

abortion law, in Germany, 220–1	availability
abstraction levels, 89–90	of data ´
accountability, of governments towards	in decisional analysis, 140-1
parliaments, 160–1	in quantitative analysis, 235–6,
Ackerman, Bruce, 230	237
Acquis Principles (Principles of the	of information, 311
Existing EC Contract Law,	
Acquis Group), 99, 104	behaviour
system neutrality in, 111–13,	cooperative, cross-cultural studies
114–15, 116	on, 273–4
Adams, Maurice, 5, 6, 8, 11–12, 14, 15,	and law/legal regimes, 7
21, 65–6, 321	constitutional norms as reasons
administrative law, and transnational	for, 219–20
legal order, 205–11	for euthanasia, 11–12
Against Method (Feyerabend),	medical
280–1	comparisons of, 284–6
Aghion, Philippe, 275	see also euthanasia
Algan, Yann, 275	behavioural economics
ambitions of comparative law research,	applied to comparative law, 11,
324	20–1, 258–9, 264–6
see also purposes, of comparative	and cross-cultural variability,
law	271–6
analogical reasoning, 86–7	and empirical substantiation,
anthropology, and human rights law,	266–71
197–9	limitations of, 276–8
Arcelor case, 152	Belgium
arguments, 35	comparisons of legal systems within,
see also formal legal arguments; legal	320–1
arguments; reasoning	legal regime on euthanasia in,
Arizona v Roberson case, 62–3	289–90, 293–5, 300
authoritative texts in legal systems,	compared with Netherlands,
129–30	287–8, 295–6
automated coding of texts,	interpretation of, 291–2
242–3	Bell, John, 313, 317–18
autonomy, relative, of legal sphere,	best practices, as point of convergence,
88–9	132–3



328	INDEX
biases	choice
hidden, in comparisons of legal systems, 73	of methodologies in comparative law, 312
normative, in comparative studies, 284–6	questions based, 6–7, 280, 282–3
Western	specifications and explanations of
in behavioural economics, 271–	
in comparative law, 94–5, 136	theories based, 7–8
bindingness of precedent, 60, 64–5 in English legal system, 60	premise in judicial discourse, 83 civil law jurisdictions
Black, D., 298–9	implementation of EU legislation in
Blaustein, A. P., 237	103
Bomhoff, Jacco, 5, 9–10, 14, 18	interaction with common law
botany, 44–5	jurisdictions, 175–6
comparative law being similar to, 43	legislative drafting styles in, 105–9
bottom-up perspectives, in	precedent in, 57-8, 67
comparative law methods,	convergence with common law
165–8, 259, 322	jurisdictions, 65–7
Brandeis, Louis, 70	sources of law in, 58–60
Butler v McKellar case, 62–3	civilization theory (Elias), 299
Cabus Diarro 275	Claes, Monica, 5, 7, 14, 16, 19 classifications
Cahuc, Pierre, 275 Canada, language policies in, 217–18	
Cappelletti, Mauro, 66	projects, 102
Cardozo, Benjamin, 183	of legal systems, 45–6, 48
case law	for contractual mistake, 46–7
on application of precedent	and convergence issues, 127
by United States Supreme Court	
61–3	codes of corporate governance,
cassation cases, 57–8	proliferation of, 193–4
as comparative law perspective/	codifications of law, functions of,
focus, 9–10, 166–7	182–3
and social science methods, 12	coding
technique, 51–2, 56–7 categorizations	automated, 242–3 of constitutional law, 237–8, 241
of bindingness, 64–5	non-automated, 242
of law labels, 31–2	common law jurisdictions
of systemic influence, 129–31	implementation of EU legislation in
see also classifications	103
causal claims, in constitutional law,	interaction with civil law
233–4, 256	jurisdictions, 175–6
causal inference, used in comparative	
constitutional law research,	precedent in, 51–2, 53–4, 56–7
252–5	convergence with civil law
causality	jurisdictions, 65–7
and correlation, 253	United States Supreme Court
reversed, 253–4	application of, 61–3



commonality	conformity, and compliance, 217–21
emphasis in comparative law, 162-5,	Coninck, Julie de, 4, 11, 14, 20–1
307	Connolly, Terry, 268–70
criticism of/difference theory,	Constitutional Courts in New
261–2	Democracies (Ginsburg), 252
in European constitutional law,	constitutional law
162–5, 168	causal claims in, 233-4, 256
in European private law, 173–5	comparative analysis in, 212–13
communication	quantitative, 230-2: availability of
in comparative law research,	data, 235-6, 237; extraction of
315–16	data from legal texts, 240-4;
inter-institutional, law as, 7	legal texts as objects of analysis,
communities	237–40; use of data, 245: causal
interpretive, 77–8	inference, 252–5; mapping
in legal systems, 130	trends, 245–52
comparability, problem of, 87–8	compliance with, 20, 216–17, 221–4
Comparative Constitutions Project	and conformity, 217–21
(National Science Foundation),	by officials disagreeing with
237–8, 239	decisions, 224–7
coding in, 242, 243	research methods, 227–9
Comparative Manifestos Project, 242	European, 7, 16, 19, 147–56
comparisons, 22–3, 184–5	comparative research on, 143–4,
aims of, 178	156–61, 168–9: commonality
proportional, 47	and diversity issues, 162-5, 168;
competition, global, operational rules	EuNaCon project, 144–7,
of, 133	166–8; identification of
competition law, 121	principles and rules, 165–8
convergence in, 123	constitutional values in, 151–2
decisional analysis applied to, 131,	and national constitutions, 146,
137, 140: identification of	150–1, 152–5
convergence mechanisms, 136;	and globalization, 234–5
intentional convergence, 137–8;	and transnational legal order,
measuring distance towards	199–205
convergence point, 135–6; and	Constitutional Law of the European
operational rules, 133–5;	Union (Lenaerts and Van
shared perceptions, 138–9	Nuffel), 147
European, 122–3, 151–2	constitutional rights
and globalization, 121–2	and democratization, 252-5
in United States, 122–3	quantitative research on, 245–51
economics-based approach of,	constitutionalism, 202, 223–4, 225
130–1, 132, 136, 137–8	transnational, 200
compliance	constitutionalization of European
with constitutional law, 20, 216–17,	Union, 147–8, 159–60
221–4	Constitutions of the Countries of the
and conformity, 217–21	World (Blaustein and Flanz),
by officials disagreeing with	237
decisions, 224–7	Constitutions of Nations (Peaslee),
research methods, 227–9	237



Cambridge University Press 978-1-107-01085-7 - Practice and Theory in Comparative Law Edited By Maurice Adams and Jacco Bomhoff Index More information

> contextualist approaches Cross, Rupert, 60, 63-4 in comparative law, 263-4, 293-6 cultural changes, 299 to intellectual history, 81-3 cultural studies contract law comparative law influenced by, 180, comparative studies of, 13, 18 of English and French law, 33-4, on cooperative behaviour, 273-4 38, 43: contractual culture interpretation, 30-1, 34; formal in behavioural economics, 271-6 legal arguments used in, 38, 39; law as, 261-2, 263-4 internal analysis used for, 40-1; need for immersion in, in labelling problems, 31-2; comparative legal research, objective-subjective distinction 307-10 in, 29-30, 42, 46-7 Da Costa case, 70–1 European drafting of, 14-15, 18-19, 99-100: Damaška, Mirjan, 71 general rules, 103-4; interface Dannemann, Gerhard, 5, 14-15, 16, issues, 104–5, 119; system 18-19, 119 Darwin, Charles, 279 neutrality in, 97-8, 100-2 future of, 118-19 data in comparative legal research implementation issues, 103 availability of system neutrality in, 111-15, 116, in decisional analysis, 140-1 in quantitative analysis, 235-6, types of, 98-100 237 see also Acquis Principles building sets of, 236-7 harmonization/unification projects extraction from legal texts of, in, 96, 102 240 - 4liability in, 110, 111 use of, 245 convergence in legal systems, 6-7, causal inference, 252-5 131 - 3mapping trends, 245-52 and comparative law, 3, 15-17, 19, 120, 123-4, 141-2 of judicial decisions, 237, 238–9 limitations of traditional in social sciences, 239-40 methods, 126-8 Dawson, John, 59 decisional analysis in comparative law, relevant questions, 125-6 in competition law, 123 19, 128-9, 139-40, 142 see also decisional analysis in applied to competition law comparative law convergence, 131, 137, 140, desirability of, 174 methods for achievement of, 174-5, identification of convergence 178 - 9mechanisms, 136 in treatment of precedent, 65-7 intentional convergence, cooperative behaviour, cross-cultural 137 - 8studies on, 273-4 measuring distance towards corporate governance, and convergence point, 135-6 transnational legal order, 192-5 and operational rules, 133-5 correlation, and causality, 253 shared perceptions, 138-9 categories of systemic influence, courts comparative law practised by, 201 129-31 see also case law data availability, 140-1



decisions	system neutrality in, 110, 111,
law as, 7	112–13, 116–18
legal/judicial, 68	drafting see legal drafting
comparisons based on see	
decisional analysis	ECJ see European Court of Justice
compliance with, 20, 216–17,	Eco, U., 325
221–4: and conformity, 217–21;	Economic Effects of Constitutions
by officials disagreeing with the	(Persson and Tabellini), 232,
decision, 224–7; research	233
methods, 227–9	economics
databases of, 237, 238-9	behavioural
deductive-inductive distinction, in	applied to comparative law, 11,
legislative drafting styles, 106	20–1, 258–9, 264–6: and
Delegating Bills of Rights (Erdos),	cross-cultural variability,
252	271–6; and empirical
democratization, and constitutional	substantiation, 266–71;
rights, 252–5	limitations of, 276–8
Denning, Lord, 108–9	US competition law based on,
development of law	130–1, 132, 136, 137–8
of comparative law, 142, 186–7	Edkins, Zachary, 237–8
of competition law, 136	education, legal
evolutionary theories of, 176,	comparative law in, 187–8
182	methodologies in comparative law
difference theory of comparative law,	oriented towards, 304–5
261–2	Edwards v Arizona case, 62–3
differences see diversity	Efferson, Charles, 274–5
disciplined practices, comparative law	Elias, N., 299
as, 4–6	empirical methods/substantiation see
discourses, 81	quantitative analysis
on constitutionalization of EU,	endowment effect, applied to
159–60	comparative law, 11, 267–70
on human rights, 196	ends see purposes
legal/judicial egal/judicial	enforcement, of constitutional
choice premise in, 83	compliance, 223–4
relativity of meaning in, 84–7,	English language, comparative legal
90–3	research published in, 307-10
diversity	English law
in European constitutional law,	bindingness of precedent in,
162–5, 168	60
in European private law, 173-5	contract law, 29-30
methodological emphasis on, 178,	compared to French contract law,
307	33–4, 43, 44: contractual
Donoghue v Stevenson case, 52–3	interpretation, 30–1, 34; formal
Draft Common Frame of Reference	legal arguments used in, 38, 39;
(DCFR) for European Private	internal analyses used for, 40-1;
Law, 180	labelling problems, 31–2;
Contract Law Frame of Reference,	objective-subjective distinction
99–100, 104, 106–7, 109	in, 29–30, 42, 46–7
long-term effects of, 118-19	formal legal arguments in, 37



332 INDEX

Eörsi, Gyula, 101-2, 107-8, 110, 111 system neutrality in, 111-15, 116, equality, 274-5 Erdos, David, 252 types of, 98-100 erreur sur la qualité substantielle, 31-2, see also Acquis Principles; 33-4 Principles of European ethnography, constitutional, 167 Contract Law (PECL) EuNaCon project (European and Directives, 99 National Constitutional law), drafting of, 106, 115 144-7, 167-8 system neutrality in, 114, 115–16, case law focus in, 166-7 European Court of Human Rights, law making in, 59-60 comparative law practised by, identification of principles, 180-1 322 - 3sources of law, 145 European Court of Justice (ECJ), 50 system neutrality in, 97-8 comparative legal research by, see also harmonization of law projects on constitutional pluralism in EU legal development in, 175-6 private law in, 16, 19-20, 171-3 154 - 5constitutional review by, 161 comparative law research in, on general principles of law, 181 156–7, 171: commonality and on need for comparative legal diversity issues, 173-5 research, 157-8 denationalization of, 176-7, 183 theories of precedent applicable to, harmonization of, 180 51, 52, 60 euthanasia, 287 European Union, 159 comparative law studies of, 11-12, Commission-Parliament 281, 297, 298 relationship in, 160-1 on Belgium and Netherlands, competition law in, 122-3, 151-2 287-8, 295-6 constitutional law of, 7, 16, 19, on legalization process, 298-301 147 - 56methodologies, 282-3: actors and use of rules focus in, 296-7; comparative research on, 143-4, engaging social and 156-61, 168-9: commonality institutional context, 293-6; and diversity issues, 162-5, 168; functionalism, 283-90; EuNaCon project, 144–7, 166-8; identification of non-formalistic approaches, principles and rules, 165–8 290 - 3pluralistic relationship with questions, 281-2, 286-7 national constitutions, 146, legal regimes on, 11-12 150-1, 152-5 in Belgium, 289–90, 293–5, 300 constitutionalization of, 147-8, interpretation of, 291-2 159 - 60in Netherlands, 288-9, 292, 295, contract law in in Switzerland, 291 drafting of, 14-15, 18-19, 99-100: general rules, 103-4; interface Euthanasia and Law in Europe issues, 104-5, 119; system (Griffiths, Weyers and Adams), neutrality in, 97-8, 100-2 281, 298, 299 future of, 118-19 evolutionary theory of law implementation issues, 103 development, 176, 182



INDEX 333

Ewald, William, 9 exhaustive regulation, in legislative drafting, 107-8 expressivist approaches to comparative law, 74-5 bridging gap with functionalism, external analyses in comparative law, 28-9, 42-3and internal analyses, 77 fact-intensive precedent, 72-3 in application of precedent, 52-3 in common law jurisdictions, as starting point for comparative legal research, 319-20 Fauvarque-Cosson, B., 304 Feldbrugge, F.J.M., 184, 312 Ferrante, Francesco, 275-6 Feyerabend, Paul, 280-1 Flanz, G.H., 237 Fletcher, George P., 178 foreignness, comparative law as engaging with, 4-5 formal legal arguments, 18, 35-6 used in comparative law, 36-9 formal-substantive distinction, in legal systems, 88-9, 92 formants analysis, limitations of, 127 Forsthoff, Ernst, 207 France contract law, 29-30 compared to English contract law, 33-4, 43, 44: contractual interpretation, 30-1, 34; formal legal arguments used in, 38, 39; internal analyses used for, 40–1; labelling problems, 31–2; objective-subjective distinction in, 29-30, 42, 46-7 mistakes in assumption equivalent in, 31-2, 33-4 Cour de cassation, 55-6 precedent applied by, 57–8 legal system in, subjectivity of, 42-3, 46 - 7

Frankenberg, Günter, 186
functionalism in comparative law, 3,
12–15, 32–3, 48
bridging gap with expressivist
approaches, 75
contextualization of law in, 263–4
criticism/limitations of, 77, 127,
260–1
in euthanasia study, 283–90
in harmonization of law projects, 97
and hermeneutics, 34–5, 305–10
usefulness of, 183, 185
weak applications of, 320–2

Gächter, Simon, 274 Gardner, John, 51-2 Geertz, Clifford, 180 Gélard, Patrice, 311 generic descriptions, in legislative drafting, 107 Gerber, David, 4, 5, 6-7, 16, 19 Germany abortion law in, 220-1 Federal Constitutional Court on constitutional pluralism in EU, legal scholars from, publishing in English, 309-10 legal system of, 46-7, 59 administrative law, 207-9 comparisons with United States, 90-3,209Ginsburg, Tom, 237–8, 252 Global Administrative Law project (GAL), 205-6, 210-11 global competition, operational rules of, 133 global governance, 211 globalization and competition law, 121-2 and constitutional law, 234-5 see also transnational legal order governments, accountability relationship with parliaments, 160 - 1Griffiths, John, 5, 6, 8, 11–12, 14, 15,

Grootboom case, 217

334 INDEX

habeas corpus reviews, by United States

Supreme Court, 61–3

Habermas, Jürgen, 208-9 hand-coded texts, 242 harmonization of law projects classification issues in, 102 and comparative law, 97, 157, 173-5, 179 - 80contract law, 96, 102 drafting styles and drafters in, 100-2, 105-9 need for, 178-9 Harris, J. W., 60, 63-4 healthcare systems, European, comparisons of, 284-6 Henrich, Joseph, 272, 273-4 hermeneutics, applied to comparative law context, 34-5, 305-10 Herrmann, Benedikt, 274 Hesselink, Martijn, 57 history, intellectual, contextualist approaches to, 81-3 'The History of Political Thought' (essay, Pocock), 82 HIV-AIDS crisis in South Africa, and litigation on anti-retrovirals provision, 214-15, 228-9 Hoffmann-Riem, Wolfgang, 157 Honoré, Tony, 85 housing policies, in South Africa, human rights law, and transnational legal order, 195-8 inductive-deductive distinction, in legislative drafting styles, informal sources of law, 290-3 information availability of, 311 selection of, 313-14 see data in comparative legal research instrumental variables, 253-4

intentional convergence, in competition law systems, 137-8 interdisciplinarity in comparative law research, 3, 4, 5, 9–12, 75–6, 167, 323-4 and transnational legal order, 191-2 internal analyses of legal systems, 27-8, 29, 40, 47-8, 317 and comparability problem, 87–8 in English and French contract law comparisons, 40-1 expressivist approaches to, 74–5 and external analyses, 77 and home audiences, 317 limitations of, 317-18, 324-5 internal of constitutional values, 225 and compliance, 225-7 international conventions, direct application of, 98 interpretation contractual, 30-1 English and French law compared, 30-1,34of legal regimes on euthanasia, 291 - 2Interpreting Precedents (comparative law project, Peczenik), 64-6 interpretive communities, 77-8 An Introduction to Comparative Law (Zweigert and Kötz), 260 Italy, comparative legal research in,

judicial decisions see decisions
Judicial Deliberations (Lasser), 55
judicial discourses see discourses
juridification processes, 300
jurisdictions
 convergence between, 65–7
 interactions between, 175–6
 selection of, for comparative law
 projects, 49, 54–6, 73, 163–5
 see also civil law jurisdictions;
 common law jurisdictions; legal
 systems
jurisprudence see case law

Kapteyn, P., 299 Kaufmann, Erich, 209–10

instrumentalist views, of rules, 296

integrated regulation, in legislative

approaches to, 81-3

drafting, 106 intellectual history, contextualist



Kennedy, David, 245, 256	sources of law, 145
knowledge, of languages of	system neutrality in, 97–8
comparative legal scholars,	see also legal drafting
307–10	The Law of Obligations
Komarék, Jan, 5, 7, 9–10, 14, 18	(Zimmermann), 172
Kötz, Hein, 260, 263–4, 283–4	law-in-action approaches, in legal research, 312–13
Lagrange, Advocate General, 70-1	legal arguments
languages	legitimizing force of, 76–7, 89,
knowledge of, of comparative legal	93
scholars, 307–10	in comparative law perspective,
policies on, in Canada, 217–18	74, 78–81, 89, 93–4
theories on origins of, 182	practical application of, 86–7,
used for legal drafting,	90–3
109	meaning of, 77–8
Lasser, Mitchel, 55, 317	see also formal legal arguments
law	legal decisions see decisions
and behaviour, 7	legal discourses see discourses
classifications of, in harmonization	legal drafting, 18–19
of law projects, 102	comparative law methodologies
codifications of, 182–3	oriented towards, 304–5
conceptions of, 7	of EU legislation
broad, 306	contract law, 14–15, 18–19,
as culture, 261–2, 263–4	99–100: general rules in, 103–4;
as decisions, 7	interface issues, 104–5, 119;
as inter-institutional	system neutrality in, 97–8,
communication, 7	100–2
limited/narrow, 8	EC Directives, 106, 115
contextual of, 263–4, 293–6 development of, 175–6, 181–2	languages used for, 109 styles used for, 105–9
internal of, 225	see also law making
and constitutional compliance,	legal education
225–7	comparative law in, 187–8
normative nature of, 26–7	methodologies in comparative law
quantity of	oriented towards, 304–5
and end of taboos, 299–301	legal family literature/treatises,
theories on, 298–9	45–6
sociology of, 194, 239	legal formality concept, 10
sources of	legal orders
of EU law, 145	European constitutional,
non-formalistic approaches to,	7
290–3	pluralism in, 7–8
precedent as, 58–60	transnational
theories on, comparative law as	and comparative law, 190-2:
application of, 7–9	administrative law, 205-11;
Law, David, 234	constitutional law, 199-205;
law making	corporate governance, 192-5;
in European Union, 59-60	human rights law, 195–8
identification of principles, 180-1	emergence of, 16–17, 20, 188–90



Cambridge University Press 978-1-107-01085-7 - Practice and Theory in Comparative Law Edited By Maurice Adams and Jacco Bomhoff Index More information

> legal regimes thought patterns in, 130-1 for abortion, in Germany, 220-1 values central to, 41-2 for euthanasia, 11-12 Western, comparative law bias in Belgium, 289-90, 293-5, 300 towards, 94-5, 136 interpretation of, 291-2 see also jurisdictions in Netherlands, 288-9, 292, 295, legal texts 300 extraction of data from, 240-4 in Switzerland, 291 as objects of quantitative legal for termination of life of neonates, analysis, 237-40 legal research, purposes of, 27, 177–8 legal of euthanasia, comparative legal scholarship studies on, 298-301 and comparative legal studies, 4 Léger, Advocate General, 69-70 and knowledge of languages, legislative precedent, 72-3 307-10 legitimacy concept, 10, 93 legal sphere, relative autonomy of, 88-9 legitimization legal systems force of legal arguments authoritative texts in, 129-30 contributing to, 76-7, 89, 93 classifications/taxonomies of, 45-6, in comparative law perspective, 74, 78-81, 89, 93-4 for contractual mistake, 46-7 practical application of, 86-7, and convergence issues, 127 90 - 3communities in, 130 need for ('the legitimization comparisons of, 43-4 problematic'), 78 within Belgium, 320-1 strategies, 92-3 of England and France, 44 Legrand, Pierre, 94, 178, 305-7, 316 and hidden biases, 73 Lemmens, Koen, 4, 18, 21 Lenaerts, Koen, 147, 154-5 convergence in, 6-7, 131-3 and comparative law, 3, 15-17, 19, liability, in contract, 110, 111 120, 123-4, 141-2: limitations Lijphart, Arend, 232 of traditional methods, 126-8; lists, used in legislative drafting, 107 relevant questions, 125–6; local meanings see relativity of meaning see also decisional analysis methods for achievement of, MacCormick, N. D., 85 174-5, 178-9 mapping trends, in quantitative in treatment of precedent, 65–7 constitutional research, 245-52 formal-substantive distinction in, markets, beliefs in self-regulation of, 88-9, 92 207 Marshall, Geoffrey, 52-3 institutions in, 130 Mattila, H., 309-10 internal analyses of, 27–8, 40, 47–8, Mbeki, Thabo, 214 MBPSL (Medical Behaviour that in English and French contract law comparisons, 40-1 Potentially Shortens Life) expressivist approaches to, 74-5 see euthanasia and home audiences, 317 McElreath, Richard, 274-5 meaning limitations of, 317-18, 324-5 labels for law categories in, 31-2 of legal arguments, 77-8 objective-subjective distinction in, relativity of, 84 England and France compared, in legal/judicial discourses, 84-7, 29-30, 42, 46-7



INDEX 337

see also translation medical behaviour comparisons of, 284-6 see also euthanasia Melton, James, 237-8 methodologies in comparative law, 1-2, 5, 17, 18, 21, 23-5, 124-5, 170-1, 183-4, 297-8, 301 abstraction levels, 89-90 application of, 318–19 behavioural economics applied in, 11, 20–1, 258–9, 264–6 and cross-cultural variability, and empirical substantiation, 266-71 limitations of, 276-8 bottom-up perspectives/approaches, 165-8, 259, 322 categorization/classification, limitations of, 127 choice of, 312 questions based, 6-7, 280, 282-3 specifications and explanations of, 314-15 theories based, 7-8 commonality emphasis in, 162-5, criticism of/difference theory, communication/translation issues in, 306, 315-16 contextualist approaches, 263-4, 293 - 6decisional analysis, 19, 128-9, 139-40, 142 applied to competition law convergence, 131, 137, 140: identification of convergence mechanisms, 136; intentional convergence, 137-8; measuring distance towards convergence point, 135-6; and operational rules, 133-5; shared perceptions, 138-9 categories of systemic influence, 129-31 data availability, 140-1 development of, 142, 186-7

education-oriented, 304-5 external analyses, 28-9, 42-3 and internal analyses, 77 formants analysis, limitations of, functionalism, 3, 12-15, 32-3, 48 bridging gap with expressivist approaches, 75 contextual of law in, 263-4 criticism/limitations of, 77, 127, 260 - 1in euthanasia study, 283-90 in harmonization of law projects, usefulness of, 183, 185 weak applications of, 320–2 hermeneutics applied to, 34-5, 305-10 internal analyses, 27-8, 29, 40, 47-8 and comparability problem, 87-8 in English and French contract law comparisons, 40-1 expressivist approaches to, 74–5 and external analyses, 77 and home audiences, 317 limitations of, 317-18, 324-5 law-in-action approaches, 312-13 non-formalistic, 290–3 obscurity of, 302-4 quantitative/empirical, 230-2, 255 - 7availability of data, 235-6, 237 behavioural economics applied to, disinterest in, 260-3 extraction of data from legal texts, 240 - 4legal texts as objects of analysis, 237 - 40limitations of, 162 to measure constitutional compliance, 227-9 and political science quantitative analysis, 232-6 of texts, 241-2: automated coding, 242-3; non-automated coding, 242 use of data, 245: causal inference, 252-5; mapping trends, 245-52



Cambridge University Press 978-1-107-01085-7 - Practice and Theory in Comparative Law Edited By Maurice Adams and Jacco Bomhoff Index More information

> methodologies in comparative (cont.) Nowenstein, G., 292-3 social practices/use of rules focus in, 296-7 objective-subjective distinction in legal of social sciences, 4, 10-12, 20, systems, England and France compared, 29–30, 42, 46–7 299-301 and jurisprudence perspective, 12 Okuno-Fujiwara, Masahiro, 271-2 sociological theories applied to, omitted variable bias problem, 254–5 299-301 'On Analogical Reasoning' (article, structuralism, 84, 90-3 Sunstein), 86-7 theory-driven, 7-8 operational rules Meuwese, Anne, 4, 5, 8, 11, 20 of global competition, 133 Meyer, Linda, 62, 63 of legal competition system, 133-5 Michaels, Ralf, 257 organ donation, comparative studies mistakes in assumption (English law) on, 292-3 contract law dealing with, 29-30 D'Orlando, Fabio, 275-6 French equivalent of, 31-2, 33-4 parliaments, accountability national constitutions in EU, and relationship with governments, European constitutional law, 146, 150-1, 152-5 Patterns of Democracy (Lijphart), 232 Nelken, David, 10-11 Peaslee, A. J., 237 neologisms, use of, 112-13 Peczenik, Alexander, 64-6 neonates, legal regimes on termination perceptions of life of, 293 of constitutional issues, 167 Netherlands of convergence in competition law, cultural changes in, 299 138-9 legal regime on euthanasia in, Persson, Thorsten, 232, 233 288-9, 292, 295, 300 persuasive precedent, 60, 63-4 Pinotti, Paolo, 275 compared with Belgium, 287-8, 295 - 6pluralism constitutional, between EU and interpretation of, 291–2 national constitutions, 146, neutrality idea in comparative law, 150-1, 152-5 14-15, 32-3, 100, 297 see also system neutrality in legal orders, 7–8 'new legal realism' (NLR), 196-7 Pocock, J. G. A., 82 non-automated coding of texts, 242 politics non-formalistic approaches, to sources dimension of comparative law, of law, 290-3 16-17, 20quantitative analysis of, and norm-intensive precedent, 72–3 normative biases, in comparative comparative law, 232-6 studies, 284-6 practice norms best, as point of convergence, 132–3 constitutional of comparative law, by courts, 201 compliance with, 221-4 disciplined, comparative law as, 4-6 identification of, 200 social, and use of rules, 296-7 as reasons for behaviour, 219-20 and theory, in comparative law, 2-3, of corporate governance, 193-4 6-9, 73, 211 professional, as source of law, 292–3 Prasnikar, Vesna, 271-2



precedent	purposes
application/role of, 18, 50	of comparative law, 6, 25–6, 48, 178,
and bindingness concept, 60, 64–5	324
in civil law jurisdictions, 57–8, 67	of legal research, 27, 177-8
in common law jurisdictions,	and rules, 284
51–2, 53–4, 56–7: United States	
Supreme Court application of,	Quantitative Text Analysis (QTA)
61–3	in comparative constitutional
convergence between civil law and	research, 243–4
common law jurisdictions,	in social sciences, 241–2
65–7	quantitative/empirical analysis in
role of facts in, 52–3	comparative law, 230–2,
concept of/understandings of, 14,	255–7
49–50, 63–4, 67	availability of data, 235-6, 237
models of, 72–3	behavioural economics applied to,
normative implications of, 68-72	266–71
as source of law, 58–60	disinterest in, 260–3
theories of, 10, 49, 51	extraction of data from legal texts,
applicable to ECJ, 51, 52, 60	240–4
common law theories, 51–2, 53–4	legal texts as objects of analysis,
Precedent in English Law (Cross and	237–40
Harris), 60	limitations of, 162
principles	to measure constitutional
identification of, 173–4	compliance, 227–9
constitutional, 165–8	and political science quantitative
dangers of, 175, 180–1	analysis, 232–6
Principles of European Contract Law	of texts, 241–2
(PECL), 98–9	automated coding, 242-3
system neutrality in, 113, 117	non-automated coding, 242
private law	use of data, 245
European, 16, 19–20, 171–3	causal inference, 252–5
comparative law research in,	mapping trends, 245–52
156–7, 171: commonality and	quantity of law
diversity issues, 173–5	and end of taboos, 299–301
denationalization of, 176–7, 183	theory, 298–9
harmonization of, 180	questions
system neutrality in drafting of,	in comparative law, 279–80
97–8	euthanasia study, 281–2, 286–7
professional organs, norms/documents	methodological choices based on,
produced by, as source of law,	6–7, 280, 282–3
291, 292–3	relevant, in convergence of legal
property, Roman law on, 284	systems, 125–6
proportional comparisons, 47	D 1 1 F + 262 4
public-private distinction in	Rabel, Ernst, 263–4
administrative law	Raes, Koen, 324
in Anglo-American perspectives,	rationalism, of competition law
207	development, 136
in Germany, 207–9	Raz, Joseph, 64



Cambridge University Press 978-1-107-01085-7 - Practice and Theory in Comparative Law Edited By Maurice Adams and Jacco Bomhoff Index More information

> reasoning Schauer, Frederick, 4, 7, 11, 12, analogical, 86-7 see also arguments Scheppele, Kim Lane, 167 reasons, for behaviour, constitutional Schleifer, Andrei, 275 norms as, 219-20 Schmitt, Carl, 207 Reb, Jochen, 268-70 Schoonheim case, 288-9 regression analysis, use of, 252-5 selection regulation, demands for, and trust, of information, 313-14 275 - 6of jurisdictions for comparative law Reitz, J., 257 projects, 49, 54–6, 73, 163–5 relative autonomy, of legal sphere, 88–9 of methodologies in comparative law relativity of meaning, 84 see choice, of methodologies in in legal/judicial discourses, 84-7, comparative law self-interest, humans motivated by, reliability, of text coding, 242-3 Renner, K., 284 self-regulation of markets, beliefs in', res judicata, and precedent, 68-72 207 semantic change, 113 results of comparative law research, 324 retroactive applications of rulings, by separated regulation, in legislative United States Supreme Court, drafting, 106 shareholder approach to corporate governance, 192-3 reversed causality problem, 253-4 rights, constitutional similarities see commonality and democratization, 252-5 Smits, Jan, 4, 6, 14, 16, 19-20 quantitative research on, 245-51 social practices, and use of rules, as to euthanasia, 293-5 focus of comparative law and transnational legal order, 195-8 research, 296-7 Riles, Annelise, 94, 239 social science databases, 239-40 social science methods/theories Roemer, Advocate-General, 157-8 Roman law, on property, 284 applied to comparative law, 4, Roth, Alvin E., 271-2 10-12, 20, 299-301 Ruiu, Gabriele, 275-6 and jurisprudence perspective, rules constitutional, identification of, Quantitative Text Analysis (QTA) in, 165 - 8241 - 2of corporate governance, and reversed causality problem, proliferation of, 193-4 253 - 4of legal drafting, 103-4 sociology, of law, 194, 239 operational sources of global competition, 133 of formal legal arguments, 38-9 of legal competition system, 133 - 5of European Union, 145 and purposes, 284 non-formalistic approaches to, and system neutrality 290 - 3general rules, 111 precedent as, 58-60 specific rules, 111–12 South Africa use of, focus in comparative law, constitutional compliance in, 296 - 7214-15, 224-5, 228-9



housing policies in, 217 Speath database, 238–9	draftspersons, 100–2
specific rules, and system neutrality,	strategies for achieving of, 109–10 going down one level, 111–12
111–12	going up one level, 111
stakeholder approach to corporate	occupying middle ground,
governance, 193	110–11
states	stepping outside, 112–13
diminishing role of, 176–7, 183,	use of, 16
202	in drafting European law, 97–8,
emergence of, 201	100–2
statistics	
causal inference technique, 252–5	Tabellini, Guido, 232, 233
mapping trends, 245–52	Taboo, Power and Morality in the
Stein, Eric, 148	Netherlands (Kapteyn), 299
strategies	taboos, end of, 299–301
for achieving system neutrality,	Takezawa, Masanori, 274–5
109–10	taxonomies, of legal systems, 45-6
going down one level, 111–12	for contractual mistake, 46–7
going up one level, 111	Teague v Lane case, 62
occupying middle ground,	texts
110–11	authoritative, 129-30
stepping outside, 112-13	legal
legitimizing, 92–3	extraction of data from, 240–4
structuralism	as objects of quantitative legal
comparative law application of,	analysis, 237–40
90–3	quantitative analysis of
relativity of meaning in, 84	automated coding, 242–3
subjectivity, of legal systems, 29–30, 42	non-automated coding, 242
in France, 42–3, 46–7	in social sciences, 241–2
in internal analyses, 317-18	theories
substantivity see formal-substantive	of law/law development
distinction	comparative law as application of
suicide, physician-assisted, 291–2	7–9
see also euthanasia	evolutionary, 176, 182
Summers, R. S., 85	on origin of languages, 182
Sunstein, Cass, 50, 86–7	and practice, in comparative law,
Switzerland, legal regime on euthanasia	2–3, 6–9, 73, 211
in, 291	of precedent, 10, 49, 51
symbiosism, 182	applicable to ECJ, 51, 52, 60
system neutrality	common law theories, 51–2,
in European contract law, 111–15,	53–4
116, 118	on quantity of law, 298–9
in European Directives, 114, 115–16,	symbiosism, 182
117	of translation, applied to
search for/obstacles to, 14–15, 32–3,	comparative law, 306
100, 113	Thöni, Christian, 274
drafting language, 109	thought patterns, in legal systems,
drafting styles, 105–9	130–1



342 INDEX

Tiersma, Pieter, 53-4 Tomlin, Lord, 53 translation in comparative law research, 306, 315-16 see also meaning transnational constitutionalism, 200 transnational legal order and comparative law, 190-2 administrative law, 205-11 constitutional law, 199-205 corporate governance, 192-5 human rights law, 195-8 emergence of, 16–17, 20, 188–90 Treatment Action Campaign cases (anti-retrovirals provision in South Africa), 214–15, 224–5, trust, and demands for regulation, 275 - 6Tshabalala-Msimang, Manto, 214 typical regulation, in legislative drafting, 107-8 unification of law see harmonization of law projects 'Unifying the Law. A Play in One Act, With a Song' (article, Eörsi), 101-2 **United States** competition law in, 122-3 economics-based approach of, 130-1, 132, 136, 137-8

formal legal arguments in, 37 legal system of, comparisons with Germany, 90-3, 209 Supreme Court, 55 database of decisions of, 238-9 precedent applied by, 61–3 Valcke, Catherine, 5, 6, 9, 10, 13, 18, 302, 303 values in legal systems, 41–2 constitutional in EU law, 151-2 internal of, 225: and compliance, 225 - 7Van Gend en Loos case, 70-1 Van Nuffel, Piet, 147 Versteeg, Mila, 4, 5, 8, 11, 20, 242 Visser, Maartje de, 5, 7, 14, 16, 19 Vogenauer, Stefan, 58-9, 119 Watson, Allan, 316–17 Weiler, Joseph, 148 Western biases in behavioural economics, 271-2 in comparative law, 94-5, 136 World Values Survey, 256

Zamir, Shmuel, 271–2 Zimmermannn, Reinhard, 172 Zumbansen, Peer, 4, 6, 7–8, 16–17, 20 Zweigert, Konrad, 260, 263–4, 283–4