

## Tilburg University

### Comparing law

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*Published in:*  
Practice and theory in comparative law

*Publication date:*  
2012

*Document Version*  
Publisher's PDF, also known as Version of record

[Link to publication in Tilburg University Research Portal](#)

*Citation for published version (APA):*  
Adams, M., & Bomhoff, J. A. (2012). Comparing law: Practice and theory. In M. Adams, & J. Bomhoff (Eds.), *Practice and theory in comparative law* (pp. 1-21). Cambridge University Press.

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## Comparing law: practice and theory

MAURICE ADAMS AND JACCO BOMHOFF

### Comparative law practice and theory: the ‘missing middle’

Contemporary thinking about the role of method in comparative legal scholarship often seems trapped between two kinds of exhortations which, while both containing some measure of truth, are both also unfortunately to some extent unproductive. On one side lie complaints that ‘attempts to develop even a moderately sophisticated method of comparison’ are ‘exceedingly rare’ in comparative legal studies, with many projects apparently simply adopting an ‘anything goes’ attitude to methodological questions.<sup>1</sup> On the other side, however, one finds disheartening warnings that comparison, if it is to be done well, may be so difficult as to border on the impossible.<sup>2</sup> Comparatists, it seems, are told to aim higher *and* to despair – to try much harder, *and* to not even bother.

This volume is the result of a collective attempt to recapture what might be called the ‘missing middle’ in methodological thinking in comparative legal scholarship. It stems from the conviction that the sheer volume of rigorous, interesting and exciting comparative scholarship produced over the past decades indicates that neither of these two assessments of the state of the discipline can be telling the whole story. But it is also born of a sense of unease with an area of scholarship in which much of the most influential work on method remains at the level of pure theory, omitting any sustained testing of its critiques and recommendations in practice, while at the same time much interesting ‘substantive’ comparative work does not make its methodological choices sufficiently clear.

1 M. Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’, *American Journal of Comparative Law*, 50 (2002), 689.

2 Cf. J. Hendry, ‘Review Essay: Contemporary Comparative Law: Between Theory and Practice’, *German Law Journal*, 9 (2008), 2253, 2262.

In response, this volume proposes neither a grand theory of comparison, nor an indictment of the current state of the art. Rather, it presents the results of a collective effort to learn from the myriad modest, practical and pragmatic, often messy and imperfect, but also careful, theoretically informed and, especially, *constructive* methodological choices individual researchers make on a daily basis in the wide range of projects that make up the discipline.

The essays in this volume all aim to address the wide – and widely perceived – gap between practice and theory in comparative legal studies. The common thread is an effort to work from practice to theory, and back. Contributors were asked to reflect on methodological assumptions and challenges arising in their own (past) comparative work, in work in their area of interest, or in a project they would like to carry out in the future. The aim was to present a collection of chapters that would reflect on method without losing their grounding in substantive comparative work, while at the same time offering more sustained attention to methodological issues than is common in publications that present the substantive results of comparative investigations.

The result, we think, is not strictly speaking a handbook of comparative law – a number of excellent works of that format exist already. It is rather a collection of *reflections on comparative law projects*. This choice of format meant that the division by subject area found in many comparative law collections was not self-evidently appropriate. While it is certainly arguable that particular substantive areas of law require different comparative methodological approaches,<sup>3</sup> it seemed more useful to organize the various contributions according to the nature of their project. This meant grouping them on the basis of the disciplinary approach they take, the kinds of methodological challenges they discuss, and the sorts of solutions they propose.

Following a brief presentation of the general view on the place and character of comparative legal studies that sustains this collection, most of the remainder of this introduction is dedicated to a presentation of four main axes concerning the nature of comparative projects along which the different chapters can be grouped.

3 See, for example, the literature on the emerging fields of comparative constitutional law and comparative administrative law, e.g. Vicky C. Jackson, 'Methodological Challenges in Comparative Constitutional Law', *Penn State International Law Review*, 28 (2009), 319–326; S. Rose-Ackerman and P. Lindseth (eds.), *Comparative Administrative Law* (Williston: Edward Elgar, 2011).

The first of these, ‘Questions and theories’, is intimately related to the title of this volume and engages with the nature of, and relationship between, practice and theory in comparative legal studies. While all contributors explicitly discuss both more theoretical and more practical questions, they vary in their views of what ‘theory’ or ‘practice’ entail in the context of comparative legal research, and in their views on how prominent each of these elements should be. The first section below addresses these differences through the lens of the question of the ‘theory-driven’ or ‘question-driven’ nature of comparative legal research.

In a second section, ‘(Inter)disciplinarity’, we look in detail at the nature of some of the ‘disciplining frameworks’ for comparative legal studies. Here we identify a basic contrast between, on the one hand, approaches that advocate a ‘turn to jurisprudence’ and, on the other, those that espouse rather a ‘turn to social science’ or a ‘turn to culture’. This section introduces different views of what is at stake in these methodological turns and different ways in which they may be implemented.

A third section, ‘Functionalism and beyond’, looks at the vitality, the promises and the limitations of a paragon of comparative legal studies: the functionalist tradition. This section analyses the ways in which the different projects discussed in this volume build on, modify or critique classic ‘functionalist’ insights. The emphasis here will be on the promises and limitations of ‘functionalism’ in practice.

The last of these introductory sections, ‘Interacting legal orders and “dynamic comparisons”’, engages with a classic comparative law question and the contemporary conditions in which it is addressed. The classic question is that of understanding similarities and differences between legal phenomena. This question has assumed a new relevance in the contemporary context of integrating, overlapping and (allegedly) converging legal systems. Comparative lawyers are increasingly asked to measure or even manage differences between these systems ‘in motion’, and this section introduces contributions that address the methodological challenges involved head-on.

In a concluding section, we present the basic overall structure for this volume and a very brief introduction to each contribution, focusing each time on the area of law discussed, the kinds of questions asked, the methodological challenges faced, and the sorts of solutions sought. This double approach to organization – by broad themes and by individual projects – should make it possible for researchers interested in developing their own comparative projects to easily locate, in this volume, the discussions most relevant to their work.

## Comparative law as disciplined practice

A useful way of looking at comparative law, we contend in this introduction, is in terms of *disciplined practice*. ‘Doing comparative law’ may include such disparate activities as the selection of systems and topics for study, formulating research questions, searching for a *tertium comparationis*, travel and translation, formal or informal interviews, writing and reading questionnaires, statistical regression, capturing foreign ideas in familiar language, dissemination of knowledge of foreign practices, and teaching new generations of students.

The ‘disciplining’ framework for these activities is made up out of a range of different, often overlapping and sometimes conflicting, elements. Three of these are particularly prominent in the chapters that follow.

First, comparative law may share disciplinary objectives and constraints with general legal doctrinal scholarship, as it does in the approaches of Jan Smits and Koen Lemmens. On these views, comparative lawyers are, and should be, *juristes d’abord*, conscious of their background and concerned to make a distinctively juridical contribution to the comparative study of legal phenomena. Of course, as Jan Smits shows and as will be discussed further below, saying that comparative legal studies are ‘legal’ studies leaves open many questions as to the disciplinary identity of legal scholarship more broadly.

A second set of disciplining elements for comparative legal scholarship may stem from *methods in the social sciences*, including both quantitative and qualitative approaches. Such a turn to social science is also evident in a number of contributions in this collection. Anne Meuwese and Mila Versteeg and Frederick Schauer discuss causal inference, statistical regression and ‘large-N’ comparison. David Gerber looks at the broad range of factors conditioning ‘decisions’ in legal systems, taking in elements such as rational choice theory and the study of inter-institutional communication in addition to more traditional ‘legal’ factors such as the study of authoritative texts. Julie De Coninck turns to (cross-cultural) behavioural economics to develop empirical support for the assumptions of similarity and difference that figure centrally in the research design of many comparative legal studies. Peer Zumbansen’s work, finally, helpfully stresses the politics involved in these choices of methods, linking questions of research design to projects of substantive critique and reform.

A third set of disciplining factors, finally, may be shared with all those fields of inquiry which are centrally focused on *engaging with ‘the foreign’*; think of comparative religion, comparative history, cultural

anthropology, etc. The chapters by Catherine Valcke and by Jacco Bomhoff are principally concerned with these questions. The chapters by Jan Komárek, Gerhard Dannemann, by Monica Claes and Maartje de Visser, and by Maurice Adams and John Griffiths, also focus on the difficulties involved in – and various possible avenues for – trying to reconstruct and understand the histories, ideologies, self-images and ‘languages’ that make up a legal system that is in multiple senses ‘foreign’ to the comparative observer.

One reason why viewing comparative law as disciplined practice may be useful, is because it obviates the need to formulate a definitive answer to the perennial question of whether there is such a thing as *the* comparative method,<sup>4</sup> or to the equally controversial question of whether there is *anything more* to comparative law than mere methodology.<sup>5</sup> A second reason, as just demonstrated, is that it shows just how diverse the range of disciplinary influences within comparative legal studies can be, not just in general but also within individual projects. While this diversity may sometimes impose constraints stemming from ‘the disciplinary pressures to speak to one’s peers in a familiar and recognizable vocabulary’, the very location of comparative law at these disciplinary intersections may also prove fertile ground for methodological innovation, and offer exciting opportunities for answering new questions in new ways.<sup>6</sup> These opportunities are perhaps at present not always sufficiently grasped. Both Meuwese and Versteeg and David Gerber note, with some surprise and disappointment, the absence of serious comparative law analysis from scholarly debates that could clearly benefit from its inclusion. Addressing this omission requires an understanding of comparative law method that neither seeks perfection nor succumbs to despair, but that is actively and explicitly conscious of the nature, the scope and the limitations of its potential contribution.

These two dimensions of disciplinary constraint and innovation figure centrally in many of the chapters in this collection. The following sections discuss their implications for the four themes set out earlier: the

4 See also J. Husa, ‘The False Dichotomy between Theory and Practice: Lessons from Comparative Law’, in C. Peterson (ed.), *Rechtswissenschaft als juristische Doktrin* (Stockholm: Olin Foundation for Legal History, 2011), pp. 105–128.

5 On this already W. J. Kamba, ‘Comparative Law: A Theoretical Framework’, *International and Comparative Law Quarterly*, 23 (1974), 486–489.

6 Cf. A. Riles, ‘Comparative Law and Socio-Legal Studies’, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), pp. 811–812.

relationship between practice and theory, turns to jurisprudence and to extra-judicial methods, the promises and limitations of the functionalist tradition, and comparison in dynamic settings.

### Questions and theories

The question of the relationship between practice and theory in comparative legal studies can be approached, first of all, by looking at which elements of comparative projects are predominantly question-driven, which primarily theory-driven, and at how these elements are related.

#### *Question-driven methodological choices*

One of the threads running through the contributions in this volume is the significant degree to which methodological choices in comparative legal research are determined by the questions asked. Comparative law, from a quotidian perspective, is something researchers *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. The precise contours of their comparative methods are to a great extent a function of the nature of these questions. As Jan Smits writes in his chapter: ‘The first point to emphasize is that there is not one method of doing comparative or European legal research. All depends on the question one would like to answer.’ The same is true for Catherine Valcke, who believes the search for a unique, one-size-fits-all comparative law methodology is unlikely to be fruitful. ‘A methodology is a means to an end rather than an end in itself, with the result that it can only be as good as it is suited to the end being pursued’, she writes. Of course, as Peer Zumbansen notes, this intimate connection between ‘methods’ and ‘ends’ also means that the politics of these ends will inevitably also be at work in choices of method.

Examples of the question-driven nature of comparative methodology abound in the chapters presented here. Adams and Griffiths, for instance, in their comparative study on medical behaviour that potentially shortens life, are interested in, among many other things, the development of different legal regimes in this area, and in explaining differences between systems. They describe how one essential first step in answering these questions was to construct a definition of the field of inquiry based on a particular type of conduct – i.e. a particular kind of medical behaviour – rather than one based on any legal classification. David Gerber, similarly, starts off with a basic question: how can one measure convergence

between different legal systems? He then proceeds to show how ‘traditional’ comparative methods – categorization, functional analysis, and the study of legal formants, in his list – all revealed their limitations when he tried to analyse the extent to which different national and regional systems of competition law were indeed converging.

### *Theory-driven methodological choices*

A second common thread throughout these chapters, however, is the degree to which methodological questions in comparative legal research are also *theory-driven*. Perhaps surprisingly, however, this theoretical grounding is not solely, and often not even predominantly, focused on the process of comparing, but rather on underlying *understandings of law*. Many of the methodological choices made in the chapters that follow can be traced in a fairly direct line to different underlying understandings of what law is, means and does. And when, as is normally the case, comparative research focuses on what the individual comparative lawyer finds *interesting about* what law is, means and does, then the question driven and theory-driven dimensions of comparative research come together.

The influence of different understandings of law and of what is interesting about law can be seen at work in many of the chapters. David Gerber, for example, focuses on law as ‘decisions’, because they, in his view, ‘not only constitute a legal regime, but [also] are the locus of change within such a regime’ – they are the ‘atomic particles’ of the legal world. Jan Komárek looks at judicial discourse because he is interested in law as a form of inter-institutional communication, and wants to answer questions on how one particular influential court, the European Court of Justice, communicates with other legal and political actors through its case law. And in Monica Claes and Maartje De Visser’s project, it is a particular view of the nature of the European constitutional legal order – the idea that this order has a ‘composite’ character – that sets the parameters for their methodological choices.

In many instances, the nature of the questions asked prompts a *broadening* of the factors taken as relevant for comparative inquiry. Frederick Schauer’s central question – ‘Does law influence official behaviour?’ – lies at the foundations of his efforts to develop a method of comparison that is able to take in *both* the dimension of legal authority on the one hand, and of behaviour and causality on the other. And Peer Zumbansen’s interest in the challenges of doing comparative law against the backdrop of an emergent transnational pluralist legal order prompts a search for approaches

that can adequately capture this pluralism of sources and environments. In the same vein, Adams and Griffiths say that for their purposes it is not enough to include 'para-legal' sources (such as professional guidelines) in the analysis. One also has to take account of the fact that some topics, that have been regulated by official 'state' law in one country, might be regulated in other ways in other countries. Moreover, comparative law sometimes may also require that one looks to the more informal norms of relevant social groups.

The chapter by Anne Meuwese and Mila Versteeg, however, illustrates the possibility of an opposite tendency: for certain types of comparative law questions, a more limited conception of law may be more suitable, or even the only workable one. 'Large-N' comparatists, as they write in their chapter on quantitative comparisons, do not deny the importance of unwritten norms, or of the cultural context for law. But Meuwese and Versteeg assume that, in principle, the kinds of answers their methods are capable of generating for the comparison of large numbers of systems may justify taking a narrower range of legal materials into account. Their approach, and that of the other contributions in this volume point to a simple conclusion: there can be no single method for comparative law, because there is no uniform conception of 'law' and no single comparative question.

### *Comparative law as applied legal theory?*

All these choices are related to what is commonly viewed as the classic debate on the 'sources of law' in comparative law. The prevalence of debates on the nature and the sources of law throughout the chapters included in this volume, does, however, suggest that more fundamental issues may be at stake than is perhaps generally acknowledged. The comparatist's understanding of law 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. And if it is true that theories of law play such an important role in comparative projects 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. That conclusion, 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'.<sup>7</sup>

7 Cf. Reimann 'Progress and Failure of Comparative Law', 690.

If valid, these observations also reveal a particular predicament for comparative legal scholarship. On the one hand, comparative law can hardly aspire to be as theoretically complete and ambitious as work in legal theory or the philosophy of law proper – there are good reasons, of qualifications and comparative advantage, among others, for why these are normally separate fields of inquiry. At the same time, however, it may be that comparative legal studies are, in practice, expected to be much more thoroughly ‘jurisprudentially grounded’ than both legal doctrinal scholarship within a single system and social scientific and cultural analyses of legal phenomena.

### (Inter)disciplinarity

Views on what law is, means and does, and on what is interesting about what law is, means and does, then, inform methodological choices on all levels of the comparative exercise. They are relevant, in particular, to a broad division between projects that implement a ‘turn towards jurisprudence’ and those that look rather towards the social sciences or the study of culture. This division too, emerges clearly from the chapters presented in this volume. This section presents the relevant contributions organized in three groups: those that implement a jurisprudential turn, those that turn rather to the social sciences or the study of culture, and those that try to bridge the gap between these two basic approaches.

#### *The ‘internal perspective’ and the turn to jurisprudence*

In her earlier work on comparative contract law, Catherine Valcke has advocated the merits of an ‘internal perspective’ for comparison; a view she elaborates in her contribution as a ‘maximally internal’ mode of comparison, designed to develop an understanding of foreign legal systems ‘on their own terms’. This internal perspective shows close affinity with William Ewald’s well-known call for ‘comparative jurisprudence’ as an effort to understand the way foreign law is lived by its participants and subjects.<sup>8</sup> The influence of this methodological aim is also clear in the chapters by Jan Komárek and Jacco Bomhoff, who look at the force of

8 W. Ewald, ‘Comparative Jurisprudence (I): What Was It Like to Try a Rat?’, *University of Pennsylvania Law Review*, 143 (1994–1995), 1973–1974. See also J. C. Reitz, ‘How to Do Comparative Law’ *American Journal of Comparative Law*, 46 (1998), 628: ‘[T]he primary task for which comparative lawyers are prepared by their training and experience is to compare law from the interior point of view.’

previous judicial decisions and the meaning of legal argument respectively, as perceived by local legal participants in the systems studied. All these contributions address not only the possible benefits, but also the limitations of the internal perspective – the fact that, as Valcke writes, ‘it is clearly not possible to do comparative law from a standpoint that is fully internal’.

Jan Komárek’s chapter, in particular, underlines some of the difficulties involved in a ‘turn towards jurisprudence’. Komárek’s project is the study of ‘reasoning with previous decisions’ by courts in different jurisdictions, with a focus on the European Court of Justice. He finds that the most fully developed jurisprudential concepts in his field – in particular, theories of precedent – are typically universal in their aspiration, but decidedly parochial in their provenance and validity. His chapter discusses how he attempted to construe a definition of precedent that was both informed by (necessarily local) jurisprudential theories and, at the same time, sufficiently autonomous and neutral to be useful for comparative analysis. He also shows how these new definitions could be used to reveal hidden biases in the jurisdiction studied. Jacco Bomhoff’s chapter, in a similar way, reflects on different understandings of familiar jurisprudential concepts and questions their capacity for cross-jurisdictional application. In his project, he finds that the ideas of ‘legitimacy’ and ‘legal formalism’ can serve as lynchpins for the comparative study of legal reasoning, precisely because of their dual nature as shared abstractions with local manifestations. With regard to both these concepts, however, there are real difficulties in developing understandings that are broader than those found in any single jurisdiction, but that also stay true to what these concepts mean to participants within each system.

### *The turn to social science*

In many of its manifestations, this ‘turn towards jurisprudence’, or the elaboration of an ‘internal’ perspective on foreign law, relies heavily on insights drawn from hermeneutics and the humanities more generally. In this sense, even these approaches are already to some degree interdisciplinary. However, it is when a shift is made from efforts at understanding foreign legal institutions as foreign participants might, to attempts at measuring or explaining the emergence, development or effect of foreign law, that an even greater engagement with other disciplines becomes necessary. What is at stake here, as David Nelken has recently 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.<sup>9</sup>

In a number of chapters in this collection this second perspective is explored. Both Frederick Schauer, in his chapter, and Anne Meuwese and Mila Versteeg, in their contribution, point to the wide range of empirical questions about (constitutional) law for which traditional legal scholarship simply *assumes* the answers. ‘The field of comparative constitutional law’, Meuwese and Versteeg write, ‘is permeated with causal claims [. . .] constitutions constrain government; judicial review protects human rights; socio-economic rights are unenforceable; and constitutional law is converging upon a global paradigm. These claims, which often take the form of unarticulated assumptions, are essentially empirical claims that have largely gone untested.’ Frederick Schauer voices a very similar call. Fully aware of the limitations, he nevertheless affirms the value of even incomplete empirical analysis as compared to ‘the intuitions and hunches of law professors’. Such empirical study, Schauer argues, might reveal significant biases in our understanding of constitutional compliance. ‘Research on the extent to which constitutions or constitutional decisions have contributed to some outcome or end state needs to be attentive to the possibility that in a world of multiple causation the constitutional causes may be exaggerated by those whose interests are in constitutional matters, just as they may be excessively diminished by those whose interests lie in other possible causes – economic, political, psychological, or cultural, for example – of social outcomes.’

A similar dissatisfaction with the lack of empirical grounding of much comparative work, prompts Julie De Coninck in her chapter to propose a turn towards behavioural economics, as a potential source of ‘empirically better informed and legally sufficiently neutral standards of comparison’ and as an alternative to ‘opaque conceptions of culture that seem to pervade comparative legal research’. Her contribution goes on to discuss the ways in which the ‘endowment effect’, a core insight from behavioural economics, might be able to inform comparative studies of forms of ownership in private law. If it can be shown that individuals across different cultures *feel the same way* about, and react in similar ways to, possessing and owning things, she asks, what use could comparative legal scholarship make of such findings? Adams and Griffiths, in their project on what is commonly called euthanasia but which they define more specifically as

9 D. Nelken, ‘Comparative Law and Comparative Legal Studies’, in E. Örüçü and D. Nelken (eds.), *Comparative Law: A Handbook* (Oxford: Hart Publishing, 2007), p. 16.

medical behaviour that potentially shortens life, emphasize the importance of empirical analyses of the *effects* of different legal regimes. For them, explaining similarities and differences between systems requires knowledge of what difference, if any, a given legal institution makes in social life. Their approach, which they label colloquially as ‘casting the net wide’, therefore involves looking not only at legal rules, but at actual behaviour, and takes in a range of information that in more ‘formal-legal’ studies would not be seen as ‘legally relevant’ at all. For some systems studied, this broad approach meant, for example, looking at professional codes of doctors. But in other countries, where most of the relevant practices are carried out not in hospitals but within volunteer associations, they had to look still further afield.

### *Bridging the disciplines*

Frederick Schauer’s chapter, finally, is also interesting as an attempt to bridge the divide between jurisprudence- and social science-focused modes of comparison. In his research agenda for comparative investigations into compliance with constitutional norms and decisions, Schauer draws both on advanced jurisprudential-conceptual analysis, such as Joseph Raz’s understanding of norm following, *and* on literature in comparative politics and cognate fields of empirical study, as mentioned earlier. In one sense, comparatists engaged in this kind of research, in the terms used earlier, are required to speak in the ‘familiar and recognizable vocabularies’ of more than one disciplinary community. But the flipside is obvious: they get to converse with, and build bridges between, these multiple communities. Doing this hybrid type of research well seems like a particularly daunting prospect, but, as Schauer notes reassuringly, ‘the best can be the enemy of the good in research on law as much as anywhere else’.

### **Functionalism and beyond**

In many of the chapters included in this volume, ideas of functionality and of functional equivalence play a prominent role. This may come as something of a surprise given the pervasive *anti*-functionalist tendency of much theoretical methodological writing in comparative law. Critical scholarship has long taken issue with – often overly crudely sketched – views of comparative law as the comparison of ‘solutions’ to ‘problems’ that are supposedly clearly identifiable and more or less identical across

systems. 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<sup>10</sup> – many practical efforts at comparison are instead concerned with incrementally refining and supplementing functionalist ideas, and with navigating creatively functionalism’s acknowledged limitations.<sup>11</sup> A number of chapters in this volume offer ideas and suggestions on how this might be done.

### *Moderate and refined functionalism*

Catherine Valcke’s research, for example, looked at the expressive value of rules of contract law; at what they might reveal about the ideals, the values and the particular conceptions of contractual justice that animate, in her case, French and English law. The approach she settled on combined an intriguing mix of perspectives. As she writes: ‘Whereas a purely functionalist purpose would have dictated studying all that can be (externally) observed as *actually affecting* the solution to contractual problems in the two systems – all “legal formants”, or factors causally connected to those problems – my aim was to discover what those on the inside, the legal actors in each system, consider *should ideally affect* the solution to such problems. I therefore needed to identify, from among the various materials preliminarily identified in each system as *functionally* relevant, those that could be considered as also *hermeneutically* relevant.’ Her chapter details how she proceeded to make sense of these two sets of materials.

Somewhat similar attempts to embed functionalist insights – as analytical or heuristic tools helpful to the search for equivalents as basis for

10 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford University Press, 1998), pp. 39 ff. An influential early critique of this form of functionalism in comparative law was made by G. Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’, *Harvard International Law Journal*, 26 (1985), 411–455. For important qualifications see J. Husa, ‘Farewell to Functionalism or Methodological Tolerance?’, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 67 (2003), 419–447; and J. De Coninck, ‘The Functional Method of Comparative Law: Quo Vadis?’, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 74 (2010), 318–350.

11 In part perhaps because in the chapters in this volume there is less need for straw men and ‘methodological stereotypes’ (describing ‘functionalism’ in ways that no comparative lawyer would accept), than there may be in purely theoretical-critical writing. For a fuller discussion of functionalism, and a suggestion that ‘functionalist comparative law has not yet made sufficient use of the benefits of functionalism’, see R. Michaels, ‘The Functional Method of Comparative Law’, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), p. 381.

comparison – within broader comparative projects, can be found in the chapters by Komárek, Bomhoff, De Coninck, and Adams and Griffiths, among others. Komárek and Adams and Griffiths start out with functional definitions of their field of inquiry – ‘judicial reasoning with previous decisions’ in Komárek’s case, and ‘medical behaviour that potentially shortens life’ in the case of Adams and Griffiths, precisely in order to transcend biases and limitations inherent in local legal conceptions. Julie De Coninck turns to empirically substantiated – *extra-legal* – insights into human behaviour for a baseline of similarity against which she can analyse differences in patrimonial law between systems. Jacco Bomhoff’s chapter invokes assumptions that he argues are specific to the ‘juridical field’, in particular the idea that the meaning of forms of legal argument can be understood in terms of their relative contribution to the legitimization of the exercise of public authority. In his approach, comparative lawyers could make strategic use of what they know about what could be called the ‘function’ of legal reasoning at a very high level of abstraction, in order to investigate differences in specific manifestations.

The theme of functional equivalence in terms of common problems to be solved, present in some form in all these contributions, plays a particularly prominent role in the chapters by Monica Claes and Maartje De Visser and by Jan Smits. Claes and De Visser, in their comparative work on European and national constitutional law, advocate a ‘problem-based’ method that ‘starts from system-neutral themes and “real life” concrete problems and questions’. Jan Smits, too, analyses different legal regimes in terms of their performance in fulfilling common legal functions, such as making sure law is accessible and predictable.

### *Neutrality and its limits*

Finally, the theme of ‘neutrality’ between systems – an idea much maligned in comparative law theory – also figures in some of the chapters presented here. Jan Komárek’s contribution has a vivid depiction of different roles for the idea of ‘neutrality’ and also of the sometimes unexpected ways in which comparative projects can develop: ‘When I used the word “precedent”, he writes, ‘I noticed that people from the common law jurisdictions, who listened to my presentations or read various parts of my work, projected their own legal system’s understanding of the concept. After one such experience I decided to change the title of my project to “reasoning with previous decisions”.’ A similar concern for neutrality is also central to the chapter by Gerhard Dannemann. His project concerns

the practical setting of the drafting of common private law rules intended to interact with multiple domestic legal systems, in particular the rules of the *Draft Common Frame of Reference* for European contract law. Drafters of such rules, Dannemann writes, must seek to ensure that these rules can operate with similar ease in the contexts of all those systems. They must, therefore, be drafted not with just one particular legal system in mind, but rather with all of them simultaneously, so as to promote their ‘system neutrality’. On the question of whether legal rules can ever be fully ‘system neutral’, Dannemann’s answer is clearly in the negative. Nevertheless, he writes, drafters should not call off their search and give up their quest as being futile. ‘While all permanently elusive goals are frustrating, this one has at least one virtue, namely that of a yardstick. It helps to distinguish good from bad drafting by the degree to which the unattainable has been missed. In this sense, the search for system neutrality must continue. It is essential for accomplishing a more realistic task, which one could call system sensitivity.’ Adams and Griffiths similarly point out that it is an inevitable limitation of any comparative research project that there simply are no standards of comparison available that do not run the risk of generating normative bias. The comparatist must therefore, they say, proceed in a spirit of conceptual tentativeness, seeking continuously to shake out normative preconceptions and being prepared to replace the initial analytical terms concerned, with others that permit a better comparison.

### Interacting legal orders and ‘dynamic comparisons’

Questions of similarity and difference obviously lie at the very heart of the discipline of comparative law. But while comparative lawyers have long debated the question of whether their focus should be on identifying similarities or rather differences, comparative legal studies still have enormous trouble giving some sense of any *measure* of similarity or difference between systems.<sup>12</sup> This last question, although a classic, predominantly theoretical, quandary, assumes special practical relevance in the context of interacting legal orders, and whenever the comparatist’s research question relates to the convergence or divergence between systems. Both these settings, and the problems they raise for comparative method, are represented in this collection.

12 Cf. N. Jansen, ‘Comparative Law and Comparative Knowledge’, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), pp. 312–314.

Monica Claes and Maartje De Visser discuss how, in the particular context of European constitutional law, where ‘common’ constitutional principles are given special normative status, the question of how to ‘measure’ commonality or diversity assumes special urgency. Similarity and difference, in such a setting, are no longer merely academic notions; they determine fundamental practical questions such as the standards of constitutional rights protection. Gerhard Dannemann looks at the question of commonality and diversity from the angle of ‘system neutrality’, in the practical context of the drafting of uniform rules, discussed above. He presents a number of concrete techniques to increase the interoperability of such rules with domestic legal systems which he evocatively labels ‘occupying middle ground’, ‘going up one level’, ‘going down one level’ and ‘stepping outside’. And David Gerber looks at debates on ‘convergence’ between legal regimes, and notes, with surprise how ‘serious comparative law analysis has been largely absent’ from discussions in this field. Given the ‘real-world’ economic prescriptions that often accompany debates on legal convergence, this absence may have serious consequences. He goes on to discuss not only various ways in which comparative law methodology could contribute to convergence debates, but also, especially intriguingly, ‘ways in which comparative law itself can be enriched through application of its methods to convergence issues’.

Jan Smits’ main complaint is not that comparative legal scholarship is not sufficiently engaged with convergence debates in the area in which he works – European private law – but that it is often given an instrumental, and ultimately political, role in the European unification process. He contrasts his own emphasis on identifying differences with the search for commonality that dominates European private law scholarship. Adopting uniform rules, for Smits, is a question of policy for which comparative legal scholarship cannot, by itself, provide an answer.

Peer Zumbansen’s contribution, finally, is also very clear on the political dimensions of comparative legal scholarship. The politics of comparative method, he argues, are especially relevant in the face of the emerging transnational legal order – a web of intertwining and hybrid forms of regulation ‘that can no longer be easily associated with one particular country or, for that matter, one officially mandated rule making authority’. Jurisdictional boundaries are becoming less reliable as points of reference for comparative lawyers. One clear implication of this transformation, Zumbansen writes, is that the nature of legal education will have to change: ‘Neither a nationally confined doctrinal instruction in the rules and methods of a particular field in a given country nor the, more often

than not, relatively randomly chosen jurisdiction of comparison, can provide for an adequate training of the soon to graduate legal scholar – or practitioner.’ Comparative lawyers will have to adopt their analytical toolkits to the realities of a largely fragmented and incoherent regulatory landscape, and Zumbansen presents four case studies of the implications of these challenges.

### Outlook and structure of this volume

As stated earlier in this chapter, the starting point for all the contributions was a request to authors to reflect on methodological assumptions and challenges arising in their own comparative work, in work in their area of interest, or in a project they would like to carry out in the future (in the form of notes towards a research agenda). This turned out to be an unusual format. In particular, authors could not assume familiarity on the part of readers with all the details of the substantive work relied upon, but, at the same time, could not replicate too much of what had already been described elsewhere. The guiding idea for the essays, therefore, has been to not only present methodological discussions as informed by practice, but also to offer practical examples in function of these methodological questions.

In terms of structure, as already mentioned, this volume does not follow the division by subject area found in many comparative law collections, but rather emphasizes how investigations in very different substantive areas of law, may in fact face very similar kinds of methodological challenges. The preceding sections aimed to show how the various contributions to this volume might be grouped in different ways, depending on the disciplinary approach taken, the kinds of challenges they address or on the solutions they propose. Based on these axes, a very basic outline can be suggested. A first set of chapters (Valcke, Komárek and Bomhoff) is centrally concerned with the operationalization of a *turn to jurisprudence* in comparative law. In a second set (Dannemann, Gerber, Claes and De Visser, Smits, Zumbansen), the dominant theme is the context of a plurality of *interacting legal orders*. And a third group (Schauer, Meuwese and Versteeg, De Coninck, Adams and Griffiths) focuses on the benefits, practicalities and challenges of a *turn towards social science* in comparative law methodology. As will be seen, however, each of these chapters addresses so many other issues besides, that imposing this particular structure too rigidly would not do justice to the broad variety of themes and approaches

discussed, and to the many other links between the contributions. Koen Lemmens' chapter concludes this volume, and deals explicitly with the tension that was referred to in the opening lines of this introduction; the idea that comparative law is either not constrained by any method, or doomed to trying – and failing – to satisfy impossible methodological demands.

### Contributions and topics: a very short readers' guide

Readers looking for discussions that may be of particular relevance to their own work may benefit from this very short overview of themes and keywords for each contribution.

*Reflections on comparative law methodology – getting inside contract law*, by Catherine Valcke, is a reflection on methodological choices made in the comparative study of French and English contract law. This chapter shows how researchers can approach legal systems 'in their own terms', that is 'from the perspective of the participants in each system'. While this approach is discussed primarily in relation to private law, this chapter should be of relevance to all researchers interested in incorporating an 'internal perspective' in their project. This chapter also contains a very helpful general introduction to some fundamental debates in comparative legal scholarship, illustrated each time through references to practical questions.

*From comparing 'precedent' to 'reasoning with previous decisions'*, Jan Komárek's contribution, presents methodological choices made in the context of a comparative project on the role of precedent, or 'previous decisions'. Three general themes addressed in detail in this chapter are: the question of how to choose which systems to compare; of how to elaborate and subsequently refine working definitions of key concepts and categories such as 'precedent' or 'case-law technique'; and the question of how to conduct comparisons among systems belonging to different traditions, such as the common law and civil law traditions.

*Comparing legal argument*, by Jacco Bomhoff, offers suggestions on how to compare the meaning of legal arguments as they are used in different legal systems. The main concern in this chapter is negotiating the differences between more 'internal' and more 'systematic' forms of comparison; precisely the kind of differences discussed also by Catherine Valcke.

*In search of system neutrality: methodological issues in the drafting of European contract law rules*, by Gerhard Dannemann, 'explores issues in

comparative methodology which arise in the drafting of rules which are intended to interact with a variety of domestic legal systems, using the example of European contract law rules'. Questions addressed include: comparison in the practical context of legal drafting; how to frame differences between systems in terms of 'drafting style' or 'drafting language'; and how to manage these differences through different analytical 'moves', such as 'occupying middle ground' or shifting between levels of abstraction.

*Comparative law and global regulatory convergence: the example of competition law*, by David Gerber, addresses two related comparative projects. One is how to measure 'distance' between legal systems, in particular with regard to the question of whether systems are converging or diverging. The other is the choice to take official 'decisions', by judges but also by public officials more generally, as the main site for comparison. Themes addressed in this chapter include: the relationship between comparative legal scholarship and policy debates; how to imagine and implement original objects of comparison in order to get the best possible 'access' into foreign systems; and how to integrate insights from other disciplines to answer a broad range of questions with regard to these objects of comparison. Examples are taken primarily from competition law, but again the discussion should be of broader relevance, perhaps in particular for projects in fast-moving fields of law heavily influenced by economic thinking, such as financial law and regulation or intellectual property law.

*Reflections on comparative method in European constitutional law*, by Monica Claes and Maartje de Visser, describes the methodological thinking behind a large-scale, multi-year project on European constitutional law. Their focus is on comparison among legal orders that are very clearly *in motion*, and that continuously influence each other in numerous complex ways. They discuss in particular also the question of how to measure commonality and difference among systems in settings where such measurements have important normative consequences.

*Rethinking methods in European private law*, the chapter by Jan Smits, reflects on the role of comparison in the field of European private law. Like Claes and de Visser, Smits works in an area marked by 'Europeanization', where claims of similarity or convergence are often given normative status. His contribution is both a practical overview of the kinds of comparative projects that can be undertaken with regard to legal rules in various dynamics and stages of harmonization, and a call for more careful reflection on what law and comparative law as disciplines can and cannot contribute to the policy choices behind law's 'Europeanization'.

*Transnational comparisons: theory and practice of comparative law as a critique of global governance*, by Peer Zumbansen, is again concerned with comparison in dramatically dynamic settings – not just ‘Europeanisation’, this time, but ‘transnationalisation’, or the ‘deep-running transformations of the normative and institutional regulatory landscape’ on a global scale. His contribution looks at the ‘ambiguous space between comparative law and transnational legal pluralism’ that has emerged as a result of these changes, by way of four case studies: comparative corporate governance; human rights law and legal anthropology; comparative constitutional law; and comparative administrative law through the lens of ‘global administrative law’. Beyond its relevance to researchers working in these four broad areas, Zumbansen’s contribution should be of particular interest to all comparative lawyers who are curious to discover the political dimensions not just of the developments they study, but, especially, of their own approaches to these developments.

In *Comparative constitutional compliance: notes towards a research agenda*, Frederick Schauer looks at ‘constitutional compliance’ – the question of whether, and to what extent, constitutions and constitutional decisions *matter*. This, for many legal scholars, is an unusual question to which the answer is commonly assumed. Schauer shows how to combine legal conceptual refinement with social science methods to come to new understandings of the conditions under which officials will tend to comply with constitutional decisions. His chapter could serve as a source of inspiration for all legal researchers interested in tackling similarly ‘neglected’ questions about law, using tools from multiple disciplines.

*Quantitative methods for comparative constitutional law*, the chapter by Anne Meuwese and Mila Versteeg, addresses the use of social science methods by comparative lawyers in more detail. Topics they discuss include: increasing awareness of the role of causal claims in comparative law scholarship, and of the methodological steps required to substantiate them; how to shift from a jurisprudential perspective of ‘texts as authority’ to a social science perspective of ‘texts as data’; the use of social science methods, notably statistical analysis, at various levels of intensity and ambition, in particular also by legal scholars not formally trained in any other discipline.

In *Comparisons in private patrimonial law: towards a bottom-up approach using (cross-cultural) behavioural economics*, Julie De Coninck also invokes social science insights. She turns to cross-cultural behavioural economics to develop ‘empirically underpinned standards of comparison’. Like Schauer and Meuwese and Versteeg, she is interested in investigating

questions that comparative legal scholars tend to ignore; in her case, the empirical validation of working assumptions as to individual behaviour across different cultures, and the precise role of 'culture' in the legal domain. Her contribution contains a concise introduction to cross-cultural behavioural sciences and their potential relevance to the comparative study of law.

In *Against 'comparative method': explaining similarities and differences*, by Maurice Adams and John Griffiths, legal comparison is regarded as a means available to those who seek to answer various sorts of questions about law. When the question being asked concerns the explanation of differences in law between different jurisdictions, they argue that 'casting the net wide' is essential. The data that such an approach produces can then, in combination with a theory of law or of legal change, be put to work to solve an explanatory question of the general type: Why here but not there? Why now but not then? And: How should we understand where we are and where we are heading?

Koen Lemmens' chapter, *Comparative law as an act of modesty*, concludes this volume. Lemmens deals explicitly with the tension that was referred to in the opening lines of this introduction; the idea that comparative law is either not constrained by any method, or doomed to trying – and failing – to satisfy impossible methodological demands. Lemmens' answer is clear and provocative: 'Instead of expecting comparative researchers to do what they will never be able to do (i.e., become foreigners) – with our discipline losing out all round: a self-defeating venture if ever there was one', he writes, 'we would be wise to expect them to deliver what they can reasonably and realistically be expected to obtain and achieve: to instruct or even to educate an audience that without comparatist intervention would remain ignorant of foreign law. Our discipline would stand to gain from such an approach.'