

Tilburg University

Against comparative method

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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., & Griffiths, J. (2012). Against comparative method: Explaining similarities and differences. In M. Adams, & J. Bomhoff (Eds.), *Practice and theory in comparative law* (pp. 279-301). Cambridge University Press.

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Against ‘comparative method’: explaining similarities and differences

MAURICE ADAMS AND JOHN GRIFFITHS

About 30 years ago there was much talk that geologists ought only to observe and not theorize; and I well remember someone saying that at this rate a man might as well go into a gravel-pit and count the pebbles and describe the colors. How odd it is that anyone should not see that all observation must be for or against some view if it is to be of any service.

(Darwin, Letter to Fawcett, 1861)

Introduction

All scientific work begins with a question about the world we live in. Questions go before methods, and until one has specified what the question is, no sensible discussion of methodology is possible. Trying to find ‘a methodology’ for something that is not a question – like ‘comparative law’ – is like looking for ‘a methodology’ for pebble-counting. Not, as Darwin would say, ‘of any service’. Legal comparison, like pebble-counting, is itself a method – a way of answering questions. Actually it is a whole collection of methods that may be helpful in seeking answers to a variety of sorts of questions about law. What legal comparison entails in a concrete situation depends on the sort of question one wants to try to answer.

It may be useful to identify here some examples of the sorts of questions about law to which corresponding sorts of comparative method might be addressed.

- What is the law of some other social group (e.g. a state) on a given point and how does it differ technically from the domestic law of one’s own group or state? This sort of legal comparison is primarily of interest to practicing lawyers and judges (‘private international law’), colonial administrators (‘customary law’), and law reformers (especially those promoting ‘unification’ of some sort).

- How does a legal culture develop, diffuse, influence other legal cultures, and so forth? And what are the implicit cultural assumptions of lawyers, judges, legislators and legal scholars? Legal texts can be examined for evidence related to such questions. Thus a good deal of the work of legal historians, for example historians of Roman law, is essentially philological in character. A similar concentration on legal texts is characteristic of some practitioners of Critical Legal Studies.
- How can similarities and differences – between societies and over time – in the (‘legal’) regulation of particular sorts of behavior and in the social practices governed by such regulation, be explained? It is ‘comparative law’ in the service of sociological explanation to which the rest of this chapter will be addressed.

If one begins with a question (and a certain body of theory: accumulated insight surrounding the question), methodological questions tend to answer themselves (which, as we will see, does not mean the answers make life easy). When comparing domestic and foreign law, the method used will mostly vary along the spectrum from formalism (‘law on the books’) through legal realism (‘law in practice’), to various sorts of ‘functional’ comparison, depending on the task at hand. A philologist interested in texts and their diffusion and influence will use all of the technical apparatus of philology to trace borrowings, differences, and so forth, but if he is appropriately modest he will not suppose that textual similarities or differences tell him much about how the people concerned actually interpreted the texts, nor what they did with the rules as they understood them. A sociologist of law who seeks to explain why the procurement of organs for transplantation is much less successful in France than it is in Spain – although the legal arrangements in the two countries are essentially similar (‘presumed consent’) – will collect detailed field information in the two countries about the concrete social context of ‘intensive care units’ to which the respective rules apply and about how the respective laws are being interpreted and used in practice.¹ There is, to repeat, no single ‘comparative method’ because there is no single question.

It is in connection with this last point that the title of this chapter, which is of course also meant as a teaser, alludes to Paul Feyerabend’s classic *Against Method*.² Feyerabend’s argument was much more far-reaching

1 See G. Nowenstein, *The Generosity of the Dead: A Sociology of Organ Procurement in France* (London: Ashgate Publishing, 2010).

2 P. Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (London: Verso, 1975).

than ours here. But we follow his lead in arguing that there is no such thing as a single method which, applied as a sort of recipe, will lead to the right results.

The book on which this contribution is based – *Euthanasia and Law in Europe*³ – is the fruit of an interdisciplinary and international research project on the regulation of 'Medical Behaviour that Potentially Shortens Life' (hereafter: MBPSL).⁴ It can be considered a study in 'comparative law', since we were dealing with law and its use in practice, and the way we went about doing what we did was to a considerable extent that of comparison. We concentrated first and foremost on the Netherlands and Belgium, comparing them and their respective paths of legal development as regards the legalization of euthanasia⁵ and closely related other forms of MBPSL (such as withdrawal of treatment and terminal sedation). Along the way we compared these two countries, which were the first explicitly to legalize euthanasia, with eight other European countries⁶ which (with the partial exception of Switzerland⁷) have not (yet) done so.

Our questions

What does 'comparative law' entail in such a case? To answer this question we first have to be more specific about the questions we wanted to answer. These were many, but in short we wanted to know what, if any, rules ('legal'

3 J. Griffiths, H. Weyers and M. Adams, *Euthanasia and Law in Europe* (Oxford: Hart Publishing, 2008).

4 See on this research program (now referred to as 'RSPMB'): www.rug.nl/rechten/rspmb.

5 Unless otherwise clear from the context, we use the term 'euthanasia' to include both euthanasia in the narrow sense (killing another at his request, in particular when done by a doctor) and assisted suicide (particularly when this assistance is provided by a doctor).

6 England and Wales, France, Italy, Spain and Switzerland. The Scandinavian countries (Denmark, Norway and Sweden) were for the purposes of the book treated together. There was not much rigorous method to our selection of countries (apart from the choice to limit the book to Europe). The following criteria played a role: in what countries was the question of legalizing euthanasia (or of related sorts of medical behavior such as administering potentially lethal pain relief or withdrawing life-prolonging treatment) known to us to be a matter of public/political debate? In what countries was there legal and empirical material available for purposes of the sort of comparison we wanted to make? In what countries did we have access to local colleagues whom we could trust to provide the sort of legally and empirically reliable information we were interested in? These criteria identified one country not included in the book but which certainly should have been: Germany.

7 In Switzerland, assisted suicide is not illegal so long as it is not a doctor who gives the assistance (volunteers working for lay organizations do this). For further information, see the chapter on Switzerland in, *Euthanasia and Law in Europe*, pp. 463–481.

and otherwise) apply to MBPSL, and how ‘euthanasia’ is separated out from the other MBPSL for special treatment. We also wanted to know what the rules (as locally interpreted) are taken to mean and why this is so, and what accounts for their similarities and differences. Then we wanted to know when and how the rules are used in medical (and other) practice and what sorts of social effects such use has (e.g. for the ‘safety’ of patients; and whether there is evidence of a ‘slippery slope’). We further sought to understand why legalization of euthanasia has so far occurred in the Netherlands and Belgium (and recently, Luxembourg), and not elsewhere, and what such legalization has entailed. A final important question concerned the more general context in which legalization of euthanasia is taking place: is euthanasia an example of increasing liberty for doctors and patients, or rather one of increasing legal control? So you might say that we were interested in: (a) the legal norms (broadly understood) concerned and how they have changed in recent years, (b) their social effects, and (c) explanations for the similarities and differences of the norms and their effects in different jurisdictions. Our reason for doing all this in a comparative manner was not just idle curiosity. It was based in the wisdom of the observation that, ‘He who knows one society knows no society.’⁸

Although we deal here only with the specific subject matter of our book, we nevertheless believe that the comparative methodology employed applies more generally to all research projects with similar purposes.⁹

Our approach

To be able to do all this we adopted an approach that can be summarized as ‘casting the net wide’. This phrase refers metaphorically not only to the fact that we had set ourselves ambitious and far-reaching goals for which a broad approach was inevitable, but also to the fact that even more limited

8 A. Köbben, ‘De vergelijkende methode in de volkenkunde’, in A. Köbben, *Van primitieven tot medeburgers* (Assen: Van Gorcum, 1974), p. 24 (quoting Fahrenfort). Quite apart from all this, we also wanted to provide (practicing) lawyers with a complete and accurate account of current law, and policy makers in other countries with as full a description as possible of what a system of legalized euthanasia looks like (in the Netherlands and Belgium).

9 A similar methodology, especially as far as the first three parts of our research project was concerned (next section, ‘Cast the net wide’, parts 1–3), can be found in V. V. Palmer, ‘From Lerotholi to Lando: Some Examples of Comparative Law Methodology’, *American Journal of Comparative Law*, 53 (2005), 276–281 (setting out the methodology used in the Trento Common Core Project on ‘Pure Economic Loss in Europe’).

goals would have required a broad perspective. Thus, for example, living up to the goal of identifying the relevant rules required a broad approach to what count as 'legal' rules in the context of medical practice at the end of life.

In what follows we set out how we went about all this. Illustrations come mostly from the book itself (and we have not considered it necessary to cite chapter and verse for each of them).

Cast the net wide (part 1): functionalism

The approach we took to comparison had as its starting point a *functional* scheme. The term 'functional' is however prone to misunderstanding because of its varied meanings in different contexts,¹⁰ and – in a comparative law context – because of the simplistic and unfortunate use of the term by K. Zweigert and H. Kötz in their influential treatise on comparative law.¹¹ For them 'functionalism' refers, among many other things, to the fact that legal rules must be 'seen purely in the light of their function, as

10 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 A. L. Stinchcombe, *Constructing Social Theories* (New York: Harcourt, Brace & World, 1968) for an unusually careful analysis and discussion of the circumstances in which a functional explanation may be appropriate). In the form of 'structural functionalism' the idea is that a structural element of a social system is essential to the maintenance of the system as a whole. The tendency among sociological 'functionalists' is to assume that once a 'function' has been attributed to a social institution, that institution actually does have the effects attributed to it. And the attribution of 'functions' tends to have an at least latent normative foundation. Thus the 'function' of maintaining social order is often attributed to 'law' (whatever that term may refer to) and the existence of 'law' is thought to be explained by the fact that some degree of social order seems to obtain. We do not assume here that 'law' (or 'a law') has any particular 'function' nor that the existence of law can be explained in such terms; nor do we claim that law succeeds in realizing the functions attributed to it (whether by the lawgiver or the sociologist).

11 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford University Press, 1998), p. 34 ff. 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'. M. A. Glendon, M. W. Gordon and P. G. Carozza, *Comparative Legal Traditions (in a Nutshell)* (St Paul: West Group, 1999), p. 9. The first full scale criticism of this sort of functionalism in comparative law is G. Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law,' *Harvard International Law Journal*, 26 (1985), 411–455. 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 University Press, 2004), pp. 100–126. For important qualifications, see J. Husa, 'Farewell to Functionalism or Methodological Tolerance?', *Rabels Zeitschrift für ausländisches und internationales*

an attempt to satisfy a particular legal need'.¹² According to Zweigert and Kötz 'functionalism' builds on 'what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results'.¹³ Law is everywhere, so they claim, a mechanism that has the 'function' of solving universal 'problems of life'.¹⁴

Such a broad use of the idea of 'function' confuses what a rule does *as a matter of fact* ('solves those problems') with (legislative) *purpose* ('attempt to satisfy a particular legal need'). Apart from the fact, obvious all around us, that there is no one-on-one relationship between the 'purpose' someone attributes to a rule and what the effects of the rule really are, the very notion that law 'everywhere attempts to solve universal "problems of life"' is: (1) anthropomorphic – law does not 'attempt' anything; (2) many times not true – much law simply offers facilities and is indifferent whether they are used; (3) not true for another reason (unless the idea of 'universal problems' is made so abstract as to be meaningless) – in what sense do Minangkabau rules of matrilineal descent solve any universal problem? It simply doesn't make sense to speak of problems that are common to and 'solved' by 'law' in all societies. Furthermore, the whole causal problem-solving approach runs foul of Renner's observation that the contents of a body of law and its 'social functions' can be largely indifferent to each other.¹⁵ The Roman law of property prevailed (formally) in Rome, in the middle ages (feudalism), for early bourgeois personal ownership, and under modern corporate capitalism – thus serving four vastly different economic 'functions' with virtually unchanged legal texts! It is not, so it seems, a legal rule itself, but rather the social circumstances, that determine how and when, and to what ends, the rule is used.¹⁶

For us the idea of 'function' was just an analytic tool that makes it possible to achieve some kind of comparability in the rules, the institutions

Privatrecht, 67 (2003), 419–447; and J. De Coninck, 'The Functional Method of Comparative Law: *Quo Vadis?*', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 74 (2010), 318–350.

12 Zweigert and Kötz, *An Introduction to Comparative Law*, p. 34.

13 *Ibid.*

14 *Ibid.*

15 K. Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion* (1929). The English edition is edited by O. Kahn Freund and published as: *Institutions of Private Law and their Social Functions* (London: Routledge and Kegan Paul, 1949).

16 See J. Griffiths, 'The Social Working of Legal Rules', *Journal of Legal Pluralism*, 48 (2003), 1–84.

and the behavior with which we were concerned.¹⁷ Modern European healthcare systems are broadly similar and the roles doctors in different countries play at the end of a patient's life involve at most minor variations within a common basic structure.¹⁸ To identify the (legal) rules to be compared, we could therefore begin with this body of largely similar behavior.¹⁹ We were also able to describe this behavior with a classificatory framework that seemed as neutral *as possible* as between the ten countries we were dealing with. It was important, of course, that in doing so we not make 'false comparisons': comparing 'dissimilar data . . . as if they were similar'.²⁰ Our descriptive framework must thus not force medical behavior in the ten systems onto a Procrustean bed formed by the normative ('folk concepts') classifications proper to only one system when identifying the behavioral situations whose regulation we wanted to compare.²¹ Unfortunately – and this is an important limitation of any

17 Compare R. Michaels, 'The Functional Method in Comparative Law', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), p. 366. The expression 'factual approach' would perhaps be better than 'functional approach', but since functionalism is the household name in the comparative law literature we stick to it.

18 If there is no minimum of similarity in the topic to be researched in different jurisdictions, doing comparative law is simply not feasible. In that sense, and contrary to popular opinion, apples and oranges can indeed be compared: as fruit! But when there is only comparability at a high level of abstraction, one can wonder to what end comparison would be meaningful at all. Without any information about the problem to be addressed and the accompanying research questions, it is hardly possible to say anything sensible about this.

19 Compare the approach to comparative law developed by R. A. Kagan in 'How Much Does Law Matter? Labor Law, Competition, and Waterfront Labor Relations in Rotterdam and US Ports', *Law and Society Review*, 24 (1990), 35–69; R. A. Kagan and L. Axelrad (eds.), *Regulatory Encounters: Multinational Corporations and Adversarial Legalism* (Berkeley: University of California Press, 2000) and R. A. Kagan, N. Gunningham and D. Thorton, *Shades of Green: Business, Regulation, Environment* (Stanford University Press, 2003).

20 On 'false comparisons' in comparative law, see J. van Velsen, 'Procedural Informality, Reconciliation, and False Comparisons', in M. Gluckman (ed.), *Ideas and Procedures in African Customary Law* (London: Oxford University Press, 1969), pp. 137–52.

21 On 'folk concepts' see the classic debate between Gluckman and Bohannan, who disagreed about the concepts used to describe another legal system (Gluckman used Roman and English legal concepts to describe Barotse law; Bohannan argued that the use of such foreign concepts inevitably distorts legal reality). See P. Bohannan, 'Review of *The Ideas in Barotse Jurisprudence*', *Kroeber Anthropological Society Papers*, 36 (1967), pp. 94–101; M. Gluckman, *The Ideas in Barotse Jurisprudence*, 2nd edn (Manchester University Press, 1967) (first published in 1965 as the Storrs Lectures on Jurisprudence at Yale Law School) and 'Reappraisal', in *The Judicial Process among the Barotse of Northern Rhodesia (Zambia)*, 2nd edn (Manchester University Press, 1967), first published in 1955. Compare, from the Dutch adat-law tradition, B. ter Haar, *Adat Law in Indonesia*, 1st edn (1939) (in Dutch,

comparative research project – outside of mathematics and purely artificial languages there are no descriptive terms available that do not run the risk of normative bias.²² One must therefore proceed in a spirit of conceptual tentativeness, seeking continuously to smoke out normative preconceptions, replacing the terms concerned with others that permit a better comparison. Objective neutral classification of the behavior to be compared is a matter of aspiration, since whatever terms one uses will inevitably carry traces of the normative preoccupations of those who use the natural language from which they derive. As with all other classifications of behavior, our framework was (and is) always subject to correction in the light of better insight. From that point of view it was not only the starting point of our research (in the form of an hypothetical analytic framework), but also (in revised form) a product of the research.²³

As we have noted, the ‘functional’ framework we used to identify and describe the legal regulation of MBPSL in the Netherlands and Belgium (and in the eight other countries treated more briefly), has as its point of departure not the rules themselves but the behavior (mostly of doctors) that they purport to regulate. We sought to classify the rules in which we were ultimately interested according to their applicability to various parts of the whole range of ‘medical behavior that potentially shortens life’. The questions the framework is intended to address are these: what,

English translation by E. A. Hoebel and A. A. Schiller (New York: Institute of Pacific Relations, 1948)).

Of all ‘folk concepts’ probably the most dangerous is ‘law’ (and its equivalents in other languages), reflecting, as it always inescapably does, the normative preoccupations of a society which distinguishes the ‘legal’ from the ‘non-legal’ in its own peculiar way. The danger of distortion involved in the use of ‘folk concepts’, it should be emphasized, is not limited to comparative work. They are perhaps even more insidious in the case of observation of and reflection on one’s own system.

- 22 Van Tol’s research on the classification of MBPSL by Dutch doctors and prosecutors shows convincingly how strong the ‘cognitive solidarity’ of such social groups affects the way they classify behavior – doctors having quite a different view from that of prosecutors as to what constitutes ‘euthanasia’, for example. See D. van Tol, ‘Grensgeschillen. Een rechtssociologisch onderzoek naar het classificeren van euthanasie en ander medisch handelen rond het levenseinde’, dissertation, University of Groningen (2005), summarized very briefly in Griffiths, Weyers and Adams, *Euthanasia and Law in Europe*, pp. 203–204.
- 23 An example of the sort of classificatory cumulative insight we have in mind concerns a recent newcomer to the world of (acknowledged) MBPSL: palliative/terminal sedation. While it is possible to analyze these as a combination of pain relief and withholding treatment, it seems increasingly clear that to do so is to oversimplify. A more adequate comparison of the regulation applicable to MBPSL than is reflected in the table below would probably have to include a separate category for this sort of behaviour.

if any, rules apply to (one or another sort of) medical behavior that potentially shortens life? And how is 'euthanasia' separated out for special treatment?

In the jurisdictions we were concerned with, many things doctors do can knowingly cause the death of a patient (in most countries, roughly half of all deaths take place in this way). Like other people, doctors can commit murder or cause someone's death by careless driving. But our study was not concerned with such situations, where the fact that the actor is a doctor is irrelevant as far as the legal consequences of his behavior are concerned. Nor did we deal with everything a doctor does as a doctor that causes a patient's death: in particular, medical negligence that leads to so-called *iatrogenic death* – that is, death due to medical mistakes – was not part of our subject. What we were concerned with were deaths that are not an accident, not the result of negligence, nor the untoward consequences of taking justifiable risks in pursuing legitimate curative or palliative objectives, but the outcome of medical behavior in which the doctor engages *expecting the behavior to lead to the earlier death of the patient*. It is possible to define this category in two ways: 'subjectively' (in terms of what the doctor involved actually anticipated) or 'objectively' (in terms of what a reasonable doctor would have anticipated). Both for legal and for scientific purposes, there is rarely any way to know what a doctor 'actually' anticipated other than by taking his word for it or assuming he anticipated what others in his position would have anticipated. Since self-reports of the reasons for behavior are notoriously unreliable,²⁴ the choice for an objective approach was easily taken.

MBPSL thus consists of a number of sorts of medical behavior that can be distinguished in (largely) behavioral terms common to the systems of medical end-of-life care we are concerned with, as shown in the left-hand column in Table 13.1 below. The right-hand column shows the general legal category under which such behavior falls in Dutch and Belgian law (but not necessarily in that of any other country).

Taking the various sorts of MBPSL in order, from the top of Table 13.1 down, the legal situation in the Netherlands and Belgium is, very generally speaking, as follows. If a patient refuses life-prolonging treatment, his doctor is obliged to comply, and this also applies to the situation of a currently non-competent patient who, when he was competent, expressed the

24 Cf. R. C. Lewontin, 'Sex, Lies, and Social Science', *New York Review of Books* (20 April 1995).

Table 13.1

Varieties of end-of-life medical behavior	
Behavioral category	Legal categorization in Dutch and Belgian law
honoring patient's refusal of treatment (current or in treatment directive)	patient's consent required for treatment
abstention: withholding or withdrawing 'futile' life-prolonging treatment	'medical exception' to criminal prohibitions for 'normal medical practice'
pain relief with life-shortening effect	
euthanasia	justification of necessity (Netherlands until 2002) or explicit legalization
physician-assisted suicide (PAS)	
termination of life without an explicit request	justification of necessity (Netherlands)

refusal in the form of a so-called 'treatment directive'.²⁵ Abstention from life-prolonging treatment on grounds of 'medical futility', and administration of indicated doses of pain relief despite the fact that this may hasten the death of the patient, are considered 'normal medical practice' and fall within the so-called 'medical exception' that permits a doctor to do things (such as surgery or turning off a respirator) that in the case of a non-doctor would be criminal offenses.²⁶ 'Termination of life' is in principle homicide (murder or the like). However, if done by a doctor at the explicit request of the patient, 'euthanasia' (including 'physician-assisted suicide') has been made legal in Belgium and the Netherlands. Termination of life in the absence of a request can also be legally justifiable in the Netherlands (but not in Belgium) in some narrowly-defined circumstances (e.g. neonates).

As far as the legal justification of euthanasia is concerned, a short explanatory note on the difference between the Netherlands and Belgium is necessary and illustrative. In the Netherlands, euthanasia and assisted

25 See generally on treatment directives, C. Vezzoni, *Advance Treatment Directives and Autonomy for Incompetent Patients* (Lewiston, NY: Mellen Press, 2008). Such instruments are often called 'advance directives' but for reasons explained by Vezzoni, the term 'treatment directive' is more precise.

26 See *Euthanasia and Law in Europe*, pp. 55–56.

suicide were until 2002 explicitly and apparently absolutely prohibited by two articles of the Dutch Penal Code. Despite the forbidding text of these two articles, the Supreme Court held in the *Schoonheim* case in 1984²⁷ that a doctor can rely on the defense of justification due to necessity if he administers the necessary drugs (euthanatica) to a patient who asks him to do so and whose suffering is 'unbearable and hopeless'. The justification of necessity is provided for in article 40 of the Dutch Penal Code, which states that an actor is not guilty of an offence if it was 'the result of a force he could not be expected to resist [*overmacht*]'. Although article 40 looks on its face like an excuse, since 1923 it has been interpreted to include the justification that the act took place in a situation in which the actor has to make a choice between two conflicting duties. Based on this existing doctrine, the Supreme Court held in the *Schoonheim* case that a doctor who, confronted by the request of a patient who is unbearably and hopelessly suffering, can be regarded as caught in such a situation of conflict of duties. On the one hand, there is the duty to respect life, as reflected in the Dutch Penal Code. On the other hand, there is the doctor's duty to relieve suffering. If, the Supreme Court held, a doctor confronted by such a conflict of duties, chooses a course of action that, considering the norms of medical ethics, is 'objectively' justifiable, he is not guilty of an offence. In the period following the *Schoonheim* case the courts, generally following the lead of the Royal Dutch Medical Association, worked out the 'requirements of due care' that must be followed in such a case. Only in 2002, more than fifteen years after *Schoonheim*, did legislation on euthanasia become effective. In effect it ratified the solutions arrived at by the courts.

In Belgium, euthanasia was illegal until 2002, when legislation was passed legalizing it. Before that time, it undoubtedly took place in actual medical practice, but unlike the Netherlands there had never been a prosecution in which the possibility of a legal justification could be tested. Because of this, it was (and is) not known, for example, whether the justification of necessity, as accepted by the Dutch Supreme Court in the case of euthanasia, might also be applicable in Belgium (for example, in a situation not covered by the law of 2002).

It is precisely the lack of prior case law and practical experience in Belgium that also helps to explain why the Belgian Euthanasia Act,²⁸

27 Dutch Supreme Court, 27 November 1984, *Nederlandse Jurisprudentie* 1985, no. 106.

28 For an English translation see: www.kuleuven.ac.be/cbmer/viewpic.php?LAN=E&TABLE=DOCS&ID=23 (accessed 12 September 2010). Also in *European Journal of Health Law*, 10 (2003), 329.

unlike its Dutch counterpart,²⁹ contains so many detailed provisions. Because legislation took place in a situation that was legally hardly pre-structured (with as a result much legal uncertainty), it was felt necessary to create legal certainty by means of extensive legislation.

To recapitulate: Given purposes such as ours, meaningful comparison must be *functional* in the sense that one begins with *behavioral categories* and uses these to identify the legal rules (broadly taken) applicable to such categories of behavior in the jurisdictions being compared.

Cast the net wide (part 2): what concept of legal sources and law?

Our approach to comparison was also *non-formalistic*. We do not have to take a position on the question whether such an approach would be necessary in every area of law (although it certainly can be useful in many other comparative research projects), but in studying the law concerning euthanasia and the other MBPSL, even in one country but certainly when one engages in comparison, it is for several reasons essential to take broadly the concept of what constitutes a legal source or a legal rule. For us, the concept of legal sources must be taken to mean ‘everything that shapes or helps to shape the law’.³⁰

For example, in the regulation of everyday medical practice, in particular as such regulation develops and changes, there is a great deal of relevant data that goes beyond formal ‘legal’ texts such as statutes or judicial decisions. These are preceded, surrounded and given meaning, and followed by a vast amount of ‘para-legal’ sources of law. It would, in every country we know of, be impossible to state what the law ‘is’, let alone what it will be tomorrow, without taking account of – to name a few of the most obvious and important other sources of law – parliamentary reports (such as that of the House of Lords Select Committee on the Assisted Dying for the Terminally Ill Bill), reports of official advisory committees (such as those of the French National Ethics Committee), reports of state commissions and the like (such as the Dutch State Commission on Euthanasia, which among other things settled the terminological question of the distinction between ‘euthanasia’ and other MBPSL).

29 For an English translation see: www.healthlaw.nl/wtlovhz_eng.pdf (accessed 12 September 2010).

30 K. Zweigert, ‘Zur Methode der Rechtsvergleichung,’ *Studium Generale*, 13 (1961), 196, quoted by S. Vogenauer, ‘Sources of Law and Legal Method’, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), p. 879. The word ‘law’ in the quote from Zweigert apparently refers only to state law.

Of particular importance in a highly developed system of regulation of euthanasia such as that in the Netherlands (but less so in Belgium, among other reasons because the Belgian statute is far more detailed than the Dutch statute) is the fact that legal sources include various professional documents whose pedigree is not, strictly speaking, 'legal', but which are generally followed by the courts, prosecutors and other legal authorities. On crucial matters such as the 'requirements of due care', appropriate euthanatica, and the extent to which nurses may be involved in the administration of euthanasia, the position formulated in various documents by the Royal Dutch Medical Association (KNMG) has been authoritative. More recently, the legitimacy of and requirements for palliative sedation have effectively been settled by a national guideline issued by the KNMG. Similarly, national guidelines of specialist organizations have largely fixed the rules governing physician-assisted suicide in the case of psychiatric patients (Dutch Association for Psychiatry) and for withholding treatment and termination of life in neonatology (Dutch Association for Pediatrics). A particularly interesting illustration of the importance of formal statements by professional organizations in the regulation of medical behavior is the case of Switzerland: while assistance with suicide is not a criminal offence (unless done for a selfish motive), the very limited involvement of doctors in Swiss institutionalized practice, and hence the central role of volunteer organizations that give the actual assistance, is based on the position of the organized medical profession concerning medical ethics. A further consequence is that regulation of the practice of assistance is largely to be found in the internal rules of the lay organizations, which determine, for example, eligibility for their services.

There are also low-visibility 'legal' sources that give specific content to the statutory provisions. The 'case law' of the Dutch and Belgian Review Committees has effectively settled a number of very important questions concerning the interpretation of the euthanasia statutes in the two countries. In the Netherlands for example, current regulation of the question how much prior relationship a doctor must have with a patient who requests euthanasia is to be found in the 'case law' of the Review Committees. An interesting Belgian example is provided by the question of the legality of physician-assisted suicide. Unlike its Dutch counterpart, the Belgian Law on Euthanasia does not expressly apply to physician-assisted suicide. On the face of it this seems surprising. It is generally accepted that the differences between euthanasia on the one hand and assisted suicide on the other, are ethically minimal. It would seem logical for both forms of termination of life to be tied to the same legal standards. Why regulate the

‘greater’ but not the ‘lesser’? From the point of view of patient autonomy and of societal control, assisted suicide is probably preferable to euthanasia, and such a preference could easily have been built into the Law. The issue was settled by the Belgian Review Commission. In its first biennial evaluation report, in September 2004, the Commission simply stated that it considered physician-assisted suicide to fall within the definition of euthanasia.³¹ Since the Commission’s assessment of cases reported to it is in effect final, unless it finds that the doctor did not conform to the legal requirements, this ‘interpretation’ of the statute by the Commission is effectively final too.

Another not quite fully ‘legal’ source of relevant rules consists of prosecutorial guidelines. In the Netherlands, the relevant guideline concerning prosecution of cases in which a doctor is found by a Review Committee not to have followed all the (statutory) requirements of due care, while largely unknown outside the prosecutorial service, in effect repairs some unfortunate mistakes made in the drafting of the euthanasia statute (e.g. where the statute subjects the failure to report a case of euthanasia to the same criminal liability as that for performance of illegal euthanasia: the guideline provides that such cases do not usually call for criminal prosecution). Recently, in the United Kingdom, the Director of Public Prosecutions has issued a guideline which in effect regulates the practice of helping a person to travel to Switzerland for assisted suicide.³²

In casting the net wide, however, it is not enough to take account of the sort of ‘para-legal’ sources we have been describing. One also has to take account of the fact that issues that have been regulated by official ‘state’ law in one country, might be regulated in other ways in other countries. Moreover, comparative law for our purposes requires that one also looks to the informal law (‘norms’, if one prefers) of the social groups to whom the relevant actors belong. Certainly in our domain this is true: an important part of the regulation of medical behavior takes place in the form of social rules of the medical profession itself. Some of these are ‘para-legal’ and have been noted above. Others, however, are non-legal (such as the rules of Swiss assisted suicide organizations) or even *contra legem*. Nowenstein has shown, to use an example from a closely related area of medical practice, that the success of the Spanish ‘presumed consent’ law

31 *Premier Rapport aux Chambres Législatives / Eerste Verslag aan de Wetgevende Kamers* [First Report for the Legislative Chambers], *Parliamentary Proceeding, Senate and Chamber of Representatives, 2003–2004*, 3–860/1 (Senate); DOC 51 1374/001 (Chamber).

32 See P. Lewis, ‘Unfinished Business’, *The Solicitors Journal*, 153:37 (2009), 11.

concerning procurement of organs for transplantation, and the failure of the equivalent French law, is the result of strikingly different norms in the two medical professions relating to the interaction of medical personnel with the family of a 'brain dead' patient.³³ Similarly, although French law absolutely prohibits 'active termination of life' in neonatology, the social norms among neonatologists in France result in such medical behavior being far more frequent than in the Netherlands, where it is legal in very narrow circumstances but tightly regulated by professional guidelines; and whereas Dutch medical norms (reflected in the guidelines referred to) absolutely require close involvement of the parents in such cases, as well as in the much more common case of withholding of treatment, and research shows that the official norms are essentially always followed, in France involvement of the parents is apparently very rare.³⁴ In short, comparing the way medical behavior is regulated in different countries requires that one take account not only of formal 'legal' rules but also of the applicable professional norms.

*Cast the net wide (part 3): engaging social and institutional context
in the interpretation of legal norms*

The problems the law addresses and the rules which it provides for dealing with these problems are always embedded in a particular social and institutional context. In our case this meant that it was important to study the rules concerning euthanasia and other MBPSL in a *multilayered* way. The rules themselves were the first layer, and we paid careful and detailed attention to them. But without taking account of their historical, institutional, political, cultural and social environment, their meaning cannot be understood. The second and third layers of comparison, in our case, concerned specifically the health care system within which the rules were situated, and more generally the political culture and constitutional background of the legal system of which all this is a part. In effect, we were thus engaged in (comparative) institutional and political sociology.

Thus anyone who, for example, wants to know what the Belgian legal rules on euthanasia mean will find that this is to large degree determined by the institutional structure and legal culture in which they are

33 See Nowenstein, *The Generosity of the Dead*.

34 Compare A. Paillet, *Sauver la vie, donner la mort. Une sociologie de l'éthique en réanimation néonatale* (Paris: La Dispute, 2007) with S. Moratti, "Medical Futility" in Dutch Neonatology', dissertation, University of Groningen (2009); cf. also *Euthanasia and Law in Europe*, pp. 246–249.

embedded. A good example of this is the debate about the alleged existence of a *right* to euthanasia. Article 14 of the Belgian Euthanasia Act clearly provides that a doctor may refuse to perform euthanasia on grounds of conscience. There is no such thing as a subjective right to euthanasia in the sense that a patient can demand euthanasia from a specific doctor. Yet there are differing opinions among lawyers and doctors, and among the public, about the meaning of article 14.

Proponents of a right to euthanasia argue that because the Belgian Euthanasia Act explicitly requires that euthanasia be performed by a doctor, it must be considered 'normal medical behavior'. Since it is 'normal medical behavior', doctors are under an obligation to perform it if the extensive conditions listed in the Euthanasia Act are met.³⁵

Opponents of a 'right' to euthanasia, on the other hand, rely heavily on a reconstruction of the legal context in which the Euthanasia Act should be read, situating the supposedly applicable legal norms in the wider context of health care legislation.³⁶ From a legal point of view, the opinion that euthanasia is 'normal medical behavior' cannot be correct, so the opponents argue, because under Belgian law medical behavior that for non-doctors would be criminal can only be legally justified under the Royal Decree concerning the practice of health care professionals. This Decree provides, among other things, that a doctor has an obligation to treat a patient when there is a *medical indication* for the treatment – subject to the consent of the patient, of course. This legal justification (and the connected obligation for the doctor) does not, however, cover behaviour of physicians for which there is no *medical indication*, such as (in most cases) abortion, removal of an organ for transplantation, non-therapeutic medical research, and euthanasia. In other words, so these opponents argue, to justify these medical activities specific legalisation is required. It is the Euthanasia Act itself that creates a specific legal justification for euthanasia, but not a right to it. To the opponents the distinction between medically-indicated treatment and medical behavior that is legal but not medically indicated³⁷ clearly implies that euthanasia cannot be considered 'normal medical behavior'.

35 See for this and other arguments, E. De Keyser, 'Euthanasie: een medische handeling?', *Nieuw Juridisch Weekblad* (2003), 1067–73.

36 H. Nys, 'Euthanasie is geen medische handeling', *Acta Hospitalia*, 4 (1999), 71–72 and H. Nys, 'Euthanasie in de Caritasziekenhuizen: een juridische verheldering', *Ethische Perspectieven*, 1 (2002), 29–31.

37 The distinction was accepted by the Belgian Council of State in its advice on the then pending euthanasia Bill. *Parliamentary Proceedings, Senate*, 1999–2000, 2–244/21.

Differences of opinion continue to date, but the key to understanding and possibly even resolving this matter lies in the political and societal context, and ultimately revolves around the mainly ideological question of whether Catholic hospitals may prohibit doctors in their employ from performing euthanasia: if euthanasia is not a subjective right, hospitals might be free to do so. The answer to this question is not merely academic, since about 80 percent of the hospitals in Flanders (the region that accounts for more than half of Belgium in terms of number of inhabitants and geographic size) are associated with Catholic organizations. Awareness of this political and societal context is the natural habitat of Belgian lawyers – and the population at large – when interpreting the legal norms. They have no difficulty recognizing and understanding the interests at stake. Nevertheless, in the legal literature the matter is translated into (some would say 'disguised as') an almost exclusively legal dispute. That makes the Belgian discussion difficult for an outsider to understand.

What especially complicates matters for a comparatist is that in the Netherlands the idea that euthanasia cannot be considered a form of 'normal medical practice' has *not* been discussed in similar terms (and there is general consensus that it is *not*), but in quite a different context. The Dutch discussion has focused not on the matter of a subjective 'right' (for which there is little support³⁸) but rather on the question whether a criminal control regime for euthanasia is necessary and wise, or whether control can be left (at least in the first instance) to the profession itself (as is largely the case for 'normal medical practice'). Here the discussion has not been so much ideologically inspired (far less so than in Belgium) as policy driven: what form of control can best meet the need for safety and public confidence, once euthanasia is made legal?³⁹

So what we see is two countries using similar legal arguments in a seemingly similar debate but with quite different practical implications and motivations. It is especially when foreign legal systems and circumstances seem familiar and even self-evident that the comparative researcher can

38 Griffiths is a partial exception. Many years ago he argued that while there was no duty resting on any particular doctor (and hence no corresponding right within the doctor-patient relationship), the fact that the medical profession had claimed, and received, a monopoly over legal euthanasia necessarily implied that the profession should not, ultimately, be allowed to avoid the duty of ensuring access for patients who meet the requirements. See J. Griffiths, 'Een toeschouwersperspectief op de euthanasiediscussie', *Nederlands Juristenblad* (1978), 681–693.

39 See J. Griffiths, A. Bood and H. Weyers, *Euthanasia and Law in the Netherlands* (Amsterdam University Press, 1998), pp. 285–298.

be lead to draw ‘obvious’ but in fact superficial or misleading conclusions as far as similarities and differences are concerned. This confirms the need to make the socio-legal context explicit.

Cast the net wide (part 4): not just the rules but social practice as well

Finally, in making comparisons with an ultimately explanatory objective in mind, it was important to consider not only the (legal and other) rules, but also the social practices in which they play a part. This implies a rejection of simplistic ‘instrumentalism’: the notion that in normal circumstances rules are direct causes of the behavior they prescribe. The archetypical example is driving: people keep to the right when driving because this is what the traffic rules require and if you want them to wear seat-belts as well, there should be a rule that requires it. In effect, instrumentalism privileges the perspective of the rule-giver. There are many troubles with such a view, of which perhaps the most embarrassing is that although there has been a vast amount of research inspired by the instrumental approach, no one has ever been able to demonstrate a direct causal relationship between rules and behavior.⁴⁰

The approach we adopted begins the other way around, privileging the perspective of the actors on the ‘shop floor’ of social life, where the behavior covered by a rule is taking place. Where instrumentalism focuses, in effect, on obedience, the approach we favor asks whether and how these actors will ‘use’ a rule – by following it, for example, or as a resource in case of conflict or struggles over power, or in connection with the creation of other rules, and so forth. Such an approach does not assume that ‘legal’ rules have priority over rules of other provenance (such as moral or professional rules), which for the actor on the shop floor may be more pressing reasons for behavior.⁴¹

A simple example of the importance of focusing on actors and their use of (legal) rules – if, that is, one is interested in explanation – is the matter of legal knowledge. Obviously, an actor whose behavior is covered by a rule cannot follow it unless he knows of its existence and interprets it correctly. The same applies to all the other actors whose use of a rule is an essential part of a practice in which the rule produces social effects: those, for example, who use it in urging rule-conforming behavior, in reprimanding or reporting violators, in conflicts with their fellows, in

40 See J. Griffiths, ‘Is Law Important?’, *New York University Law Review*, 54 (1978), 339–374.

41 See Griffiths, ‘The Social Working of Legal Rules’, 1–84.

drafting protocols and the like incorporating the requirements of the rule into local regulations, and so forth.

Ultimately, what one needs to know is the difference, if any, that a given rule makes in social life. Only when one has such information is comparison of legal systems capable of producing explanations of differences between them and of change over time. 'Casting the net wide' thus involves looking not only at rules but at actual behavior, and appreciating the relevance of a range of information that from the perspective of a legal formalist is not 'legally relevant' at all.

Intermediate conclusion

Broad, multi-layered descriptions of legal, cultural and socio-political contexts of euthanasia in the jurisdictions under review allowed each system we looked at to express its own individuality. As a result it is possible for the reader to: (a) have a keen eye for the differences between the systems (and not just for similarities), and (b) see the comparative evidence for himself. On this last point, we thought it important that the reader be allowed to draw his own conclusions from the comparative evidence we presented, conclusions possibly quite different from our own.⁴² Otherwise the neutrality we were striving for would carry the danger that it be mistaken for absolute neutrality. Neutrality is not just a problem for the authors but for the *reader* too. Learning about a foreign legal system can induce anyone who is not sufficiently self-critical to reflect on the issues at stake from the perspective of his own native legal system, making 'false comparisons' of his own. All this only affirms the need for a broad approach: the dangers we are calling attention to can only be kept under control if one is explicit about one's assumptions and choices.

Comparison and explanation

In the introduction to this chapter we emphasized that there is no single 'comparative method' because there is no single question to which legal comparison can be addressed. We believe one only chases a will-o'-the-wisp if one tries to find a methodology for doing comparative legal research, or to decide what counts as similarities or differences, or to overcome a gap between goals and methods, and so forth, in the abstract,

42 Compare V. V. Palmer, 'From Lerotholi to Lando', 278.

not connected to some (sort of) concrete question. We noted in the introduction that in the case of our research concerning the regulation of MBPSL we wanted to be able to *explain* the regulatory phenomena we observed. Even if no absolute certainty, comparison can provide at least more explanatory power and evidence than enquiries that limit themselves to one legal system.⁴³

In *Euthanasia and Law in Europe* we explore *en passant* a whole variety of differences between the countries dealt with (for example, the differences between the very general terms of the Dutch euthanasia law and the highly detailed terms of the Belgian law; the difference in the degree to which ‘advance directives’ are honored in countries like the Netherlands and Belgium, on the one hand, and France and Italy on the other). At the end of the book we focus specifically on several particularly important explanatory questions. Some of these relate to processes of legal change (for example, whether there is evidence of a ‘slippery slope’ and why (or why not); which European countries seem most likely to legalize euthanasia in the near future and why). Another important question concerns the more general context in which legalization of euthanasia is taking place: is this one of increasing liberty for doctors and patients, or rather one of increasing legal control? Since we obviously cannot deal here with all of the questions we tried to answer with a comparative method, we take this last question as an example.

A normal person in any other country, upon hearing that euthanasia has been made legal in the Netherlands and Belgium, could be excused for supposing that what has happened is that existing rules prohibiting euthanasia have been eliminated, that is, that in a general sort of sense, there is ‘less law’ on the subject now than there was before legalization. On the other hand, the oft-heard fear of ‘juridification’ of the doctor-patient relationship assumes that more and more law regulates it – that the ‘rule pressure’ (to use a current Dutch expression) is increasing, and that this is particularly worrisome in an area of life that is too delicate to bear the weight of so much law. But how to measure ‘how much’ law there is, is not immediately apparent. We approached that problem in a rather rough and ready way, using Black’s idea that the ‘quantity of law’ can be measured in terms of ‘the number and scope of prohibitions,

43 Cf. G. Dannemann, ‘Comparative Law: Study of Similarities or Differences?’, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), pp. 398–399.

obligations and other standards to which people are subject, and by the rate of legislation, litigation, and adjudication.⁴⁴

Black's theory tells us to expect more law where there is greater inequality of wealth, where social bonds between members of society are looser, where the degree of social integration is lower, and where other forms of social control over the behavior concerned are weaker. As far as euthanasia is concerned, however, Black's theory seems to point in precisely the wrong direction. All of his variables would lead us to expect less law on the subject in the Netherlands and Belgium than elsewhere. In fact, quite the opposite is true, especially in the Netherlands. In *Euthanasia and Law in Europe*, we show in some detail that the amount of official application of legal control to doctors who perform euthanasia has grown enormously over the past decade (it is now about 4,000 cases per year), that the 'rule pressure' (the number of rules – 'legal' and otherwise – to which the behavior is subject) is heavy, and that doctors and institutions apply the relevant rules more than 30,000 times a year. Apart from Belgium, there is nothing like this amount of law in any other country.

A more hopeful theoretical approach to explaining the fact that there is much more euthanasia law where it is legal than where it is illegal is Elias's 'civilization theory'.⁴⁵ Elias sought to explain the growth of social control concerning violence and good manners over the past 1,000 years or so of European history. In his footsteps, Kapteyn studied the cultural changes of the 1970s in the Netherlands. One chapter in Kapteyn's book *Taboo, Power and Morality in the Netherlands*⁴⁶ is devoted to the collapse of the taboo on nudity in public, in particular on beaches. Kapteyn argues that whereas the defenders of traditional Dutch cultural values regarded the whole development as an instance of a more general collapse of civilized order, the fact of the matter was that elimination of an unqualified taboo lead to *more* rules and *more* control than there had ever been before. There is, for example, on an old-fashioned beach, hardly a need for special rules about how people look at each other. On nude beaches, however, such rules quickly arose and were effectively – if informally – enforced.

It seems, thus, that the decline of an unqualified general prohibition of a given sort of behavior gives rise to the need for much more specific

44 D. Black, *The Behavior of Law* (New York: Academic Press, 1976).

45 See N. Elias, *The Civilizing Process: The History of Manners and State Formation and Civilization* (Oxford: Blackwell, 1993).

46 P. Kapteyn, *Taboo, ontwikkelingen in macht en moraal in Nederland* (Amsterdam: De Arbeiderspers, 1980).

regulation, dealing with when, how, and subject to what restrictions the previously forbidden sort of behavior is acceptable. Taking the idea of 'law' broadly, the end of a taboo brings more law, not less. The Dutch and the Belgians have not freed their doctors from constraints that bind their colleagues in other countries. On the contrary, they have subjected the behavior of doctors to much more law than used to be the case, and to much more than it attracts elsewhere.

There is a longer-term sociological logic at work here, and the word 'juridification' that we used to describe the increase in the quantity of law was meant to evoke it. Legalization of euthanasia and the increase in the quantity of law that accompanies it are not isolated phenomena. They are part of a much more general process of 'juridification' of the doctor-patient relationship. This more general process is manifest in all sorts of developments, of which we mention just a few to give an idea of what we have in mind: the requirement of informed consent, the legal recognition of advance directives, the legal acceptance and regulation of decisions to withhold or withdraw treatment, the burgeoning of medical guidelines, standards and protocols, and so forth.⁴⁷

With all this in mind, we can better understand the fact, that in the years after the Dutch Supreme Court had held that euthanasia can be legally justifiable, a substantial number of Dutch doctors remained unwilling to report cases of euthanasia as required because they believed that the state should not be involved in regulating euthanasia at all: it was something that belonged to the authority of the doctor and the privacy of the doctor-patient relationship. The initial opposition of the Belgian Order of Physicians to the proposal to legalize euthanasia is likewise understandable from such a perspective. Legalization was not necessary, a spokesman stated during legislative hearings to the Belgian Senate, because up till then Belgian doctors practiced euthanasia whenever they thought it appropriate and never experienced any interference from the legal authorities. What the law really proposed to do, he argued, was to impose a legal regulatory regime on the decision making of doctors and patients. We can summarize this reflection on the legal change that has taken place in the Netherlands and in Belgium in one sentence: *He was absolutely right.*

Our ultimate conclusion from this reflection on some of the findings of our research is that the most fruitful way of looking at the process of legalization of euthanasia may be to see this not only or even principally

47 To refrain from the all too obvious, we do not even go into the so-called 'explosion' in malpractice litigation.

as a matter of liberation of doctors and patients from an existing taboo. Rather, one should see it as the subjection to systematic legal control of behavior that had long been taking place with some frequency (and there is much evidence for this) but – precisely because it was taboo – in secret and outside of all societal control.

Conclusions

In this chapter, we have rejected the idea that there is a single 'comparative legal method'. We regard legal comparison rather 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, we have argued that what we call 'functional comparison' and 'casting the net wide' is essential. This involves all the elements we discussed in part 3 of this chapter. The data that such an approach produces can then, in combination with some 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? How should we understand where we are and where we are heading?

Rejecting the notion of 'the' comparative method, and insisting on 'functional' comparison and 'casting the net wide', is obviously not a prescription for making the life of a comparatist easy. We can therefore anticipate a reaction along the lines of: such demands are beyond the means and capacities of mere mortals. Of course that is so. We do not pretend that in the examples given in this chapter, or in the rest of our work, we come near to fulfilling the requirements we here lay down. Nor do we expect that anyone else will ever be able to do so, unless the question he seeks to answer is so simple as to be uninteresting. What we do propose is an ideal against which the performance of ordinary mortals can be measured, by themselves and by others. But in doing one's daily work (and in being charitable to others) one must never lose sight of the most fundamental methodological rule of all: row with the oars you have.