative law increasingly serves to just legitimize preordained reform plans. Scholarly research is then an instrument that should be concerned with serving its economic and political masters and take into the bargain that this does not always allow for a well-elaborated methodology. Both authors are not *in se* against 'bridging the gap between research and the market'. They do however deplore that in many cases this degrades into 'advocacy scholarship', which first and foremost wants to defend the contractor's interest and entails only the thinnest veneer of methodology.

As gatekeepers of our profession, this should concern us all. Eventually 'an ongoing instrumentalisation of comparative legal research can easily undermine the public trust in legal scholars in general and comparative lawyers in particular', Van Gestel and Micklitz write. Therefore, it is our duty to instill in aspiring lawyers a sense of the authentic imagination comparative law can stimulate. But for that we more or less need a sense of what we are doing when we 'do' comparative law, and this is first and foremost an epistemological and methodological endeavor. This book is essentially about this endeavor and hopes to contribute a small part to that, thus honoring a scholar who has inspired us all to put comparative law at the heart of our research.