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Comparing law: practice and theory

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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.[1] 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.[2] 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,[3] 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,[4] or to the equally controversial question of whether there is *anything more* to comparative law than mere methodology.[5] 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.[6] 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-juridical 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'.[7]

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.[8] 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 formality' 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