# 1

# Introduction

'Lawyers are professionally parochial. Comparative law is our effort to be cosmopolitan.'[1] This statement may seem exaggerated, but there is also a good deal of truth in it. Most lawyers are almost entirely trained and specialised in the law of their domestic jurisdiction. Thus, as soon as lawyers leave the borders of their own country, they may feel as if they are stranded on a foreign planet. Learning about comparative law aims to address this problem. But where do you start? Which method do you apply? And is it really feasible to learn about all laws of the world?

It is the aim of this introductory chapter to set the scene for thinking and learning about comparative law. It deals with the questions 'why compare laws?' in Section A and 'what belongs to comparative law?' in Section B. The chapter also explains the focus of the present book – as well as its apparent limitations.

## A Why Compare Laws?

### 1 How to Slide into Comparative-Law Thinking

Becoming interested in comparative law often happens quite naturally. Let us assume that a lawyer from country A has to deal with a tricky legal problem and a particular set of domestic legal rules applicable to this problem. Someone suggests that it may be helpful to consider the experience of the neighbouring country B. After some research, our lawyer finds a similar, but not identical, rule in B's law and starts wondering why there is this slight but distinct difference.

Thus, she feels that she has to examine the background of the domestic and foreign legal rules in more detail. For instance, she may find out that the two countries share a common legal history but that, at some stage, country B had modified its law based on the model of another legal system, country C. She

[1] Merryman 1999: 10. Similarly, Platsas 2011 (for comparative law and legal education); Lawson 1977: 73 (value of comparative law like 'escaping from prison into the open air'); Hantrais 2009: 9 (for comparative research more generally). For cosmopolitanism and comparative law see also Chapter 13 at Section B 3, below.

may also have doubts about the relevance of the difference between countries A and B. Yes, the text of the law reads differently, but perhaps courts apply it in a similar way, or there may be extra-legal factors that lead to a similar result. Or, perhaps, she needs to go further and examine other parts of B's legal and socio-economic system in order to understand why B's legal rules differ from her own ones.

Comparing both provisions, our lawyer from country A also wonders whether country B's law may not be preferable to her own one. But then she hesitates. Is it really possible to say that one country has better legal rules than another one, or could it not be the case that the legal differences just reflect differences between these two societies? And if we really think that country A should follow country B's path, how should this be done? Perhaps it may be feasible if A's courts applied its law in such a way as to make it similar to B's. Or would it be better if A's legislature changed its law accordingly? Or, if we are really confident that B's law is preferable, why not suggest international harmonisation of the law according to B's model?

All these questions immerse our lawyer deep within many topics of comparative law. It can also be seen that a comparative project may start with a hunch and curiosity, but quickly moves into interdisciplinary and policy issues. Moreover, it shows the need to examine more systematically what benefits research in comparative law can have.

## 2 Purposes of Comparative Law

Comparative lawyers frequently discuss the objectives of comparative law. Though they often use somehow different classifications,[2] it is most appropriate to distinguish between three main categories: knowledge and understanding, use of comparative law at the domestic level and use at the international level.

Table 1.1 presents these three categories together with further subcategories, as they will be explained in the following. Moreover, it indicates that all of these categories will re-emerge at different points in the subsequent chapters of this book.

### (a) Knowledge and Understanding

The view that comparative law has an intrinsic purpose emphasises its role in legal research and education. Knowledge of foreign laws is valuable where these laws are relevant for the domestic legal system – for example, where the

[2] See, e.g. Mousourakis 2006: 7–15; Dannemann 2006: 401–6; Glenn in EE 2012: 65–74; Bogdan 2013: 15–25; Müller-Chen et al. 2015: 25–55; Head 2011: 22–5; Örücü 2007: 53–6; Kamba 1974: 490–505; Constantinesco 1972: 331–431. Similar to the three categories here: Lundmark 2012: 12–14; Chodosh 1999: 1067. Most other scholars also highlight a plurality of purposes, but see also Chapter 5 at Section D 3, below.

**Table 1.1** The purposes of comparative law in this book

| Main category | Sub-categories | Related to themes addressed in chapters of this book |
|---|---|---|
| *(a) Knowledge and understanding* | Knowing foreign laws | traditional method (Chapter 2 at Section A); civil and common law (Chapter 3); measuring legal quality (Chapter 7 at Section D); examples of legal transplants (Chapter 8 at Section B) |
| | Understanding context | socio-legal approaches (Chapter 6); implicit comparative law (Chapter 12) |
| | Global concepts of law | universalism (Chapter 2 at Section B); legal families in the world (Chapter 4); law and development (Chapter 11) |
| *(b) Practical use at national level* | Legislative comparative law | legal transplants (Chapter 8); legal convergence (Chapter 9 at Section A); rule of law reforms (Chapter 11 at Section B); comparative politics (Chapter 12 at Section B) |
| | Judicial comparative law | counting cross-citations (Chapter 7 at Section B); legal transplants (Chapter 8 at Section B) |
| | Advising on foreign law | transnational commercial law (Chapter 10 at Section B) |
| *(c) Practical use at international level* | Unification of law | international and regional laws (Chapter 9 at Sections B and C); transnational and global law (Chapter 10) |
| | Other convergence | measuring convergence (Chapter 7 at Section C); convergence of laws (Chapter 9 at Section A) |
| | Idealist comparative law | postmodern approaches (Chapter 5); critics of 'Western law' (Chapter 11 at Section C) |

domestic law is of a plural legal nature.[3] In other cases, knowledge of foreign laws can make lawyers or law students reflect on their own laws. It may often be something of a shock to learn that features of the law, previously taken for granted, do not exist in other parts of the world. For instance, a continental European lawyer may be astonished to learn that in England they do not have

[3] See Chapter 5 at Section B 2, below.

Codes, whereas an English lawyer may be deeply puzzled by the one-sentence style of French court judgments.[4] So, the lawyer exposed to foreign experiences may develop a deeper, and potentially more critical, perspective of her own law and the choices its legislators and courts have made.

Going beyond mere knowledge of foreign legal rules, comparative law broadens the understanding of how legal rules work in context. This also often happens quite naturally. If a comparative researcher identifies unexpected similarities, she may want to find out whether there are any common historical roots or recent globalising trends of which she had been unaware. And, if there are unexpected differences, she may want to explore the political, cultural and socio-economic reasons that may explain them. It may also be the case that such understanding of the embeddedness of legal rules fosters tolerance towards other societies and legal traditions.

The aspiring comparatist may progress to develop a more general intrinsic interest in the legal systems of the world. This can afford the insight that the Western (or Eastern, etc.) idea of law is not universal, as well as affording a more general appreciation of the diversity of legal rules across the world. A comparatist may also develop an understanding of law as a general phenomenon, with individual legal systems existing as mere variations on the same theme. For instance, she may try to identify a common core of legal rules, or may try to develop general concepts of jurisprudence that incorporate ideas from different parts of the world.[5]

### (b) Practical Use at Domestic Level

Comparative law can also be a means to diverse ends at the domestic level. A frequent suggestion is that comparative law can be an important aid to the legislator. Foreign laws can provide models of how well different sets of legal rules work in addressing a particular problem or in pursuing a particular policy. This suggestion may be driven by the idea of regulatory competition, since law-makers may be keen on attracting firms and investors. It may also be due to the desire of developing and transition economies for legal modernisation, although any reform project needs also to consider the limitations of transplanting foreign models, as frequently discussed in the legal and social policy literature.[6]

In addition, it is possible for judges to make use of foreign law. In some instances, conflict of law rules may require them to do so, but in other cases, too, judges may wish to take foreign ideas into account. Such judicial comparative law can aim modestly to inspire judges with alternative ways of approaching a particular problem, but it can also go further, especially if they openly follow a particular foreign model (though a problem of such

[4] For these examples see also Chapter 3 at Section B, below.
[5] For all these points see also Chapter 2 at Section B 2 and Chapter 5 at Section C 1 (a), below.
[6] For law see Chapter 8 and Chapter 11 at Section C, below. For social policy see Hantrais 2009: 120.

receptiveness may be that the context of the foreign law may be different, and there may also be concerns of national sovereignty).[7]

Furthermore, other practising lawyers (solicitors, barristers, attorneys, advocates, etc.) make use of comparative law. Apart from situations where foreign law is applicable, many international business transactions require a skilful choice between different laws, or how concepts from two or more legal systems may be combined. Knowledge and understanding of different approaches to law can therefore be crucial in order to provide appropriate legal advice.

### (c) Practical Use at International Level

At the international or supranational level, legislators use comparative law when they deal with questions of whether and how unification of the law can be achieved. If the decision is taken to unify a particular field of law, the negotiating states may want to compare existing domestic laws in order to decide whether to choose the lowest common denominator, the most common approach, a compromise solution with a combination of legal rules, the 'best solution' – however this may be defined – or a general solution that comprises the existing models.[8] This solution can then be the basis for an international treaty, a supranational act (such as an EU directive) or a form of 'soft law'. Alternatively, a comparative analysis may lead to the recommendation not to unify the law, for instance, because different legal cultures are irreconcilable, or because the costs of unification outweigh its benefits.

Other actors may also foster common rules, making use of comparative law. Judges and arbitrators who apply international or supranational law often need to consider the diverse domestic origins of these rules. It is also possible that they aim to develop common solutions, even without such international rules. Furthermore, the international business and legal community may develop similar responses to legal problems, even where the domestic laws stay diverse. Thus, the frequent use of terms and concepts such as 'transnational governance' and 'convergence of legal systems' emphasises that there is more than formal unification to be considered at the international level.[9]

Comparative law is also not only of practical interest for lawyers. As the world is becoming more and more interconnected, the translation of laws, judgments and legal scholarship is of crucial importance. This is a challenging task since legal terminologies are closely related to the underlying legal systems. Thus, legal translation requires not only excellent skill in the languages in question, but also knowledge of comparative law.[10]

[7] For further details see Chapter 7 at Section B 1 and Chapter 8 at Sections B 1 (b) and C, below.
[8] Cf. Pistor 2002: 108 (national model, lowest common denominator or synthetic concept); Dannemann 2012: 109–13 (middle ground, going up one level, going down one level, or stepping outside).
[9] For details see Chapter 9 and Chapter 10, below.
[10] See, e.g., Goddard 2009; Mattila 2013: 17–18. For the role of languages in comparative law see also Chapter 2 at Section A 2 (b) and Chapter 5 at Section C 2 (b), below.

Finally, one can have an idealist understanding of the international use of comparative law. The knowledge of foreign law and its underlying cultures and societies can improve international understanding, and, as a result, possibly help to create a peaceful and just world.[11]

## B. What Belongs to Comparative Law?

### 1 Status Quo: No Fixed Canon

According to Harold Gutteridge, a literal interpretation of the term 'comparative law' is impossible since is does not have its own subject-matter, such as contract or family law.[12] This problem can partly be attributed to this specific English term which seems to refer to a distinct legal domain.[13] Yet, it is also a reflection of the variations in which comparative law is presented in the academic literature. While general books on subjects such as contract or family law are bound to deal with more or less the same topics, the situation in comparative law is potentially confusing. Table 1.2 presents the main topics of nine general comparative law books,[14] published in English.[15] The words 'high', 'medium' and 'low' indicate to what extent these books deal with methodological questions, legal families (such as civil and common law) and specific areas of law.

It can be seen that the focus of these books differs considerably. On the one hand, there are the books by Örücü and Nelken, Samuel and Husa that have a strong focus on method (column 1). So, according to these authors, comparative law is a label for applying a comparative method to legal research, which may also be called 'comparative study of law' or 'comparative legal studies'.[16] On the other hand, David, Zweigert and Kötz, and de Cruz have

[11] Khan and Kumar 1971: 16–21. Most emphatically Wigmore 1928: viii ('May this volume contribute to a better understanding of other peoples, and thus help toward greater intelligence and mutual toleration in world-affairs!').

[12] Gutteridge 1949: ix. Similarly, Kahn-Freund 1966: 40–1 (comparative law is a subject 'that does not exist').

[13] See Hall 1963: 7; Varga 2007: 101 (contrasting it with the French term 'droit comparé', meaning 'law that is compared'); Adams 2014: 89 note 9 (contrasting it with the Dutch and German terms 'rechtsvergelijking' and 'Rechtsvergleichung', meaning 'comparing law').

[14] Not included are books without the aim to map the field of comparative law (e.g. Ehrmann 1976 and Glenn 2014 dealing with legal cultures/traditions; Frankenberg 2016 on critical approaches), books on cases and materials (e.g. Mattei et al. 2009; Riesenfeld and Pakter 2001), as well as encyclopaedias and collections of articles.

[15] For general comparative law books published in *French* see, e.g. Rambaud 2017; David et al. 2016; Legeais 2016; Legrand 2016; Cuniberti 2015; Fromont 2013; Vanderlinden 1995; in *German*: e.g. Kischel 2015; Zweigert and Kötz 1996; Constantinesco 1971–1983 (also published in French); in *Italian*: Scarciglia 2016; Guarneri 2016; Sacco and Rossi 2015; Somma 2014 (also published in Spanish); Varano and Barsotti 2014; Ajani and Pasa 2013; Gambaro and Sacco 2008 (also published in French); Losano 2000; Mattei and Monateri 1997; in *Spanish*: Silva Vallejo 2015; Sánchez-Bayón 2012; García Cantero 2010; Somma 2006; Altava Lavall 2003.

[16] Gordley and von Mehren 2006: xvii.

**Table 1.2** Focus of general comparative law books

| | 1. Method of comparative law | 2. Legal families and traditions | 3. Comparing specific areas of law |
|---|---|---|---|
| Gutteridge 1949 | medium | medium-low | low |
| David 1985 | low | high | low |
| Zweigert and Kötz 1998 | medium-low | medium | high-medium |
| de Cruz 2007 | medium-low | medium-low | high |
| Örücü and Nelken 2007 | high | low | medium |
| Bussani and Mattei 2012 | medium | medium | medium |
| Bogdan 2013 | medium | medium | low |
| Samuel 2014 | high | low | low |
| Husa 2015 | high | medium-low | low |

a more substantive focus (columns 2 and 3). Thus, here, comparative law is regarded as a body of knowledge.[17]

Which approach is preferable? Given the diversity of economic research today, it is often said that economics can only be defined as being 'what economists do'.[18] Similarly, comparative law is what comparative lawyers do.[19] Therefore, it is not suggested that one of the options illustrated in Table 1.2 has to be 'the correct' one. Still, since it is clear that 'nobody can compare everything in the world of laws',[20] a selection had to be made.

## 2 Substantive Scope of This Book

Table 1.2 shows the trend that today's general comparative law books published in English focus less strongly on legal families and specific areas of law than in the past.[21] In the present book too, these topics will not be the main focus; yet, they will also not be ignored.

The concept of legal families stems from the view that we can group the legal systems of the world into separate traditions, each with its distinct common features. Such an approach is relevant for comparative law since, if successful, it can elucidate differences and similarities between legal systems. However, the role of legal families has diminished in recent years. Thus, in the present

[17] For the discussion see de Cruz 2007: 231–2; Nelken 2007a: 12; Constantinesco 1971: 217 ('rechtsvergleichende Methode' oder 'vergleichende Rechtswissenschaft?').

[18] Backhouse et al. 1997.

[19] See also Adams and Bomhoff 2012: 4 ('comparative law as disciplined practice'); Glanert 2012: 69 (on subjective nature of methods, referring to Heidegger).

[20] Frankenberg 1985: 430. Similarly, Khan and Kumar 1971: 36 ('the total area of what can be described as comparative law is boundless, and everyone planning a course of such description is faced with a threshold problem of selection'); Frankenberg 2016: 16 ('The 17 volumes of the Encyclopedia of Comparative Law (with a focus on private law!) demonstrate the futility rather than the utility of reaching out and comparing the laws of all countries at all times').

[21] By contrast, many books published in French and German (see above note 15) still have a strong focus on legal families.

book, two chapters deal with legal families in detail,[22] but they are not seen as the general 'macro-structure' for the entirety of comparative law.

Comparisons of specific areas of law are valuable. Yet, a general book on comparative law cannot provide a comparative treatment of all areas of law, and thus it is preferable to leave such detailed studies to specialised monographs, articles and encyclopaedias. It is, however, useful to provide examples to illustrate the use of comparative law in different fields. As Table 1.3 shows, this book attempts to include a good mixture of examples from different parts of the world.

**Table 1.3** Overview of main areas of law and legal systems covered in this book

| Areas of law | Context and chapter | Legal systems |
|---|---|---|
| Civil procedure, litigation and courts | civil/common law divide (Chapter 3 at Sections B 2 and C 2) | England, France, Germany, United States |
| | socio-legal research (Chapter 6 at Section B) | England, Germany, Japan, Netherlands, United States |
| | quality of court proceedings (Chapter 7 at Section D 2) | various countries |
| | judicial cross-citations (Chapter 7 at Section B 1 and Chapter 8 at Section B 1 (b)) | England, Germany, United States and others |
| Contract law | civil/common law divide (Chapter 3 at Section B 3) | England, France, Germany |
| | transplantation of civil codes (Chapter 8 at Section B) | various countries |
| | regional hard/soft law (Chapter 9 at Section B 3) | EU harmonisation |
| Tort law | traditional comparative method (Chapter 2 at Section A 5) | England, France, Germany, New Zealand, United States |
| Family law | religion and law (Chapter 6 at Section A 2 (b)) | Christian and Islamic legal traditions |
| Commercial law | socio-legal research (Chapter 6 at Section C 1) | France, Germany, Italy, United Kingdom, United States, Muslim countries |
| | transnational commercial law (Chapter 10 at Section B) | international and transnational laws |
| Company law | numerical approaches (Chapter 7 at Sections B 3, C 3 and D 1) | |

Continued

[22] See Chapter 3 and Chapter 4, below.

**Table 1.3** Continued

| Areas of law | Context and chapter | Legal systems |
|---|---|---|
| | | Eastern European legal systems, United States and others |
| | convergence of law (Chapter 9 at Section A 3) | various (and conceptual) |
| Criminal law | deep-level approaches (Chapter 5 at Section C) | European countries, United States, Muslim countries |
| | socio-legal research (Chapter 6 at Section C 2) | European countries, United States and others |
| Constitutional law | numerical approaches (Chapter 7 at Sections B 3, C 3 and D 1) | various countries |
| | convergence and internationalisation of law (Chapter 9 at Sections A 3 and C 3) | various, including international human rights |
| | comparative politics (Chapter 12 at Section B) | France, United States and others |
| Customary law, rule of law and legal culture | legal families (Chapter 4 at Section C) | China, Latin American and African countries |
| | deep-level approaches (Chapter 5) | England, France and other countries |
| | legal methods (Chapter 7 at Section C 2) | United Kingdom, Ireland, Germany |
| | law and development (Chapter 11 at Sections B, C) | China, Russia, Afghanistan and others |
| | interdisciplinary approaches (Chapter 12 at Section C) | Africa, East Asia and the West |

In addition, this book includes substantive topics, classified under the heading of 'global comparative law',[23] which traditionally have not been in the core interest of comparative law. The inclusion of these topics takes into account that the trend towards more and more transnational, international or even global laws challenges the conventional focus of comparative law of 'simply' comparing legal rules from different countries.

Finally, in about half of the chapters of this book methodological questions feature prominently. Since comparative law can serve a variety of purposes, it is suggested that a plurality of methods can be used in a fruitful way. However, special emphasis is given to the interdisciplinary dimension of comparative research, as the following explains.

[23] See Part III, below.

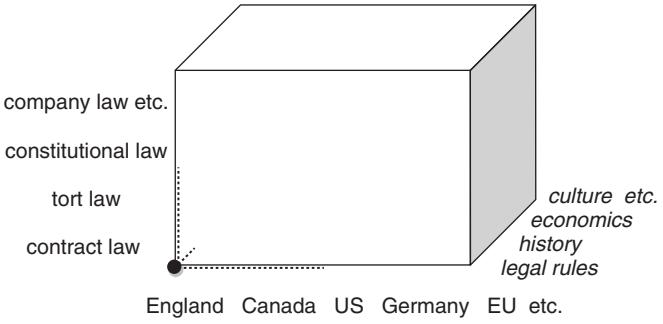


**Figure 1.1** The three dimensions: areas of law, legal regimes and methods

## 3 Three Dimensions of 'Comparative Law in Context'

In the recent literature there are frequent statements urging comparative lawyers to become more interdisciplinary. For instance, according to Mary Ann Glendon and colleagues, 'comparative law is by its very nature an interdisciplinary field'; according to Ugo Mattei, 'sophisticated comparative scholarship can be produced only by interdisciplinary efforts'; and, according to John Reitz, 'since law is but a part of the seamless whole of human culture, there is in principle scarcely any field of study that might not shed some light on the reasons for or significance of similarities and differences among legal systems'.[24]

The relationship between comparative law and interdisciplinary approaches can also be presented in a visual way. Figure 1.1 suggests that knowledge about law can be thought of as a three-dimensional space. The *height* refers to areas of law, such as constitutional, company, tort or contract law. The *width* refers to differences between legal regimes. These may be countries, but also supranational regimes such as the EU or rules of transnational law.[25] The *depth* addresses different approaches to legal knowledge. For instance, a lawyer may not only be familiar with the legal rules in her field of expertise, but may also know something about the underlying history, economics and culture of the law.

Many lawyers, both in practice and academia, are primarily interested in one 'dot'. For instance, in Figure 1.1 the 'main dot' and the dotted lines represent an English contract lawyer with a secondary interest in tort and company law, some expertise in Canadian and US contract law, and some knowledge of the

[24] Glendon et al. 2016: 11; Mattei 1998: 717; Reitz 1998: 627. Similarly, Frankenberg 2016: 13 (comparative law 'offers perfect platform' for interdisciplinarity); Samuel 2012: 190 (comparatist has 'by definition to be interdisciplinary'); Mousourakis 2006: 39 (interdisciplinary and comprehensive approach); Peters and Schwenke 2000: 832 (full understanding requires a comprehensive and interdisciplinary approach); Hall 1963 (on comparative law and social theory).

[25] For the latter see Chapter 9 at Section B and Chapter 10, below.

history of contract law. This lawyer may then regard everything else as 'too foreign', be it because it refers to a different area of law, a foreign country or an unfamiliar method.

However, it is crucial for a comparatist to appreciate all three dimensions and how they relate to each other. For instance, a cautious researcher may start with a limited project comparing a specific question of English and Canadian contract law. Yet, in the course of her research she may have no choice but to broaden her investigation: for instance, it may be the case that the topic which is part of contract law in England is dealt with by tort law in Canada. Or, perhaps, the English law on this issue has been influenced by EU law drawing on continental European models and therefore she realises that she needs to study these jurisdictions. And, then, our comparatist may want to explain the differences between the jurisdictions in question which typically requires the consideration of the countries' history, economy, culture, etc.

It is not suggested that every other discipline is always relevant. Sometimes it is said that comparative lawyers should regard themselves as social scientists. According to Geoffrey Samuel, it is crucial that comparative lawyers 'work within a spirit of enquiry rather than authority', meaning that they should be social scientists not 'theologians'.[26] Others, such as Pierre Legrand and David Nelken, refer to fields of humanities, such as philosophy, history and literary theory.[27] But how precisely other disciplines are able to contribute to comparative legal research also depends on the actual research question; for example, David Nelken suggests that 'economics has an affinity with private law, and that political science will be most relevant to the sphere of administrative and constitutional law, whilst psychology has more to offer for family law'.[28]

## 4 Conclusion: Structure of This Book

Comparative law is a 'strange animal'. Thus, it was necessary to explain the aim and scope of the present book in some detail. Based on these considerations, the structure of this book is as follows: Part I deals with 'traditional comparative law'. It critically discusses the main approach of twentieth-century comparative law, in particular universalism and functionalism, and the distinction between legal families. Part II is called 'extending the methods of comparative law'. This part addresses new approaches challenging traditional comparative law, such as critical, socio-legal and numerical comparative law. Part III is on 'global comparative law'. It deals with topics such as legal transplants, convergence of legal systems, transnational and global law and the relationship between comparative law and development. Part IV goes further in presenting 'implicit comparative law'. This refers to comparative research in other fields,

[26] Samuel 2014: 171–2; Samuel 2008: 314; 2007: 235.
[27] Legrand 2006b: 371; Nelken 2007a: 16. See also Chapter 5, below.
[28] Nelken 2007a: 17.

such as politics, economics and anthropology that, implicitly, also addresses similarities and differences between legal systems.

As a result, the contextual nature of the book appears in the following form: Part I looks at *past* approaches to comparative law and how these approaches have been challenged by contextual research. Parts II and III explain how at *present* other disciplines make comparative law richer by using new methods and extending it to new questions. In Part IV, it is proposed that *future* comparative law can go even further by integrating the research of other disciplines, even if this is not yet classified as comparative law.