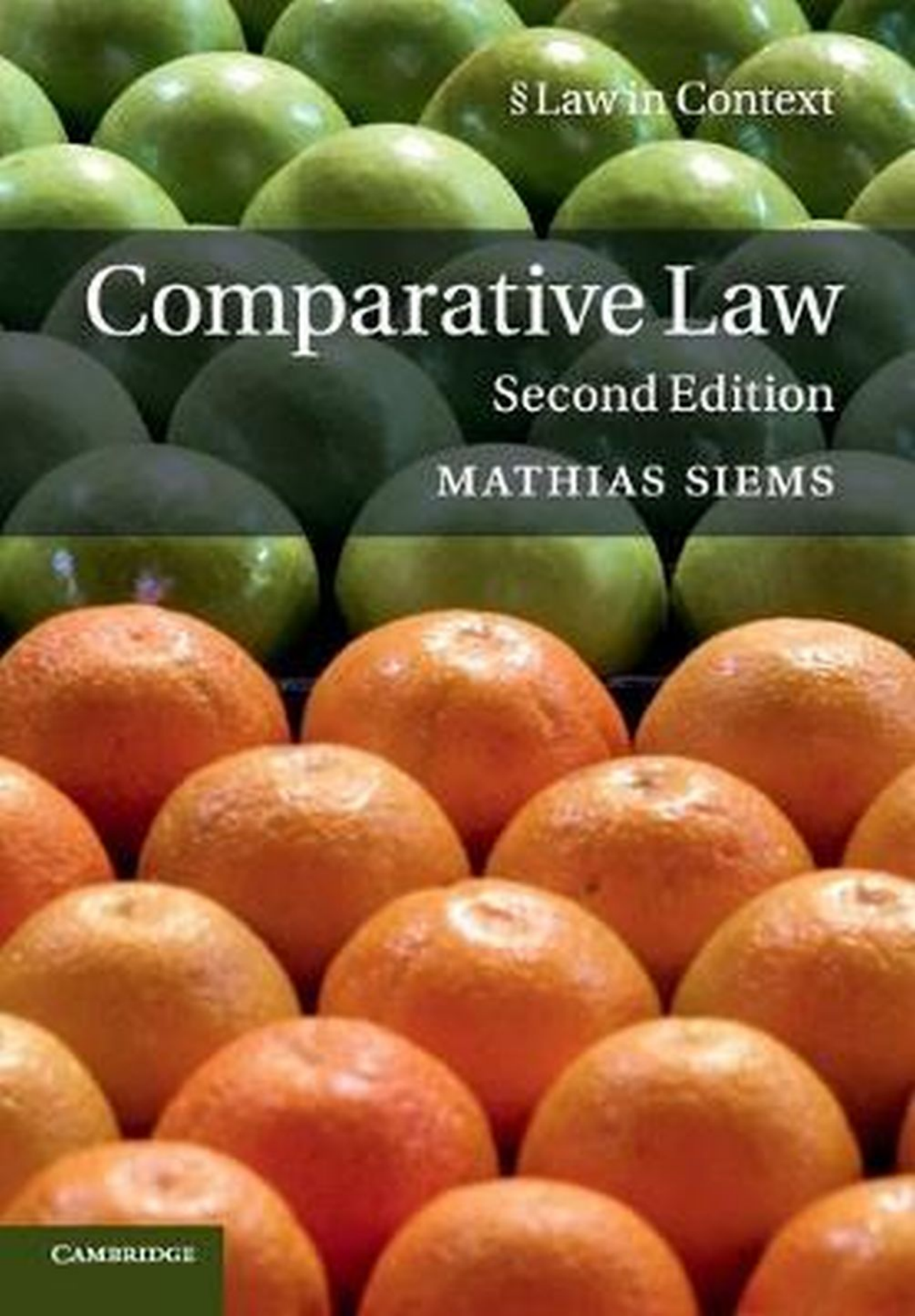
§ Law in Context

Comparative Law

Second Edition

MATHIAS SIEMS



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University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107182417
DOI: 10.1017/9781316856505

First published 2014
Second editon published 2018

Printed in the United Kingdom by Clays, St Ives plc

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Siems, Mathias M., 1974– author.
Title: Comparative law / Mathias Siems, University of Durham.
Description: Second edition. | Cambridge, United Kingdom : Cambridge University Press, [2018] | Series: The law in context series | Includes bibliographical references and index.
Identifiers: LCCN 2017043869 | ISBN 9781107182417 (hardback) | ISBN 9781316633557 (paperback)
Subjects: LCSH: Comparative law.
Classification: LCC K583 .S587 2018 | DDC 340/.2–dc23
LC record available at https://lccn.loc.gov/2017043869

ISBN 978-1-107-18241-7 Hardback
ISBN 978-1-316-63355-7 Paperback

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Abbreviations

ADGM	Abu Dhabi Global Market
AFTA	ASEAN Free Trade Area
AU	African Union
BCBS	Basel Committee on Banking Supervision
BEEPS	Business Environment and Enterprise Performance Survey
BGB	German Civil Code
BGH	German Federal Supreme Court
CA	Court of Appeal of England and Wales
CARICOM	Caribbean Community
CBR	Centre for Business Research (University of Cambridge)
CDF	Comprehensive Development Framework
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEMAC	Monetary and Economic Community of Central Africa
CEPEJ	European Commission for the Efficiency of Justice
CISG	Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPI	Corruption Perception Index
DBR	Doing Business Report (World Bank)
DCFR	Draft Common Frame of Reference (EU)
DIFC	Dubai International Financial Centre
EBRD	European Bank for Reconstruction and Development
ECCAS	Economic Community of Central African States
ECCU	Eastern Caribbean Currency Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
EFTA	European Free Trade Association
EJN	European Judicial Networks
EU	European Union
FATF	Financial Action Task Force

G20	Group of Twenty
GCC	Gulf Cooperation Council
GRI	Global Reporting Initiative
HDI	Human Development Indicators
HRAF	Human Relations Area Files
ICC	International Chamber of Commerce
ICCt	International Criminal Court
ICJ	International Court of Justice
ICRG	International Country Risk Guide
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFRS	International Financial Reporting Standards
ILO	International Labour Organization
IMF	International Monetary Fund
IOC	International Olympic Committee
IOSCO	International Organization of Securities Commissions
IPCC	Intergovernmental Panel on Climate Change
ISDA	International Swap and Derivatives Association
ISO	International Organization for Standardization
LDP	Liberal Democratic Party (Japan)
LL.M.	Master of Laws
MDS	metric multidimensional scaling
MERCOSUR	Mercado Común del Sur
NAFTA	North American Free Trade Association
NGO	Non-governmental organisation
OAS	Organization of American States
OECD	Organisation for Economic Development
ODIHR	Office for Democratic Institutions and Human Rights
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
OSCE	Organization for Security and Co-operation in Europe
PECL	Principles of European Contract Law
QCA	qualitative comparative analysis
QFC	Qatar Financial Centre
ROSC	Report on the Observance of Standards and Codes
SII	Structural Impediment Initiative
SE	Societas Europaea (European Company)
SEZ	special economic zone
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UCC	Uniform Commercial Code
UDHR	Universal Declaration of Human Rights
UEA	University of East Anglia

UEMOA	West African Economic and Monetary Union
UN	United Nations
UNASUR	Union of South American Nations
UNCITRAL	UN Commission on International Trade Law
UNCTAD	UN Conference on Trade and Development
UNDEF	United Nations Democracy Fund
UNDP	UN Development Programme
UNIDROIT	International Institute for the Unification of Private Law
USAID	United States Agency for International Development
WBES	World Business Environment Survey (World Bank)
WEF	World Economic Forum
WGI	Worldwide Governance Indicators (World Bank)
WHO	World Health Organization
WJP	World Justice Project
WTO	World Trade Organization
ZERP	Zentrum für Europäische Rechtspolitik (University of Bremen)

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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.

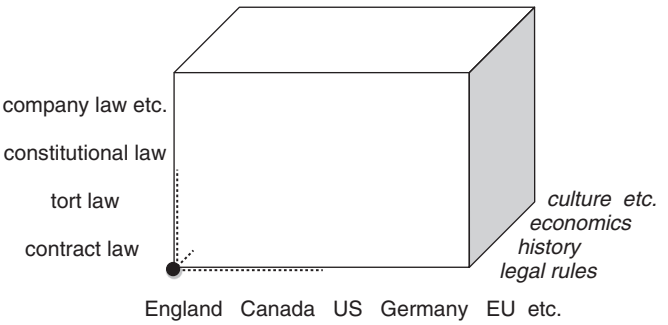

Figure 1.1 The three dimensions: areas of law, legal regimes and methods

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.

Part I
Traditional Comparative Law

Comparative law has a long history. Sometimes it is said to be as old as law itself,[1] but, in looking for a precise origin, views range, for instance, from Aristotle's comparison of constitutions in the third century BC, to comparisons between Roman, canonical and customary sources in the sixteenth century, to Montesquieu's comparison of political systems in the eighteenth century.[2] More narrowly, the development of comparative law as an academic discipline is somehow clearer, with 1861, 1869 and 1900 offered as possible dates of birth.[3] The background of this development was that the emergence of nation-states and the enactment of codes in nineteenth-century Europe led to the initial need for legislative comparative law and, subsequently, to the opportunity of comparisons between these new national laws.[4]

Thus, what is often called 'traditional comparative law' started at the beginning of the twentieth century and has continued to be influential until now, as distinguished from postmodern and critical approaches.[5] Using such a category does not mean that there are no differences within the group of traditional comparative lawyers. Every comparative lawyer is shaped by her background: by, for example, the legal systems she is trained in, or the domestic law of her main field of expertise. Still, there are a number of core themes that are typically seen as belonging to the main substance of traditional comparative law. For example, Ralf Michaels speaks about a focus on positive state law and a 'legal scientific approach to comparative law'; Reza Banakar sees as its central ideas the concept of legal families, harmonisation of laws, and the relationship between law and the state; and Pierre Legrand identifies its 'doxa' with the functional approach by Zweigert and Kötz.[6]

[1] Eörsi 1979: 17. [2] Husa 2015: 6–7; Glenn in EE 2012: 65–6. See also Donahue 2006: 3.
[3] See Gutteridge 1949: 16–17 (publication of Maine's Ancient Law in 1861); Twining 2000b: 36 (foundation of French Society of Comparative Legislation and Maine's appointment to the Oxford Chair of Historical and Comparative Jurisprudence in 1869); Sacco 2000 (first International Congress of Comparative Law held in Paris in 1900).
[4] David 1985: 3; Glenn in EE 2012: 65–6.
[5] See Schieck 2010; Riles 1999: 231; also Kiikeri 2001: 42–4 (traditional, value-based and instrumental comparative reasoning). See also Part II, prologue, below.
[6] Michaels 2016: 355; Banakar 2009: 73; Legrand 2005: 632.

This part critically discusses the main elements of traditional comparative law. It starts with Chapter 2 on the established method of comparative law. Chapter 3 deals with the distinction between civil and common law countries, and Chapter 4 turns to the division of the world into legal families more generally. This structure follows a reasoning from 'micro-', to 'meso-', to 'macro-comparison'. Research using the established method of comparative law is typically a 'micro-comparison' as it focuses on specific legal topics (e.g. strict liability in English and German tort law[7]). This can be distinguished from 'macro-comparisons' which deal with legal systems as a whole (e.g. English and German law) as well as broad divisions of the world into legal families.[8] The general civil/common law divide is an example of such a macro-comparison; however, as we will see, its main emphasis is typically on comparisons in particular areas of law, such as differences in civil procedure between civil and common law countries, which can therefore be seen as an example of a 'meso-comparison'.[9]

The overall aim of those chapters is to assess the benefits and pitfalls of the traditional approach. It is not the purpose to dismiss it as such but, rather, to show how this approach has evolved and for which functions it remains useful, while also illustrating its limits and how recent scholarship has contested some of its core assumptions.

[7] See the example in Chapter 2 at Section A 5, below.
[8] Husa 2015: 101–2, 210; Samuel 2014: 50–3; Zweigert and Kötz 1998: 4–5.
[9] For this term see Constantinesco 1983: 81.

2

The Comparative Legal Method

It is one of the aims of this book to challenge traditional comparative law and promote alternative approaches. Yet, to start with, it is useful to discuss the 'comparative legal method' of traditional comparative law in some detail. For this purpose, Section A outlines how, according to traditional comparatists, a comparative legal analysis should be conducted. Section B focuses on two of the most important concepts on which this method is based: functionalism and universalism. A critical analysis follows in Section C, and Section D concludes. Examples will be provided throughout this chapter, in particular from topics of private law as those feature most prominently in the established approach to comparative law.

A Typical Structure of a Comparative Paper

Traditional books and articles on comparative law often provide guidance, or even a blueprint, on how a comparative analysis should be conducted.[1] Most of these guidances are fairly similar, though the precise number of suggested steps depends on how some of those are grouped together. The following distinguishes between four steps. First, a comparative analysis starts with preliminary considerations, deciding on the research question and the choice of legal systems. Secondly, the comparatist has to describe the laws of these countries. Thirdly, she has to compare them, in particular exploring the reasons for unexpected similarities and differences. Fourthly, she should critically evaluate her findings, possibly also making policy recommendations. Doing so, this section will also explain that there are some variations in the traditional approach to comparative law.

1 Preliminary Considerations

(a) Possible Research Questions

Not all comparisons that involve legal questions are part of comparative law. For example, it is not about comparing how different areas of law deal with

[1] E.g. Zweigert and Kötz 1998: 1–47; de Cruz 2007: 242–5; Müller-Chen et al. 2015: 68–95, 426–7; Oderkerk 2015; Husa 2007; Reitz 1998; Kamba 1974: 511–12; Örücü 2006a: 37–40; Örücü 2007: 447–9; Constantinesco 1972: 137–8; Dannemann 2006: 406–19.

a particular issue within the same country, nor about comparing law with other academic disciplines.[2] Still, this leaves open many possibilities. Thus, one may adopt a wide view and allow anything that could also be a topic for a micro-legal analysis of domestic law.[3] Such an approach is followed by some comparatists who, for instance, suggest that one can start with a question about the structure of the legal system (e.g. prevalence of case law or statutory law), law's institutions and actors (courts, solicitors, etc.), different forms of legal reasoning, particular legal rules or concepts, or the court decisions of two or more countries.[4]

A well-known example examining courts is John Dawson's book on *The Oracles of the Law*. It compares, amongst others, the role of the judiciary in England and France. Based on a historical analysis, Dawson finds that in the decentralised court system of England a small group of judges has gradually become the dominant influence for the development of the law. Conversely, in France, a more centralised court structure led to excessive judicial interference and subsequently, as a reaction by the legislature, to its restriction by way of codification.[5]

A problem with such an approach arises if a particular legal system does not possess the institution or rule the comparatist plans to analyse. For example, what should a researcher do if she wants to compare the commercial courts of two countries but finds out that, in one of them, commercial disputes are predominantly dealt with by non-legal forms of dispute resolution? Or, what should she do if she is interested in formal requirements for contracts, but in one legal system there are none?

The answer many comparative lawyers give is that a comparative analysis should not start with a particular legal topic, but with a functional question. For example, in the situations mentioned in the previous paragraph, the comparatist should have asked how commercial disputes are solved, or how the law protects the parties of a contract from unexpected consequences,[6] avoiding any legal terms in the description of this problem. The recommendation is therefore that a real-life, socio-economic problem should be the starting point. In the words of Ernst Rabel, 'we compare the solutions produced by one state for a specific factual situation, and then we ask why they were produced and what success they had'.[7]

[2] See McEvoy 2012: 145–9 (calling these internal and heterogeneous comparisons); but see also Chapter 5 at Section B 3 below.

[3] For the general distinction between micro- and macro-legal analysis see Siems 2008b.

[4] Lundmark 2012: 19–24; Örücü 2007: 447; Graziadei 2003: 100; Merryman 1999: 484; Kamba 1974: 509; Markesinis 2003: 44 (on comparing cases); Bomhoff 2012 (on comparing legal reasoning).

[5] Dawson 1968. For these topics see also Chapter 3 at Section B, below.

[6] Example from Zweigert and Kötz 1998: 34.

[7] As translated in Gerber 2001: 199. See also Markesinis 2003: 35–45 and Markesinis and Fedtke 2009: 37–42 (defending Rabel's method).

Thus, here, functionalism has the aim to identify the range of issues – whether legal institutions, legal rules or equivalents – that will be addressed in the comparative analysis. Its role is, therefore, at least in the first instance, limited to this 'functionalist identification' at the preparatory stage of the comparative analysis.[8] If one follows the concept of functionalism more strictly, it can, however, have further implications for other parts of the comparative analysis.[9] Since legal functionalism is seen as one of the most important features of traditional comparative law, it will also be discussed in more detail in a separate section of this chapter.[10]

(b) Countries to be Examined

The core interest of traditional comparative law is in the laws of countries. Thus, this typically excludes inter- and supranational laws on the one hand, and regional and municipal laws on the other.[11]

Usually, the comparison will concern current laws only. There can also be circumstances where it is helpful to compare one or more current legal systems with laws from the past (called 'diachronic comparison').[12] For example, when a country enacts a new law on a specific topic and the researcher aims to establish how this new law will be received, the comparatist may want to compare it with countries that faced a similar situation in the past. By contrast, when a researcher examines two or more legal developments which have taken place entirely in the past, for example, the codifications of major Codes in European countries in the eighteenth century,[13] this is better characterised as a subject matter of (comparative) legal history. Calling it legal history and not comparative law does not imply a qualitative assessment. However, the conceptual difference is that traditional comparative law has, according to the dominant view, the aim to provide critical policy evaluations, which is different from research only concerned with laws of the past.[14]

A sometimes controversial question is how many legal systems should be included. There is a clear trade-off between the depth of a focused comparison and the generalisability of a more wide-ranging study.[15] At least for the purposes of a single paper, traditional comparative lawyers tend to favour a limited number in order to focus on the actual comparison (explained below), since choosing a large number of countries may just lead to parallel

[8] Valcke and Grellette 2014: 101; Oderkerk 2015: 596. [9] See Sections 2 (c) and 4 (a), below.
[10] See Section B 1, below. [11] But see the criticism in Section C 2, below.
[12] Martinico 2015; McEvoy 2012: 150.
[13] Halpérin 2014: 38–49. For another example see Haley 2016 (emergence of law in China, Japan and Western legal traditions).
[14] See Zweigert and Kötz 1998: 8 (distinguishing comparative law and legal history). Potentially wider Husa 2015: 35, 165 ('it is almost impossible to separate comparative legal history from comparative law'); Bogdan 2013: 25 (comparison between English law in the fifteenth century and today may be part of comparative law).
[15] Husa 2015: 108–10; Pakes 2015: 20.

country studies.[16] A frequent suggestion is that three may be a good number. Just choosing two countries may overemphasise the contrast between these legal systems, whereas with three the comparatist may be nicely able to show what determines both similarities and differences. For instance, a comparison between English, German and Indian law may be fruitful in showing in which respects the common legal heritage of England and India may be more or less relevant than the shared European features of English and German law. Just choosing two countries can also lead to false results. For example, a US lawyer who compares US and Japanese law may characterise certain differences from his own law as 'typically Japanese'. But, then, many parts of the codified Japanese law are based on German law: thus, adding Germany to the analysis can provide a more accurate assessment.[17]

A difficult question is to assess in advance how the choice of legal systems may influence the results in which the comparatist is interested. To illustrate, Andrew Huxley uses the example that 'while a comparison of chalk with cheese must necessarily highlight the question of edibility, a comparison of chalk with marker pens will focus on legibility';[18] and, according to Ian McGilchrist, 'comparing a football match with a trip to the betting shop brings out some aspects of the experience; comparing it with going to church brings out others'.[19] Thus, at the stage of choosing the legal systems, the comparatist already needs to anticipate what type of differences and similarities she may be able to identify.

A related consideration is as to the types of legal systems that should be included in the comparison. Traditional comparative lawyers favour legal systems which are neither too similar nor too different. Often this leads to a comparison between Western common and civil law countries.[20] Conversely, a comparison of two common law countries, say England and Ireland, may be uninteresting since in many respects these legal systems still share the 'common law as a whole'.[21] Traditional comparative lawyers are also hesitant to compare legal systems which are too different since this would lead to comparisons between 'apples and oranges'.[22] Thus, traditionalists typically do not consider non-state law or 'radically different legal systems' from Africa or other parts of the developing world.[23]

Basil Markesinis and Jörg Fedtke make the further suggestion to focus on the major legal systems of the world since 'legal systems enjoy differing degrees

[16] Gutteridge 1949: 74; Hall 1963: 33; Hantrais 2009: 145, 155 (for comparative studies in general).
[17] For these examples see Dannemann 2006: 411 and Nelken 2010: 30. Similarly, for comparative studies in general: Macfarlane 2004: 105.
[18] Huxley 1997: 1924–25. [19] McGilchrist 2009: 97.
[20] For details on common law/civil law see Chapter 3, below. [21] See de Cruz 2007: 232–3.
[22] See also Valcke 2004: 720 (comparison of 'apples and airplanes', though technically possible, entirely fruitless). Similar the view of 'controlled comparisons' in other disciplines, see Chapter 12 at Section A 4, below.
[23] For counter-views see Sections B 1 (c) and C 2, below.

of sophistication and richness of material'.[24] This seems to be in line with the mainstream general comparative law books,[25] which, for example, often have large sections on German and French law, but only short ones on smaller jurisdictions such as Luxembourg or Switzerland. Yet, for comparative research on specific topics, such a restriction cannot be regarded as the mainstream view; for instance, in an article on a topic of comparative banking law, Swiss and Luxembourg law may well be very interesting to compare.

Finally, pragmatic considerations can determine the legal systems a comparatist plans to examine. A fairly obvious point is the availability of primary and secondary resources on these legal systems. Usually, it is good advice to start with primary resources, such as legislation and court decisions, published in the original language. Secondary resources, such as academic books and articles, from the country should also be consulted, in particular in legal systems where institutional writers or doctrinal scholarship play an important role. This means that preference should be given to countries whose language the comparatist is able to read. However, even then, the comparatist should explain her choice of countries based on substantive considerations.[26]

2 Description of Laws

(a) Finding the Right Perspective

Different perspectives may be adopted for describing a foreign legal system. First, the comparatist may analyse it from her own perspective, i.e. from that of her own legal system; secondly, she could aim to adopt the viewpoint of the other legal system; or, thirdly, she could try to take a neutral stance. Traditional comparatists agree that the first approach is not the right one as we should not impose our own preconceptions on other legal systems.[27] Peter de Cruz illustrates this point as follows:

> Europeans and Americans must be constantly aware, when studying non-Western legal systems and cultures, that they must not approach or appraise these systems from their Western viewpoints or judge them by European or American standards. For example some Western lawyers concluded in the 1970s that China has no legal system because she has no attorneys in the American or European sense, no independent judiciary, no Codes, and, since the Cultural Revolution, no system of legal education. Yet, this is surely to judge a non-Western system by Western standards, rather like the Western visitor who assumed that there was no 'proper' music played in China because he did not see any Western instruments in the Chinese concert hall he visited.[28]

[24] Markesinis and Fedtke 2009: 50. See also Markesinis 2003: 50.
[25] See Chapter 1 at Section B 1, above.
[26] Van Hoecke 2015: 4. For the choice of countries see also Oderkerk 2015: 604.
[27] Zweigert and Kötz 1998: 35; Bogdan 2013: 29.
[28] de Cruz 2007: 223. For the notion of law in China see also Ruskola 2003 and Chapter 4 at Section C 1, below.

With respect to the other two options, opinion is divided. Sometimes it is said that one should adopt an interior point of view, with the consequence that the comparatist should try to present the legal materials in the same manner as a lawyer of the foreign legal system in question.[29] Others take the view that the functional method provides comparatists with a neutral way of analysing how legal systems address certain socio-economic problems.[30] We will return to this debate at later stages of this book.[31]

Another issue is how the different legal systems will be presented: either it may be done in a 'successive' way – so the first section dealing with the first country, the second with the second one, etc. Or it may be done in a 'simultaneous' way – first dealing with the first topic for all countries under examination, then with the second topic, etc.[32] This, at first sight, rather technical point is related to the debate about the right perspective: someone who is keen to present a country's law from an interior point of view may want to do this in a separate section dedicated to this country, while someone who aims to approach the description in a neutral way may be more inclined to talk about all legal systems under consideration in a simultaneous way.

(b) To Translate or Not to Translate?

Thinking about the relationship between comparative law and language can invite deep research about the way legal language reflects a country's culture. However, traditional comparatists are mainly interested in the question of whether or not to translate foreign legal terms. Thus, dealing with language differences is simply 'an interim step whereby otherness is removed from the foreign text'.[33]

The affirmative view presents the question about translation as a merely pragmatic one. As it cannot be assumed that everyone reads all of the languages of countries covered in a comparative study, the translation of terms may simply be a necessity in order to make foreign legal concepts and ideas accessible.[34] If it is not straightforward to translate, the comparatist may also create neologism or develop 'a socio-legal Esperanto which abstracts from the language used by members of different cultures'.[35] Further help may be provided from translation studies,[36] multilingual legal systems[37] and websites

[29] Bogdan 2013: 32–4; Bell 1995: 20 (allow phenomena to speak for themselves).
[30] Zweigert and Kötz 1998: 10. For further details see Section B 1, below.
[31] See, e.g. Section C, below and Chapter 5, below.
[32] Terminolgy by Oderkerk 2015: 617.
[33] Hendry 2014: 89 (disagreeing with this position). For further topics of language and comparative law see Chapter 3 at Section C 1, Chapter 5 at Section C 2 (b) and Chapter 7 at Sections B 2 and C 1, below.
[34] Örücü 2007: 426; Markesinis and Fedtke 2009: 44 ('Some colleagues . . . cringe at these efforts to anglicise sensibly foreign law. Our own view has always been that if we do not attempt them, we shall never benefit from foreign law nor will foreign lawyers ever see their legal ideas spread further than their national boundaries.').
[35] Husa 2015: 198; Nelken 2007a: 124.
[36] See De Groot in EE 2012: 541–2; Husa 2011a: 23; Pozzo 2012: 102–3.
[37] See, e.g. Lemmens 2012: 316; Gambaro 2007; Cao 2007.

such as the EU inter-institutional terminology database and corpus-based collections of translated texts.[38]

The counter-view is keen on not misrepresenting foreign law, suggesting to keep the original foreign legal terms.[39] For example, if, in a paper published in English, terms such as 'equity' or 'trust' are used for related concepts in French or German law, this may mislead someone who is not familiar with the conceptual differences between common and civil law countries.[40] An article on appeal proceedings takes a similar position, with the title suggesting that the terms 'cassation', 'revision' and 'appeal' 'should not be translated'.[41] Moreover, where Western scholars are dealing with non-Western legal systems, using Western-derived legal terms and concepts is even seen as a 'fundamental mistake'.[42]

It is also possible, however, to reconcile these apparently conflicting views. On the one hand, it is clear that questions of translation are related to further differences between the corresponding countries. Thus, in order to understand properly a particular foreign legal term, the comparatist may find it useful to engage with differences between languages by, for example, drawing on research on comparative legal linguistics.[43]

On the other hand, there is the question of how to deal with foreign terms in practice. In a comparative paper, the use of foreign terms may often be a matter of presentation: for instance, the comparatist may simply clarify her translation by way of putting the original term in brackets when it is used for the first time. Teaching comparative law, it can also be useful to mention the original terms before translating them, thus teaching students a few words of the foreign language in question.[44]

It is also suggested that the reader ought not to be underestimated. For instance, if the French term 'juge' is translated into English as 'judge', no one would assume that this means that the legal position of a French judge is exactly identical to an English one. In this respect the situation is also not different from a comparison between two countries that have the same language: say, a paper on English and US law would use the term 'judge' for both legal systems without meaning to imply that there are no differences between them.

[38] For the former see http://iate.europa.eu/. For the latter see, e.g. http://opus.lingfil.uu.se/.
[39] de Cruz 2007: 220; Sacco 1991: 19.
[40] See Chapter 3, below. For the distinction between concept and term see Mattila 2013: 140–2; cf. also Pozzo 2012: 94–5.
[41] Geeroms 2002.
[42] Ainsworth 1996: 20 (for Chinese law). See also Ali 2011: 228 (for corresponding views about Islamic law).
[43] Mattila 2013; Galdia 2009. See also Husa 2014: 39–40 (more sceptical given differences in aims and methods).
[44] Ali 2011: 221 (for teaching Islamic law to Western students).

(c) Positive Law and Beyond

In substance, it seems to be clear that the comparatist has to consider all law relevant for her research question. Of course, legal theorists and philosophers disagree on the precise meaning of the term 'law'. But, then, legal traditions too differ as to what precisely law is. Thus, traditionally, it is recommended that the comparatist not get stuck in philosophical or terminological debates, but be pragmatic, and treat as law that which the people of the legal system in question view as law.[45] This includes statute law, case law and customary law. It is also said that legal systems must be studied in their entirety because, across countries, problems may be addressed by different areas of law. To provide an example, the right of the surviving spouse to share in the division of property may be found in property law, family law or the law of succession.[46]

Getting the positive law of a foreign legal system right can be challenging: to quote Ernst Rabel, 'in their explorations on foreign territory comparatists may come upon natives lying in wait with spears'.[47] In particular, this is the case if the study concerns diverse legal systems, because, quoting Stathis Banakas, the comparatist 'studying different laws outside the context of their own culture is like a colour-blind painter: what he paints is foggy shapes and lines only'.[48]

Moreover, even traditional comparatists suggest that, in addition to the positive law, a number of further aspects need to be considered. First, a comparative study should not only describe legal rules but also explain their underlying theories and conceptions as well as scholarly writings.[49] Secondly, the comparatist has to illuminate the historical, cultural, social and economic context of the law in order to show why particular legal rules exist in a particular place.[50] Thirdly, she has to consider the law in action since, following the functional perspective, it matters whether law is really able to address a particular socio-economic problem. Fourthly, in addition, functionalism requires consideration of the fact that societies are juridified to a different extent. Thus, a comparative study also has to consider non-legal forms of social control and dispute resolution.[51]

It seems to be the case that the latter three aspects may get a comparatist deep into interdisciplinary and empirical research. Yet, it is doubtful how far traditional comparative law has moved in this direction. In the first half of the twentieth century, books by John Henry Wigmore[52] included photographs

[45] Cf. Tamanaha 2000: 313. [46] Bogdan 2013: 35.
[47] As translated in Zweigert and Kötz 1998: 36. [48] Banakas 1993–94: 153.
[49] Husa 2006: 1115.
[50] Bogdan 2013: 39; Zweigert and Kötz 1998: 36; Mousourakis 2006: 49–53. See also Banakar 2015: 146 (contextualisation as 'indispensable methodological characteristic of all comparative studies of law').
[51] Zweigert and Kötz 1998: 38; Vogenauer 2006: 872; Bogdan 2013: 39.
[52] Wigmore 1928 (on world's legal systems); Wigmore 1941 (accounts of trial scenes, though without visualisations).

and images, stories of everyday life, biographies and other forms of illustrative presentations in order to visualise and experience legal reality, but mainstream comparative law has not treated his work as serious scholarship.[53] Today, traditional comparatists also express the view that fully engaging in interdisciplinary analysis may just not be attainable as lawyers lack the appropriate training in these disciplines.[54]

A final point the comparatist has to consider is whether she wants to address these three additional aspects in the descriptive section of her comparative paper. Such a structure can make sense because the positive law is closely related to its underlying theories, history and context. In particular, it may be suggested that this is the right place for the historical analysis of the relevant legal rules as the comparatist may want to show in some detail how different legal solutions have emerged.[55] However, using legal history as a primary explanation can also be risky since any 'Just So Story' does not prove that this particular line of events could not have happened otherwise.

In terms of structuring the argument, it is also not uncommon to present the contribution of a comparison as refuting certain myths. It is even said that comparative law is 'a bit like a good Hitchcock: things are rarely what they are perceived to be'.[56] Thus, it can be a useful way of presentation to keep the descriptive part focused on the black letter law, and use more detailed historical, sociological and other contextual observations for the subsequent comparative analysis, possibly challenging the relevance of the positive law.

3 Comparative Analysis

(a) Identifying Variation

It is often complained that work called 'comparative law' lacks a proper comparison. According to Linda Hantrais, such work is 'confined to the presentation of meticulously detailed parallel descriptions of national legal codes and systems'; Pierre Legrand contends that comparatists often 'do not compare; they assemble'; and William Ewald writes that comparative law seems to be 'animated by the Muse Trivia – the same Goddess who inspires stamp collectors, accountants, and the hoarders of baseball statistics'.[57]

[53] Cf. Riles 2001; Riles 1999; Twining 2000a: 143. See also Wigmore 1941: v ('Reader! this work is not offered to you as a piece of scientific research, but mainly as a book of informational entertainment.').

[54] Lemmens 2012: 311, 323. But see also the research discussed in Part II, below.

[55] For the close relationship between comparative law and legal history see, e.g. Husa 2015: 35–6; Van Hoecke 2015: 18.

[56] Ramseyer 1984–85: 645.

[57] Hantrais 2009: 35; Legrand 1999: 3; Ewald 1995a: 1961 (and ibid. 1983: 'telephone-book approach'); also Legrand 2005: 707 and Riles 1999: 281 (pure data collection can be left to domestic lawyers).

Indeed, to do comparative law, and not just 'foreign law', the description of laws has to be followed by the identification of similarities and differences.[58] This should, however, not be done in a pedantic fashion, providing a list of all variations. Categories and concepts can be useful tools to focus the comparison. For example, when the countries under investigation show differences under two broad categories, a table mapping the relationship between those categories can be a good starting point for an analysis of these differences.[59]

A frequent approach is to distinguish between formal and functional aspects. The formal dimension addresses the content of legal rules. In addition, it can be interesting to consider further aspects, such as on which sources of law these rules are based, differences in legal style and legal concepts. The functional dimension of the traditional approach asks how the law actually works, in particular whether the legal rules are able to address the socio-legal problem which was the starting point of the comparative study. Based on this distinction, traditional comparatists often claim that – at least in private law – there may only be formal differences, but that, functionally, legal systems are fairly similar.[60] Thus, traditional comparative law has the tendency to identify that, at a practical level, law is relatively universal. This is, however, very contentious, as discussed later in this chapter.[61]

(b) Explaining Variation

In some comparative projects, little consideration is given to the reasons that account for differences and similarities between the legal systems: thus, comparative law becomes a simple juxtaposition of the relevant laws of a number of countries. However, even under the position of traditional comparative law, this is an important omission as it is said that the guiding principle for comparative law 'should not be a "what" but a "why"'.[62] Particular consideration should be given to unexpected results, namely, when similar countries have relatively different laws, and vice versa. In both instances, a wide range of explanatory factors need to be considered.

To explain differences in the laws, the comparative lawyer will, in all likelihood, start with a legal analysis that explains how these differences are related to more general and other specific elements of the legal systems under examination. For this purpose, she may also refer to relevant conceptual structures

[58] Kamba 1974: 511–12; Örücü 2007: 447–9; Markesinis and Fedtke 2009: 352; Müller-Chen et al. 2015: 9.

[59] For an example: Munger et al. 2014: 380 (with the two categories 'autonomy of law' and 'political openness').

[60] Zweigert and Kötz 1998: 40.

[61] See Sections B 2 and C, below.

[62] Khan and Kumar 1971: 2. Similarly, Kamba 1974: 511–12; Örücü 2007: 447–9; Bogdan 2013: 55.

that courts and legal scholars have developed.[63] Sometimes, comparatists also use the division of the world into legal families to explain legal differences. For instance, it has been said that '[l]egal reasoning in the UK differs fundamentally, at least in theory, from legal reasoning in France or Germany, because the UK (with, to a certain extent, an exception for Scotland) belongs to the common law family'.[64] Such a statement is, however, tautological, because whether a country belongs to a particular legal family is determined by its way of legal thinking;[65] thus, as such, it cannot be at the same time a factor explaining such differences.

Considering further reasons for legal differences, a useful approach is to take into account all three major fields of scholarship: humanities, social and natural sciences. To start with the humanities, the comparatist may examine the relationship between different legal rules and philosophical, cultural, ethical and religious factors.[66] Historical factors may also explain the different paths legal systems have taken and how those are reflected in the precise language of the law.[67] However, some discussions have taken a wrong turn. In the nineteenth century, Sir Henry Maine and other comparatists took the view that legal systems went through a natural process of legal evolution: in primitive societies it was based on ad hoc decisions of the sovereign, which was followed by the evolution of customary law, and finally progressive societies developed advanced and rational forms of law.[68] Yet, today, such 'comparative historical reconstruction'[69] is not regarded as acceptable as it marginalises traditional legal systems, and has an implicit ethnocentric and (neo)colonial bias.[70]

With respect to the social sciences, the lack of rules in one of the countries may be explained by the fact that, here, the problem is addressed by extra-legal means – or else that it is not perceived as relevant in the social environment of this country.[71] For differences in legal rules, the comparatist may find that those reflect different socio-economic factors, for example, for questions of business law, the dominant sector of the economy (agriculture, manufacturing or services), the employment rate

[63] Brand 2007; Samuel 2014: 76, 91–2. [64] Hage in EE 2012: 533.

[65] See Chapter 3 at Section B and Chapter 4 at Section B, below. A related argument in econometrics concerns the exogenous or endogenous nature of legal origins, see Chapter 12 at Section B 3, below.

[66] For examples see Chapter 4 at Section C 1 (law in China); Chapter 5 at Section C 2 (a) (culture and criminal law); Chapter 6 at Section B 2 (b) (religion and law); Chapter 9 at Section C 3 (b) (global human rights); Chapter 12 at Section C 2 (national character studies) below. For the concept of path-dependence see also Chapter 9 at Section A 3 (b), below.

[67] For examples see Chapter 3 at Section A (origins of civil and common law); Chapter 4 at Section B (legal families); Chapter 6 at Section C 2 (harshness of US criminal law), below.

[68] Maine 1861. See also Chapter 11 at Section A 1, below. [69] Frankenberg 1985: 427.

[70] Riles 1999: 228; Menski 2006: 88; Bennett 2006: 652.

[71] Rudden 1994: 144–5. See also the research from comparative policy studies, Chapter 12 at Section B 3, below.

and the openness towards trade and investment. Politics is likely to matter because different legal rules may be related to differences in law-making procedures and political economy. However, it also needs to be clarified that consideration of all of these factors does not lead the traditional comparative lawyer to a definite answer about a particular causal relationship.[72] Thus, her approach is different from that of socio-legal comparatists and researchers in other social sciences who often have the aim to establish such causal proof.[73]

Regarding the natural sciences, some legal rules may be influenced by the geography and the climate of the countries in question, whereas ethnic differences may only play a role in rare cases.[74] These factors may also overlap with some of those identified in the humanities and social sciences. For example, the fact that geographically close countries often have similar laws can be a result of cultural, social, economic and political similarities as ideas spread from one country to another. Ethnic conflicts within a country may also provide a possible social explanatory factor as compared with countries without ethnic division or conflicts.

As far as the comparatist identifies unexpected legal similarities, many of the same factors play a role. Thus, for example, parallels in history, culture, society, politics and geography may all show why two countries have similar legal rules. An interesting point of discussion is whether legal similarity is contingent on a 'genealogical' (or filial) relationship between legal systems.[75] For instance, a frequent topic of comparative law is the idea of 'legal transplants', which have spread from some jurisdictions to the rest of the world.[76] However, such historical links may well have weakened. In today's world it is often a matter of institutional design that determines whether countries have similar rules: for example, the fact that they belong to the same regional organisation, such as the European Union.[77] Recent research has also been interested in the so-called BRICS countries (Brazil, Russia, India, China and South Africa) which have fundamentally different histories but may also share some similarities today.[78] Moreover, a functional view assumes that the actual result of legal rules is often similar across countries, even where there is no apparent relationship between them. Thus, in this view, a comparative analysis may uncover this 'natural' universalism of the law.[79]

[72] Husa 2015: 180 ('comprehensive scientific explanations' not feasible in comparative law).
[73] See Chapter 6 at Section C and Chapter 12 at Section B 3, below.
[74] A possible example may be a comparative study into the law relating to a certain disease whose prevalence differs between ethnic groups (e.g. skin cancer). But see also Chapter 4 at Section B 2, below (for past justifications of legal families).
[75] Cf. Samuel 2014: 57; Samuel 2009: 41. [76] See Chapter 8, below.
[77] Lalenis et al. 2002: 49 (common institutional design vs. common descent). See also Chapter 9 at A, below (on convergence of laws).
[78] See, e.g. www.bricslawjournal.com. [79] See Section B, below.

4 Critical Policy Evaluation

(a) Should This be Part of Comparative Analysis?

The first chapter of this book explained that there can be various reasons to do comparative law.[80] As one of them is to get a better understanding of the legal world, comparative lawyers with a core interest in this reason may not be too keen on engaging in policy evaluations. But, as explained, help for national and international law-makers is frequently also seen as one of the purposes of comparative law. So, in principle, some policy evaluation may be provided: but how far should the comparatist go?

Peter de Cruz expresses some doubts, as 'the comparatist is not seeking to be judgmental about legal systems in the sense of whether he believes them to be "better" or "worse" than any other given system'. But, then, de Cruz also adds that it is acceptable to evaluate 'the efficacy of a given solution or approach to a legal problem in terms of that particular jurisdiction's cultural, economic, political and legal background'.[81] Thus, overall, his answer is a cautious and limited 'yes', similar to other scholars.[82]

Other comparatists are even more willing to engage in applied comparative law.[83] For example, Konrad Zweigert and Hein Kötz hold 'that the comparatist is in the best position to follow his comparative researches with a critical evaluation', and add that '[i]f he does not, no one else will do it'.[84] It is not a coincidence that such a positive view is taken by proponents of a functional perspective of comparative law. Since this approach tends to emphasise the technical and rational nature of the law in order to fulfil certain socio-economic purposes, the comparative analysis may indeed be able to give an indication which tool is better suited to achieve a particular goal.

From another starting point, Jan Smits also supports the use of comparative law for critical policy evaluation. He takes the view that the main general topic of legal research should be 'what the law ought to be'. Here, comparative law has an important role to play. For example, considering that the legal drinking age varies between sixteen in Italy, twenty-one in the United States and eighteen in most other countries, comparative legal information can provide some insights into the effect of lowering or raising the drinking age. According to Smits, this should be done in a way that considers foreign experiences as a source of information in the normative discussion, not in a mechanical way.[85]

[80] See Chapter 1 at Section A 2, above. [81] de Cruz 2007: 224.

[82] Oderkerk 2015: 599–601; Bogdan 2013: 65–7; Örücü 2007: 450; Constantinesco 1972: 323–5.

[83] Already Wigmore 1928: 1120 ('comparative nomothetics'); Gutteridge 1949: 9. See also Finnegan 2006: 102–3 (for law and development); Pardolesi and Granieri 2013 (aim of comparative law to devise norms); Bellantuono 2012 (proposing a 'comparative legal diagnostics'); Nelken 2010: 5, 11–8 (for work on comparative criminal justice that has a 'normative agenda').

[84] Zweigert and Kötz 1998: 47. Similarly, Grossfeld 1990: 4 ('making a pile of bricks and then leaving them unused', citing Julius Binder).

[85] Smits 2012: 76, 78 (for the example).

Such a non-mechanical approach is also necessary for problems that involve conflicting goals. For example, assume that for a particular social problem the legal rules of one country are better able to reduce the crime rate while those of the other country provide stronger protection of individual rights. Thus, here, the comparatist has to be open about her normative preferences. It also leads us to the question which type of policy recommendations may be possible.

(b) Possible Recommendations

The first and most cautious step is to use the comparative analysis for a critical evaluation of one's own law. Such an analysis should be conducted with an open mind, and not merely to confirm a pre-existing view. Thus, the comparative experience should be seen as a means of viewing one's own legal system 'as if through the eyes of an outsider'.[86] A good example is a book by Basil Markesinis and colleagues on the tortious liability of statutory bodies: taking five English cases on this topic, the authors discuss how the cases would be solved under French and German law, which is then followed by a critique of the English approach.[87]

More generally, a comparative analysis can be used to treat the law of a foreign country as a test case of what may happen if the domestic law were changed accordingly.[88] Thus, in principle, it is possible that the comparatist may be able to suggest law reform in order to improve the fairness or efficiency of the law (which can also mean the deletion of an existing rule). However, foreign models will not always be suitable, because they may only work in the socio-economic context of the other legal system. To illustrate this point, Michael Bogdan uses the example of a law-maker who is keen on slowing down population growth. Policy options may be to introduce unrestricted abortion, to withdraw subsidies to families with more than two children, or to raise the minimum age of marriage. But, then, not all of these legal tools may be effective: for instance, raising the minimum age does not work if pre-marital relationships are common and accepted.[89] Moreover, even if a particular tool is indeed the most effective one in achieving a particular result, the foreign model may be rejected since the means of achieving this result may be seen as unacceptable.[90]

In principle, the same approach could be applied in order to offer advice on possible reform of the foreign legal system. Models from other countries may be used, taking into account differences in context. The comparative lawyer is, however, well advised to think twice before suggesting that a foreign country should follow the comparatist's own law. It is not unlikely that she will be

[86] Vranken 2015: 6. Similarly, Coendet 2016: 506 ('taking distance from oneself').
[87] Markesinis et al. 1999. [88] Zweigert and Kötz 1998: 15.
[89] Bogdan 2013: 66–7. See also the empirical study by Kim et al. 2013 (showing significant effect for countries which introduced strict minimum age).
[90] See Nelken 2010: 22 (in the context of comparative criminal justice). See also the discussion about legal transplants in Chapter 8 at Section C, below.

accused of applying her own values in considering what is best for others,[91] an accusation often made about lawyers (and economists) urging legal improvements in developing countries.[92]

Recommendations can also concern the growing transnational and international dimension of the law. Here, some suggest an urgent need for comparative law. For example, according to Francis Pakes, writing about cross-border crime:

> Traditionally, comparative research was perhaps a luxury. It served to broaden one's horizon and to establish if elsewhere there might be success stories in criminal justice worth adopting at home. Today, comparative research is a necessity.[93]

However, the discussion about the use of comparative law to unify the law internationally also raises a number of questions, such as: do the benefits of unification outweigh its costs, which model should be chosen, and how should the unification be implemented (by formal harmonisation or soft law)? These questions will be addressed later in this book.[94]

5 An Example from Comparative Tort Law

It seems now helpful to illustrate the traditional comparative method by way of an example, based on Zweigert and Kötz's chapter on strict liability.[95] Zweigert and Kötz's approach is similar to the one outlined in this part, though they do not slavishly follow the four-step procedure. The starting point is the social problem that a victim has suffered damages, but that it is impossible to show that this has been the result of someone else's fault. The main examples are traffic and industrial accidents. Over the last two centuries, this problem has become more severe since technological progress had the side-effect of increasing the risks of such damages. As all of these incidents can occur across countries, such a functional starting point is seen as rewarding in comparative tort law.[96]

The descriptive sections of Zweigert and Kötz deal with German, French, English and US law in detail, with shorter sections on Austria, Switzerland and Italy. Manufacturer liability is addressed in a separate part, starting with US law and then dealing with the way it influenced the EU directive on this topic. The style of this descriptive phase is that of a diligent mainstream comparative analysis: the text examines the statutory and case law, and it refers to secondary documents published in the native languages of all of the

[91] Bogdan 2013: 65. [92] For details see Chapter 11, below [93] Pakes 2015: 13.
[94] See Chapter 9 and Chapter 10, below.
[95] Zweigert and Kötz 1998: 646–84. References to other research will be provided in the following footnotes.
[96] See also Reimann 2015: 262; van Boom 2012: 18.

four main jurisdictions. Foreign terms are usually translated, but occasionally the original terms are added in brackets.

In substance, the main findings are as follows: over time, in Germany, a number of special statutes on strict liability have been enacted for certain types of accidents, though these statutes often provide for a *force majeure* exception and limit the amount of damages payable. German courts have shown reluctance to go beyond these pieces of legislation. The French development was distinctly different: in 1930, the Cour de Cassation decided, in the case of *Jand'heur*,[97] that a vague general provision of the French Civil Code (article 1384) could be interpreted as providing for strict liability. Thus, there has been less need for special statutes.[98] In England and the United States, case law has also played an important role. In 1868, the House of Lords held in *Rylands* v. *Fletcher* that someone was strictly liable for damage caused by the escape of a thing from his or her land.[99] There have been some extensions of this principle, though English courts have been more reluctant to generalise *Fletcher* than US courts,[100] and legislation has been enacted for some cases, such as traffic accidents.

Zweigert and Kötz provide a few, but not many, comments explaining the differences between the legal systems.[101] For instance, they note that the relative importance of strict liability in the United States may be related to procedural reasons fostering liability claims (jury trial, class actions and lawyers' fees).[102] Furthermore, as is not untypical for traditional comparative law, Zweigert and Kötz find that all of the legal systems have seen a similar development of introducing and extending strict liability. Thus, we have an example of functional equivalence, of legal systems of both civil and common law countries using different tools to achieve a similar result.[103]

The final section of the chapter critically evaluates the legal systems. Surprisingly, the innovative law of New Zealand, which had not been discussed earlier, is introduced here. This illustrates the problem with a focus on major jurisdictions.[104] New Zealand's law on accidents is interesting because, in 1974, it decided to shift from tort law to public compensation: almost all personal injury claims are now compensated by a social security scheme with private actions being barred from courts.[105] Zweigert and Kötz are sceptical about such an approach, since tort law also has to fulfil an important deterrence function. This point could have invited a comparative treatment of deterrence by way of administrative or criminal sanctions,[106] yet Zweigert and Kötz are mainly interested in the social problem of compensating the victim. There are

[97] Chambres Réunies of the Cour de Cassation, 13 February 1930, S 1930, I 121.
[98] But see also Faure in EE 2012: 9 (for the no-fault accident compensation system in France).
[99] *Rylands* v. *Fletcher* [1868] UKHL 1, (1868) LR 3 HL 330. [100] See also Wagner 2006: 1032.
[101] For a detailed historical analysis see Bell and Ibbetson 2014.
[102] On these points see also Chapter 3 at Sections B 2, C 2, below. Faure in EE 2012: 7 suggests that this could also compensate for less developed provision of social security in the United States.
[103] See also Reimann 2015: 267 (remaining differences mainly about questions of procedural law).
[104] See Section 1 (b), above. [105] See also Struck 2008. [106] See, e.g. Whittaker 2005.

also no references to interdisciplinary research, such as cultural, economic and empirical approaches to tort law.[107] Furthermore, the chapter does not include the recent discussions about the impact of European law and how any future harmonisation of tort law could proceed.[108]

B Functionalism and Universalism in Particular

Functionalism and universalism are two of the core elements of traditional comparative law. For this reason, the following deals with these concepts in more detail, in particular their origins and operation. A discussion of the 'Common Core project' will provide a practical illustration.

1 Functionalism: Origins, Use and Consequences

(a) Attractiveness of Functionalism Elsewhere

In sociology and anthropology, the main discussion about functionalism took place in the 1940s to 1960s. For instance, Talcott Parsons suggested that the balance of social systems depended on the way they satisfied certain needs.[109] Walter Goldschmidt's comparative functionalism took a similar starting point – the social needs of societies – but in addition he also claimed that the institutions addressing these needs were fairly similar across societies.[110] Functionalism has not been without its critics and it has gradually made way for cultural and hermeneutic approaches.[111] Yet, even today some books and articles on comparative methods appreciate the potential benefits of functionalist approaches. For instance, the main attractiveness of the concept of functional equivalence is said to lie in the fact that dissimilar units of analysis can be grouped into meaningful categories.[112] More specifically, functionalism may be of help for the analysis of non-Western societies, since it may be shown that informal structures within these societies fulfil functions equivalent to the state in the Western world.[113]

In legal research, functionalist approaches have also frequently been suggested. Legal historians who study ancient legal doctrines and institutions, seemingly obscure today, may want to examine the function that these doctrines or institutions used to fulfil.[114] Private international law often requires the characterisation of a foreign legal doctrine, which may make it necessary to identify a functional equivalent in domestic law.[115] Legal sociologists are said to be interested in the way legal rules 'function' in the real

[107] For those see, e.g. Boggio 2013: 223–31 (cultural schemas as explaining differences in compensating asbestos victims); Shavell 1987 (for law and economics of tort law); Faure in EE 2012: 13–14 and Reimann 2003: 803–6 (for empirical data).
[108] Giliker 2014 (for English law); van Dam 2013: 126–64 (for possible harmonisation).
[109] Parsons 1951. See also Husa 2003: 431; Husa 2013: 7–8. [110] Goldschmidt 1966.
[111] See Michaels 2006: 354. [112] Hantrais 2009: 77. [113] See Macfarlane 2004: 98.
[114] Gerber 2001: 192. [115] Muir Watt in EE 2012: 703–4.

world.[116] And legal translators may try to identify which legal institution of the target language has the same function as the origin one.[117]

(b) Popularity of Functionalism in Comparative Law

While some comparative lawyers have identified various kinds of functionalism,[118] others regard it more pragmatically as a 'rule-of-thumb'.[119] In the following, not all nuances of the discussion can be explored. There is also agreement as to the core element of functional comparative law: namely, that a socio-economic problem should be the starting point of a comparative analysis.[120]

This problem-based approach leaves some flexibility in the way a research question is framed in a particular project. For example, a researcher can ask at a high level of abstraction 'how do countries become rich?', but she could also ask more specifically 'how do countries enable companies to raise sufficient finance?'.[121] It is also possible to be even more specific and start a functional project with a case scenario, be it a simplified hypothetical case or a real-life case from one of the countries under investigation.[122] As a further variant, it is possible to start the functional research with a particular legal rule from one of the countries and then explore which tools from other countries fulfil the function of this particular rule. For example, if one starts with 'punitive damages' in US law, the functional question would be about the tools other countries use in order to deter and punish breaches of private law obligations.[123]

The main advantage of the functional method is that it provides the necessary link between the different rules that legal systems tend to employ. Thus, the shared purpose of these rules is the common denominator ('tertium comparationis') which allows comparability of these legal systems.[124] Moreover, this functional method is regarded as preferable to a strong positivist approach, which would simply juxtapose different legal rules and come to the conclusion that 'these legal systems differ because they were enacted by different States'.[125] In addition, functionalism is said to counter the tendency to assume that foreign legal systems must have the same type of rules as one's own country.[126]

In the last two decades, functionalism has also received support from law and economics scholars. Here, one can start with the way different legal systems deal with a particular problem and then compare these approaches

[116] Zweigert and Kötz 1998: 45. For socio-legal comparative law see Chapter 6, below.
[117] Husa 2011a: 223–4; Mattila 2013: 363–5. See also Chapter 5 at Section C 2 (b), below.
[118] Michaels 2006; Örücü 2004a.
[119] Husa 2013: 17. See also Husa 2011c (functionalism as facilitating analogies).
[120] See already Section A 1 (a), above.
[121] Similarly, Husa 2015: 148–50 (multiple yardsticks possible).
[122] See Section 3, below, as well as Siems and Cabrelli 2013.
[123] Oderkerk 2015: 612 (using this example).
[124] Bogdan 2013: 46–7; Brand 2007: 409.
[125] Valcke 2004: 730–1.
[126] Örücü in EE 2012: 560.

in terms of economic efficiency. For example, consider the differing approaches of English and French law to the purchase of a stolen good by a bona fide purchaser. English law protects the original owner of the stolen good[127] and French law the bona fide purchaser. In order to determine the economic effect of the different laws, one has to compare the costs generated by taking care of the good, which matters for French law, with the costs for investigations of the ownership of the title, which matters for English law. Since, typically, it is more expensive to investigate a foreign title than to take care of one's own property, the functional conclusion is that the French solution is more efficient than the English one.[128]

(c) Limitations Set by Functionalism

Functionalism, as understood by most comparative lawyers, requires comparability. So, in general terms, the first limitation is that 'incomparables cannot be usefully compared and in law the only things which are comparable are those which fulfil the same function'.[129] Thus, functionalism can even exclude a comparison of fairly similar rules, namely, if in the countries in question they fulfil different functions.

Secondly, certain legal systems may need to be excluded from a comparative analysis. It is frequently said that comparisons must be between alikes, i.e. legal systems must be in the same stage of legal, political and economic development.[130] Thus, traditional comparative lawyers often only compare the laws of Western countries. This is seen as having the advantage of controlling for the stage of development since it makes it easier to explore the remaining differences amongst a baseline of similarity in terms of the countries' history, society, economy and ideology.[131]

Accordingly, political differences may make some comparisons fruitless. For instance, it may not be possible to come up with a functional research question that would compare the antitrust law of market economies with something similar in the few remaining socialist legal systems.[132] It is also frequently said that it may usually not be fruitful to compare Western legal systems with 'radically different legal cultures', in particular from the developing world, perhaps with the exception of some technical legal rules, such as the law related to traffic accidents.[133] For instance, an English

[127] For possible exceptions see Smith 2013: 415.

[128] Ogus 2006: 45–7. For further countries see the quantitative analysis by Dari-Mattiacci and Guerriero 2015. For further examples from law and economics see Chang and Smith 2016 (property law in civil and common law); Mattei 1997a: 138 (building on someone else's land); Adams 1995 (cost allocation and role of judges).

[129] Zweigert and Kötz 1998: 34.

[130] de Cruz 2007: 226–7; Sacco 1991: 6; Gutteridge 1949: 73.

[131] Cf. Smelser 1976: 66 (on Durkheim and Mill's method of difference); Dannemann 2006: 411; Van Hoecke and Warrington 1998: 533 (specifically for a comparison of European countries).

[132] Sacco 1991: 6; Bogdan 2013: 51 (differentiating between political goal and function).

[133] Cf. Hall 1963: 102–3; Riles 1999: 244; Smelser 1976: 66 (citing Durkheim: 'if one includes all sorts of societies and civilisations one ends up with tumultuous and summary comparisons').

comparatist interested in building societies would not want to look at the Afghan law on this matter since, presumably, 'Afghanistan does not practice anything like the English mode of buying houses by instalments'.[134] Thus, Basil Markesinis and Jörg Fedtke even go as far as saying that the laws of less developed systems are 'more appropriately left to anthropologists and sociologists rather than to lawyers proper'.[135] This statement sounds provocative but it is also in line with the view of anthropological researchers emphasising the profound differences between the methods of comparative law and legal anthropology.[136]

Thirdly, certain areas of law are seen as less suitable for a functional comparative analysis than others because they are heavily influenced by geographical, socio-political, cultural and other peculiarities.[137] Contract and tort law are regarded as good areas for functional research since the real-world problems are fairly similar across countries, but in other fields the suitability may depend on the precise topic and countries under consideration. For example, it is plausible to ask how different legal systems deal with flood damages in order to compare whether they have a preference for tools of prevention, mitigation and compensation;[138] yet, of course, this would not work for a country that does not face this particular environmental problem.

The traditional view has its doubts about applying functional methods to comparative family and constitutional law. Family law is seen as closely related to 'sentiments and traditions', 'power structures', 'psychological influences' and 'moral considerations' which are often specific to particular nations.[139] Thus, the cultural bases of family law may be too diverse to engage in a comparison of common functions, going beyond juxtaposition of similarities and differences.[140] In the time of the Cold War, constitutional law was said to suffer from a similar problem since political structures and values were just too different, thus limiting the usefulness of a functional approach.[141] And even for Western democracies today, some say that a comparative constitutional analysis assumes a shared understanding of political, social and economic functions of the state that cannot be taken for granted.[142]

However, some comparatists do provide functional examples from these areas of law. For instance, in family law a functional question would be how to help an impoverished spouse after the termination of marriage: alimony, family support or state security?[143] In constitutional law, it can be considered as a functional question to ask about the way human rights are protected: is it through written constitutional law, incorporation of international human

[134] Lawson 1977: 65. [135] Markesinis and Fedtke 2009: 46.
[136] Bennett 2010. For (legal) anthropology see also Chapter 12 at Section C, below.
[137] Gutteridge 1949: 32, 73 and the following footnotes. [138] Suykens et al. 2016.
[139] Citations in Bradley in EE 2006: 263. See also Bradley in EE 2012: 315–17.
[140] See Bradley in EE 2006: 259; Krause 2006: 1101, 1110. [141] Gutteridge 1949: 29.
[142] Teitel 2004: 2576, 2581. See also Tushnet 2006a: 1230; Schweber in Kritzer 2002: 353–6.
[143] Örücü 2006a: 33. For methods in comparative family law see also Nicola 2010.

rights norms or unwritten rules?[144] Yet, according to the same author, for other questions, the 'mixture of institutions and principles' by which the separation of powers, the rule of law and democracy are pursued also shows the limits of a functional comparison in comparative constitutional law.[145]

2 Comparative Law's Interest in Finding Commonalities

(a) Parallels in Philosophy and Other Fields

The idea that certain laws and legal concepts are common to all human beings has been a frequent topic of philosophy and jurisprudence.[146] The Aristotelian tradition of general jurisprudence aims to identify universal principles of natural law, and Christians developed the idea of a universal divine law. Since the enlightenment, such an endeavour has also been driven by a humanist desire to identify eternal principles of justice. More recently, other perspectives have been put forward to support the idea of universal principles of law as, for instance, being identified by way of rational reasoning or by way of showing a universal organic evolution of the law.

The question about a universal law is an obvious point of interest for comparative lawyers, as the following will explain. In addition, comparatists have taken notice of claims about the universality of other phenomena. For example, Yoshiyuki Noda considered Carl Jung's concept of psychological archetypes. According to Jung, all human beings are shaped by these archetypes. Noda advances the idea that there may be something similar in law: an unconscious shared legal mentality, which he calls 'protodroit'.[147] Similarly, Vivian Grosswald Curran highlights the impact of Johann Wolfgang von Goethe's vision of a single humanity of European thought, in particular the search for universal, unifying principles, which Goethe called 'Urphänomene'.[148] John Mikhail refers to a possible analogy of Noam Chomsky's controversial idea of a universal grammar. Chomsky challenges the view that languages are unique; rather he takes it that all languages share deep structures, making it possible to identify universal rules of human grammar – an idea which could also justify the search for universal moral and legal judgements.[149]

[144] Saunders 2009: 13; also Bignami 2016b (for question about relevant supreme law for judicial review). For functionalism in constitutional law see also Jackson 2012: 62–6.

[145] Saunders 2006: 123. See also Hirschl 2014: 151–91 (suggesting an interdisciplinary approach to comparative constitutional research).

[146] For the following see, e.g. Gordley 2003; Menski 2006: 132–47; Goldman 2008: 12; Schrage and Heutger in EE 2012: 509; Peters and Schwenke 2000: 803; Gutteridge 1949: 2; David 1985: 2. See also Chapter 5 at Section C 1 (a), below.

[147] Noda 1975; also Bogdan 2013: 83. This also relates to the idea of a 'proto-language' in linguistics, see McGregor 2015: 386–90.

[148] Curran 1998a: 72. See also Goethe's aspiration for a 'world literature', discussed by Markesinis 2009 and Glanert 2013.

[149] Mikhail 2011. Curran 2006: 679–80, 685 also refers to Chomsky's idea. More generally on universality in language and grammar see Berry et al. 2011: 195–9.

(b) Universalism and Comparative Law

Legal universalism may be regarded as a problem for comparative law since complete uniformity would make comparisons obsolete. Yet, in reality, if one goes beyond an extreme naturalist conception of the law,[150] it is clear that legal rules are not completely uniform across the world. Thus, comparative lawyers have sought to establish how universalist ideas and comparative law can be linked.

An initial suggestion may be to identify how far commonalities of legal rules confirm or rebut universalism.[151] The likely result of such an approach would be a rebuttal of universal legal rules since even the laws of fairly similar countries often differ in at least some details. The response of comparative lawyers has been that functional uniformity may be more important than the precise formal rules. Thus, functionalism and universalism are seen as complementing each other.[152] Often traditional comparative law also has the explicit aim of identifying functionally equivalent legal rules, referring to the aim that 'we must try to overcome obstacles of terminology and classification in order to show that foreign law is not very different from ours but only appears to be so'.[153]

Going even further, some comparatists suggest that, empirically, similar practical problems lead to similar results across the world. The most well-known formulation of this idea is by Zweigert and Kötz:

> if we leave aside the topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively 'unpolitical' we find that as a general rule developed nations answer the needs of legal business in the same or in a very similar way. Indeed it almost amounts to a '*praesumptio similitudinis*', a presumption that the practical results are similar.[154]

Supportive commentators highlight that making such a presumption mirrors procedures elsewhere in science: one starts with an initial conjecture that can then be falsified. The presumption is therefore not an ontological but merely a heuristic one.[155] It should also be noted the statement is only made for developed countries. In particular, traditional comparative law is often only interested in a comparison between developed common and civil law countries. Here, differences between common and civil law are said 'to be found rather in form than in substance'.[156] Thus, as the *praesumptio similitudinis* indicates, the results are often equivalent.

[150] Term by Valcke 2004: 721.
[151] See Clark 2012: 12; Esquirol 2001: 219; Peters and Schwenke 2000: 803; Banakas 1993–94: 116.
[152] See Michaels 2006: 345; Graziadei 2003: 109.
[153] Markesinis 1993: 443. Similarly, Ehrmann 1976: 11.
[154] Zweigert and Kötz 1998: 40. Similarly, Merryman 1999: 9 (on civil and common law: 'as a rule one can expect the two groups of legal systems to produce similar results in like cases'); Nottage 2010 (two paths leading to the same goal).
[155] Schafer 1999: 115 (with reference to Popper); Valcke and Grellette 2014: 110.
[156] Goff 1997: 746. For details of the common/civil law divide see Chapter 3, below.

The question remains why this presumption is supposed to be valid. Possibly, it matters that all law-makers have a similar aim, namely, to increase the wealth of their countries.[157] Furthermore, the universalism of traditional comparative law has been the subject of more psychological interpretations. The attempt to construct similarities may be driven by a desire to 'enhance certainty in an otherwise increasingly uncertain world'.[158] Another line of reasoning is that, after the Second World War, comparative law was dominated by continental Europeans and Jewish emigrants to the United States, and it is said that both of these groups may have had the understandable tendency to emphasise the commonalities of people from different countries, races and religions.[159]

However, universalist ideas in comparative law also have a long pedigree. They featured prominently in the research of scholars such as Sir Henry Maine and John Henry Wigmore who took a deep interest in non-Western societies. For example, in the nineteenth century, Maine suggested that all societies evolve through various stages with the liberal model of rational laws as the natural end point.[160] Similarly, Wigmore's comparative research of the first part of the twentieth century has been called a 'discovery of endless examples of universal legal ideas'.[161]

The tendency towards uniformity was also apparent at the first International Congress of Comparative Law in 1900. Statements by Raymond Saleilles and Édouard Lambert, the two leading French comparatists of that time, illustrate this point. Saleilles called on comparative law to 'ascertain the principles which are common to all civilised systems of law'.[162] Lambert took a similar, though geographically more narrow, view in suggesting that the laws of continental European countries should converge, since differences were not attributable to the political, moral or social qualities of the different countries, but merely to historical coincidences or to temporary circumstances.[163] Thus, both of these pleas anticipate the approach of twentieth-century mainstream comparative law: a focus on Western countries, a functional perspective, and a call for unification of the law. It is also interesting to see that Saleilles directed his statement more to academics, whereas Lambert referred to the need for legislative convergence, reflecting the frequent view that comparative law should not shy away from making policy recommendations.[164]

[157] Faust 2006: 846. [158] Banakar 2015: 148.

[159] Curran 1998a: 68; Curran 1998b: 666. But see also Markesinis 2000: 45 (for the émigrés to England: 'temptation to present themselves as being more English than the English').

[160] Maine 1861 as interpreted by Corcodel 2014: 104. For Maine see also Section A 3 (b), above, and Chapter 11 at Section A, below.

[161] Riles 2001: 108, 126. On Wigmore see also Section A 2 (c), above.

[162] Saleilles 1900: 397 ('droit commun de l'humanité civilisée') as translated in Gutteridge 1949: 5. See also Jamin 2002; Zweigert and Kötz 1998: 3; Hall 1963: 17, 44.

[163] Lambert 1905 (his contribution to the congress of 1900). See also Lambert 1903.

[164] See Section A 3, above.

3 Example of the Common Core Project

According to David Gerber '[t]he value and importance of the Common Core project may well place it among the defining achievements in the history of comparative law'.[165] In the context of this book, this project is also a good example of functionalism, universalism and mainstream comparative law.

The term 'common core' originates from a project organised by Rudolf Schlesinger at Cornell University, dealing with the formation of contract from a comparative perspective.[166] The main approach was as follows. A working paper asked country experts how their legal systems would solve a list of factual problems. These answers were used to produce a general report showing emerging themes of agreement (the 'common core'), and the subsequent parts of the two-volume book reported details of the legal systems, while not producing the initial working paper.

In the mid-1990s this approach was picked up by European academics interested in comparative contract, tort and property law. Due to the location of the annual meetings this endeavour was initially called the Trento project, then the Turin project and today it is usually referred to as the Common Core project. A number of comparative books deriving from this project have been published.[167] In addition, the Common Core website and further books provide explanations and reflections on the method used.[168]

The structure of the Common Core books is similar to the traditional approach to comparative law. As to the preliminary points, the Common Core follows the recommendation to start with a social problem by way of using hypothetical cases. It mainly covers European legal systems. Only in the introductory and concluding chapters do some of the books include information on the laws of other countries, most often the United States.[169] The restriction to Western, in particular to European, countries is seen as having the benefit of assuming a common conception of law, society, politics and religion.[170] This mirrors the limitations set by functionalism in terms of legal systems and areas of law.

The main parts of the books present the solutions to the hypothetical cases, the country experts having been asked to describe how the cases would be solved in their legal system. In addition, the organisers of the Common Core project explain that they are not only interested in the actual results, but also (i) how, in a particular legal system, different elements of statutory law, case law and scholarly writings interact with and potentially contradict each other;

[165] Gerber 2004: 1001.
[166] Schlesinger 1968. See also Mattei et al. 2009: 98–100; Örücü 2007: 435–6.
[167] List at www.cambridge.org/aus/series/sSeries.asp?code=CCEP. See also Siems and Cabrelli 2013 (applying a similar method to comparative company law).
[168] See heading 'About' at www.common-core.org. See also Bussani and Mattei 2007; Bussani and Mattei 2002; Bussani and Mattei 2000.
[169] E.g. Möllers and Heinemann 2008: 67–88; Brüggemeier et al. 2010: 38–72.
[170] Common Core website, above note 168, sub-heading 'The Project'.

and (ii) how policy considerations, values, economic and social factors, and the structure of the legal process may affect the solution to the case.[171] In some books of the Common Core project, these two elements appear under separate headings within the country solutions.[172] Yet, most studies are not fundamentally different from the paradigms of the traditional comparative method.[173] According to the traditional method, comparatists should also analyse different sources of law.[174] Most case solutions of the Common Core project also focus on the positive law without references to non-legal factors or empirical research on how problems are actually solved. Thus, the overall approach of the Common Core is fairly 'legal' and 'practical', evident also in the publisher's advertisement that it is a series 'to assist lawyers in the journey beyond their own locality'.[175]

Short chapter conclusions and separate chapters in the final parts of the books compare the countries' solutions. This is done in the spirit of functionalism and universalism. The title 'Common Core' already refers to this aim. Moreover, the project website indicates that the project seeks to unearth that which is already common in the EU Member States, and that 'common core research is a very promising hunt for analogies hidden by formal differences'.[176]

A cautious approach is followed with respect to policy recommendations. In contrast to other projects, no attempt is made to offer suggestions for a future European Civil Code.[177] Yet, it is again useful to consult the project website, which states that 'this kind of research should be very useful for and deserve more attention from official institutions that are encharged to draft European legislation' and that their 'task is part of building a common European legal culture'.[178] So, a not-so-hidden agenda is clearly part of the Common Core project.

C Critical Analysis

Not long ago it was said that the literature contained few serious discussions about the methodology of comparative law.[179] Yet, this has changed. The traditional method of comparative law has frequently been

[171] Ibid. sub-headings 'Approach' and 'How to Answer the Questionnaires'. These are called descriptive and metalegal formants. On legal formants see also Section C 1, below.
[172] E.g. Brüggemeier et al. 2010.
[173] For a similar assessment see Frankenberg 2006a. See also Ewald 1995a: 1981 (on the initial Cornell project).
[174] See Section A 2 (c), above.
[175] See www.cambridge.org/aus/series/sSeries.asp?code=CCEP.
[176] Common Core website above note 177, sub-heading 'The Project'. See also Mattei 1997a: 144; Mattei et al. 2009: 98–100.
[177] See ch. 9 at C 3 (b), below.
[178] Common Core website, above note 168, sub-headings 'The Project' and 'Approach'.
[179] Merryman 1999: 3.

challenged and alternative approaches have been suggested. The remainder of this chapter addresses this criticism; the alternatives follow in Part II of this book.[180]

1 Simplistic Approach

A first general point of criticism challenges the very idea of a blueprint that can be applied to any comparative project. Since comparative law serves various purposes, a plurality of methods may be used in a fruitful way.[181] The choice among these methods may also depend on practical considerations, for instance, the legal systems in question, the subjective abilities of the researcher and the affordability of the costs.[182] Moreover, it has been suggested that the most fruitful approach is not to start with a particular method but to develop the appropriate tools in a dialectic way together with the research of the substantive points of interest.[183]

A riposte may be that the restrictions set by the traditional method mean that, under these restrictions (e.g. start with a functional question, focus on Western legal systems), the blueprint does usually work. But, then, another line of criticism can be raised, namely, that the traditionalists miss interesting topics. For example, if we accept functionalism, is it not unsatisfactory that we cannot compare certain countries and areas of law? And is it really the ideal starting point only to allow functional questions, and not, for instance, a comparison of legal institutions, values, categories, concepts and ways of reasoning?[184]

More specifically, it can sometimes be useful to have a theoretical section preceding the actual comparative analysis. This section can explain the methodological approach of the study, including any specific theoretical concepts relevant for the respective area of law. It can be combined with a functional approach, but it can also be used as an alternative 'second order concept' providing a means to link the legal systems under investigation.[185] For example, an economically oriented comparative lawyer may start with a model of the most efficient legal position and then compare how and why legal systems differ from it.[186] Starting with theory is also suggested in other comparative studies: for example, in comparative politics it is said that concepts should precede and guide the collection of the necessary materials.[187]

[180] This includes 'critical comparative law', Chapter 5 at Section D, below, which goes beyond merely being critical about the traditional comparative method (discussed here).
[181] Siems 2005: 537; Husa 2011b: 127; Husa 2007; Husa 2003: 425. For the purposes of comparative law see Chapter 1 at Section A 2, above.
[182] Gutteridge 1949: 72; Palmer 2004.
[183] Tschentscher 2007. See also Kischel 2015: 118–20.
[184] Samuel 2008: 319.
[185] Van Hoecke 2015: 28. Similarly, Oderkerk 2015: 610 (as a *tertium comparationis*); Husa 2015: 121 (as conceptual framework).
[186] Mattei 1997a: 182. See also Kovac 2011 (on comparative contract law and economics).
[187] Rose 1991: 447–8; Hantrais 2009: 72, 76. See also Chapter 12 at Section A 1, below.

Moreover, is an explicit comparison really necessary for comparative law? In general comparative studies, it is said that descriptive words such as 'democratic' or 'densely populated' are implicit comparisons.[188] Similarly, studies of foreign law can have a comparative dimension because the author is bound to use terms and concepts of her own legal system as points of reference.[189] Giving consideration to the readership may also lead to a comparative dimension: for example, a book on English law for lawyers from other common law countries is bound to be written in a different way from a book on English law for lawyers from civil law countries.

The traditional comparative method is also criticised for being too narrowly focused on the positive law.[190] Law needs institutions that enforce it. Enforcement is a well-known problem where, due to high levels of corruption, state law is 'thin'.[191] But, according to John Bell, comparatists should also consider the role of institutions more generally:

> In short, that means that we cannot be content to present rules without some reference to the organisational setting, the procedural context and the conceptual structure within which legal problems emerge and the rules are operated. This is not necessarily a call for socio-legal or even 'law-in-context' work, but it does require thought at least about the legal embeddedness of the legal problems as they present themselves in the different countries studied.[192]

Rodolfo Sacco offers another perspective on the limitations of a purely positivist analysis.[193] His main idea is that law is an aggregate of various 'legal formants'. Comparative law should consider not only legislation but also court decisions and legal scholarship, regardless of whether a particular legal system regards the latter as sources of law. Comparatists should also illuminate how these legal formants interact and compete with each other, thus resisting the usual temptation of domestic lawyers to establish the correct solution to a particular problem.[194]

Sacco, in addition, introduces the term 'cryptotype' to comparative law. This refers to the unformulated elements of legal formants: for instance, the mentality, ideology or other shared premises of law-makers, judges or legal scholars.[195] Similarly, Ugo Mattei and colleagues illustrate this idea as follows:

> At home, every experienced lawyer is a 'practicing anthropologist', to use an expression coined by the late Jerome Frank. By living and practicing in one's own community, a person becomes intuitively aware of the way in which legal

[188] Smelser 1976: 3. See also Chapter 12 at Section A 2, below.
[189] Ruskola 2002: 192; Twining 2000a: 187–8. See also Twining 2000b: 57 ('comparative study is more like a way of life than a method').
[190] Grossfeld 2003: 180; Örücü 2007: 61. [191] Glenn 2003: 96.
[192] Bell 2011: 170. See also Bell 2006a; Bell and Ibbetson 2012: 45.
[193] Sacco 1991; Sacco 1990: 47–74. See also Graziadei 2003: 116; Mattei 2001: 251; Mattei et al. 2009: 219–23; Monateri 1998: 841.
[194] Similarly, Hyland 2009: 106 (law needs to be considered 'as a collective fabric of justification').
[195] Sacco 1991: 384–7; Sacco 1990: 155–9.

> institutions actually work; but when one tries to penetrate into a foreign system, no such intuition or experience is available to serve as a guide. The comparative law student who recognizes this handicap is well on the way to overcoming it.[196]

Beyond this specific point, a more general response to the traditionalists is that they are negligent with respect to the cultural and socio-economic context of the law. This is said to be particularly relevant for comparisons of very different legal systems,[197] though it is also a frequent general assertion of the recent comparative law literature.[198]

What follows from this line of criticism? It raises important points but not all of them are entirely fair. At a general level, it can be said that approaches to research can range from more reductionist to more holistic approaches.[199] Some of the critics of the traditional method seem to say that comparatists should always be fully holistic as such an approach provides a richer comparative understanding of legal rules. However, being focused also has its benefits. Thus, it depends on the precise aim and subject of a comparative study how far the limitations of a particular method can be justified.

More specifically, whilst it is true that traditional comparative law often tends to be fairly positivist, this is not a necessary consequence of the main traditional method of functionalism. Rather, a comparative analysis that starts with a functional question would have to address not only the law, but also the way it is enforced and how it is related to non-legal solutions.[200] It is also clear that traditional comparative research does not support a shallow description of statutory law, but asks comparatists to examine carefully the complexity of legal rules in terms of court decisions and scholarship. Yet, it remains a valid point of criticism that the limitations of the traditional method exclude a great deal of interesting research. This will also become apparent in the following more specific objections.

2 Focus on Western Countries

The country-level analysis of traditional comparative law is based on the premise that legal systems are distinguished by nation-states. This 'Westphalian' conception of law, stemming from the Peace of Westphalia of 1648, is, however, frequently regarded as outdated.[201] Since international, transnational and regional legal orders play a crucial role today, there is no reason why one should not also compare, for instance, differences between international regimes or between regional organisations and federal states.[202] Furthermore, the focus on states disregards the role of non-state law. In

[196] Mattei et al. 2009: 175. [197] Van Hoecke and Warrington 1998: 510.
[198] See Chapter 1 at Section B 3, above.
[199] See Romano 2016 (and relating those to comparative law).
[200] De Coninck 2010: 336. See also Sections A 2 (c) and 3 (b), above.
[201] See Nelken 2001: 32; Glenn 2003: 91, 93. See also Part III, below.
[202] For examples see Chapter 9 at Sections B and C, below.

non-Western countries, legal systems are often said to be pluralist, where state law is only one of many legal orders, while in the West, too, there is increased interest in private forms of regulation.[203] All of this poses challenges that comparative law should take into account. Yet, at the same time, one should not go as far as saying that countries no longer matter. Their precise role also depends on the area of law: in some fields of commercial law it is hardly feasible to ignore the international dimension, whereas, for other areas of law, it may still be justifiable to focus on the country-level.

The disregard of non-Western countries by traditional comparative law is more difficult to excuse. With respect to the assertion that these countries are too different to be comparable, it can be objected that, in today's globalising world, non-Western societies often use terms and concepts not fundamentally dissimilar to those from the Western world.[204]

But even assuming that countries from the South and East are still very different from the West, the functional method can offer a feasible tool of comparison. For instance, consider a course on 'Law in Radically Different Countries' that was taught at Stanford University in the 1980s. This course dealt with the legal systems of the United States, China, Egypt and Botswana, and, despite the 'radical differences', it did use common problems such as 'how does society deal with a promise made, relied on but not kept?' or 'what happens when someone with property, who holds office and has social status dies: who gets all of these things?'.[205] Another example is a recent article by Petra Mahy: it compares work regulations in Australia and Indonesia, taking as a starting point the common social problem 'to arrange work in restaurants so as to fulfil the requirements of the business owner to deliver food and service to customers and make a profit while at the same time ensuring a certain level of satisfaction and benefits to workers'.[206]

Extending functionalism to very different countries can require some adjustments. We have already seen that functional questions can be posed at different levels of abstraction,[207] and here then a higher level may be needed in order to capture the more diverse rules. Moreover, the substance of the analysis will be different from a comparison of relatively similar legal systems: the analysis will, of course, explain the diversity of the legal rules, but it can then also be revealing to find and explore similarities in legal systems which in other respects are very different.[208] This latter focus is in line with the position of other comparative disciplines which, depending on the research design, allow a comparison of both 'most similar' and 'most different' units.[209]

[203] For further details see Chapter 4 at Section C 3, Chapter 5 at Section B 4, and Chapter 10, below.
[204] Riles 1999: 251. See also Chapter 4 at Section C 2 (a) and Chapter 11, below.
[205] Gibbs 1981. See also Barton et al. 1983.
[206] Mahy 2016 (but also mix with other methods).
[207] See Section B 1 (b), above.
[208] See also Nelken 2007a: 26; Örücü 1999: 25; Graziadei 2003: 120.
[209] For details see Chapter 12 at Section A 4, below. Hirschl 2014: 244–5 also suggests applying those principles to comparative law.

In terms of method, a comparison of very different countries often makes interdisciplinary research necessary.[210] Whereas comparison between Western legal systems can take certain cultural similarities as given, a comparison of inheritance law across Western, Eastern and Southern legal systems (as in the Stanford course) has to consider more closely the extent to which these legal rules are shaped by different value systems, family traditions, religious beliefs, etc. Applying the traditional framework, it is possible for the researcher to address these points in the comparative stage of her research after having described and juxtaposed the legal systems in question. However, such a structural separation of law and context may not always be advisable:

> [T]here is no one method of comparative law but a large variety of methods to compare laws, fitting the different objects of a given comparative project. For example, if we wish to compare the land law of Mali with the land law of Afghanistan, two legal cultures in which a thick component of the legal system is neither written nor dominated by a formalized legal profession as in Germany or the US, we might find useful or even unavoidable an ethnographic or an anthropological method in the study of comparative law.[211]

This more anthropological perspective also means that the comparatist has to be aware of her own preconceptions, avoiding an attitude of '[w]e are the Greeks; all others are barbarians'.[212] This is not to say that a comparative analysis of radically different legal systems can be entirely neutral, as some traditional comparative lawyers sugggest.[213] Rather, the comparatist should be aware of what the 'unstated norm' of her analysis is: for instance, whether research on US and Indian family law approaches the specifics of Indian family law from a US perspective, or vice versa.[214]

To conclude, non-Western legal systems can be part of a comparative analysis. There can also be good reasons to include countries that may be as different as 'apples and oranges' in order to produce 'new and destabilising knowledges'.[215] Of course, the precise choice of countries depends on the topic of the analysis. For instance, if someone is interested in a specific technical detail of capital markets law, it can make sense to focus on Western countries, whereas a more general analysis of how businesses are financed may well analyse legal systems from different parts of the world.

[210] See also Menski 2006: 264 (research on Indian constitution should be joined work with Indologists).
[211] Mattei et al. 2009: 48–9.
[212] Demleitner 1998: 653 (citing Karl Llewellyn).
[213] See Section A 2 (a), above.
[214] Cossmann 1997: 536. See also Chapter 5, below.
[215] Radhakrishnan 2009: 454 ('If comparative studies are to result in the production of new and destabilizing knowledges, then apples and oranges do need to be compared, audaciously and precariously').

Table 2.1 Similarities and differences

		Formal	
		Similarity	Difference
Functional	Similarity	Socio-economic similar countries of same legal family	Socio-economic similar countries of different legal families ('functional equivalents')
	Difference	Socio-economic different countries of same legal family ('functional dissimilarities')	Socio-economic different countries of different legal families

3 Critics of Functionalism

A first line of attack criticises the functionalist's focus on similarities. On the one hand, this criticism concerns the endeavour to identify functional equivalents. Here the objection is that it may be equally rewarding to look for functional dissimilarities (or 'disequivalence'), despite formal differences. For example, in divorce law, many legal systems understand the concept of 'irretrievable breakdown of marriage', but the precise application ranges from fault-based systems to divorce by consent.[216] Or, in administrative law, many countries limit the freedom of the state based on the 'principle of proportionality', but differ in the precise extent to which judges can interfere.[217] In particular, such examples of formally similar but functionally different rules are likely to occur when legal rules have been transplanted from abroad (say, within a particular legal family), but do not match perfectly with the conditions of the domestic society.[218] Table 2.1 aims to illustrate this point.

On the other hand, frequent criticism has been raised against the *praesumptio similitudinis*, the presumption of functional equivalents. Such a presumption is rejected by comparatists who aim to be 'neutral as between similarity and difference'.[219] A further criticism is that the underlying concept of universalism is itself culturally conditioned, having emerged and been developed at particular points in time in European legal history.[220] Finally, and more generally, the 'difference theory' rejects the search for shallow similarities as being based on the flawed notion that legal comparison can be

[216] Antokolskaia 2007: 251.
[217] See, e.g. Jackson and Tushnet 2017; Barak 2012; Sandulli 1998.
[218] For legal transplants see Chapter 8, below. For legal families see Chapter 3 and Chapter 4, below.
[219] Michaels 2006: 369. See also Chapter 5 at Section C, below.
[220] Menski 2006: 132. Generally see also Section B 2 (a), above.

unpolitical and unbiased. This is embedded in a critical postmodern conception of comparative law, to be discussed in detail later on in this book.[221]

A second key criticism – and a criticism closer to the core of comparative functionalism – is that it is regarded as unacceptable to assume that all societies face the same social problem.[222] Human needs are not universal, but are conditioned by their environments. This is obvious if one thinks about different natural environments, but it also applies more broadly. The factual situation may be identical in two countries, but this does not necessarily imply that both societies (and law-makers) feel the need to provide legal rules on this issue. For instance, whether adultery is regarded as a 'problem' the legal system should address depends on moral, cultural and religious values, which differ across the world. Or, more fundamentally, according to Simon Roberts:

> Societies differ widely as to the kinds of behaviour which are approved or tolerated and hence also in the amount of tension and quarrelling that will be felt acceptable. The possibilities can be seen as ranged along a continuum. At one end are societies in which subdued, self-effacing conduct is expected of the members. Here, peace and quiet and sustained harmonious inter-personal relations represent dominant values, and urgent appeals for unity are made wherever a quarrel shows signs of developing ... Elsewhere, at the opposite end of the scale, loud, aggressive behaviour may be approved and a high value attached to individual ascendancy and achievement ... There, persistent disputes may be tolerated, ignored or even enjoyed.[223]

Thus, it is said that societies have distinct priorities, and that it is unacceptable to impose an external measure on them, such as expecting them to deal with a particular issue.[224]

Thirdly, the very idea that law serves particular functions has been challenged. A strict version of functionalism has to assume that there is a clear sequential order: a social problem arises, courts or legislators respond to it, which in turn has the effect of solving the problem. Yet, such a view fails to consider that legal rules often arise in a complex process of historical path-dependencies, cultural preconditions and legal transplants, and that legal rules also shape the problems of society.[225]

Moreover, law does not necessarily serve an explicit function. Law-makers may have responded to conflicting aims or they may just offer a certain legal framework, being indifferent to how it is used. Symbolic and aspirational laws

[221] See Chapter 5 at Section D, below.

[222] Örücü 2007: 51–2; Nelken 2007a: 22–3; Adams and Griffiths 2012: 284; Brand 2007: 419; De Coninck 2010: 327; Husa 2003: 438; Hyland 2009: 69–73; Constantinesco 1983: 54–8.

[223] Roberts 2013: 35–6. For anthropological research see also Chapter 12 at Section C, below.

[224] Frankenberg 2016: 76; Frankenberg 2014: 235; Nelken 2013: 344; Nelken 2003b: 814; Glenn 2007: 95; Ruskola 2002: 190; Husa 2003: 438.

[225] For this relationship see also Chapter 6 at Section A, below.

may not have a particular function though being perfectly explainable by a county's culture. And laws may become dysfunctional but remain in force due to inertia and conservatism of law-making and legal thinking.[226] Finally, functionalism is said to run the risk of misunderstanding non-Western legal systems, since the top-down approach, whereby state law achieves particular social ends, is very much a Western creation.[227]

Where do these lines of attacks leave functionalism? Some of them raise important objections, but it is submitted that they do not discredit functionalism as a whole. It is true that functionalism tends to focus on, or even assume, similarities over differences. Yet, comparatists have long distinguished between integrative and contrastive comparisons,[228] and it is not *a priori* better or worse to prefer one over the other. Critics show, however, that functionalism may not work very well in some areas of law, or with respect to legal systems, where we cannot say that law really has a well-defined purpose. We may, therefore, be left to using a functional starting point for comparisons mainly between Western countries in areas such as contract and tort law, a limitation also acknowledged by traditional comparative law.

4 Policy Evaluation

Attempts at policy evaluation in traditional comparative law are fiercely attacked by some postmodern approaches, which emphasise profound differences between legal cultures: '[t]here cannot be a "better" law. The very notion is fallacious. Who could finally and definitively say what it is?'[229] It is interesting to see that similar counter-arguments have also been raised more generally. In the mid-1980s, some US academics expressed support for the German model of civil procedure, given the more active role of the judge in the German civil trial than in the US one; yet, the majority of US lawyers responded that the institutional arrangements of civil procedure were so deeply embedded in US society and culture that it would not be appropriate to change them.[230]

More pragmatically, the question is how exactly comparative law can help us to find a 'better' solution. For example, a problem faced by the Common Core research is that, whilst it may identify a majority solution, the mere fact of a majority solution does not explain why it should be regarded as the best one.[231] Favouring one solution over another one also

[226] For all of these points, see, e.g. Husa 2015: 125; Husa 2011a: 220; Pirie 2013: 76, 127–8, 227; Graziadei 2003: 100, 118; Michaels 2006: 354; Brand 2007: 415.
[227] Twining 2007: 75–6. See also Chapter 11 at Section C 2, below.
[228] Schlesinger 1995: 481; Mattei et al. 2009: 69.
[229] Legrand 2006b: 448. For postmodernism see Chapter 5, below.
[230] For the debate see, e.g. Maxeiner et al. 2010: 17; Maxeiner et al. 2011; Stiefel and Maxeiner 1994; Chase 2002; Bryan 2004. For civil procedure see also Chapter 3 at Section B 2, below.
[231] Smits 2010b: 36.

raises the objection that this is just too subjective.[232] However, this should not be the final word. Following the quantitative turn in other social sciences, empirical tools have emerged in order to test which types of rules are best able to achieve particular goals. This is an important innovation, though such an approach is not without problems, as later chapters will explain.[233]

D Conclusion

The traditional comparative legal method has the benefit that it provides some guidance to the way a comparative analysis should be conducted. In particular, this is the case for research that puts functionalism at its core as it can start with a socio-economic problem and reach a policy recommendation at the end of the analysis. This chapter has, however, also presented variations of this traditional method: for example, on the one hand, black-letter juxtapositions with little interest in explaining the reasons of similarities and differences, and on the other hand, historically oriented research that focuses on these reasons with little interest in policy recommendations.

This chapter has also shown that critics raise a number of valid objections. To some extent, these points of criticism 'merely' highlight the limitations of the traditional method, in particular that it is not perfectly suitable for all areas of law and all countries of the world. In addition, the critics deserve credit for exploring various aspects of comparative law methodology. Thus, it is suggested that a researcher who applies the traditional method needs to justify why this approach is seen as the most suitable for her topic. Most importantly, many points of criticism highlight the relevance of context and interdisciplinarity for comparative legal research, which will be explained further in Parts II and IV of this book.

Most of the examples in the present chapter concerned comparisons between two or more countries on specific legal topics. These 'micro-comparisons' can be distinguished from 'macro-comparisons' which deal with legal systems as a whole.[234] There is also an overlap of both types, since macro-comparisons typically include analyses of specific topics. However, in addition, the 'macro-comparatist' may aim to provide a more general assessment about the similarities and differences between the legal systems of her study. This often makes use of legal families: for example, when comparing English, French and German law, it may be the case that we observe that the latter two countries are particularly close since both of them are civil law countries (as opposed to England, being a common law country). This will be the topic of the next two chapters.

[232] Hill 1989: 105. [233] For details see Chapter 7 and Chapter 12, below.
[234] See Part 1 prologue, above.

Supplementary Information

Questions for discussion. Does the traditional method of comparative law have a fixed method that works for any topic? What are the advantages and disadvantages of applying functionalist ideas to comparative law? What is the relationship between comparative law and universalism? Is the Common Core approach only interested in the positive law? Should comparative law be concerned with policy recommendations?

Suggestions for further reading. For the traditional method in general: Zweigert and Kötz 1998: 32–47. For the methodological framework: Oderkerk 2015. For functionalism: Michaels 2006. For explanations of differences and similarities between legal systems: Husa 2015: 147–86. For traditional and some non-traditional methods of comparative law: Örücü 2006a.

3

Common Law and Civil Law

Most of the traditional general books on comparative law include chapters on 'legal families', some of them using terms such as 'legal traditions' or 'legal cultures'.[1] The core idea of legal families is that the diversity of the world's legal systems is not random, but that groups of countries share common features in terms of legal history, legal thinking and positive rules. Recently, this idea of legal families has also become popular among economists and political scientists, often calling them 'legal origins'.[2]

Chapter 4 of this book discusses attempts to classify all legal systems of the world. Before doing so, Chapter 3 starts with a detailed critical analysis of the distinction between common and civil law countries. The reason for this structure and focus is that, according to traditional comparative law, this distinction is the 'most fundamental and most discussed issue in comparative law',[3] as common and civil law are said to 'constitute the basic building blocks of the legal order' and to be 'the dominant legal systems of the world'.[4]

Before going into these details, Section A clarifies the terminology and origins of the common/civil law divide. Section B explains the core substantive differences. Particular emphasis is given to questions of sources of law, legal methods and court proceedings; a smaller section deals with comparative contract law. Section C provides a critical analysis. Section D concludes.

A Terminology and Origins

The words 'common law' and 'civil law' have multiple meanings. In the current context, they are meant to refer to labels given to groups of legal systems in terms of similarities and differences. Broadly speaking (details below) common law countries are legal systems whose law is based on English law,

[1] See Chapter 1 at Section B 1, above. Some also use the term 'legal systems' though this can be misleading since it can also refer to the law of a single country, see Constantinesco 1983: 76–7. The term 'legal culture' is also used in further contexts, see Chapter 5 at Section B 1 and Chapter 6 at Section A, below.

[2] See Chapter 12 at Section B 3, below.

[3] Mattei 1997a: 70.

[4] Palmer in EE 2012: 591 and Barnes 2005: 680.

whereas civil law countries are those influenced by continental European traditions.

Some of the other meanings are related to this distinction. Within a common law country, we can distinguish between 'common law' and 'equity', the latter being those types of claims that had not been part of the original forms of action (more below). The term 'common law' can also refer to the case law of a common law country, as distinguished from statute law that tends to be of more modern origins.[5] Moreover, the term 'common law' can simply refer to the law that a wider range of people have in common, as distinguished from local laws.[6] Finally, within a particular legal system, 'civil law' can refer to fields such as contract and tort law, distinguishing it from criminal and public law.[7]

In order to understand the civil/common law divide, it is useful to start with the origins of both legal families.[8] This is not entirely straightforward. The civil law tradition is based on Roman law which, in its ancient form, used to follow a casuistic style, something today more associated with the common law. In the early sixth century AD the Eastern Roman Emperor Justinian commissioned a synthesis of the Roman law. This Corpus Juris Civilis became influential again in the eleventh century with the revival of Roman law in continental Europe (also called 'reception'). Three distinct features are worth highlighting. First, universities supported the reception of Roman law, thus explaining the frequent description of the civil law as 'learned law'. Secondly, the received Roman law was a common law ('*ius commune*') that transcended national borders, replacing or at least supplementing local customary laws. Thirdly, judicial enforcement of the law was kept under the strict control of the state in order to prevent corruption and guarantee uniform application of the law.

This version of the civil law changed with the emergence of the nation-states in the eighteenth and nineteenth centuries. States began to codify the Roman law, often mixed with local laws, in order to create a unified national law. The most important of these new codes was the French Code Civil of 1804, often seen as a symbol of the modern civil law tradition. The Civil Code is drafted in an abstract fashion while also aiming to be understandable for the common public ('as simple as the Bible'; 'simple and clear like the laws of nature').[9] This contrasts with the German Civil Code of 1900, whose style is more conceptual and professorial. Thus, the codification movement led to the divergence of laws in continental Europe. However, it also facilitated the

[5] Zweigert and Kötz 1998: 188. [6] See Glenn 2005 and Section C 1, below.

[7] See van Rhee and Verkerk in EE 2012: 140; Mattila 2013: 142, 305–6. But note that in common law countries administrative sanctions may also be called 'civil sanctions', as distinguished from criminal ones.

[8] For the following see, e.g. Glenn 2014: 132–64, 236–60; Gordley and von Mehren 2006: 3–63; Dam 2006; Head 2011; Djankov et al. 2003b: 605–6.

[9] Ehrmann 1976: 26; Sagnac 1898: 385 (own translation).

spread of the civil law across the world. In parts, this happened through the colonial empires of the European countries. Moreover, some countries, such as Japan and Turkey, voluntarily transplanted major codes of the civil law countries.[10]

The origins of the common law appear to be clearer. In 1066, following the Norman conquest of England, William the Conqueror was crowned King of England. William and his successors used a feudal system of land ownership and a new court system to control the country and to unify the law. The legal system was based on standardised forms of action ('writs'), which became the basis of the common law. Courts were centred in London, but travelling judges also operated in other parts of the country. In court proceedings, the fact finding was left to juries in order to facilitate acceptance of the royal justice in the local population.

Initially, the royal influence on the legal system was strong. However, when, in the seventeenth century, King James I attempted to make use of his feudal powers in claiming ownership of the entire land, Parliament intervened, and a stronger protection of property rights and a more independent judiciary emerged.[11] Gradually, judges also delivered more elaborate judgments, thus transforming the procedural origins of the 'writs' into more substantive rules; as a result, it has famously been said that '[t]he forms of action we have buried, but they still rule us from their graves'.[12] As with the civil law, colonisation meant that this approach to law spread to other parts of the world, such as the United States, Australia and India.

B Juxtaposing Civil and Common Law

It would not be feasible in one chapter to provide a summary of all the possible differences and similarities between all possible civil and common law countries. Yet, it is also submitted that this is not necessary, according to the traditional mainstream of comparative law. First, most legal scholars agree that certain topics are at the core of the common law/civil law divide. These are sources of law and legal methods, legal styles and techniques, and institutions and procedure,[13] which will therefore be the main focus of this chapter. It will also discuss how these differences are reflected in one more specific area of substantive law (contract law). Secondly, while civil and common law countries are found in all parts of the world, their typical

[10] For details see Chapter 8 at Section B, below.

[11] Klerman and Mahoney 2007; Beck and Levine 2005: 254–8. Similarly, Shapiro 1981: 104; Glenn 2014: 255–7.

[12] Maitland 1936: 2.

[13] Vogenauer 2006: 873; Dannemann 2006: 393; Glenn 2010: 610. Details, e.g. in Vranken 2015: 16–37; Lundmark 2012; Barner 2005: 686–731; Smits 2002a: 73–94; Van Caenegem 2002: 38–53; Pejovic 2001; Tetley 2000: 701–7. Specifically on comparative civil procedure, see, e.g. Maxeiner et al. 2010; Maxeiner et al. 2011; Chase and Hershkoff 2007; Chase and Varano 2012; Schmiegelow 2014; Koch 2003; Garapon and Papadopoulos 2003; Hadfield 2008: 50–8.

features are mainly seen as a result of a few countries' influence. With respect to the civil law, French and German law are said to have influenced all countries regarded as civil law countries today, and, with respect to the common law, English law and more recently US law have done the same.[14] It is therefore possible to focus on these four legal systems. The aim here is to present a fair description of the mainstream view – with a critical analysis provided in the subsequent section.

1 Legal Methods and Sources of Law

(a) Role of Statute Law and its Interpretation

In the civil law world, the main codes for civil law, commercial law, criminal law, civil procedure and criminal procedure emerged in the nineteenth century. Codification efforts are also not unknown to common law countries. In the mid-nineteenth century the American lawyer David Dudley Field drafted a Code of Civil Procedure which was initially adopted by the State of New York, and which has influenced today's Federal Rules of Civil Procedure and the corresponding State laws.[15] With respect to substantive law, some US States have a Civil Code (e.g. California, Montana), and the model law of the Uniform Commercial Code (UCC) has been adopted by all US States with only slight modifications.[16] In pre-independence India, codification concerned procedural rules as well as substantive law.[17] These laws have also impacted on the laws of other British colonies, for example, in Africa.[18]

However, there is a significant difference between these common law codifications and the 'codes' of civil law countries. The modern codes of civil law countries follow the idea of the Enlightenment to provide an abstract, systematic and self-contained treatment which anticipates as completely as possible all relevant issues in particular branches of law.[19] Some of today's law-makers are also keen to keep the idea of such codes (in a narrow sense) alive: for instance, France set up a Commission Supérieure de Codification in 1989, which has led to the introduction of new codes and the redesign of old ones.[20] In the common law world, the UCC has been influenced by a civil law style of drafting legislation;[21] yet, this is the exception, since codifications in common law countries have mostly

[14] See also Chapter 8 at Section B, below on legal transplants.
[15] Weiss 2000: 505–6; Zweigert and Kötz 1998: 242–3.
[16] See www.law.cornell.edu/uniform/ucc.html.
[17] E.g. Criminal Procedure Code 1861; Civil Procedure Code 1908; Penal Code 1860; Contract Act 1872.
[18] See Menski 2006: 462 and Chapter 8 at Section B 2 (a), below.
[19] Vranken 2015: 16–21; Weiss 2000: 456–66; Curran 2006: 683; Legrand 1995: 15–16, 27. For the question of whether this gives civil law countries an advantage in legal certainty see Siems 2017b.
[20] See Steiner 2010: 38. [21] Steiner 2010: 42. See also Whitman 1987.

been ex-post consolidations of previous case law with only some attempts to systematise the topics.[22]

With respect to the substance of modern legislation, it has been said that continental European law-makers tend to provide mandatory rules in the public interest, whereas in the common law the focus is on individual rights and responses to market failures.[23] There may also be a link between this difference and the more pronounced role of litigation in common law countries, since litigation favours the use of property rights in order to deal with externalities, whereas civil law countries may prefer strict rules.[24] Similarly, it can be suggested that civil law countries tend to be 'policy-implementing' and not merely 'conflict-solving', and therefore more activist social welfare providers.[25]

The interpretation of the civil law codes has experienced a significant shift in the last two centuries. The French Civil Code of 1804 stated (and still states) that 'judges are forbidden to decide cases submitted to them by way of general and regulatory provisions'.[26] The background of this provision was that previous French courts (the 'Parlements') tended to obstruct reform by announcing general rules binding on all courts. Thus, the Civil Code had the aim of enforcing a strict separation of power, and to disallow judicial law-making: the law should be applied exactly the way it is written in the Code.[27] However, throughout the nineteenth and twentieth centuries it became clear that such a narrow and literal interpretation was not feasible.[28] Today, a common tool of civil law interpretation is to consider the historical background of the law in order to give full effect to the intention of the law-maker ('exegetical method'). If a provision is ambiguous and the will of the law-maker is not clear, the interpretation may also be based on the objective purpose of the law ('teleological method'). The purpose of the law is particularly relevant for provisions drafted in general terms. Exceptionally, it may also be justifiable to interpret provisions extensively or even to apply them by way of analogy, if this is necessary to give full effect to the law.[29] This use of analogies is explicitly authorised in some modern codes, such as the Swiss Civil Code, which states that if the Code 'does not furnish an applicable provision,

[22] See Menski 2006: 242 (for the Indian codes). For convergence in modern legislative drafting see Section C 3 below.

[23] Suk 2012 (for anti-discrimination and equality legislation); Ogus 2004: 149.

[24] Mattei 1997a: 64.

[25] For this distinction see Damaška 1986: 71–96, 147–80. See also Chapter 7 at Section D, below (quantitative research that common law more business friendly); Chapter 12 at Section B 3, below (research on different types of welfare states).

[26] Code Civil, art. 5 (as translated at www.legifrance.gouv.fr).

[27] See Legrand 1995: 11–12; Vogenauer in EE 2012: 830–1 (also on the alleged statement by Napoleon when the first commentary on the Code was published: 'Mon Code est perdu!').

[28] For the following see Steiner 2010: 69, 73; Hage in EE 2012: 530–1; Van Hoecke and Warrington 1998: 501–2; Vogenauer 2006: 884; Zimmermann 2001: 176.

[29] See Mattei et al. 2009: 579; Gutteridge 1949: 94.

the judge shall decide in accordance with customary law, and failing that, according to the rule which he would establish as a legislator'.[30]

In the common law, traditionally, statutory interpretation focuses on the text ('literal rule'), unless this would lead to an absurd result ('golden rule') or would not sufficiently address the defect the law had sought to remedy ('mischief rule'). But, similar to the civil law, interpretation has gradually shifted from wording to legislative history and purpose.[31] Still, it matters that, traditionally, the main source of the common law is case law. Thus, as statute law is regarded as the exception, statutory interpretation tends to be narrower in common law than in civil law countries. This is also reflected in the way many statutes are drafted, since interpretation sections and detailed provisions aim for laws that indicate precisely how they should be applied. Moreover, while in civil law countries judges are keen to anchor their reasoning in the codified law, common law judges are said to refer to statutory law in a more ad hoc fashion, even where a particular topic is heavily codified.[32]

(b) Role of Courts

Judicial law-making presents the reverse picture. In the common law, trials not only have the function of solving an individual conflict, but court decisions are a means to develop the law 'from below'. This has had a distinctive influence on the law. The common law is reactive since 'it awaits the interpretive occasion'.[33] The reliance on cases also means that the specific facts of each case are carefully considered. In the words of Lord Macmillan, it follows that '[a]rguments based on legal consistency are apt to mislead, for the common law is a practical code adapted to deal with the manifold diversities of human life'.[34] Given the lack of comprehensive codifications, knowledge of history is also said to be more important than in civil law countries.[35]

Moreover, since previous cases are regarded as binding precedents, judges apply law made by themselves.[36] Thus, the law tends to evolve gradually, as can be seen in traditional fields of common law such as equity and torts. Common law judges are also willing to show judicial creativity in establishing policies for matters of social controversy, and they are said to be relatively open to arguments from economics and other social sciences.[37] In addition, judges of common law countries are praised for being 'market-wise' – for instance, in guaranteeing the freedom of contract.[38] It has also been said that the

[30] Civil Code (Zivilgesetzbuch), art. 1(2) (as translated in Ehrmann 1976: 111).
[31] Samuel in EE 2012: 178–9; Bell 2006a: 334–6; Hermida 2004: 343. See also MacCormick and Summers 1991.
[32] See Lundmark 2012: 80 (contrasting the situation in Germany and California).
[33] Legrand 1999: 69.
[34] *Read* v. *J. Lyons and Co.* [1946] 2 All ER 471 at 478 (HL).
[35] Mattei et al. 2009: 404.
[36] Shapiro 1981: 69. For precedents in common and civil law countries see Section 2 (f), below.
[37] See Bell 2006a: 334–6; Faust 2006: 857; Nelken 2003b: 827.
[38] Arruñada and Andonova 2008.

protection of individual rights and freedoms by these fiercely independent legal professionals has precluded violent intrusions of political power.[39]

Judges in civil law countries reason very differently. As the previous section explained, they have more discretion in interpreting statutory law. But once this is completed, they are said just to be law-appliers. In 1921 Roscoe Pound put it as follows:

> [T]he theory of the codes in Continental Europe of the last century made of the court a sort of judicial slot machine. The necessary machinery had been provided in advance by legislation or by received legal principles and one had but to put in the facts above and take out the decision below. True, the critic says, the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed, not at all to the thumping and joggling process, but solely to the machine.[40]

This mirrors statements made today. The civil law judge is seen as keen to follow legal reasoning based on syllogism: first, identifying the legal rule and how it should be interpreted; secondly, subsuming the facts within these legal rules; and, thirdly, applying the consequence of the legal rule.[41] Thus, in contrast to the common law, the facts of the case are only relevant as far as they relate to the legal rule in question. Similarly, as far as precedents are used, the focus is on the principles of law, not the factual details of the previous cases.

Overall, the method of civil law judges may therefore be criticised as positivist, mechanical and uncreative.[42] More sympathetically, it may be described as seeking to respect the decisions of the legislator, and applying the law in a rational and predictable matter.[43] The institutional structure of courts reinforces this approach: judges are civil servants on a judicial career path and within an institutional hierarchy.[44] They also have to deal with a high workload of cases, thus making unavoidable the normal focus on implementing, not developing, the law.[45]

(c) Role of Legal Scholarship

A discussion of legal scholarship points towards another reason why the civil and common law traditionally differ. Historically, the civil law tradition is associated with the concept of 'learned law'.[46] In particular, German law professors are said to have had a strong influence on the character of German law, contrasting it with judges in England and the legislator in France.[47]

[39] Mattei and Nader 2008: 181. [40] Pound 1921: 170–1.
[41] Maxeiner et al. 2010: 33, 241; Smits 2002a: 82; Legrand 1999: 76; Lundmark 2012: 284.
[42] Merryman and Pérez-Perdomo 2007: 38; Curran 2001b: 74–5; Andenas and Fairgrieve 2006: 22.
[43] Bell 2006a: 144, 170 (for Germany). [44] See Section 2 (c), below.
[45] Bell 2006a: 103 (for France). [46] See Section A, above.
[47] See Van Caenegem 1987; also Van Caenegem 2002: 44–5; Shapiro 1981: 147.

On the one hand, this concerns the influence of scholarship on legislation and the way it should be interpreted. It has been said that the Pandectists, i.e. the Roman lawyers of nineteenth-century Germany, essentially wrote the Civil Code of 1900.[48] Similarly, the reform of the German Civil Code from 2002 was based on reports produced by law professors.[49] With respect to statutory interpretation, legal scholars also take the lead. In Germany and in other civil law countries professors write multi-volume detailed annotated guides on the main codes. Monographs, textbooks and journals also deal extensively with the interpretation of statutory law. Often, then, what emerges is a predominant view ('herrschende Lehre' in Germany, 'la doctrine' in France) that is almost as important as the positive law.[50]

On the other hand, civil law scholarship impacts on courts. Prior to the codification of German law, judges asked law professors to advise on the law.[51] Today, the courts of civil law countries closely consider academic writings, even if this is not regarded as a source of law, and judges are not always allowed to cite them.[52] In return, law journals usually provide substantive sections on case reports. Since French judgments are written in a very condensed style, it is also essential that legal academics explain in short journal commentaries how these judgments relate to previous cases and scholarship.[53]

In the common law world, scholarship and practice are less intertwined than in civil law countries. Historically, it may matter that the forms of action of the common law have invited reasoning by analogy but not, as in the civil law, the desire to construct law as an abstract legal science.[54] Moreover, Geoffrey Samuel observes that, more recently:

> the narrow perspective of the legal profession and the judiciary in the common law world has stimulated a certain section of the academic community to turn away from the study of positive law. Such academics have, instead, seen themselves more as social scientists or philosophers taking as their object of study 'law'.[55]

Yet there is also some interaction between legal scholars and law-makers. In England (and Wales), the Law Commission, which prepares legislation, usually has some law professors as its commissioners.[56] Doctrinal legal research also takes great interest in case law and it has even been said that the quality of the common law depends on a strong relationship between legal scholars and judges.[57]

[48] Shapiro 1981: 147. [49] See Bundesminister der Justiz 1992.
[50] See Mattei et al. 2009: 442; Hermida 2004: 342. [51] See Vogenauer 2005.
[52] See Sacco 1991: 346 and Section 2 (e), below.
[53] See Steiner 2010: 191; Bell 2006a: 83. See also Section 2 (e), below.
[54] Samuel in EE 2012: 187.
[55] Ibid. See also Siems and MacSíthigh 2012 and Chapter 7 at Section C 2, below.
[56] See www.lawcom.gov.uk/about/who-we-are/. [57] Braun 2006: 666–70.

2 Courts and Civil Procedure

(a) Which Types of Courts Exist?

Civil law countries tend to have different courts for different areas of law. This dates back to Roman law which strictly distinguished between the matters of the state and those of the individuals.[58] Initially, courts were mainly concerned with matters of the individuals, i.e. private law, as well as with criminal law. Thus, in civil law countries, on the one hand, there are regular (or ordinary) courts on private and criminal law. On the other hand, there is often a variety of specialised courts. For instance, Germany has specialised courts for administrative law, labour law, social security law, tax law, plus a federal constitutional court. In France, the Conseil d'Etat is the highest court in public law, though with a more restricted constitutional function than its German counterpart.[59] Since French ordinary courts cannot decide on matters concerning the state, lower-instance administrative courts were established in 1987.[60] In addition, there are other specialised courts – for instance, for commercial and labour matters.

Traditionally, common law countries distinguished between courts for 'common law' (in a narrow sense) and 'equity', depending on the forms of action used.[61] Today, this distinction is largely obsolete since a competent court would not dismiss a claim on this basis. In the United States and some other common law countries, the two types of courts have also been merged.[62] In England and Wales, however, the High Court has different divisions, and the jurisdiction of the Queen's Bench (or King's Bench) and the Chancery Court can still be related to the actions of common law on the one hand and equity on the other.

Common law countries did not use to distinguish between courts for private and public law. For instance, in matters of civil liability, the state was, and often still is, just a normal party in courts of general jurisdiction. Yet, in the twentieth century, public and administrative law emerged as distinct fields of academic research.[63] In the United Kingdom there are now also specialised tribunals for administrative law, as well for other matters (e.g. employment disputes).[64] However, this has not led to a separate line of courts as in Germany and France, since tribunal decisions can be appealed to the courts of general jurisdiction. It has also been suggested that, in any case, legal counsel (solicitors, barristers, etc.) specialise in particular fields, thus providing a substitute for the more specialised courts of civil law countries.[65]

With respect to appeal courts, there is traditionally also said to be a civil/common law divide. In civil law countries, the possibility of appeal

[58] D.1.1.1.2 (Ulpian 1 institutionum).
[59] For constitutional courts and judicial review see also Chapter 9 at Section C 3, below.
[60] Mattei et al. 2009: 534–5. [61] See Section A, above.
[62] Van Rhee and Verkerk in EE 2012: 143, 151.
[63] See Allison 1996: 1, 19–23, 81–2 (stimulated by continental European contacts).
[64] See www.justice.gov.uk/about/hmcts/tribunals/. [65] Lundmark 2012: 212.

tends to be more extensive: the first level of appeal courts may not only re-examine the law but also the facts. Then, a second appeal to a higher court may be possible, whereby French law follows a 'cassation model' and German law a 'revision model'. The French model only allows the higher court to quash the decision of the lower court and refer it to a new assessment, whereas in the German model it is possible for the higher court to replace the lower court's decision.[66] In today's common law countries, there are also often multiple levels of courts. For example, in 1875 the Court of Appeal of England and Wales was created, allowing a further appeal to the UK Supreme Court (until 2009, the Judicial Committee of the House of Lords). Yet, in the common law tradition, appeals cannot be used to re-examine the facts, and it is often at the discretion of the courts whether to grant permission to appeal.[67]

The difference in the propensity to allow appeals is closely linked to other characteristics of civil and common law. Civil law countries tend to have career judges who work within a hierarchy (see Section (b), below), thus emphasising accountability and making it plausible for senior judges to re-examine the work of junior ones. In the common law, typical traditional features include the use of juries and the requirement of oral proceedings (see Sections (b) and (c), below), making it difficult for appeal courts to re-establish the facts.[68] Another typical feature of the common law is the binding effect of precedents (see Section (f), below), which fosters uniformity of law without the need to allow appeals in all but exceptional cases.[69]

(b) Who Exactly is 'the Court'?

Here, a first distinction can be made according to the number of judges on a particular court. Traditionally, civil law courts tend to decide by way of panels of judges, whereas individual judges are more prevalent in common law courts.[70] Yet, the precise structure of the court also depends on the type of the case. For instance, in both legal families it is likely that important appeal cases will be decided by a panel of judges, and routine cases at the courts of first instance by a single judge.

Secondly, the education and careers of judges are said to be fundamentally different in civil and common law countries. Mirjan Damaška relates this to the way state authority is administered: in the civil law, the organisation of authority follows a hierarchical (vertical) ideal, with professional judges and a 'legalist' application of the law (see also Section (e), below). The common law, by contrast, follows a coordinate (horizontal) ideal, with judges and juries as the protagonists of such a decentralised system.[71]

[66] Bobek 2009: 36; UNIDROIT 2003: 4–5.
[67] Bobek 2009: 36, 42; Chase and Varano 2012: 235.
[68] See Zekoll 2006: 1332; Samuel in EE 2012: 173. [69] See Bobek 2009: 42.
[70] Bell 2006a: 30.
[71] Damaška 1986. Similarly, Milhaupt and Pistor 2008: 183 (matrix according to centralised/decentralised and coordinative/protective legal systems).

To elaborate, in the civil law family, the concept of 'learned law' means that university education is essential in order to transmit 'the science of law'.[72] Of course, not everyone who studied law can become a judge. In France, prospective judges have to pass special exams and attend training at one of the judicial colleges. The German model is somewhat different since both university and practical legal education are largely uniform for all prospective lawyers, but only the best graduates have the option to become judges. It is a commonality of civil law countries that judges are appointed at a young age, leading to a lifetime civil-service career as judges.[73]

Traditionally, in the common law model, there has been no special training; rather, in the English tradition, experienced barristers are appointed as judges. Thus, it is said that such an appointment is seen as a 'badge of quality', producing persons who 'have strong personal independence' and 'the capacity to think and act as good lawyers'.[74] English and US judges are also frequently involved in non-judicial tasks – for instance, as wise men in expert commissions.[75] But there may also be further complications: notably in the United States, there is a great variety of forms of appointments, including the use of elections.[76]

In addition to professional judges, juries or lay judges play a role in both civil and common law countries, but it is usually said that they are more prevalent in the latter ones. In the common law tradition, juries used to be responsible for fact finding in both civil and criminal cases. Today, civil law juries have disappeared in most common law countries, with the notable exception of the United States where the jury is seen as a key element of American culture and democracy.[77] Still, the prior prevalence of the jury is regarded as important in all common law countries, because imagining a 'phantom jury' can aid understanding of the core features of the common law trial, such as the principle of orality and the trial as a single event (see Section (c), below).[78] In England and Wales, lay judges also play an important role in lower courts in matters of criminal and family law.[79]

In civil law countries the use of juries has varied, while being confined to criminal trials. Germany abolished the jury for criminal trials in 1924 and

[72] See Lawson 1977: 98. See also Section A, above.

[73] Dodson and Klebba 2011: 9; Guarnieri and Pederzoli 2001: 14. For exceptions see Garoupa and Ginsburg 2015: 53–7 (e.g. constitutional courts; specialised courts).

[74] Lawson 1977: 98 (first quote); Bell 2006a: 374 (second one), 35 (third one). See also Garoupa and Ginsburg 2015: 73–4 and Garoupa and Ginsburg 2011 (suggesting hybrid between career and recognition judiciaries as most efficient model).

[75] Garoupa and Ginsburg 2015: 86–96 (also on legal restrictions in civil law countries); Lee 2011: 540; Bell 2006a: 357; Holland in Kritzer 2002: 788–90.

[76] Dodson and Klebba 2011: 9; Garoupa and Ginsburg 2015: 100–1 and Garoupa and Ginsburg 2011: 414 (overview of diverse forms of appointment to US State Supreme Courts).

[77] See Section C 3, below. [78] Samuel in EE 2012: 173 ('jury fantome').

[79] Blank et al. 2004: 24; Glendon et al. 2016: 219–24. See also Nolan 2009: 47 (in United States low-level crimes dealt with by single-judge courts); Ehrmann 1976: 103 (in France Justices of Peace abolished in Fifth Republic).

replaced it with a system of community judges ('Schöffen'), whereas other civil law countries recently introduced juries for some criminal trials.[80] France still uses jurors for severe criminal offences at the Assize Court ('cour d'assises'). In civil law cases, both Germany and France have lay judges in specialised courts (e.g. labour and commercial courts). These are usually expert or representative judges – for instance, in labour courts, they are representatives of the social partners.[81] A difference from juries is that professional and lay judges are part of a mixed panel. This means that lay judges not only decide on matters of facts, but also on matters of law, while also not being insulated from judicial influence.[82]

(c) What is the Main Form of Civil Proceedings?

A common law trial is traditionally a single oral event at which all evidence is received. These concepts of concentration and orality are a consequence of the more frequent use of juries in common law countries (see Section (b), above). In civil law countries, by contrast, written proceedings tend to be more prevalent, written documents preferred to oral testimony, and the trial divided into multiple procedural steps.[83] This piecemeal method of trying cases still exists today; yet, there have also been some changes.

The nineteenth and twentieth centuries saw a tendency towards oral proceedings in civil law countries.[84] For example, today's German law encourages courts to have a single hearing.[85] But there is also a general global trend to speed up trials, and law-makers may even be urged to do so, since the right to a fair trial implies no undue delay in court proceedings.[86] Thus, in both civil and common law countries, out-of-court settlement and alternative forms of dispute resolution have been fostered, and fast-track proceedings for simple cases have been introduced.[87]

Still, the difference remains that, under the common law concept of the trial as a single event, there has to be more extensive pre-trial preparation than in continuous proceedings. Today, the clearest example are the pre-trial discovery rules of US law, where parties are under extensive obligations to disclose possible evidence to the other side. Yet, these rules were only introduced in 1938, and, in the English version of the common law, pre-trial discovery is less important.[88] In civil law countries, there are more limited forms of discovery – not necessarily restricted to the pre-trial stage – but there are also other

[80] Reamey 2010: 709–10 (in particular in Eastern Europe); Yeh and Chang 2014: 38 (for East Asian jurisdictions).
[81] Burgess et al. 2014; Bell 2006a: 89, 151, 351–2. [82] Reitz 2009: 858.
[83] See generally UNIDROIT 2003: 4–5; Mattei et al. 2009: 778, 787.
[84] Van Rhee and Verkerk in EE 2012: 151; Cappelletti and Garth 1987: para. 3.
[85] German Code of Civil Procedure (ZPO), s. 272.
[86] E.g. European Convention on Human Rights, art. 6(1); International Covenant on Civil and Political Rights 1966, art. 14(1).
[87] Van Rhee and Verkerk in EE 2012: 148, 151–1; Chase and Varano 2012: 223.
[88] See Maxeiner et al. 2010: 147; Zekoll 2006: 1330.

mechanisms, such as shifts in the burden of proof or rules of substantive law (e.g. strict liability), to address imbalances of information.[89]

(d) What are the Roles of Judge, Parties and Lawyers in Civil Trials?

Starting with the role of the judge, it is traditionally said that the civil law judge is more managerial than the neutral judge of the common law, who is more like 'a neighbour helping the feuding parties in their troubles'.[90] For example, in Germany the judge has a duty to give hints and feedback to the parties.[91] In civil law countries it is also for the judge 'to know the law' ('iura novit curia', 'da mihi factum, dabo tibi ius'), whereas in common law countries the parties need to present the legal arguments in their favour.[92]

A possible explanation for this difference is that civil and common law procedures focus on different categories of cases: the civil law, but not the common law, is mainly aimed at cases that involve small amounts of money, where parties need more guidance from the judge.[93] Alternatively, it can be suggested that the difference relates to different conceptions of government. In the civil law, the law-maker desires that judges implement its policies; thus, court proceedings should not be left only to the parties. Conversely, the common law has the character of a more reactive system, since the trial has the main aim of providing justice in the individual case (see also Section (e), below).[94]

In England, the 1999 Rules of Civil Procedure have given judges more powers in order to speed up trials. Thus, its position is said to have shifted from that of a 'neutral umpire' to that of a 'focused interrogator'.[95] But there are still differences between common and civil law judges. With respect to the United States, it has been said that both the system of elected judges, and the high number of cases, mean that judges would have neither the skills nor the time to engage in active case management.[96] There is also some resistance to any move away from the model of the relatively passive judge, since this is seen as most consistent with a high level of judicial independence (see Section (b), above).

Turning to the role of the parties, the common law trial follows an adversarial system in which parties (and their lawyers) are actively involved, performing some tasks which, in the civil law model, are performed by the

[89] Mattei et al. 2009: 763; Maxeiner et al. 2010: 177–8. See also Chase and Varano 2012: 224–5 (on recent extensions of procedural duties of disclosure in France and Germany).

[90] Adams 1995; Van Rhee and Verkerk in EE 2012: 143 (also noting that under the Romano-canonical procedure judges were more passive); Ehrmann 1976: 91 (for the quote).

[91] Mattei et al. 2009: 749, 752 (in France possible but not required).

[92] See Mattei et al. 2009: 747.

[93] Kötz 2003: 76–7; also Kötz 2010: 1252 (for contract law).

[94] Zekoll 2006: 1332–3.

[95] Bell 2006a: 307. For similar trends in other common law countries see Chase and Varano 2012: 222.

[96] See Kravets 2010, but also Seidman 2016: 24 (more activism in complex litigation).

court.[97] With respect to the civil law countries, it is today accepted that it would not be appropriate to downplay the role of the parties and call civil trials 'inquisitorial'. Parties play an important role: they initiate the trial and determine its subject-matter, they present evidence and they have the rights crucial for a fair trial.[98] Sometimes, trials are also very adversarial in practice. However, in comparison, it is believed that civil law trials are less confrontational and more likely to promote compromise than common law ones.[99] James Maxeiner and colleagues illustrate the mutual competitive nature and the remaining differences with the analogy that US civil proceedings 'are likened to football matches and American judges to passive football referees' and German ones 'to athletics contests, such as high jump, where referees direct contestants in their competition'.[100]

More specific differences between the roles of judge and parties can be seen in the law of evidence. In the common law model, parties are said to be in charge of the interrogation of witnesses, the designation of expert witnesses, the presentation of documents, etc.[101] Yet, due to the (previous) prevalence of juries (see Section (c), above), there are also a number of restrictions, such as bans on hearsay evidence and suggestive questions, in particular in the United States and to a lesser extent in England.[102] In civil law countries, the parties can submit evidence, but it is mainly the judge who is responsible for fact-finding and establishing the truth.[103] Thus, the judge takes a greater role than in common law countries: for instance, it is for the judge to interrogate witnesses and to designate expert witnesses, with party involvement differing between countries.[104] Due to the absence of juries in civil trials, most types of evidence are permissible, and it is at the court's discretion to evaluate its credibility.[105]

Finally, there are differences in the role lawyers play in relation to their clients, the court and the state. A preliminary consideration is whether countries have a unitary or a divided profession. The latter is today often associated with England: here, only barristers can represent clients in higher courts, whereas solicitors deal with all other matters. Yet, this division is not specific to the common law, because its origins can be traced to the advocates and procurators in Roman law.[106] Most of today's civil law countries have,

[97] Van Rhee and Verkerk in EE 2012: 141.
[98] Seidman 2016: 21–5; Van Rhee and Verkerk in EE 2012: 146, 151; Zekoll 2006: 1330; Cappelletti and Garth 1987: paras. 28, 43; Maxeiner et al. 2010: 143.
[99] Bell 2006a: 134. [100] Maxeiner et al. 2010: 190.
[101] See Dodson and Klebba 2011: 10; Mattei et al. 2009: 798. But see Andrews 2010: 105 (since 1998 single joint expert or court-appointed expert possible under English law).
[102] Mattei et al. 2009: 758; Zweigert and Kötz 1998: 274–5; Glendon et al. 2016: 277.
[103] Damaška 2010: 17.
[104] UNIDROIT 2003: 4–5; Dodson and Klebba 2011: 10; Mattei et al. 2009: 781, 798; Kern 2007: 28 (for cross-examination in Germany and France).
[105] Mattei et al. 2009: 758; Zweigert and Kötz 1998: 274–5.
[106] Clark 2012: 370–4; Clark 2002: para. 27.

however, merged the two professions,[107] and the same has happened in some common law countries, such as the United States.

A broad civil/common law divide can be found with respect to the 'gatekeepers' of the legal profession.[108] In civil law countries the state tends to play a larger role: it may use a system of state exams (as in Germany and Japan), and/or it may require a degree from a (typically state-funded) university in order to become a lawyer. In the common law tradition, it may not be technically necessary to have a law degree, though today that would usually be the case. The actual qualification as a lawyer is usually in the hands of the legal profession itself, with only some state oversight.

These differences are reflected in the relationship between lawyer and client. In common law countries, it is usually accepted that the lawyer's clear focus is on the client's interest. A good example are the rules on costs and fees in the United States: each party pays its own costs (called the 'American rule'), but client and lawyer can agree that the latter is only entitled to remuneration if he or she wins the case ('no-win no-fee' or contingency fee arrangement). Yet, this cost and fee structure is not a general feature of all common law countries: in England, the losing party has to pay the costs of the trial (called the 'English rule'), and the permissibility of contingency fees is fairly diverse across the world.[109] As far as there is a split of the legal profession, barristers have a stronger duty to the judicial system than solicitors.[110]

Lawyers in civil law countries are also required to act in the best interest of their clients, but, being a 'free profession', in addition there is a strong emphasis on public responsibility.[111] In German law, it is explicitly said that lawyers are 'independent agents of the administration of justice'.[112] There are also frequent restrictions in codes of conduct enacted by the legal professions. For instance, continental European lawyers may face stricter standards for personal advertising and publicity than common law lawyers.[113]

(e) How are Judgments Written?

Where judges decide in panels (see Section (a), above), the question arises as to whether the court speaks with one voice, or whether there can be individual concurring or dissenting opinions. In general, civil law courts use the first option, occasionally making an exception for constitutional courts, whereas common law courts use the second.[114] This is in line with institutional and methodological differences, since the common law judge tends to have a more independent individual position within the court organisation, and the civil

[107] Clark 2002: paras. 30–1; Chase and Varano 2012: 218. [108] Anderson and Ryan 2010.
[109] Hodges et al. 2010: 132–3; Reimann 2014: 44–5. For further discussion see Sections C 2 and 3, below.
[110] Compare, e.g. Code of Conduct of the Bar of England and Wales 2004, ss. 302, 303 with the Solicitors Regulation Authority Code of Conduct 2011.
[111] See Shapiro 1990: 697. [112] Federal Lawyer's Act (BRAO), s. 1 (own translation).
[113] See Garoupa 2004 (contrasting Europe and the United States).
[114] See Zekoll 2006: 1332; Mattei et al. 2009: 556–60.

law judge tends to aim for an objective and impersonal finding of the law (see Section (b), above).

Differences in the style of judgments can also be related to the differences in legal reasoning. Common law judgments give a detailed account of the facts, and the reasoning is inductive, discursive and pragmatic.[115] Thus, its attractiveness may be that the judgment can inform us 'what is really going through a judge's mind when he [or she] is trying a case'.[116] Because of the role of precedents (see Section (f), below), common law judgments may also provide a detailed treatment of previous cases. Traditionally, no references are made to academic writings, but this is slowly changing in English courts.[117] With respect to the United States, the decisions of the Supreme Court can be seen as a special case, since its clerks often provide judges with detailed references not only to previous cases, but also to the academic literature.[118]

The style of judgments in civil law countries reflects their more deductive mode of reasoning, as well as the prevalence of a specialised career judiciary. It has been described as more formalistic, austere and abstract than in common law countries.[119] Policy arguments may be concealed through such reasoning.[120] There is also less emphasis given to facts, indicating a concept of justice which is more concerned with general principles than with the specifics of each individual case.[121] With respect to further details, a distinction needs to be made between German and French judgments, with some other civil law countries using a mixture between these models.[122]

The most distinctive feature of German judgments is their academic style.[123] The reasoning of simple cases in lower courts is somehow akin to common law judgments, though the summary of the facts tends to be more condensed. This is different in legally more complicated cases. German courts often use a strictly logical approach, employing various levels of analysis with many headings and sub-headings (I, II, III, 1, 2, 3, a, b, c, aa, bb, cc, etc.). The language is fairly technical, making frequent references to the positive law, often by way of chains of articles or sections ('Paragraphenkette').[124] Moreover, there are frequent citations of previous decisions, though usually without a detailed discussion of the precise facts and findings of those precedents, a practice described as an 'uncritical use of headnotes'.[125] Academic writings are also frequently referred to. The latter may surprise lawyers from other legal traditions, but, when asked about it, German judges

[115] See Vogenauer 2006: 894; Mattila 2013: 110. [116] Markesinis 1994: 610.
[117] See Markesinis 1994: 621–2. [118] See Peppers 2006; Petherbridge and Schwartz 2012.
[119] Hermida 2004: 342; Vogenauer 2006: 894; Komarek 2011: 26.
[120] Markesinis 1994: 613. See also Section 1 (b), above.
[121] Komarek 2011: 26; Curran 2001a: 87.
[122] See Forster 1995: 153–7 (for a general comparative overview); Monateri 2003 (for Italy).
[123] See also Mattila 2013: 111; Monateri 2003: 584 ('theoretical activism').
[124] Also noted by Markesinis 1994: 620.
[125] Zweigert and Kötz 1998: 264. See also Lundmark 2012: 363 (on empirical study of the frequency of citations in 1980s).

even respond that they 'genuinely consult these writings' and pay attention to the views of academics.[126]

French judgments, by contrast, contain no references to the academic literature. Traditionally, there have also been no references to previous cases. And, in total, the judgment may just be a few lines, hardly ever more than one page. The justification for such an approach is that the shortness of a judgment provides clarity,[127] similar to the French codes which are also deliberately drafted in a short but clear style. Others have called this way of writing judgments 'cryptic' and, since the late 1970s, the Paris Court of Appeals has provided more extensive explanations.[128] Still, the style of the Cour de Cassation, the highest court in matters of civil and criminal law, has largely remained unchanged.

This French style has puzzled US comparative lawyers. Michael Wells took the starting point that US lawyers expect 'reason and candor' in judicial decisions in order to guarantee fairness and legitimacy. Yet, French opinions written in 'an uninformative syllogism of a few hundred words' show that this correlation may not be as important as Americans think.[129] Mitchell Lasser's analysis was interested in the discourse not reported in the formalistic French judgments. He observed that policy-oriented discourse takes place in France as well, but that it is separated from the judgments ('bifurcation'). Evidence of this discourse can be found in the reports of the reporting judge and the opinions of the advocate-general, published in some cases. Thus, in Lasser's view, the differences between the United States and France are about judicial mentalities, not the existence of substantive deliberation.[130]

(f) What Effects Do Judgments Have?

In both civil and common law countries, judgments are binding between the parties of the trial ('res judicata'). Thus, subject to appeals, there shall be no second trial on the same issue between the same parties ('inter partes'). Details differ between countries,[131] but the more interesting distinction is that some legal systems allow 'class actions', which have effect for everyone within the class who does not opt out. A predecessor of class actions, 'group litigations', had existed in medieval England but they were gradually abolished throughout the nineteenth century.[132] In the United States, however, the idea survived and it regained importance in modern times, since, today, single incidents can often harm many people (e.g. industrial accidents, investment frauds).[133] In civil law countries, other means, such as the involvement of public authorities or consumer organisations, have typically been used to tackle such problems.[134] Recently, in some civil law countries, limited forms

[126] Markesinis 1994: 609. [127] See Monateri 2003: 584.
[128] See Steiner 2010: 171, 182; Lasser 2009a: 4; Mattila 2013: 111. [129] Wells 1994.
[130] Lasser 2009a. See also Lasser 1998. [131] See, e.g. Chase and Varano 2012: 227–9.
[132] For details see Yeazell 1987. [133] See generally Zekoll 2006: 1358.
[134] See Hodges 2010; Chase and Varano 2012: 230–1.

of class actions have been introduced; yet, it is not clear to what extent they can really work in countries without US style law firms and contingency fees.[135]

With respect to the more general effect of judgments, it is a typical feature of common law countries that judgments not only decide individual cases but are precedents for future ones ('stare decisis').[136] This has the benefit of ensuring consistency and predictability, in the absence of comprehensive codifications. At the same time, the reasoning from case to case can ensure that the law is adaptable to changing circumstances.[137] The way this process works is that judges have to distinguish between factual differences, while also distinguishing between the ruling of a case (the 'ratio decidendi') and further elaborations (the 'obiter dicta') of judgments. Thus, despite binding precedents, it may be argued that this process of reasoning gives judges considerable freedom, and in the United States in particular it is frequently said that the importance of *stare decisis* should not be over-emphasised.[138]

In civil law countries, the traditional starting point is that previous court decisions are not binding and that case law is not a source of law.[139] In the French tradition, the main reason for this is that, following a strict view about the separation of powers, the Napoleonic Codes had precisely the aim of preventing judges from making law.[140] In Germany, the strong tradition of legal scholarship may also play a role in promoting national uniformity, without binding precedents.[141] Yet, this is not the full picture. In some civil law countries, there are special laws that make decisions of supreme courts binding.[142] Moreover, it is argued that the persuasive authority that decisions of higher courts have in practice can be regarded as akin to precedents.[143]

This is not to say that the effect of precedents is identical in civil and common law countries. A study on precedents, coordinated by Neil MacCormick and Robert Summers, illustrates this point. This research was based on country reports, drafted according to precise guidelines in order to facilitate comparisons.[144] Though overall the study finds some convergence, MacCormick and Summers conclude that common and civil law countries still tend to differ. Common law courts discuss precedents in detail in order to identify the *ratio decidendi*, and to give careful consideration of the facts. Conversely, in civil law countries court rulings tend to be reduced to the

[135] Milhaupt 2009: 843 (for South Korea); Mullenix 2010: 59 (mere formal convergence). For the global trend to introduce class actions see also Seidman 2016: 28–9; Hensler 2016 and the underlying project at http://globalclassactions.stanford.edu/.

[136] Samuel in EE 2012: 175; Dodson and Klebba 2011: 13. But for its history see Hondius 2007.

[137] For this dual purpose see Fernandez and Ponzetto 2012.

[138] See Hondius 2007.

[139] For the debate in France see Steiner 2010: 85–6; Dawson 1968: 422. For changes in the importance of precedence in civil law countries see Marchenko 2010: 223–5.

[140] See Section 1 (a), above, and Hondius 2007: 16.

[141] See Mattei 1997a: 24.

[142] For Germany see Federal Constitutional Court Act (BVerfGG), s. 31(1).

[143] Maxeiner et al. 2010: 38; Bell 2006a: 69; Komarek 2011.

[144] See MacCormick and Summers 1997: 13–14.

principles of law, with the facts of this decision having no further role to play in future cases.[145] Another important difference is that civil law courts often look for a series or group of decisions before they conclude that this line of reasoning should be followed.[146]

(g) Conclusion

The civil and common law divide is not always clear-cut. Yet, overall, this section has shown that courts operate differently in civil and common law countries. Moreover, the individual points of variation are not somehow arbitrary, but they often complement each other. As the frequent references between the different sub-sections have illustrated, topics such as the structure of courts, the prevalence of career judges, the use of juries, the form of civil proceedings, the role of judges in trials, the methods that judges use and the style and the effect of their judgments are all closely interrelated. Thus, it may be said that, here at least, civil law on the one hand, and common law on the other, seem to be relatively coherent 'bundles' that cannot be mixed.

Such a view can also point towards reasons why civil procedure is relatively resistant to change: for example, it is a field of law where litigants and lawyers greatly value predictability; it is difficult to foresee the impact of any change as it would affect any possible dispute; and there is less public pressure to change rules than in more politically charged areas of substantive law.[147] However, later in this chapter, it will also be shown that the common/civil law division is questionable even in this area of law.

3 Comparative Contract Law

(a) Introduction

Contract law is regarded as a popular topic for comparative lawyers, since legal systems tend to share the initial division of this area of law into questions such as contract formation, non-performance and remedies, while also being different enough to make a comparison interesting.[148] A prominent feature of the books on comparative contract law is the division between common and civil law countries, with the main focus on English, French and German law.[149]

[145] MacCormick and Summers 1997: 536–8. See also Curran 2006: 702; Curran 2001b: 74–5; Legrand 2003: 289–90 (against case-book approach to German law since it denies the experience of the Germanness in German law).

[146] MacCormick and Summers 1997: 538. See also Mattei et al. 2009: 619; Steiner 2010: 98.

[147] Picker 2016: 46–50.

[148] Farnsworth 2006: 901.

[149] See, e.g. Beale et al. 2010 (focus on England, France and Germany); Kadner Graziano 2009 (focus on England, United States, France, Germany, Italy, Switzerland); Levasseur 2008 (focus on England, United States, France, Germany, Louisiana, Québec); Klimas 2006 (focus on England, United States, France, Germany, Lithuania, Louisiana, Québec); Marsh 1994 (focus on England, France, Germany). See also Gordley and von Mehren 2006: 413–551 and Zweigert and Kötz 1998: 323–536 (both focus on England, United States, France, Germany).

In part, this distinction is a reflection of different sources of law.[150] In common law countries, the starting point of contract law is typically case law, with statute law playing an increasingly important, though conceptually secondary role. An analysis of contract law in civil law countries typically starts with the civil codes, while not denying the role of case law and special statutes (e.g. on matters of consumer protection). In addition, the role of scholarship is seen as playing an important role in civil law countries: for instance, it has been said that scholars are to French contract law what judges are to the English one.[151]

However, there are also said to be differences in the substance of legal rules and concepts. The following illustrates those differences by way of three main topics of contract law. It will also show that here we can sometimes confirm the position of traditional comparative law that different legal rules lead to functionally equivalent results.

(b) Contract Formation

Most contracts are concluded by way of offer and acceptance, and this is indeed a starting point in both civil and common law countries. Yet, at a conceptual level, in common law countries contracts are defined in an objective way, since they require an exchange of promises, whereas in civil law countries more emphasis is put on the subjective element of a meeting of minds.[152] A similar divide exists in the interpretation of contracts: in the interest of legal certainty, common law countries use an objective starting point, whereas in civil law countries preference is given to the intention of the parties.[153] Neither of these approaches is pure, however; so it may well be argued that the eventual results are often similar.[154]

A further prominent difference is the doctrine of consideration, which has developed in common but not civil law countries. This means that a valid contract requires that the parties agree to exchange something of value.[155] It is not necessary that the consideration is fair or adequate, but, if there is no consideration, in particular in the case of gifts, there can be no contract. Gifts are, of course, recognised in common law countries, but to make a binding promise it has to be put in a deed. By contrast, civil law countries have no problem treating gifts as contracts but, then, the civil codes often impose formalities, such as a notarial deed, to make such a contract binding. Thus, we can say that the results are functionally similar. In a possible discussion

[150] See, e.g. Smits 2014:18–32; Beale 2013: 323–5. [151] Valcke 2009b: 81.

[152] Beale 2013: 320; Hermida 2004: 350–1; Legrand 1999: 3–4; Gordley and von Mehren 2006: 63 (for the background of the 'will theory'); but see also Van Hoecke 2004: 178–9 (for the shifting positions throughout history).

[153] See, e.g. Smits 2014: 123–5; Herbots in EE 2012: 425–31.

[154] Barnes 2008; Van Hoecke 2004: 181, 189; Siems 2004a.

[155] See Gordley in EE 2012: 216–22; Gordley and von Mehren 2006: 421 (for the controversial historical background).

between an English and a French lawyer about gifts, Rodolfo Sacco illustrates this as follows:

> [T]he two lawyers will claim that the difference between the two systems lies in the following: that the formal gift is valid in England because it is not a contract and therefore does not come under the law of consideration, while the formal gift is valid in France because it is a contract and therefore must be binding; that furthermore informal donation is not valid in either country and that delivery of a movable operates the transfer of ownership with the purpose of making a gift … [Thus] they will claim that the operating rules are analogous in the countries just quoted; and that however the phenomena are explained by techniques, concepts, dogmatic apparatus completely opposite in the various countries.[156]

(c) Good Faith and Precontractual Duties

Another dividing factor is that in civil law but not in common law countries, there is said to be a general principle of good faith in contract law. This principle has various dimensions. In terms of concluded contracts, good faith may be used to ensure fairness, though civil law countries also recognise the principle of good morals to strike down unfair contractual provisions. Moreover, even before a contract is concluded, parties have to act in a way that takes the interests of the other side into account. In German law, there is an explicit provision in the Civil Code stating that a precontractual relationship is a legal relationship under the law of obligations, with the result that the principle of good faith is applicable.[157] Precontractual liability is also possible in other civil law countries, where it may also be based on a general principle of fairness (as in the Netherlands) or tort law (as in France).[158]

In common law countries, good faith in contract law is a controversial topic. Although in 1766 Lord Mansfield referred to good faith as the governing principle applicable to all contracts and dealings,[159] and although the term good faith is sometimes used in specific cases,[160] traditionally, English law has not endorsed it as a general principle.[161] It has been said to be too uncertain, or even unworkable in practice, and inconsistent with values of a market economy since it gives undefined and unfettered discretion to judges to decide cases with subjective notions of morality and fairness. Good faith in precontractual negotiation is also regarded as being irreconcilable with the freedom of contract, and the adversarial position of the parties to negotiate the

[156] Sacco 2001: 186–7. See also Sacco 1991: 350–8; Smits 2014: 72–3.
[157] German Civil Code (BGB), s. 311(2). See also Siems 2002.
[158] For details see Cartwright and Hesselink 2009.
[159] *Carter* v. *Boehm* (1766) 3 Burr. 1905 at 1909 (97 ER 1162 at 1164).
[160] Details in Piers 2011.
[161] For the following: *Walford* v. *Miles* [1992] 2 AC 128 at 138 per Lord Ackner; Thomson 1999; Goode 1998: 19–20.

most favourable bargain and to look after their own interests, without the need to act in an altruistic manner.

Yet, some legal tools of common law countries are similar to good faith.[162] A traditional technique is to use the concept of 'implied terms' to reach a result that is fair and just. More recently, some common law courts, though not the English ones, take it that there can be an equitable relief against procedural or substantive unconscionable bargains.[163] Legislation has also provided special rules on consumer protection, and some modern laws of common law countries actually do use the term 'good faith' in contract law.[164] How far this concept has properly 'arrived' in the common law is, however, a matter of debate. Gunther Teubner called its transplantation to the common law a 'legal irritant', since such an abstract and open-ended principle is seen as 'a unique expression of continental legal culture'.[165] This is confirmed by research showing that, in the judicial practice of English and US courts, good faith is only 'a weak interpretative tool'.[166] Specifically, there is no inclination to use good faith in order to establish duties in precontractual negotiations.[167]

Returning to the situation in civil law countries, it would, however, also be misleading to over-emphasise the role of good faith. In Germany, for instance, the freedom of contract, the adversarial position of the parties and the belief in a market economy are the main principles of contract law, and only under exceptional circumstances does the principle of good faith require that other policy reasons prevail. Good faith is also not about morality, nor does it give unfettered discretion to judges. German courts do not use good faith to allow the legal consequences of contract or statute in a single case to be superseded by a supposedly more equitable solution; rather, they employ it to develop categories and rules which can then be applied in a reliable way to individual cases.[168]

Thus, the extent to which there are differences in the results between legal systems depends on the specific circumstances. One of studies of the Common Core project investigated how European legal systems solved thirty cases dealing with good faith. It was found that eleven cases led to the same result, in nine there was general but imperfect harmony, and, in ten, significant disharmony of results, with English law often, but not always, pursuing a path separate from the legal systems of the continent.[169]

[162] See Piers 2011: 152–62; Samuel 2014: 66–70; Valcke 2009b: 77.
[163] For Australia, New Zealand, Canada and the United States see, e.g. Chen-Wishart 1989; Kiefel 2000: 693–5.
[164] See Mason 2000. For the United States see also Uniform Commercial Code (UCC), s. 1–201.
[165] Teubner 1998: 19. For legal transplants as 'irritants' see also Chapter 8 at Section C 1, below.
[166] Pistor 2005: 259–61.
[167] See McKendrick 1999.
[168] Similarly, Kötz 2010: 1245 ('number of distinct rules').
[169] Zimmermann and Whittaker 2000. For the Common Core project see Chapter 2 at Section B 3, above.

(d) Contractual Remedies

In the field of contractual remedies one also finds frequent references to differences between civil and common law countries. The following provides three examples.[170]

First, a fundamental question is whether the main remedy is specific performance or damages. In civil law countries, the starting point is that each party can force the other to perform the contractual obligation; thus, 'one does not buy a right to damages, one buys a horse'.[171] In particular, this is the case when performance can be ensured by the handing over of an existing good, whereas rules of civil procedure may exclude enforcement to perform in nature in other cases, such as individual services.[172] The line of reasoning in common law countries is precisely the opposite. According to Oliver Wendell Holmes, 'the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else'.[173] Thus, one is generally free to refuse performance, provided that one then becomes liable to compensate the other party. This is supported by economic arguments since it allows an 'efficient breach of contract'.[174] But there are also exceptions to this rule: for instance, in US law, 'specific performance may be decreed where the goods are unique or in other proper circumstances'.[175] Thus, it is possible, but not necessary, that, in practice, civil and common law countries reach the same result.

Secondly, and similarly, there is a different starting point for the question of whether a claim for damages requires any fault on the part of the other side. Fault is typically required in civil law countries, in particular in Germany, though there is often a shift of the burden of proof.[176] Other civil law countries, in particular France, more frequently distinguish between different types of contract, and exclude damages only in the case of *force majeure*.[177] In the common law, the starting point is strict liability. For example, in an English case involving the liability of a laundry, it was stated:

> The laundry company undertakes, not to exercise due care in laundering the customer's goods, but to launder them, and if it fails to launder them it is no use saying 'I did my best. I exercised due care and took reasonable precautions, and I am very sorry if as a result the linen is not properly laundered'.[178]

However, this is not the entire picture because there are many cases where the principle of strict liability does not apply.[179] It can also be said that, in both civil

[170] For further topics see, e.g. Rowan 2012; Torsello in EE 2012: 754–76; Treitel 1988.
[171] Jones 1983: 452.
[172] See Lando and Rose 2003 (for Denmark, France and Germany). In France, Ordonnance no. 2016–131 of 10 February 2016 added further restrictions.
[173] Holmes 1897: 462. [174] See, e.g. Shavell 2006; Siems 2003: 51–3.
[175] Uniform Commercial Code, s. 2–716. Similarly, the case law in England: *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd* [1998] AC 1.
[176] German Civil Code (BGB), s. 280(1). [177] See Zweigert and Kötz 1998: 499–502.
[178] *Alderslade* v. *Hendon Laundry* [1945] 1 All ER 244 at 246 (CA) per Lord Greene MR.
[179] See Zweigert and Kötz 1998: 503–5.

and common law countries, often intermediate solutions prevail, such as adjusting the burden of proof, requiring fault but on the basis of an objective standard of care, distinguishing between different types of contracts or between different scenarios on the basis of implied warranties and conditions for breach.[180]

Thirdly, civil and common law countries tend to differ in their treatment of penalty clauses. In principle, civil law countries allow penalty clauses. Courts have, however, some means of control. For instance, in German law a penalty that is 'disproportionately high' may be reduced to a reasonable amount, and in French law the penalty can be reduced or increased if it is 'manifestly excessive or derisory'.[181] Common law countries distinguish between penalty and agreed damages clauses because agreeing on a penalty would be against the doctrine of consideration. A clause which requires a party that has broken the contract to pay a sum which is extravagant in relation to the likely loss is invalid as a penalty; but a clause which represents a genuine pre-estimate of the likely loss is a valid liquidated damages clause.[182] Although this prohibition of penalties has become less restrictive,[183] insertion of a penalty clause into a contract is still a risky enterprise.

(e) Conclusion

The differences outlined in this section can be seen as interconnected. For instance, in favouring an objective approach to contract interpretation while rejecting the principle of good faith and reducing the scope of specific performance, the common law approach of contract law has been associated with a preference for economic efficiency and predictability of the results of a case. By contrast, the contract law of civil law countries, for instance, its acceptance of specific performance, its subjective interpretation and the principle of good faith, has been related to legal thinking in subjective rights preceding remedies, Kantian principles of personal freedom of will and personal responsibility and an emphasis on justice in the specific case.[184]

These differences between common and civil law may be regarded as remarkable since Western societies are fairly similar.[185] But it is also possible to relate these legal differences to socio-economic ones. For instance, it has been said that 'the English law of contract was designed for a nation of shopkeepers', while 'the French system was made for a race of peasants'.[186] Or to put it in a more elaborate way:

[180] Grundmann 2009; Smits 2017: 29.
[181] German Civil Code (BGB), s. 343(1); French Code Civil, art. 1152.
[182] *Dunlop Pneumatic Tyre Co. Ltd* v. *New Garage & Motor Co. Ltd* [1915] AC 79.
[183] *Philips Hong Kong* v. *Attorney-General of Hong Kong* (1993) 61 Build. LR 41 (Privy Council).
[184] Banakas 2008: 546; Dedek 2010: 99, 112; Rowan 2012: 240; Moss 2007: 1.
[185] Bell 1995: 23.
[186] Kahn-Freund et al. 1979: 318. See also Kötz 2010: 1251 ('Of course, "shopkeepers" might have to be replaced these days by "hard-nosed business executives" and "peasants" by "consumers"').

> [D]ifferences may be explained by the fact that English courts hear more cases involving shipping, international trade and financial services than courts on the continent. The atmosphere is naturally more bracing, so that if a choice has to be made between the justice in the individual case and the security of the transaction, the latter is the favoured option.[187]

A contentious aspect of this statement is that law is seen as simply following social and economic circumstances. This has been a frequent topic of socio-legal approaches to comparative law, to be discussed later in this book.[188]

C Critical Analysis

The previous section has aimed to provide a fair picture of the common/civil law divide, neither over-emphasising the differences between these two legal families, nor downplaying the variety within them. At the same time, these caveats have already indicated that calling a country 'civil law' or 'common law' may only have a limited explanatory value. The following provides further reasons to be sceptical.

1 Diversity in Continental Europe

The legal systems of continental Europe cannot be regarded as uniform modern versions of Roman law. Modern civil law countries may have rules which are precisely the opposite of Roman law – for instance, in allowing specific performance.[189] Moreover, there is considerable diversity between civil law countries. One can start with saying that there were different 'common laws' in Europe (*droit commun* in France, *gemeine Recht* in Germany, *derecho commún* in Spain, etc.), which did not disappear with the reception of Roman law.[190] In addition, the received commonalities became weaker with the emergence of nation-states, since national codifications gradually modified the Justinian version of Roman law.[191]

Thus, for instance, it has been said that, in the substantive law, '[t]he differences between French and German law may be as great, or even greater, than those between French and English, or German and English law'.[192] As to the operation of courts, it has also been found that there is 'no single pattern', due to the way the diverse structures of the judiciary, the government, the legal community and wider society are interrelated.[193] Accordingly, there are also differences in judicial style, where one may identify not a clear divide, but a spectrum of open to closed legal reasoning, starting with England, then Germany, then the Netherlands, and finally France.[194]

[187] Zweigert and Kötz 1998: 510. [188] See Chapter 6, below.
[189] See Dedek 2010: 111; Mattei et al. 2009: 880; Zimmermann 1996: 591.
[190] Glenn 2005; Glenn 2013: 112–25.
[191] See Section A above and Chapter 8 at Section B 1, below. [192] Zimmermann 2001: 113.
[193] Bell 2006a: 2. [194] Jagtenberg and de Roo 2009: 304–5. See also Section B 2 (e), above.

Consequently, most classifications distinguish at least between a Romanist and a Germanic model of continental civil law.[195] A common way of differentiation is whether the main codes of a country are akin to the French or the German models. As already mentioned, the French codes were drafted in an abstract fashion while also aiming to be understandable for the common public; by contrast, the German codes tend to have a more conceptual and professorial style.[196] More types may also be observed: for example, the Swiss Civil Code from 1912 is frequently seen as an example of a popular and modern approach to legislative drafting.[197] Moreover, some taxonomies have a separate category for the Nordic countries, since they differ from other continental legal systems in not having adopted comprehensive codes. Naturally, things become even more complex when one considers non-European countries, as Chapter 4 will explain.

As a further reason for within-differences in the civil law family, William Van Caenegem suggests that:

> the common law world has traditionally been more integrated and homogenous than the civilian world. Language is an obvious reason for that; whereas it is an immediate problem for any civil lawyer interested in another civilian jurisdiction, the red carpet of the English language is run out for any common lawyer seeking to access another common law country's sources.[198]

These language differences can certainly account for the lack of cohesion of civil law countries. However, some common law countries have dropped English as the official legal language,[199] and divergences can also be observed for two countries that share English as the same language.

2 Differences Between England and the United States

Just as England and the United States may be 'two nations separated by a common language', their two legal systems are also said to be 'separated by a common law'.[200] Two versions of this divergence are suggested. On the one hand, some point towards the mixed nature of US law because it has rejected many common law principles and has adopting those from the civil law.[201] On the other hand, there is the position of American exceptionalism. Most prominent is Robert Kagan's view that the 'American way of law' follows a strict version of 'adversarial legalism', which is different from all other legal systems: not only those of civil law countries, but also England.[202] A similar result may follow from the fact that, due to EU law, English law has become less

[195] See Chapter 4 at Section B, below. [196] See Section A, above. [197] Gerkens 2010: 126.
[198] Van Caenegem 2014: 158. [199] See Chapter 7 at Section C 1, below.
[200] Curran 1998a: 55 (referring to the Oscar Wilde quote, 'We have really everything in common with America nowadays except, of course, language', *The Canterville Ghost*, 1887).
[201] Glenn 2014: 265. [202] Kagan 2001; Kagan 2007.

English,[203] whereas the United States has retained many elements of the original English common law.

In detail, it is possible to identify a number of significant differences between the substantive law of England and the United States. The constitutional structure of both countries is very different: the United States has a written constitution and is a federal country. US law has also put a stronger emphasis on human rights as a result of the struggle for independence and the influence of the French Revolution.[204] This may also explain why US tort law tends to be more protective than the tort law of other common law countries.[205] In addition, Kagan mentions further differences: in the United States, criminal sanctions are more severe, social insurance is less important, while the tax rate is lower than in other developed countries.[206]

There are also differences in terms of courts, civil procedure and legal thought. In some of these areas, the United States can be regarded as more 'civilian' than England. The Code of Civil Procedure, drafted by David Dudley Field, and the Uniform Commercial Code, a result of work by Karl Llewellyn, are said to have been partially influenced by the civil law.[207] In terms of sources of law, extensive legislation – possibly similar to civil law countries – is today regarded as a typical feature of US law.[208] And, with respect to the doctrine of precedent, it is said that US judges usually have more flexibility than their English counterparts.[209]

Yet, more often the emphasis is on US exceptionalism – or, if put from a European perspective, on the idea that 'the English judiciary appears to be more like the Continental system(s) than it is like the American'.[210] Most of these differences are related to the fact that, in US civil procedure, the jury still plays an important role, in contrast to England and other common law countries. It follows that US law uses more extensive pre-trial discovery, since a jury trial needs to be a single event. The trial itself follows a strong adversarial tradition controlled by the parties and their lawyers (e.g. when it comes to questioning witnesses). Today, this is not only different from continental European courts, but also English ones, where judges can manage cases more actively than in the past.[211]

[203] Cooke 2004: 273. When (or if) the United Kingdom leaves the EU, this may change again.
[204] See Mattei et al. 2009: 67.
[205] Garoupa et al. 2017: 39–42; Garoupa and Gómez Ligüerre 2012: 326–32; Reimann 2003: 837–8 (for product liability).
[206] Kagan 2001; Kagan 2007. For the harshness of US criminal law see also Chapter 5 at Section C 2 (a) and Chapter 6 at Section C 2, below.
[207] Van Rhee and Verkerk in EE 2012: 142; Whitman 1987.
[208] Glenn 2014: 263. Though civil law legislation may be more principled, see Section B 1 (a), above.
[209] Atiyah and Summers 1991: 113–34; Posner 1996: 90. See also Section B 2 (f), above.
[210] Posner 1996: 36. Similarly, Kern 2007: 90; Andrews 2010: 98. For the following see Parker 2009; Garoupa et al. 2017: 43–5; Garoupa and Gómez Ligüerre 2012: 335–40; Vorrasi 2004; UNIDROIT 2003: 5.
[211] See Section B 2 (d), above.

In the US judicial process, it is crucial for parties to be able to afford the best lawyers since, in contrast to other countries, legal aid for civil cases is usually not available.[212] Such a 'privatised model' is also apparent from the way fees and costs are allocated.[213] Since in the United States even the winning party has to pay its own costs, the involvement in trials can be very expensive. The possibility of contingency fees can reduce this risk; such arrangements, however, also confirm the strongly competitive nature of the US judicial process. In addition, the possibility of class actions has the effect that winning a case may not only be about getting justice, but also about making a profit. What emerges, therefore, is that the US approach encourages 'litigant activism', whereas the loser-pays rule and the lack of contingent fees and class actions in England reduce the incentive to file 'novel suits'.[214]

Turning to judges, it is also possible to present a strong contrast between the United States and England (as well as other European countries). In the United States, it is regarded as essential that the selection of judges is democratically legitimised, say, by way of election or political appointment. Thus, political, social and moral values often play a crucial role. In England, by contrast, the focus is on professional qualifications. It has also been argued that the English system has moved to a model of a career judiciary: one starts as a barrister, then becomes a 'recorder' and eventually a judge.[215] All of this also has the consequence that the English judiciary is more homogenous and less political than its US counterpart.

Furthermore, the political function of US judges can be seen in their role 'as guardians of the constitution'. Most importantly, they can review legislation. Thus, judges are central players in a politically fragmented system, despite controversy over the limits to judicial activism. In the English tradition, judicial review of legislation is not possible, since judges should respect the primacy of Parliament.[216] The more cautious approach of English judges can also be observed more generally. English judges tend to reason formally by, for instance, relying on previous case law and interpreting statutory law in a narrow fashion. By contrast, American judges are said to be less reluctant to engage openly with policy arguments and to decide on ethically, politically or scientifically sensitive topics.[217]

A similar division can be seen in legal thought more generally. It has been noted that, in the nineteenth century, German ideas about teaching law at universities were influential in the United States.[218] Yet, the twentieth century has seen significant changes in US legal thinking, with the main trends and

[212] Maxeiner et al. 2010: 48; Cappelletti and Garth 1987: para. 63. For access to justice see also Chapter 6 at Section B 3 (c), below.
[213] Mattei and Nader 2008: 146. See also Section B 2 (d), above.
[214] These terms are from Kagan 2001: 9 and Posner 1996: 34, 90.
[215] Posner 1996: 30 (classifying barristers as akin to junior judges); Bell 2006a: 298.
[216] For further discussion on judicial review see Chapter 9 at Section C 3, below.
[217] Atiyah and Summers 1991; MacCormick and Summers 1991. [218] Mattei et al. 2009: 67.

schools being legal realism, law and society, law and economics, and empirical legal studies. Thus, Susan Bartie contends that, today:

> the main point of distinction is that in America there is a growing band of scholars who proclaim that the discipline can abandon its link with the profession and should boldly shape its interdisciplinary studies to meet broader conceptions of the law.[219]

Here, too, the United States is therefore the exception because legal thinking in England as well as in continental Europe tends to be more focused on the positive law, be it through the analysis of case law or codified law.[220] This is not to deny that there have also been some developments in Europe. It has, for instance, been said of the United Kingdom that today's legal scholarship is more varied and lively than fifty years ago.[221] Still, comparing three of the major law journals of England, Germany and the United States, Reinhard Zimmermann rightly observes that 'the briefest comparative glance at the *Law Quarterly Review* reveals that in approach, outlook and focus it is much closer to the *Juristenzeitung* than to the *Harvard Law Review*'.[222]

The claim that a particular country is 'exceptional' is a problem for comparative studies as it implies that this unit is 'peerless, beyond compare'.[223] It is not the position of this book that US law should be seen as 'exceptional' in this sense. However, we can conclude from this section that there are significant differences between the legal systems of the United States on the one hand, and those of England and other European countries on the other. According to Kagan, these legal differences are so deeply entrenched in political structures and legal cultures that no changes can be expected.[224] Even if this goes too far, it can be seen that the various factors distinguishing US from English law are closely connected. Thus, we are not talking about some minor variation, which can be found between all members of the same legal family; rather, it can be misleading even to start with the assumption that English and US law are fundamentally similar.

3 Western Law Instead of Civil versus Common Law?

The emphasis on the common/civil law divide can disguise the commonalities shared by Western legal systems. Relevant general factors[225] include concepts and ideas such as nation-states, capitalism, liberal values, individualism, and

[219] Bartie 2010: 367. See also Edwards 1992.
[220] Wagner-von-Papp 2014: 141–2; Posner 1996: 21.
[221] Twining 1997: 338–9. See also Siems and MacSíthigh 2012: 670–1.
[222] Zimmermann 1996: 584.
[223] Stam and Shohat 2009: 476.
[224] Kagan 2007. But for convergence see Chapter 9 at Section A, below.
[225] For the following see, e.g. Glenn 2010; Mousourakis 2006: 66–7; Zimmermann 2001: 111; Husa 2004: 26–7; Goldman 2008: 16; Van Hoecke and Warrington 1998: 502–3; Ziegert 2004: 149; Van Caenegem 2014: 150; Kinoshita 2001: 32; Gambaro and Sacco 2008: 51 ('occidental law'). See also Wieacker 1990 (for a common European legal culture).

a joined intellectual, cultural and scientific heritage from Greek and Roman philosophy, Christianity and the Enlightenment. Factors more specific to law include individual human rights, the rule of law, a positive and rational law, a specialised legal profession with judges and lawyers, and the separation between law and religion. It may therefore be justified to speak of a comprehensive Western legal tradition, being different from the laws of religious and tribal communities and dysfunctional states.

More specifically, it is too simplistic to say that the civil law, but not the common law, is based on Roman law. On the one hand, no contemporary legal system is entirely based on Roman law. According to Reinhard Zimmermann, 'it is not easy to think of a legal rule derived, directly or indirectly from Roman law and expressed exactly the same way in all European codes'.[226] Even core civil law countries such as France and Germany are not only a product of Roman law but also of their own local traditions.[227] On the other hand, considerable evidence of Roman law can be found in common law countries. For instance, in Patrick Glenn's description of English law, there are repeated references to Roman law such as the relevance of canon law, the Roman origins of trust law, and the influence of Pothier and the French codes in England.[228] Another point to mention is the use of legal Latin and legal French in England.[229]

There has also been extensive research on the convergence between civil and common law countries.[230] This discussion about convergence goes beyond legal families, by, for instance, showing how international, transnational and regional laws, as well as other influencing factors, have changed domestic legal systems.[231] But, more specifically, convergence has been identified in the areas that are seen as determinant for the civil/common law divide: civil procedure, legal methods and sources of law.[232] Thus, it is worth revisiting some of those topics as they relate to the roles of legislation, courts and legal academics, in both legal families.

With respect to legislation, the distinction of countries with or without codes has lost its relevance. In civil law countries, the main codes are no longer seen to be the most significant sources of law, and common law countries are said to have reached the 'age of statutes'.[233] The legislative style in civil and common law is also more mixed than it is traditionally assumed. In some areas of law, such as tax law or land law, precise and detailed rules are used in both legal families. Other pieces of legislation are drafted in a more principled

[226] Zimmermann 2001: 114. [227] See Section 1, above, and Chapter 4 at Section C 3 (a), below.
[228] Glenn 2014: 238, 268–69, 271. See also Markesinis 2000: 38–42. [229] Mattila 2013: 314–18.
[230] See, e.g. Van Hoecke and Warrington 1998: 499–501; Worthington 2011: 349; Markesinis 2000 and the following notes.
[231] See Chapter 9 and Chapter 10, below.
[232] See Section B 1, above. For convergence in civil procedure see Chase and Walker 2010; Dodson and Klebba 2011. For sources of law see Zweigert and Kötz 1998: 201; Zimmermann 2001: 177–85; also Reimann 2002: 677.
[233] Worthington 2011: 359. For a critical view of the 'age of statutes' see Calabresi 1985.

fashion, not only in the civil law, but also the common law, as frequent words such as 'reasonableness', 'equitable' and 'unfair' show.[234] It is also possible to identify some convergence in the expectations for a good drafting style, for example, to provide 'clarity, simplicity, precision, accuracy and plain language' in legislation.[235]

In terms of legal methods, it can be argued that the difference between reasoning with statutes and reasoning with cases is similar as both use textual, historical, functional and analogical forms of argumentation.[236] More specifically, the proposition of a clear civil/common law divide in statutory interpretation has been challenged. In the last few decades, English courts have moved away from a narrow interpretation, for instance, in allowing analogies of statutory provisions.[237] A comprehensive study on statutory interpretation in France, Germany and England has also shown that, despite different starting points, all three legal systems use a similar mix of formal and value-oriented arguments.[238]

Turning to courts, the main criticism is that the common/civil law divide mischaracterises the way the judiciary works in today's civil law countries. According to Martin Shapiro, it is 'fundamentally incorrect' to assume that the civil-law judge simply applies a set of complete and self-explanatory rules in a mechanical way.[239] Similarly, according to Basil Markesinis and Jörg Fedtke, it is not accurate to describe the judicial function of civil-law judges as 'narrow, mechanical, and uncreative';[240] rather, here too they are the 'oracles of law'.[241] Particular reference can be made to the importance of general clauses in civil law countries, such as the principle of good faith: here, akin to common-law case law, courts develop the law incrementally.[242] This point can also be reversed; referring to the common law, Hein Kötz asks:

> Would the balance of power between Parliament and the judges be altered if the German rule were introduced in England by way of statute? I do not believe so. In both countries judges operate under fairly broad principles, and in both countries the practitioner must eventually look at the precedents in order to find out what a court is likely to say in a difficult case.[243]

Topics of law enforcement are also mentioned as examples of growing similarity, indicating even a convergence between US law and other legal systems. For example, today, the traditional divide in the costs of civil litigation is often different in practice: in the United States, various fee shifting rules mean that here too the loser may often need to compensate the winner, while in the United Kingdom and in civil law countries, judges have some means to protect

[234] For further examples see Kötz 1987: 4–5. [235] Xanthaki 2014: 208. See also Xanthaki 2012.
[236] Lundmark and Waller 2016 (comparing Germany, California and England and Wales).
[237] Kötz 1987: 10–11. See also Voermans 2011. [238] Vogenauer 2001.
[239] Shapiro 1981: 126–56. [240] Merryman and Pérez-Perdomo 2007: 38.
[241] Markesinis and Fedtke 2009: 182–3. This refers to Dawson 1968.
[242] See Zimmermann 2001: 176 and Section B 3 (c), above. [243] Kötz 1987: 6–7.

the losing party who initiated a trial in good faith.[244] In the choice between private and public enforcement in fields such as competition and securities law, there are also signs of convergence: starting from a preference for public enforcement, European countries have enacted reforms to facilitate private enforcement, while in the United States there are growing restrictions on the ease of private enforcement.[245]

As to the role of legal scholars, a strict common/civil law divide fails to consider that legal thought has long extended across the borders. Duncan Kennedy identifies three globalisations of legal thought: classical legal thought (1850–1914), based on the German concept of 'legal science'; the social (1900–68), mainly driven by French scholarship on the limits of positivism; and policy analysis, neo-formalism and adjudication from US legal scholarship (since 1945).[246] Of course, this does not deny differences. Yet, overall, it is plausible to conclude that, today, legislators, courts and scholars play a joint role in both civil and common law countries, not least because all three groups depend on each other.[247]

Finally, the distinction between civil and common law can mislead in pointing towards presumed differences in substantive law. For instance, it has been said that both legal families 'divide private law into large legal fields, such as property, tort and contracts, among others, and analyse these fields in a similar way', and that 'there is probably as much diversity among the responses of civil law systems to various legal issues as there is between civil law and common law countries'.[248] These are fairly general statements, but many more specific examples can also be provided – for example, that 'civil and common law do not differ fundamentally in the types of trust-like arrangements that they permit',[249] that in commercial contract law they can even 'be considered as one legal tradition',[250] and that the common/civil law divide does not play a role in relatively new legal fields, such as Internet law.[251]

D Conclusion

The concluding sections on civil procedure and contract law in civil and common law identified some interconnected similarities between the rules of

[244] Mattei and Pes 2008: 268; Seidman 2016: 27; Reimann 2014: 9, 52–3 (and 26–7 on convergence of lawyer fees). For the 'American' and 'English' cost rules see Section B 2 (d), above.
[245] Rathod and Veheesan 2016. See also Jackson and Roe 2009 (for securities law).
[246] Kennedy 2003a. See also Chapter 8 at Section B 1 (a), below.
[247] For the interdependency see Shapiro and Stone Sweet 2002: 174–5.
[248] Hermida 2004: 343; Glendon et al. 2016: 54.
[249] Mattei 1997a: 175. See also Zimmermann 2001: 167 ('it can hardly be maintained that a wall of incomprehension separated English trust from the law of the Continent. Rather the trust appears to be the specifically English variation of a common European theme').
[250] Hermida 2004. For further examples see Constantinesco 1983: 131–2.
[251] Marchenko 2010: 228.

countries of the same legal family.[252] Yet, the more general conclusion has to be a more sceptical one. It has been said that 'comparison all too often proceeds through misleading or exaggerated dichotomies and binaries'.[253] The foregoing discussion has shown that this is also a recurrent problem for the distinction between civil and common law countries. This is not to deny that legal systems differ in various ways. But often perceptions are misleading:

> Key differences between the two systems can, initially, appear greater than they actually are – partly because of the dissimilar frameworks within which the systems operate, and partly because of linguistic and cultural factors which may exaggerate unfamiliar aspects of the common law.[254]

Thus, criticising the civil/common law divide is not meant to imply that there are no differences, but, rather, that it is unhelpful to regard this divide as the main tool to understand them: for example, it would be too risky to start with the presumption that, say, just because a particular legal rule of contract law says something for France that is probably also how it is for Germany but not England. There is also the problem that a fixation on the civil/common law divide is bound to shift the focus in a particular direction, thus preventing researchers from exploring other, and potentially more interesting, questions about the legal systems under investigation.[255]

The present chapter focused on Western countries, in particular France and Germany as civil law countries, and England and the United States as common law ones. If one considers other parts of the world, the limitations of the civil and common law families become even more striking. To be sure, here, other categories also play a role. Accordingly, the next chapter provides a more general discussion about the benefits, limitations and pitfalls of classifying the world into distinct legal families.

Supplementary Information

Questions for discussion. How profound are the differences between common and civil law countries? Why are civil procedure and contract law popular areas of research about differences and similarities between common and civil law countries? Does the possibility of functional similarities challenge the common/civil law divide? Is there greater cohesion within the countries of the civil law or the common law family? Why is the United States seen as a difficult country for the common/civil law divide?

[252] See Sections B 2 (g) and 3 (e), above. For a similar assessment see Bell 1995: 28 (on the coherency of legal traditions).

[253] Freeden and Vincent 2013: 10.

[254] Fordham 2013: 3.

[255] Similarly, Langer 2014: 906–12 (for the focus of comparative criminal procedure on the adversarial/inquisitorial divide); Gaudreault-DesBiens 2017 (for the disregard of informal laws).

Suggestions for further reading. For civil law and common law in general: Lundmark 2012. For civil procedure: Seidman 2016 (and other contributions in the same work). For contract law and conceptual differences: Dedek 2010. For US exceptionalism: Kagan 2001. For European commonalities: Zimmermann 1996.

4

Mapping the World's Legal Systems

The division between civil and common law countries discussed in Chapter 3 is a major building block for mapping the world's legal systems. In addition, a number of further categories have been suggested. Section A of this chapter discusses why scholars attempt to classify the world's legal systems at all. Section B provides examples of how precisely this has been done in the twentieth and early twenty-first centuries. The critical analysis of Section C challenges the usefulness of these classifications for comparative law, and Section D concludes. It is a characteristic feature of the discussion about these taxonomies that it occurs at a relatively high level of generality; however, in the course of this chapter, it will also be discussed whether classifications may differ across areas of law, for example, referring to criminal, constitutional, administrative and commercial law.

A Setting the Scene

1 Background of Classifications

Classifications are common in many academic disciplines. In the natural sciences, the most prominent example is the Linnaean taxonomy of animals, plants and minerals, originally developed in 1735 by Carl Linnaeus. This taxonomy is also said to have inspired 'the comparative lawyer as a zoologist' to classify legal systems.[1] Yet, in substance, the various taxonomies of the social sciences are closer to comparative law, since some of those categories mirror the legal families explained in the next section.

For example, in linguistics, one can distinguish between language families, such as Indo-European, Afro-Asiatic and Sino-Tibetan, each having various offspring.[2] Classifications of religions may start with the main categories of Abrahamic, Indian and East Asian religions, or list them by the number of adherents to, say, Christianity, Islam, Hinduism, etc.[3] With respect to

[1] Mattei et al. 2009: 258; also Glenn 2006: 423; Constantinesco 1971: 257; Varga 2007: 97.

[2] See, e.g. McGregor 2015: 391–9, as well as www.ethnologue.com/browse/families and http://wals.info/languoid.

[3] See www.adherents.com/Religions_By_Adherents.html.

cultures, various classifications are possible. A prominent example is by Samuel Huntington, who identified eight civilisations: Western, Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox, Latin American and African.[4]

There are also frequent classifications of political and economic systems. With respect to politics, an initial distinction can be drawn between presidential and parliamentary republics, and constitutional and absolute monarchies, and there are also more sophisticated classifications of the electoral systems of the world.[5] Until the end of the Cold War, it was also common to distinguish between 'three worlds' of capitalist, communist and non-aligned countries;[6] today, one suggestion is that countries can be classified into eight worlds, considering economic policies as well as wealth.[7] An alternative distinction is based on political power: here Immanuel Wallerstein's historical research is influential, suggesting that the 'world system' is composed of countries of the core, the semi-periphery and the periphery.[8] This produces a result which is akin to the frequent distinction of the development literature between developed countries, transition economies (emerging economies, newly industrialised countries) and developing countries (less developed countries).[9]

Since taxonomies seem to be feasible in these fields, it may simply be the case that 'so too the comparatist can classify laws by reducing them to a limited number of families'.[10] Such a 'just do it' approach may also draw a parallel to more pedestrian activities: in the words of Jacques Vanderlinden, 'classifying legal systems is similar to reorganising the books in our library, or the knives in our kitchen'.[11]

2 Purposes for Legal Classification

In addition, more substantive reasons can be suggested as to why comparative lawyers attempt to map the legal systems of the world. First, the main rationale mentioned in the literature is that classifications facilitate the description and understanding of foreign laws. A researcher who analyses legal systems that are known to share common features can focus on the remaining differences.[12] Similarly, there is a benefit when learning about foreign laws:

[4] Huntington 1993; Huntington 1996. See also Chapter 12 at Section C 1, below.
[5] IDEA 2005. See also Chapter 12 at Section B, below.
[6] A study that related these categories to other differences was Sawyer 1967–68.
[7] Economides and Wilson 2001: 115 (United States/EU/Japan; other OECD countries; newly industrialised economies; semi-industrialised countries; newer newly industrialised economies; former Soviet Union countries; remaining communist countries; sub-Saharan Africa).
[8] E.g. Wallerstein 1979. See also Economides and Wilson 2001: 56–7.
[9] For a good overview see Nielsen 2011.
[10] David 1985: 18. See also Husa 2011b: 112 ('paralleling the comparative study of law with scientific disciplines').
[11] Vanderlinden 2002: 162. [12] Hertel 2009: 128. Similarly, Twining 2000a: 152, 178.

> If one has for instance become acquainted with English law, the need arises for knowledge of legal rules in New Zealand, one can avoid having to study New Zealand law from the beginning; since the New Zealand legal system is based upon English law, it is sufficient to concentrate on the relatively few significant differences between the two legal systems.[13]

A necessary caveat is that classifications only provide an initial picture, often used for pedagogical and didactic purposes.[14] Legal families are bound to be 'a loose conglomeration of data', 'a rough and ready device' or a 'first roughly sketched map'.[15] Thus, as one goes deeper into a comparative analysis, complications and qualifications of the national legal systems mean that one has to go beyond the initial taxonomy.[16]

Methodologically, this is not at all unusual. For example, such an approach can be related to Karl Popper's view that scientific knowledge grows by way of 'conjectures and refutations'.[17] Since legal family classifications can never be a perfect fit to the real world, they can be seen as, more or less refined, conjectures. It is then the task of the comparative researcher to critically scrutinise these conjectures in order to gain a fuller picture of the legal world.

The second reason for mapping legal systems is that being part of the same legal family does not 'just' mean that legal systems have a set of legal rules in common: it can also be a 'matter of self-identity', or even an attempt at 'insulation' from foreign influence.[18] For example, for lawyers from Hong Kong, being part of the common law may help them to maintain a difference from mainland China, as English lawyers may like to use the common law to show that they are different from continental European countries. A similar relationship may also be observed in the civil (or mixed) character of the laws of Quebec and Scotland within Canada and the United Kingdom, respectively.[19]

Thirdly, legal families can help predict the success of a legal transplant (a topic to be discussed in detail in a subsequent chapter of this book). If two legal systems are based on similar conceptual understandings of the law, the transfer of a rule or institution between these countries is more likely to be successful than across legal families.[20]

[13] Bogdan 2013: 24.
[14] Bogdan 2013: 73; Husa 2004: 19; David 1985: 21; Mousourakis 2006: 59.
[15] Glenn 2014: 16; Zweigert and Kötz 1998: 72; Husa 2011b: 116; also Husa 2015: 224 ('crudely sketched roadmap'); Husa 2016 ('preliminary and general hypotheses about the foreign legal system under study').
[16] Mattei et al. 2009: 260; Zweigert and Kötz 1998: 72. See also Husa 2016 (legal families as a means of discourse).
[17] Popper 1963. See also Glenn 2014: 1–3 (referring to Popper's 'rational theory of tradition'); Schafer 1999: 117 (drawing a parallel to Kuhn's paradigms).
[18] Mattei et al. 2009: 263; Monateri 2012: 9.
[19] For England see Monateri 2012: 9. For mixed legal systems see Section C 3 (a), below.
[20] Mattei 1997b: 5; Esquirol 2001: 223; Berkowitz et al. 2003a: 167; Berkowitz et al. 2003b: 163; also Lalenis et al. 2002 (for policy transfers). See also Chapter 8 at Section A 3 (c), below.

Fourthly, classifications may be used to show how legal similarities and differences are related to non-legal ones. For example, in economic geography, a distinction is made between spatial, institutional, cultural, organisational and relational proximity.[21] Geographers are primarily interested in the spatial aspect, and lawyers in the institutional one. But if one combines those taxonomies, it may be possible to say whether legal traditions are conditioned by spatial or other non-legal circumstances.

B Classifying Countries

1 Bases for Classification

Jaakko Husa explains that the various taxonomies of legal families are based on:

> history, ideology, legal style, legal argumentation and thinking, codification level of law, judicial reasoning, structural system of law, structure of court system, spirit and mentality of legal actors, training of lawyers, law's relation to religion and to politics, the economical basis of law, the background philosophy of legal thinking, the doctrine of sources of law, the empirical effectiveness of formal legal rules, the role of tradition in law, paradigmatic societal beliefs about law, etc.[22]

Thus, these criteria range from more technical ones, for example about the level of codification, to more general ones such as a country's history and ideology.[23] Given this diversity, they do not always lead to clear-cut classifications. In other words, to classify countries means making a decision about some common aspects that matter, while disregarding others.[24]

Methodologically, two approaches may be distinguished. On the one hand, it can be said that, historically, legal systems have evolved into distinct 'real types' of legal families; notably, this is the case for the way the division of common and civil law countries is usually presented.[25] On the other hand, some comparative lawyers refer to 'ideal types' of legal families, for instance, indicating possible sources of law in order to classify countries;[26] similar to architectural styles, it is then also possible that legal constructs may be more or less true to their original style.[27]

However, these starting points are less different than they appear. The historical reasoning according to 'real types' does not mean that legal

[21] Coe et al. 2013: 393–4.

[22] Husa in EE 2012: 492–3. See also Vanderlinden 1995: 328 (identifying fourteen criteria used in the comparative law literature).

[23] See Husa 2015: 254–71.

[24] Peters and Schwenke 2000: 826.

[25] See Chapter 3 at Section A, above.

[26] Vanderlinden 1995: 338–55 (customary, doctrinal, jurisprudential, legislative and religious legal systems). Similarly, Vanderlinden 2002: 169, 178; Constantinesco 1971: 266–7; 1983: 270–431; also referring to 'ideal types' are Bavinck and Woodman 2009: 208; Luts 2010: 38.

[27] For this analogy see Langer 2014: 893.

classifications are permanent. It is clear that 'legal systems never are, they always become'.[28] Thus, classifications are bound to be subject to change, not dissimilar to classifications of economic and political systems.[29] With respect to the ideal types, it is evident that their criteria are chosen in a way as to reflect differences between the actual legal systems of the world. Moreover, as the proponents of this view use criteria that are 'permanent' or 'determinant', not merely 'incidental or fungible',[30] here, too, historical contingencies play an important role. The following examples also show that classifications sometimes mix ideal and real elements: for instance, they may start with the ideal-type category of religious legal systems, but then add the real-type groups of Muslim law and Hindu law.

2 Review of Main Classifications

Table 4.1 displays how comparative lawyers have tried to map the legal families of the world.[31] It can be seen that most classifications have led to relatively similar results, but there are also some interesting variations.

The first two examples, both from the first decades of the twentieth century, employed classifiers that would not be approved by today's comparatists, while the actual categories are not entirely different from modern ones. Georges Sauser-Hall based his taxonomy on racial characteristics. He distinguished between the law of the Aryan or Indo-European people (for European countries, India and America), the law of the Semitic people (for the Middle East), the law of the Mongolic people (including China and Japan), and the law of barbarous people (mainly Africa). John Henry Wigmore, by contrast, tried to illustrate different legal traditions by way of an impressionistic and pictorial method to comparative law. The legal families are more specific than Sauser-Hall's ones, while they also point to broader categories: Romanesque and Germanic (as civil law), Anglican (as common law), Islam, Hebrew and Hindu (as religious legal systems), plus the specific cases of Slavic, Japanese and Chinese law.[32] In addition, Wigmore included historical legal systems, such as Egyptian, Mesopotamian and Celtic law.[33]

[28] Mattei 1997b: 14; Mattei and di Robilant 2001: 1075. Similarly, Garoupa and Pargendler 2014: 49 (taxonomies as temporally grounded).

[29] See Section A 1, above. See also Constantinesco 1983: 477, 521; Husa 2004: 31 (distinguishing legal families as 'strengthening/established' and 'weakening/unestablished'); Legeais 2016: 114–20 (distinguishing between legal systems with and without a long tradition of the rule of law).

[30] Luts 2010: 32; Constantinesco 1983: 241. See also Mattei 1997b: 15; Husa 2015: 244.

[31] For good overviews see also Husa 2016; Husa in EE 2012: 493–8; Pargendler 2012b; Varga 2010; Constantinesco 1983: 88–157.

[32] Similar was already Esmein 1905 (Roman, Germanic, Anglo-Saxon, Slavic and Islamic law; based on history, geography, religion and race).

[33] Wigmore 1928. See also Wigmore 1929 (presenting the existing legal systems in a map) and Chapter 2 at Sections A 2 (c) and B 2 (b), above (for Wigmore's approach to comparative law).

Table 4.1 Overview of legal family classifications across time

	France, Italy, Spain, Belgium; Latin America	Germany, Austria, Switzerland, Greece	Nordic countries, or mixed legal systems (RSA etc.)	England, United States, Canada, Australia, Singapore, Hong Kong	Russia; Eastern European and Central Asian countries, Cuba	North Africa, Middle East, Pakistan, Malaysia, Indonesia	Israel	India	Japan, China, Mongolia, (South) Korea, Thailand, Vietnam		Sub-Saharan Africa
Sauser-Hall 1913	law of the Arian (Indo-European) people					Semitic		Indo-European	Mongolic		barbarous people
Wigmore 1928	Romanesque	Germanic		Anglican	Slavic	Islam	Hebrew	Hindu	Japanese	Chinese	(seven historical legal systems)
Arminjon et al. 1951	French	German	Scandinavian	English	Russian	Islamic		Hindu			
Schnitzer 1961	Roman	German		Anglo-American	Slavic	religious laws (Islamic, Jewish, Christian)		Afro-Asiatic laws			
Derrett 1968	Roman			English		Islamic	Jewish	Hindu	Chinese		African
David 1950	Western				Soviet	Muslim		Hindu	Chinese		
David 1982/85	Romano-Germanic			common law	socialist	other forms of social order (Muslim, Indian, Far East, Africa)					
Zweigert and Kötz 1996/98	Romanistic	Germanic	Nordic	common law		Islamic		Hindu	Japanese	Chinese	
Mattei 1997b	political law	professional law			political law	traditional law					political law
	law of development	Civil law	mixed systems	common law	law of transition	Islamic		Hindu	Far Eastern		law of development
La Porta et al. 1998	French legal origin	German legal origin	Nordic legal origin	English legal origin	socialist legal origin	French legal origin	English legal origin		German legal origin		English or French legal origin
Saidov 2003	Romano-Germanic		mixed systems	common law	socialist	religious and traditional laws			Roman Germanic	religious and traditional laws	
de Cruz 2007	civil law		hybrid legal systems	common law	socialist system	other types of law		common law	Eastern legal conceptions		
Glenn 2014	civil law			common law	civil law	Islamic	Talmudic	Hindu	Confucian		Chthonic

After the Second World War, the interest in comparative law increased, and most general books were structured according to legal families. Pierre Arminjon, Boris Nolde and Martin Wolff based their taxonomy on a combination of legal history, sources of law, technique, terms, concepts and culture, focusing on topics of private law.[34] This led to groups of French, German, Scandinavian, English, Russian, Islamic and Hindu legal families. Adolf Schnitzer followed an even stronger historical approach.[35] Thus, his treatment starts with the 'law of the primitive people' and the 'law of ancient culture', but then also turns to the familiar groups of Roman, German, Slavic and Anglo-American law. The subsequent category on religious law deals with Jewish, Christian and Islamic law. In addition, there is a broad category of Afro-Asian law with short sections on various legal systems. The book edited by Duncan Derrett also follows a historical perspective with chapters on Roman, Jewish, Islamic, Hindu, Chinese, African and English legal systems. The choice of these legal systems is justified by saying that these are ones which have a long history but which, in a modified version, still exist today.[36]

The main comparative law books of the second part of the twentieth century were the ones by René David, and Konrad Zweigert and Hein Kötz. The treatment of legal families in David's books has changed throughout the various editions. Initially, economic, political, philosophical and religious similarities were seen as the main criteria. This led to a major distinction between Western and Soviet law,[37] supplemented by chapters on Islamic, Hindu and Chinese legal systems. The more recent editions provide more emphasis on legal technique. This is not meant to refer to particular legal rules, but to the 'constant and more fundamental elements' that may determine whether 'someone educated in the study and practice of one law will then be capable, without much difficulty, of handling another'.[38] As a result, the distinction between Romano-Germanic civil law and English common law became more prominent, with further chapters on socialist law and other legal systems.[39] After the fall of communism, a new edition of David's book replaced socialist with Russian law.[40]

From the outset, the book by Zweigert and then Zweigert and Kötz focused on the divide between common law and (Romanist, Germanic and Nordic) civil law.[41] Smaller sections have dealt with Chinese, Japanese, Islamic and Hindu law and, before the fall of communism, with the socialist legal family. These legal families are mainly based on different legal styles in private law,

[34] Arminjon et al. 1951. [35] Schnitzer 1961. [36] Derrett 1968: xiii–xiv.

[37] The same distinction was made by comparative lawyers of the socialist countries: e.g. Eörsi 1979: 45 (distinction between legal families based on socio-economic system as a whole); Oksamytnyi 2010: 47 (distinction between socialist and bourgeois legal systems).

[38] David 1985: 20–1.

[39] Similarly, Ehrmann 1976: 13–19 (families of Romano-Germanic, common law, socialist, non-Western laws).

[40] The most recent French edition is David et al. 2016. [41] The first edition was Zweigert 1969.

and, specifically, on the legal systems' history, their characteristic modes of thought, distinctive institutions, variations between sources of law, and the ideologies of the law.[42]

With the books by David, and Zweigert and Kötz, a consensus seemed to emerge. Yet, since the mid-1990s, two new classifications have been suggested. The one by Ugo Mattei offers a distinctly different ideal-type starting point, his main categories being 'rule of professional law', 'rule of political law' and 'rule of traditional law'.[43] In Europe and North America, for example, the legal arena is said to be distinct from the political and religious one; these countries therefore belong to the rule of professional law, with the sub-categories civil law, common law and mixed legal systems. The rule of political law refers to countries where the legal system is weak due to the power of the ruling elite. Mattei includes in this group the transition economies and developing countries of Eastern Europe, central Asia, Latin America and Africa – while also noting elements of professional and traditional law. Finally, the rule of traditional law includes the Islamic legal systems as well as India, China and Japan, while acknowledging elements of professional and political law in the latter countries.

The opposite approach to Mattei's is the classification adopted by Rafael La Porta and colleagues. These authors are financial economists who use the categories of 'legal origins' as variables in quantitative studies.[44] They take the view that all legal systems of the world can be captured by common law (English legal origin), civil law (German, French and Nordic legal origin) and socialist law.[45] To classify countries, the main consideration is whether, according to a book on foreign law,[46] the main codes of these legal systems are based on a particular model. This sounds like a crude approach, but it may be justified by the fact that the imposition of codes is a proxy for colonial or quasi-colonial influence. In this sense, it has also been said that 'if you want to understand why a country has a particular legal system, look at the nationality of the last soldier who departed its shores'.[47]

Retaining the category of socialist law for Russia and her neighbouring countries is also less unusual than it may appear. Akmal Saidov and Peter de Cruz have also kept the category of socialist law, with similar categories as most other taxonomies (civil law, common law, mixed, religious/other legal systems).[48] Furthermore, these books classify some non-Western countries

[42] Zweigert and Kötz 1998: 67–8.

[43] Mattei 1997b; also in Mattei and Monateri 1997. Similarly, Oksamytnyi 2010: 51–7 (Western, Eastern and ideological legal systems).

[44] Summarised in La Porta et al. 2008. See also Chapter 7 at Section D 1 and Chapter 12 at Section B 3, below

[45] Note that La Porta et al. 1998 only examined forty-nine Western countries. The category of 'socialist law' was used in later studies, e.g. Djankov et al. 2003a.

[46] Reynolds and Flores 1989. See also www.foreignlawguide.com.

[47] Yoram Shachar, as cited in Feeley 1997: 94.

[48] Saidov 2003; de Cruz 2007. Similarly, also Husa 2015: 211–28.

as being part of common or civil law: Saidov allocates Japan to the Romano-Germanic legal family, and de Cruz India to the common law. As a basis for distinguishing legal families, both Saidov and de Cruz follow a similar mix of history, sources of law and legal style as Zweigert and Kötz.

The final book to mention is by Patrick Glenn, now in its fifth edition.[49] With the exception of one modification (replacing the Asian with the Confucian legal tradition), the categories have remained unchanged. Most of them are similar to the ones of the previous literature, in particular Derrett's book. Glenn and Derrett also share a historical perspective keen on providing a balanced treatment of all legal traditions, whereas, in most of the other books cited here, civil and common law are dominant.

3 Main Commonalities and Differences

There are a number of constant features in the legal family classifications of the last one hundred years. Most prominent is the divide between civil and common law, usually based on an analysis of legal styles, sources of law and institutional features.[50] Often, within the civil law, a distinction is made between the French-Roman and the Germanic sub-families, which can be related to historical differences but also the distinct drafting styles of the major French and German codes.[51]

As far as a category of mixed legal systems is included, this is usually limited to a small number of countries such as Scotland and South Africa that have been influenced by both civil and common law traditions.[52] The Scandinavian countries are sometimes classified as Germanic civil law. Yet, it has also been argued that, while they are a 'country cousin of Continental law',[53] they are also a bit different: akin to the common law, they do not have major codes of the French and German variant but (merely) specific pieces of legislation. Their common model of the welfare state and the close interaction between their law-makers may also justify a separate and relatively uniform Nordic legal family.[54]

The precise borders between civil and common law and the rest of the legal world are not entirely clear. Extreme views would be that, either, civil and common law are together part of a Western legal family distinct from all other legal cultures, or that all legal systems of the world have followed the models of civil or common law countries. The predominant view takes an intermediate position: civil and common law are most prominent in the West, but have also gained some influence in other parts of the world. In particular, there is a greater tendency to allocate developed than developing economies to the

[49] Glenn 2014. [50] See also Chapter 3 at Section B, above.
[51] See Chapter 3 at Section C 1, above. [52] For further details see Section C 3 (a), below.
[53] Husa 2015: 227.
[54] See, e.g. Husa et al. 2008; Bernitz 2007; Zweigert and Kötz 1998: 276–85.

civil and common law categories, for example Japan to the former and Singapore to the latter.

Many of the taxonomies have a category with Russia and some of its neighbouring countries. In the times of the Soviet Union, this could be justified by the impact of the political system on the law. It is not entirely clear what may be the basis for this group today. Most frequently, reference is made to the socialist legacy of these countries. The view of a 'socialist legal tradition without socialism'[55] is not seen as a contradiction in terms. Since the use of law as an instrument of economic and social policy is the typical feature of socialist law, it can exist in any political system. It is also possible to point towards the continuity of legal institutions and traditions after the fall of communism, for example, in the judiciary and legal education, with a preference for a 'mechanical' and 'hyperpositivist' application of the law.[56] Others stress that it is not only the socialist legacy that may be relevant: for example, it may be typical for a Slavonic legal culture that there is a continuing influence of customs.[57] Considering the difficult transition period, another point of commonality may be a 'deep institutional scepticism' but also 'high expectations in terms of social justice'.[58]

Frequently, there are categories of religious legal systems, typically for Islamic law but sometimes also for Hindu and Talmudic law. These legal families are closely related to the corresponding religious traditions. This link to religious beliefs presents a major distinction from secular legal families since it excludes a complete overhaul of core paradigms.[59] In detail, religion is clearly relevant as far as a particular area of law directly incorporates religious beliefs, as is often the case in family law. The distinct character of these legal families may, however, be that the role of religion has a wider reach since it also extends to, at the surface, more secular questions.[60] But then it also needs to be considered that today there are no legal systems which are entirely based on religious traditions: rather all examples are mixtures between religious and state laws.[61] As far as comparative law research is concerned, it is also no surprise that most taxonomies only deal with these legal families briefly, since the (mainly) secular Western comparatists often lack knowledge about the respective religious beliefs.

With respect to the rest of the world – as far as not already captured by the civil/common law categories – many taxonomies use geographic classifiers, such as East Asian and African law. The likely motivation is that countries that are located in close geographic proximity share a similar culture which is also

[55] Uzelac 2010: 377. [56] E.g. Kühn 2011; Manko 2013.
[57] Butler 2010. But see also Butler in EE 2012: 783 (socialist legal thought has remained strong in Russia).
[58] Fekete 2011: 48.
[59] See also Chapter 6 at Section C 1 b, below, for Islamic law and commerce.
[60] For the relationship between law and religions see further Chapter 6 at Section A 2 (b), below.
[61] See Section C 3 (a) and Chapter 8 at Section B 2, below.

reflected in their laws. For example, for East Asia, a possible linkage is sometimes seen in Confucianism, while for Africa the role of customary law and the colonial experience may be the defining features. Of course, such reasoning sounds somewhat speculative – and it may indeed raise concerns, as the following section will discuss.

C Critical Analysis

It has been said that 'great divides are tempting organizing techniques'.[62] At the same time, classifications are bound to simplify. Thus, these simplifications may be criticised for over-emphasising the differences between categories, under-emphasising the differences within these categories and ignoring hybrids. All these points have been directed against the mainstream classifications of legal families.

1 Over-emphasis of Differences

There is no denying that there are differences between legal systems. The notion of legal families may therefore have the benefit of making aspiring comparatists aware of such differences. However, there is also the risk of a mistaken black-and-white thinking. We have already seen that Western civil and common law have more in common than divides them.[63] It is also possible to highlight similarities between the legal systems of the West and of other parts of the world. For instance, it is possible to draw parallels between the common law and Islamic law, since both legal traditions are based on a decentralised system of institutions.[64] There is also an extensive debate about the relationship between Western and East Asian legal systems, as discussed in the following.

Most taxonomies have a category of East Asian law (or Far Eastern or Confucian law). This legal family is said to be markedly different from Western conceptions of law. Law is seen as less important, as society is primarily based on personal relations and networks. In the Confucian terminology, this also means that consensus, harmony and goodness ('li') are preferred to formal standards and regulations ('fa').[65] If disputes arise, the main aim is to ensure that no one loses his or her face.[66] Thus, extra-judicial means based on a 'deeply rooted Asian conciliation culture' are preferred to a 'struggle for law' with winners and losers.[67] Overall, such collectivism means

[62] Marcus 2010: 521. [63] See Chapter 3 at Section C 3, above.

[64] Makdisi 1999: 1696–717; Rosen 2000: 38–68; Rosen 2006: 40–1 (contrasting it to the civil law, being centrally controlled, and traditional legal systems); Husa 2015: 244, 247. Similarly, Ziegert 2004: 149.

[65] Zweigert and Kötz 1998: 282–3.

[66] See Pattison and Herron 2003: 482, 490. For the corresponding view in cultural studies and cross-cultural psychology see Chapter 12 at Section C 1, below.

[67] Fan and Jemielniak 2016: 577; Ehrmann 1976: 45.

that concepts such as individual rights, the rule of law and formal legal reasoning are regarded as alien.[68] As far as there is law, the focus is on public law, being in line with China's 'legalist tradition',[69] as well as criminal law being obeyed as a mere external force 'like children who fear parental punishment'.[70] Conversely, contract law is seen as unimportant: traditionally, the exchange of goods was based on mere customs and private ordering,[71] and even today signing a contract does not imply a formal obligation but merely the continuation of negotiations.[72]

Such a picture may be helpful for an aspiring comparatist who had assumed that all countries of the world have a similar understanding of the law. Yet, the apparent danger is that it would also mislead her. Once she visits a country such as China or Japan, she would be surprised to find out that these legal systems have codes and statutes akin to Western countries,[73] and that at universities law is taught in a positivist fashion akin to continental European universities.[74] Moreover, when she visits a law firm or a court, a lawyer or judge may start a technical discussion about details of the positive law (such as the concept of piercing the corporate veil in company law[75]), which may make her wonder whether Western and Eastern legal cultures are really as irreconcilable as they had appeared to her.

More specifically, Chinese legal culture has changed considerably in recent decades. In the increasingly differentiated Chinese society, morals and custom can no longer meet the interest in a stable order; the need for legal rules is therefore increasing, and there is a growing emphasis on law in the population.[76] For instance, firms want to use well-drafted contracts, and judicial enforcement of contractual rights has become more common.[77] There have also been a number of institutional changes. In the last three decades, the number of lawyers has increased dramatically.[78] According to the ideas of the Chinese leadership, market economy and the rule of law are also compatible not only with capitalism and democracy, but also with socialism of the Chinese type.[79] Because of this, and because of changes

[68] Van Hoecke and Warrington 1998: 506. For Japan see Maslen 1998. [69] Haley 2016: 61–97.
[70] Cf. Ruskola 2002: 189. [71] Menski 2006: 520; Haley 2016: 81–3.
[72] Pattison and Herron 2003: 460, 491, 508; Zweigert and Kötz 1998: 284.
[73] See also Chapter 8 at Section B 3, below (on legal transplants in China and Japan).
[74] See Menski 2006: 56–7, also 470 (for Africa), criticising the 'positivist ideology'.
[75] Based on my experience visiting the Shanghai Supreme Court in January 2011. For an overview of the discussion about 'veil piercing' in Chinese company law see Clarke 2014: 261–6.
[76] Dam 2006: 12–13; also Peerenboom 2003: 50–5 (criticising Mattei's classification of China as a 'traditional legal system').
[77] See empirical findings in Clarke et al. 2008; Zhou and Siems 2015: 193–4; Yu 2014: 61–8; Chen et al. 2017.
[78] Clarke et al. 2008 (for general data); Liu et al. 2017 (for role of corporate lawyers). See also Alford 2007 (case studies of emerging legal profession in China, Japan and South Korea).
[79] See Zhou and Siems 2015: 194–7.

following the accession to the World Trade Organization (WTO) in 2001, there has been a professionalisation of the judicial system.[80]

All of this shows that the view that there is 'law in the West' but 'culture in the East' can be highly misleading. For example, it is clear that in Western legal systems contractual conflicts are often solved without the involvement of lawyers or courts.[81] With respect to East Asia, the idea of a distinctly different legal family can lead to a stereotyped view of these legal systems. Teemu Ruskola has discussed this problem under the heading of 'legal orientalism': what Western lawyers write about China tells us more about their own legal ideology than about Chinese law.[82] This does not mean that the picture presented of law in China is necessarily a negative one: there can also be a 'fervid idealisation', or even a hallucination, of a society that does not need law.[83] More often, however, it is said that the concept of legal families is used so as to favour one's own conception of law. It can lead to an 'exoticization of legal cultures', where the West is seen as the centre and the developing world as the periphery.[84] This may have the deeper purpose of legitimising the Western supremacy of law, by way of constructing the identities of 'us' and 'them'.[85] And if these groups of legal systems are seen as incompatible, such an approach may even contribute 'to conflictual and antagonistic relations between peoples and laws'.[86]

A further twist of this debate is that it is insufficient only to focus on the Western understanding of Chinese law without taking into account the Chinese understanding of Western law. Chinese law-makers, judges and academics consider Western legal concepts, but here too it is possible that there are misunderstandings: they may be of a technical nature, for example, due to problems of translations, but they can also be of a more fundamental one as far as Western law is portrayed in an 'occidentalist' way. Thus, it may be best to approach Chinese law as a 'bilateral process' that considers how both sides understand – and sometimes misunderstand – each other.[87]

Overall, the orientalism debate illustrates the problem of thinking that others are essentially different from us. Of course, one should also not do the reverse in presuming that 'they are just like us'.[88] Hence, we turn to the problem that legal family classifications also over-emphasise similarities.

2 Over-emphasis of Similarities

Chapter 3 already provided two examples of over-emphasising similarities: it was said that the civil law family of continental European countries is fairly

[80] For further discussion of the rule of law in China see Chapter 11 at Section B 2, below.
[81] Macaulay 1963. See also Charny 1990; Deakin and Michie 1997.
[82] Ruskola 2002: 189. See also Ruskola 2013. The term 'orientialism' derives from Said 1979. For legal orientalism see also Darian-Smith 2013: 48–51.
[83] Ruskola 2002: 217 (but see also 299). Some use the term 'reverse orientalism' for such an idealisation, see Gaudreault-DesBiens 2010: 176.
[84] Muir Watt 2006: 595. [85] Monateri 1998: 832. See also Monateri 2012.
[86] Glenn 2006: 431. [87] As suggested in Zhou and Siems 2015. [88] Cf. Nelken 2006: 949.

diverse (as is also apparent in distinctions between a Romanist and a Germanic model), and England and the United States follow fundamentally different paths on many legal questions.[89] The following deals with the legal systems of Asia, Africa and Latin America, and how their suggested classifications can mislead us.

(a) Asian and African Legal Systems

Some of the classifications allocate the legal systems of the entire world, including all Asian and African countries, to either the civil or the common law family. This leads to some unusual results. For example, according to La Porta et al., Iran, Saudi Arabia and Yemen are seen as common law countries, while a book by Francesco Galgano classifies them as belonging to the civil law[90] – with neither of the two studies providing any further explanations. Other researchers are more cautious, but here too it is frequently suggested that, for instance, India is regarded as common law and Japan as German civil law. These classifications are usually based on the colonial influence of European countries, and, in some cases, such as Japan, voluntary copying of some of the major codes.[91]

Legal scholars specialised in these countries tend to regard such classifications as unacceptable. Paradigmatic is Werner Menski's book on the legal systems of Asia and Africa. Having explained the religious dimensions of the Indian legal system, Menski rejects its classification as a common law country.[92] Similarly, with respect to Africa, he writes that African traditions have not been superseded by modern laws, that African laws are not mere copies of Western ones, and that 'one must ask how much effect less than a century of colonial domination could have had on many peoples of Africa'.[93] Furthermore, socio-legal and critical comparative lawyers bring forward that classifying non-Western countries as either civil or common law is too positivistic and Eurocentric since it disregards the law as experienced beyond the courtroom as well as the deeper structures of those non-Western legal cultures.[94] Finally, even two more traditional comparatists say about the spread of the common law:

> [T]his might lead one to the conclusion that in the areas of Africa which were previously under British rule most legal relations today are governed by the rules of English Common Law. This conclusion would be wholly erroneous. The fact is that to much the largest part of the African population the Common Law is almost of no practical significance; the legal relations of Africans, in contract and land matters as well as family and succession matters, are principally governed

[89] See Chapter 3 at Sections C 1 and 2, above.
[90] For the former see Section B 2, above. For the latter see Galgano 2011: 2–3.
[91] See Section B, above, and Chapter 8 at Section B, below.
[92] Menski 2006: 203.
[93] Menski 2006: 464. See also Chapter 8 at Section B 2, below.
[94] Friedman 1997: 36; Baxi 2003: 49; Frankenberg 1985: 442; Frankenberg 2016: 52 (ethnocentrism problem of legal families).

by the rules of customary African law, and in many regions also by the rules of Islamic law.[95]

It follows that such classifications are not helpful because they would indicate a similarity between legal systems that have very little in common. The alternative is therefore to seek categories that would better capture the specifics of these legal systems. Here, the countries of Asia and Africa are frequently classified as (East) Asian law, African law or even Afro-Asian law.[96] Yet, such geographic categories are usually not more than a definition of an area study. In the books cited in the previous section, these terms are often just headings which are immediately followed by a discussion of individual countries, raising doubts about the value of these categories.

Some attempts have, however, been made to relate these geographic categories with more substantive classifications. For example, with respect to Asia, some scholars have developed substantive classifications, such as that of a Confucian legal family, as already mentioned.[97] According to the general literature on comparative law, it is a characteristic feature of African legal systems that lawyers and law-makers are less influential, since customary and folk law play an important role.[98] Legal scholars from Africa suggest further details, mainly focusing on the countries of Sub-Saharan Africa, namely: the legal pluralism created by the mix of state and customary law; the cross-border nature of some of the customary laws due to the arbitrariness of state borders in Africa; the continuing relevance of mediatory forms of dispute resolution; the role of community interests in customary law, such as the concept of 'humanness' (*ubuntu*); and the post-colonial struggle to reassert one's own legal culture rooted in tradition.[99]

Yet, it is not clear how meaningful categories of African and Asian legal families can be. The differences between, say, all African countries are so profound that any description of these legal systems as a single group is bound to over-emphasise similarity.[100] For example, the role of customary law in Africa is not independent of the divide between common and civil law countries. In common law countries, legal pluralism between common law rules and customary law is often accepted unless the customary laws are seen as 'repugnant'. In the civil law countries, by contrast, unified codified laws have often merged Western and customary laws.[101] It is also clear that many further factors have shaped the nature of African legal systems in a diverse way, such as

[95] Zweigert and Kötz 1998: 230. [96] See Section B 2, above. [97] See Section 1, above.

[98] See Sacco 1995: 456; Twining et al. 2006: 128; Glenn 2014: 63 (but also 83–5: no pure chthonic traditions in the world today).

[99] Banda 2015 (for pluralist nature); Mancuso 2015 (for customary law and African dispute resolution); Silungwe 2014 (for African legal theory and *ubuntu*); Hinz and Patemann 2006 (parallel of old tree and new leaves). See also Section 3 (a), below, for the mixtures with customary laws.

[100] Menski 2006: 383; Bogdan 1994: 88.

[101] Banda 2015: 655–7. For a comparative introduction to African customary laws see Onyango 2013.

differences between old and new customary laws, between political and economic systems post-independence, as well as the impact of religious laws in many Muslim communities.

Moreover, the reference to a common culture may play a role in some instances, but it is not necessarily the case that cultural proximity also translates into a legal one.[102] For instance, China, North Korea and South Korea are all countries influenced by Confucian thinking, but their legal systems are very different. In addition, it can be objected that classifications referring to cultural characteristics are unsatisfactory in re-stating the categories of other disciplines,[103] whereas the legal family categories have the aim of identifying distinct approaches to law.

So, overall, we are left with a rather unsatisfactory situation. It is possible to suggest classifications of African and Asian countries, but then, 'the separation we seek to bring about, for purposes of clarity and recognition, is immediately challenged by information which is inconsistent with the separation we have chosen'.[104]

(b) Latin America

In the late nineteenth and early twentieth centuries, Latin American comparatists often classified their legal systems as 'sui generis'.[105] Today, however, Latin American countries are usually seen as being part of the French version of the civil law, since they were influenced by the French codes in private, criminal and procedural law, with additional but more limited influence from German, Portuguese and Spanish law.[106]

Yet, recent research has shown that just calling the legal systems of Latin America 'French civil law' does not do them justice. An article by John Henry Merryman on 'the French deviation' addressed how French judges had soon disregarded the strictness of the civil code, creating judge-made law (even though it was not officially described that way). In contrast to this, the courts of the former colonies did not regard it as acceptable to deviate from the strong separation of powers between legislators and judges.[107] A similar point is made by Patrick Glenn (not limited to these countries):

> [I]n creating large states, large corporate structures, large labour organizations, large legal professions – in short, large institutionalized elites in all directions, western law provides all the disadvantages of a large, wooden house in a warm, humid climate. It may be beautiful, and well-designed, but be subject to many forms of internal rot. To survive, it requires protection beyond the structure itself and if this is neglected, or impossible, the structure will not last.[108]

[102] Similarly, Mattei et al. 2009: 270; Chase and Walker 2010: lxi (distinction between modern and non-modern legal systems).
[103] See Section A, above. [104] Glenn 2014: 362 (for legal traditions in general).
[105] See Pargendler 2012b: 1046, 1049. [106] See Zweigert and Kötz 1998: 115.
[107] Merryman 1996. See also Chapter 3 at Section B 2, above. [108] Glenn 2014: 280.

The question remains why Latin American legal systems have stuck to a formal version of the French codes. Here, Jorge Esquirol's research is helpful, and can be summarised in the statement that 'Latin American societies are not European, only their jurists pretend to be'.[109] Esquirol contends that Latin American lawyers are deliberately 'legalist' in insulating law from an illiberal society. Thus, facing the tension between the European ideal of law and the Latin American social, political, cultural and economic particularities, it is not seen as necessary to change the former 'fiction of Europeanness' but, rather, it is hoped that society will eventually catch up.

Research has also explored how Latin American law is no longer limited to the European codes. Matthew Mirow's article on the 'Code Napoleon buried but ruling in Latin America' illustrates this tension. On the one hand, the French Code has decreased in importance in the twentieth century due to external and internal changes. The former denotes the influence of US positive law, legal culture and politics; the latter refers to specialised subject-matter legislation, changes to the codes, and the growth of case law. On the other hand, the Code still rules since it 'continues to serve a taxonomic function as the intellectual superstructure upon which all legal thought is built'.[110] Jorge Esquirol meanwhile suggests that there have been some changes to the traditional formalism, in particular in constitutional law, supported by a use of Anglo-American legal literature.[111]

In addition, it can be noted that there are profound differences within the group of Latin American countries, for example, as regards the prevalence of legal pluralism and the effectiveness of the law in practice. While in Bolivia, Guatemala, Haiti and Paraguay, informal and/or indigenous laws play an important role, countries such as Argentina, Chile and Uruguay have a predominance of state laws similar to European countries. And in terms of rule of law and judicial independence, it can be seen that Chile, Costa Rica and Uruguay are in the top quarter of the global rankings, while countries such as Paraguay and Venezuela are in the bottom one.[112]

Overall, this short discussion shows that just calling Latin American countries 'French civil law' is not helpful.[113] Rather, to get a proper understanding of law in Latin America, various topics need to be addressed, such as, how complete was the influence of the French positive law in different areas of law, how has the law been applied and how has it been insulated from society, and how have legal rules been changed in the last two

[109] Esquirol 1997: 470. See also Esquirol 2003 and Esquirol 2008 (challenging common misconceptions about law in Latin America); Somma 2014: 114 (Latin American law as periphery of occidental law).
[110] Mirow 2005: 191. See also Mirow 2004.
[111] Esquirol 2011. See also Chapter 8 at Section B 2, below.
[112] Couso 2015. For indicators see also Chapter 7 at Section D and Chapter 10 at Section C, below.
[113] For a similar conclusion see López-Medina 2012: 360.

centuries? We will revisit some of these topics in Chapter 8 on 'legal transplants'.[114]

3 Disregard of Hybrids

The prevalence of forms of hybrid legal systems also challenges the notion that there are distinct legal families. In addition, reflecting on such hybrids is not merely a mode of criticism: rather, understanding the origins and operation of hybrid legal systems has emerged as a topic of comparative law on its own terms.

(a) Mixed Legal Systems

Hybrids are often equated with mixed legal systems, but the latter is only one of its sub-categories. In contrast to other forms of hybridity (see the following sub-sections), here it is the entire legal system that deserves to be called mixed. In principle, any type of mixture may be conceivable. However, following the focus of traditional comparative law on common and civil law, the term 'mixed legal systems' is often limited to legal systems which have been strongly influenced by both of these legal families.[115] Typically, this is the result of historical developments: say, a country was initially part of the common law but was then occupied or influenced by a civil law country (or vice versa).

As far as the comparative taxonomies use the category of mixed legal systems,[116] the main examples are Israel, Louisiana, Quebec, Puerto Rico, Scotland, South Africa and Sri Lanka. These are also the countries where lawyers often perceive themselves as belonging to a mixed legal system.[117] Sometimes reference is also made to a number of further countries, namely, Botswana, Cameroon, Cyprus, Guyana, Jordan, Lesotho, Malta, Mauritius, Namibia, the Philippines, Saint Lucia, Somalia, Seychelles, Thailand, Vanuatu and Zimbabwe.[118] In addition, it can be suggested that this list should be even longer since, after the Second World War, many civil law countries have been influenced by US law. The previous section already mentioned countries in Latin America. Another example is Japan: between 1890 and 1900, Japan copied large parts of the five major German codes, but these legal transplants have not fully persisted. For example, the Japanese corporate law has been substantially changed since the Second World War, in particular due to American influence. The same is true for other areas of trade and business law.[119]

[114] See Chapter 8 at Section B 2, below. See also Chapter 6, below (on the relationship between law and society).
[115] Palmer 2008 (as 'the traditional view'). See also Palmer 2012.
[116] See Section B 2, above.
[117] For the relevance of such an 'subjective element' see Castellucci 2008.
[118] Kim 2010: 705.
[119] See Chapter 8 at Section B 3, below. See also Matsuo 2004: 50 (Japan as a mixed legal system). For the position of Japan see also Oda 2009: 3–4.

Legal scholars have also tried to identify mixed legal systems that go beyond the mixture of civil and common law. Wigmore, writing in 1929, presented 'a map of the world's law' which distinguished pure systems from national blends and colonial composites.[120] A contemporary example are the maps found on the website Juriglobe of the University of Ottawa. It uses the categories civil law, common law, Muslim law and customary law, and allows mixtures between them. Most African and Asian countries are regarded as being mixed between common or civil law and Muslim or customary law.[121] In the case of mixtures, the website also indicates the dominant category. For instance, Iran is regarded as Muslim law with elements of civil law, whereas Iraq is seen as civil law with elements of Muslim law. Overall, this taxonomy confirms the importance of the civil/common law categories, since more than 55 per cent of the world's population live in a country where the civil law is dominant, and 15 per cent in a country where the common law is dominant.[122] It can also be seen that, according to these categories, more than half of the legal systems of the world are regarded as mixed.[123]

The mixture of Western legal traditions and customary law, say in Africa, has also been a general topic of comparative and anthropological legal research. Here it is helpful to distinguish four types of customary law.[124] 'Living customary law' is the original unwritten version of customary law. Colonial powers often dismissed it as not 'proper law', and after independence many of the new leaders saw it as an obstacle to consolidate their power over the entire country. Still, living customary law may have survived at the local level – for instance, as regards family relationships.[125] In addition, more generalised written versions of customary practices have emerged. This can be 'textbook customary law', where academics or state officials have tried to consolidate the customary practices of a particular people.[126] It can also be 'codified customary law', where the state has incorporated customary practices into legislation. Yet, there have also been doubts about the authenticity of such customary law, since national law-makers may lack knowledge of local customary practices – or since they may even transform them so as to serve international business interests.[127] Finally, 'judicial customary law' is about the way judges make use of living, textbook and codified customary law. Details depend on many further questions, such as whether state law accepts customary law and traditional forms of dispute resolution, and whether state courts are in practice willing to consider traditional values as being relevant in

[120] Wigmore 1929: 117.

[121] See www.juriglobe.ca and Fathally and Mariani 2008. For a general discussion about 'maps of law' see Bavinck and Woodman 2009. See also Chapter 7 at Section C 4, below.

[122] Koch 2003: 2.

[123] See Du Plessis 2006: 482.

[124] Following Ubink and van Rooij 2011. Similarly, Menski 2006: 473–81.

[125] See, e.g. Read 2000: 190–3; Bennett 2006: 664–5, 662, 666; Odinkalu 2006: 154; Moore 1986: 35.

[126] Cf. Donovan 2008: 79–87 (as 'applied anthropology'); Bennett 2006: 646.

[127] See Pirie 2013: 46–51 (unwarranted expansion of law concept); Riles 2006: 788 ('invented tradition'); Snyder 1981 (on Senegal: transformation to serve interests of world capitalism).

their decisions.[128] Overall, it can therefore be seen that mixtures of Western and customary law can appear in a variety of forms, which would necessitate many further sub-categories of mixed legal systems.

Furthermore, the Ottawa map does not consider that most legal family taxonomies distinguish between French, German and Nordic civil law countries. Thus, many legal systems in Central and Eastern Europe can be regarded as mixed civil law countries. For example, traditionally, Lithuanian law tended to be influenced by French law, and Latvian law by German law. Yet, after regaining independence in 1990, both legal systems have re-drafted their laws in a comparative fashion, being influenced by both German and French legal traditions, by Nordic law, and partly also by advisers from the United States.[129] In addition, here, as elsewhere in Central and Eastern Europe, it may still be possible to identify some aspects of a socialist legal culture as far as judges and law professors have retained their posts and parts of their ideology.[130]

Mixtures are even more complex in parts of the world where there have been various sources of influence. More generally, it has been suggested that, in Southeast Asia, Islamic, Chinese, Hindu, indigenous customary and European legal norms all play a role, and that therefore the idea of legal families 'makes no sense whatsoever'.[131] For instance, it has been said of Thailand that:

> it has had in its modern texture a real mixture of sources such as English Law, German Law, French law, Swiss Law, Japanese Law and American Law ... alongside historic sources in existence since 1283, such as rules from indigenous culture and tradition, customary laws and Hindu jurisprudence, still to be found in some modern enactments.[132]

Such complex mixtures also show that there cannot be 'one correct' taxonomy of legal families. By way of another example, Figure 4.1 illustrates the position of the BRIC countries (Brazil, Russia, India and China), using all of the main taxonomies of Table 4.1. It can be seen that these four legal systems belong to two or three legal families in the respective taxonomies. Such a mixed classification can be useful for the purpose of comparison. For instance, comparing Brazil and China, there is similarity due to the joined civil law affiliation, while the other categories are different (socialist and traditional for China, and political for Brazil). This does not imply that a comparatist has to endorse all of these

[128] See, e.g. Mancuso 2014: 13 (on Mozambique's Constitution recognising legal pluralism); Faundez 2011: 28–30 (on Bolivian Constitution recognising indigenous courts); Keep and Midgley 2007: 29 (on 'ubuntu-botho' in South African case law).

[129] See Siems 2007a: 65.

[130] See Section B 3, above.

[131] Harding 2001: 200; Harding 2002: 49; also Harding 2015. Similarly for Africa: Mattei et al. 2009: 255–7 (traditional, religious, colonial, post-independence law and perhaps socialist or Americanised law).

[132] Örücü 2004b: 364; also Örücü 2008: 39. One could also add Buddhist law: see Sucharitkul 1998.

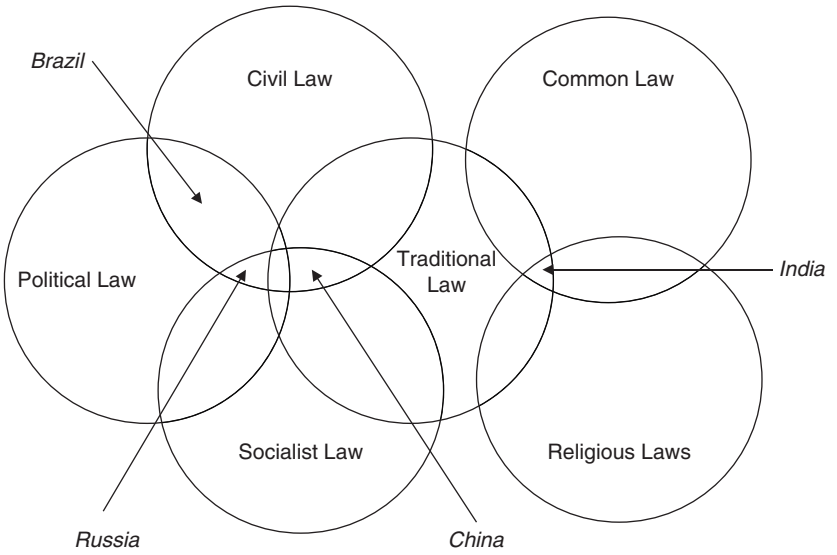

Figure 4.1 Possible classification of BRIC countries

classifications, though at least they offer a useful conceptual framework to discuss why, say, for Brazil the political element may not be the decisive one.[133]

Finally, even England, France and Germany may be regarded as mixed.[134] It was already mentioned that English law has been influenced by Roman law.[135] France and Germany can also be called mixed legal systems because, apart from Roman law, both the 'droit coutumier' of tribes from Northern France and Germanic sources of law influenced their laws.[136] Moreover, there has always been some exchange of legal ideas and concepts on commercial topics.[137] Thus, the notion of mixed legal systems can indeed have a destructive force in showing that there are no pure legal families.

(b) Horizontally Divided Legal Systems

Another form of hybridity is that the mixture concerns differences between regions of a particular legal system, with the result that legal systems are 'horizontally divided' or 'bijural'. Again, we can start with the legal families of common and civil law. Cameroon has, through colonisation, been influenced

[133] As also contemplated by Mattei 1997b: 33.
[134] Zimmermann 2001: 158; Örücü 2004b: 363; Donlan 2011 (project on 'remembering legal hybridity').
[135] See Chapter 3 at Section C 3, above.
[136] See, e.g. Zweigert and Kötz 1998: 75, 139; Zimmermann 2001: 159; Glenn 2007 and Glenn 2014: 87–9 (on interaction between Western and chthonic law).
[137] Vagts 2000: 598–9. See also Mattei et al. 2009: 434 (since Roman law, as civil law, was unsuitable for business transactions).

by both English and French law. Yet, in contrast to mixed legal systems, the division is spatial, with English common law having been influential in the North and South West, and French civil law in the other parts of the country.[138] Other possible examples are the United Kingdom, the United States and Canada, with mixed legal systems in Scotland, Louisiana and Quebec and the common law in the other parts. It can also be suggested that the EU is bijural, since it has members from both common and civil law jurisdictions.[139]

In some horizontally divided legal systems one part is significantly smaller, for example, Hong Kong's common law in China's civil law system and Goa's civil law in India's common law system. Here the smaller part may then have the strategic advantage that it can design laws that are particularly attractive. Considering Hong Kong, the economist Paul Romer suggests that this benefit of a fully separate legal zone can be generalised, promoting the idea of 'charter cities'.[140] Although attempts to directly implement Romer's idea have not been successful,[141] some parallels exist. Starting in China, many developing countries have introduced special economic zones (SEZ) which provide specific legal and economic incentives for businesses. While those modifications do not justify treating these zones as belonging to separate legal families, this is different in three examples from the United Arab Emirates and Qatar. Generally speaking, the United Arab Emirates and Qatar can be classified as civil law countries with significant elements of Islamic law. However, the Dubai International Financial Centre (DIFC), the Abu Dhabi Global Market (ADGM) and the Qatar Financial Centre (QFC) were allowed to create their own 'common law courts' for civil and commercial matters, with judges trained in common law jurisdictions.[142]

Horizontal divisions can also relate to religious, customary and political laws. For example, in Nigeria, some Islamic law is applied in the predominantly Muslim northern states but not in the predominantly Christian southern ones.[143] The relationship between Western and customary law in Africa (see the previous sub-section) can also appear as a horizontal division because the former may be influential in the big cities, whereas customary law may be dominant in rural areas.[144] Similarly, in countries of transition, it may be the case that Western laws have become influential in some of the

[138] See Cameroon Legal Systems, at www.hg.org/article.asp?id=7155.
[139] See generally Breton and Trebilcock 2006, while Breton et al. 2009 refer to them as 'multijural' (defined as 'coexistence of two or more legal systems or sub-systems with a broader normative legal order to which they adhere').
[140] See https://paulromer.net/tag/charter-cities/.
[141] See Castle Miller 2015 (example of Honduras); Sagar 2016.
[142] See Sharar and Khulaifi 2016 and e.g. www.difccourts.ae.
[143] See Ostien and Dekker 2010.
[144] See International Council of Human Rights 2009: 10; Mamdani 1996: 11–12 (using the term 'bifurcated state').

metropolitan regions but not elsewhere.[145] Thus, overall, the phenomenon of horizontally divided legal systems may be more frequent than it is usually assumed.

(c) Vertically Divided Legal Systems

Fairly common is a vertical division between areas of law, which may also be called 'legal polytheism'.[146] In order to distinguish between such a division and mixed legal systems, Esin Örücü's 'salad bowl analogy' is a helpful device. Örücü distinguishes between bowls where the ingredients are a purée (also called 'covert mixtures'), where they are clearly visible ('Italian salad bowls'), and where they are clearly separate ('English salad plate').[147] Mixed legal systems, as discussed in the first sub-section, are the first two types of 'bowls' since the entire system is in-between legal traditions. In the present sub-section, by contrast, we are interested in the 'English salad plate' option, where one or more areas of law follow their own logic.

Most taxonomies of legal families focus on topics of civil procedure, in particular as regards the distinction between civil and common law countries.[148] The resulting classifications clearly reflect this focus. For example, with the exception of the classification by Mattei, they do not consider political differences between countries in detail since civil procedure and corresponding fields of private law are regarded as relatively unpolitical in nature. Given the long history of many rules of civil procedure, there is also a considerable degree of stability in these classifications.

With respect to criminal procedure, it has sometimes been said that here the common/civil divide is even sharper,[149] but most scholars express the view that generalisations are problematic, since we observe convergence between the adversarial model, traditionally associated with common law countries, and the inquisitorial model, traditionally associated with civil law ones.[150] As such a trend can also be found in civil procedure,[151] the coherence of legal family affiliations may be fairly similar in both areas of law. Yet, this is different if we go beyond Western legal systems. In some Muslim countries, private adjudication is dealt with by courts similar to the Western world, but criminal procedure, as well as criminal law, are distinct, being based on Islamic law. Thus, for these countries, we can clearly identify vertically divided legal systems.

[145] For China see Chapter 11 at Section B 2, below.
[146] Ehrmann 1976: 30 (for common law and equity).
[147] Örücü 2007: 180; Örücü 2008: 47, 52.
[148] See Chapter 3 at Section B 2, above.
[149] Chase and Walker 2010: lix.
[150] See Ross and Thaman 2016: 12–18 (hybrid and pluralist character); Langer 2014; Weigand in EE 2012: 271–3; Reamey 2010; Roberts 2007: 353; van der Walt 2006: 52–3.
[151] See Chapter 3 at Section C 3, above.

In constitutional law, the basic political structures, such as democratic or autocratic, or federal or unitary, play a key role and may justify distinct classifications. In addition, factors such as whether there is a written constitution, a separate constitutional court, or a case-based approach to human rights, lead to categories different from the common/civil law divide.[152] In administrative law, a division may be made between the United States and Germany on the one hand, and England and France on the other, since the former two countries have general laws on administrative procedure, whereas in the latter two it is mainly judge-made law.[153] But there may also be other divisions: for example, in England, but not in France, ordinary courts have the power of administrative review, and in Germany, but not in the United States, there is a general principle of proportionality in administrative review.[154] Finally, a more general comment starts with the observation that, from early on, private law has often spread across borders (e.g. the received Roman law), whereas the development of public law has been more dependent on national borders. Thus, it has been suggested that classifying legal systems in public law may be less meaningful than in private law.[155]

In private and commercial law, too, complications need to be considered, though often the distinction between mixed and vertically divided legal systems is not entirely clear. For instance, South Africa, Sri Lanka, Quebec and Cyprus are usually called mixed legal systems, but one could also regard them as vertically divided because some areas of law are based on civil law and others on common law models.[156] For the legal systems of Africa, it has been said that the divide is between areas such as family law, where the importance of customary law is now often reaffirmed, and business laws based on Western legal patterns.[157] As far as Muslim countries are concerned, contract law is often a blend of different variants of Western law and Islamic law; in company law, there may be both Western forms of companies and Islamic partnerships available; and family law may be predominantly based on Islamic law.[158] Most of Chinese private and commercial law is a mix as well, but there are

[152] Summary of discussion in Jackson 2012: 55–8. See also Shapiro and Stone Sweet 2002: 168 (constitutional law almost invariably becomes case law); Komarek 2011: 8 (in the United States, fundamental difference between common law and constitutional adjudication). See also Chapter 7 at Sections B 3 and C 3, below.

[153] Ziller in EE 2012: 746–7; Dam 2006: 122.

[154] Bignami 2016a.

[155] Bell 2006c: 1266. See also Ackerman 2010 (contrast between common and civil law 'is a non-starter'); Zeno-Zencovich 2017: 92 (it 'makes very little sense outside the private law context').

[156] In South Africa and Sri Lanka areas such as property law are based on civil law rules, whereas commercial law is predominantly based on common law ones. In Quebec, there is French-heritage civil law, while public, criminal and other federal laws are based on Canadian common law, see Kim 2010: 711; Zimmermann and Visser 1996. In Cyprus, family law and administrative law are part of civil law, while other areas are part of common law, see Hatzimihail 2013.

[157] Mancuso 2014: 20–1; Mattei 1997b: 16 (as split between 'rule of traditional law' and 'rule of professional law').

[158] See Chapter 8 at Section B 2 (b), below.

differences in detail: contract law is a mix of the former socialist law, German law and the international sales law (CISG), company law is primarily based on a German model but with some US influence, and securities regulation is predominantly influenced by the United States.[159] In India, a codified version of the common law is the basis for contract and tort law, but in family law things get complicated (even disregarding the Islamic law applicable to the Indian Muslims): though its origins lie in classical Hindu law, it gradually changed due to its consolidation by British lawyers under colonialism, its codification after independence and the case law by modern Indian courts.[160]

In commercial law more generally, a formal distinction can be made between countries that do and do not have a commercial code: most civil law countries (e.g. Germany and France) would belong to the former category, but there are also civil law countries that have incorporated commercial law topics into their civil codes (e.g. Italy and Switzerland).[161] It may also be possible to classify according to the international commercial laws that countries follow:

> Take the law of international sales. Is it really the Germans with their Bürgerliches Gesetzbuch versus the Americans with their Uniform Commercial Code? Or is it rather the Germans and the Americans as members of the United Nations Convention on Contracts for the International Sale of Goods (CISG) versus the English who have not ratified it? Or is it perhaps the Germans and the English as EU members (and thus signatories to the Rome Convention) versus the Americans? Or is it perhaps all these countries as members of the WTO (and thus beneficiaries of its free trade regime) versus those nations who are not?[162]

The picture that may therefore emerge is that it is fairly common for legal systems to have divided identities. Yet, any specific area of law is also embedded in the entire legal system.[163] Thus, just because a country adopts a set of rules for a particular topic, this does not mean that it would be justified to talk about a vertically divided legal system, in particular since the main bases for classifications are the general features of legal systems and not specific legal rules.[164] Still, the differentiations between areas of law show that legal systems tend to have various shades, disregarded by the broad categories of legal families.

(d) Parallel Legal Systems

The previous sections already dealt with some aspects of the relationship between Western laws and customary/religious laws. It was said that there

[159] See Zhou and Siems 2015; Siems 2007a: 66.
[160] See, e.g. Menski 2006: 246–54; Glenn 2014: 296 ('much of the great corpus of hindu law is now said to be obsolete').
[161] See, e.g. Mattei et al. 2009: 421–2, 438–9; Siems 2004c.
[162] Reimann 2001: 1114.
[163] This point is emphasised by Whitman 2005b: 394 (e.g. on similarities between criminal law, privacy, hate speech and workplace harassment law).
[164] See Section B 1, above.

may be genuine mixtures of these two forms of law, or that legal systems may be horizontally or vertically divided. A further possibility is that of parallel legal systems.[165] Such parallelism arises when a legal system applies the rules of different legal traditions to different persons. A good example is the family law of countries such as India, where different legal regimes are applicable to Hindus, Muslims and Christians.[166]

Another case of parallelism arises where, on a purely domestic level,[167] citizens can choose between different legal regimes. This may be explicitly provided for: for instance, Western and customary/religious courts have co-existed in some countries of Africa and the Middle East, though the recent trend is to merge these two court systems.[168] But even if that is not the case, there may be de facto choice between the official and an informal legal order. The latter orders can be found across the world and are often independent of national borders. Frequently discussed examples are the law of the Romani people ('Gypsy law'), the law of the Quaker community, the law of squatter settlers in Brazil, and the norms of religious communities.[169]

Transnationality is also a common feature of business and commercial law. It is possible that such laws have become part of the positive law (e.g. the CISG, as explained in the previous sub-section). But there is also the view that, for some rules of transnational governance, national borders have become irrelevant. A good example of this are the Incoterms, clauses drafted by the International Chamber of Commerce (ICC), which are applied in many international business contracts. This point will be addressed in detail later on, in the context of globalisation and comparative law.[170]

Overall, the prevalence of these parallel legal systems shows that many laws are not based on geographical borders. Thus, this variant of hybridity in particular challenges the core belief that one can develop taxonomies of legal families comprising particular countries.[171]

D Conclusion

The present and the previous chapter have shown that classifications into legal families often do not provide an accurate picture. Legal families have the didactic aim of facilitating the understanding of the world's legal

[165] Oksamytnyi 2010: 48; also Moore 2005: 49 (dualistic legal systems).

[166] See Menski 2007: 195–6; Fyzee and Mahmood 2008: 1 (noting that due to the personal scope the term should be 'Muhammadan law' not 'Islamic law'). But see also Ali 2011: 211–12 (Shari'a law, Muslim law, Islamic law or Muhammadan law?).

[167] As distinguished from questions of conflicts of law. See Chapter 9 at Section A 2 (b), below.

[168] See Menski 2006: 477 (on Africa); Masud in Kritzer 2002: 1347–9 (on various Muslim countries). See also Faundez 2011: 34 (for Mozambique).

[169] For the first three examples see Weyrauch 2001; Bradney and Cownie 2000; Santos 2004: 99–162. See also Chapter 5 at Section B 2, below (on legal pluralism).

[170] See Chapter 10 at Section B, below.

[171] For a similar point see Twining 2000a: 150, 181; Twining 2007: 73.

systems. Yet, in many instances, a comparatist can be misled by such categories because she may assume stark differences (or similarities), whereas in reality there are similarities (or differences), or a mixed picture. Thinking about legal systems as belonging to distinct legal families can also inhibit the comparatist's curiosity as she should be prepared to find unexpected differences between similar countries and unexpected similarities between different ones.

Often, it is also possible to conduct comparative legal research without using the notion of legal families. To illustrate, Chapter 3 started with a comparison of civil procedure and sources of law in common and civil law countries. Yet, as is the established practice of traditional comparative law, this comparison focused on France, Germany, England and the United States, since it is believed that the laws of these countries have influenced neighbouring countries, former colonies and other legal systems. Thus, a preferable alternative is to examine differences in civil procedure and sources of law as follows: the starting point is a comparison between those four legal systems (not using the concepts of common and civil law). Subsequently, one can discuss how their laws have influenced other parts of the world. This influence can be direct (say, French law to Spain), or indirect (say, French law to Latin America via Spanish law), and it may also be said that some legal systems have been influenced by multiple foreign legal systems (say, Latin American legal systems by French and US law). Thus, the result is something akin to a tree-like model, which shows how some legal systems have influenced others.[172]

However, at this stage, the assessment of legal families will be regarded a preliminary one. Part II of this book will discuss that some postmodern comparatists find legal families a useful concept in their explorations of deep differences between legal systems. It will also be explained how socio-legal comparative law can provide answers to the question whether the law in practice confirms or refutes the legal family taxonomies. Finally, this part will present a new global taxonomy of legal systems based on a more robust quantitative method than the existing research.[173]

Part III on global comparative law then presents further challenges to the idea of legal families. If we take the views that, today, countries widely copy rules from anywhere in the world, that legal systems have converged to a significant degree, and that regional, international, transnational and global laws replace many domestic rules, it seems unlikely that the established taxonomies of legal families still play a major role. But, as it will be shown, sometimes legal families also re-emerge in this debate, for example, in the

[172] For this idea see also Örücü 2004b; Örücü 2007: 175–6.

[173] See Chapter 5 at Sections C 1 and D 2, Chapter 6 at Sections B and C 1 and Chapter 7 at Section C 4, below.

choice of the most appropriate model for domestic, international and transnational transplants.[174]

Supplementary Information

Questions for discussion. What are the possible rationales for taxonomies of legal systems? How uniform are the main classifications used today and in the past? How should one classify the legal systems of Africa and Asia? Does the belonging of a country to a particular legal family differ between areas of law? Are hybrids of legal systems the exception or the rule?

Suggestions for further reading. For a detailed account of legal traditions: Glenn 2014. For the evolution of research on legal families: Pargendler 2012b. For the notion of 'legal orientalism': Ruskola 2002 and 2013. For the challenging classification of China: Zhou and Siems 2015. For the alleged relevance of legal families for economic differences: La Porta et al. 2008.

[174] See Chapter 8 at Section A 3 (c), Chapter 9 at Section C 2 (a), and Chapter 10 at Section A 3 (a), below.

Part II
Extending the Methods of Comparative Law

It is common to distinguish traditional from 'other forms of comparative law'.[1] The latter approaches are not a single school,[2] but have in common the disapproval of the legalism and doctrinalism associated with the traditionalists. To illustrate, consider the following apparently harmless statement:

> As Japan belongs to the German legal family, both German and Japanese commercial law provide that in case of a sale between traders, the buyer shall, upon taking delivery of the subject matter, examine it without delay (German Commercial Code, s. 377; Japanese Commercial Code, s. 536).[3]

The previous part already dealt with the reference to legal families,[4] but non-traditionalists may raise a number of further and more general objections against this statement. They recommend that comparative lawyers should 'prolong [their] puzzlement' and should 'not jump to easy conclusion'.[5] Thus, first, the mere comparison of legal rules is regarded as insufficient. At the very least, comparative law needs to be based on an understanding of the theories and values underlying legal orders. So, in the example, the similarity between the German and Japanese law may only be superficial, whereas deep-level comparative law could highlight profound differences. Secondly, a rule-based comparison gives no consideration of the real-world sense in which these rules operate in both countries. Thus, socio-legal research would need to be conducted. Thirdly, comparative law, as well as legal research in general, traditionally did not embrace the use of quantitative tools prevalent in many other academic disciplines. But there is no reason why this should not be done. Thus, for instance, comparatists may want to compare quantitatively how often courts in Japan and Germany have actually applied the provision in question.

[1] Husa 2003: 445.
[2] But see Markesinis and Fedtke 2009: 359 (wondering 'which academic school was gaining the upper hand: Hein Kötz, Ulrich Magnus, Walter van Gerven or Reinhard Zimmermann, one might argue, versus Duncan Kennedy, Ugo Mattei, Pierre Legrand or Annelise Riles? That is four on either side, so is it a draw?').
[3] Modified example from Siems 2007b: 140–1.
[4] See Chapter 3 and Chapter 4, above.
[5] Cotterrell 2006: 723.

These three 'extensions' to the method of comparative law are addressed in the following chapters on postmodern, socio-legal and numerical comparative law. The view taken in this book is that these relatively new approaches to comparative law are valuable, but that not everything traditional should be abandoned, nor is everything new necessarily a way forward.[6] In addition, the subsequent Parts III and IV show that changes to comparative law are not only trigged by these new ideas, but also by the 'globalisation' of the law and the growing interest in comparative legal topics by non-legal researchers.

[6] Similarly, Peters and Schwenke 2000: 803, 829; Husa 2003: 445.

5

Postmodern Comparative Law

Some traditional comparative lawyers denounce postmodern comparative law as 'incomprehensible'.[1] Indeed, it is often fairly complex. Yet, this chapter aims to show that it is possible to make it comprehensible. It also highlights both its strengths and limitations. To start with, Section A explains that 'postmodernism' is understood as a wide label for research that challenges the traditional method but does not merely suggest 'modern' adjustments. Sections B to D discuss the main variants of postmodern comparative law, categorised under the general headings of deep-level analysis of law, deep-level comparison and critical comparative law. Section E concludes.

It is one of the potential advantages of postmodern comparative law that it may be used for any legal question. This chapter will refer to some examples that examine general considerations of a country's legal culture but also more specific ones, mainly from contract and criminal law.

A Challenging the Orthodoxy

In a nutshell, the traditional approach to comparative law means that the main analysis is divided into three parts: description of laws, comparative analysis and critical policy evaluation. A functional problem-based research question is often the starting point of the analysis, and sometimes a functional approach also channels comparison and policy evaluation.[2]

In the comparative law literature, there is reluctance to abandon this traditional approach, despite its acknowledged limitations. This may be described as a *modern* response: associating modernity with a belief in rationality,[3] the recommendation is that the comparatist should 'just' show more awareness and rationally explain her choices, in particular on the preference for traditional methods and the values on which her policy evaluation is based.[4]

[1] See below note 189. [2] For details see Chapter 2 at Sections A and B, above.

[3] For the related concept of 'modernisation' in the development discourse see Chapter 11 at Section A, below.

[4] See Hendry 2014: 95 (criticising traditional comparative law for lack of methodological self-reflection); Paris 2016 (for need to explain choices); Müller-Chen et al. 2015: 94 (for transparency of values).

With this additional effort, modern comparative law may then well continue with the conventional functional approach because more progressive viable alternatives may not yet be available.[5]

By contrast, *postmodern* comparative law has a more ambitious goal. It aims to challenge both the traditional and the modern. It is therefore sceptical of the traditional method of comparative law as well as the belief in complete rationality and objectivity as the basis of modernity. Following postmodernists in other fields, it also focuses on differences[6] – in particular, that apparently similar words and concepts often have different meanings in different legal systems. Thus, the main purpose of comparative law is not to find common denominators between legal systems but to appreciate their complexity. This is in line with the view that 'one cannot understand a place without seeing how it varies from others',[7] but postmodern comparative law often goes further. It emphasises that the identity and self-knowledge of the researcher crucially determines the understanding of the foreign law and, thus, also the judgement of similarity or difference.[8] In particular, the neutrality assumption of traditional comparative law is rejected: as there is no 'view from nowhere',[9] the postmodernist is said to start 'from the premise that reasoning, language and judgement are determined by inescapable and incommensurable epistemic, linguistic, cultural and moral frameworks'.[10]

This should not be seen as a closed definition, as the term 'postmodernism' is notoriously ambiguous. For instance, it is associated with cultural studies, a rejection of functionalism, a prevalence for local narratives,[11] and an emphasis on 'plurality, intersubjectivity, experience, situated knowledge, hermeneutics, [and] hybridity',[12] referring to trends that started in the mid to late twentieth century. The topics discussed in this chapter can be related to these trends – for instance, they emerged in a similar period, they reject the functionalism of comparative law, they often favour local specificity to generalisations, and they emphasise the role of culture, plurality and subjectivity in law.

Thus, in the following, the label of 'postmodern comparative law' is understood in a pragmatic way as referring to a range of approaches that challenge the traditional method but do not merely suggest modern adjustments. In this context, it also needs to be clarified that not all of the scholars whose research is discussed in this chapter may consider themselves as 'postmodernists'; however, on balance, it was felt that related terms, such as critical, sceptical or hermeneutical comparative law would have been insufficiently inclusive.

[5] See Schafer 1999: 123 (referring to scientific epistemologies).
[6] Somma 2014: 64, 150, 169–70; Antokolskaia 2006: 31 (with references to Derrida and Foucault).
[7] Lawson 1977: 73. [8] See van Erp 1999; Cotterrell 2012: 39. [9] Nelken 2010: 10.
[10] Peters and Schwenke 2000: 802. See also Mattei and Di Robilant 2001.
[11] Calhoun et al. 2002: 351, 413–14. [12] Eberhard 2009: 68.

This chapter discusses three main categories of postmodern comparative law: deep-level analysis of law, deep-level comparison and critical comparative law. The difference between those categories is as follows: the two 'deep level' variants refer to the criticism that the traditional method of comparative law only achieves a relatively shallow understanding of differences and similarities.[13] This can be distinguished from the more openly 'critical' approaches, which take the position that the traditional method leads to flawed results. Thus, there is a similar disagreement with the traditional approach but a different response. With respect to deep-level analysis of law and deep-level comparison, the difference lies in the part of the comparative analysis which the researcher aims to improve: in the first variant it is the exploration of the law, even at the level of a single country, while in the second variant it is the comparison.[14]

As a consequence, the following will have three sections dealing with deep-level analysis of law, deep-level comparison and critical comparative law. Each of these sections contains three sub-sections. It is the position of this book that the first two sub-sections of each section are, generally speaking, helpful in addressing the shortcomings of the traditional method. The third sub-sections present more radical positions which may be seen as more problematic.

B Deep-level Analysis of Law

The need for a deep-level analysis of law is particularly relevant for the part of a comparative analysis which explains the countries' law on a particular matter. The following will discuss two approaches to achieve this: 'law as requiring immersion' and 'law as legal pluralism'. A possible objection against these approaches as tools of *comparative* law may be that they are not specifically concerned with the comparative stage of the analysis. However, as the third sub-section will discuss, this has led to the rejoinder that there is no need to separate general legal scholarship from comparative law.

1 Law as Requiring Immersion

The main idea about immersion is clear for anyone who researches foreign law: typically, it takes some time and effort to understand the content, operation and meaning of the foreign rules. Therefore, the comparatist has to be curious about the country and its rules, without applying a fixed template of understanding that may have worked for another country.

Two authors, Vivian Grosswald Curran and John Bell, use the phrase of immersion explicitly in their writings. Vivian Curran acknowledges that 'total

[13] For a similar terminology see Van Hoecke 2004 ('deep-level comparative law'); Watt 2012 ('comparison as deep appreciation').

[14] This distinction was not sufficiently clear in the first edition of this book, see Patrignani 2015: 286.

immersion' is impossible, since one's own legal culture will inevitably influence one's interpretation of foreign law.[15] Still, the comparatist as an 'outsider' should have precisely the aim of understanding the insider's view, and this:

> necessitates acts of imagination, for the leap into a foreign mentality necessarily involves a leap of imagination, no matter how steeped the comparatist may be in the target country's legal culture. An act of imagination must occur in the penetration by the legal comparatist of foreign legal cultures, as the comparatist begins to understand new categories, new patterns of interpretation.[16]

It is interesting to note that Curran uses the term 'legal culture' in the context of law as requiring immersion. This is akin to the use of 'legal culture' by others – for example, referring to legal culture as the ideas, value preferences and moral foundations of the law.[17] Yet, legal culture is also employed in the context of socio-legal comparative law, namely, as far as it relates to the way law is applied in practice. Of course, both meanings overlap, since the application of the law depends on the deeper meaning legal rules have in a particular society. Pragmatically, thus, it may be helpful to include both elements within the meaning of legal culture.[18]

John Bell too suggests that we should understand legal systems on their own terms.[19] This means, taking the 'insider's view on legal systems', i.e. becoming the 'voice of that system, albeit with a non-native accent'.[20] However, Bell also suggests that the description of foreign laws can be accommodated to make them understandable to the local audience.[21] This is not an uncommon recommendation: for instance, in a comparative law book written explicitly for the Indian market, one might expect the Indian point of view to influence the presentation of the subject.[22]

The overall advantage of 'immersion' is that we do not have to assume that laws can plainly be understood as fulfilling certain functions. Other researchers use different terms to refer to a similar idea. Richard Hyland, for example, calls his approach 'the interpretive method'.[23] To illustrate it, Hyland draws a parallel between comparative law and comparative literature: for instance,

[15] Curran 1998a: 90.

[16] Curran 1998a: 64. See also Dannemann 2006: 392 and Cotterrell 2003: 151 (parallel to 'thick description' in anthropology).

[17] Varga 2007 (with references to his earlier work).

[18] Sunde 2010: 26 (institutional and the intellectual structure of legal culture); Bell 2001: 2–5 (ideological and practical aspects of culture); also Merry 2010: 48–52 (practices of legal institutions, public attitudes and beliefs about the law, legal mobilisation, legal consciousness). See also Chapter 6 at Section A 1 (a), below.

[19] Bell 2006a: 41. See also Bell 2001: 17; Valcke 2012: 25.

[20] Bell 2011: 168. Similarly, Hall 1963: 33, 67 (comparative law as 'humanistic legal sociology', understanding law from an internal perspective).

[21] Bell 2011: 171. See also Husa 2015: 18.

[22] Khan and Kumar 1971: 46. Similarly, Lemmens 2012: 317, 321 (bridge between foreign law and domestic audience).

[23] Hyland 2009: 106. See also Hyland 1996.

a researcher of novels from different countries that all relate to the Second World War would not start with a functional question, but would analyse the novels as they are.[24] In his comparative study of the law of gifts, Hyland accordingly recommends that:

> we think of gift law in the context of the world that jurists imagine for its operation, the purposes gift norms are designed to achieve, and the effects these norms are imagined to have. There is no need to consider beforehand the extent to which that world is real or whether the norms have any particular effect or function.[25]

Notwithstanding this critical positioning towards comparative law's functionalism, it may be objected that immersion and interpretation are not specific tools for *comparative* legal research. Even when a researcher only deals with one country, it is necessary not to remain at the surface level of the functionalities of the positive law but to become immersed into that legal system. However, it may also be said that identifying the limits of functionalist comparative law can have further implications: as with most postmodern comparative law, the immersion into one legal system means that the comparatist is likely to emphasise the difference between this law and the laws of other countries.

For example, this encouragement to reflect on differences is found in Curran's research. Following Isaiah Berlin, she stresses that humans define their identities by way of being different from others. Thus, a comparative approach is essential to make legal reasoning intelligible to members of one's own legal system, as well as others.[26] Similar but with another conceptual starting point is Igor Stramignoni's approach. He suggests applying Heidegger's concept of 'poetry' to comparative law. Poetry, as understood by Heidegger, refers to 'what really lets us dwell', and with this the 'comparatist-poet' will be equipped to tell 'what difference the law makes' and develop a 'poetic awareness of difference' between legal systems.[27] Such reasoning could also be phrased as a recommendation of law as requiring immersion.

2 Law as Legal Pluralism

A deep understanding through immersion can be concerned with formal statute or judge-made law. However, it is also an important feature of deep-level and postmodern comparative law that it argues that law has to be understood in a more comprehensive way, namely, as legal pluralism. Such a view also reflects research in other academic fields dealing with topics such as cultural, social, structural, political and socio-economic pluralism.[28] A representative definition of legal pluralism is:

[24] Hyland 2009: 116. [25] Hyland 2009: 106. [26] Curran 1998b: 667; Curran 1998a: 46–8.
[27] Stramignoni 2002: 760, 763. [28] Moore 1986: 20–2.

> Legal orders or single rules may be rooted in different sources of legitimacy, such as age-old tradition, religion, the will of the people, or agreements between states. The coexistence of such legal forms in the same social field (however defined) is generally called 'legal pluralism'.[29]

A widespread distinction is between weak and strong forms of pluralism.[30] In the weak form, multiple legal orders are only recognised if they are accepted by the state. By contrast, strong legal pluralism refers to the view that there can also be 'law' without the involvement of the state. In such a scenario, it can then also be justified to speak about 'ubiquitous law' as the notion of law is extended to all 'shared normative experiences' with 'policentricity of authorship and control over it'.[31] Thus, strong legal pluralists reject the view that only the state can make law, or even regard this as a 'myth'.[32] In addition, legal pluralism is seen as the rule since the social order is typically based on a variety of sources of normativity.[33] These sources can exist at the country level, but this is not necessarily the case. Indeed, it may be argued that modern societies 'no longer aspire to one set of apparently solid moral and cultural values';[34] thus, these multiple formal and informal sources may be as prevalent at the sub-national and supranational level.[35]

Clear examples of legal pluralism are found where customary law plays an important role, in particular in tribal communities of developing countries, but also in the laws of groups and communities such as the Quakers, Romani, Native Americans and religious organisations.[36] Thus, in the first instance, the pluralism is one between state and non-state legal orders. Secondly, a plural situation occurs since these local and personal non-state laws are not pure any more, but interrelated with the other legal domains, including the ones of state law.[37]

In addition, legal pluralists are keen on emphasising that, even in mainstream Western legal systems, pluralism is widespread. This should not be seen as a surprise since, in medieval Europe, canon, Roman, feudal, royal and urban laws, as well as laws based on religious, ethnic and commercial affiliation, all co-existed in the same territory.[38] Today, too, Western law is seen as a combination of human design and human experience, since law obtains its legitimacy 'from within the cultural, private societies of peoples and not just

[29] von Benda-Beckmann et al. 2009a: 2. A good source of information is the website of the Commission on Legal Pluralism, available at www.commission-on-legal-pluralism.com.
[30] Following Griffiths 1986. Similar is the distinction between normative/institutional and sociological concepts, see Auby 2017: 154.
[31] Melissaris 2009: 5, 6. [32] Menski 2006: 115, 183.
[33] Moore 2005: 1; Mattei 1997a: 105, 107, 119. [34] Banakar 2015: 261.
[35] See, e.g. Moore 2005: 307; Twining 2007: 85; Griffiths 2009a: 166. See also Chapter 10, below.
[36] For these examples see, e.g. Weyrauch 2001; Bradney and Cownie 2000; Cooter and Fikentscher 1998. See also Chapter 4 at Section C 3 (a), above (on role of customary law in Africa).
[37] Griffiths 2009b: 503.
[38] Goldman 2008: 38; Berman 2009: 227. See also Glenn 2013: 17–34; Tamanaha 2008: 377–81.

the public, external, political constitution of the state'.[39] As an example, researchers have identified the law on assisted suicide: here, apart from the positive criminal and medical law, a pluralist understanding of the law also includes the guidelines of medical associations and public prosecutors, and how these are translated into social practice.[40]

From a normative perspective, scholars of legal pluralism tend to support the idea of plural legal orders. Yet, it is also difficult to make a general assessment: while the community nature of the norms that give rise to legal pluralism may be seen as advantageous, problems arise when someone does not want to be bound by these community standards any longer. Thus, it has been suggested that what matters is whether legal pluralism includes the notion of choice of law.[41] In the context of law and development, it has also been discussed how far legal pluralism may either be helpful or harmful for developing countries.[42]

Another challenge is how far it is feasible for a comparative researcher to consider everything that can contribute to social order – for instance, whether also to include means such as 'language, customs, moral norms, and etiquette'.[43] In the context of comparative law, this challenge is not something specific to legal pluralism, since even traditional comparatists would not be blind to these factors as far as they are regarded as relevant for the functional question of the study. Still, the position of legal pluralism presents a shift in emphasis as it tells comparatists that, from the very start, pluralist notions of law should be at the core of their analysis.

The question remains, however, how far legal pluralism is a specific tool of comparative law. For example, research on assisted suicide may deal with the legal position in one country only and, in doing so, apply the notion of legal pluralism. But there is also the view that, even in such a scenario, we may have a case of comparative law, as the following sub-section will discuss.

3 General Legal Scholarship as Comparative Law

Some comparatists have expressed the view that we should think about comparative law as a variant of legal research more generally, not a unique and distinct method.[44] As a consequence, it would not be a problem that immersion and legal pluralism can also be relevant for the analysis of just

[39] Goldman 2008: 51. See also Easterly 1977: 209.

[40] See Adams and Griffiths 2012. The underlying book is Griffiths et al. 2008. Similar from the perspective of 'law and governance': A. McCann 2015.

[41] Smits 2013. See also Chapter 9 at Section A 1 (c), below.

[42] See Chapter 11 at Sections B 2 and C 2, below.

[43] Tamanaha 2001: 180; also Tamanaha 2008: 390–1 (criticising legal pluralism as a 'troubled concept'); Tamanaha 1993b (even calling it a 'folly').

[44] E.g. Adams and Griffiths 2012; Lemmens 2012: 304–5, 313; Bell 2011; Smith 2010. But see also Chapter 13 at Section B 2, below (comparative law as variant of research from any discipline that has a comparative dimension).

one legal system and therefore for both comparative law and general legal scholarship.

It is also possible to go further and suggest that concepts of comparative law can have a wider application than traditionally assumed and that therefore much of general legal scholarship can be regarded as belonging to comparative law. This line of reasoning starts with the position that we need to go beyond the view that comparative law is 'just' about comparing the formal laws of two or more countries. Thus, for example, if it is said that the comparative investigation can be concerned with 'all formally articulated instances of systemic institutional governance',[45] it means that an analysis of a pluralist legal order can be seen as an exercise in comparative law. Going further, Matthew Dyson suggests that we should allow comparisons of any 'legal domain', even if those belong to the same legal system. For example, it can therefore be 'comparative law' when a researcher compares how, within the same country, tort and criminal law deal with a particular behaviour.[46]

In favour of such a view, it can be argued that only allowing comparisons of different state laws does not reflect the changing configurations of the legal world today as seen in the growing importance of legal pluralism, international, regional, transnational and global law for topics of comparative law.[47] Comparisons are also a general form of knowledge formation.[48] Thus, even for the case of a within-state comparison, some concepts of comparative law can be helpful, for example, whether it may be possible to 'transplant' an idea from one area of law to another, say, how to determine negligence in tort and criminal law.

However, there are better reasons to be wary about such an expansion of the scope of comparative law. Many questions of legal thinking involve comparisons but subsuming all of those under the heading of 'comparative law' would blur the lines between regular legal analysis and comparative law. The typical problems that comparative law addresses are due to the fact that it poses distinct challenges to research and compare foreign laws.[49] Thus, comparative lawyers – be they traditional, postmodern or socio-legal ones – have developed specific tools to address this 'foreignness'. It would therefore be counter-intuitive to expand comparative law to research for which many of these considerations would not be relevant.

As a result, 'comparative law' as a distinct discipline is not concerned with research that compares different areas of law enacted by the same law-maker. As far as we have different law-makers, however, it can be helpful to consider, at a second level, a comparison between areas of law. For example, as an exercise of *comparative*-comparative law it has been suggested that

[45] Grellette and Valcke 2014: 573. [46] Dyson 2014. See also Dyson 2015.
[47] See Chapter 9 and Chapter 10, below. [48] Husa 2015: 60–2.
[49] Similarly, Adams 2014: 89.

a comparison between US and European models of constitutional review can benefit from other US–European comparisons, for example, cross-country variations in punitiveness.[50]

C Deep-level Comparisons

A number of approaches have been developed that aim to provide 'deep-level comparisons', thus substituting (or at least complementing) the functional comparison and the search for a 'tertium comparationes' in traditional comparative law. This research is classified here under the headings of 'jurisprudential and structural approaches' and 'cultural and linguistic approaches'. A contentious question, discussed in the third sub-section, is whether comparative cultural arguments can also be used to advance normative positions.

1 Jurisprudential and Structural Approaches

(a) Jurisprudential Approaches

Comparative law is sometimes said to have the aim to generate 'general legal knowledge that is not as State-specific in nature as in national legal research'.[51] Jurisprudential approaches that aim to identify common legal structures are an example of such research. This search for commonalities has been a topic of 'universal' or 'general jurisprudence', notably John Austin's concern for an 'exposition of principles, notions and distinctions common to all systems of law'.[52] Similarly, Jerome Hall suggests that comparative law should try to identify concepts that legal systems have in common despite differences in specific rules, the ultimate aim being a 'transnational theory of what is common in all legal systems'.[53]

To provide two more specific examples, Martin Shapiro's study on courts had the explicit aim of moving beyond descriptions towards 'a more general theory of the nature of judicial institutions'. He found that, across countries, courts do not only solve conflicts, but they also have many political functions, such as setting social policies or providing legitimacy to government and politicians.[54] In a number of books, George Fletcher has aimed to develop universal concepts of criminal law. Though the surface structure of the law is admitted to be diverse across countries, Fletcher finds a 'universal grammar',

[50] Bomhoff 2017. For the latter topic see also Chapter 6 at Section C 2, below.
[51] Husa 2015: 21.
[52] Austin 1885: 1073; see also Husa 2015: 20 (for Anselm von Feuerbach's aim for a universal jurisprudence); Van Hoecke 2015: 13 (Hart's distinction between primary and secondary rules as common core). A different use of the term 'general jurisprudence' is advocated by critics of such universalism: e.g. Tamanaha 2011c; Tamanaha 2001; Twining 2009a: xiv.
[53] Hall 1963: 59, 62. Similarly, Klami 1981: 21 (comparative law as empirical test of legal theory).
[54] Shapiro 1981: vi, viii, 17–36.

since criminal law everywhere is shaped by the same conflicts and controversies.[55]

However, it is also clear that there are limitations to a search for such global similarities. Even if one follows the philosophy of a natural law based on certain moral human universalities, there can still be differences. As far as there are common principles, they may have different forms across countries. And even according to supporters of natural law, there is also 'human law by determination' where the human creativity extends to both form and substance.[56]

Thus, jurisprudential approaches have more often been used to understand and explain differences between legal systems. An ambitious global perspective on this matter was provided by the late Wolfgang Fikentscher. In the mid-1970s, Fikentscher produced a five-volume work on comparative methods of law. It dealt with four legal families – ancient and religious, Romanic, Anglo-American and central European – and analysed their methods of law based on jurisprudential and philosophical streams of thought. For example, the section on central Europe includes detailed discussions of Kant, von Savigny, Puchta, von Jhering, Hegel, Marx and others.[57] In a more recent monograph, Fikentscher examined 'modes of thought' more generally, distinguishing between pre-axial age, East and South Asian, Western, Muslim, Marxist and National Socialist modes of thought. This book goes beyond a jurisprudential approach, in particular drawing on anthropological research.[58] Yet, a review by a well-known anthropologist strongly criticised the idea that the global variety of modes of thought could be condensed into five types.[59]

More frequently, research about jurisprudentially grounded differences is more specific in its subject matter and countries. Typical examples are from, mainly, Western civil and common law countries. Research by William Ewald, Catherine Valcke and Geoffrey Samuel will be used to illustrate this line of research: William Ewald advocates that comparative law needs to become less technical and more jurisprudential. He suggests a transformation of comparative law into 'comparative jurisprudence' with a core interest in the 'principles, concepts, beliefs, and reasoning that underlie the foreign legal rules and institutions'.[60] Thus, the main focus is neither on black letter doctrines nor on external socio-legal aspects of how law works, but it is to understand the 'cognitive structure' of the legal system from the inside.[61] For instance, a comparatist interested in the German law of obligations may start with its Roman origins, but then it is also important

[55] Fletcher 2007. See also Mikhail 2009 (on the world-wide prohibition of homicide as example of a 'moral universal'); Mikhail 2011 (possibility of a universal moral grammar).
[56] Wilcox 2013: 61 (specifically referring to Thomas Acquinas). [57] Fikentscher 1975–77.
[58] Fikentscher 2004. See also Fikentscher 2016: 138–83.
[59] Moore 1996. See also Chapter 12 at Section C 1, below. [60] Ewald 1998: 705.
[61] Ewald 1995a: 1930, 1947–8.

to understand the specific German and European intellectual context; thus, Ewald asks the comparatist to study the ideas of legal thinkers such as von Savigny, Puchta, Windscheid and Gierke, but also Kant and Herder, since the former cannot be understood without having a grasp of the ideas of the latter.[62]

Catherine Valcke follows Ewald's terminology of 'comparative law as jurisprudence', referring to the ideas underlying the positive law.[63] She illustrates this approach by studying the differences between the French and English law of contract formation. French law aims to establish the actual subjective intention of the parties, whereas English law uses an objective concept, incorporating that which the parties reasonably have (and can be taken to have) intended. Valcke relates this aspect of the law to different philosophical and political conceptions about the relationship between the individual and the state:

> The individual in Rousseau's state of nature is, somewhat like contractual intention at French law, exclusively empirical, whereas the individual in Hobbes's and Locke's states of nature, somewhat like contractual intention at English law, combines an empirical and a normative dimension.[64]

Akin to this is Geoffrey Samuel's approach to comparative law, which asks us to identify the 'internal structures of legal knowledge'.[65] For instance, he considers the difference between English and French government liability law. In England the claimant has to prove fault, but not in France. This is said to be related to different concepts about the relationship between the individual and the community:

> In France the emphasis is on the community as a *persona* with its own *intérêt général*; each time an individual citizen is damaged as a result of some activity in the public interest it is unjust, given the constitutional principle of equality, that it should be the individual who bears the cost of the activity. In England, in contrast, a government body is seen simply as an ordinary *persona* with its own individual interest to protect.[66]

Many more examples about the philosophical background of civil-common law differences could be provided. For example, it has been argued that the civil law tradition reflects Cartesian logic – considering the style of the French Civil Code in particular, as well as idealist philosophical traditions and the Enlightenment – whereas the common law has been influenced by utilitarianism and 'intellectual traditions that emphasise empiricist philosophies which stress the importance of observation, particular facts and even common

[62] Ewald 1995a: 1996, 2101, 2107.
[63] Valcke 2004: 731; also Valcke 2012 ('getting inside contract law'). See also Husa 2009.
[64] Valcke 2009a: 86.
[65] Samuel 1998: 827. In his writings Samuel also frequently refers to Berthelot's 'schemes of intelligibility', e.g. Samuel 2014: 81–92; Samuel 2007: 106; Samuel 2004: 73.
[66] Samuel 2014: 18; Samuel 1998: 824 (footnotes omitted). For this topic see also Fairgrieve 2003.

sense'.[67] And it has been suggested that the acceptance of the economic analysis of law in the United States is due to its inclination towards utilitarianism, whereas in Germany the influence of Kantian philosophy puts more emphasis on matters of justice.[68]

(b) Structural Approaches

The position of 'structural comparative law'[69] partly overlaps with jurisprudential approaches. It is based on the belief that the full understanding of particular legal rules in a particular legal system requires an understanding of the underlying principles of the law and interrelated elements of the legal system. The so-called 'playing card analogy' is an intuitive way to illustrate this point: in order to understand the meaning of an individual playing card, we have to understand the system of the pack of cards and the underlying rules of the game. For comparative law, this approach means that identifying such structures is not only crucial for the analysis of each of the legal systems but is also the means to compare whether and why laws are similar or different.

Akin to the doctrinal method of legal analysis, the structural approach is therefore interested in the way lawyers conceptualise legal rules but it also uses this conceptualisation as a means of comparison. Three recent examples of such research deal with questions of private law, where we also see some variation in the way this approach is described. A study on 'impaired consent transfers' in Germany and England expresses the aim to understand the relevant rules as part of 'a larger system of law', considering the 'internal processes' of the legal systems.[70] A study on the law of errors in the contract law of Germany, France, Italy and England compares the 'structures of argumentation and reasoning' of the relevant legal rules in order to identify similarities and differences.[71] And research on the doctrine of unconscionability in Louisiana, as compared to other countries, explains its aim as to 'look to the philosophical foundation of a legal system to determine the coherency of the proposed solutions'.[72]

The literature sometimes also refers to 'structural*ist* comparative law'.[73] This can be regarded as a variant of structural comparative law which is more closely aligned to the 'structuralism' of linguistics and anthropology in the tradition of Ferdinand de Saussure and Claude Lévi-Strauss.[74] Possibly, this association with the methodologies of non-legal disciplines makes structuralist comparative law more interdisciplinary in outlook than its structural

[67] Collins 2008: 156, 178. See also Chapter 3 at Section B 1, above.
[68] Wagner-von-Papp 2014: 143–4. See also Chapter 3 at Section C 3, above.
[69] See generally Samuel 2014: 83, 96–107 (with 106 for the playing card analogy), 156–8; Husa 2015: 127–30; Van Hoecke 2015: 11.
[70] Häcker 2009: 5. [71] Lomfeld 2015: 253. [72] Smith 2016: 1337.
[73] Husa 2015: 133; Mattei 2001: 251–2; Somma 2014: 150–5; Scarciglia 2016: 70–82.
[74] Sacco 1991: 5. See also Chapter 2 at Section C 1, above (for legal formants).

counterpart. However, both have in common that they aim to analyse the complex configuration of the elements that make up legal systems. So it may often only be a terminological difference whether research is presented under the headings of structural or structuralist comparative law.

(c) Further Discussion

The question that remains is how much these jurisprudential and structural approaches differ from traditional comparative law. Traditionalists suggest that a comparative analysis should start with a description of the laws, which is then followed by an explanation of similarities and differences.[75] It is clear that, in this latter phase at least, concepts and theories play an important role. Thus, it seems to be that the difference is mainly a formal one: either start with a black-letter analysis of the law followed by more jurisprudential concepts, or adopt a jurisprudential approach from the very beginning.

However, it can also be suggested that this difference may well matter. It can make sense to start with theories and concepts, since these tend to be older than the concrete legal norms.[76] Moreover, in many papers of traditional comparative law, it seems that the comparatist puts all her efforts into a detailed description of the legal rules, with the explanatory part becoming a mere supplement. Thus, there may be some need to follow an approach that puts less emphasis on a mere black-letter description of legal rules but uses jurisprudential and structural thinking as the main guiding principle.

A limitation of the structural approach to comparative law is that the law of a country is often not 'a tidy and ordered system'.[77] Details also depend on the precise topic that a comparatist aims to analyse. While for many topics it is helpful to consider the general philosophical values of a legal order, this link may be weaker for some modern and technical legal questions, such as the regulation of the Internet or differences in tax rates. Looking for deep philosophical meaning and logical structures is also likely to be less relevant for areas that are shaped by contemporary political forces, such as environmental laws or anti-terrorism legislation.

2 Cultural and Linguistic Approaches

(a) Cultural Approaches

Since the 1950s, the humanities and social sciences are said to have experienced a shift from materialism, universalism and ideology to culture-bound approaches ('cultural turn').[78] This also had an impact on legal scholarship as we are told, that 'to consider law, one cannot fail to see it as part of culture', or

[75] See Chapter 2 at Section A, above. [76] Klami 1981: 26. [77] Pirie 2013: 152.
[78] Sarat and Simon 2003: 1–2; Hantrais 2009: xi, 73; Nelken 2012: 313.

that law is 'first and foremost, a cultural phenomenon, not unlike singing or weaving'.[79]

The view of law-as-culture has become a prominent feature in the comparative law literature. In contrast to traditional, philosophical and structural approaches, it has been less focused on Western countries and matters of private law – and this more extensive scope of application may indeed be one of its appeals.

For example, in a number of articles, Bernhard Grossfeld and collaborators examined how the mutual influence of law and culture shapes differences between legal systems.[80] Culture is understood broadly: to start with, it is about the written text and language. For example, a comparison between Chinese law and that of a Western legal system needs to consider that the Chinese language uses more concrete words than Western languages.[81] It also requires an immersion into the 'milieu and social setting' that affect the convictions of the law-maker and its interpreters.[82] In addition, Grossfeld and colleagues mention other 'invisible powers' that comparative lawyers should consider. 'Invisible' does not mean that these powers cannot be identified, but that they are usually taken for granted: for example, whether and how law forms and reflects history, geography, philosophy and ideology.[83]

In some legal systems, and for some areas of law, a cultural view may be particularly relevant. For example, Menachem Mautner starts his book on the 'law and the culture of Israel' with the observation that Israeli law reflects 'the struggle over the shaping of the Jewish culture and identity'.[84] Writing about Russia, Uriel Procaccia takes the position that the widespread antipathy towards contracts is related to the fact that elements of Western European culture, such as individualism, materialism, rationalism and humanism, have not been well received in Russia.[85] It is also evident that an understanding of the rules of traditional societies requires a cultural and anthropological perspective.[86]

Criminal law and criminal procedure in particular have both been subjects of the cultural approach to comparative law. For example, in order to understand why in the United States someone can be jailed for minor crimes that in Europe would only result in a fine, one may consider that the US policy reflects 'strong Christian values based on Old Testament retribution'.[87] There may also be 'two different visions of human moral nature', since the concept of 'human

[79] Rosen 2006: 5; Legrand 1999: 5.
[80] Grossfeld and Eberle 2003: 295. See also the following footnotes and Grossfeld 1990.
[81] Grossfeld 2005: 173. See also Hiller and Grossfeld 2002 (on comparative legal semiotics); Gaakeer 2012: 259–60 (different language versions as different modes of thought).
[82] Eberle 2009: 458; Grossfeld and Eberle 2003: 293, 306, 309.
[83] Grossfeld and Eberle 2003: 292; Eberle 2009: 452–3; Eberle 2007: 97.
[84] Mautner 2011: 1.
[85] Procaccia 2007. For similar views about Japan and China see Chapter 4 at Section C 2 (a), above.
[86] See, e.g. Moore 2005: 86, 100; Geertz 1983 and Chapter 12 at Section C, below.
[87] Eberle 2009: 484.

evil' may be immanent in US criminal law, but not in its German counterpart.[88] Specifically with respect to capital punishment, it has been argued that understanding it purely as a means of crime control misses the point: the death penalty is deeply embedded in the cultural life of the United States, whereas the abolition of the death penalty has become part of the European identity.[89]

Criminal trials too should not be seen in purely functional terms. David Garland speaks about 'a rhetoric of symbols, figures, and images by means of which the penal process is represented to its various audiences'.[90] As regards differences in criminal procedures, it has been suggested that the adversarial position of common law countries is related to individualism and Puritanism, while the inquisitorial position of Romanist civil law countries is linked to communitarian concepts and Catholicism.[91] Research by Lawrence Rosen contrasts Western and Islamic criminal trials. In the West, the trial is restricted to the facts that are relevant for the law in question. In the Islamic trial, by contrast, the character, background and social relationships of the accused are treated as at least as important. It is therefore crucial to understand that cultures may have different preferences as regards the information seen as relevant for the application of the law.[92]

Other scholars too have explored the connections between law, culture and religion. At a general level, there are said to be strong methodological and epistemological similarities between law and theology since both create their 'own abstract constructions' which do not necessarily depend on external realities.[93] The linkages are particularly close where the comparatist examines religious laws: for example, consider the statement that 'Jewish law, which is binding upon Jews according to the tradition, produces Jewish culture, and Jewish culture produces Jewish law'.[94] But there can also be more indirect links. For example, Gary Watt speculates about a parallelism between the English trust, on the one hand, and the dualism of the Church of Rome and the Church of England in sixteenth-century England on the other: namely, that the possibility of splitting the asset into a legal and an equitable title, and this religious dualism, are both seen as 'a creative expression of a culture of divided unity'.[95]

[88] Kleinfeld 2016.

[89] Boulanger and Sarat 2005; Girling 2005. For socio-legal approaches on this topic see Chapter 6 at Section C 2, below.

[90] Garland 1990: 17. See also Garland 2001 (for crime control more generally); Marrani 2010 (comparing the symbolic position of the judge in England and France); Chase 2005 (dispute resolution systems as reflecting but also affecting culture).

[91] See Langer 2014: 896.

[92] Rosen 2006: 99–100, 109–10; also, ibid. 26 (in the West judges should not bring their own moral values into their decisions). On Islamic justice and culture more generally see Rosen 2000 and Rosen 1989 (fieldwork research of qadi courts in Morocco).

[93] Samuel 2012: 174, 188–90.

[94] Kwall 2015: xiii (challenging the notion of a secular Jewish culture).

[95] Watt 2012: 101–2. See also Chapter 6 at Section A 2 (b), below, for linkages between law and religion.

Works of art, in particular literature and film, are also said to be revealing for comparative lawyers.[96] To be sure, a novel or a film with a law-related plot is unlikely to present an accurate description of the respective legal system. Yet, it can offer important insights: it may illustrate and reflect the legal attitudes and aspirations prevalent in a particular country and it may reveal the reasons why a law-maker has felt the need to address a particular social phenomenon.[97] In addition, even if there has been no impact on the actual law, works of fiction can be used to compare existing laws with laws as they exist in the human imagination. For example, insights from literature and films can help to identify 'virtual transplants' – say, when individuals of foreign countries believe that trial proceedings in their own country are akin to those watched in Hollywood movies.[98] It has also been suggested that the 'virtual law' of computer games and online worlds can be a point of comparison for comparative law.[99]

(b) Linguistic Approaches

Postmodern comparative lawyers often emphasise that it is necessary to take the language of the law more seriously than in traditional comparative law.[100] Questions of language can be relevant where two countries share the same language;[101] yet, the main focus is on circumstances where the comparatist examines countries which do not have the same legal language and/or writes about countries in a language foreign to this country. Here a growing body of literature examines the relevance of translation studies and linguistics for comparative law. A key point of discussion is how foreign legal terms should be translated:[102]

A functional approach to translation focuses on the target language. The aim of the translation is that the receiver (i.e. the reader of the translated text) reacts to the text in a way that is equivalent to a reaction as if the text had initially been written in the target language. The justification for such 'domestication' of the text is seen in the nature of law as a language for specific purposes. Law's normative dimension means that it aims to tell the reader to act in a particular way. Thus, in this respect, it is similar to translating, say, assembly instructions for IKEA furniture into different languages.

[96] Olson 2010; Dellapenna 2008; Samuel 2012: 189–90; Watt 2012: 84 ('aspect of law that is art').

[97] Siemens 2016 (impact of popular crime dramas on criminal law); Procaccia 2007 (using pictures and other illustrations for analysis of Russian law). See also Legrand 2006b: 368 (even fantasies sustained by a culture are a valuable clue for comparatist).

[98] Nelken 2006: 940; Mattei and Nader 2008: 208.

[99] Grimmelmann 2004.

[100] For traditional comparative law see Chapter 2 at Section A 2 (b), above.

[101] See Sacco 1991: 16 (comparing the language of the civil codes of the former Western and Eastern Germany)

[102] For the following see Galdia 2009: 224–37; Pozzo 2012; McAuliffe 2014; Samuel 2014: 144–7; Husa 2015: 125–7, 193–6, as well as the contributions in *The Translator* 20:3 (2014) and Glanert 2014.

A literal approach, by contrast, argues that translation needs to be faithful to the linguistic particularities of the source text. This too may refer to the specific nature of law. In law, every word is important and may give rise to problems of interpretation: so it is crucial to retain the original structure of the text, even if it sounds strange in the translated version. In particular, this is the case where there is some ambiguity in the source language as such ambiguity also has to be retained.[103]

A cultural approach aims to get the best of both worlds. Like the functional translation, it aims for a non-literal translation that reads well, while, like the literal translation, it also aims to be sensitive to the source language. The view of legal language as culture can also draw on the parallel to other cultural texts, say, religious books, where a translation has to attempt a cultural transfer of the text. Thus, here too, the aim has to be 'to illuminate, not to eliminate, cultural differences'.[104]

Following the view of language as culture has further implications. A topic of a subsequent section of this chapter is that the comparatist is sensitive to, and possibly sceptical about, the ability of language to transmit meaning.[105] For the present section, it is important to note that this view asks comparatists to consider the embeddedness of a legal text in both the general culture and the legal culture of a country. Often such research also has a historical dimension, tracing the evolution of a country's legal language, including influences from other languages.[106] Thus, according to this perspective, linguistic, cultural and historical approaches are bound to overlap.

Linguistics, being a diverse field of research,[107] can also be related to approaches to comparative law discussed in other chapters of this book. For example, research on socio-linguistics deals with the way language is used in a particular social context. It can therefore be relevant for socio-legal comparative research[108] in order to understand the context of the legal language, say in a trial or a contract. More specifically, whether a court considers case law from foreign countries may depend on whether they share the same legal language.[109] Corpus linguistics is an approach which studies language through existing 'real world' text, often with the use of quantitative methods. Thus, this form of linguistics is closely related to research on numerical comparative law, in particular methods of content analysis which aim to identify similarities and differences between the legal texts of different legal systems.[110]

[103] See McAuliffe 2014: 83–4 (for deliberate ambiguity in decisions of the CJEU).
[104] Baaij 2014b: 113. See also the research by Grossfeld discussed in the previous section.
[105] See Sections D 2 and 3, below.
[106] Mattila 2013 (for European countries); Pozzo 2014 (for non-European ones). See also Chapter 3 at Section C 1, above (for languages and legal families).
[107] Cf. McGregor 2015: 3 (links to other humanities, social sciences and hard sciences).
[108] See Chapter 6, below.
[109] For this topic see Chapter 7 at Section B 2 and Chapter 8 at Section B 1 (b), below.
[110] See Chapter 7 at Section C 1, below. For an example of research applying corpus linguistics to court judgments see Goźdź-Roszkowski and Pontrandolfo 2013.

(c) Further Discussion

A cultural approach is said to have the advantage that the comparatist does not have to find a particular function as a common theme but can develop the criteria of comparison from the units under investigation.[111] The law-as-culture view is also an effective way to challenge the position of some traditional comparative lawyers that law is merely a technical tool to fulfil certain functions.

However, there are also some problems with this approach. Comparatists should not assume that all elements of the law are deeply culturally embedded as law reforms may also aim to change current cultural practices.[112] Moreover, the strong emphasis of the law-as-culture view on explaining differences needs to be aware of its limitations. There is the risk of treating a country's culture and law as internally coherent wholes, or even closed, static and immutable 'monads'.[113] Consequently, if asked why a particular country has a particular law, one could simply provide the meaningless 'explanation' that this is just the way this country's culture deals with a particular situation. Such reasoning would also be circular: 'culture is as much a consequence as a cause of behavior: if anything, it is not culture that explains behavior, but rather behavior that defines culture'.[114] In addition, it has been argued that such a view is based on a cross-disciplinary misunderstanding:

> legal anthropologists assert that legal comparatists might have misinterpreted the concept of culture, presenting it as integrated and relatively harmonious ideas and practices of a particular group, instead of seeing it more as actions, practices and beliefs that are relatively flexible and open to change.[115]

This criticism does not deny the role of culture, but the comparatist should be open as to the precise role that cultural factors can play in a particular legal question. For example, it is possible that different cultures have similar laws and similar cultures different ones. This calls for an analysis of the causal relationship between culture and legal institutions.[116] It is also argued that, today, we live in 'era of cultural hybridity and interconnectedness' with 'no longer [just] one prevailing morality at the national level'.[117] Thus, the comparatist needs to explore law's cultural history but also be mindful of changes to law's cultural embeddedness.

[111] Gingrich 2015: 413–14 (explaining the comparative method in anthropology).
[112] See Pirie 2014: 95; also Nelken 2003a: 456 (for legal transplants 'geared to fitting an imagined future').
[113] Riles 1999: 241; Peters and Schwenke 2000: 814; Comparato 2014: 11.
[114] Law 2011a: 1432. See also Nelken 2007a: 123; Nelken 2010: 50–1.
[115] Vermeylen 2015: 307.
[116] For an example see Zhang 2016 (on culture and property law in China, England and Japan). Such causal questions are frequently addressed in socio-legal comparative law, see Chapter 6 at Section A 2, below.
[117] Riles 2015: 163; Smits 2012: 81.

3 Normative Cultural Comparison

Beyond the aim of explaining other legal systems, cultural aspects are sometimes used in a normative manner. One variant is the 'cultural constraints argument', which argues that differences between legal systems are 'unbridgeable', since laws are embedded in 'unique national cultures'.[118] Legal diversity is then presented in a positive way. Understanding that law is culture-specific should lead to respect, tolerance and appreciation of difference;[119] thus, as in multicultural societies, communication becomes richer 'with perceptions of difference being part of the richness'.[120] Relatedly, it is argued that legal pluralism has a normative dimension in supporting a 'sustainable diversity of laws'.[121]

However, there is the apparent risk of cultural relativism. If we always had to appreciate foreign laws as being part of another country's culture, this would also embrace cruel and dictatorial laws which do not deserve to be appreciated.[122] Thus, while there are good reasons to be tolerant towards foreign cultures, the cultural argument cannot be an absolute reason to justify any possible legal position.

This leads to the question whether a view of law-as-culture may be used for the opposite purpose, namely, to support one particular legal model and challenge another one. Often postmodern comparatists are sceptical about the use of comparative law for policy recommendations as this may be seen as a 'suppression of local knowledge'.[123] Yet, some are also supportive of this idea. For example, Horatia Muir Watt suggests that law is a 'contextualised cultural phenomenon' and that comparative law is a way of questioning legal norms,[124] and John Bell explains how comparative law can contribute to the normative ambitions of jurisprudence.[125]

More controversially, a normative cultural position has been taken by Mary Ann Glendon, writing, amongst others, about the abortion laws of the United States and Western Europe (as they were in the late 1980s[126]). Referring to Plato, Glendon takes the view that law is not only about legal rules, but that it 'tells stories' about attitudes and behaviours. It follows that comparative law has a 'pedagogical claim' when the experience of other countries shows

[118] Antokolskaia 2007: 256 (for family law). See also Grossfeld 1990: 41 (uniqueness of legal systems).

[119] Menski 2006: 11, 26; Menski 2007: 189 (aim to 'construct plurality-conscious models of handling legal diversity'); Darian-Smith 2013: 108–9 (epistemological diversity needed); Cotterrell 2006: 712.

[120] Cotterrell 2007: 136. [121] Glenn 2011; Glenn 2001: 50. See also Section B 2, above.

[122] Peters and Schwenke 2000: 819. Similarly, Cao 2016 (for culture in law and development).

[123] Samuel 2014: 42.

[124] Muir Watt 2000; also Muir Watt 2012 (specifically dealing with the field of global governance). Similarly, Fletcher 1998.

[125] Bell 2016: 141–5. For its more analytical ambitions see Section 1 (a), above.

[126] For comparative quantitative research on the liberalisation of abortion laws in recent decades see Boyle et al. 2015; Finlay et al. 2012.

deficiencies of our attitudes and behaviours.[127] Glendon contends that this is precisely what can be said about the 'excessively liberal' US abortion law:

> A Martian trying to infer our culture's attitude toward children from our abortion and social welfare laws might think we had deliberately decided to solve the problem of children in poverty by choosing to abort them rather than to support them with tax dollars.[128]

Reviewers of Glendon's book have noted that it is somewhat ironic that she uses the concept of 'law as storytelling', developed by the political left and radical feminism, to suggest a shift to a more conservative abortion law.[129] The more substantive point of criticism is that Glendon makes a policy suggestion on a controversial issue, but avoids openly discussing politics, the socio-economic context of the law and the way any such rules influence the practice of abortion.[130] These points are useful to note, since they will re-appear in the subsequent sections on critical and socio-legal comparative law. Moreover, it shows that, as with the 'cultural constraints argument', a reference to 'culture' on its own is insufficient to justify a particular policy response.

D Critical Comparative Law

The term 'critical comparative law' is occasionally used in the literature, but often without a precise definition.[131] This is not implausible since the corresponding 'critical legal studies' was seen as a movement, not a fixed canon. Much the same can be said about other critical theories, such as literary theory. Thus, it is best to use the term critical comparative law in a pragmatic way as including all comparative legal research closely related to such critical approaches. The following will elaborate on it in the sub-sections 'law as politics', 'law as discourse' and 'negative comparative law'. A common feature of these three positions is that they aim to challenge the validity of findings of other comparatists, be it at the level of the descriptions of the law, the comparisons or the making of policy recommendations.

[127] Glendon 1987. See also Glendon et al. 2016: 8 ('power and duty to make a critical evaluation what he or she discovers through comparison'); Glendon 2007 (re-stating the reference to Plato).

[128] Glendon 1987: 55.

[129] Bartlett 1987. Glendon's 'pro-life' position also became more prominent later on, notably when she was US ambassador to the Vatican in 2008–9.

[130] Cohen 1989: 1270; Fineman 1988: 1443. See also Rebouché 2014 (for the final point, phrased as a 'functionalist approach to comparative abortion law').

[131] See, e.g. Frankenberg 1985: 434 (for hidden political agenda of Western-centric approach of comparative law); Twining et al. 2006: 2 (reference to the 1997 Symposium on New Approaches to Comparative Law, published in the *Utah Law Review*); Somma 2006 and Somma 2007 ('fight' against positivism); Merino Acuña 2012 (referring to the Frankfurt school). But also Örücü 1999: 131–2 ('transfrontier mobility of law and reciprocal influence between systems'), though this may also be seen as part of mainstream comparative law.

1 Law as Politics

The US critical legal studies movement of the 1970s contested the established division between law and politics. When traditional lawyers pretended that law can be applied in a logical and neutral way, this was seen as pure rhetoric in order to disguise hidden agendas, and that in fact law always has a political and ideological dimension.[132]

Turning to comparative law, political or ideological factors can, on the one hand, be used to explain similarities and differences. Such a political dimension is obvious when one compares the constitutional law of countries with different political systems, and ideology is likely to be a decisive factor for areas such as immigration and labour law.[133] But these factors can also be relevant elsewhere. For instance, whether a legal system provides for precontractual liability may depend on whether a communitarian social ideology is prevalent in the country in question.[134] It has also been suggested that modern family laws are less a reflection of culture but of political determinants, such as a particular ideological position on topics such as marital property, divorce and homosexuality.[135]

On the other hand, the notion of law as politics can be used in a more normative way. Thus, law becomes 'legal mobilisation' aiming to pursue a particular social aim.[136] This notion shares with a functional approach the belief in the effect of law; yet, it is also different since a functional comparatist is merely interested in the legal response to a specific situation while the aim here is to change society permanently. In the comparative literature, Brenda Cossmann is open about:

> putting the question of political agendas onto the agenda of comparative law . . . We are attempting to contribute to the debate about how law can be used, if at all, in women's struggle for social change – to debates about how law can be used to begin to destabilize hierarchical gender identities in India. We make no claims to neutrality in our work, but rather begin from an explicitly and unapologetically political location.[137]

Political views are also frequent in the discussion about postmodernism, hegemony and comparative law. Critical studies see it as a main feature of the postmodern world that today's capitalism works to the sole benefit of multinational corporations and their supporting elites.[138] Here, 'law' also plays a role. For instance, Western legal influence and the use of comparative law are said to have a hidden political agenda to the detriment of the poor and

[132] See, e.g. Hutchinson and Monahan 1984; Tushnet 1991.
[133] See, e.g. Kennedy 2012: 39, 42.
[134] Fletcher 1998: 694. For precontractual liability see also Chapter 3 at Section B 3 (c), above.
[135] Bradley in EE 2012: 314–31.
[136] Morrill et al. 2015. See also Chapter 11 at Section B 1, below (for legal empowerment).
[137] Cossmann 1997: 542. [138] E.g. Harvey 1989a; Jameson 1991.

oppressed in developing countries.[139] In this literature, it is therefore suggested that law should not be seen as depoliticised and neutral; rather, it is necessary to reconnect law with politics in order to make use of its 'emancipatory' and 'counter-hegemonic' potential.[140] Later chapters of this book will return to these topics, for instance, in the context of legal transplants and law and development.[141]

David Kennedy's article on 'New Approaches to Comparative Law: Comparativism and International Governance' tells us that it is not only the politics of the law but also the politics of the comparative lawyers that deserve attention. Amongst others, Kennedy shows how political attitudes determine the views of comparatists. This can be seen in both the cultural and the technocratic forms of comparative law. According to Kennedy, the cultural variant is interested in private law, legal cultures and area studies. Here, a left-wing comparatist is said to hold the view that national differences in legal culture and legal rules, in particular in the field of private law, should be left intact, and that local cultures should inform the universal one, whereas a right-wing comparatist supports the standardisation and codification of private law, as well as the use of legal transplants in order to reduce the transaction costs set by local cultures. The technocratic variant is directly concerned with topics of international economic law, harmonisation and development. Here, Kennedy identifies a left-wing view with an approach that is, on the one hand, supportive of international law but, on the other hand, regards the World Trade Organization (WTO) as a system that suppresses differences and cultural specificity. A right-wing view, then, favours internationalisation as a bargain process between countries, while supporting a system of regulatory competition in which universal rules of the neoliberal variant emerge.[142]

Kennedy also discusses how comparative law can benefit from a closer alignment with international law. Comparative lawyers tend to attribute legal rules to historical commonalities and legal borrowings, whereas international lawyers are interested in international governance, that is, to build the 'normative or institutional conditions for international public order'.[143] But that should change:

> [I]f we are to rejuvenate comparative law, criticize or claim the discipline, we should do so not simply by interrogating the methods and limits of its own project, but should also see comparative law in relation to the broader problems of governance in which it plays, often unwittingly to be sure,

[139] Frankenberg 1985: 434; Peters and Schwenke 2000: 822; Santos 2004: 192–3; Corcodel 2014: 92–3 (for the role in colonialism).
[140] Santos and Rodriguez-Garavito 2005: 15, 17; Santos 2004: 351.
[141] See Chapter 8 at Section C and Chapter 11 at Section C, below.
[142] Kennedy 1997: 594, 606–12. See also Siliquini-Cinelli 2015 (criticising the variant of right-wing technical comparative law).
[143] Kennedy 1997: 549 and 583, 601–5.

> a number of important roles. And we should see comparativists as people with projects – political, professional, and personal projects of cosmopolitan governance.[144]

Finally, Kennedy indicates the contribution comparative lawyers can make to the governance debate. In line with other postmodern comparatists, their task is mainly seen as highlighting differences: for example, comparative law may show how international governance can accommodate cultural differences, or where unification of the law is not appropriate.[145]

Assessing the law-as-politics approach, it may be argued that some of its elements are not unfamiliar to traditional comparative law. Traditionalists may consider political factors at the stage of a comparative analysis that seeks to explain the variation of legal rules.[146] Most traditional comparative lawyers also take it that policy recommendations can be part of a comparative analysis.[147] Yet, these recommendations tend to be about technical details of the law, not fundamental political questions. Thus, law-as-politics offers the lesson that comparatists should not shy away from discussing these big questions.

Moreover, it is valid to reflect on the politics of comparative legal research itself. It is revealing how Kennedy shows that the choices comparatists make are not the ones of neutral academic researchers, but are shaped by their political views. It is also plausible to suggest that a more openly political comparative law can contribute to the use of comparative law at the international level.[148]

2 Law as Discourse

The notion of law as discourse followed the rise of literary theory and related postmodern scholarship in the second part of the twentieth century. A core element of these approaches is the view that a particular subject is shaped by our own preconceptions and the language we use to describe it.[149] With respect to the method of comparative law, it follows that:

> there is no getting outside the dominant discourse of law, and thus no foreign worlds for the comparativist to discover. All that can be done, then, is to deconstruct the ambiguities and indeterminacies within the dominant discourse, including the internal contradictions in its assumptions about the character of foreign law.[150]

Thus, understanding human communication is seen as crucial while recognising that objective and universal knowledge is impossible. The view of law as

[144] Kennedy 1997: 551. See also Chapter 9 at Section C 2, below (for the emerging field of 'comparative international law').
[145] For details Kennedy 1997: 614–33. [146] See Chapter 2 at Section A 3 (b), above.
[147] See Chapter 2 at Section A 4 (a), above.
[148] For this purpose of comparative law see Chapter 1 at Section A 2 (c), above.
[149] Schneider 1995: 627. [150] Riles 1999: 246.

discourse is therefore relativist in seeking to 'celebrate plurality', and in exposing differences between 'us' and 'them', while rejecting the view of law as an instrument of solving problems or of finding commonalities between legal systems.[151] It can also be associated with the critique of the mainstream as 'legal orientalism' since the research by traditional Western comparatists may tell you more about the preconceptions of these comparatists than the foreign law under investigation.[152]

A growing number of authors can be classified as belonging to the law-as-discourse school. Some of them also use other terms to describe their approach, for example, the term 'hermeneutical method' has been used to refer to the goal to understand the meaning of communication.[153] The works of three authors will be discussed for further illustration.

According to Nora Demleitner the aim of comparative law is to 'help us understand how another person conceives of the world'. Without such understanding, comparative law will merely confirm stereotypes about legal systems and cultures.[154] Conversely, the correct approach will not only identify but respect foreign legal cultures since 'difference often drives creativity'.[155] Thus, here, as with most postmodern comparative law, there is a preference for differences over similarities.

In one of Mitchel Lasser's methodological papers, he asks comparatists to 'understand discursive and conceptual patterns' in order to gain access to the 'ideolects of foreign legal actors'.[156] Naturally, this is not an easy task, but Lasser does not want to over-emphasise the cognitive problems of understanding foreign law: in principle, these problems also apply to domestic legal systems, and the growing transnationalisation of legal science may weaken the 'inside/outside' distinction.[157] More specifically, Lasser examined how literary theory can help us in our understanding of French and US court judgments.[158] For example, referring to concepts developed by Roman Jakobson, Lasser explains that French judgments can be read as suffering from a 'contiguity disorder' because they are unable to combine considerations (here: law and policy), whereas US judgments suffer from a 'similarity disorder' since they are unable to say anything without knowing the context.[159]

Günter Frankenberg is more sceptical as to whether we can 'go native' and understand foreign legal cultures. He advocates a critical approach to

[151] See McCrudden 2007: 373–4; Menski 2006: 11; Riles 2006: 807.
[152] For legal orientalism see Chapter 4 at Section C 1, above.
[153] Schneider 1995 (deconstructionist); Teitel 2004: 2584 (dialogical); Somma 2007 (hermeneutical), cf. also Somma 2014: 14. See Samuel 2014: 96, 110 (hermeneutical).
[154] Demleitner 1999: 741. [155] Demleitner 1999: 746. See also Demleitner 1998: 652.
[156] Lasser 2003: 203, 222. [157] Lasser 2003: 215, 218, 222.
[158] For the following Lasser 1998, in particular 748–50.
[159] For France, however, this is not seen as the complete picture since judicial discourse also takes place in the unofficial sphere not expressly mentioned in judgments. See Chapter 3 at Section B 2 (e), above.

comparative studies that is sensitive 'to the relationship between the self and the other'.[160] Thus, it is important to recognise the subjectivity of knowledge, in particular to be aware of one's own cultural ties and biases. With this, Frankenberg admits, that the critique may well turn into a tragedy:

> [T]he tragic comparatist seems to be well aware of the limits and defects of her home law and her intellectual situation. Confined to the borders of a national legal regime and the parochial nature of the corresponding legal education, the tragic self dresses casually and bemoans a state of 'consecrated ignorance' of foreign laws and of her own alienation.[161]

In a recent book, Frankenberg also indicates what the comparatist needs to do: she should aim for a 'thick comparison' accepting that other law is truly foreign (called 'distancing') and doing justice to the singularity of every legal system (called 'differencing').[162]

Overall, it can be seen that most of the 'law as discourse' view is concerned with the understanding of 'foreign' as opposed to 'domestic' law. In line with such an approach, there is a preference for a binary comparison, i.e. between just two countries: a foreign one and the home country of the comparatist.[163] However, such a limitation to two countries can be problematic as the inclusion of a third country can often expose interesting similarities and challenge the rationales of the differences identified for the two countries.[164] In addition, it should not be assumed that national legal systems are holistic, as the divide between 'us' and 'them' may indicate. Even at the individual level, identities are often complex, leading to different understandings of the law. As Pierre Legrand notes:

> Any individual partakes in a seemingly infinite array of ascertainable cultural formations. One can be a labour lawyer in Poitiers while being a woman, a Belgian expatriate, a European, a militant of Amnesty International, a breeder of Siamese cats regularly entering international competitions, and a long-standing member of the *Parti socialiste*.[165]

Thus, the 'law as discourse' view needs to be aware of problems of understanding at multiple levels. For this purpose, consider the observation by the former US President George W. Bush that '[n]ot everybody thinks the exact same way we think. Different words mean different things to different people'.[166] Of course, Bush meant to say that even the same words (not different ones) can mean different things to different people. This can be contrasted with the naïve attitude that the same words always mean the same thing to different people, or a more optimistic one that different words

[160] Frankenberg 1985: 441. See also Frankenberg 2012b: 177–8.
[161] Frankenberg 1997: 266 (footnotes omitted). [162] Frankenberg 2016: 70, 72, 225.
[163] See Samuel 2014: 11, 164; Gingrich 2015: 412 (for anthropology).
[164] See Chapter 2 at Section A 1 (b), above.
[165] Legrand 2006b: 376 note 43. See also Legrand 1996: 63. [166] Cited in Roberts 2007: 360.

can mean the same thing to different people. Further permutations of this sentence would keep the final part constant at 'the same', leading to the statements that the same (or different) words can mean the same (or different) things for the people of the same country. Each of these eight permutations can, in some instances, be accurate: thus, comparatists should not limit their analysis to the variant that the same means different things to different people.

3 Negative Comparative Law

The term 'negative comparative law' has been coined by Pierre Legrand to summarise his general position in relation to comparative law. In brief, he defines it 'as the theoretical formulation of a resounding "no" to the orthodoxy that has long been occupying the field'.[167] His arguments partly overlap with the approaches discussed in the previous sections of this chapter. However, as he is one of the most prolific – but also one of the most controversial – contemporary comparatists, his research deserves special attention.

A significant proportion of Legrand's research is openly confrontational, characterising the traditional comparative literature as positivistic, superficial, and as providing a mere illusion of understanding of other legal systems.[168] Some of these critiques are the topics of subsequent parts of this book, such as the rejection of legal transplants, harmonisation and convergence.[169] With respect to the traditional method of comparative law, the functionalist search for similarities is called an 'instrumental dissolution of specific cultural forms into generic strategic effects, an enterprise of totalization, and a "theological" project'.[170] Legrand also criticises the positivist comparatists for feeling equipped to make normative assessments about the superiority of particular legal rules.[171] As regards recent projects, the Common Core publications are described as 'snippety compilations' that accumulate 'selected titbits extracted largely from legislative texts and appellate judicial decisions'.[172] And reviewing the *Oxford Handbook of Comparative Law*, Legrand writes:

> This book evidences pathologies not unfamiliar to the field of comparative legal studies: a compulsion for lists and an obsession with size . . . Salient contributions were thus entrusted to friends and to friends of friends . . . Variations on the theme of discipleship include a defence of functionalism, or of comparative studies at the level of the lowest common denominator, and a 37-page chapter

[167] Legrand 2015: 449; also ibid. 410 (inspired by Adorno's negative dialectics).
[168] E.g. Legrand 2016; Legrand 2005.
[169] See Chapter 8 at Section C and Chapter 9 at Sections A 3 (c) and B 3 (c), below, in particular on Legrand 1996 and Legrand 1997b.
[170] Legrand 2005: 705. [171] Legrand 2006b: 394. See also Chapter 2 at Section C 4, above.
[172] Legrand 2005: 660 note 159. For the Common Core see Chapter 2 at Section B 3, above.

> on comparisons as studies in similarities or differences which, astonishingly, excludes meaningful treatment of philosophical, anthropological, sociological and linguistic texts.[173]

With respect to the final point, Legrand is particularly interested in the writings of Heidegger, Gadamer and Derrida.[174] According to these, the interpretation of text is a complex undertaking that requires an understanding of the relationship between 'the self' and 'the other'. This leads to a focus on textual analysis for criticism and deconstruction, since a non-textual starting point cannot be assumed. In this respect, the textual approach is not a black-letter one; rather, history, politics, society, philosophy, language, economics, epistemology and culture are seen as inherent parts of the text.[175] For comparative law it follows that we should understand 'law in its fullest sense',[176] meaning:

> how foreign legal communities think about the law, why they think about the law as they do, why they would find it difficult to think about the law in any other way, and how their thought differs from ours.[177]

For these features, Legrand often uses terms such as the 'cognitive structure of the law', the 'collective mental programme' of legal cultures, and, most frequently, 'legal mentalities'.[178] According to Legrand the result of such considerations is that there are deep differences between countries: every legal system is singular[179] and comparing them is like comparing different 'world versions'.[180] It also follows that a full understanding of foreign law is impossible: 'to interpret foreign law is immediately and necessarily to disfigure it'.[181] The comparatist is therefore only able to provide 'his invention of foreign law' and can at best aim for 'a just interpretation'.[182]

This position extends to differences between legal families. Here, Legrand takes the position that civil and common law are based on irreducibly different ways of understanding: it is not possible for a civil-law lawyer to think like a common-law lawyer, or vice versa.[183] This does not mean that the former cannot understand the latter. However, this is merely an imagination in the former's own terms, while, for instance, a civil-law lawyer 'can never understand the English legal experience like an English lawyer'.[184]

Finally, Legrand takes the view that a comparatist must be someone who values and, even cherishes, diversity.[185] Differences are seen as a matter of

[173] Legrand 2007b.
[174] References in Legrand 2016; Legrand 2006c: 523. See also Glanert 2012.
[175] Legrand 2015: 429, 432. [176] Legrand 2007a: 222. [177] Legrand 2005: 707.
[178] Legrand 1996: 60. See also Samuel 2008: 292. [179] Legrand 2006c.
[180] Cf. Caterina 2004 (who argues against this position). [181] Legrand 2015: 408.
[182] Legrand 2015: 423, 435. [183] Legrand 1999: 11, 64.
[184] Legrand 1996: 78. See also Legrand 2009: 221 (other law 'can only ever be intelligible to me on my terms'); Legrand 2003: 244 (describing himself as 'someone who is free to imagine oneself as either a common-law or a civil-law lawyer').
[185] Legrand 1999: 11; Legrand 2002: 62; Legrand 2003: 287.

'national and cultural identity' and as 'the expression of the human capacity for choice and self-creation'.[186] Thus, it cannot be said that the law of a particular country is superior, since we may 'simply have two narrative construals of reality that are both intrinsically valid'.[187] And any alleged universalism of the law is just seen as a 'totalitarian' way of downgrading rival knowledges.[188]

In the assessment of Legrand's position, three types of criticism can be distinguished. First, some have disapproved of his writings and related research on the basis that it cannot be put to practical use. For instance, Basil Markesinis and Jörg Fedtke express the view that the need for applied legal research will not allow 'comparative law falling into the hands of philosophers, anthropologists, and incomprehensible "post-modernists"'.[189] Unsurprisingly, Legrand takes the opposite position:

> The vocation of comparative work about law is intrinsically scholastic and its agenda is, therefore, incongruent with that of practitioners or lawmakers seeking to elicit epigrammic answers from foreign laws.[190]

However, both positions are too extreme. As we have seen earlier, comparative law can validly fulfil a number of purposes, some more academic and some more practical.[191] Thus, in the current context, it would not be appropriate to reject something merely because it leans towards the academic side of comparative law.

Secondly, the strong emphasis on the limits of understanding foreign law is open to criticism. There is no denying that preconceptions influence our understanding, but this does not mean that it is impossible to learn new things. Thus, legal systems should not be seen as 'closed frameworks' that foreigners can never enter.[192] A possible reply may be that we can only acquire a partial knowledge about a foreign legal system. But, then, domestic lawyers face the same problem. Every lawyer, be it a practitioner or an academic, only has incomplete knowledge of the legal rules and the way these are applied in his or her own legal system.[193] Consequently, since complete understanding is an illusion,[194] knowing something about domestic law and about foreign law merely differs in degree not in kind.

Moreover, one can make the case that, in some instances, being a foreigner may even be helpful. It was already mentioned that a comparatist may be the

[186] Legrand 1998b: 225, 229; Legrand 2001b: 1050.
[187] Legrand 1999: 78. See also Legrand 2009: 220. [188] Legrand 2015: 440.
[189] Markesinis and Fedtke 2009: 69; also ibid. 54; Markesinis 2003: 51–4. Specifically, they refer to Mattei and Di Robilant 2001.
[190] Legrand 2007a: 222. Similarly, Sacco 1991: 2 ('the effort to justify comparative law by its practical uses sometimes verges on the ridiculous').
[191] See Chapter 1 at Section A 2, above. On legal research more generally see Siems and MacSíthigh 2012.
[192] Similarly, Peters and Schwenke 2000: 816. [193] Edge 2000: 11.
[194] Similarly, Van Hoecke 2004: 173; Antokolskaia 2006: 35.

best person to communicate a foreign legal order to the local audience of her own country.[195] But the comparatist's advantage can also be a more general one. The foreign lawyer's outsider perspective can illuminate features of the law that internal observers would not realise: for example, having a greater 'cognitive and emotional distance' and showing the 'unarticulated assumptions' and 'constructed nature' of the way domestic lawyers portray their legal system.[196] Similarly, anthropological research has been praised for writing about foreign law in a way that 'no native would write about it'.[197] For literary works, Stephen Smith starts by saying that authors such as Ibsen, Shaw and Joyce were better understood abroad than at home. With respect to law, Smith suggests that:

> the significance of a certain law or legal doctrine is often best understood precisely by taking them out of its local context. In the same way that locals often fail to appreciate what they have in their own backyard until tourists arrive, domestic lawyers, fully immersed in the local legal culture, are not always best positioned to appreciate what is significant about their law.[198]

Thirdly, the emphasis on differences can be seen as problematic. Since Legrand and other discourse-oriented comparative lawyers are influenced by literature, language and cultural studies, it is interesting to note that here too it is often regarded as possible to identify similarities. For instance, in comparative literature it is not uncommon to search for universal archetypes that transcend time and place.[199] In the philosophy of language, it is suggested that the existence of a common measure is a precondition for the analysis of differences.[200] Furthermore, the deconstructive method in particular may, without assuming universality, aim to challenge binary oppositions such as those between domestic and foreign law.[201]

For comparative law, the view that the differences of any two legal systems are irreconcilable would have the consequence that such an analysis would just have two chapters, one written by someone trained in the legal tradition of the first country, the other written by someone trained in the legal tradition of the second one. Thus, we would lack the ability to make generalisations, which is a precondition for comparative law.[202] Furthermore, from a methodological point of view, it is difficult to argue why one should start with a presumption of difference. Rather, a preferable position is to be open to both similarity and

[195] See Section B 1, above.
[196] Husa 2015: 177–8; Whitman 2003b: 335–6; Kessler 2011: 132; also Laithier 2009: 15.
[197] Fletcher 1998: 691. [198] Smith 2010: 348.
[199] See contributions in Saussy 2006. For the counter-view see Apter 2013. See also Samuel 2012: 178 (references to research on universal themes in comparative methodology).
[200] Baaij 2014a (with reference to Donald Davidson's philosophy).
[201] Coendet 2016: 480–3 (with reference to Jacques Derrida); Schneider 1995: 629, 634–5 (with reference to Jonathan Culler).
[202] Merryman 1999: 491; Siems 2007b: 140.

difference (a point which, of course, can also be raised against the presumption of similarity in traditional comparative law).[203]

More specifically, it is often an exaggeration to claim that there are fundamental differences between countries or legal families. Legrand's views on this matter have been related to the historical school of thought of Friedrich Karl von Savigny who believed that a country's law is the manifestation of a common consciousness formed over centuries: thus, every people have a unique law.[204] Yet in today's world, legal rules and cultures are often subject to change due to circumstances that are not specific to a particular country or region.[205] There is also the problem that putting too much weight on the characteristics of, say, English v. French law (or common v. civil law) risks viewing legal systems (or families) as 'pure' and 'monolithic'.[206] This can lead to a disregard of many other factors that determine similarities and differences (e.g. different dynamics in specific areas of law; the role of the EU).[207] Thus, it is suggested that is not helpful to challenge the superficiality of the positivist tradition while making equally broad generalisations about differences between legal families.

E Conclusion

The postmodern approaches to comparative law illustrate that there is considerable diversity in the way comparative law can be researched. They also stimulate methodological awareness, in particular as they highlight the limitations of traditional comparative law. This is not to say that traditional methods have become obsolete; yet, there are, at least, five possible shortcomings that postmodernists have identified.

First, traditional comparatists have a tendency to regard similarities between legal systems as more plausible and interesting than differences. Yet, there is no reason why, *a priori*, this should be the case. Secondly, traditionally, comparative law tends to focus on black letter rules, whereas postmodernists highlight that, amongst others, culture, language and politics are often of crucial importance. They also use the concept of legal pluralism to show that even Western legal orders do not only consist of black letter law. Thirdly, postmodern approaches teach us that functionalism is often problematic since law may, to put it as a modest criticism, not always be geared towards certain functions. Fourthly, these points can also impact on the way a comparative paper is structured. For instance, if a pure description of the positive law is highly misleading, a comparatist may not want to defer the deeper analysis to the

[203] See Lemmens 2012: 322; Cotterrell 2012: 39; Bell 2011: 174; Nelken 2010: 32 and Chapter 2 at Section B 2 (b), above.
[204] Palmer 2004: 10; Mautner 2011: 33. See also Chapter 6 at Section A 2 (a), below.
[205] See also Part III, below.
[206] Husa 2015: 67 and Samuel 2014: 166 (both criticising Legrand).
[207] Cotterrell 2007: 139–40; Cotterrell 2003: 150; Karhu 2004: 84; Riles 2006: 798.

explanatory phase,[208] but use 'immersion' as a primary tool of analysis. Fifthly, traditional comparative law is sensitive to problems of 'getting the foreign law right';[209] yet, the postmodern approach shows that it is also necessary to go further and consider how biases and preconceptions influence our understanding of foreign legal systems.

Thus, postmodern approaches to comparative law are valuable. However, they should not be the final word on the methods of comparative law, because they too leave a number of shortcomings that lead directly to the subsequent topics of this book. For example, some postmodernists claim that legal systems and cultures are fundamentally different. But, then, in order to make such statements, would it not be necessary to present data that show, or do not show, that there are indeed such differences (see Chapters 6 and 7, below)? Moreover, is it not worth examining whether globalising trends have changed these established divisions, say, through the emergence of transnational and global law (see Chapter 10, below)? In particular, is it not equally interesting to explore curious similarities – for instance, by way of analysing the prevalence and functioning of legal transplants (see Chapter 8, below)?

In addition, postmodern comparative law tends to regard differences between legal systems as worth preserving. But, then, why is this the case? Could it not be that cultures and societies have already converged to a significant degree, and that the law just needs to catch up (see Chapter 9, below)? Specifically, there is the need to examine the role of law in development: so, is it the case that foreign legal influence disrupts local legal cultures, or could this not be precisely what some countries need in order to develop a legal system 'fit' for the modern world (see Chapter 11, below)?

These questions also show that further tools are needed to assess the operation of comparative law in context. Help may come from other disciplines. For example, political science and economics are interested in law as well – yet, in contrast to traditional legal research, not in a pure description of legal rules, but often in a normative analysis. And disciplines such as psychology and anthropology can help us in evaluating more precisely how far different mentalities hinder cross-border understanding (see Chapter 12, below).

Supplementary Information

Questions for discussion. What is 'postmodern' about postmodern comparative law? How do the variants of postmodern comparative law challenge traditional comparative law? Is postmodern comparative law mainly interested in deeper legal forms of comparison or interdisciplinary approaches to comparative law? How does critical comparative law differ from other forms of postmodern comparative law? Is an unbiased understanding of foreign legal systems possible?

[208] See Chapter 2 at Section A 3 (b), above. [209] See Chapter 2 at Section A 2, above.

Suggestions for further reading. For the first main account of comparative law and postmodernism: Peters and Schwenke 2000. For recent books: Samuel 2014 and Frankenberg 2016. For the variant of 'negative comparative law': Legrand 2015. For an overview of postmodern and more traditional approaches: Van Hoecke 2015.

6

Socio-legal Comparative Law

The growing use of socio-legal comparative law responds to the lack of consideration given by traditional comparative law to both the law in practice and the relationship between law and society. It also reflects developments in general legal scholarship as many countries have seen a trend towards scholarship in socio-legal studies, law and society and empirical legal research, using qualitative or quantitative methods.[1]

The structure of this chapter is as follows: Section A sets the scene and explains the scope and aims of socio-legal comparative law. The main two parts then present representative studies of socio-legal comparative law. Thus, Sections B and C discuss socio-legal research on civil procedure, commercial and criminal law, referring to examples from various countries and regions. Section D concludes.

A Setting the Scene

Two elements characterise socio-legal comparative law. First, it replaces the formal understanding of 'law', attributed to traditional comparative law, with a socio-legal one – often using the term 'legal culture'. Secondly, it reflects on whether and how law and society are related in a causal way. These two elements are discussed in the first two sub-sections below. The third sub-section then explains that for both of them it is possible to use qualitative, quantitative or mixed methods in socio-legal comparative law.

1 Legal Culture and Comparative Law

(a) Meanings of Legal Culture

The term (legal) culture is criticised for its vagueness.[2] Yet, alternatives, such as (legal) mentalities, formants, traditions, ideologies or styles, are hardly more

[1] See Section A 3 below as well Chapter 7, below.

[2] Cotterrell 1997; Glenn 2004: 20. See also Piché 2009: 105 (on different definitions); Nelken 2004b: 118–19 and Nelken 2013: 347 (use of indicators or interpretation of cultural meaning); Sunde 2010, as well as Chapter 5 at Section B 1, above.

precise.[3] It is also possible to identify a number of specific building blocks of legal culture.

To start with, research on legal culture goes beyond the 'law in books' in considering the 'law in action'.[4] For example, the system of traffic signs (and traffic lights) is relatively similar across countries, but in practice the situation is more diverse.[5] According to David Nelken:

> Knowing more about differences in legal culture can actually save your life! One well-travelled colleague who teaches legal theory likes to tells a story of the way crossing the road when abroad requires good knowledge of the local customs. In England, he claims, you are relatively safe on pedestrian crossings, but rather less secure if you try to cross elsewhere. In Italy, he argues, you need to show about the same caution in both places; but at least motorists will do their best to avoid actually hitting you. In Germany, on the other hand, or so he alleges, you are totally safe on the zebra crossing. You don't even need to look out for traffic. But, if you dare to cross elsewhere, you risk simply not being 'seen'.[6]

Thus, legal culture is concerned with compliance of the law. In addition, it explores the general attitudes of the public towards the law. For socio-legal comparative law, it can therefore be fruitful to use cross-country surveys in order to compare legal cultures.[7] It has also been attempted to establish the importance of law in society by way of collecting and comparing data on litigation rates.[8]

Lawrence Friedman calls these aspects relating to the behaviours and views of the general public 'external legal culture'. By contrast, 'internal legal culture' refers to the persons who make the law, in particular the attitudes of legislators, judges and practising lawyers.[9] With respect to the latter group, it is also important to consider the institutional setting and operation of the legal system. For instance, this may refer to the number of lawyers in a particular country, the structure of courts, the appointment of judges, the way legal education and training are organised, and the willingness of police and prosecution to enforce violations of the law.[10]

Finally, legal culture is not only about formal institutions of law-making and law enforcement. Often, other ways of achieving social order may be as

[3] See Nelken 2016; Nelken 2007a: 115.

[4] See Ehrmann 1976: 4; Blankenburg and Verwoerd 1988: 9.

[5] See Zeno-Zencovich 2016 (for traffic lights).

[6] Nelken 2004a: 3. See also Nelken 2012: 311–13; Nelken 2013: 341. Similarly, Zeno-Zencovich 2016: 17 ('One does not, however, need to be a full-fledged anthropologist or sociologist to know that a cross-roads in Naples is not like a cross-roads in Reykjavik.').

[7] See also Chapter 7 at Section D 3 and Chapter 12 at Section C 3, below.

[8] See Section B 1, below.

[9] Friedman 1975. See also Nelken 2007a: 112; Nelken 2004a: 4; Cotterrell 2006: 719; Cotterrell 2001: 74 (internal–external distinction sociologically doubtful since law part of society); Bell 2001: 12–13 (preferring distinction between institutional and non-institutional actors).

[10] See Ehrmann 1976: 9; Nelken 2007b: 11; Zeno-Zencovich 2016: 20–2 (for differences in the enforcement of traffic light violations).

important as, or more important than, formal law.[11] Thus, one also needs to consider informal types of social control and dispute resolution and, again, the structure of these institutions and the habits and attitudes underpinning them.

(b) Spatial Levels of Legal Cultures

Following both traditionalists and postmodernists,[12] a tempting starting point is to say that legal cultures differ at the levels of legal families and countries. With respect to legal families, such reasoning reflects that most classifications incorporate elements of legal culture, such as legal style and the operation of courts.[13] It is also not implausible to assume that the common political framework of a nation-state will shape a country's legal culture.[14]

However, neither connection is a necessary one. On the one hand, it can be said that legal culture goes beyond theses scales. For instance, Lawrence Friedman suggests that today we may have a 'legal culture of modernity' or even 'world legal culture', traversing the borders of countries and legal families.[15] A related question is whether we can become as competent in the law of a foreign country as we are in our own law. A sceptic may say that our own background will always shape our way of legal thinking, as is the case for our native languages when we learn a foreign one.[16] However, the important difference is that the native language is acquired as an infant while law is studied as an adult. Here, we can be more optimistic and follow the view that it is possible to overcome national legal cultures: identifying legal culture as 'mental software', it becomes clear that legal culture is not acquired automatically by way of birth or nationality, and it is feasible that 'mental programming' can accommodate different cultural perceptions.[17]

On the other hand, in focusing on legal families and countries we may be misled in assuming that the legal culture of a particular legal family or country is uniform.[18] With respect to legal families, the previous part of this book discussed the apparent risk of over-emphasising similarities.[19] With respect to the country level, it may, for instance, be shown that legal cultures differ according to areas of law: for example, there may be distinct career paths for civil, criminal and administrative judges. It can also be said that legal pluralism is widespread in all legal systems.[20] At a more general level, the problem may

[11] See, e.g. Nelken 2007b: 11; Nelken 1995: 438. [12] See Part I and Chapter 5, above.
[13] See Chapter 4 at Section B 1, above.
[14] See Nelken 2012: 315–17; Nelken 2007b: 12; Nelken 2004b: 120–1 and Nelken 2013: 351 (also referring to other units of legal culture).
[15] Friedman 1994, but also Friedman 2001: 354 (most lawyers 'firmly rooted in their own legal habits and traditions'). See also Part III, below (on global comparative law).
[16] Junker 2014: 89. See also Legrand's position, discussed in Chapter 5 at Section D 3, above.
[17] Smits 2007b. [18] Nelken 2007a: 117; Nelken in EE 2012: 487.
[19] See Chapter 3 at Sections C 1 and 2 and Chapter 4 at Section C 2, above.
[20] See Chapter 5 at Section B 2, above.

be described as one of 'invented cultures'. In anthropology and cultural studies, it is observed that the coherence and uniformity of cultures is often less real than it is a result of ideology, rhetoric and imagination – and it is not unlikely that this may also be the case for legal cultures.[21]

This discussion about similarities and differences is similar to the one in traditional and postmodern comparative law. Yet, socio-legal comparative law has the advantage of being able to provide empirical information to support or refute similarities between, say, countries of the same legal family. In addition, socio-legal comparatists are not only interested in descriptive questions, but also in causal relationships as the next section will explain.

2 Causality Problem in Socio-legal Research

(a) Mirror View and its Critics

The mirror view of law and society assumes that law reflects the society in question. One variant of this view suggests that law is a product of a society's history. The well-known positions of Montesquieu and von Savigny relate this mirror to countries. They argue that there is an organic connection between a particular people – its beliefs, culture, morals, as well as its social, political and economic forces – and its legal system.[22] But it is also possible to use other scales: for instance, it may be shown that the practice of a particular local court reflects the specifics of this place; or it may be the case that all European legal systems are seen as a mirror of the interwoven histories of European countries.

Another version is that law reflects the society as it is at the moment. Émile Durkheim famously suggested that the preference for private law over criminal law in modern societies showed that here (in part) 'law mirrors' the existence of social solidarity.[23] It may also be possible to refer to the Marxist position, which holds that, in capitalist societies, economic forces are paramount, shaping the legal rules to accommodate the interests of the capitalist class.[24] Today, this version of the mirror view is often phrased in a more general way: namely, that law reflects the needs of current society,[25] that law changes over time in response to social developments[26] and that law is the result of felt social needs.[27] Thus, the main point of this emphasis on

[21] Nelken 2007a: 114 and Nelken 2007b: 15 referring to Kuper 1999; Hobsbawm and Ranger 1983; Anderson 1983.

[22] See Antokolskaia 2006: 37–9; Ewald 1995b; Nelken 2003a: 448. See also Chapter 12 at Sections B 1 (for Montesquieu) and C 2 (for national character studies), below.

[23] Durkheim 1947: 52. For Durkheim see also Chapter 12 at Section C 1, below.

[24] Cf. Bogdan 2013: 56.

[25] See Graziadei 2003: 100, 118; von Wangenheim 2011: 741 (referring to neo-institutional research on property rights).

[26] Nelken 2002; Ehrmann 1976: 38.

[27] Friedmann 1959: 3–23.

present conditions is that the law-as-a-mirror-of-history view risks seeing law as a 'frozen phenomenon', which it evidently is not.[28]

The question is, however, what determines how quickly law is able to respond to new or changing circumstances. Identifying these determinants of 'legal adaptability' is not always straightforward. For example, consider the preference towards professional or lay judges. On the one hand, professional judges may be more knowledgeable and notice that certain legal concepts are outdated. On the other hand, it is also possible that lay judges foster adaptability because they may not bother with formal legal arguments in the first place.

There is also the problem of which types of criteria need to be considered. A paper by Thorsten Beck and colleagues uses variables on the strictness of judicial legal justification as proxies for legal adaptability.[29] Based on data from eighty countries, this leads to the result that the law is more adaptable in common law than in civil law countries. Such a view is shared by other scholars, indicating that the civil law countries' greater reliance on formal legal rules, and the more bureaucratic nature of the judiciary, lead to greater autonomy of the law than in common law countries.[30]

However, it is too narrow only to focus on the role of courts. A more meaningful catalogue needs to take into account the legislature, legal practice, academics and the general public of a particular place. This is illustrated in the non-exhaustive list of criteria in Table 6.1 on whether and how law mirrors aspects of current societies. It is then also clear that it is too simplistic just to speculate about a divide between civil and common law countries.

The counter-view takes the position that law is largely autonomous of past and present social structures. The main line of reasoning is that it is not society as a whole but mainly the internal discussion between judges, law professors and other legal experts which determines the substance of legal rules.[31] It has also been suggested that legal discourses have their own dynamics and legal systems, as sub-systems of modern society, their own forms of self-reproduction.[32]

[28] See Kurkchiyan 2009: 360; also Banakas 1993–94: 125 ('legal culture may be swept aside by the winds of political and economic change'); Sunde 2010: 24 ('legal culture is in constant flux').

[29] Beck et al. 2003: 664 with data from Djankov et al. 2003a: 465 (variables on 'complaint must be legally justified', 'judgment must be legally justified' and 'judgment must be on law not on equity').

[30] Lundmark 2012: 40, 101–7 and Garcia-Villegas 2006: 346 (both comparing civil law countries with the United States). See also Hadfield 2008 (distinguishing between open and closed judicial regimes). Generally on the civil/common law divide see Chapter 3, above.

[31] Antokolskaia 2006: 38; Graziadei 2003: 124; Menski 2006: 110; Tamanaha 2001: 74. The notion of law as a 'semi-autonomous social field' goes back to Moore 1973 and Moore 1978.

[32] Teubner 1998: 22; Deakin and Carvalho 2011; King 1997: 125 (all with references to Niklas Luhmann).

Table 6.1 Criteria which can foster legal adaptability[1]

1. Legislature and administration	Balanced federal structure – Swift law-making (including delegated legislation) – Research by natural and social sciences taken into account – Foreign ideas taken into account – Evaluation of existing laws – Feedback by interested parties possible – Democratic structures – Competent, heterogeneous, responsive, open-minded and honest politicians and civil servants – Freedom of contract, choice of laws, arbitration and self-regulation possible – Principled legislation – Adaptability-friendly regulation of courts, advocates, legal academia, and general public (see items 2–5, below)
2. Courts	Legal actions simple, cheap and quick – Flexible interpretation, analogies, customary and case law possible – Parties or experts can actively take part in proceedings – Precedents not binding – Judgments published – Appointment of judges who can foster innovation – Promotion does not reward legal conservatism – Independent judges
3. Advocates	Sufficient number of lawyers (no 'closed shop') – Contingency fees possible – Liability towards clients possible – Creative contract drafting
4. Legal academics	Innovative forms of interpretation favoured – Factual impact of law taken into account – Foreign law taken into account – Innovative legal thinking supported (e.g. by appropriate grading systems, appointments, promotions) – Successful exchange with general public and law-makers (legislature, judges, advocates)
5. General public	Freedom of speech – Culture of discussion – Pluralist society – Knowledge of foreign languages and cultures – Interest in political questions – Culture of learning and thinking – Scientific research respected

[1] Based on Siems 2006: 397 (with further explanations).

Such autonomy of law is said to be supported by specific examples. Some of those concern the longevity of legal rules. For instance, the mirror thesis would seem to be refuted by the fact that Germany and France use their century-old civil codes, and England case law which is even older, whereas everything else has changed in the last centuries (political systems, industrialisation, technology, internationalisation, etc.).[33] Moreover, comparative law is said to teach us that very different societies may have fairly similar law, whereas similar societies may have very different ones. For example, due to legal transplants, the civil codes of France and Germany have spread to other regions of the

[33] This example is from Siems 2006: 405. More generally see Watson 2007.

world, often with only small modifications,[34] while in Europe, countries such as England, Scotland and the Netherlands may be regarded as similar in sociological terms, albeit that their laws are very different.[35]

An initial problem with this line of reasoning is, however, that it is based on a very narrow and positivist conception of law: perhaps the wording of particular sections of the French Civil Code has been unchanged for 200 years, and perhaps these sections are indeed identical to, say, the Civil Code of Mali, but this does not mean that the way the law actually operates is identical.

A more fundamental objection is that the critics of the mirror view tend to focus on fairly technical areas of law, such as general contract law, which may indeed be relatively time-independent and easy to transplant. Other types of law are clearly not independent of society. For instance, the law on industrial accidents depends on the industrialisation of the country in question. Family law may be another example because legal changes have often followed cultural ones, for instance, with respect to cohabitation and homosexuality. Alternatively, it is possible that the causal relationship is reversed and that law is used as a tool of engineering.[36] For instance, the law-maker may favour a particular industry or may want to provide a more liberal family law because it aims to initiate changes to the economic and cultural structure of the society in question. Thus, it is worth examining these potential causalities in more detail.

(b) Illustrating Possible Causalities

Law and society may interact in various ways. Table 6.2 uses law and religion in order to illustrate some of these possible causal relationships. Equivalent examples could be provided for other relationships, for example between law and culture or between law and the economy.

The first category is the one that puts the 'law in context' in trying to identify the factors that make the law.[37] As far as a causal relationship can be established, this would also confirm the view that, at least in some aspects, law is a mirror of society. Harold Berman examined the case of law and religion in detail, tracing the influence of Gregorian church-state reforms and of the Protestant reformation on secular law.[38] Table 6.2 provides two specific examples, family law and consumer credit, where Christian values may still play a role in many legal systems. This is not meant to imply that these legal rules only reflect Christian values; indeed, it has also been suggested that usury

[34] See Graziadei 2003: 120; Tamanaha 2001: 107 and Chapter 8, below (on legal transplants).
[35] Sacco 2001: 182.
[36] Dalhuisen 2004: 113; Nelken 2003a: 451. See also Chapter 11, below (for law and development).
[37] Nelken 2007a: 21.
[38] Berman 1983; Berman 2006. See also Berman 1974. For further references on the role of religion for Western law see Darian-Smith 2013: 324.

Table 6.2 The relationship between law and religion

Categories	Possible examples
1. religion → law	– family law of Christian countries – restrictions on consumer credit in legal systems influenced by Christian rejection of usury
2. religion → no law	– no law on financial derivatives in some Muslim countries – no law on opening hours of shops in some orthodox Jewish communities
3. law = religion	– family law in some Muslim countries – prohibition of interest for credit in some Muslim countries
4. law → effect on religion	– law of non-profit organisations – tax law (e.g. church tax)
5. law → religion influences the effect of the law	– effect of absence of common family name influenced by Christian values – effect of favourable business law influenced by Protestant work ethic
6. law ←→ religion	– laws against religious symbols (niqab etc.) – liberal abortion laws and evangelical Christians

prohibitions were (or still are) typical for many small-scale societies with their need for reciprocity.[39]

Secondly, it is also possible that religion has the opposite effect, namely, that there is no law on a particular topic. The examples of Table 6.2 show that this can be the result of two very different reasons. In the first example, there is no law on financial derivatives because Islam is said to ban gambling: so, here the religious rule and the lack of law complement each other. The second example is meant to refer to a situation where strong religious beliefs already have the effect that shops stay closed on religious holidays.[40] Thus, here, law and religion are supplements: since religious conventions effectively influence behaviour in a particular way, legal rules are not seen as necessary. To be sure, it is not always clear that, without religion, a corresponding law would have been enacted. For example, adultery is seen as a taboo in many religions: thus, on the one hand, it may be thought that, given this religious sanction, law is not necessary.[41] On the other hand, in Western European societies, this

[39] Moore 1986: 26. See also Rubin 2010 (comparing the evolution of interest bans in Christianity and Islam).

[40] See also Mautner 2011: 121–5 (for the relationship between ultra-Orthodox Jews and the Israeli state); Glenn 2014: 109, 119–20 (for the extensive scope of the orthodox variant of the Talmudic tradition).

[41] See H. Aoki 2001: 139 (on research by Nobushige Hozumi).

religious taboo has largely disappeared, without leading to the desire to introduce laws against adultery.

The third category refers to a situation where religion is part of the law (or law part of religion[42]). The examples – family law and credit in some Muslim countries – are similar to the ones of the first category, but there is the crucial difference that in the third category there is no strict separation of law from religion, as in today's Western legal culture.[43] To be sure, this division between religion as an element of the law and as an influencing factor of the law is not always clear-cut. For example, the secularisation of the law of marriage in the Christian world has been a gradual process, still ongoing in some countries.[44] And, with respect to Islamic law, it would be misleading to regard it simply as 'God's law', since it also contains many 'man-made elements'.[45]

The next two categories both turn to the 'context in law', showing how law can have an impact on the outside world.[46] In the fourth category, the question is how the law impacts on religion. Table 6.2 provides two examples of the way religious organisations are structured and financed. In these cases, the causal effect of the law is straightforward to identify since these laws directly impact on the structure and funding of religious organisations. For other topics of socio-legal comparative law the causal link can be more contentious, as examples in the subsequent sections of this chapter will discuss.[47] In addition, the question about the effect of the law is of natural interest to comparative law and development, and it has also been explored in empirical studies by financial economists.[48]

The fifth category refers to the way religion (or other aspects of society) influence the effect of the law. Here, the first example is about the question of whether the strength of family ties is weakened if married couples keep their own names. This concern was expressed in Germany when it abandoned the prerequisite of a common family name. Yet, the case of Latin American countries may indicate that, possibly due to strong Christian values, family ties can remain strong without a common family name.[49] The second example is based on Max Weber's controversial view that legal rules and a favourable work ethic, which is attributed to Protestantism, can foster economic development.[50]

[42] See the category in Berman 1974 (law as a dimension of religion); also Hirschl 2011 (with eight models of state and religion relations).

[43] See Head 2011: 237. See also Glenn 2007: 186 (Islamic law as 'composite science of law and morality').

[44] See Antokolskaia 2007: 244–5.

[45] Menski 2006: 279–83. Moreover, Muslim countries often distinguish between state law and religious norms: see An-Na'im 2008.

[46] Nelken 2007a: 21. [47] See Sections C 1 (b) and 2 (b), below.

[48] See Chapter 11 and Chapter 12 at Section B 3, below. [49] See Dannemann 2006: 398.

[50] Weber 2008 (original from 1905). For Weber see also Chapter 12 at Section C 1 (b), below.

Sixthly, there are cases where there is conflict between law and religion, leading to the question of how religious believers try to reconcile these duties. Table 6.2 provides two topical examples, with liberal laws on the one hand – allowing abortion and banning full-face coverage – and conservative religious beliefs on the other.[51] Such cases can also be due to the way religious communities traverse national boundaries and thereby lead to conflicts between these transnational personal laws and the domestic laws of residence.[52]

3 Qualitative, Quantitative and Mixed Approaches

By definition, socio-legal comparative law not only considers the positive law but also other information related to society. This information may be of a qualitative or quantitative nature. It is sometimes suggested that choosing one or the other can have a profound impact on the results of the comparative analysis.[53] Qualitative comparative socio-legal research tends to focus on the details of particular legal cultures and therefore differences between legal systems, akin to most of postmodern comparative research. By contrast, quantitative comparative socio-legal research may be better able to show similarities between apparently very different legal systems, in this respect akin to its traditional counterpart. In addition, inferential statistics aims to show causal relations;[54] thus, it may be particularly suitable to respond to the causality problem in socio-legal research outlined in the previous section.

However, there is also a considerable degree of variation in the way quantitative or qualitative methods can be employed. As far as socio-legal comparative research examines the operation of legal rules and institutions in practice, it can do so with a variety of qualitative and quantitative methods: for example, the comparatist can conduct interviews or surveys, observe trials, analyse contracts with textual or empirical methods, collect data on litigation, etc. As far as the socio-legal comparatist aims to identify causal relationships, quantitative research may deduce such patterns from large datasets, but qualitative research can also contribute to this topic: for example, the question why a particular legal solution has emerged in some countries but not in others can be based on qualitative historical research. And as far as research is concerned with the effect of the law on society, interviews can show law's impact on behaviour in a specific context.

Both quantitative and qualitative approaches to socio-legal comparative law have certain advantages. For example, quantitative research can examine a larger set of countries and it may provide 'hard evidence' for

[51] For further examples of such tensions see Bottoni et al. 2016.
[52] See Chapter 10 at Section A 2 (a), below. [53] Cotterrell 2012: 48. See also Nelken 2010: 42.
[54] But here too it can be difficult to prove such causalities, see Chapter 12 at Section B 3, below.

certain facts and regularities. Qualitative research, by contrast, can be beneficial as it provides a deeper and more nuanced understanding of specific facts and regularities, thus being better able to reflect differences in context. It may also be suggested to get the best of both worlds and use 'mixed methods', which indeed have gained in popularity in many fields of comparative research.[55]

The following sections of this chapter discuss examples of socio-legal comparative research using different methods. In the first section, the research on civil litigation, courts and lawyers often uses quantitative differences between countries as a starting point but then also employs more qualitative methods. In the second section on substantive law, the research on comparative commercial law is quantitative or mixed, while the research on comparative criminal law is more qualitative but also with some quantitative research.

B Civil Litigation, Courts and Lawyers

As socio-legal research is interested in 'law in action', one of the key topics of its comparative counterpart has been the examination of similarities and differences in civil litigation, in particular litigation rates, the number of lawyers and judges and the ease of litigation. These issues will be addressed in this section.

1 Civil Litigation and Other Forms of Dispute Resolution

Comparative research on the use of civil litigation is a frequent topic of socio-legal research. In the 1970s, John Henry Merryman and colleagues collected time-series data on litigation rates and types of claims in a number of European and Latin American jurisdictions.[56] Yet there was only limited analysis of these data. To be fair, it is not easy to say with certainty why there is more litigation in some jurisdictions than in others. Presumably, differing attitudes towards litigation play a role. For example, a book by Laurent Cohen-Tanugi from the mid-1980s argues that, in the United States, litigation is seen as more positive – since it is more democratic – than in France and other European countries.[57] Research for the 2006 Congress of the International Academy of Comparative Law has, amongst others, tried to explore whether it is perceived as a stigma to be sued in civil litigation. Such a stigma was found to be prevalent in China, Japan, Chile and Sweden, but not in the United States or most European countries.[58]

[55] See Chapter 12 at Section A 2, below.
[56] Merryman et al. 1979. See also Merryman 1999: 503; Twining 2005: 230.
[57] Cohen-Tanugi 1985. See also Cohen-Tanugi 1996.
[58] See Mattei 2007: 8.

Another line of research is to compare data on cases filed, resolved and pending per judge, on the time to resolve a case, and on clearance and congestion rates.[59] Maria Dakolias examined these issues for a number of Latin American and selected other jurisdictions. For example, it was found that in Chile the average of cases per judge per year is 5,000, whereas in the United States it is 1,300, in France 277 and in Germany 176.[60] These are striking differences in workload that may invite deeper analysis of potential determinants, for instance, the availability of expedited proceedings, exemptions to provide reasoned opinions, assistance by administrative staff or paralegals, organisational inefficiencies, etc.

Comparative data on civil litigation in the developing countries of Africa and Asia are less frequently discussed. Following statements of traditional comparative lawyers, this may have something to do with the fact that its population largely lives under an indigenous legal tradition that would not be called 'law' in the Western world.[61] This sounds like an 'orientalist' stereotype,[62] but, considering socio-legal research, there is evidentially some truth to it. According to studies on different African countries, between 75 and 90 per cent of all disputes are settled by customary forms of justice.[63] And, if countries leave citizens the choice between civil and religious courts, data from Indonesia show frequent preference for the latter ones.[64] There has also been fieldwork research in Niger showing that judicial enforcement is of secondary importance, since law is seen as 'a process for establishing a *modus vivendi* for a community and is inextricably interwoven with family relations, community relations, history, and spiritual beliefs'.[65]

One may question whether these customary traditions of dispute resolution can survive in an increasingly globalised world.[66] Yet, at the same time, there is a trend away from litigation towards 'privatisation of adjudication' in the developed world.[67] In Europe, law-makers have fostered the use of mediation and arbitration,[68] and the globalisation of business relationships has promoted alternative dispute resolution in international commerce, to be discussed later in this book.[69] The importance of alternative forms of dispute resolution is also relevant to the following sub-section, examining litigation rates in selected developed countries in more detail.

[59] For studies on 'court performance' see Voigt and El Bialy 2016: 304. See also Chapter 7 at Section D 2, below.
[60] Dakolias 1999. See also Buscaglia and Ratliff 2000: 61.
[61] David 1985: 31; Zweigert and Kötz 1998: 66.
[62] For legal orientalism see Chapter 4 at Section C 1, above.
[63] Studies cited in Ubink and van Rooij 2011: 8; Wojkowska 2006: 12.
[64] See K. von Benda-Beckmann 2009 (also comparison between different regions).
[65] Kelley 2007: 17. See also Chapter 12 at Section C, below (for research in anthropology).
[66] Pimentel 2011. See also Chapter 11 at Section B, below (on rule of law reforms).
[67] Resnik 2010. See also van Aeken 2012. [68] See Jagtenberg and de Roo 2009: 313–14.
[69] See Chapter 10 at Section B 2, below.

2 Litigation Rates in Five Countries

Do litigation rates differ between the United States and England, Germany and the Netherlands, and Japan and Western countries? Research on these country relationships is interesting since it may confirm or refute the relevance of legal families.[70] Such research has also attempted to understand the determinants for differences in litigation rates.

(a) United States, England, Germany and the Netherlands

Litigation rates are considerably higher in the United States than in England. A core study on this topic was by Patrick Atiyah, who found that in 1983/84 there were twenty times as many suits for medical malpractice and even 350 times as many product liability suits in the United States as in England.[71] A possible explanation may be differences in national character, Americans being more aggressive, the English being more restrained and fatalistic.[72] Yet, in both jurisdictions, many routine disputes are handled without the involvement of courts. Thus, it may be more significant that in particular areas of law, such as the ones of Atiyah's study, class actions and punitive damages are more readily available in the United States than the United Kingdom.[73]

It is also helpful to consider the availability of alternative institutions. Rebecca Sandefur's analysis of remedies for civil justice distinguishes between formal institutions (courts, administrative agencies and ombudsman services) and 'auxiliaries'. With respect to the latter institutions, she explains that the monopoly on legal advice is stronger in the United States than in the United Kingdom. Furthermore, there are more national advice providers in the United Kingdom, in particular the Citizens' Advice Bureaux with more than 3,000 locations. Other national and local auxiliaries are also available in both countries, though they are only competent for some types of disputes.[74] The data of Sandefur's research confirm that in the United Kingdom it is more common to use auxiliaries, whereas in the United States it is more common to go to courts or to 'do nothing'.[75]

Research on litigation rates in Germany and the Netherlands (as well as other civil law countries) has also tried to explain differences in apparently similar legal systems. The main studies were conducted by Erhard Blankenburg and colleagues in the 1980s and early 1990s. For example, Blankenburg reports the number of adversarial procedures of civil courts of first instance: Austria, Belgium and West Germany are seen as litigation prone, with 5,020, 4,800 and 3,561 procedures per 100,000 inhabitants, whereas in

[70] See Chapter 3 and Chapter 4, above. Specifically for the United States and England see Chapter 3 at Section C 2, above. For East Asia see Chapter 4 at Section C 2 (a), above.
[71] Atiyah 1987.
[72] Posner 1996: 108–9. More sceptical as regards such differences Markesinis 1990b.
[73] Ramseyer and Rasmusen 2010. Also differentiating between types of claims Kritzer 2008.
[74] Sandefur 2009: 965. [75] Sandefur 2009: 969.

France, Italy and the Netherlands, litigation is more often avoided, with 1,950, 1,640 and 1,430 such procedures.[76] Other studies compared the German state of North Rhine Westphalia with the Netherlands. Since both are similar in terms of size, population, industrial structures, Blankenburg assumed that the conflict potential should be similar in both regions, yet, again, there was more litigation (as well as more judges and lawyers) in the German state than in the Netherlands.[77]

A number of explanatory factors were contemplated but eventually dismissed. First, Blankenburg regards the substantive law of both countries as fairly similar.[78] Thus, here, one does not encounter the problem of, say, comparing countries with extensive and little employment protection.[79] Secondly, Dutch courts are not seen as fundamentally different from German ones, since they are based on a composite of the French and the German traditions.[80] Thirdly, Blankenburg refers to a study on attitudes towards legality, which found that the Dutch and Germans have fairly similar views about obeying the law.[81] Fourthly, legal aid is not seen as a contributing factor, since it only accounts for a small proportion of cases in both countries.[82]

Thus, what does explain the difference between the Netherlands and Germany? Blankenburg argues that the lower number of lawyers in the Netherlands is a result of the more pronounced infrastructure of the alternatives to courts. For example, some conflicts, such as road accident claims, are handled by public agencies, while in Germany they lead more often to civil litigation.[83] Similarly, in the Netherlands, but not in Germany, divorce proceedings can be handled without court involvement.[84] There are also a number of quasi-judicial bodies which function as a filter to litigation in the Netherlands: conciliation commissions take care of many conflicts between landlords and tenants, and employment disputes may require permission from the local labour bureau in order to proceed.[85] Finally, it is seen as significant that the monopoly of the legal profession to give legal advice is less restrictive in the Netherlands than in Germany, thus explaining the greater role of organisations such as consumer associations and trade unions in taking care of disputes in an informal way.[86]

[76] See Blankenburg 1997: 46; Blankenburg 1992: 103 (also with data that include summary debt enforcement, which produces a similar division).
[77] Blankenburg and Verwoerd 1988. [78] Blankenburg 1997: 64; Blankenburg 1994: 791.
[79] See Blankenburg 1992: 105 (for the United States and Europe); Blankenburg and Rogowski 1986 (for Germany and the United Kingdom).
[80] Blankenburg 1994: 790.
[81] Blankenburg 1998: 19. The study is Gibson and Caldeira 1996, further discussed in Chapter 12 at Section C 3, below. See also Hertogh 2010: 164 (challenging Blankenburg's assessment).
[82] Blankenburg 1997: 61; Blankenburg 1998.
[83] Blankenburg 1997: 45; Blankenburg and Verwoerd 1988. [84] Blankenburg 1997: 45.
[85] Blankenburg 1997: 57–8. See also Blankenburg 1994: 797; Jettinghoff 2001: 110–11.
[86] See Blankenburg 1997: 54, 56 (also on differences in lawyers' fees).

David Nelken challenges this emphasis on alternatives to civil litigation.[87] Blankenburg seems to concur with the functional starting point of traditional comparative law, namely, that there are certain social problems which need to be addressed by everyone. Yet, this is not self-evident, since what is regarded as a 'problem' may well differ across countries.[88] Thus, the focus on structural alternatives to litigation at the 'supply side' may miss the role of cultural factors at the 'demand side'. A recent contribution by Blankenburg also refers to the possible relevance of the demand side. The context of this statement is an increase in litigation in the Netherlands in the last decade, which Blankenburg associates with new social problems (and possibly the way 'litigation' is classified in the underlying dataset).[89] It may also be said that in Germany, as in other countries, there is now a growing use of alternative forms of dispute resolution such as ombudsman services.[90]

(b) Japan: 'Harmony Culture' or a 'Normal Country'?

This debate about the relationship between structural and cultural arguments also re-appears in the socio-legal research about litigation rates in Japan. The usual narrative is that Japan's rate of litigation is considerably lower than in that of other developed countries. This was already found in one of the aforementioned articles by Blankenburg, according to which the other developed countries had between 1,400 and 5,100 adversarial civil cases per 100,000 inhabitants per year, whereas in Japan this number was only 500.[91] This initial difference was also confirmed by other researchers.[92]

For a long time, the most frequent explanation was that the low Japanese litigation rate is due to their ideal of a 'harmony culture', an ideal that prefers conciliation and other informal means of settling a controversy, rather than open conflicts.[93] Thus, suing or being sued may be socially discouraged or even stigmatised.[94] This may also be a general feature of the East Asian legal culture, since in China, too, formal litigation is often said to be avoided for cultural reasons.[95] It may therefore confirm the category of an East Asian (or Confucian) legal family that rejects the Western 'struggle for law' with winners and losers.[96]

However, this line of reasoning has been challenged on a number of grounds. To start with, it is likely that it is not simply culture, but also the institutional availability of alternatives, that matters. For example, in Japan,

[87] For the following see Nelken 1997. Similarly, Hertogh 2010: 165.
[88] See Chapter 2 at Section C 3, above.
[89] Blankenburg and Niemeijer 2014: 299–300, 310.
[90] See Creutzfeldt 2016 (comparing use in Germany and the United Kingdom).
[91] Blankenburg 1992 and 1997.
[92] E.g. Wollschläger 1997; Wollschläger 1998, but see also the following notes.
[93] See, e.g. Aronson 2014: 821 (outlining the 1963 work of the Japanese professor of sociology of law Takeyoshi Kawashima); Mayeda 2006: 572; Nelken 2007a: 113; Law 2011a: 1430; Abe and Nottage in EE 2012: 462.
[94] See also above text to note 58.
[95] Menski 2006: 548.
[96] See Chapter 4 at Sections C 1 and 2 (a), above.

a divorce does not necessarily require court involvement, but can be realised by an entry on the family registry in the competent administrative office.[97] There is also a special law on civil conciliation that incorporates an arbitral procedure into civil litigation: when one of the parties requests it, the court sets up an arbitral committee with one judge and two commissioners. This is a popular way of solving disputes.[98]

Moreover, institutional characteristics of the courts and the legal profession may explain the low rate of litigation. Here, it is helpful to start with the position which emphasises that in Japan litigation is very costly and time-consuming, and that it may even be difficult to find a lawyer, since the number of lawyers is kept low by way of a strict judicial exam system.[99] This leads to the question of why the Japanese law-maker installed such measures. Here, a sceptical view argues that the Japanese power elite were not keen on citizens asserting their rights, thus creating the 'invented tradition' of weak legal consciousness.[100] The same reason may also explain the (alleged) close control and supervision of the judiciary by the dominant political party (the LDP), with the side-effect of a high degree of predictability of litigated outcomes reducing the need for litigation.[101] Alternatively, the high predictability may be due to the character of Japanese judges as a group of fairly homogenous 'faithful public servants'.[102] Or, even more positively, the low litigation rates may not be the result of a 'dysfunctional system but from trust in a system that works', for example as it provides legal certainty through the use of standardised tables to calculate common forms of compensation.[103]

Others directly challenge the view that Japan has a culture that avoids litigation. This line of reasoning can refer to some specific developments in a comparative perspective. For example, starting in the 1960s mass accidents led to tort law litigation (as well as administrative compensation schemes) in Japan, as it did in France.[104] Similarly, when, in the 1980s, legal conflicts arose over HIV-contaminated blood, individual claims and an innovative judiciary played a crucial role, akin to comparable events in the United States and in France.[105] Medical malpractice litigation has also risen from fewer than 100 new claims per year in the 1970s to more than 1,000 in the year 2005.[106] Another example is company law: since the 1990s, the number of derivative actions has risen sharply. The most likely explanations for this development

[97] See Ramseyer and Rasmusen 2010: 11 (contrasting it with US law).
[98] See Oda 2009: 67; Clark 2002: para. 278; Zweigert and Kötz 1998: 301.
[99] E.g. Haley 1978; Haley 1998; Haley 2002; also Oda 2009: 5 (reporting survey that 80 per cent of respondents refer to time and costs regarding their hesitation to engage in litigation). For lawyers in Japan see also Section 3, below.
[100] Upham 1998. See also Upham 1987. [101] Ramseyer 1988; Ramseyer and Rasmusen 2003.
[102] Upham 2005 (as opposed to 'political lackeys').
[103] Ramseyer 2015 (referring to traffic accidents, product liability and medical malpractice cases).
[104] Knetsch 2016. [105] Feldman 2000a; see also Feldman 2000b. [106] Feldman 2009.

are changes to the law, such as a reduction of court fees in 1993, but possibly also the globalisation of companies and investments.[107]

The view of a 'harmony culture' has also been dismissed on more general grounds. It has been called a 'cultural stereotype' that makes Japan 'a victim of comparative law'.[108] So instead of perpetuating this view we should 'treat Japan as a "normal" country, while explaining the Japanese context within which socio-legal comparisons must take place'.[109] As far as litigation is concerned, there is also some evidence for 'Japan's turn to litigation'. From 1990 to 2006, litigation has increased by approximately 40 per cent, being attributed to the growing number of lawyers, the reform of civil procedure in 1996, as well as changing economic circumstances.[110] A 2005 survey also found that the clear majority of the Japanese population would file a claim if they felt that their rights had been infringed.[111]

A final twist of the Japanese litigation data is that since the late 2000s there has been a fall in newly filed civil law cases.[112] But this trend is, in all likelihood, the result of specific circumstances and not evidence of a renewed general reluctance to litigate. The main reason is that around 2006, due to a change of Supreme Court case law, there was a dramatic spike of interest refund suits against consumer loan companies, which has now receded.[113] It is also possible that two new laws fostering legal support and alternative dispute resolution had an effect on civil litigation in recent years.[114]

(c) Conclusion

Overall, the three examples (United Kingdom/United States, Germany/Netherlands, Japan/West) teach us that one has to be careful about making too confident assumptions about the relationship between litigation rates and legal cultures. It is also important to note that cultural and structural determinants for litigation are mutually interdependent: on the one hand, structures may be a reflection of cultural values, but, on the other hand, cultures can also change, which may, in part, be determined by structural decisions.[115] If both factors change, as has happened in Japan, it is therefore difficult to assess what exactly accounts for the variation in litigation rates.

[107] See Siems 2008a: 216–17. [108] Colombo 2014: 746. [109] Aronson 2014: 837.
[110] Ginsburg and Hoetker 2006; also Oda 2009: 79 (data on increase of lawyers).
[111] Murayama 2014 (e.g. positively responding to statement 'If I buy something and find it defective, I would not accept it quietly but assert my consumer rights').
[112] See Sugiyama 2015: 203; Kawagishi 2014: 89.
[113] Ramseyer 2015: 199; Sugiyama 2015: 202.
[114] Comprehensive Legal Support Act (Act No. 74, 2004) (this led to the Japan Legal Support Centre on 2 October 2006); Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151, 2004) (in effect since 1 April 2007).
[115] See Nelken 1997: 87.

3 Research on Judges, Lawyers and the Public

(a) Challenges and Choices

Apart from the litigation rates, the personnel of the civil process have been a frequent topic of comparative socio-legal research.[116] A good starting point seems to be to compare the number of judges and other practising lawyers across jurisdictions. Yet, this is not a straightforward task. For example, with respect to 'judges', one may want to focus on professional judges, since only they may have the proper legal qualifications to be a judge. But, then, such data may be misleading since, in some countries, judicial functions are performed by lay judges (or magistrates, justices of the peace, etc.). However, including lay judges may lead to the objection that they are akin to jurors. But then, including jurors may overstate the numbers for countries with jury systems. In addition, the division between judges and other lawyers may not be straightforward. For example, in a comparison between England and the United States, Richard Posner suggests that English barristers are not like US attorneys-at-law, but more like junior judges in the US system, since the 'English bar is almost an apprenticeship for becoming a judge'.[117]

With respect to the term 'lawyer', the main problem is whether to include all graduates in law, only persons who are qualified to represent clients, or everyone who practices law. Choosing the first approach may inflate the numbers in countries, such as France, where it is common to study law without having the intention of a legal career in a narrow sense.[118] But only including qualified lawyers may raise the objection that the standards for passing this hurdle are very diverse across countries. For instance, in most countries, it requires a number of years of practical training, but not in the United States; and, in most countries, the majority of candidates have a fair chance of passing the bar exam, but this was – and, to some extent, still is – different in Japan.[119] Thus, a possible compromise would be to consider everyone who practises law. For example, in Japan this may include a larger group of legal professionals,[120] but this approach would pose many borderline problems, namely under which circumstances a job is regarded as 'legal' enough to be equivalent to that of a lawyer. Naturally, things get even more complicated if one considers religious or customary legal systems: for example, some Muslim countries may have 'Western' lawyers, but also a parallel profession that practises before Shari'a courts.[121]

None of these points speak against comparative socio-legal research on the number of judges and lawyers, though it has to be made very clear what the

[116] For an extensive treatment see Abel and Lewis 1988. See also Shapiro 1990.
[117] Posner 1996: 22.
[118] See Steiner 2010: 202.
[119] For Japan's shift towards postgraduate law schools and the remaining cap of bar exam pass rates see Watson 2016; Abe and Nottage in EE 2012: 472–4.
[120] See Jones 2014: 911–24 (distinguishing between eleven types of lawyers).
[121] See Clark 2002: para. 35.

numbers really show.[122] Moreover, presenting such data may aim precisely to identify substitutes and complements between legal professions in different countries: for example, a low number of judges and lawyers may invite further research in the relevance of informal methods of dispute resolution.

(b) Selected Comparative Information about Lawyers and Judges

Turning to actual data,[123] a comparison between European and North American countries is often said to lead to the result that there are more judges per capita in continental Europe than in the United States, the United Kingdom and Canada, and that there are more practising lawyers in the latter countries; consequently, there is a higher ratio of judges to other practising lawyers in continental Europe.[124] These differences are usually attributed to the more active role that judges tend to play in civil law countries, since, in the common law, many of these tasks are said to be performed by the lawyers representing their clients.[125] However, as a general trend, it can also be observed that, throughout the twentieth century, the number of lawyers (as well as law students) has risen in both civil and common law countries, which may be attributed to the rise of capitalism and the modern state.[126]

It is also worth revisiting the countries discussed in the previous section. With respect to England and the United States, Richard Posner reports that, when considering judges in a mere literal sense, the ratio of lawyers to judges is similar. But if one treats English barristers as akin to junior judges (as indicated above), the English rate drops to the rate of France and Germany.[127] This seems to be in line with the lower rate of litigation in England. Posner also suggests that England can manage a smaller legal system, since English law is clearer than US law, and because it has fewer judicially enforceable rights.[128] However, adding Germany and the Netherlands to this picture does not confirm the positive correlation between a higher ratio of lawyers to judges and more litigation, since this

[122] See Galanter 1993: 77–9 (on dubious claims that the United States is home to 70 per cent of the world's lawyers); also Twining 2009a: 247 and Ehrmann 1976: 56 (on problems of defining the term 'lawyer').

[123] Apart from the following footnotes see CEPEJ 2016: 81–112, 159 (professional and non-professional judges and lawyers in Europe); Schmiegelow 2014: 166–7 (courts, judges and lawyers in eight countries); Yeh and Chang 2014: 22, 39–40 (lawyers and judges in selected Asian jurisdictions); Pérez-Perdomo and Friedman 2003 (data on Latin American countries); Galanter 1993: 104–7 (various countries).

[124] Clark 2002: paras. 73, 137; Clark 2012: 383; Van Rhee and Verkerk in EE 2012: 141; Blankenburg and Verwoerd 1988: 14; Posner 1996: 28; Maxeiner et al. 2010: 79–80.

[125] Van Rhee and Verkerk in EE 2012: 141–2; Posner 1996: 29; Blankenburg and Verwoerd 1988: 14. See also Chapter 3 at Section B 2 (d), above.

[126] Clark 2012: 337, 340, 380–1 (on Europe, United States, Japan and Latin America); Pérez-Perdomo and Friedman 2003: 8, 10 (on Latin America); Shapiro 1990: 684, 709. See also Clark 2002: para. 98; Clark 2012: 394–6 (declining resistance against huge law firms in civil law countries).

[127] Posner 1996: 28. [128] Posner 1996: 83.

ratio is higher in the Netherlands than in Germany.[129] Considering the absolute numbers, however, we find that Germany has more judges and lawyers per capita than the Netherlands, thus being in line with the higher rate of litigation.[130] Finally, with respect to Japan, the main problem is the aforementioned definition of lawyers: if one only includes qualified lawyers, the per capita number of lawyers is considerably lower than in Western countries (and thus in line with the hypothesis, Japan having a low rate of litigation), but this changes if one includes everyone 'who performs lawyerly functions'.[131]

A wealth of further comparative data, whether quantifiable or not, can be collected on judges and lawyers. For example, it is interesting to compare the salaries of judges, which shows that they tend to be higher in England than in continental Europe.[132] The selection and recruitment of judges also tends to be diverse: this can invite an analysis of the applicable legal rules, but it may also invite a more socio-legal examination of the influence of politics in the appointment process.[133] A related question is whether personal ideologies affect the decisions of judges. For this purpose, a comparative analysis of court decisions is fruitful, as far as judges deliver individual opinions.[134] If this is not the case, one may conduct interviews in order to find out how judges think about the relationship between law and politics.[135] Turning to lawyers, questionnaires have been used to explore the views of the legal profession on EU law.[136] Another study has empirically examined contracts on attorney fees in the United States, showing that parties often tend to adopt the loser-pays fee structure dominant in other parts of the world.[137] There is also interesting comparative research on the sociology of legal professions, including, for instance, the influence of transnational lawyers, to be discussed later in this book.[138]

(c) Comparisons of 'Access to Justice'

A final point to consider is the 'user side' of the judicial process, in particular the debate about 'access to justice' and 'ease of litigation'. Researchers have examined a variety of reasons as determining access to justice.[139] Some of these concern details of the positive law, for instance, the provision of legal aid, the

[129] Blankenburg and Verwoerd 1988: 14 (comparing the Netherlands with the German state of North Rhine Westphalia).
[130] Blankenburg 1997.
[131] Childress 2007. See also Maxeiner et al. 2010: 79–80 (on South Korea, as compared with the United States and Germany).
[132] CEPEJ 2016: 108–12; Bell 2006a: 39. [133] See CEPEJ 2016: 81–8; Jacob et al. 1996: 390, 395.
[134] See Weinshall-Margel 2011 (comparing the supreme courts of Israel, Canada and the United States).
[135] See Sturgess and Chupp 1988: 255–537. [136] Örücü 2007: 442–8.
[137] Eisenberg and Miller 2013. [138] See Chapter 10 at Sections B 2 and 3, below.
[139] Overview of different strategies in Johnson 2015 and Barendrecht 2011. For a comparative book see Wrbka et al. 2012. The first major study was Cappelletti and Garth 1978.

availability of small claim procedures and class actions, the rules on costs and fees, and the right to free legal representation or self-representation. It is also possible to approach this debate from a socio-legal perspective, say, to collect comparative data on legal aid and costs of litigation.[140]

For example, Chris Hodges and colleagues have used a functional approach in order to compare the precise costs that would arise in a number of hypothetical cases. Their results seem to confirm some of the differences in litigation rates, discussed in the previous section,[141] while noting that there may also be non-financial impediments, such as a lack of awareness of legal remedies. Another problem related to access to justice is that of legal delay.[142] Here, a case-based study funded by the World Bank has examined the duration of trials and enforcement in 109 countries. It also identified how many procedural steps were necessary in each of these countries, with the plausible result that the number of steps is positively correlated with the duration of judicial proceedings.[143]

Is it possible to say which country has more accessible courts? A non-empirical book on the judiciary of five countries contends that the United States and Germany are at the high-end of accessibility, Japan at the low end, and France and England in the middle.[144] A quantitative US-based project has created a Justice Index that aims to measure questions of attorney access, self-representation, language and disability access; yet, limited to a comparison between US States.[145] A project of Dutch academics constructed an index in order to measure access to justice across countries;[146] yet, it has now been transformed into a wider project of 'measuring justice'. Thus, this study is closely related to more general measurements of legal rules and institutions, to be discussed in the subsequent chapter on 'numerical comparative law'.[147]

C Substantive Law 'in Action' and Society

Any area of substantive law is open to socio-legal comparative research. The following provides examples from commercial and criminal law. Both subsections start with the question of how the positive law is applied in practice. Subsequently, following the discussion on potential causal relationships,[148] it is

[140] See, e.g. CEPEJ 2016: 59–79 (data on court fees and legal aid); Posner 1996: 76–9 (data on costs of litigation).

[141] Hodges et al. 2010 (e.g. typically lower costs of litigation in Germany than in England and in the Netherlands). See also Reimann 2014: 54 (lawyer fees higher in common law countries).

[142] See, e.g. Krishnan and Kumar 2011 (for comparison between Indian states); Buscaglia and Ratliff 2000: 57 (selected data for developing countries).

[143] Djankov et al. 2003a. For the more contentious claims of these studies see Chapter 7 at Section D 2, below.

[144] Jacob et al. 1996: 397–9. [145] See http://justiceindex.org/. [146] TISCO 2009.

[147] See Chapter 7 at Section D 2, below. [148] See Section A 2, above.

shown how societal factors may shape the law, and how, in turn, law may shape society.

1 Comparative Commercial Law

(a) How the Law is Applied

Many areas of private and commercial law invite analysis of how the positive law is applied in practice. This is particularly interesting where choices are left to private parties, for instance, where the law only provides default rules. In a comparative context, one can then examine how differences and similarities in the positive law are related to the way it operates in practice across countries.

The first example to be provided here is from comparative contract law. It is often thought that contracts tend to be wordier in common law than in civil law countries.[149] Comparative socio-legal research is relatively rare, but an empirical study by Alessandro Arrighetti and colleagues from the 1990s examined contractual drafting in Germany, Italy and the United Kingdom in some detail.[150] They conducted sixty interviews on 'contracts between original equipment manufacturers and suppliers of component parts', and evaluated these findings both quantitatively and qualitatively.

The questions of this study include topics related to the form, duration and substance of contracts. For instance, Arrighetti and colleagues report that 91 per cent and 84 per cent of the German and British interviewees indicated that they 'always' (as opposed to 'sometimes' or 'never') used legally binding contracts, whereas in Italy these were only 58 per cent. A similar picture emerges when one considers specific clauses of contracts: for example, the majority of German and British contracts had clauses on retention of title, protection of intellectual property rights and limitation of liability but only a minority of the Italian ones. All of this was attributed to the real, or perceived, weakness of the Italian court system.

The study also reports on the role of trade associations in contractual drafting and its relationship to law and law enforcement. In Germany, there were 'general conditions of business' that applied to entire industries, but they also followed the guidance of the codified law to perform in good faith. In Italy, the role of trade associations is important in practice, though their influence was more informal, given the deficiencies in the court system. For the United Kingdom, we have to distinguish between previously nationalised sectors and

[149] See, e.g. Mattila 2013: 324–7 (main reason: English courts interpret terms more literally); Kötz 2010: 1247 (due to default rules in civil law); Lundmark 2001; Lundmark 2012: 67–74; Hill and King 2004. See also Kitagawa 2006: 240, 251–2 (contracts in Japan shorter and simpler than in the United States).

[150] Arrighetti et al. 1997. See also Deakin and Michie 1997. For another example see Dietz 2014 (based on interviews finding reliance on informal governance structures for cross-border contracts in Germany, Bulgaria, Romania and India).

other private firms: firms that belonged to previously nationalised sectors tended to draft detailed contracts, reflecting the desire of the former state corporations for uniform rules, whereas other firms made their own agreements often including informal understandings. Overall, it can therefore be seen that differences in contractual practices are closely related to the legal system, but also reflect other socio-economic factors such as the influence of trade associations.

Secondly, comparative company law is often approached from a socio-legal perspective. A relatively straightforward line of research is to consider certain countable events related to company law. For instance, company law typically provides different types of companies, it allows mergers and takeovers, and it enables shareholder suits. Accordingly, it can be interesting to find out how often certain types of companies are incorporated, merged or sued in different jurisdictions.[151]

A more challenging question concerns the relationship between corporate governance at a country level and at a firm level. The country level can refer to certain socio-cultural characteristics that are specific to the way companies are run in a particular country. Moreover, legal systems use different tools of corporate governance. For instance, some of them require a division between supervisory and management board (e.g. Germany), whereas in others companies have just a single board of directors (e.g. in the United States). But many further questions about the running of companies are left to the individual firm. The empirical examination of these features is a major topic in academic and non-academic research on corporate governance. A number of professional advisers use documents, such as the articles of association or annual reports of companies, in order to rate factors such as investor protection across firms.[152] In academic research, most prominent is the study by Paul Gompers and colleagues, which uses twenty-four rules to construct a governance index for the level of shareholder rights in US firms, and there has also been research on firm-level corporate governance in other countries.[153]

A common view is that the country and firm level of corporate governance are substitutes. For instance, if a particular legal system is weak in terms of investor protection, companies themselves may be keen on providing adequate mechanisms in order to attract international investment. There is some empirical evidence supporting this view, based on data from emerging markets where law and law enforcement may often be inadequate. The counter-view doubts the capacity of firm-level corporate governance to substitute for a weak institutional framework. Thus, the relationship between firm- and country-level governance may be complementary, and there is also some empirical support for this view, based on data from East Asian companies.[154]

[151] See, e.g. Wymmersch 2009; Armour et al. 2009c. [152] See, e.g. www.msci.com/esg-ratings.
[153] Gompers et al. 2003; MacNeil and Xiao 2006 (for the United Kingdom); von Werder et al. 2005 (for Germany).
[154] For references to these studies see van Essen et al. 2013.

(b) How the Law Shapes Society – and Vice Versa

Even more challenging is the question of whether company and commercial law shape society – or whether there is the reverse causal relationship. Comparative company law offers a detailed discussion of this problem. To start with, mainstream research tends to use categories similar to the general division into legal families.[155] On one side, there is the Anglo-Saxon common law model. This is seen as pursuing a market-based approach, where the shareholders' individual interests are to the fore. Moreover, in these countries, capital markets are seen as more developed, so that interest in shares is broader and shareholder ownership is often dispersed. In civil law countries, by contrast, it is claimed that concentrated ownership structures mostly prevail in joint-stock companies. Since management cooperates with the dominant shareholders, relations within the company count more than control through the markets. This 'insider model' is to be explained by the fact that banks and employees hold a strong position. The firm is accordingly run not primarily in the interests of shareholders, but of all stakeholders in the undertaking.

So, assuming this close link between company law and financial markets is accurate,[156] how can it be explained? One view – popular in business and finance studies[157] – stresses that law 'matters' for financial development. For instance, common law countries are seen as having 'good law' in protecting investors, which motivates people to invest in shares. This explains the importance of their financial markets, a proxy for which is the higher degree of dispersed shareholder ownership. In civil law countries, by contrast, investor protection is seen as inferior, and therefore financial markets are less developed.

It may be suggested that, 'from a lawyer's viewpoint, it is extremely satisfying that the importance of law as a pre-condition of desirable economic and social development is now generally recognized'.[158] However, many legal scholars tend to be more sceptical about this alleged unidirectional positive relationship between law (cause) and finance (effect). As summarised in Table 6.3, some take the view that other causal relationships between law and finance are more plausible. To start with, there is the counter-view of 'director primacy' which argues that the very success of companies is due to the fact that the running of the business is delegated to directors and managers with little shareholder involvement.[159] Furthermore, if there is causality, it can also go the other way. For the historical evolution of US and UK company law, it can be shown that only after the number of investors and the importance of the capital market increased was shareholder protection strengthened: so here 'good' shareholder protection responds to 'good' financial development.[160]

[155] This paragraph draws on Siems 2008a: 29.
[156] For this claim see Chapter 7 at Section D 1 and Chapter 12 at Section B 3, below.
[157] See Chapter 12 at Section B 3, below. [158] Bogdan 2009: 33. [159] E.g. Bainbridge 2012.
[160] Coffee 2002; Cheffins 2008.

Table 6.3 Possible relationship between shareholder protection and financial development

	. . . *good* financial development	. . . *bad* financial development
Good shareholder protection *causes* . . .	'law and finance' view	'director primacy' view
Good shareholder protection *responds to* . . .	'law follows' view	'crises-driven law' view

Sometimes 'good' shareholder protection can also be a consequence of 'bad' financial development, in particular as far as law-makers aspire to remedy deficiencies of company law after financial crises and scandals.[161]

There are also other considerations that are frequently adduced in order to explain variation in company and commercial laws. It was already mentioned that the position of a linear causal relationship (such as the 'law and finance' view) is criticised as failing to consider legal systems' own internal dynamics of self-reproduction.[162] Specifically for commercial law, Nick Foster emphasises the fact that legal differences are not mere technicalities, but historically and culturally conditioned. For example, comparing France and England, he explains that the more restrictive French laws on security interest, and the higher minimum capital requirements, reflect different attitudes to commerce.[163]

Others point towards the way legal systems are influenced by political structures and events. For example, Mark Roe takes the view that, in the second part of the twentieth century, a strong emphasis on shareholder protection and capital markets – dominant in the United States and the United Kingdom – was seen as incompatible with social-democratic ideas in continental Europe.[164] Similarly, Katharina Pistor relates differences in company and financial law to the literature on comparative capitalism, namely, the distinction between liberal and coordinated market economies.[165] In a co-authored book she also refers to differences in the degree of centralisation of law-making and enforcement, expecting more centralisation in civil than in common law countries. However, using case studies of individual countries, the book also shows that regulatory responses to financial crises may depart from these different starting points.[166]

In other fields of private and commercial law too, differences in political economies are frequently mentioned in order to contextualise the common/civil law divide. For example, according to James Whitman, civil law countries

[161] See, e.g. Romano 2005. [162] See Section A 2 (a), above. [163] Foster 2007.
[164] E.g. Roe 1993; Roe 2000.
[165] Pistor 2005. See also Pistor 2009 and Chapter 12 at Section B 3, below.
[166] Milhaupt and Pistor 2008.

tend to favour the interests of consumers, and common law countries the interests of producers, which is seen as reflecting differences in politics and values.[167] John Reitz, too, refers to common and civil law, while also indicating that the United Kingdom is sometimes closer to the European continent than the United States.[168] In one of his papers, Reitz discusses the relevance of political economy in understanding differences in contract law, showing that common law countries tend to be more market-centred and civil law countries more state-centred. This includes regulatory aspects of contract law, such as employment at will, price controls and consumers' cancellation rights, but also includes the doctrine of consideration and the default remedy for breach of contract.[169]

Adding the commercial law of Muslim countries to the picture confirms the mutual interdependence between law and society. Timur Kuran's book *The Long Divergence: How Islamic Law Held Back the Middle East* initially seems to argue that the deficiencies of Islamic law, such as the absence of corporations and credit, explain the lack of economic growth in many countries of the Middle East.[170] Yet, one can also start with the reverse causal relationship. Islamic law emerged in a pre-industrial, local economic environment where laws allowing for small-scale businesses and transactional arrangements were entirely sufficient.[171] Thus, a preferable line of reasoning is that it is not the inherent nature of Islamic law as such that is the problem, but the fact that it has not evolved so as to accommodate the need for large-scale production, capital accumulation and business entities found in the Western world.

A tempting explanation for this lack of legal evolution may be the static nature of a law based on religion. However, Islamic law, too, has evolved: for instance, countries of the Middle East have transplanted significant parts of Western business laws, and one may also refer to the recent design of Shari'a-compliant forms in banking and finance.[172] Thus, according to Kuran, incomplete reforms, low trust and high levels of corruption explain why Muslim countries do not have an up-to-date legal system that stimulates development.[173] Of course, one may further respond that there are considerable differences between Middle Eastern countries in terms of legal and economic development, inviting more detailed comparative socio-legal research on the countries of this region.

[167] Whitman 2007. See also Cotterrell 2007: 149–51; Whitman 2003b: 329–34.
[168] Reitz 2009: 857. See also Reitz 2002 (on role of the political economy in limiting convergence).
[169] Reitz 2007; Reitz 2012. For the latter points see also Chapter 3 at Section B 3, above.
[170] Kuran 2010a. See also Kuran 2005.
[171] N. Foster 2010: 30.
[172] See Chapter 8 at Section B 2, below.
[173] Kuran 2010a: 194. Similar assessment by Ayres and Macey 2005. Kuran 2016 also relates today's authoritarianism in the Middle East to Islamic restrictions to private organisations.

2 Comparative Criminal Law

(a) How the Law is Applied

From a socio-legal perspective, it is said that comparative research on criminal punishment should not focus too much on the text of the laws, but needs to determine 'whether behaviors that are nominally forbidden are in fact prosecuted'.[174] In addition, it matters whether prosecutions result in actual convictions, what precise sentences are imposed, and how these are executed.[175]

Doing such socio-legal research faces a number of challenges. Information about committed crimes, prosecuted crimes and convictions is not available on a world-wide basis. Moreover, comparing the frequency of criminal convictions across countries can be misleading as some countries use administrative sanctions in situations in which others use criminal ones (e.g. minor offences, sanctions against legal persons). It is therefore said to be preferable to examine the actual use of such sanctions.[176] Naturally, this is also important as far as there is a mismatch between the law in the books and the law in practice. For example, with respect to the Islamic law of countries such as Saudi Arabia, Western observers are often upset by sanctions such as stoning and the cutting off of a hand, but it has to be asked how far these sanctions are actually applied in practice.[177]

Specific sanctions are also an interesting point of socio-legal comparisons. For example, imprisonment is a possible sanction in all countries of the world today. Since some datasets provide comparative information,[178] it may also be used to explore why some countries – notably the United States – have higher rates of incarceration than other legal systems. Another frequent topic of research is the availability of capital punishment. As a paradigmatic case of differences in the 'harshness' of a country's criminal sanctions, it will be the main focus of the subsequent analysis.

Since the 1970s, more and more countries have formally abolished the death penalty. In addition, organisations such as Amnesty International use the category of being 'abolitionist in practice' for countries where there have not been any executions for more than ten years. According to data from 2016, in total 141 countries have abolished the death penalty in law or in practice, while fifty-seven countries remain 'retentionist'.[179] Two well-known countries with capital punishment are the United States (though not

[174] Whitman 2005a: 31. [175] For available data, and their limitations, see Pakes 2012: 68–71.
[176] See Spamann 2016: 37; Cavadino and Dignan 2006: 5.
[177] For a historical account of theory and practice of Islamic criminal law see Peters 2005.
[178] See, e.g. the documents of the International Centre for Prison Studies, available at www.prisonstudies.org (World Prison Briefs and Publications). For such data see also Mazerolle et al. 2018; Nelken 2010: 56–70.
[179] Amnesty International 2017: 42. On the abolitionist movement and its progress see also Hood and Hoyle 2015: 49–74 and Zimring 2003: 16–41.

all States) and China. But here, too, the number of executions has declined in the last twenty years.[180]

There has also been significant interest in the process between the prosecution of a crime punishable by death and the execution of the sentence. Naturally, the fairness of the trial is essential due to the irreversible nature of this sanction, as is the fairness of the death row experience and the process of execution.[181] For instance, the reports by Amnesty International include case studies on all of these problems, supplemented by comparative observations.[182]

(b) How the Law Shapes Society – and Vice Versa

Can harsh criminal punishment reduce the crime rate? Such a view may be based on a simple belief of criminal law as deterrent. But even if it is regarded as unlikely that individuals can accurately predict possible sanctions, criminal law may still be able to influence behaviour by way of 'habit formation'.[183]

The value of comparative research is that it can provide information on the possible effects of relatively harsh or lenient criminal laws. However, to be robust, such research has to include control variables on other factors that may influence differences in crime rate. This can be challenging, even if one only considers relatively similar jurisdictions. For example, research on the death penalty has often made use of variations between the US States. Yet, the results do not tend to be reliable. For example, in criticising a newspaper article, which claimed that 'each execution saves more than 70 lives', Gebhard Kirchgässner shows how easy it is to choose econometric techniques either supporting or rejecting the deterrence hypothesis.[184] It is also revealing to compare the homicide rate between the United States and Canada, since both rates have tended to move in the same direction while laws on the death penalty differed sharply.[185]

These types of questions also relate to research in criminology and moral philosophy. Explaining crime is one of the interests of criminologists, and law is part of this picture (though not necessarily at the centre). In addition, comparative criminology can reveal how levels of crime are related to topics such as crime prevention, the process of the criminal justice system, and the internationalisation of crime.[186] Moral philosophy would take another angle on law's influence on the crime rate. For example, even if it were found that capital punishment reduced the crime rate, one may take the moral point of

[180] For the United States see Berry 2011: 1019; Sarat and Martschukat 2011: 1–6 (also decline in public support). For China see Johnson 2010: 339.
[181] Hood and Hoyle 2015: 265–336 and 155–86.
[182] E.g. Amnesty International 2017. See also www.handsoffcain.info.
[183] Hood and Hoyle 2015: 395.
[184] Kirchgässner 2011. See also Hood and Hoyle 2015: 404–25.
[185] Donohue and Wolfers 2006: 799. [186] See, e.g. Nelken 2000; Nelken 2010; Nelken 2011.

view that it is not 'right' for the state to kill the perpetrator. Or, alternatively, if it were shown that capital punishment did not reduce the crime rate, one may take the moral point of view that retribution demands the death penalty.[187]

This leads to the general question of why countries differ in the harshness of punishment. A frequent starting point is the debate about differences in criminal punishment between the United States and Europe, in particular as regards the availability of the death penalty.

One set of reasons follows the view that legal systems mirror their histories.[188] For example, David Garland links the racially motivated lynchings in the nineteenth-century southern US States with their relatively frequent use of the death penalty today.[189] Referring to a similar period, according to James Whitman, the US situation can be explained by the fact that forms of punishment such as hanging, which had been reserved for persons of the lowest social status, were gradually generalised to the upper classes. In continental Europe, by contrast, equal treatment meant that the more lenient treatment of the aristocracy, based on the wish to respect the perpetrator's honour, became the general approach.[190] It is also possible to focus on events that happened in the twentieth century. Here, Europe may be regarded as a special case, the argument being that the abolition of the death penalty was a reaction to the atrocities of the two World Wars. A more contentious reasoning is that modernity has marched further along either in Europe or in the United States, with scholars disagreeing on whether a harsh criminal law is or is not typical for 'late modern societies'.[191]

Alternatively, there are a variety of reasons why current factors may be decisive. It has already been mentioned that postmodernists tend to explain differences in capital punishment, as well as the harshness of punishment in general, with the more pronounced role of Christian values in today's United States than in Europe.[192] Some quantitative empirical work has also confirmed the relevance of religion.[193] But the more general question of whether differences in criminal sanctions reflect differences in opinions and values does not provide a clear answer. While, in general, public attitudes seem to be correlated with the harshness of punishment, the abolition of the death penalty in Europe often occurred despite public opinion supporting it.[194]

Thus, tangible features of current societies may be more important. A tempting explanation could be that the higher crime rate in the United

[187] Cf. Hood and Hoyle 2015: 426–68 (death penalty as a question of opinion or principle).
[188] See generally Section A 2 (a), above.
[189] Garland 2007. See also Zimring 2003: 89–118 (referring to the legacy of lynch mobs); Garland 2001 (for crime control in the United States and the United Kingdom more generally).
[190] Whitman 2003a (referring to both law and application of punishment in general).
[191] References in Kleinfeld 2016: 1017–18. See also Chapter 12 at Section C 1, below.
[192] See Chapter 5 at Section C 2 (a), above. [193] Greenberg and West 2008.
[194] See Nelken 2010: 67–8; Kleinfeld 2016: 988–9.

States is accountable for its harsher punishment,[195] but, then, punishment should also have some effect on the crime rate, so the causal relationship may not be clear. There is some empirical support for the relevance of inequality and ethnic diversity, following the theory that relatively homogenous societies tend to use other remedies than criminal punishment.[196] Sociologists have also suggested that criminal punishment is related to more complex social practices, such as workplace and household discipline, the organisation of labour markets, and the welfare state.[197]

Another potentially important cause are political structures. Andrew Hammel takes the view that the existence of a cohesive group of elites and a centralised political system account for the fact that the abolition of the death penalty happened in Europe but not in the United States. Since, across countries, the general public often supports the death penalty, the role of European elites is seen as crucial for its abolition. Conversely, in the United States, the federal system and the democratically elected judges lead to greater receptiveness to more diverse social groups.[198] This view is shared by other researchers, who also suggest a link between the greater democratic responsiveness of officials and harsher punishment, comparing the United States with Europe.[199] In Europe, any public support for the death penalty may now also be irrelevant as its ban has been included in the European Convention on Human Rights.[200]

Adding Asian countries to the discussion presents some variations to these possible explanatory factors.[201] Many Asian legal systems still allow the death penalty, yet it can be shown that democratisation and economic development have led to its abolition in some countries, and to a decline in executions in others (e.g. in India, Taiwan, South Korea, Japan and Singapore). The highest number of executions can mostly be found in communist or authoritarian political regimes (e.g. in China, North Korea and Vietnam), thus being explainable as a means of political control. The link to economic development is also in line with other research as it is said that richer countries are better able to use other legal means than capital punishment to preserve social order.[202] Conversely, cultural factors seem to be less important. Moreover, as far as capital punishment has, de iure or de facto, been abolished, this was often on the initiative of political elites, with public opinion still in favour of it (e.g. in Hong Kong and South Korea).

[195] See Boulanger and Sarat 2005: 4–6.
[196] Jacobs and Carmichael 2002 (based on comparison between US States). The theory about the use of different types of law (penal, compensatory, therapeutic or conciliatory) is from Black 1976: 4–6.
[197] See Whitman 2005a: 20.
[198] Hammel 2010. See also Berry 2011.
[199] See Whitman 2005a: 28; Whitman 2003a: 14–15; Berry 2011: 1023.
[200] See Temkin 2015 (emphasising the permanence of the abolition in Europe).
[201] For the following see Johnson and Zimring 2009; Johnson 2010; Scherdin 2014 (also with chapters on Muslim countries).
[202] See Miethe and Lu 2005: 73.

Table 6.4 Potential relationships between political economy and imprisonment

1.	*political economy*	→ crime rate →	*punishment*
2.		←→ general culture → public opinion →	
3.		→ media culture → political and public opinion →	
4.		→ political culture → political opinion →	
5.		←→ political institutions →	

Beyond the debate about the death penalty, research about harsh punishment has often focused on incarceration rates. A particular point of interest has been why some countries, in particular the United States, have enacted policies leading to 'mass incarceration'. The main theories are akin to those about capital punishment, in particular referring to increased crime rates, public opinion and control of marginal populations.[203] Empirically, and different from the finding for capital punishment, there is said to be some correlation between imprisonment rates and public attitudes towards punishment.[204] Comparative empirical research has also confirmed the significance of other legal, social and political explanatory factors, while also noting the possibility of outlier countries.[205]

A specific point of interest has been the relationship between political economies and the harshness of punishment. Here, researchers explain the high incarceration rates in the United States with neoliberal politics, whereas, in continental Europe the more inclusive economic and social policies point towards the aim of resocialisation.[206] Michael Cavadino and James Dignan have developed models of how precisely the political economies of 'neoliberal', 'conservative corporatist' and 'social democratic' countries may be reflected in different rates of imprisonment.[207] Table 6.4 illustrates the potential causalities. Cavadino and Dignan regard a combination of the models 2 and 5 as most plausible. Contrasting the five models, it also seems likely that there are diverse ways causalities operate across the world. This is a challenge for comparative socio-legal research, while it offers the opportunity to illuminate such potential differences. It also shows that the initial illustration of possible causalities[208] can be further differentiated in terms of the precise interaction between the various non-legal elements (society, culture, politics, etc.) that influence the law.

[203] Frost and Clear 2018. See also Chapter 5 at Section C 2 (a), above (for cultural and religious reasons).

[204] Cavadino and Dignan 2006: 29–31.

[205] D'Amico and Williamson 2015 (lower incarceration rates in civil law countries); Spamann 2016 (for the United States as an outlier); see also Nelken 2009: 297–301 (in particular on Italy).

[206] Lacey 2011; Wacquant 2009; Cavadino and Dignan 2006.

[207] For the following see Cavadino and Dignan 2011.

[208] See Section A 2 (b), above.

D Conclusion

Applying socio-legal methods to comparative research has many benefits. For example, it can help in showing whether alleged differences between legal families are just technicalities, or whether they are correlated to real-life data such as the frequency of litigation, the strength of financial markets and crime rates. It can also improve our understanding of the relationship between law and society – for instance, whether laws are as effective in addressing a social problem as they claim to be and whether societal factors may substitute for deficient laws.[209]

It is sometimes possible to integrate socio-legal comparative law in the structure of a traditional comparative analysis. As explained previously, the traditional functional approach may even expect the researcher to examine whether the laws in question effectively fulfil this function.[210] Thus, in the traditional structure, some socio-legal aspects can become part of the country reports, others part of the comparative analysis or the policy recommendations. Alternatively, the socio-legal analysis may be presented in a separate section if this is seen as an elegant way of dividing the analysis between the 'law in books' and the 'law in practice'.

However, socio-legal comparative research can also indicate a fundamentally different structure if the main question is 'how to best solve a particular problem' and the comparison is 'just' a supporting tool. This is of particular interest for the debate on whether comparative law confirms or refutes the theory that law mirrors society.[211] Yet, the research discussed in this section has also shown that forms of influence are often too complex to prove clear causal links. In particular, it seems to be a general feature of the law that it tends to be in a mutually interdependent relationship with society. It has also been said that 'the more deeply legal rules are embedded in their context, the more difficult it becomes to suggest, let alone prove, causal links'.[212] Thus, socio-legal comparative lawyers tend to be careful in making claims about distinct causal relationships.

Researchers in economics, politics and sociology sometimes address related socio-legal questions while being less hesitant to make general causal claims. By contrast, the way anthropologists deal with such questions often tends to do the opposite in emphasising the distinctness of specific relationships. In this book, research from those and other non-law disciplines which, in substance, deal with questions of comparative law will be discussed in Part IV on 'implicit comparative law'. Moreover, socio-legal comparative studies will re-appear in the discussion about globalisation and comparative law in Part III of this book as it also requires an understanding of the socio-economic dimension of globalisation.[213]

[209] See, e.g. Section C 1 (a), above. [210] See Chapter 2 at Section A 2 (c), above.
[211] See Section A 2, above. [212] Dannemann 2006: 399.
[213] See also the 'global socio-legal perspective' by Darian-Smith 2013.

Supplementary Information

Questions for discussion. What is 'legal culture'? Is law a reflection of society, or vice versa? Which precise methods can be used in socio-legal comparative law? What do differences and similarities of litigation rates tell us about the divide between civil and common law countries? Can socio-legal comparative law answer the question why some countries have a 'harsh criminal law' but not others?

Suggestions for further reading. For the notion of legal culture: Nelken 2016. For comparisons of legal adaptability: Siems 2006. For the debate about the effectiveness of legal institutions in Japan: Ramseyer 2015. For the impact of Islamic law on development: Kuran 2010a. For the death penalty world-wide: Hood and Hoyle 2015.

7

Numerical Comparative Law

According to Lord Kelvin (1883) '[w]hen you can measure what you are speaking about and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of the meagre and unsatisfactory kind'.[1] Lord Kelvin was a natural scientist but today many social scientists would agree that quantitative approaches are central to scientific progress. Legal researchers have joined in relatively late, but there is now also a growing field of empirical legal studies, applying statistical methods to legal questions.[2]

This chapter starts, in Section A, with an overview of the types of quantitative legal information that are used in numerical comparative law. The subsequent three main sections are structured according to core topics of comparative law: Section B shows how numbers can be used to measure the impact of foreign and comparative legal ideas. Section C discusses how to measure similarities and differences between legal systems, thus supplementing the traditional and postmodern research on this issue. Section D turns to attempts to measure the quality of legal rules and institutions. Section E concludes.

This chapter will provide examples from various areas of law. Some of the examples will draw on my own writings, in particular on cross-citations between supreme courts, classifications of legal systems and measurements of shareholder protection. In addition, it will refer to research in other areas of law, in particular the growing use of quantitative methods in comparative constitutional law.

A Types of Quantitative Legal Information

As such, legal rules are not represented in a quantitative way. Thus, a preliminary question for numerical comparative law is how to attain such quantitative legal information. Table 7.1 categorises research according to three methods: counting facts about law, coding law and conducting surveys about law. As the table shows, all three methods can be used for the topics discussed in this chapter.

[1] See Merton et al. 1984. [2] See, e.g. Lawless et al. 2016; Epstein and Martin 2014.

Table 7.1 Overview of methods and examples of numerical comparative law

	Measuring the impact of foreign legal ideas (Section B)	Measuring similarities and differences (Section C)	Measuring the quality of legal rules and institutions (Section D)
Counting facts about law	judicial cross-citations (B 1), academic influence (B 2)	variations in amount of law (C 1)	benchmarks about courts and their operation (D 2)
Coding law	influence of foreign statute law (B 3)	coding differences in substantive law (C 3)	coding strength of legal rules (D 1)
Conducting surveys about law	hidden foreign influence (B 1), receptiveness of foreign ideas (B 3)	research preferences of legal scholars (C 2), perceptions of legal similarity (C 3)	surveys about quality of law (D 3)

'Counting facts about law' refers to information which can simply be counted, for example, how often one court cites another one, or how many laws there are in a particular country. These data can also be socio-legal ones, such as the days it takes for a court to decide a case. However, for such socio-legal data the focus of this chapter is different from the previous chapter: in the latter, the 'law in action' was the main point of interest, while here such data will be analysed as a form of benchmarking about the quality of legal institutions.

'Coding law' is based on mechanisms which translate the form or substance of legal rules into numbers. For example, we may code countries that have the death penalty as '1' and those that do not have it as '0'. Terminologically, in such a case, empirical researchers talk about 'qualitative' (or 'categorical') information that is presented as numbers.[3] It is also possible to develop a coding mechanism that considers further nuances, for example, coding as '0', '0.1', '0.2' etc. up to '1' whether a country criminalises the use of ten types of recreational drugs. Thus, here, the coding of the qualitative information has the aim to be akin to a quantitative 'interval variable', referring to a variable where the difference between values contains meaningful information.

'Conducting surveys about the law' can concern different types of information. Surveys can ask socio-legal questions about the law in action (and are thus mainly within the scope of the previous chapter), but they can also be about other topics such as the influence of foreign case law, the nature of legal scholarship or the perceived quality of a country's law. It depends then on the type of data whether, akin to the previous category, it is necessary to develop a mechanism of translating the survey responses into numerical

[3] See Epstein and Martin 2014: 120–3.

values. For example, a question may ask whether respondents think that a country's law is sufficiently business friendly and then code the answers of the ordinal variable 'strongly yes', 'weakly yes', 'neutral', 'weakly no' and 'strongly no' as '1', '0.75', '0.5', '0.25' and '0', in order to attain average scores which are comparable across countries.

The following will show how quantitative legal information can be presented descriptively as a form of numerical comparative law. In addition to such descriptive statistics, it is possible to use quantitative legal information in inferential statistics such as regression analysis, aiming to identify causal relationships. In such inferential research, on the one hand, the legal information can be the 'dependent' variable (i.e. the variable that the regression analysis tries to explain). For example, this may aim to respond to the question why some countries still have the death penalty while others have abolished it. On the other hand, the legal information can be one of the 'independent' (or 'explanatory') variables that explains something else. For example, this may aim to respond to the question why some countries have more developed financial markets than others (is it due to differences in law or other reasons?). These latter type of questions are not, however, the main focus of the present chapter as they will be discussed in Chapter 12 on 'Implicit Comparative Law', dealing with research in other disciplines in more detail.[4]

B Measuring the Impact of Foreign Legal Ideas

One of the aims of comparative law is to get lawyers interested in rules and concepts from other legal systems.[5] The success of this endeavour may be measured by way of counting how often courts cite the courts from other jurisdictions. Moreover, one can count references to words and persons indicating the influence of foreign ideas, or try to develop measures of legal transplants as far as statute law is concerned.[6]

1 Cross-Citations Between Courts

Court citations are a popular topic of quantitative research today since in most countries the text of judgments of higher courts is freely available online. There has also been a growing effort to evaluate citations between courts from different countries ('cross-citations') quantitatively. Often, such research has a time dimension which may be used to prove or refute the question about a growing relevance of comparative law to judicial practice.

[4] See in particular Chapter 12 at Section B 3, below. See also Chapter 11 at Section A, below (on comparative law and development).
[5] See Chapter 1 at Section A 2 (b), above.
[6] For legal transplants more generally see Chapter 8, below.

For example, David Zaring examined how often US federal courts referred to foreign case law between 1945 and 2005, finding that the most popular foreign courts are from Canada and Western Europe, but also that the use of foreign decisions is rare and more or less unchanged over time.[7] Esin Örücü searched all decisions of the All England Law Reports published in 1972, 1982, 1992 and 2002. She found between thirty and fifty-seven citations of common law courts, but only three to seven of continental jurisdictions in all four years.[8] In one of my papers, I examined the decisions of the Court of Appeal of England and Wales (CA) and the German Federal Supreme Court (BGH) for the years 1951 to 2007. For instance, it was found that, on average, the CA cites other common law jurisdictions in about 16 per cent of its decisions. Citations from the CA to other countries, as well as foreign citations from the BGH, tend to remain under 1 per cent, though in the early twenty-first century there has been a slight increase in German citations to the highest Austrian and Swiss courts.[9]

A joint project with Martin Gelter pursued a more comprehensive analysis of cross-citation in Europe. Using databases from Austria, Belgium, England (and Wales),[10] France, Germany, Ireland, Italy, the Netherlands, Spain and Switzerland, we hand-collected a dataset of cross-citations between the highest courts in matters of civil and criminal law.[11] We considered 636,172 decisions between 2000 and 2007, and found 1,430 cross-citations. A problem with this number, however, is that some of these highest courts are also competent for matters other than civil and criminal law, for example, administrative or labour law. Thus, we also identified the precise areas of law, and deducted the cases not concerning criminal and civil law. This led to a total of 1,098 cross-citations between these ten courts.

Table 7.2 displays the total number of cross-citations per citing court. In addition, it indicates why the foreign courts have been cited. Interestingly, the majority of these citations have been made for purely comparative reasons, i.e. they were not triggered by international or European law or a problem of jurisdiction or conflict of laws. It can also be seen that there are considerable differences in the overall propensity to cite one of the other nine courts: Austria and Ireland do this fairly frequently, but there are less than twenty cross-citations coming from France, Spain and Italy.

It may be suggested that these differences mainly reflect differences in the style in which judgments are drafted.[12] For example, common law judges or

[7] Zaring 2006. [8] Örücü 2007: 417. [9] Siems 2010a.

[10] In the subsequent text of this sub-section the term 'England' is always to be read as referring to 'England and Wales'.

[11] For France, Belgium and the Netherlands we also considered the opinions of the respective Advocates General, though for France only a sample of them could be incorporated. For the citations of the High Court of Ireland to the Court of Appeal of England and Wales (CA) we had to rely on a random sample of decisions because citations to English courts do not always reveal whether the cited court is really the CA.

[12] See generally Chapter 3 at Section B 2 (e), above.

Table 7.2 Number of cross-citations in civil and criminal law (all areas of law)[1]

Citing court is supreme court from . . .	Reasons to cite foreign court			
	Case history and jurisdiction	International and European	Pure comparative	Total
Austria	13 (14)	53 (57)	423 (431)	489 (502)
Belgium	4 (4)	9 (14)	41 (45)	54 (63)
England	8 (9)	29 (51)	8 (9)	45 (69)
France	11 (11)	2 (2)	5 (5)	18 (18)
Germany	5 (5)	16 (16)	25 (25)	46 (46)
Ireland	1 (1)	24 (84)	209 (382)	234 (467)
Italy	5 (5)	2 (11)	5 (5)	12 (21)
Netherlands	10 (14)	23 (47)	67 (73)	100 (134)
Spain	1 (1)	12 (12)	4 (4)	17 (17)
Switzerland	24 (29)	4 (5)	55 (59)	83 (93)
Total	*82 (93)*	*174 (299)*	*842 (1,038)*	*1,098 (1,430)*

[1] *Source:* Gelter and Siems 2013; Gelter and Siems 2014 (also for the subsequent text).

the courts in German-speaking countries often write comparatively long opinions with many citations to other cases, whereas in Italy and Spain it is less common to provide detailed references. In these latter countries, foreign case law may therefore not be disregarded, but 'only' left uncited.

To identify such hidden influence other empirical tools can be used. Some researchers have conducted interviews with judges in order to understand the relevance and conditions for judicial comparativism.[13] There is also a quantitative study by Brian Flanagan and Sinéad Ahern, who conducted a survey of forty-three judges from common law countries. Here, about half of the judges indicated that they had personal contacts with judges from other jurisdictions, and all but one judge stated that they were at least infrequent users of comparative material.[14] This apparent popularity of comparative law may mainly be due to the consideration of judgments from other common law countries, but my research with Gelter found that this is not the entire picture.

Figure 7.1 shows that the citations from Austria to Germany, and from Ireland to England, dominate the picture: Austria has cited Germany 459 times, and Ireland has cited England 456 times. The other relationships trail behind these two by one order of magnitude: fifty-eight and forty-five citations to Germany from the Netherlands and Switzerland respectively, forty-one citations from Belgium to France, and thirty-four citations from Germany to Austria. Thus, there is apparently some 'one-way traffic' from smaller to bigger

[13] Mak 2013 (for courts in Europe and the United States); Law 2015 (for courts in Asia).
[14] Flanagan and Ahern 2011 (42 per cent considered themselves as frequent users).

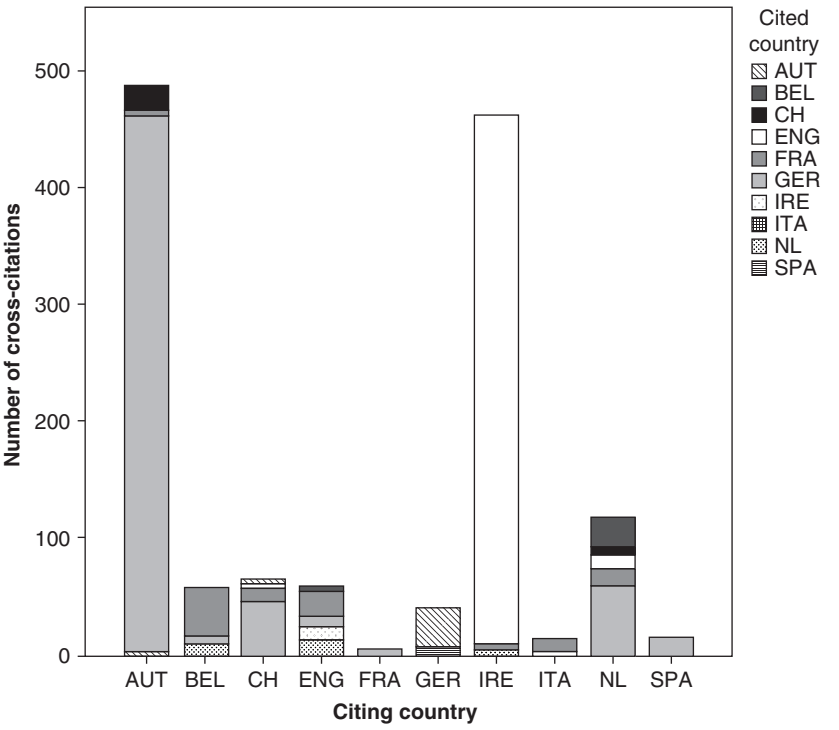

Figure 7.1 Bar chart on cross-citations between supreme courts[1]

[1] *Source:* Gelter and Siems 2012 (also for the subsequent text).

jurisdictions, while one may also contemplate the role of cultural and linguistic proximity.

These, and other possible explanatory factors, can also be assessed more formally. For this purpose, we undertook regression analysis in order to understand the differences between these cross-citations. The dependent variable, i.e. the variable that is to be explained, is the number of cross-citations between the ten courts in matters of civil and criminal law. Since this refers to count data (0, 1, 2 etc.), a technique called 'negative binomial regression' was used, with further technical details explained in the paper. A number of reasons, i.e. the independent variables, were examined as potentially explaining differences in cross-citations.

Table 7.3 shows that the independent variables of this model are all statistically significant.[15] Thus, it can be said that the population of the cited

[15] Statistical details are beyond the scope of this chapter. The symbols mean: *** significant at the 1 per cent level, ** significant at the 5 per cent level, * significant at the 10 per cent level, # significance denotes highest degree (individual parameter estimates not displayed).

Table 7.3 Negative binomial regression with dependent variable number of cross-citations in matters of civil and criminal law[1]

Independent variables		Interpretation of coefficients	
(Constant)	−8.077***	*Change per 1 unit increase*	*Change per standard deviation*
Population of cited country	.0389***	+3.97% per 1 million	+185.11%
Lack of corruption of cited country	.753***	+112.37% per 1 point in index	+130.02%
Same language	1.122*	+207.13% for change to same language	+53.94%
Language skills	2.106***	+721.59% for change from 0% to 100% knowledge of language	+97.01%
Same legal family	.599***	+82.10% for change to same family	+31.41%
Cultural difference	−956**	−61.57% per 1 point in index	−38.11%
Coordination difference	−1.475*	−77.12% per 1 point in index	−28.91%
Dummies citing court	#***		
Number of observations (N)	90		

[1] Adapted from Gelter and Siems 2013 (also for the subsequent text).

country and a low level of corruption, native languages, language skills, legal families, and cultural and political factors all have a bearing on which courts are likely to be cited. We also tested other variables, such as GDP per capita and geographical distance, which turned out not to be significant. The column 'Change per standard deviation' allows a comparison between the weight of the independent variables: thus, population, corruption and knowledge of the language of the cited court (i.e. native languages and language skills) are more important factors driving cross-citations than legal traditions, culture and politics.

The relevance of the population of the cited country is not really surprising, since even a casual glimpse of our data shows that most citations go from smaller to larger countries. With respect to corruption, it likely matters that the highest courts of the two countries that performed poorly in this index (Italy and Spain) are only rarely cited by the other countries. In substance, the data concerning both the size of population and the absence of corruption may indicate that the reputation of a court explains why it is the target of cross-citations. Moreover, a particular court may attract citations because its decisions are more easily accessible than others. Language is the main proxy for this – and, as a matter of policy, our results may therefore suggest that courts should strive to make their decisions available in languages that possible

foreign readers understand. It is also interesting to see that in Table 7.3 languages are more important than legal families.

2 Measuring Foreign Influence Related to Academic Research

Adding academic research leads to a number of further questions related to the impact of foreign legal ideas: for example, are foreign academics cited in domestic judgments; are foreign laws or judgments cited in domestic law journals; and have foreign academics had an influence on domestic laws? In particular, it can be interesting to measure the international impact of academic research, since, possibly, the 'most common way in which foreign law permeates national law is through national legal writing'.[16] This may even be the case where the actual law is very different.[17]

Research by Basil Markesinis has measured the influence of comparative lawyers on both fellow academics and judges.[18] For example, with respect to Italian comparatists, he observes strong citation networks, in particular due to Sacco and his pupils. Here, as well as in other countries, it also matters in which language a particular piece is published: for instance, British comparatists, as well as Zweigert and Kötz, David, Legrand, and the English articles by Sacco, are occasionally cited in the US literature, but not others. With respect to courts, Markesinis does not find that comparative law is very influential since, even when comparative lawyers are cited, this is often for their non-comparative work. Markesinis believes that this disregard of comparative law is a problem, though he also indicates that being cited should not be seen as a measure of scholarship.

It is also interesting to investigate how the impact of comparative law has changed over time. This measure can respond to claims that, on the one hand, comparative law is said to have remained an esoteric subject, which matters only to a few people with special interests,[19] the likely explanation being that legal education is primarily focused on providing a coherent description of the law as it is applied domestically. On the other hand, there are claims that we can observe a growing interest in comparative law, with a gradual internationalisation of legal education[20] and the claim of the twenty-first century becoming the 'era of comparative law'.[21]

[16] Smits 2006b: 517, also 523. See also Faust 2006: 861 (aim of positive economic analysis of comparative law to establish why lawyers in different jurisdictions care, or do not care, about comparative law).

[17] See Kleinheisterkamp 2006: 296 (for the use of foreign legal doctrine in Latin America).

[18] Markesinis 2003: 75–155 and 261–4 (for list of databases and journals searched); updated in Markesinis and Fedtke 2009: 77–120.

[19] Reimann 1996: 65; Markesinis 1990a (calling it 'a subject in search of an audience').

[20] Jamin and Van Caenegem 2016.

[21] Örücü 2004a: 216. See also Siems 2016b.

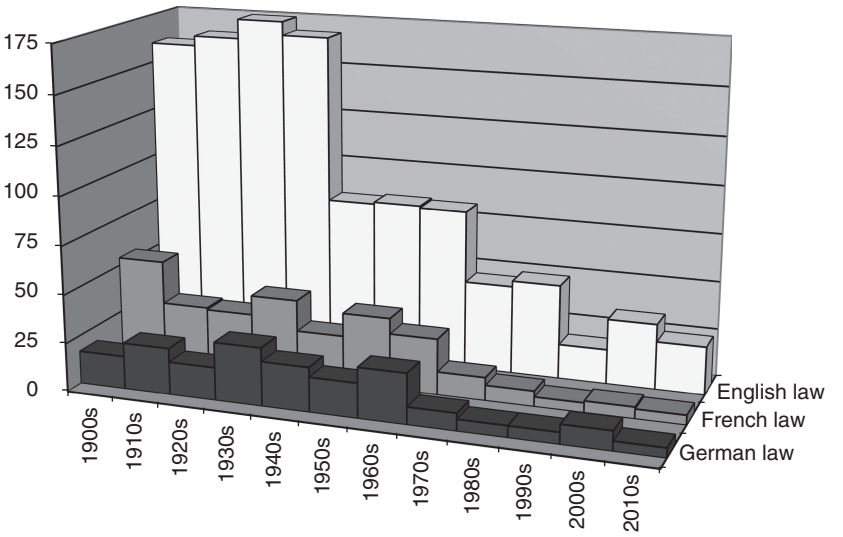

Figure 7.2 'Foreign laws' in *Harvard Law Review*[1]

[1] *Source:* own calculations (the 2010s data extrapolate the references up to 2016)

A previous paper searched how often foreign words for 'law' (e.g. 'droit', 'Recht') as well as the term 'comparative law' (and the equivalent German term) have been mentioned in two of the main US and German law journals between 1950 and 2006.[22] It was found that in general there has been a decline in the use of all of these words in the US journal. The German data are more ambiguous. In particular, while there is a decline in the French term 'droit', the English term 'law' has been mentioned more frequently, possibly reflecting the shift towards English as the internationally dominant language in legal scholarship.

Figure 7.2 illustrates a related way of collecting and presenting such data. Here, the *Harvard Law Review* is searched for the terms 'English law', 'French law' and 'German law', starting with the year 1900. All three time series show a general downward trend. One can also calculate how the relative frequency of these three terms has changed: at the beginning of the twentieth century there were almost four times as many references to 'English law' than to 'French law' and 'German law' combined, whereas today it is just twice as many. Thus, apparently, the growing independence of US from English law has been a stronger trend than more general factors that play a role, such as (as some speculate) 'parochialism, belief in the superiority of the American Way (i.e., arrogance), the lack of language skills, etc'.[23]

[22] Siems 2007b. The journals were the *Harvard Law Review* and the *Neue Juristische Wochenschrift* (NJW).

[23] Reimann 1996: 53. See also Garoupa 2011 (on legal parochialism); Chapter 3 at Section C 2, above (for differences between English and US law).

Table 7.4 The top ten words of the Draft Common Frame of Reference (DCFR), compared with four domestic codes[1]

Rank	Word	Top ten ranks in French, German, Indian and US codes
1	contract	Germany (1), France (9), India (1), United States (8)
2	person	Germany (2), France (2), India (3), United States (2)
3	party	Germany (6)
4	performance	Germany (9)
5	time	Germany (7), France (8), India (8)
6	obligation	–
7	right	Germany (5)
8	security	United States (1)
9	goods	India (2), United States (3)
10	debtor	France (3)

[1] *Source:* own calculations. Note: property and family law were excluded; thus, the DCFR was used without books IX, X. The other Codes are: French Code Civil (ss. 1101–1386-18; and 1582–2322); German BGB (books 1 and 2); Indian Contract Act; US Uniform Commercial Code. Common terms such as 'article', 'section' or 'may' have been omitted.

3 Measuring the Influence of Foreign Statute Law

Empirical research on the influence of foreign statute law has explored how far there is popular support for such influence. Surveys from five European countries (Bulgaria, England, Norway, Poland and Ukraine) and the United States found that, generally speaking, there is support for learning from foreign legislative models.[24] In the European study, however, the respondents from England also indicated that the United Kingdom could learn more from other common law countries than from continental Europe.

In order to measure the actual influence of foreign ideas on statute law, a possible approach may be to scrutinise the number of citations to foreign legal systems in preparatory works of law-making institutions. However, such materials are often not available and they may not disclose all foreign influence. Thus, another approach is to develop measures of the actual 'output', i.e. the relevant statute laws. While laws themselves do not mention on which foreign model they are based, there are at least four ways in which influence on statute law may be identified.

First, one may start with a particular law and then examine which laws may have influenced it. Table 7.4 illustrates this approach, aiming to calculate the main origin of the DCFR, essentially the draft for a future European Civil Code.[25]

[24] Grødeland and Miller 2015: 508; Linos 2013: 36–66. Different for references to foreign precedents in US case law: Curry and Miller 2008 (based on an experimental design).

[25] Available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf. See also Chapter 9 at Section B 3 (a), below.

The four foreign codes considered are the German Civil Code (BGB), the French Code Civil, the Indian Contract Act and the US Uniform Commercial Code (UCC). It can be seen that six of the top German terms but only four of the top French, Indian and US terms, are in the DCFR's list of most common terms; in particular all top five DCFR terms are part of the German top ten. Thus, it may not be unreasonable to assume that the BGB has been particularly influential.

Examining such similarities in language can also be done with more elaborated matching techniques.[26] It is also in line with non-quantitative research which compares legal languages in order to identify legal transplants.[27] But, of course, there are limitations as well. The use of certain words is likely to be influenced by purely linguistic preferences or how the German and French codes have been translated. Since the Indian Contract Act deals with fewer topics than the DCFR, and the US UCC with somewhat different ones, a more limited overlap is, in any case, to be expected.

Secondly, it is possible to ask the reverse question, namely, whether particular legal rules have had an impact on other legal systems. A good example (though not strictly speaking about foreign influence) is William Carney's article which analysed the impact of the Model Business Corporation Act on the corporate laws of the fifty US States. The general result was that the Model Business Corporation Act led to convergence, because 74.4 per cent of its 142 provisions had been taken over by all States. Since not all provisions are equally important, Carney also isolated important provisions and found that the Model Business Corporation Act also led to convergence with regard to these provisions.[28]

A more complex process was examined by T.T. Arvind and Lindsay Stirton, analysing the reception of the French Code Civil in the German states of the early nineteenth century.[29] Arvind and Stirton coded the way these states had adopted and implemented the French Code Civil, assigning scores of '1', '0.75', '0.5', '0.25' and '0'. Subsequently, they aimed to explain what may account for differences in the degree of implementation of the Code. For this purpose, they used a 'fuzzy-set qualitative comparative analysis' (fsQCA) in order to identify necessary and sufficient conditions for the full or partial implementation of the Code.[30] Yet, this was not seen as providing evidence of causation, since questions of causal relationships needed 'the help of the researcher's substantive and theoretical knowledge'. Thus, this approach differs from a fully quantitative method that uses regression analysis to identify causal relationships. But regressions can only show statistically significant results when we

[26] See Section C 3, below. [27] Pozzo 2012: 90–4. [28] Carney 1998.

[29] Arvind and Stirton 2010.

[30] The main ones, identified by the paper, are 'territorial diversity, control by Napoleon, central state institutions, a feudal economy and society, liberal (enlightened absolutist) rule, nativism among the governing elites and popular anti-French sentiment'. On fsQCA see also Chapter 12 at Section A 3, below.

have a large number of observations and a limited number of explanatory variables. In the situation analysed by Arvind and Stirton, this would not be the case, since they only have fourteen states but eight possible explanatory factors. Thus, their analysis is a good compromise of using some quantitative tools in order to establish possible causal relations, while not claiming that they can provide statistical proof.

It is also possible to take instruments of international and regional organisations as a starting point in order to establish how far they have influenced national law-makers. For example, in the EU, the Commission has a natural interest in monitoring how directives have been implemented and whether recommendations have been taken up by national legislators.[31] Researchers have also analysed the causes and impact of (non-)compliance with EU directives.[32] In addition, whether an EU directive leads to uniform rules depends on aspects beyond simple compliance, for example, how specific and comprehensive this instrument is and, at the level of the Member States, whether they dilute its effect through the use of words different from the instrument.[33]

The next two categories are based on methods that do not start with a particular law. So, thirdly, in some situations it can be both feasible and useful to aim for a comprehensive measurement of the statute law on a particular topic, which, amongst others, can then be used to identify the influence of foreign law. The main example here is the quantitative research on comparative constitutional law. Two, initially separate but now intersecting projects by Tom Ginsburg and colleagues and Mila Versteeg and colleagues coded the information of codified constitutions of all countries going back to the year 1789.[34] For this coding of the constitutional provisions it is an advantage that there is a relatively distinct set of constitutional rights (freedom of expression, right to vote, prohibition of torture, etc.) which can be comprehensively coded as being available ('1') or not available ('0').

The main paper about the determinants for constitutional transplants analysed the evolution of constitutional rights in 180 countries after the Second World War. Using econometric models of spatial interdependence

[31] Statistics on the implementation of directives are published in the Internal Market Scoreboard, available at http://ec.europa.eu/internal_market/score/index_en.htm. For an example of a recommendation see Commission Staff Working Document 2007.

[32] See, e.g. Börzel et al. 2010; Linos 2007.

[33] See Goanta 2016 (constructing a convergence index, analysed for the implementation of five Directives of consumer sales law in seven Member States).

[34] The data are available at http://comparativeconstitutionsproject.org/. See also Meuwese and Versteeg 2012 (discussing the use of quantitative methods in constitutional law); Landman and Carvalho 2010: 78–86 (for quantitative research on 'de jure human rights commitment'), as well as Section C 3, below. The first quantitative study of constitutions (and, possibly, numerical comparative law) was van Maarseveen and van der Tang 1978 (analysing the text of 157 constitutions).

(with details going beyond the scope of this chapter), the paper could establish under which circumstances a country follows the model of another country. It was found that shared colonial ties, commonalities in religion and legal origin, and competition for foreign aid are statistically significant.[35] The significance of legal origin deserves special attention since, usually, comparative lawyers take the view that the civil/common law divide is less relevant for questions of constitutional law.[36]

Fourthly, in other fields, legal measurement often follows a functional approach. For example, in company law, research may start with a question, such as 'what are the possible ways of protecting shareholders?' and then develop an index that translates details of the law into numbers. This approach is, on the one hand, more narrow than the one outlined for comparative constitutional law as it does not have the ambition to measure all details of the codified law. On the other hand, it is more ambitious as it includes any legal tool that achieves a particular function, for example, not only the codified company law but also case law, listing rules and other functional equivalents.

Such a functional approach of measuring shareholder protection has been applied at a project at the Centre for Business Research (CBR) of the University of Cambridge in which the author of this book has also been involved.[37] Amongst others, this project developed a functional ten-variable index on shareholder protection, considering topics such as the independence of board members, the powers of the general meeting and the prohibition of multiple voting rights. Then, we coded various legal systems for the period from 1990 to 2013 according to this index, i.e. assigning values such as '0', '0.5' or '1' depending on the legal rules in question.[38] Subsequently, it is possible to measure how different one country (or a group of countries) is from others: calculating the differences between each variable in the law of a particular legal system, and the same variable in the law of the other countries, and then adding together the absolute values of these differences.

Based on this method, Figure 7.3 indicates the likely influence of Western legal systems on the law on shareholder protection in six Central and Eastern European countries between 1990 and 2013. It can be seen that the latter countries seem to have adopted provisions from English, French and US company law, leading to a clear decrease in the respective differences.

[35] Goderis and Versteeg 2014 (based on data for 180 countries after 1945). But see also Ginsburg and Versteeg 2014 (right to constitutional review mainly driven by domestic electoral politics).

[36] See Chapter 4 at Section C 3 (c), above.

[37] For the following see Lele and Siems 2007: 37–43 (for calculating differences); Katelouzou and Siems 2015 (for the most recent data from 1990–2013). The dataset is available at www.cbr.cam.ac.uk/datasets/. For more details see also Sections B 3 and C 1, below.

[38] The full text of the index, the dataset and detailed explanations can be found online: see ibid.

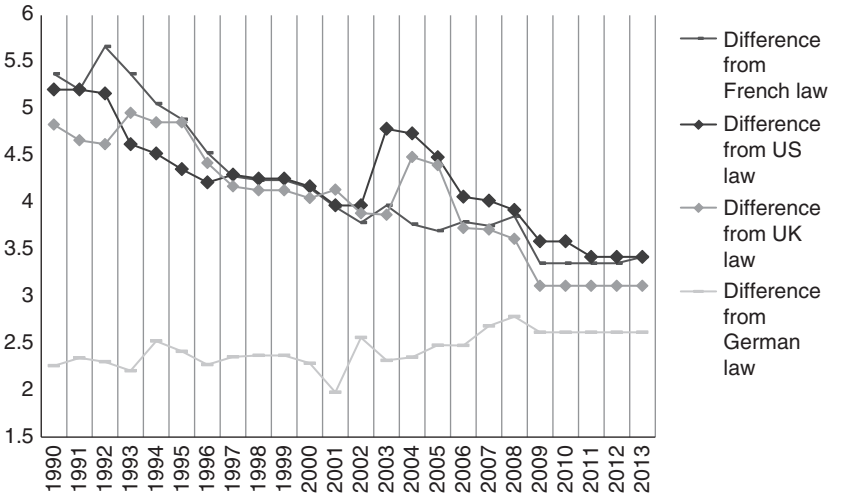

Figure 7.3 'Westernisation' of shareholder protection in Central and Eastern Europe (Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovenia) (based on ten variables)

German law had already been fairly similar in the 1990s, and – possibly due to the influence of the other three countries – there has been a slight divergence in the 2000s. What precisely triggered these changes cannot be answered with such an approach. Thus, the question of legal transplants in law-making may also invite a qualitative historical analysis, understanding more precisely how foreign political, cultural or economic forces have influenced domestic law-making.[39]

C Measuring Similarities and Differences

Some comparative lawyers seem to get disillusioned about the debate of whether there are more differences or similarities between legal systems. For instance, there is said to be a high degree of subjectivity in whether comparatists are more inclined to perceive differences or similarities,[40] and that similarities between common and civil law depend 'only on the terms of comparison and on the problems that one is facing'.[41] The growing quantitative legal research offers, however, a less subjective way of identifying similarities and differences between legal systems, for instance, for the question whether or not it is justified to say that they belong to the same legal family.

The topic of this section is related to the previous section since foreign influence may lead to an approximation of legal systems. Yet, this is not necessarily the case: for example, it may also be interesting to show legal similarities triggered by similar socio-economic conditions, but without direct interaction. The following will provide a range of examples of such research about similarities

[39] See Chapter 8 at Section B, below. [40] Antokolskaia 2006: 27. [41] Mattei 1997b: 41.

and differences, in particular concerning the civil/common law divide. It will, in turn, deal with the formal features of the legal system, legal research methods, the substance of legal rules and a new proposal for a combined measure.

1 Formal Features of the Legal System

An intuitive initial question about a legal system is how much a country relies on formal, as opposed to informal ways of achieving social order.[42] It is, however, difficult to find an objective measure of formal law that can be valid across countries. Peter Nardulli and colleagues compiled a dataset on the number of legal publications and law schools across countries,[43] but it is not entirely clear how those data have been collected as the raw data have not been made available.

Cross-country surveys have mainly been interested in opinions about the relationship between statute and case law. Two of those studies confirm the stereotypical differences between civil and common law countries. The European study, mentioned in the previous section, found that English, and to some extent Norwegian, respondents were more likely to indicate a preference for general principles that should be applied by courts than Bulgarian, Ukrainian and Polish respondents, expressing a preference for detailed law that should be applied literally.[44] Similarly, a book by Thomas Lundmark reports a small-scale four-country survey where he questioned legal philosophers about the completeness, determinability and certainty of their legal systems. Amongst others, Lundmark asked them to assess whether their legal systems have a preference for predictability of the law or individual justice (scored from 1 for a maximum of predictability to 5 for a maximum of individual justice): here the average responses from Germany and Sweden were '3' while those from the United Kingdom and the United States were '4'.[45]

Research which uses objective data can compare the amount and detail of the codified law. For example, in the 1980s Heinz Schäffer and Attila Racz led a research project on 'Quantitative Analyses of Law – A Comparative Empirical Study: Sources of Law in Eastern and Western Europe'.[46] This project used questionnaires to estimate the total amount of generally binding normative acts, for instance, in terms of pages and the number of single norms. Schäffer and Racz also tried to identify the amount of legal changes within

[42] See Black 1976 who contends that the quantity of law is inversely related to the extent of informal social order. But this correlation is disputed: see, e.g. Nelken 2010: 37.
[43] Nardulli et al. 2013. See also www.clinecenter.illinois.edu/data/sid/rule/.
[44] Grødeland and Miller 2015: 92; Kurkchiyan 2011: 380.
[45] Lundmark 2012: 96–130. Similarly, for judicial discretion, Cooter and Ginsburg 1996: 300. But note that these two studies do not indicate how many scholars participated in the surveys: thus, their validity cannot be scrutinised.
[46] Schäffer and Racz 1990.

Table 7.5 Countries with or without Civil Code and English as official language[1]

		Civil Code	
		Yes	No
English language	Yes	8	28
	No	102	18
Total		110	46

[1] *Source:* own calculations. The information about Civil Codes is based on http://foreignlawguide.com/. 'English language' includes countries where English is at least one of the official languages as well as Australia, New Zealand, United Kingdom and United States where English is de facto the official language.

a period of ten years, as socialist governments were expected to be less hesitant in changing existing legal orders.

It is also possible to examine codified laws of specific areas and topics. Table 7.5 responds to the frequent view that Civil Codes are typical for civil law countries and that common law countries are typically English-speaking.[47] It can be seen that, generally speaking, there is a positive correlation between countries having a Civil Code and not being Anglophone, and vice versa. However, there are some interesting irregularities. The eight Anglophone countries with a Civil Code consist of some countries that may be classified as mixed legal systems (e.g. Mauritius, Philippines), but also some countries that are typically classified as civil law (e.g. Eritrea) or common law (e.g. Malta). The eighteen non-Anglophone countries without a Civil Code are the Nordic countries, some of the countries of the former Yugoslavia, some Muslim countries, some mixed legal systems (e.g. Israel, Sri Lanka) and some countries which are typically classified as common law but which no longer have English as an official language (e.g. Bangladesh, Cyprus, Nepal).

Research by Tom Ginsburg and colleagues has explored differences in the 'specificity' of codified law. The first paper called this 'leximetrics', and examined whether in Europe the length of laws implementing EU directives varies systematically across countries.[48] Based on the implementing statutes of directives on product liability, works council and e-commerce, they constructed a 'statutory specificity index' with the most specific legal system being the United Kingdom (i.e. having the longest implementing statutes) and the least specific ones being the Scandinavian countries. Thus, this result may confirm statements by comparative lawyers that, in common law countries, legislation tends to be more detailed in order to make clear that it replaces prior judge-made law.[49] Ginsburg and colleagues also

[47] See Chapter 3 at Sections B (1) (a), C 1, above. [48] Cooter and Ginsburg 2003.
[49] See Chapter 3 at Section B 1 (a), above, and, e.g. Zweigert and Kötz 1998: 268.

examined the specificity of constitutions, using data from most countries of the world.[50] Here, too, civil law countries tend towards shorter texts than common law ones, though, in Latin America, constitutions also tend to be relatively long. As with other statutes, the lengthiness could be the result of a relatively detailed treatment of particular issues, but it is also possible that it is the outcome of a broader scope of topics. It can also be revealing to explore how the length of constitutions is related to other factors, such as the level of social trust in a particular society.[51]

Beyond the length of the text, further elements of codified law can be the topic of a quantitative analysis. For example, one may want to explore how difficult it is to understand and interpret the text of a constitution: here one paper evaluated constitutions based on the 'Flesch reading ease' score;[52] another one examined the inter-coder reliability of the interpreted responses.[53] Also worth mentioning is a new website, Global Regulation, which enables searches for the frequency of terms based on a large number of laws from forty-eight countries,[54] though, at present, only presenting data about the number of laws, not their length and other characteristics.

With respect to similarities and differences between courts, one may simply count and compare the number of court decisions, or say, dissenting judgments across countries,[55] or one may use socio-legal data such as the duration and cost of trials.[56] Another approach is to pursue a content analysis of court decisions. Mark Hall and Ronald Wright provide the following summary of this approach:

> On the surface, content analysis appears simple, even trivial, to some. Using this method, a scholar collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning. This method comes naturally to legal scholars because it resembles the classic scholarly exercise of reading a collection of cases, finding common threads that link the opinions, and commenting on their significance. But content analysis is more than a better way to read cases. It brings the rigor of social science to our understanding of case law, creating a distinctively legal form of empiricism.[57]

[50] Ginsburg 2010b. Based on the Comparative Constitutions Project, see Section B 3, above.
[51] Bjørnskov and Voigt 2014. The data are from Voigt 2009 (also finding that common law countries tend to have longer constitutions). See also Chapter 12 at Section C 3, below (for research on relationship between law and trust).
[52] Smits 2016. See http://flesh.sourceforge.net/. [53] Melton et al. 2013.
[54] See www.global-regulation.com (click at 'analytics').
[55] For the first point see Section A 1 (b), above, and for the second one, see, e.g. Bricker 2017.
[56] See Chapter 6 at Section B 3, above, and see Section C 2, below.
[57] Hall and Wright 2008: 64. See also Meuwese and Versteeg 2012: 240–4 (on quantitative text analysis and comparative law) and Chapter 5 at Section C 2 (b), above (for corpus linguistics and law).

How exactly can this be done in comparative law? A comparatist may find it interesting to explore whether such an analysis could show differences and similarities in legal methods – for instance, in forms of statutory interpretation. However, linguistic and conceptual differences can make a direct textual comparison across legal cultures difficult. For example, a content analysis of English judgments would search for terms such as 'literal rule', 'golden rule' and 'mischief rule', whereas in Germany the relevant terms would refer to 'Wortlaut' ('wording'), 'Entstehungsgeschichte' ('historical background') and 'Sinn und Zweck' ('purpose').[58] Alternatively, the coding can aim for more generic attributes, for example, whether courts in some countries have a greater tendency to refer to moral, economic, sociological or other arguments external to law.[59]

Another subject of such research can be whether courts differ in the extent to which they make references to the academic literature and other court cases. Usually, it is said that the academic literature is cited more frequently in Germany than in England,[60] whereas it may be assumed that, in a common law country like England, case law is cited more often than in a civil law country like Germany. However, the latter point was not confirmed in a previous paper, already mentioned in the preceding section. Considering the Court of Appeal of England and Wales (CA) and the German Federal Supreme Court (BGH) for the years 1951 to 2007, it counted all court citations for a random sample of fifty-seven decisions per country (one per year). The sample mean of all citations per judgment was 7.26 for the CA and 7.96 for the BGH, and since the standard deviations were relatively high (6.00 and 6.84), one could not reject the hypothesis that the population means were equal.[61]

A related question is whether there are differences in the way courts cite their own decisions. For example, comparing the average age of cited cases in the United States and England, Richard Posner observes that the turnover of cases is higher in the United States due to the larger pool of recent cases.[62] With respect to the common and civil law divide, it may be suggested that, in the system of case law of the former countries, old decisions are more honoured than more recent ones. Yet, this is not necessarily the case.

Figures 7.4 and 7.5 show how often and when the German BGH and the English CA cite their own decisions.[63] The general shape of the curves is that

[58] For an attempt to quantify these topics see Siems 2007c.

[59] Jakab et al. 2017: 773, 782 (more frequent in common law countries; yet, overall, similar constitutional reasoning in civil and common law countries).

[60] See Kötz 1990. See also Chapter 3 at Section B 2 (e), above.

[61] Siems 2010a: 159. See also Section B 1, above.

[62] Posner 1996: 86–7. For more recent research on US courts see Black and Spriggs 2013.

[63] This and the following is from Siems 2010a: 166–8. Four volumes were chosen for each of the courts: with respect to the BGH it was examined how frequently the decisions of the volumes 10 (1953), 50 (1968), 100 (1987) and 140 (1998) of the official law reports (BGHZ) have been cited in decisions published in the *Neue Juristische Wochenschrift* (NJW); and with respect to the CA it was traced how often the CA decisions published in volumes (1953) 1, (1968) 1, (1987) 1, (1998) 1 of the *Weekly Law Reports* (WLR) have been cited in other decisions published in the WLR.

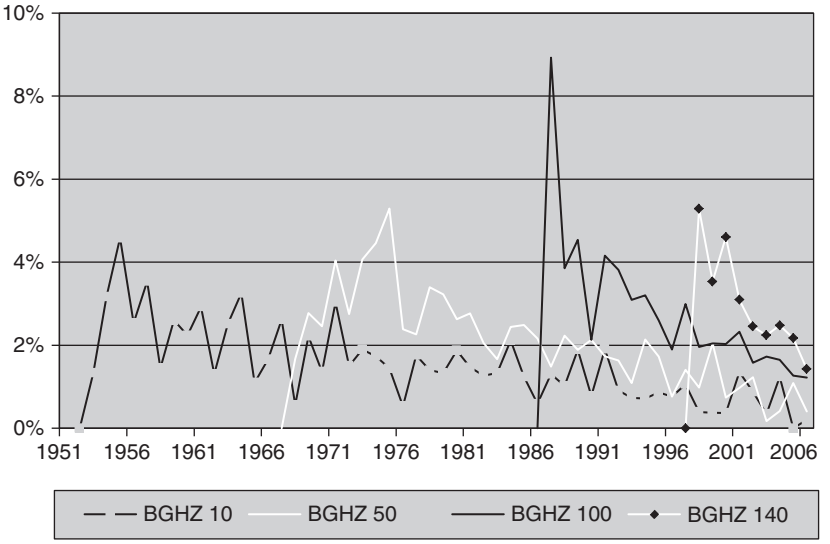

Figure 7.4 How often has the BGH cited its own decisions?

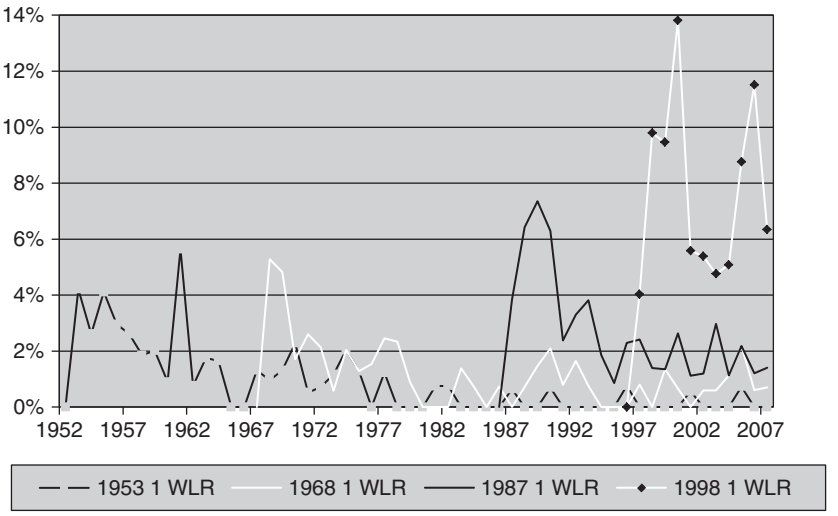

Figure 7.5 How often has the CA cited its own decisions?

there are initially no citations, then a steep rise, and finally a smooth decline. Three reasons can be brought forward in order to explain these developments. First, it is likely that there is an initial 'excitement' about new decisions, but subsequent decisions or law reforms may modify or even reverse their findings. Secondly, courts may prefer to cite the most recent decision. Thus, in these situations, the original decision is still 'good law', but falls victim to shorthand citation. Thirdly, court decisions reflect the socio-economic problems at that time. As the world constantly changes, it is clear that some of the topics of older decisions become obsolete.

The eight curves of Figures 7.4 and 7.5 do not look entirely identical. Some of the curves reach a considerably higher peak, and some are less skewed than others. In order to identify the reasons for these different shapes, one would have to examine the specific citations of the specific years in a non-quantitative way. Comparing the BGH and CA data, it can, however, be established mathematically that, in both figures, the 'skewness', i.e. the degree of asymmetry of a distribution around its mean, is similar.[64] Thus, in terms of the number of citations of previous case law, it cannot be confirmed that, in England, old decisions are more honoured than in Germany. Yet, this also shows the limitations of such a quantitative approach. A more qualitative assessment may be able to identify a difference, since English courts carefully analyse the facts, ratio and dictum of previous judgments, whereas German courts often only provide a list of references.[65]

2 Research Methods of Legal Scholars

In the debate about common and civil law countries it is sometimes said that the core difference is the way legal scholars approach 'law' as an academic subject.[66] Comparative research of a quantitative nature is, however, rare. To provide an illustration of a numerical comparative law approach, the following outlines the findings of a small-scale survey, conducted together with Daithí Mac Síthigh, about preferred research methods in five law school.[67]

In this survey, we used the categories of 'law as humanities', 'law as social sciences' and 'law as a practical discipline' in order to classify different types of legal research. The distinction between the humanities and the social sciences is widely accepted around the world. For the survey, we were interested in legal research that makes use of the methods of humanities or social sciences, not the substance of the research. The category of 'law as a practical discipline' reflects that some legal academics may be 'academic lawyers' who share the methods and approaches of practising lawyers. In the actual questionnaire we phrased the categories as follows:

Please assume that there are three main methods of legal research:

→ *Legal research as part of humanities, i.e. analysis of legal texts (cases, statutes, etc.) using approaches similar to research in humanities (history, philosophy, literature, theology, etc.)*
→ *Legal research as part of social sciences, i.e. analysis of law in its context, similar to research in social sciences (sociology, economics, psychology, etc.).*
→ *Legal research as akin to the analysis of law in legal practice, i.e. similar to the approaches used by legal practitioners (judges, solicitors, etc.)*

[64] For the BGH the numbers are between 0.74 and 2.45 and for the CA between 0.71 and 1.89.
[65] Gelter and Siems 2014: 69–82. See also Chapter 3 at Section B 2 (e), above.
[66] See Chapter 3 at Section B 1 (c), above.
[67] Siems and Mac Síthigh 2017. The three categories derive from Siems and Mac Síthigh 2012.

In your current research how frequently do you use one of these three approaches? Please allocate in total 10 points (e.g. something like 5/5/0 or 3/3/4).

Note that mixtures can be the result of a mix of these approaches in individual pieces or across various research outputs. Please also note that these categories refer to method not substance.

The survey was sent to academic staff at two German law school (Heinrich-Heine University Düsseldorf and Bucerius Law School, Hamburg), two UK ones (University of East Anglia [UEA], Norwich, and University of Edinburgh) and one Irish one (Trinity College, University of Dublin). The responses were evaluated with various tools of descriptive statistics. The following provides just two examples.

Figure 7.6 is based on the arithmetic means of the research preferences. It can be seen that in the two German law schools, practical legal research is ahead followed by law as humanities and then, some distance behind, law as a social science; in the United Kingdom and Ireland, law as humanities is ahead with law as a social science also popular in the two UK law schools (though not the Irish one). Some of these differences in preferences can be related to institutional features of these five law school, but they also reflect the countries of the study. For example, for the two UK universities, it can be noted that practical research is often seen as not 'original' for the purposes of the regular Research Assessment Exercises (RAEs, now REFs). As far as Germany is concerned, the predominant mix of practical and humanities-influenced legal research is a general feature of German legal scholarship with its strong focus on legal doctrine.

We also considered that the United Kingdom is not a uniform legal system, and that Scotland is sometimes seen as belonging to a separate 'mixed legal

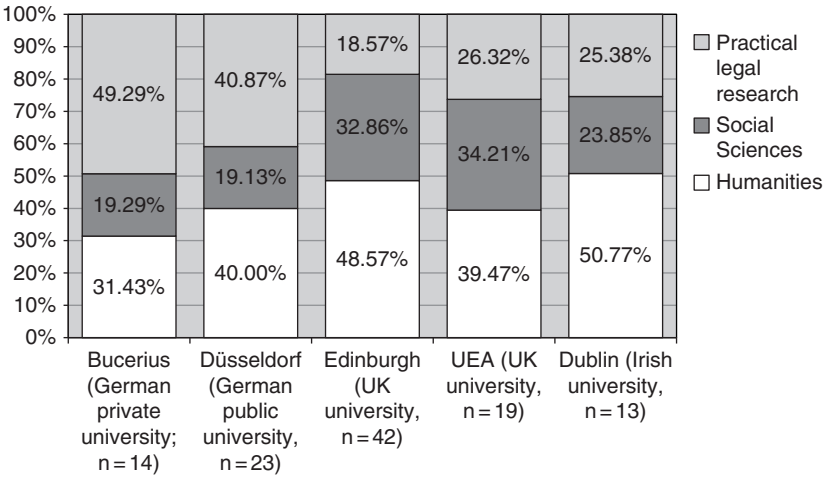

Figure 7.6 Preferred research methods of legal scholars in five law schools

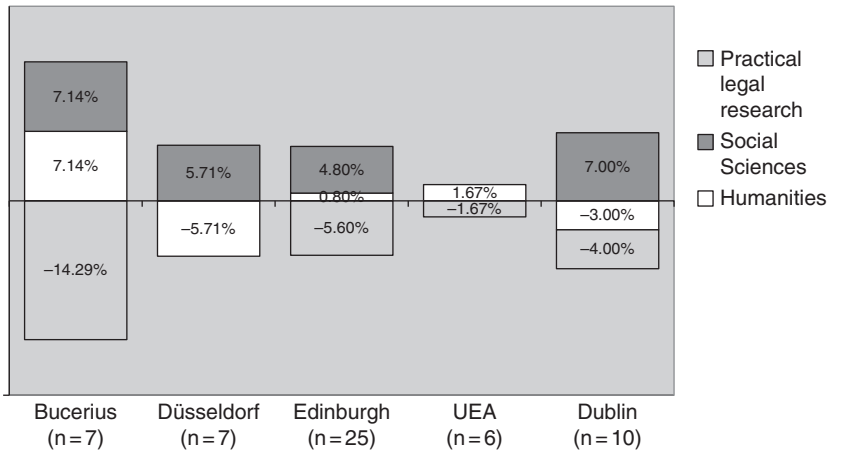

Figure 7.7 Changes in preferred research methods in last ten years

family'.[68] Having asked Edinburgh respondents whether they have received their undergraduate training in Scotland or elsewhere, we could calculate that the arithmetic means within the sub-category of Scots lawyers from Edinburgh (fifteen respondents) are 43 per cent for law as humanities, 36 per cent for law as social sciences and 15 per cent for practical legal research. This is close to the overall Edinburgh data for all forty-two staff members: thus, this suggests that, in terms of these three general legal methods, Scotland is not very different from the rest of the United Kingdom.

As a follow-up question, the respondents of the survey who were already academics ten years ago were asked the question: 'How did your methods change in the last ten years?'. Figure 7.7 presents the result compared to the responses given by the same persons for their research preferences today. It can be seen that practical legal research has become less popular, and law as social sciences more popular, with a mixed development of law as humanities. This finding may therefore indicate a gradual shift in the direction of US legal scholarship which tends to pursue a more interdisciplinary approach, in particular as it frequently incorporates methods from the social sciences.[69]

3 Substance of Legal Rules

Research of numerical comparative law that examines differences and similarities in the substance of legal rules can use similar approaches as those measuring the

[68] See Chapter 4 at Section C 3 (a), above.

[69] See Chapter 3 at Section C 2, above. For quantitative comparisons based on methods used in law journal articles see Dibadj 2017: 178–9 (comparing the United States, the United Kingdom and France), and Garoupa and Ulen 2016: 87 (comparing the United States and the United Kingdom).

influence of foreign statute law.[70] Most of it makes use of objective data, but it is also possible to conduct surveys about this topic. For example, the Oxford Civil Justice Survey asked 100 participants, predominantly in the legal departments of companies, whether they thought that there was considerable variation in the contract laws and civil justice systems of the EU Member States. With respect to contract laws, 71 per cent answered in the affirmative, and, with respect to civil justice systems, these were 84 per cent.[71] Of course, this does not prove that there are actually considerable differences. Still, it is interesting to see that such a perception exists, possibly influencing the way businesses operate in other Member States and justifying harmonisation of rules in this area of law.[72]

For an objective approach, one can start with one particular legal system and then examine quantitatively how far it differs from others. For example, William Carney was interested in the differences between EU and US company law.[73] For this purpose, he undertook a taxonomy of the EU company law directives, divided them into 131 provisions, and searched in the laws of the US States for similar provisions. He found that ninety-five provisions were not in effect in any US State, fourteen were in effect in all fifty States, and the remaining twenty-two provisions were adopted by a random number of States. He also observed that the provisions which were in effect in none of the US States mainly consisted of rules protecting creditors and employees.

Such an approach can also show how similar legal systems have gradually diverged. For example, a paper by Mark West starts with the observation that in 1950, the US Model Business Corporation Act and the modern Japanese Commercial Code were both based on the Illinois Business Corporation Act of 1933. Using a fifty-year historical database, he found that, despite globalisation pressures, these laws had diverged over time, classifying provisions as the same if the functions of the statutes were substantially similar.[74] Similarly, Maya Berinzon and Ryan Briggs examined the variations of the fading influence of the French criminal code in seven countries in West Africa. The main innovation of their paper is that the question whether articles of the French and African codes still 'match' is not done by hand but with an algorithmic approach through a computer program.[75]

More frequent, however, is the use of indices. The quantitative projects of comparative constitutional law, already mentioned in the previous section,[76] provide various perspectives on differences and similarities of constitutions based on large datasets of all of the word's constitutions. For

[70] See Section B 3, above. [71] Vogenauer 2008.
[72] For the latter point see Wulf 2014: 201, 207 (respondents who perceive differences to be large also support EU harmonisation of contract law). See also Low 2012 (for question whether consumers regard legal diversity as a reason to avoid cross-border contracts).
[73] Carney 1997. [74] West 2001. [75] Berinzon and Briggs 2016. [76] See Section B 3, above.

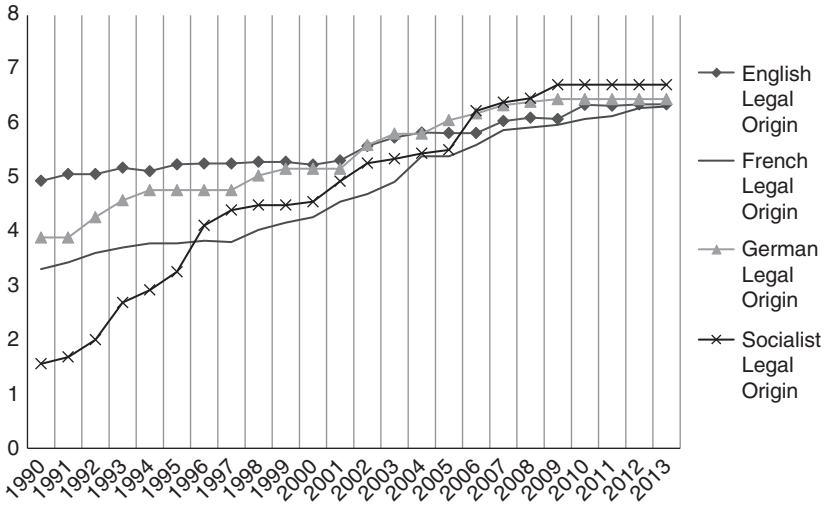

Figure 7.8 Shareholder protection by legal origin (ten variable index)

example, categorising constitutions, an ideological ranking shows a clear split between libertarian and statist constitutions.[77] Constitutions change, of course; thus, it has also been examined whether particular models have been influential, with the interesting result that the US Constitution increasingly diverges from global models.[78] It is also possible to identify what patterns increase the endurance of constitutions, in particular how far differences in the process of constitution-making matter.[79] Important further topics of this research are about the link between the convergence of constitutional laws in the books and in practice, as well as the relevance of international human rights for constitutional convergence, both discussed in the chapter on 'convergence, regionalisation and internationalisation'.[80]

The other example already mentioned[81] is the CBR project which coded shareholder protection based on a functional approach. The most recent 'leximetric' paper[82] includes Figure 7.8 which presents the aggregates of shareholder protection in thirty countries grouped according to English, French, German and socialist legal origin.[83] It can be seen that there is a general trend of improvements in shareholder protection between 1990 and 2013. Clear differences between the legal origins still existed in the 1990s but since then the three groups of civil law countries (French, German and socialist legal origin) have caught up with the common law (or English legal

[77] Law and Versteeg 2011. [78] Law and Versteeg 2012.
[79] Elkins et al. 2009; Ginsburg et al. 2009. [80] See Chapter 9 at Sections A 3 and C 3, below.
[81] See Section B 3, above, as well as Section C 1, below. [82] Katelouzou and Siems 2015.
[83] For the 'legal origin' categories see Chapter 4 at Sections B 2 and C 2, above and Chapter 12 at Section B 3, below.

origin) countries. In particular, the stark rise of the countries that are (or used to be) of socialist legal origin is noteworthy.[84]

This finding does not necessarily mean that the strengthened laws are really effective. Indeed, the aforementioned paper shows that there is a negative correlation between changes in shareholder protection and rule of law in the socialist legal origin countries. Thus, it may well be the case that these countries feel the need to signal to foreign investors that they have decent shareholder protection, even if this is more a form of 'window dressing' due to the deficiencies of the rule of law.[85] Using econometric methods, another paper explores explanatory factors for the increases in shareholder protection: in particular, it finds that imitating rules from neighbouring countries and the United States and receiving loans from the IMF, moderated by the strength of state capacity, have a statistically significant effect.[86]

The research of the CBR index also employs another approach to measure similarities and convergence. Rather than using the aggregate score of shareholder protection we calculated the differences between each variable in the law of a particular legal system and the same variable in the law of the other countries; subsequently, the absolute values of these differences were added together.[87] Here, it has been found that according to the aggregates of all countries there has indeed been convergence of the law on shareholder protection.[88] Moreover, this convergence has made most of the differences between civil and common law countries disappear: for example, the French law on shareholder protection used to be closer to German than to UK law but this position is now reversed.[89] Presenting the data for all countries in a network and calculating clusters of countries (a method explained in the next sub-section) also leads to country pairs and clusters which do not match the established legal family categories.[90]

4 Combined Measures

The general classifications of legal families do not provide us with an unambiguous scheme that assigns countries to particular families.[91] A recent paper by me aimed to fill this gap and develop a more robust taxonomy of legal systems covering 156 countries.[92] The following will present its main idea.

The paper is based on fifteen variables that aim to provide good legal proxies for a country's law: thus, they combine topics related to the formal

[84] In the thirty-country dataset the following countries fall under this category: China, Czech Republic, Estonia, Latvia, Lithuania, Poland, Russia and Slovenia.
[85] Katelouzou and Siems 2015: 149. [86] Guillen and Capron 2016: 145–8.
[87] So this is the same approach as in Section B 3, above.
[88] Lele and Siems 2007; Siems 2010b; Armour et al. 2009a. [89] Lele and Siems 2007: 38.
[90] Siems 2010c; Katelouzou and Siems 2015. [91] See Chapter 4, above. [92] Siems 2016a.

and substantive nature of legal systems. The variables can be divided into three main categories: five variables aim to capture commonalities between groups of countries; five code attributes related to the general legal infrastructure of countries; and five address specific areas of law (whereby, here too, the aim was to choose variables that relate to general themes and attitudes of legal systems).[93]

These variables describe attributes of countries. For further analysis, they have been transformed into a relational dataset that indicates how different each country is from each other county.[94] Thus, the resulting matrix contains information about 1+2+3 . . . 156 = 12,090 country pairs. The next step was to present the difference matrix graphically. For this purpose, the information about each of the pairs was entered into a network analysis program (UCINET) enabling the researcher to represent only those 'ties' (i.e. relationships between countries) that are below a particular threshold. Figure 7.9 displays the closest 675 of the country pairs.

Figure 7.9 can be interpreted as follows: starting at the top of the graph, there are some common law countries with the ones on the right densely connected to the Nordic countries. Clockwise, those countries are then loosely connected to a group of countries which are predominantly from continental Europe. Towards the bottom of the graph, those countries are connected to, mainly, transition economies from eastern Europe and central Asia, and towards the centre there are some connections to developing countries in Africa and Latin America. On the left centre and bottom of the graph, we find many Muslim countries from the Middle East and North Africa, more or less well connected. Further to the top, there is then a connection between these countries and Bangladesh, Malaysia and Pakistan. Those latter countries are connected to a dense group of common law countries from Africa and Asia, with Israel providing a link back to the European countries. Finally, on the top left it can be seen that three countries (China, Taiwan and Thailand) are 'isolates', meaning that they are not connected to any of the other countries.

The limitation of Figure 7.9 is that it does not make use of the full information of the dataset as it only shows the closest links. Fortunately, network analysis programs also enable an evaluation of this full information by way of identifying community structures. One such method is to calculate 'optimisation clusters'. In the present case, a division into four clusters provides the best 'fit'. In Figure 7.10 the country nodes were shaped

[93] The list of variables (details in Siems 2016a) is: (1) Countries of Latin Notariat; (2) Islam state religion; (3) EU / EEA countries; (4) Participation in international commercial law; (5) Participation in international courts; (6) Rule of law; (7) Judicial independence (according to constitution); (8) Constitutional court; (9) Civil Code; (10) Democracy index; (11) Civil liberties infringed; (12) Business freedom; (13) Labour freedom; (14) Death penalty not abolished; (15) Abortion permitted.

[94] This calculation follows the same method as explained for the CBR index in Section 3, above.

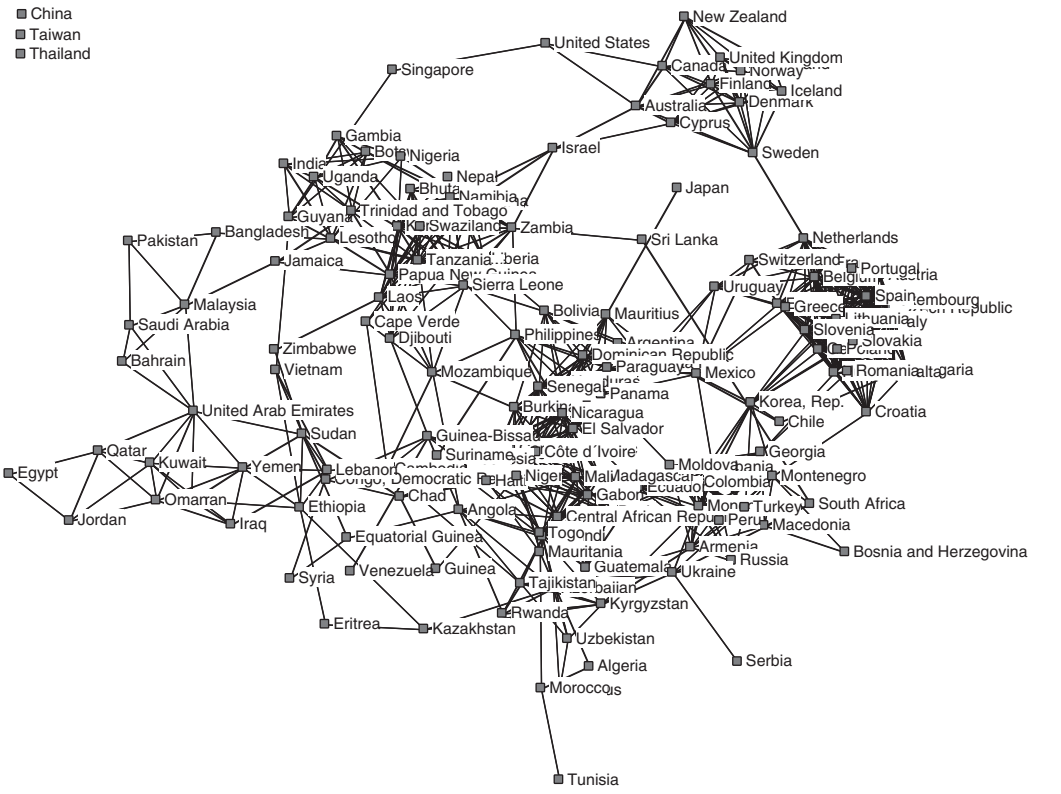

Figure 7.9 Network of the world's legal systems

according to these four clusters (with lines between them added), with the position of the nodes based on a 'metric multidimensional scaling' (MDS) of the similarities between legal systems.

The main cluster divisions, and their naming, can be explained as follows: the 'European Legal Culture' cluster mainly consists of European countries from any legal tradition but also some non-European countries that have been strongly influenced by European legal systems. It can also be seen that, within this cluster, the Anglophone and Nordic countries are close together – and a bit apart from the main group of continental countries. The cluster 'Mixed Legal Systems' includes countries that have at least some features of common law systems but are also mixed with civil law and/or religious legal traditions. The cluster 'Rule by Law' consists of many non-democratic countries, often with a socialist background, as well as some countries of Islamic law. Finally, the cluster 'Weak Law in Transition' includes a variety of countries from Latin America, Africa, Asia and South-East Europe; many of these can be seen as countries in transition.

Analytically, the network and the clusters challenge the established division of the world into legal families. There can also be normative lessons that can be

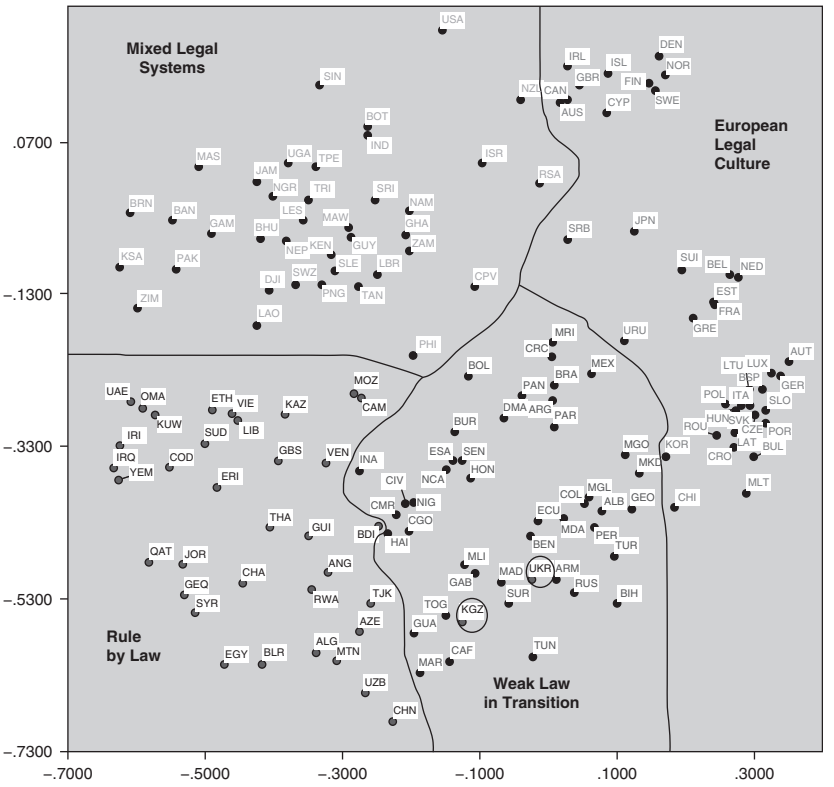

Figure 7.10 Map of legal systems (with metric MDS)[1]

[1] This figure uses the IOC country codes as abbreviations, see www.statoids.com/wab.html.

drawn from this new taxonomy: for example, the fact that the data have led to a mainly European cluster of different legal traditions indicates that within this group EU harmonisation may be less problematic than it is sometimes assumed. Considering the use of foreign legal models, there may be the tendency to transplant rules from countries which are neighbouring countries in the map of legal systems of Figure 7.10. However, it could also be the case that a country has the aim to change its position in this map: for instance, adopting the view that 'getting to Denmark' equates the desire to move to the model of 'stable, peaceful, prosperous, inclusive, and honest societies',[95] the aspiration would be to get towards the top right-hand corner of Figure 7.10.

D Measuring the Quality of Legal Rules and Institutions

Most challenging is measuring the quality of legal rules and institutions, such as courts and administrative agencies. An initial point to consider is who is

[95] Fukuyama 2011: 12. See also Fukuyama 2014: 25.

involved in such research. Legal scholars are sometimes sceptical as to whether policy evaluation should be part of comparative law.[96] Economists and political scientists are less hesitant about making such evaluations – as well as quantifying them. In addition, policy actors (governments, international organisations, etc.) are interested in assessing how well particular legal rules or institutions 'work'. Of course, policy actors and academics tend to have different incentive structures. Thus, they approach questions of quality from different perspectives, as they belong to different communities with their own interests, approaches and ways of communication.[97]

As regards data for such measurements, one can distinguish whether the aim is to measure the quality of the black letter legal rules, or whether one is interested in institutional structures, such as the operation of courts. A number of studies also combine methods, aiming to achieve 'the best of all worlds'. All of these approaches are discussed in the present section.[98] More briefly, the section addresses how such measurements may be used to show causal relationships. This second step can be relevant in determining the quality of legal rules and institutions, yet it properly belongs to the later Chapter 12 on 'Implicit Comparative Law'.[99]

1 Measuring Legal Rules

The most influential study that tried to measure the quality of legal rules across countries is the article by Rafael La Porta and colleagues on 'Law and Finance'.[100] This study coded the law on shareholder and creditor protection across countries. For instance, with respect to shareholder protection, it used six variables to construct an index for 'anti-director rights'. The variables were defined in a brief and binary way, for instance for 'proxy by mail allowed' it coded as 'one if the company law or commercial code allows shareholders to mail the proxy vote to the firm, and zero otherwise'.

Next, La Porta and colleagues looked at forty-nine countries and each legal measure, and calculated an aggregate score for the strength of 'anti-director rights' for each of the legal systems. Subsequently they grouped the countries into legal origins (i.e. legal families),[101] with the result that common-law countries had the strongest, and French civil-law countries the weakest, legal protection of shareholders. Finally, they drew on these numbers as independent variables for statistical regressions, finding that good shareholder protection leads to more dispersed shareholder ownership, which can be seen as an indicator for developed capital markets: thus, this study was not merely a measurement of the law but was aimed at identifying law of a good quality.

[96] See Chapter 2 at Sections A 4 and C 4, above.
[97] See Hantrais 2009: 122 ('two communities theory').
[98] The following is based on Siems 2011.
[99] See Chapter 12 at Section B 3, below, as well as Section A, above.
[100] La Porta et al. 1998.
[101] See Chapter 4 at Section B 2, above.

Many subsequent papers by La Porta and other researchers have used a similar method for other areas of law, for instance, in civil procedure, securities regulation and labour law.[102] This line of research has also become one of the most important trends in contemporary comparative legal and economic scholarship: searches with Google and Westlaw result in many times more hits for 'La Porta et al.' than for 'Zweigert and Kötz',[103] and citation statistics from finance studies provide evidence that they are one of the most influential studies of the last decades.[104] These studies have also had an impact beyond academia. For instance, the EU Commission's impact assessment on the Directive on Shareholders' Rights explicitly referred to the 'Law and Finance' article in order to justify their reform proposal.[105] Most importantly, the World Bank has incorporated some of the La Porta et al. studies into its annual Doing Business Reports (DBRs). It has also extended its scope, supplementing it with some socio-legal data.[106]

By way of clarification, La Porta et al. and the World Bank were not the first to conduct such normative measurements of law. Already in the early 1990s, the OECD developed indicators of employment protection, being regularly updated and having inspired academic research in this field.[107] In other fields of law and regulation too, the OECD often employs quantitative measurements. For example, its Product Market Indicators deal with regulatory issues in the domains of state control, barriers to entrepreneurship, and barriers to trade and investment,[108] and its Indicators of Regulatory Policy and Governance present information on regulatory policy practices, for instance, on stakeholder engagement in the regulatory process.[109]

The research by La Porta et al., in particular the initial article on 'Law and Finance', has remained very controversial. Concerns about the way they classify legal systems into distinct Western-based legal origins were already mentioned in a previous chapter.[110] There has also been frequent criticism of the coding of legal rules. At a general level, comparative lawyers may object that their approach is far too simplistic, treating legal systems as mere compilations of information which can be coded and aggregated in a numerical way.[111] More specifically, numerous errors have been identified in La Porta et al.'s coding on shareholder protection and a full re-coding by

[102] Djankov et al. 2003a; La Porta et al. 2006; Botero et al. 2004. See also the references in Siems 2007a; Siems and Deakin 2010.

[103] See Siems 2007b: 144. [104] See Durisin and Puzone 2009.

[105] European Commission 2006: 7, 53.

[106] Therefore, the DBRs will be discussed in more detail in Section 4, below, on 'combined approaches'.

[107] See www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm. For research see, e.g. Estevez-Abe et al. 2001 (relevance of firm-specific, industry-specific and general skills depends on employment and unemployment protection).

[108] See www.oecd.org/economy/growth/indicatorsofproductmarketregulationhomepage.htm.

[109] See www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

[110] See Chapter 4 at Section C, above. [111] See Siems 2005.

Holger Spamann led to many changes of the scores (see also Table 7.6) with most of the results disappearing.[112]

Another line of criticism concerns the very limited number of variables. It is doubtful whether the six variables for 'anti-director rights' are good proxies for the general level of shareholder protection since they do not capture many important aspects of company law.[113] Moreover, the choice of variables suffers from a clear US bias. Thus, the 'Law and Finance' article can be regarded as a form of implicit benchmarking and it may therefore be open to the challenge that it misleads the reader: La Porta et al. claim to measure the quality of legal rules in an objective way, but in reality they only show how much countries deviate from the US model.

A possible rejoinder may be that, despite the US bias, most of the La Porta et al. studies have managed to identify a statistically significant effect of law on financial development.[114] Thus, only the interpretation of their results may change: countries do not benefit from any improvements to their legal system, but only from such changes that follow the US model. But, again, this is unsatisfactory. Legal rules operate differently in different institutional environments. The fact that legal transplants from US law may have had a positive effect in some countries leaves open the possibility that they may work in a completely different manner in other parts of the world. It is therefore preferable to acknowledge openly the variety of legal models, and to measure legal rules from a functional perspective.

For instance, following the approach of the Common Core project,[115] a comparative researcher may start with a hypothetical problem in order to examine how this problem would be solved in different legal systems. Alternatively, a comparatist can start with a question such as 'how do legal systems protect shareholders?' and then examine the different tools of different legal systems. Both of these approaches can be used to measure legal rules in a quantitative way. The first one is found in an article by Simeon Djankov and colleagues on the law and economics of self-dealing.[116] They present a complex hypothetical case of a transaction between two companies to lawyers from seventy-two countries, and ask them to respond to questions such as 'which body of the companies has to approve the transaction in question?' or 'how could the transaction's validity be challenged?'. Then, Djankov et al. code this information using various indices and sub-indices. Finally, they find that this new dataset predicts stock market development, and generally works better than the initial La Porta et al. index.

[112] Spamann 2010. For previous criticism see Cools 2005.
[113] See Lele and Siems 2007: 19–21.
[114] But see also the discussion in Chapter 12 at Section B 3, below, on the problem of establishing a causal relationship between law and finance.
[115] See Chapter 2 at Section B 3, above.
[116] Djankov et al. 2008. A similar case-based quantitative approach to company law has been employed by Cabrelli and Siems 2015; Siems and Cabrelli 2013.

The second functional approach has been used in the aforementioned project at the Centre for Business Research (CBR) of the University of Cambridge.[117] The overall objective of the CBR project was to examine the mechanisms by which legal institutions influence financial systems and thereby affect economic development with the help of time-series indices on shareholder, creditor and worker protection. The selection of the variables considered that the same functional role may be performed in different jurisdictions by rules with different formal classifications. The aim was, therefore, that the indices should get as close as possible to representing a coherent and meaningful characterisation of the law in any given jurisdiction. Subsequently, the CBR researchers examined the claim that the quality of the law is reflected in a country's financial development, which, however, has only been confirmed in some cases.[118]

Is one of these two techniques preferable? The first approach seems more straightforward, but it is not without problems. Evidence on the state of law as seen by practising lawyers is not available on a historical basis. Thus, the case-based approach cannot collect time-series data, making claims about causal relationships between law and finance doubtful. This approach also has to assume that the same type of problem exists in all of the legal systems examined. This is far from obvious, since social and economic structures differ widely between countries.[119] Thus, instead of relying on just one case, a comprehensive index is better able to capture how different legal tools may reflect different types of problems.

However, the second approach, too, has its shortcomings: the index construction and the coding of variables may aim to be as objective as possible, but since the legal world is very complex it inevitably involves some subjective element. Once the data are collected, the most common procedure is to aggregate the numbers of all variables. This, however, raises the question of whether all variables are really equally important. Also, the same variable may play a completely different functional role in different countries, or different variables may play the same role, with their relative importance varying from one context to another.[120] The possible time dimension, though useful, also creates further challenges, since the development of black letter legal rules needs to be supplemented by data that track changes to the political and social climate.[121]

Finally, it is important to note that different methods of measurements can lead to very different results. In Table 7.6, this can be seen in the highlighted top six ranks of the initial La Porta et al. index, the Spamann correction, the

[117] See Sections B 3 and C 3, above.
[118] Deakin et al. 2018; Siems and Deakin 2010; Armour et al. 2009d.
[119] For the critique of functionalism see Chapter 2 at Section C 3, above.
[120] Ahlering and Deakin 2007: 884.
[121] E.g. see the time series on property rights, political liberty and stability by Fedderke et al. 2001; Fedderke and Garlick 2012; Luzi et al. 2013.

Table 7.6 Comparison of measures of shareholder protection[1]

	La Porta et al. 1998 [1996 data]	Spamann 2010 [1996 data]	Djankov et al. 2008 [2003 data]	CBR [1996 data]	CBR [2003 data]
Argentina	4	3	0.34	3	5.25
Belgium	0	2	0.54	5.25	5
Brazil	3	5	0.27	4.75	5.5
Canada	5	4	0.64	6.75	6.75
Chile	5	5	0.63	2.25	4.25
France	3	5	0.38	7	7.35
Germany	1	4	0.28	3.58	6
India	5	4	0.58	5.5	6.375
Italy	1	2	0.42	3.35	5.6
Japan	4	5	0.50	7.25	7
Malaysia	4	4	0.95	7	7.25
Mexico	1	2	0.17	2	3.375
Netherlands	2	4	0.20	1.75	1.75
Pakistan	5	5	0.41	2.5	3.68
South Africa	5	5	0.81	5.21	5.46
Spain	4	5	0.37	4.75	5.5
Sweden	3	4	0.33	4	5
Switzerland	2	3	0.27	4.25	5.25
Turkey	2	4	0.43	4.25	5.66
United Kingdom	5	4	0.95	6.625	6.625
United States	5	2	0.65	6.25	7.25

[1] The table only includes the countries for which data are available in all of the datasets. The respective top six values are highlighted.

Djankov et al. method and the CBR index. The correlations between these different measurements are also fairly weak, never exceeding 0.6.[122] Thus, this confirms the need to carefully choose measures of quantification in order to achieve a meaningful representation of the law.

2 Measuring Courts and Other Legal and Political Institutions

The measurements by La Porta et al. may also be regarded as unsatisfactory if one takes the view that the most important factor is not the details of the positive legal rules but the quality of political and legal institutions, and, in particular, the strength and quality of law enforcement. This interest in the operation of courts and other institutions partly overlaps with socio-legal

[122] It is 0.52 for La Porta et al. and Spamann; 0.58 for La Porta et al. and Djankov et al.; 0.35 for La Porta et al. and CBR (1); 0.54 for Djankov et al. and CBR (2).

comparative law.[123] In the research addressed here, however, the focus is not on interpretation and understanding, but on improving these institutions, and thus developing 'benchmarks' or 'indicators'.[124] Paradigmatic is the following statement from the World Bank's website:

> Measuring the performance of the various elements of the justice sector is crucial for any justice reform. Empirical research and court statistics are key in this context. Benchmarks and comparative data are invaluable tools for justice reform practitioners working on evaluations.[125]

It is difficult to establish what measures are the appropriate ones. At a general level, one can distinguish between input and output measures.[126] For example, input measures may refer to the financial resources provided to a particular enforcement authority, and output measures may aggregate the fines imposed by this authority. Yet it is not clear what comparing input measures tells us about the quality of this enforcement authority, since good financial resources may also just be wasted. But comparing output measures may also not be very meaningful if a particular jurisdiction has more violations of the law simply due to external circumstances.

In detail, comparisons about the efficiency of judicial systems are a natural point of interest for governments and other policy actors. The Netherlands Council for the Judiciary assigned a study to compare the judicial system of the Netherlands with that in other countries,[127] and the European Commission for the Efficiency of Justice (CEPEJ) undertakes a regular evaluation of the judicial systems of the Council of Europe's Member States.[128] These two studies contain comparative socio-legal information on the number of lawyers, judges, cases, etc., but they also have a clear policy dimension. For instance, the Dutch study includes a performance index calculated by the number of concluded cases per judge and per Euro spent on the judiciary, and the European study reports data such as the public budget allocated to all courts per inhabitant, the level of computerisation of courts, the number of cases violating the right to a speedy trial, and the clearance rate of litigious and non-litigious civil cases.

Two private organisations provide more general quantitative information on political and legal institutions. Freedom House produces the report on Freedom in the World, which rates from one to seven the political rights and

[123] See Chapter 6 at Section B, above.
[124] For indicators as a form of transnational law see also Chapter 10 at Section C, below.
[125] See http://go.worldbank.org/LRFA0Q06E1. See also www.worldbank.org/ljr.
[126] See, e.g. Easterly 2006: 159; Fukuyama 2013: 355–6; Rotberg 2014.
[127] Blank et al. 2004: 7.
[128] See www.coe.int/t/dghl/cooperation/cepej/evaluation/. The most recent version is CEPEJ 2016. The EU also incorporates these findings in its 'justice scoreboards', see http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm.

civil liberties of countries.[129] Political Risk Services has designed a Political Risk Index, including a variable which rates countries from zero to six on law and order.[130] One of the law and order sub-variables examines the independence of the judiciary, based, for instance, on questions such as 'are judges appointed and dismissed in a fair and unbiased manner?' and 'is the judiciary subject to interference from the executive branch of government or from other political, economic, or religious influences?'. In addition, the 'law and order' variable incorporates other data, such as the crime rates of countries.

This combination of legal data with non-legal ones has been criticised.[131] Further critique is similar to that of other indices. On the one hand, this concerns the choice of indicators. Since the variables of Freedom House and Political Risk Services use a Western model of law, rights and democracy as a benchmark, they can only tell readers how different other countries are to the West. This is also a topic that will re-emerge in the context of comparative law and development.[132] On the other hand, it is difficult to justify whether and how to aggregate data. Here, the criticism is therefore that categories such as 'law and order' and 'rule of law' are 'too broad and fuzzy to contain meaningful information'.[133]

These and other indicators are also discussed in a book chapter on 'the quality of judges' by Sandra Oxner, a retired Canadian judge.[134] Oxner develops her own criteria on issues such as appointment, training, performance, discipline and dismissal of judges. The Annex to her chapter applies these criteria to the judiciary of Canada, Pakistan, the Philippines, South Africa, Trinidad and Tobago, Uganda and the Ukraine. The 'coding' is done with '+'and '–', without aggregating the scores and ranking the countries in question (though it can be seen that Canada performs very well).

There has also been academic research on those and related topics in various fields. In political science, scholars are interested in the functioning of institutions of law-making and law enforcement, including courts. For example, with respect to legislators, one can research their 'performance' in terms of number of parliamentary laws passed, and then try to establish whether this is related to similarities in parliamentary models, or more a result of socio-economic developments.[135] And, with respect to bureaucracies, one can develop categories of factors that account for a professional and effective government.[136]

[129] See https://freedomhouse.org/report/methodology-freedom-world-2017.

[130] See www.prsgroup.com/about-us/our-two-methodologies/icrg. Other variables, too, include law-related questions: e.g. economists have used the 'expropriation' variable in order to measure the strength of property rights, cf. G. Xu 2011: 343–4.

[131] Davis 2004: 149–50.

[132] See Chapter 11 at Section C 3, below.

[133] Voigt 2013: 2. See also Chapter 11 at Section B, below (for the rule of law).

[134] Oxner 2003.

[135] See Pettai and Madise 2007 (data from three Baltic states from 1992 to 2004; finding that the challenges of renewed state-building and EU accession steered them in same direction). See also Chapter 12 at Section B 1, below.

[136] Discussion of possible criteria in Fukuyama 2013 and Rotberg 2014.

Research in political science may also involve the use of comparative measurements in order to make policy recommendations. For instance, a paper by Stefan Voigt and Nora El Bialy analysed the determinants of judicial resolution rates as measured in the CEPEJ study. It found that, amongst others, mandatory training is helpful while the presence of judicial councils is negatively correlated with resolution rates.[137] Another paper by Voigt was interested in the optimal number of high courts. In terms of expertise, having specialised high courts may be useful, but they may also lead to an incoherent legal system. Using data from 138 countries, it was found that a larger number of high courts never seems to have a positive economic effect, and that, in some instances, the outcome is negative.[138]

In legal research, for example, Howell Jackson and Mark Roe have challenged the view that it is effective private enforcement of investor protection, and not public enforcement, which stimulates financial market development.[139] For this purpose, they used resource-based enforcement data, such as the staffing of securities regulators per population, and their budgets per GDP, as indicators of the strength of public enforcement, finding that it is more important than private liability rules, and about as important as disclosure rules, in explaining financial outcomes.[140]

Last but not least, two articles by Simeon Djankov and colleagues, all of them economists, deal with the efficiency of courts and the entry procedures of start-up firms across countries.[141] The main focus is on the speed of proceedings. In the article on courts, this relates to the duration of trial and of enforcement in hypothetical cases to evict a tenant for non-payment of rent and to collect a bounced cheque; in the article on regulation of entry, they examine the number of procedures, official time and official cost that a start-up must bear before it can operate legally. Table 7.7 provides an extract from the former article.

In total, the article reports data on 109 countries, but even the data on seven countries can invite a number of observations. The general picture is that the common law countries (United Kingdom, United States and Uganda) have quicker proceedings than the civil law ones, which is also the general finding of their study. The normative view that Djankov et al. take is that lengthy proceedings are harmful, since they make the enforceability of contracts more difficult. As they found that the number of procedural steps determines the duration of judicial proceedings, they recommended that countries reduce formalism in civil procedure. This normative dimension of the Djankov study

[137] Voigt and Nora El Bialy 2016 (also reporting negative correlations for French and socialist legal origin).

[138] Voigt 2012. For a more general discussion about specialised courts see Garoupa et al. 2017: 77–89; Garoupa and Gómez Ligüerre 2011: 321–34.

[139] This relates to La Porta et al. 2006.

[140] Jackson and Roe 2009.

[141] Djankov et al. 2003a; Djankov et al. 2002. See also Balas et al. 2009 (based on the former study, analysing the evolution of civil procedure law between 1950 and 2000).

Table 7.7 Duration (days) of court proceedings to evict tenant (to collect cheque) (extract)[1]

	Duration until completion of service of process	Duration of trial	Duration of enforcement	Total duration
China	15 (15)	105 (120)	60 (45)	180 (180)
France	16 (16)	75 (75)	135 (90)	226 (181)
Germany	29 (29)	191 (61)	111 (64)	331 (154)
Poland	90 (90)	720 (730)	270 (180)	1080 (1000)
Uganda	1 (14)	7 (40)	21 (45)	29 (99)
United Kingdom	14 (14)	73 (73)	28 (14)	115 (101)
United States	6 (23)	33 (17)	10 (14)	49 (54)

[1] Djankov et al. 2003a: 494–9.

is reinforced by the fact that it found its way into the World Bank's World Development Report 2002,[142] and subsequently also into its Doing Business Reports (DBRs).[143]

A critical assessment has to address at least three problems. First, Djankov et al. seem to argue that it is good to have cheap courts which decide many cases in a short period of time. This is a rather limited understanding of the requirements for procedural quality.[144] More specifically, is it really desirable to focus on speed? The apparent danger of this kind of 'justice light' is that the quality of decision suffers. Thus, one could equally make the opposite case, namely, that it is preferable to have a well-funded court system where judges can take their time to decide a few cases as well as possible. Or, considering Table 7.7, if trials take 720 days (Poland), this may be too long, but perhaps seven days (Uganda) may be too hasty.

Secondly, the aim of the Djankov et al. study is to measure the general operation of courts. However, in many countries there are special laws to protect tenants. Thus, merely considering the duration of proceedings does not provide general information on courts, but it may mainly show the strength of tenant protection. In particular, this is apparent for the three continental European countries in Table 7.7, where the duration of proceedings to evict a tenant exceeds the one to collect a cheque.[145] Thus, what would be needed would be a typical case that plays a similar role in such diverse societies as China, France, Uganda and the United States. This leads us back to the problem of functionalism and the limits of using problem cases as a starting point in comparative law.[146]

[142] World Development Report 2002: 117–32. [143] See Section 4, below.
[144] See Schmiegelow 2014: 131–3 (suggesting an alternative measure of eight categories comprising a total of fifty-five indicators).
[145] For more details see Kern 2007: 12–13. [146] See Chapter 2 at Section C 3, above.

Thirdly, one may raise doubts about the accuracy of information on the duration of judicial proceedings. Djankov et al. present their results as objective information indicating the number of days proceedings take in various countries. Yet, the data are collected by way of questionnaires sent to lawyers of the Lex Mundi network of law firms.[147] Thus, these statements about the duration of trials indicate the perceived duration of trials from the perspective of the lawyers. For example, it could be the case that there are historical contingencies explaining why, in Poland, judges and courts are not popular and therefore, when asked about the duration of trials, lawyers assume that everything takes a long time. Thus, what exactly is measured with these subjective assessments needs to be scrutinised more closely.[148] Of course, using perceptions may also have its advantages, as discussed in the following section.

3 Surveying Perceptions about Law and its Enforcement

Comparative survey methods are frequently used in the social sciences.[149] They are also an important tool for governments and other policy actors. For instance, the EU has an obvious interest in measuring the effectiveness of European integration, and therefore sponsors surveys and other data-collections such as Eurobarometer, Eurostat, the European Social Survey, and the EU Survey of Income and Living Conditions.[150]

Surveys related to questions of comparative law are also not a new phenomenon and often go beyond scholarly work. In 1976, Henry Ehrmann's book on *Comparative Legal Cultures* already reported whether, according to opinion polls, people in England, France, Germany and the United States had confidence in their courts.[151] Sandra Oxner explains that, since 1981, the United Nations has developed comparative standards of judicial independence, sometimes using surveys to measure them.[152] Individual governments are also interested in such data: according to the European Commission for the Efficiency of Justice (CEPEJ), thirty-two Member States of the Council of Europe survey court users or legal professionals in order to assess the functioning of the judicial system.[153] A prominent example of an NGO conducting a comparative survey on a law-related question is Transparency International's

[147] See www.lexmundi.com.

[148] For a similar point see Eisenberg 2009 (criticising the survey of the US State Chamber Institute for Legal Reform on the tort liability systems of US States); Hallward-Driemeier and Pritchett 2015 (country-level results for entry procedures of start-up firms do not correlate with the firm-level responses of World Bank Enterprise Surveys).

[149] See Hantrais 2009: 26, 49 and Chapter 12 at Section C 3, below.

[150] See Hantrais 2009: 17, 130. There are corresponding surveys in other regions and at the international level: see, e.g. www.issp.org (International Social Survey Programme); www.afrobarometer.org; www.latinobarometro.org; www.asianbarometer.org.

[151] Ehrmann 1976: 51–2. [152] Oxner 2003: 311, 314. [153] CEPEJ 2016: 181.

Global Corruption Barometer, based on a survey of more than 70,000 households.[154]

Frequently, general surveys also contain questions on legal topics. For example, the World Values Survey, which is based on 256,000 interviews across the world, asks participants to rate from one to four whether they have confidence in their justice system, and whether they think that human rights are respected in their country.[155] Similar, but restricted to European countries, is the European Social Survey.[156] Here, too, there is, amongst others, a question which asks participants to rate on a scale from zero to ten whether they have trust in their legal system. For example, in Germany, Sweden, and the Netherlands, the majority of the population considers courts as trustworthy, whereas only a minority does so in France and Belgium, and in Italy, Spain and the United Kingdom there is approximately an equal split.[157]

Academic research, too, has taken an interest in these surveys. Bruno Deffains and Ludivine Roussey have examined what determines the level of trust in judicial institutions, as measured by the World Value Survey. Using data on public resources devoted to the judiciary, they show that investing in such resources pays off.[158] A project, called Euro-Justis, specifically aims to create indicators that measure confidence in criminal justice.[159] The data collection of these new indicators is conducted as part of the European Social Survey. The overall rationale of this project is that 'the police and criminal courts need public support and institutional legitimacy if they are to operate effectively and fairly',[160] though one could also argue in favour of the reverse causal relationship.

A further academic project with a focus on institutional data is called 'Measuring Justice'.[161] Its surveys ask respondents to rate their experience from one to five according to ten measures: three about costs (time spent, money spent, costs and emotions); three about process (voice and neutrality, respect, procedural clarity); and four about outcome (fair distribution, damage restoration, problem resolution, outcome explanation). Despite this generic starting point, the current seven reports of the project also include variations of context. For example, depending on the country, they deal with different fields of life (such as land conflicts, divorce proceedings, employment problems) and some differentiate between responses about formal and informal forms of dispute resolution.

[154] See www.transparency.org/research/gcb/overview.

[155] See www.worldvaluessurvey.org. See also Ivanyna and Shah 2011 (constructing a new governance index based on these data).

[156] See www.europeansocialsurvey.org. [157] Loth 2009: 268.

[158] Deffains and Roussey 2012. For a similar result see Green 2011 (expectations-based measures of the World Values Survey tend to have positive effect on wealth).

[159] See http://cordis.europa.eu/project/rcn/88427_en.html. [160] Jackson et al. 2011.

[161] See www.hiil.org/audiences/justice-needs-satisfaction-tool. The predecessor was called 'measuring access to justice', see TISCO 2009.

A final group of surveys is based on the perceptions of firm managers. For instance, the World Bank's World Business Environment Survey (WBES) 2000 surveyed over 10,000 firms in eighty countries. Topics related to law included taxes and regulations, the functioning of judiciary, corruption, collateral requirements, property rights, public services, legal predictability and government intervention.[162] A successor of this survey is administered by the Enterprise Analysis Unit of the World Bank, again covering a broad range of topics, such as corruption, legal infrastructure and crime. For instance, one of the questions asks participants whether they agree or disagree that the court system of their country is 'fair, impartial and uncorrupted'.[163] The World Economic Forum's (WEF) Global Competitiveness Reports are also based on an executive opinion survey. Participants are asked to rank their legal system from one to seven on questions such as 'is the judiciary independent from political influences of members of government, citizens, or firms?' and 'are property rights clearly defined and well protected by law?'.[164]

Overall, it can be seen that there is a good deal of survey-based research with a legal dimension. It has also been supported by the argument that surveys are the best way to find out whether legal institutions respond to the interests of the public.[165] Yet, asking the public can also be problematic, as a simple measure of majority opinion disregards the fact that many legal institutions aim to protect minority interests. More generally, a first point of criticism of surveys is therefore that the choice of respondents can make a crucial difference to the results. For example, the various business surveys may have the bias that the law is only seen as a way of facilitating businesses, potentially disregarding other interests.

Secondly, a similar issue arises for the questions that are included in the survey. For instance, the World Bank studies have been criticised as mainly being interested in the protection of property rights, and not in the equal application of the law.[166] Thirdly, there can be problems with the collection of survey data. Naturally, participants may be reluctant to disclose participation in illegal behaviour, such as corruption.[167] A survey on variables about judicial independence also explains:

> It cannot be completely excluded that some questionnaire respondents pursue their own agenda and have an incentive to make reality fit to it: a loyal citizen could try to make his country look better than it really is, whereas a political activist striving for improvement might try to make his or her country look worse than it really is.[168]

[162] See http://go.worldbank.org/RV060VBJU0.

[163] See www.enterprisesurveys.org. Another survey, the Business Environment and Enterprise Performance Survey (BEEPS), was jointly undertaken by the World Bank and the European Bank for Reconstruction and Development (EBRD): see http://ebrd-beeps.com.

[164] See www.weforum.org/reports.

[165] Toharia 2003: 24.

[166] Perry-Kessaris 2011. Similarly, Krever 2013 (neoliberal conception of law).

[167] Perry-Kessaris 2003: 688.

[168] Feld and Voigt 2003: 505.

As far as terms such as 'fair' or 'just' are used, there is also the risk that participants understand these terms in a different way. This is a particular problem for comparative research. Sceptics point out that participants' views are typically coloured by cultural differences and recent economic performance.[169] Moreover, comparative survey research often has to draft questions in different languages, the problem being that even small lexical and grammatical variations can make a difference.[170]

Fourthly, it has been suggested that survey participants often give 'top-of-the-head answers' based on stereotypical views about, say, the government or the judiciary.[171] These answers may therefore be unreliable given the complexity of these institutions – unless one tried to develop more precise indicators that showed how people relate to the justice system.[172] Moreover, examining the impact of legal reforms on perceived corruption,[173] for instance, may not be read as showing that law matters for the level of corruption, since even a 'placebo reform' may have changed the perceptions of the participants. It is therefore difficult to say whether cross-country differences in perceived corruption (or other legal topics) are the result of differences in laws and institutions.

Thus, overall, one has to be sceptical: while surveys can provide interesting empirical information, there are good reasons to be cautious as to whether perceptions can really be used to assess the quality of legal systems across countries.

4 Combined Measures

Scholars and policy actors have combined indicators and approaches in different ways. Some of these combined measures are mainly aggregates of data collected by other organisations. For example, the report on Economic Freedom of the World, published by the Fraser Institute, uses data from the World Economic Forum, World Bank and Political Risk Services.[174] Transparency International's Corruption Perception Index draws on seventeen sources, including, again, data from Freedom House, Political Risk Services and the World Economic Forum, inter alia.[175] Prominent also are the World Bank's Worldwide Governance Indicators (WGI), developed by Daniel Kaufmann and colleagues.[176] The WGI contain aggregate indicators on voice and accountability, political stability and absence of violence,

[169] Kurtz and Schrank 2007; Hantrais 2009: 82–3.
[170] Hantrais 2009: 78–81. See also Chapter 12 at Section D 3, below.
[171] Toharia 2001: 91, 95.
[172] Hertogh 2010: 153 (as opposed to mere level of trust or confidence).
[173] See the study by Buscaglia 2001.
[174] See www.freetheworld.com.
[175] For further details see www.transparency.org/research/cpi/overview. In addition, Transparency International produces its own Global Corruption Barometer: see Section 3, above. For a comparison of corruption measures see Rose-Ackerman and Palifka 2016: 39–48.
[176] See www.govindicators.org. For a critical assessment see Thomas 2010.

government effectiveness, regulatory quality, rule of law and control of corruption, amongst others, and is based on research by Freedom House, Political Risk Services and Transparency International.

These studies that combine data collected by various other studies raise the question of which studies to include and how to aggregate the data – the results often being very sensitive to small changes.[177] Moreover, it is preferable to use on primary data. Thus, the following discusses how three projects have combined original data on the coding of legal rules, the measurement of institutional quality and/or survey data.

A first example is a comparative study by ZERP, an institute at the University of Bremen, Germany, on the conveyancing services market in the EU.[178] The legal rules on selling immovable property are relatively diverse, since, in Southern and Western Europe, notaries play a crucial role ('the Latin notary countries'), whereas in England and Ireland their tasks may be performed by solicitors, with mixed models in the Netherlands and the Nordic countries.[179] In order to analyse the different regulatory systems, the ZERP study constructed indices of legal rules. Using data on the costs of conveyancing services in eighteen countries, it could be shown that countries with a higher degree of regulation also tend to exhibit higher fees. Of course, fees are not the only consideration that matters for conveyancing services. Thus, the study constructed an 'Overall Service Assessment' variable with subvariables on choice, quality, certainty and speed. The data for this variable were collected by way of a survey, answered by about 700 persons from twenty-one Member States. But, here again, the result was that a high level of regulation, in particular in the Latin notary countries, leads to low scores in the ranking of those countries.

Unsurprisingly, the Council of Notaries of the European Union was unhappy with these findings. In a press release, it accused the ZERP report of lacking 'the necessary technical accuracy and scientific rigour'.[180] To support this argument, it referred to another academic study;[181] however, the latter study was explicitly based on a 'traditional comparative methodology' – thus, it was hardly plausible to attack the more empirical ZERP project for an alleged lack of 'scientific rigour'. In addition, the Council of Notaries was unconvinced by the survey evidence of the ZERP study, since many replies were from persons who were likely to have a conflict of interest, such as real estate agents. A possible response could be that the notaries, too, have a natural conflict of interest. Yet, it also shows more generally that surveys need to consider that different groups may have different preferences, and that it may therefore be crucial for a survey to disclose how the views of these groups differed.

[177] Hawken and Munck 2013. [178] ZERP 2007. See also Schmid 2009.
[179] See generally on types of notaries Clark 2002: para. 42; Mattei et al. 2009: 145, 152; International Union of Notaries, available at www.uinl.org.
[180] See www.notaries-of-europe.eu/news/press-releases/press-release-title1322738243.
[181] Murray 2007.

Table 7.8 Legal systems ranked in terms of the WJP Rule of Law Index (extract)[1]

Top 10	Ranks 11–20	Top 10 'civil justice'	Top 10 'criminal justice'
1 Denmark	11 Australia	1 Netherlands	1 Finland
2 Norway	12 Canada	2 Germany	2 Norway
3 Finland	12 Belgium	3 Norway	3 Austria
4 Sweden	14 Estonia	4 Singapore	4 Singapore
5 Netherlands	15 Japan	5 Denmark	5 Denmark
6 Germany	16 Hong Kong	6 Japan	6 Hong Kong
7 Austria	17 Czech Rep.	7 Sweden	7 Netherlands
8 New Zealand	18 United States	8 Rep. Korea	8 Sweden
9 Singapore	19 Rep. Korea	9 Austria	9 Germany
10 United Kingdom	20 Uruguay	10 Finland	10 United Kingdom

[1] *Source:* The World Justice Project, Rule of Law Index 2016, rankings and comparisons with regional and income groups available at http://data.worldjusticeproject.org/

The second example is the Rule of Law Index of the World Justice Project (WJP), a non-profit organisation launched by the American Bar Association. The WJP Rule of Law Index consists of nine factors with forty-seven sub-factors, in total over 400 variables.[182] It is based on a general survey with data collected from 'qualified respondents', usually lawyers and law professors. Thus, it combines more subjective with more objective data, while not trying to code details of black letter rules.

Table 7.8 presents the top-twenty countries according to the eight factors that the World Justice Project includes in its 'rule of law' ranking. These factors deal with the topics: limited government powers; absence of corruption; order and security; fundamental rights; open government; effective regulatory enforcement; access to civil justice; and effective criminal justice. The ninth factor, informal justice, is not included in the ranking. In addition, Table 7.8 indicates the top-ten of the categories for civil and criminal justice. Overall, it can be seen that the wealthiest countries tend to be most highly ranked. Specifically for the variables on civil and criminal justice, it has been found that developed civil law countries perform slightly better for civil justice while developed common law perform slightly better for criminal justice; no such differences could be found for developing countries.[183]

It would also be interesting to see how exactly the general survey data differ from the more objective expert responses – for instance, it is worth considering that, in oppressive political regimes, one may not expect totally honest answers to questions about the quality of political and legal institutions. However, the

[182] See http://worldjusticeproject.org/methodology. For rule of law and development see also Chapter 11 at Section B, below

[183] Botero 2014: 207–8.

WJP dataset does not provide further analysis, apart from saying that 'for those questions asked to both groups . . ., the correlation is very high (above 0.8 in most cases)'.[184]

Thirdly, the World Bank's Doing Business Report, annually updated since 2004, examines eleven areas of law and ranks legal systems accordingly.[185] The data are described as 'objective measures of business regulations' – thus differing from the more subjective WJP Rule of Law and related indicators. In detail, most of the sub-categories use codings of legal rules, as developed by La Porta and colleagues.[186] Moreover, for some questions, 'time-and-motion indicators' are used: for instance, for questions on the time and duration of incorporating a business, this includes time spent getting licences and enforcing contracts.[187]

These reports have been highly influential. The World Bank uses its numerical benchmarks of legal rules in order to put pressure on developing and transition economies, which often depend on the World Bank's funding.[188] Some countries have also deliberately pursued the strategy of improving their ranking. For instance, the front page of Georgia's main government website used to advertise the Republic of Georgia as the 'World's Number One Reformer 2005–2012', Saudi Arabia uses its good Doing Business rank in the category 'ease of paying taxes' as an example of 'positive laws and regulations', and Rwanda also promotes its high regional rank and reform efforts.[189]

In the 2017 ranking (see Table 7.9), common law countries perform very well: the top two legal systems belong to the common law, as do five of the top eight countries. From the very beginning, countries of the French civil law tradition have performed poorly in the Doing Business Reports. To some extent, this has led to reforms in these countries, with the result that French civil law countries have improved in many of the indicators.[190]

Another response is to doubt the Doing Business ranking and accuse the World Bank of a common law bias. For example, as the Netherlands and Germany perform very well in the WJP Rule of Law Index, the Doing Business rank may seem somehow implausible. Express criticism has come from France,

[184] See www.worldjusticeproject.org/?q=faq. But see also Versteeg and Ginsburg 2017: 117–24 (scrutinising differences between expert opinion and popular perceptions in the WJP index).

[185] See www.doingbusiness.org. The categories are 'starting a business', 'dealing with construction permits', 'getting electricity', 'registering property', 'getting credit', 'protecting investors', 'paying taxes', 'trading across borders', 'enforcing contracts', 'resolving insolvency', and 'employing workers' (the latter not being used for the rankings).

[186] See Section 1, above. [187] See Section 2, above.

[188] It not clear, however, whether it also impacts on received aid overall, see Yackee 2016.

[189] See https://web.archive.org/web/20130728020405/www.georgia.gov.ge/; www.sagia.gov.sa/en/WhySaudiArabia/PositiveLawsAndRegulations/Pages/Home.aspx; www.rdb.rw/media-centre/press-releases/doing-business-2012-report-rwanda-3rd-easiest-place-to-do-business-in-africa-and-2nd-five-year-top-global-reformer.html.

[190] Oto-Peralías and Romero-Ávila 2017 (comparing the 2006 and 2016 reports).

Table 7.9 Legal systems ranked in terms of ease of doing business (extract)[1]

Top 10	Ranks 11–20	Selected countries	Bottom 10
1 New Zealand	11 Taiwan	28 Netherlands	181 Haiti
2 Singapore	12 Estonia	29 France	182 Angola
3 Denmark	12 Finland	31 Switzerland	183 Afghanistan
4 Hong Kong	14 Latvia	34 Japan	184 Congo, Dem. Rep.
5 South Korea	15 Australia	40 Russia	185 Central African Rep.
6 Norway	16 Georgia	56 Rwanda	186 South Sudan
7 United Kingdom	17 Germany	78 China	187 Venezuela
8 United States	18 Ireland	94 Saudi Arabia	188 Libya
9 Sweden	19 Austria	123 Brazil	189 Eritrea
10 Macedonia FYR	20 Iceland	130 India	190 Somalia

[1] Doing Business Report 2017, ranking available at www.doingbusiness.org/rankings (data from June 2016).

challenging the methods and findings of the Doing Business Reports.[191] Apart from details on the choice and coding of legal variables, the criticism concerns the very idea of assessing law with a 'doing business' benchmark:

> French law is humanistic in nature, protecting the rights of the individual. It has played a key role in Europe and throughout the world in the dissemination of fundamental human rights. The Civil Code has inspired the belief that the law is there, first and foremost, to protect social peace and the citizens' freedom and will.[192]

In Germany, the associations of lawyers, judges and notaries have set up a website in order to promote German law[193] – apparently in reaction to an initiative by the Law Society of England and Wales promoting England and Wales as 'the jurisdiction of choice'.[194] Moreover, a number of French and German associations, sponsored by their governments, have established a Civil Law Initiative that has produced a report on 'Continental Law: Global, Predictable, Flexible, Cost-Effective'.[195] This report lists a number of reasons why the law and courts of civil law countries may be superior to the common law approach. For instance, one finds the following statements:

> Continental law is characterized by statutes and codification . . . Because of such codification, continental law is accessible . . . In common law countries, the search for the applicable law often requires consulting a long series of court

[191] Report by Association Henri Capitant des Amis de La Culture Juridique Française from 2006, available at www.henricapitant.org/publications/replique-aux-rapports-doing-business. See also Michaels 2009a: 773.

[192] Fauvarque-Cosson and Kerhuel 2009: 822.

[193] See www.lawmadeingermany.de.

[194] See www.eversheds.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf.

[195] French/English version available at www.fondation-droitcontinental.org; German/English version available at www.kontinentalesrecht.de.

> decisions in order to find an appropriate precedent – if one even exists … The courts in continental law countries are also required to explain the reasons for their decisions. In contrast, in common law countries, when jury trials are used, juries do not have to give the reasons for their decision. Continental legal systems have adopted a simplified and streamlined law of evidence, which, among other advantages, obviates the slow and costly pre-trial exchanges of evidence conducted under pre-trial discovery.[196]

Thus, amongst others, the civil law approach is seen as more certain than the common law one. For this purpose, the Civil Law Initiative also sponsored the development of a Legal Certainty Index.[197] Based on advice from local legal experts, this index codes whether specific legal issues in six areas of law refer to laws that are, for example, based on: legislation or case law; on a rule that is found in one collection or is scattered; on a law that is available on the Internet; on a rule that has been consistently interpreted by courts; on a law that has been stable over the last five years, etc. For the thirteen countries covered in the study so far, the main finding is that there is no clear common/civil divide, while civil law countries are slightly ahead in some of the categories.

Furthermore, even within the World Bank, the Doing Business Report is not beyond criticism. Other departments of the World Bank have been responsible for the World Business Environment Survey (WBES), the Business Environment and Enterprise Performance Survey (BEEPS), and the Worldwide Governance Indicators (WGI). The Doing Business project has also been the subject of a report by the World Bank's Independent Evaluation Group.[198] This report discussed various shortcomings in the choice of variables and its aggregation. Yet, in the end, it led only to a modest change to the Doing Business Report: since 2010, the 'employing workers' sub-index has been excluded from the ranking;[199] thus, worker protection is no longer seen as negative per se.

Worker protection is, however, not the only topic covered by the Doing Business Report that has advantages and disadvantages. For instance, contrary to the report, entry barriers or other aspects of formality can have a social value,[200] and paying taxes is not only a burden since businesses may benefit from a functioning well-funded government.[201] Another example is secured credit: according to the Doing Business Report, secured credit is good since it provides creditors with a quick method of compensation; however, debtors may well be concerned that this side-steps the need for due process.[202]

[196] Ibid. 4, 22.
[197] Index of Legal Certainty: Report for the Civil Law Initiative (May 2015), available at www.fondation-droitcontinental.org/en/index-legal-certainty/. See also Siems 2017b; Raynouard and Kerhuel 2011.
[198] World Bank Independent Evaluation Group 2008.
[199] See D. McCann 2015; Michaels 2009a: 774–5.
[200] Arruñada 2007: 730. See also Section 2, above.
[201] Aguilera and Williams 2009: 1427.
[202] Davis 2010.

Of course, such arguments can now also be raised against the Civil Law Initiative: for example, while legal certainty is valuable, it may also make the law less adaptable.[203]

Finally, the Doing Business Report is problematic since it does not set the right incentives for countries to enact laws that would substantially improve their legal systems. Three variants of this argument can be distinguished. First, as the examples of Saudi Arabia, Georgia and Rwanda show, it is relatively easy to rise in the rankings if a country wants to do so. The reason is that indices of legal rules cannot consider all details of the law but have to rely on proxies.[204] Thus, countries can just enact shallow reforms that focus on adopting these specific provisions in the 'law on the books', while leaving the vast majority of their legal system underdeveloped. This has been shown to have happened in the case of the Doing Business Report and Georgia but also in other circumstances.[205]

Secondly, the World Bank's ranking puts together countries in which the socio-economic, cultural and natural contexts of the law are completely different. A law-maker may therefore face the dilemma that, whilst it knows that a specific recommendation of the Doing Business Report does not make sense in its country, it may also recognise the importance of the rankings and still adopt this measure – contrary to the public interest.

Thirdly, the Doing Business Report is based on an exaggerated belief in the importance of legal rules. To illustrate, the 2008 report explains that many Italians still live with their parents because the long time it takes to evict tenants leads to an unwillingness to let property. Yet, an Italian observer rightly explains that economic and cultural explanations are, by far, more plausible.[206] Another issue is the alleged effect of law reforms. It has been found that improvements in the Doing Business indicators cannot be related to improvements in the real economy.[207] Beyond the Doing Business Reports, empirical scholarship has also suggested that other aspects, such as politics, culture and capital account liberalisation, are more important for financial development than legal rules,[208] and that there may be cases where informal dispute resolution is preferred to the formal one.[209] Thus, these indicators raise a range of further topics which we will revisit in Chapter 10 on 'From Transnational Law to Global Law' and Chapter 11 on 'Comparative Law and Development' in the next part of this book.

[203] For the latter see Chapter 6 at Section A 2 (a), above. [204] See also Section 1, above.
[205] Schueth 2011 (for Georgia). See also Infantino 2015: 118 ('In the urgency to improve countries' ranking, states often adopt shallow rules that comply with indicators' standards only in their names. For instance, in 2010 the U.S. Department of State Human Trafficking in Persons' report praised Belarus for the approval of measures to prevent human trafficking').
[206] Alpa 2010: 81–2. [207] Oto-Peralías and Romero-Ávila 2017.
[208] See Pagano and Volpin 2001; Stulz and Williamson 2003; Chinn and Ito 2006.
[209] See Buscaglia and Stephan 2005.

E Conclusion

More than a decade ago, a previous paper, also entitled 'Numerical Comparative Law', found it necessary to discuss the pros and cons of numerical comparative law at a general level, in particular the reductionist dimension of quantitative methods.[210] Today, the focus has moved beyond such general points. As the examples of this chapter have shown, numerical comparative law can contribute to many core topics of comparative law, such as legal transplants, legal families and comparisons as a basis for making policy recommendations.[211]

This does not mean that all of these studies are beyond doubt. In particular, it is not clear whether any one of the three methods – conducting surveys about law, counting facts about law, coding law – is the preferable one. Surveys provide interesting insights into perceptions about judicial comparative law, differences between legal systems and the quality of legal rules. Yet, they have the inherent limitation that the general public, and even lawyers, may have a misleading view about the law and its enforcement. Thus, counting empirical facts may be preferable. For example, this may refer to cross-citations, the quantity of laws or the number of days it takes to enforce a claim. Yet, here, we have the inherent problem that we cannot be certain what these numbers really tell us; thus, the challenge is the interpretation of possible causes and consequences. Finally, coding legal rules is akin to a black letter approach to law, having the advantage that it may actually tell us what the law is. For instance, this can be used to identify legal transplants, to evaluate the relevance of legal families, or to test whether formal legal rules really matter. Yet, such codings share the same problems as any black letter approach in disregarding the context and operation of the positive law.

Overall, it is therefore suggested that integrated approaches are most likely to provide a meaningful comparative picture. Of course, this does not mean that a comparatist cannot specialise in a particular approach to numerical comparative law. But, in any case, he or she also has to be aware of 'which conclusions can and cannot be drawn from statistics' – as already noted in the concluding paragraph of the 2005 article.[212]

Moreover, it is clear that quantitative approaches in law do not work in a vacuum. For example, as the experience of the La Porta et al. studies has shown, misunderstanding the positive law can make corresponding quantitative measurements futile. It can also be useful to combine quantitative and qualitative approaches, thus more fully embracing the methods of other social sciences.[213]

[210] Siems 2005.

[211] For non-quantitative research on these themes see Chapter 8, below; Chapters 3 and 4, above; Chapter 2 at Section A 4, above.

[212] Siems 2005: 540.

[213] See further Chapter 12, below.

Supplementary Information

Questions for discussion. What forms of numerical comparative law can be distinguished? What are the advantages and disadvantages of applying quantitative methods in comparative law? How can numerical comparative law be combined with other methods? Why are citations a popular subject of numerical comparative law? Why are combined measures about the quality of laws influential but also subject to severe criticism?

Suggestions for further reading. For the first debate about the usefulness of numerical comparative law: Siems 2005. For an extension to empirical comparative law: Spamann 2015. For more general guidance on how to apply empirical methods in law: Lawless et al. 2016. For a way to identify legal families with quantitative criteria: Siems 2016a. For the contentious impact of the World Bank's Doing Business Reports: Oto-Peralías and Romero-Ávila 2017.

Part III
Global Comparative Law

The term 'globalisation' is not without problems. For example, William Twining warns us that it may foster 'generalisations that are exaggerated, false, meaningless, superficial, or ethnocentric'.[1] There is also the apparent risk of assuming that globalisation is only a recent phenomenon, when in fact one can identify many 'globalisations' throughout human history.[2]

In this book, the term 'global' is used in a pragmatic way to illustrate a number of interlinked topics. Thus, globalisation, as understood here, has various shades. For example, it covers a variety of scales: some phenomena, such as the Internet, may genuinely be global ones, but others may be about trends which are focused on the main economic centres, or on particular regions of the world.[3] There can also be diversity as regards the subject of globalisation. Typically, reference is made to tangible factors, such as the globalisation of trade, finance, production and labour.[4] But it may also be said that globalisation is mainly an intellectual construct, emphasising the impact of the ideas about globalisation.[5] Furthermore, there is variety in the countries and cultures that may be seen as the main drivers of globalisation: frequently, emphasis is put on the Westernisation or even Americanisation of other societies, but there may also be Asian and Islamic forms of globalisation.[6]

There have also been suggestions for more complex taxonomies. For example, Boaventura de Sousa Santos distinguishes between hegemonic and counter-hegemonic globalisation, with two sub-categories for both of those.[7] Hegemonic globalisation can be 'globalised localism', where particular local phenomena spread to other parts of the world (e.g. certain features of American culture and lifestyle); alternatively, it can be 'localised globalism', where local patterns change due to the impact of transnational imperatives

[1] Twining 2009a: xviii.
[2] E.g. Steger 2009 refers to five globalisations (fifth to third millennia BC; fifteenth century AD; 1500–1700; 1700–1970; since 1970s).
[3] See also Hay 2011: 334–5 (globalisation or triadisation; globalisation or regionalisation).
[4] For data see, e.g. McGrew 2011: 297.
[5] See Hay 2011: 341; Osterhammel 2011: 95 (types of globalisations). For definitions of globalisation see also Goldman 2008: 26–34.
[6] Glenn 2014: 51–3. [7] E.g. Santos 2002; Santos 2004.

(e.g. considering the influence of multinational corporations). The two forms of counter-hegemonic globalisation are cosmopolitanism and the common heritage of humankind, referring to cross-border solidarity among excluded groups, on the one hand,[8] and global concerns such as the protection of the environment, on the other.

Globalisation is of natural interest for comparative lawyers.[9] In this part, its various elements will re-appear under four main headings. Chapter 8 deals with 'legal transplants'. This chapter shows that globalising trends are not merely phenomena that came about in the twentieth century, while also analysing recent 'Westernisations' and 'Americanisations' of legal systems as examples of 'globalised localism'. The topics of Chapter 9, 'convergence, regionalisation and internationalisation', can be seen as tangible results of 'localised globalism'. Yet, this chapter also discusses whether commonalities of legal rules may not merely be intellectual constructs. Chapter 10 addresses trends toward transnational and global law. Those rules challenge the relevance of state law and may therefore be seen as evidence of a paradigm shift due to globalisation. Yet, this chapter also considers that the scope and effectiveness of such rules may not be fully global. Finally, Chapter 11 on comparative law and development illustrates how we do not only observe 'globalisation of law', but also 'law under globalisation',[10] for example, how globalisation has an impact on demands for adherence to the rule of law. This chapter also addresses whether a counter-hegemonic form of legal globalisation may be feasible.

Throughout this part, examples are provided from different areas of law, given that the effects and implications of globalisation are likely to vary between them.[11] For example, in a relatively international field such as trade law, it seems reasonable to assume the emergence of transnational legal instruments. In other fields of private law the need for such rules may be less pronounced, but legal transplants may lead to some convergence of legal systems. Public law, too, may not be immune from such developments, but globalising trends may also be challenged as undermining state sovereignty. Similar concerns may arise in other fields of law that have a social dimension: for instance, the globalisation of labour law may lead to fears of a 'race to the bottom'.[12]

[8] Thus, this may be seen as 'vernacular', as opposed to 'elitist' cosmopolitanism, Remaud 2013. See also Chapter 13 at Section B 3, below.

[9] Similarly, Riles 1999: 275 (task of comparative law to understand concrete artifacts of globalisation); Buxbaum 2009 (comparative law as a bridge between the nation-state and the global economy).

[10] For this distinction see Heydebrand 2001.

[11] See also Mattei et al. 2009: 2 (distinguishing between contract, tort and public law); Twining 2009b (on implications of globalisation for law).

[12] See also Chapter 9 at Section A 2 (c), below.

8

Legal Transplants

The literature on legal transplants has achieved a high level of complexity. It is therefore useful to start with an illustrative example. A few years ago, the People's Republic of China enacted a new Companies Act that allowed shareholders to file a claim on behalf of the company against its directors ('derivative action'). Since these new rules were, to a large extent, based on the model of US law,[1] one may raise a number of questions, such as: Why did China do this? Did the United States have any involvement in it? Does this imported legal rule really work in China? Is this typical for the way law reform takes place? And is this approach to law-making a good or bad model for other countries?

This chapter addresses the responses to such questions in the following order: Section A discusses the conceptual debate about types of legal transplants as well as the critics of this concept. Section B turns to the empirical question where and how often legal transplants have occurred. Examples are provided from a variety of areas of law, in particular, the general colonial influence, the transplantation of civil codes and the influence of US constitutional and commercial law. Section C presents and discusses views about the desirability of legal transplants. Section D concludes.

The theme of legal transplants is linked to topics of traditional comparative law: the policy recommendations of the traditional approach can involve the recommendation of legal transplants as 'applied comparative law'.[2] Legal transplants were also crucial for the emergence of legal families in Europe and in the way those models spread to other parts of the world.[3] In addition, there is a close relationship between legal transplants and the topics of the subsequent chapters: for instance, in the example above, it seems to be the case that Chinese and US company law converged, and it may also be the case that China enacted this new provision in order to stimulate its economic development. As will be explained in these latter chapters, however, such a relationship between legal transplants, convergence and development may be a typical but it is not a necessary one.

[1] See Siems 2008a: 217.
[2] See Örücü 2007: 45–6, 427; de Cruz 2007: 13 and Chapter 2 at Section A 4, above.
[3] See Chapter 4 at Section B 2, above.

A Conceptual Research on Legal Transplants

The research discussed in this section often distinguishes between different variants of legal transplants: for instance, between the relevant actors, reasons for their adoption and the way they work or do not work. Doing so, it also discusses some of the criticism and limitations of the concept of legal transplants.

1 Relevant Actors and Objects

A typical case of a legal transplant concerns a situation where the legislator of one country enacts a new rule that largely follows the rule of another country, such as the example of derivative actions in China at the beginning of this chapter. In this case, the relevant actors are the two law-makers and the object is the codified legal rule.[4]

Yet, even in this typical case, there can be some ambiguity in the way the transplant is conceptualised: it may be said that the transplant is the precise legal rule, in particular if it has simply been copied. Alternatively, the focus can be on the underlying policy. So, then, it may be sufficient if a law-maker adopts a functional equivalent to the rule of the origin country.[5] This difference in perspective about the object of the transplant is also relevant for the question whether it can be said that a transplant 'works'.[6]

Beyond legal rules, the object of a transplant can be general legal ideas and other elements of a country's legal culture. Examples of the former are the idea of having codified state law and the ideal of the Western model of human rights,[7] and examples of the latter are a country's legal education, methods and mentalities.[8] For these objects, the conceptualisation of the transplant also changes in other respects: for example, the transplantation may not be a one-off event but a continuing process and it may not only involve the legislator but other actors such as legal scholars and practitioners. Recently, there have also been extensive discussions about citations to foreign judgments in court decisions, which can be conceptualised as a form of legal transplants.[9]

So far, the text has addressed legal transplants at the 'horizontal' level of countries, but other levels of the law can also be involved. Examples of 'vertical legal transplants'[10] are those where state law has inspired international or transnational rules (and vice versa). It may also be possible to identify horizontal transplants that do not involve the country level, for example,

[4] See the 'standard case' in the taxonomy by Twining 2007: 86–7; Twining 2004: 17; Twining 2005: 205–7; Twining 2009a: 279.
[5] See McBarnet 2002: 100 (distinction between mechanical and functional transplants).
[6] See Section 3, below.
[7] See Section B 2 (a) and Chapter 9 at Section C 2 (b), below.
[8] Sacco 1991: 394, and e.g. Farran 2013 (for transplanted legal education); Chiu 2010 (on 'transcultural articulation' of Rawlsian theory of justice in the Han-Chinese cultural context).
[9] See Section B 1 (b), below.
[10] See Perju 2012: 1319–20 (distinguishing between horizontal and vertical migration).

between norms of international law or between forms of private regulation/soft law. Those types of transplants relate closely to the topics of the subsequent two chapters and are considered there in the wider context of comparative and international/transnational/global law.[11] The focus of the present chapter is therefore on legal transplants at the horizontal country level.

2 Rationales and Transplant Process

Legal transplants are typically thought of as a smart way of choosing a foreign legal model that has proven to work well. However, this is not the entire picture, since not only the importing 'transplant country' but also the exporting 'origin country' may have an interest in the transplant – or, it can be the case that some legal transplants are not directly related to the benefits of either of the two countries involved. Thus, this section addresses the aspired benefits for the transplant country and the origin country, as well as other types of transplants. Doing so, the following also explains possible differences in the transplant process.

(a) Aspired Benefits for Transplant Country

A number of reasons can be advanced for why a country may deliberately adopt a legal rule from another legal system, also known as 'legal borrowing'.[12] The most intuitive category is that the transplant country rationally compares the laws of a number of countries and chooses 'the best one'. This may be a response to changed societal circumstances,[13] or it may have the aim of changing society in a particular way.[14] It may also be the case that the transplant country constantly seeks ways to improve its legal rules and, therefore, is keen on identifying legal rules that have already been successfully 'tested' abroad.[15] In the mid-nineteenth century, Rudolph von Jhering put it as follows:

> The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.[16]

[11] See Chapter 9 at Section C 2 (b) and Chapter 10 at Section A 3 (a), below.

[12] For this terminology see Graziadei 2006: 456–61; Mattei et al. 2009: 241–2.

[13] Eörsi 1979: 564 (calling it 'adaptational reception').

[14] Pirie 2013: 183 (legal borrowing often aspirational); Nelken 2003a: 456 ('geared to fitting an imagined future'). See also Nelken 2001: 20 (relevance for periods of revolutionary and post-revolutionary nation-building).

[15] Michaels 2013a: 34. But see also Grajzl and Dimitrova-Grajzl 2009 (uncertainty may be greater for imported than for home-made law).

[16] As translated in Zweigert and Kötz 1998: 17. Similarly, Markesinis 2000: 61 ('I believe there is a tendency, deeply rooted in human nature, to look around and borrow, where possible, good and tested ideas').

Today, such 'cost-saving transplants'[17] are often supported by law and economics reasoning. This reasoning is typically based on the construct of a competitive market for legal ideas with a potential drive towards the most efficient legal rules (i.e. a 'race to the top'). However, law and economics also asks us to consider the costs of enacting new laws, or of switching from one set of rules to another one.[18] Thus, similar to a firm's decision on whether to 'make or buy' a certain tool, it can show us when it is more efficient to 'make' one's own law, and when one should 'buy' it from elsewhere (i.e. use a transplant).[19]

Another type of legal transplant is called the 'legitimacy-generating transplant'.[20] Here, the transplant country may be unable or unwilling to evaluate the potential benefits of all countries of the world. Rather, certain models may be *a priori* more appealing because they are seen as more prestigious, or because they signal a desired turn towards modernity.[21] It is also possible to develop further criteria that play a role. For example, the law-maker of a democratic country may want to consider the perceptions of the general public about rules from particular foreign countries, albeit that these may or may not be justified.[22]

Related to these, but also somehow different, are 'entrepreneurial transplants'. This category refers to legal transplants initiated by those groups 'who reap benefits from investing their energy in learning and encouraging local adoption of a foreign legal model'.[23] Thus, it is important to recognise that a transplant may be beneficial to one domestic group, but can have a detrimental effect on another one. This also raises the general question of what is meant by saying that the transplant country chooses 'the best' or 'most efficient' foreign model. Experiences from other countries can be helpful but, given the diversity of possible aims and preferences, they do not provide law-makers with a clear-cut decision on which legal system to choose.

The final category includes transplants that aspire to benefit both the transplant and the origin country. Such benefits can follow from the aim of reducing the 'transaction costs' that arise from differences between legal systems.[24] Thus, for example, two countries have different rules on product safety, and one of them may decide to transplant the rules of the other country, not because it thinks that these are superior, but to make it easier for firms to accommodate the laws of both countries. It is also possible that the mutual

[17] Miller 2003: 845.
[18] See Mattei 1997a: 19, 129–30, 239; Caterina in EE 2012: 191; Ogus 2002.
[19] For this analogy see Michaels 2013a.
[20] Miller 2003: 854.
[21] See Milhaupt and Pistor 2008: 209; Mattei and Nader 2008: 19–20, 142.
[22] See Linos 2013: 13–35 and Chapter 7 at Section B 3, above.
[23] Miller 2003: 849–50. See also Section B 2 (b), below.
[24] Cf. Mattei 1997a: 94, 219; Pistor 2002: 97.

benefits may take the form of an 'imposition by bargaining'.[25] For instance, this is the case when a developed country makes its aid conditional on a developing country adopting certain legal rules, perhaps in order to foster the interests of foreign investors. Thus, here too, both countries aim to benefit economically.

(b) Aspired Benefits for Origin Country

Specifically dealing with the origin country, a general distinction can be made between tangible and intangible benefits. For example, a country may benefit from its laws being transplanted, since a familiar legal system makes it easier for its firms to do business with firms from the transplant country. Beyond rules of business law, a country (i.e. its people, politicians, etc.) may see it as a tangible benefit if another country follows its values – for instance, by way of transplanting its human rights law. Such a transplant may also be regarded as having intangible benefits, namely, that a country is interested in the 'prestige' of having an influential legal system. But, then, having a legal system that is seen as prestigious may, in turn, have tangible benefits: for instance, foreigners may want to buy literature about this legal system, or pay to study at its universities.

Another distinction is between forms of influence. Soft forms of influence may start by simply making the domestic law accessible to foreign readers, by way of, for instance, providing freely available translations of its laws on the Web. Going further, a country may start discussions with other countries in order to promote its law – for example, by way of setting up an expert group drafting model laws. A far less 'soft' form of influence – and most contentious – is an 'externally-dictated transplant',[26] sometimes called 'legal imposition' or even 'legal imperialism'.[27] But this type of legal transplant may also have various shades. Upendra Baxi distinguishes between conquest, colonial, Cold War and disciplinary globalisation.[28] Similarly, legal transplants can be the result of different phases of colonial, neocolonial, or other forms of imposition.[29] It is also possible to take the perspective of the transplant country and order the transplants by the extent to which it still enjoys de facto sovereignty regarding the transplant decision, distinguishing between imposition, transnational commitment, external pressure, prestige generated and voluntary adoption.[30]

(c) Transplants Beyond Direct Benefits

Legal transplants are not always the consequence of the benefits that they provide for the transplant country, the origin country, or both of them.

[25] Mattei and Nader 2008: 19–20, 142; also Müller-Chen et al. 2015: 103–5 (as 'semi-voluntary transplants').
[26] Miller 2003: 847. [27] Gardner 1980; Mattei 2003; Mattei et al. 2009: 241–2.
[28] Baxi 2009 (in addition, referring to voluntary and judicial globalisation).
[29] See, e.g. Mattei and Nader 2008: 19–20, 142.
[30] Cohn 2010: 591 (in addition, referring to negative fertilisation and novation).

Sometimes the process that leads to a legal transplant is not a deliberate one; thus, here, it may be better to talk about 'legal circulation', 'cross-fertilisation', 'diffusion' or 'migration'.[31] This terminology also reflects how political scientists think about the transfer of policies – for instance, as they research topics such as the 'diffusion of innovations among the American states' and the 'global diffusion of regulatory capitalism'.[32]

It is difficult to determine when such 'legal diffusion' occurs, since it requires an analysis of the precise historical and cultural circumstances in question. For instance, it can matter whether countries have a common language, and how easy it is to access the sources and texts of the other legal system.[33] Frequent reference is also made to the role of legal families in stimulating legal diffusion and other types of legal transplants.[34]

A commonality between the terms 'transplant' and 'diffusion' is that both seem to indicate that, after this process, the object (the rule, idea, institution, etc.) will be the same one in both countries. By contrast, a term such as 'cross-fertilisation' implies that the receiving country is 'merely' influenced by this process. This terminological difference leads us to the more general debate on whether and how legal transplants 'work' in the transplant country.

3 Outcomes in the Transplant Country

It may be seen as a tangible result that, in the example at the beginning of this chapter, the Chinese law-maker enacted a new law on derivative actions based on a foreign model. So the outcome of the transplant, if done properly, would simply be that the position in the transplant country is now the same as in the origin country. However, as this section will discuss, some scholars provide fundamentally different responses to the way legal transplants work – or do not work. This discussion can appear very confrontational, but the following also tries to reconcile some of the conflicting views.

(a) Positive View: They Work as in Origin Country

For the positive view, one has to start with Alan Watson, who is often seen as the founding father of the concept of legal transplants.[35] Watson's view is shaped by being a legal historian and Roman lawyer, in particular his insight that the private law of many countries is significantly based on the reception of

[31] For the different terms used see Perju 2012: 1306–8; Nelken 2002: 30–1. For the term 'legal migration' see also Choudhry 2006.

[32] Walker 1969 (being one of the first studies on policy diffusion); Levi Faur 2005 (also with general references to the diffusion literature). See also Maggetti and Gilardi 2016 (meta-analysis of 114 studies on policy diffusion); Peck 2011 (suggesting a shift to 'policy mobilities'); Campbell 2010: 97–106 (on other models).

[33] MacQueen in EE 2012: 791 (for Scotland). See also Evans-Jones 1998.

[34] See Section 3 (c), below.

[35] Cairns 2013, as a result of Watson 1993 (first edition from 1971). Yet, in 1782, Jeremy Bentham already reflected on 'transplanting laws': see Huxley 2007.

Roman law. This is even said to lead to the belief that 'a law student of the time of Justinian, transported to the twentieth century, would find little to wonder at in the civil codes of modern Europe'.[36]

Watson follows that 'borrowing, even mindless, is the name of the legal game'.[37] Such borrowing is not limited to legal rules, since the transplant of Roman law also concerned legal institutions and structures.[38] His main explanation for all of this is that topics of private law are typically not of interest to governments but left to legal experts. Thus, according to Watson, its rules and concepts 'can survive without any close connection to any particular people, any particular period of time or any particular place'.[39]

It is beyond the scope of this book to evaluate Watson's example of the transplanted Roman law. However, in any case, it is problematic to generalise any insights from this specific transplant. As others have noted, it is essentially an empirical question how far Watson's position is accurate as a general feature of legal transplants, for example, whether legal transplants show that law is mainly professional law, that it is insulated from society, and that transplanted law can have important effects even if it is dysfunctional to the circumstances of the transplant country.[40]

(b) Sceptical View: They are Largely Irrelevant

The positive view is challenged by scholars in the postmodern tradition, notably Pierre Legrand.[41] The basis for Legrand's criticism is that he rejects the view that law is only about the words that can be found in legal texts. Rather, one needs to consider that 'meaning is a function of the application of the rule by its interpreter'.[42] Such interpretation is always subjective and shaped by the larger cognitive framework of a particular country, in particular its culture and mentality.[43]

Legrand deduces from this the 'impossibility of legal transplants': a legal rule cannot survive the journey from one legal system to another one unchanged, arguing that 'as the understanding of a rule changes, the meaning of the rule changes', and 'as the meaning of the rule changes, the rule itself changes';[44] or, to quote Bruno Latour, there cannot be any 'transportation without transformation'.[45] For example, when Watson claims that there are similarities between Roman law and subsequent laws of civil law countries, Legrand regards these similarities as meaningless, superficial and just rhetorical, since they merely concern words.[46]

[36] Ewald 1998: 703 (paraphrasing Watson's view). [37] Watson 2007: 5. [38] Watson 1994: 2.
[39] Watson 1976: 81. See also Chapter 6 at Section A 2 (a), above.
[40] Samuel 2014: 143; Ewald 1995b: 504; Cotterrell 2001: 75–6.
[41] See generally Chapter 5 at Section D 3, above. [42] Legrand 2001a: 57.
[43] Legrand 2001a: 59 and 68 ('law as a culturally-situated phenomenon').
[44] Legrand 2001a: 61. Similarly, Menski 2006: 5 ('law is much more than a body of rules that can simply be imposed on others').
[45] Latour 1996: 118–19. [46] Legrand 2001a: 63–4.

The question remains whether Watson and Legrand do not merely have a terminological disagreement. Both seem to agree that law-makers *do* occasionally copy text from other countries' laws – whether to call it a 'legal transplant' or not. But, at the positive level, there is at least a difference in emphasis. Watson claims that transplants are often 'simply' about copying. By contrast, Legrand puts more emphasis on the complexities of this process. For example, a translated term will not mean the same in both languages;[47] and any interaction between legal systems may need to be perceived as a process of 'cultural translation'.[48]

The other question is whether law-makers *should* consider foreign models. On the one hand, Legrand's criticism seems to be focused on the conceptual point that, even when one does consider foreign models, this does not lead to a legal transplant. On the other hand, he also states that legal transplants reflect an attitude that marginalises difference.[49] Watson, by contrast, does not object, for example, to the reception of Roman law, but does not explain this point further. Thus, a more extensive treatment of the wider normative debate about legal transplants is necessary – and it will follow later in this chapter.[50]

(c) Differentiated View: They Function in a Modified Way

Different from both Watson and Legrand, most scholars take an intermediate position. A typical statement of this view is that legal transplants are often not a clear success or failure, but rather that the picture is a mixed one.[51]

Parallels are often drawn with other phenomena: Marc Galanter points out that laws are like languages, since they can absorb foreign influences while also 'preserving a distinctive structure and flavour'.[52] T.T. Arvind uses the comparison with wine: a type of grape can be transplanted outside its native terrain, but the wine will be a bit different, as is the case for transplanted law.[53] Michele Graziadei cites psychological research, according to which higher mental functions incorporate new into previous material – and legal transplants can be thought of as an example of such a process.[54] Esin Örücü suggests that tree or wave models can show how legal rules have spread.[55] The apparent parallel approach is that of comparative linguistics, with its interest in how languages interact in more or less complex ways.[56] It may also draw on parallels of unusual developments: for example, that there is not only a 'genetic transmission' of languages, but also that some people have adopted a foreign language, abandoning their mother tongue.[57]

[47] See also Chapter 5 at Sections C 2 (b) and D 3, above.
[48] For this suggestion see Foljanty 2015.
[49] Legrand 2001a: 65. See also Chapter 5 at Section D 3, above. [50] See Section C, below.
[51] Nelken 2001: 19; also Nelken 2003a: 442. [52] Galanter 1994: 680.
[53] Arvind 2010: 66; also Watt 2012: 91–6 ('horticultural metaphor').
[54] Graziadei 2009: 736–7. [55] Örücü 2007: 173. See also Chapter 4 at Section D, above.
[56] E.g. Labov 2007. See also Sacco 1991: 5; Mattila 2013: 17, 147–51, 357–59 (on interaction between legal languages).
[57] Lundmark 2012: 32 (referring to the United States).

These insights from other fields show that it is crucial to examine how the foreign rules are received in the transplant country. It is even said that the process of legal reform and development is more important than the substance of transplanted rules.[58] For instance, this process may determine how well the old and new elements mix, ranging from complete amalgamation to a situation where domestic and foreign elements remain clearly visible.[59] Specifically, the way a new official law interacts with pre-existing, more informal laws has to be examined: the latter may continue to exist, creating a pluralist legal order;[60] alternatively, the new laws may be used to challenge the previous ones.[61]

Turning to the question of how far the transplant will be identical to the law of the origin country, the best response may be that outcomes differ according to the relevant circumstances. For instance, Margit Cohn has developed a typology which starts with the categories where the transplant has been more or less successful: 'full convergence', 'fine-tuning' and 'pro-transplant transposition'. It is also possible that the transplant has not been well received, thus, leading to 'counter-transplant cross-fertilisation', 'distortion', 'mutation' or even 'rejection'.[62] In addition, it can be suggested that there can be situations where legal transplants may work even 'better' in the transplant than in the origin country.[63]

What determines which of those responses occurs? The general line taken is often that the transplant has to 'fit' into previous conditions. This insight too can draw on research from other fields. In the literature on the diffusion of innovations, 'compatibility' is seen as one of the factors that accounts for the adoption of an innovative idea or technology.[64] Scholarship in political science also discusses key conditions for the transferability of policies. Notably, it is said that countries need to be ideologically and psychologically compatible. Thus, there needs to be agreement on basic policy objectives and values, for example, whether and how social welfare is provided. It also has to be considered that resistance against a foreign policy can arise both at the level of the government and of the general public. Moreover, the implementation of a policy transfer may fail due to politics or socio-economic differences.[65]

The legal literature has identified similar conditions. Katharina Pistor refers to the need to ensure 'complementarities between the new law and pre-existing legal institutions'.[66] She also mentions the relevance of economic differences: for instance, company law rules designed for companies with dispersed

[58] Peerenboom 2013.
[59] See also Chapter 4 at Section C 3 (c), above (on Örücü's 'salad bowl analogy').
[60] Mattei et al. 2009: 248, 253.
[61] Tamanaha 2001: 120. See also Menski 2006: 123–4 (on research by Masaji Chiba).
[62] Cohn 2010: 592. [63] Siems 2014a (calling them 'overfitting legal transplants').
[64] Rogers 2003. But see also Twining 2005: 217–20 (sceptical about suitability of Rogers' diffusion theory for legal transplants).
[65] Hantrais 2009: 133–9; Rose 2005; Rose 1993. [66] Pistor 2002: 98.

shareholder ownership would not work for concentrated ownership structures (and vice versa).[67] Roger Cotterrell distinguishes between two positions: someone who regards 'law as culture' will regard a transplant as successful when the law is consistent with the environment of the transplant country, and someone who regards 'law as an instrument' will do so when the law has the intended effect.[68] John Jupp's position is similar but it is presented as two cumulative standards: the transplanted law needs to be 'accepted by the local population' and it needs to achieve 'the objectives for which it was enacted'.[69] It may also be said that both types of success are connected, since the effect of a transplant will depend on the way it fits into the society of the transplant country.

Often a distinction is also made between areas of law. Ernst Levy based this view on 'the strength of connection with a people's past', following which he argued that transplants were most difficult in family and succession law, then real property law, and then personal property and contract law.[70] Similarly, according to Otto Kahn-Freund, there is a continuum of legal transplants: some legal rules can be transferred by 'mechanical insertion' while other rules may be rejected, similar to the failed transplant of a kidney.[71] But, according to Kahn-Freund, there is also a time dimension, because trends such as industrialisation, urbanisation and new technologies have reduced obstacles to legal transplants.[72]

Furthermore, it is necessary to consider the countries involved in the transplantation process. For example, it is said that a developed legal culture may have the capabilities to absorb a legal transplant, and a small jurisdiction may need to rely on transplants in order to develop a new field of law.[73] Frequent reference is made to the role of legal families: if two legal systems are based on similar conceptual understandings of the law, the transfer of a rule or institution between these legal systems is more likely to be successful than across legal families.[74] But, this should not be seen as an absolute barrier. According to Arvind:

> [N]o legal system is entirely a prisoner of its own past traditions. Informal institutions can be changed, or new ones developed, to conform to those traditions that exist in the country of origin of the transplanted law, or the countries on whose jurisprudence a harmonised law was based.[75]

It seems unlikely that a country is easily able to switch from a civil to a common law tradition, or vice versa.[76] Yet, this statement rightly shows that copying

[67] Ibid. 127. See also Chapter 6 at Section C 1 (b), above. [68] Cotterrell 2001: 79.
[69] Jupp 2014: 403. Similarly, Maggetti and Gilardi 2016: 90 (goals, implementation and political support of diffused policy).
[70] Levy 1950: 244. [71] Kahn-Freund 1974: 6. But see also Section D, below.
[72] Kahn-Freund 1974: 9. [73] Mattei et al. 2009: 227–9.
[74] Mattei 1997b: 5; Esquirol 2001: 223; Berkowitz et al. 2003a: 167; Berkowitz et al. 2003b: 163. See also Örücü 1999: 29 (mismatch may lead to a mixed jurisdiction).
[75] Arvind 2010: 81. [76] For some attempts see Section B 2 (b), below.

a particular legal text is often only one of the elements that make a legal transplant 'work'. Indeed, in practice, it may often be a problem that, for example, the positive law is transplanted but not the underlying legal theories and scholarship needed to make it 'work'.[77] This leads us directly to the examination of the reality of legal transplants throughout history in the next section.

B Legal Transplants Throughout History

Where does your breakfast come from? It may not be untypical, if, to quote the geographer David Harvey:

> [t]he coffee was from Costa Rica, the flour that made up the bread probably from Canada, the oranges in marmalade came from Spain, those in the orange juice came from Morocco and the sugar came from Barbados. Then, I think of all the things that went into making the production of those things possible – the machinery that came from [West] Germany, the fertilizer from the United States, the oil from Saudi Arabia . . .[78]

Statements by comparative lawyers indicate that a country's law may be similar. Moreover – perhaps in contrast to one's breakfast – this is not only seen as a recent phenomenon. For instance, it has been said that 'every legal system contains imported elements', and that law's evolution 'has always been externally influenced'.[79] Yet, legal transplants are not always clearly identifiable as it is said that 'the layering of domestic sources over foreign ones will eventually camouflage many distant origins'.[80]

Thus, the challenge is to identify precisely what role legal transplants have played throughout history. The first recorded example of a legal transplant is said to go back to the Code of Hammurabi of the seventeenth century BC.[81] It is therefore obvious that a complete historical survey cannot be attempted. Still, this section discusses some of the main examples, focusing on the rationales for, and the working of, legal transplants. It starts with legal transplants in the West, and then addresses transplants in the colonial and post-colonial world, as well as in countries that have not been part of one of the colonial empires.

1 Legal Transplants in the West

(a) Legislative Transplants and 'Americanisation'

The reception of Roman law is often seen as a prominent early example of legal transplants in Europe.[82] Yet, focusing on the nineteenth and twentieth

[77] Bedner 2013 (for Indonesia). See also Section 1, above (for the objects of legal transplants).
[78] Harvey 1989b. [79] Mattei et al. 2009: 240; Cohn 2010: 628. [80] Glenn 2001: 141.
[81] Watson 1993: 22–4.
[82] See Chapter 3 at Section A and, in this chapter, Section A 3 (a), above.

centuries, legislative transplants seem to be the predominant paradigm. Some of these transplants have been involuntary – for example, due to the Napoleonic occupations of the early nineteenth century – whereas more recent transplants tend to be voluntary ones.

A popular object of legal transplants has been the French Code Civil. It has been seen as an example of a code that is 'systematic, de-contextualized and a-historical' and therefore relatively easily transplanted.[83] But the impact of the French Code Civil has often been mediated by previous local legal cultures that continued (and continue) to play a role. For instance, in Spain, traditional local laws still have effect in some regions; also, when Spain adopted a civil code in 1889, the local Castilian law was merged with elements of the French model.[84]

Frequently, multiple sources of influence have interacted. Apart from French law, German legislative models also played a role in Italy, Spain and, in particular, in Portugal.[85] In Germany, a variety of foreign laws were considered for the Commercial Code of 1861.[86] Greece is also a good example: in the first half of the nineteenth century, its Commercial Code and Code of Criminal Procedure were influenced by French models, and its Criminal Code and Code of Civil Procedure by German ones. The civil law remained initially 'Greek' (being based on the Byzantine Hexabiblos), but was replaced by a German-inspired civil code in 1946.[87]

Such foreign influence has not been limited to legislative transplants. In the nineteenth century, German lawyers travelled to Greece to give lectures, and Greek lawyers travelled to Germany to study law.[88] German legal doctrine has also been influential in Italian civil law, despite Italy having transplanted the French Code Civil,[89] and it also raised some interest in the common law world.[90] Ugo Mattei explains this influence by arguing that, in the nineteenth century, German law was only partly codified: German conceptual legal thinking, in particular its Roman-inspired civil law, was attractive to other countries since it was not tied to a particular legal text.[91] However, elsewhere, Mattei also explains that the prestige of German law continued in the early twentieth century, thus stimulating some diffusion of its codified law.[92]

The general picture that emerges is that legal transplants between continental European countries have been fairly common. They did not only concern the positive law, but also the deeper structural levels of the 'legal ocean', such as

[83] Muir Watt 2006: 591.
[84] See Zweigert and Kötz 1998: 107–8; Guillet 2005 (comparing it with the more limited impact of customary law in Peru).
[85] See Zweigert and Kötz 1998: 104–9. [86] See Zweigert and Kötz 1998: 51.
[87] See Giaro 2003: 129. [88] Ibid.
[89] See Mattei 1997a: 110 and more generally Monateri 2003. [90] See Reimann 1993.
[91] Mattei 1994: 202–3, 215.
[92] See Mattei and Nader 2008: 19–20, 142 (referring to Japan and Turkey).

the relevant legal methods and the use of law in society,[93] often mixing various models. It also helped that European countries share a common history and culture. This does not mean that transplants work exactly the same way in the origin and the transplant country, but it usually prevents an outright 'rejection' of the transplant.

Since the Second World War, and in particular since the fall of communism, US law has played a growing role in continental Europe. US transplants concern a variety of topics. The US law on product liability influenced the EU legislation on this matter.[94] The US concept of a uniform real security right provided a model for European law-makers, which was helped by model laws and guidances of organisations such as the EBRD, UNIDROIT and UNCITRAL.[95] Such indirect influence via the international level can also be seen elsewhere: for example, the US Foreign Corrupt Practices Act 1977 influenced the OECD Anti-Bribery Convention and, by doing so, the legal systems of most European countries.[96] In the field of criminal procedure, the US law on plea bargaining has been partly transplanted to Germany, Italy, France, as well as other countries, in order to speed up the disposition of cases.[97] This seems remarkable given that plea bargaining is typical of an adversarial system of criminal procedure, as distinguished from the more inquisitorial ones of continental Europe.[98] US models have also triggered institutional changes: for instance, in the use of independent regulatory agencies in the EU and its Member States.[99]

More generally, it has been said that the legal culture in continental Europe has gradually become more American. Indicators are the growing number of US-style casebooks in Europe, European lawyers studying for an LLM at US universities and large US law firms establishing offices in Europe.[100] As for the earlier popularity of German law, Ugo Mattei argues that the US legal culture has benefited from the way US scholars try to understand 'law as a phenomenon of social organisation', and are less interested in the local particularities of the formal law.[101] In addition, the wider political and economic context certainly plays a role. As international relations scholars discuss American political hegemony, the legal hegemony of the United States may be reflected in

[93] For the distinction between such structural levels see Sunde 2010: 43.

[94] See Mattei 1997a: 86, 132 note 40; Howells in EE 2012: 717; also Reimann 2003 (on convergence of product liability rules around the world). See also Chapter 2 at Section A 5, above.

[95] Uniform Commercial Code, art. 9. See van Erp in EE 2012: 652–4.

[96] See Ajani 2009: 5; Trebilcock and Prado 2014: 159–60.

[97] Langer 2004 (for Europe and Latin America); Mattei 1997a: 86 (for Italy); Glendon et al. 2016: 291 (for the United Kingdom); Grande 2012: 205 (on United States as exporter in criminal procedure).

[98] See Hodgson 2015; Feeley 1997: 98–9 and Chapter 4 at Section C 3 (c), above.

[99] See Gilardi 2005: 85. For the EU see www.euagencies.eu.

[100] Mattei 1994: 206; Wiegand 1991; Wiegand 1996.

[101] Mattei 1994: 195–6, 199; also Delmas-Marty 2009: 62 (e.g. referring to role of prestige and adaptable laws).

changes to legal thinking and consciousness – with or without changes of formal legal rules.[102]

However, claims about Americanisation should not be exaggerated, as previous chapters of this book have already shown. In the discussion about legal families, it was said that, in many respects, the United States is the exception because legal thinking in Europe tends to be focused on black-letter law, which has changed little in recent times.[103] Chapter 6 on socio-legal comparative law discussed the still prevailing use of the death penalty in the United States, as opposed to European legal systems.[104] And Chapter 7 on numerical comparative law mentioned research showing that the US Constitution increasingly diverges from global models,[105] with other research even observing that US constitutional law often was an 'anti-model' as far as federal arrangements are concerned.[106]

(b) Recent Use of Judicial Legal Transplants

The previous chapter addressed quantitative research on cross-citations between courts,[107] but the use of judicial legal transplants has also emerged as a more general topic. A number of senior judges have participated in this debate on whether and when cross-citations take place. For example, Guy Canivet, a judge at the French Constitutional Council and the former president of the Cour de Cassation, identified foreign citations in France and, in so doing, he referred to the role of legal families and the level of economic development.[108] Aharon Barak, former president of the Israeli Supreme Court, mainly refers to a common ideology, in particular 'allegiance to basic democratic principles', decisive for the frequent references of the Israeli Supreme Court to the supreme and constitutional courts of the United States, Canada, Australia, the United Kingdom, Germany and other Western European countries.[109]

For the United Kingdom, a book by Lord Bingham, late judge at the House of Lords and one time Lord Chief Justice, explains how they considered decisions from other common law jurisdictions, but occasionally also from further afield. The problem with the latter may be that, as far as the law is codified, the 'judge is unlikely to gain much help from other jurisdictions'.[110] But common law judges also discuss whether the bond between their jurisdictions may not have weakened. In the well-known British case of *Donoghue* v. *Stevenson*, the House of Lords considered US case law, but even then indicated that 'though the source of the law in the two countries

[102] Mattei and Nader 2008: 81, 83. See also Gilpin 2001: 93 (for international relations).
[103] See Chapter 3 at Section C 2, above. [104] See Chapter 6 at Section C 2, above.
[105] See Chapter 7 at Section C 3, above.
[106] Klug 2015: 953 (for power allocation between federal and State level).
[107] See Chapter 7 at Section B 1, above [108] Canivet 2006.
[109] Barak 2002: 110–14. See also Hirschl 2014: 41–76 (for the motivation to affirm Israel's position 'in the liberal-democratic club of nations').
[110] Bingham 2010a: 2.

may be the same, its current may well flow in different channels'.[111] More recently, from a US perspective, the late Justice Scalia referred to such divergence, attributing it to the United Kingdom and its 'submission to the jurisprudence of European courts dominated by continental jurists'.[112]

With respect to the United States itself, the US Supreme Court is divided on whether to refer to foreign case law in the interpretation of the US Constitution.[113] The critical view is most prominently expressed by Justice Scalia, namely that 'this Court ... should not impose foreign moods, fads, or fashions on Americans'.[114] The majority of the US Supreme Court takes a more positive view. According to Justice Breyer 'cross-country results resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas' and reflect 'a near universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity'.[115]

In the academic literature, a number of projects have discussed the frequency of judicial comparative law in these and other (mainly) Western countries. The first major project was for the XIVth International Congress of Comparative Law in 1997 which produced a general report and national reports on thirteen jurisdictions.[116] A number of further publications also deal with the relevance of judicial comparative at a general level.[117] In addition, a growing number of studies specifically examine the use of judicial comparative constitutional law.[118]

Beyond the 'if' question, these publications have tried to explore how and when foreign case law is considered. The general picture is that courts rarely provide a detailed comparative discussion of the suitability of foreign judgments.[119] Whether courts make use of foreign case law can depend on institutional differences, for example, the availability of assistants, the role of lawyers and the participation in judicial networks.[120] There is also a wide range of possible motivations to consider foreign law, for example, the existence of

[111] *Donoghue* v. *Stevenson* [1932] AC 562, 576 (per Lord Buckmaster), but see also Lord Atkin, ibid. 598 ('It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States').

[112] *Roper* v. *Simmons* 125 S Ct 1183, 1227 (2005) (per Scalia J).

[113] The main cases are *Roper* v. *Simmons* 125 S Ct 1183 (2005); *Lawrence* v. *Texas* 123 S Ct 2472 (2003); *Foster* v. *Florida* 537 US 990 (2002); *Aktins* v. *Virginia* 536 US 304 (2002).

[114] *Lawrence* v. *Texas* 123 S Ct 2472, 2495 (2003) (per Scalia J).

[115] Breyer 2003. See also *Printz* v. *United States* 521 US 898, 921 (1997) (per Breyer J).

[116] Drobnig and van Erp 1999.

[117] Andenas and Fairgrieve 2015; Andenas and Fairgrieve 2012; Markesinis and Fedtke 2005; Markesinis and Fedtke 2006; Markesinis and Fedtke 2009; Markesinis 2006; Mak 2013; Bobek 2013; Hol 2012.

[118] See, e.g. Groppi and Ponthoreau 2013; Ponthoreau 2014; Pegoraro 2015: 332 (project on how constitutional courts handle foreign literature).

[119] Gelter and Siems 2014: 69–82; Mak 2015: 74 (primarily 'featherweight comparison').

[120] See Mak 2013: 89–98, 114–24.

a gap or ambiguity in the local law, the presumed necessity of a harmonised response to a particular legal issue, increased legitimacy either in the face of 'locally expressed fears' or due to evidence that a proposed solution has worked in other systems, or when the interpreted law has an international or foreign source.[121]

The debate about judicial comparative law is also frequently concerned with the question whether courts *should* consider foreign case law, to be discussed at the end of this chapter. The topic of judicial comparative law will also re-emerge in the subsequent chapters – in the context of European harmonisation and the possibility of judicial transnational law.[122]

2 Colonialism and Post-Colonialism

(a) Colonial World: Only Common and Civil Law?

The literature on law and colonisation often identifies different paths of colonisation. A first distinction is between conquered and settled colonies.[123] As far as sparsely inhabited places have been settled, typically, the settlers simply took their laws with them. Since these laws subsequently became the law of the land, and not merely persisted as the personal laws of the migrants,[124] it is justified to talk about a process of legal transplantation. With respect to endurance of these transplants, the main question is then whether and how the settled communities kept in contact with their countries of origin. Examples may be the relationship between England and Australia, and, to a lesser extent, between England and the United States.[125]

In most of the colonies, however, there was a significant indigenous population. This led to the different colonial strategies, notably the French on the one hand and the English on the other.[126] France is said to have followed the principle of 'direct rule', trying to apply French law universally in its colonies. In contrast, the 'indirect rule' of England (later, the United Kingdom) meant that, in principle, the existing customary law and the role of native chiefs were retained for the local population. The main focus was therefore not on ensuring universal application of English law, but 'merely' on gaining political sovereignty over the occupied territories.

The differences between direct and indirect rule may be related to the distinction between civil and common law. The civil law structure of French

[121] Markesinis and Fedtke 2006. See also Andenas and Fairgrieve 2012: 50–8 (developing a typology with seven criteria); Bobek 2013: 21–34 (distinguishing between mandatory, advisable and voluntary use).

[122] See Chapter 9 at Section B 3 (b) and Chapter 10 at Section A 2 (a), below.

[123] E.g. McPherson 2007: 13.

[124] For those see Chapter 10 at Section A 2 (a), below. Müller-Chen et al. 2015: 105–6 call them 'factual transplants'.

[125] On the spread of the common law see, e.g. Glenn 2005: 63–84; McPherson 2007. See also Chapter 3, above.

[126] See, e.g. Mommsen 1992; Menski 2006: 447–50.

law may mean that one can rationally and systematically develop a monist legal system which can then be applied to people of any culture and religion. The common law, by contrast, is more willing to accept diversity – forms of law 'from below' but, for example, also by making more frequent use of juries.[127] Since law is also seen as something that derives from society, it also seems plausible that the common law would be willing to accept the use of customary law as far as pre-colonial societies remained in place.

However, this binary division is not beyond doubt. The description of French law as universal is about an aspiration, but one can be sceptical whether the entirety of French law could really be effectively transplanted to completely foreign cultures. Though France also tried to pursue a strategy of cultural assimilation – for instance, by way of promoting the French language – it is clear that, in reality, local customs and cultures did not disappear. It was also inevitable that, in practice, the French, too, had to rely on local chiefs and interpreters: thus, while 'direct rule' may have been the aspiration, the reality was often a different one.

With respect to English law, it is remarkable that some of its typical characteristics of decentralisation and gradual development were not fully transplanted. For example, while juries played a role in some of the settlement colonies to protect Europeans against the native population, there was no desire to transfer such powers to the local population.[128] There was also more reliance on statutory law than in England. Codification was a convenient tool to facilitate the transfer of common law rules: for instance, in India, large parts of the common law were codified and these codes were also transplanted to other British colonies.[129]

Moreover, the line of influence often did not simply go from one colonial power to its colony. In many colonies, more than one Western country left its mark. For example, in South Africa, both English and Dutch influence shaped the law, with the result that some areas of law became more English (e.g. commercial law) and others more Roman-Dutch (e.g. property law).[130] There are also examples where the mixture included an element of choice: for example, when Egypt was under British control, the local law-makers decided to look at French law as a source of inspiration and as a deliberate strategy against the British rule.[131]

In addition, there are claims that the Western legal systems are themselves, in part, a product of non-Western ideas. In an article entitled 'Black Gaius', Pier Giuseppe Monateri argues that Roman law is a multicultural product of

[127] Gaudreault-DesBiens 2017; Samuel 2014: 165; Easterly 2006: 243. For the relationship between political and legal explanations see Cioffi 2009.
[128] See Roe 2009: 586, 592.
[129] See Menski 2006: 242, 464; Halpérin 2010a and already Chapter 3 at Section B 1 (a), above. See also Mommsen 1992: 10 (on laws specifically designed for colonies).
[130] See Chapter 4 at Section C 3 (c), above. [131] Shalakany 2001: 168.

African, Semitic and Mediterranean civilisations.[132] Focusing on English law, John Makdisi identified foreign elements in the common law actions and in the trial by jury.[133] Reference can also be made to research by George Makdisi (the late father of John Makdisi), who showed how Islamic educational institutions had an influence on European universities and the English Inns of Court.[134]

Early on, legal rules were also transplanted within non-Western countries. For example, the comparative legal literature refers to the 'spread of Hindu legal influence in South East Asia', the 'Chinese influence on Korea and Japan' and the 'diffusion of Islamic law'.[135] Many of those sources of influence were related to other forms of proximity, such as associations by way of language, religion, political alliances or patterns of migration.[136] Thus, for many countries, it is not enough merely to determine how Western legal transplants have been received, but how the original law has interacted with various forms of foreign influence. The further question is whether independence meant that the former colonies wanted to get rid of the laws imposed by foreign powers – or whether new patterns of legal transplants emerged.

(b) Post-Colonial Development: Everything New?

Most Latin American countries had already gained independence at the beginning of the nineteenth century. At that time, the Napoleonic Codes were the main source of influence. A previous chapter of this book already discussed the view that Latin American lawyers often stayed overly faithful to the French model of a strict separation of powers between legislators and courts: thus, they applied the codes literally while French judges were (already) more flexible.[137]

But there is more to say about legal transplants in Latin America. Notably, it was the case that, after independence, traditions became more mixed. For example, the Brazilian Commercial Code of 1850 incorporated ideas from both civil and common law countries, often to suit the interests of local elites.[138] Another example is the Chilean Civil Code of 1855, drafted by Andrés Bello: while the main basis for the Chilean Civil Code was the French Code Civil, parts of it were also inspired by traditional Spanish law and elements of German law. Moreover, this Code is an example of a regional legal transplant, since it influenced the civil codes of many other Latin American countries throughout the nineteenth century.[139]

[132] Monateri 1999. [133] Makdisi 1999: 1640, 1676.
[134] Makdisi 1981; Makdisi 1985–86. A related position is Hobson 2004 (considering the origins of Western civilisation more generally).
[135] Harding 2001: 206, also Pirie 2014: 95; Glenn 2014: 325–6; Graziadei 2009: 726. On the Chinese influence see also Ruskola 2012: 259, 268–74; Graziadei 2006: 444; Twining et al. 2006: 160 (more sceptical).
[136] Twining 2009a: 16. [137] See Chapter 4 at Section C 2 (b), above. [138] Pargendler 2012a.
[139] See, e.g. Kleinheisterkamp 2006: 274–6; Mirow 2005: 183–4; also López-Medina 2012: 355 (on the central role of regional dialogue in Latin America).

This eclecticism continued with the influence of US law. In the second half of the nineteenth century, Mexico, Brazil and Argentina had already incorporated some concepts of US constitutional law.[140] As in Europe, Americanisation became more pronounced after the Second World War. Examples concern a wide range of legal topics, such as the law of trust, the adversarial model of criminal procedure, pensions, health insurance and other forms of social welfare, as well as legal education and practice.[141] Researchers trying to understand the reason for this shift towards the United States, have indicated that it has less to do with possible virtues of the common law than with a political decision for free markets and limited state powers,[142] the influence of US advisers and international financial institutions,[143] and the interests of local lawyers trained in the United States who returned to their home countries.

A sociological study by Yves Dezalay and Bryant Garth on Argentina, Brazil, Chile and Mexico examined the latter aspect in more detail, also relating it to the terminology of legal transplants. Here, the 'importers' of US law are said to belong to the cosmopolitan elite of those countries, and directly benefited from them.[144] Thus, the 'logic of those half-failed transplants' is that, on the one hand, they were not generally accepted, but on the other hand, they continued, since they were driven by powerful self-interested parties.[145]

A similar picture, where colonial origins play a continuing role subject to further mixtures, can be identified for the countries that gained independence in the twentieth century. However, as we will see, there have also been a number of variations.

Starting with the constitutional law of African countries, a first point to note is that the very idea of the state is said to be 'an imported device of colonial origins'.[146] The more specific constitutional design was initially based on those of the former colonial powers, yet with the occasional 'rejection' of the initial transplant. For example, though the former English colonies started with a parliamentary model, similar to England, most of them switched to a presidential model, similar to France.[147] Doubts have also been expressed as to whether the concept of the separation of powers is compatible with the traditional African perception about 'unity of power'.[148] This relates to the wider question about the effectiveness of the state in developing countries (a topic to which we return in Chapter 11 on 'Comparative Law and Development').

[140] See Kleinheisterkamp 2006: 268.

[141] Dam 2006: 44 (on the law of trust); Phillips 2007: 915, 926 (on criminal procedure reform in Chile and other countries); Weyland 2004 (on social welfare); Riles 2006: 789–90 (on globalisation of legal profession).

[142] Phillips 2007: 920; López-Medina 2012: 357–8. [143] See Chapter 11 at Section A, below.

[144] Dezalay and Garth 2002. A related study dealt with lawyers in seven Asian countries: Dezalay and Garth 2010. See also Chapter 11 at Section C 2, below.

[145] Dezalay and Garth 2001: 16, 246. [146] Mattei et al. 2009: 255.

[147] Nijzink et al. 2007: 60–2. [148] Mancuso 2009: 79 (for Somalia).

More generally, it is sometimes held that the role of the colonial transplants should not be overstated: indeed, 'one must ask how much effect less than a century of colonial domination could have had on many peoples of Africa'.[149] But there is also the view that emphasises the ongoing influence. For instance, legal education in African universities tends to be mainly concerned with the teaching of the transplanted black-letter law.[150] Patterns of legal cooperation and law student migration also show that lawyers (and aspiring lawyers) of the former colonies continue to associate with the former colonial powers.[151] Here, it also matters that most of the British and many of the French colonies have kept English or French as the official legal language, thus fostering the perpetuation of the former colonial legal ties. By implication, ties have loosened in countries which have changed their legal language.[152]

In Africa, some of the new Acts and codes have also been influenced by Western ideas. In Ethiopia, one of the few African countries that had not been colonised, the Civil Code of 1960 is a clear example of strong influence. It was mainly drafted by the French comparative lawyer René David, who drew on his comparative expertise but mainly followed the French model. His experience also confirms the pragmatic use of legal transplants, outlined earlier in this chapter:

> Ethiopia cannot wait 300 or more years to construct in an empirical fashion a system of law which is unique to itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of a 'ready made' system. . .[153]

Yet, the Civil Code is said to have had limited effect on the Ethiopian law in practice.[154] This is an experience it shares with transplanted laws in other countries. In some of the former colonies, the Western laws' lack of 'fit' led to new laws legitimising previous customs. For example, in 1997 the Central African Republic recognised polygamous marriage, which had previously been banned by the Western-based Civil Code of 1958.[155] But, then, it may still be said that while details of the law have changed, the Western concept of codified law has not been reversed.[156]

There have also been some examples where countries have deliberately attempted to change their legal family. As a former Belgian colony, Rwanda initially had a French-inspired law; however, in the early twenty-first century, it shifted closer to the common law. This was stimulated by a shift to English as

[149] Menski 2006: 462. See also Chapter 4 at Sections C 2 (a) and 3 (c), above (on role of customary law).
[150] Fombad 2015 (proposing an Africanisation of legal education); Onyango 2013: 57 (specifically for African customary laws).
[151] Spamann 2009: 1845, 1850. [152] For those cases see Chapter 7 at Section C 1, above.
[153] David 1963: 188–9. [154] Menski 2006: 47–8 note 62 and 483–4.
[155] See Mancuso 2014: 12; Mancuso 2009: 80.
[156] Halpérin 2010b (law as union of primary and secondary rules as successful Western transplant). Similarly, Humphreys 2010: 119 ('injection of legalism').

the main official language, and the aim of joining the Anglophone East African Community and the Commonwealth of Nations (which both happened in 2009). Today, Rwanda may be seen as a mixed legal system.[157] Sudan presents a contrasting example. In the 1970s, the government attempted to implement a general shift from common law to French civil law, but this was reversed a few years later. Still, today, there are some civilian elements in Sudanese law, mainly due to Egyptian influence.[158] In addition, Islamic law plays a role, in particular since the *coup d'état* of 1989, and in particular in areas such as criminal and family law.

This leads to the more general question of how far Islamic legal traditions have shaped the law of the Muslim countries of Northern Africa and the Middle East. Ian Ayres and Jonathan Macey take the view that the Muslim world is characterised by an underdeveloped law, since 'legal rules and institutions, once in place, tend to remain static'. They relate this to an apparent lack of legal transplants:

> The unfavorable views of the United States and the West in general among Middle Easterners inevitably contribute to their systematic reluctance to copy what are erroneously viewed as exclusively Western economic philosophies and approaches.[159]

Yet, actual developments do not confirm such reluctance, but show a mixture of Western and Islamic traditions. The precise proportion of these elements has often been a matter of debate. In Egypt, the Civil Code of 1949, drafted by Abd al-Razzaq al-Sanhuri, combines elements of French and Islamic law, including the nineteenth-century Mecelle of the Ottoman Empire, which also blended Western and Islamic legal thinking.[160] Some see the French element as dominant and criticise the Code for being unauthentic, alien and ignorant of classic Islamic law.[161] But in Article 1 of the Code there is also a commitment to customs and Islamic law, as far as the Code does not address a particular issue.[162] Thus, it may be regarded as a compromise solution.

The Egyptian Civil Code also serves as another example of a regional legal transplant, since both the code and the commentaries on the code have had an impact on other Arab countries.[163] The importance of regional trends is also apparent in the rise of Islamic banking since the 1970s. As Islam does not allow interest payments,[164] distinct forms of contract have been developed that provide alternative means of finance. This has led to some

[157] See the website of the Faculty of Law of the National University of Rwanda at www.law.ur.ac.rw.
[158] See Abdelrahman 2004 (on the history of Sudan's contract law).
[159] Ayres and Macey 2005: 426. [160] For the Ottoman model see Foster 2012.
[161] See Shalakany 2001; Mallat 2007: 261–8; Vogel 2006: para. 138.
[162] See also Menski 2006: 350; Vogel 2006: para. 135; Mattei et al. 2009: 380 (laws of Islamic world as post-colonial hybrids).
[163] See Shalakany 2001: 181; Edge 2000: 14; Vogel 2006: para. 136.
[164] To be precise, 'riba', which most scholars equate with interest payments.

legislative transplants but, predominantly, it concerns contractual practices and religious expert opinions, being in line with Islamic law as a pluralist legal tradition.[165]

Finally, in some of the former non-Muslim Asian colonies, the colonial law has continued to play an important role. For example, while it is possible to identify elements of Hindu law in India, there is no denying that many rules and principles of the received English common law have been retained and are applied in practice. Moreover, Indian law-makers keep considering experiences from England (as well as other common law countries) when they draft new or modify old laws.[166]

In other Asian countries, colonial laws have been largely superseded, often under communist rule. For example, it has been said about Vietnam that French colonial law was 'easily swept aside by Soviet inspired revolutionary reforms'.[167] Another case is that of multiple colonial powers. For instance, the islands of Micronesia were initially a Spanish colony, and, in the late nineteenth and twentieth centuries, became part of the German and then the Japanese empire. Yet, today's positive law is entirely a product of its more recent history, namely its time as a UN trust territory, administered by the United States from 1947 to 1986. Thus, the law is a clear US legal transplant – though doubts have been raised about its compatibility with local customs and values.[168]

Overall, the picture that emerges is that legal transplants did not stop with independence. Often (not always) colonial laws were kept and further foreign laws were transplanted, here, too, not always voluntarily. Thus, most of the former colonies today have a mixture of involuntary and voluntary transplants from the West, plus further transplants from neighbouring countries, and indigenous forms of law and order. This should enable transplant countries to choose such legal rules and institutions as really 'fit'. Yet, cherry picking particular legal rules can also be problematic, as can be seen in countries that have never been under colonial occupation.

3 Transplants in Non-Colonial Countries: All that Different?

(a) Transplanted Formal Law

A broad distinction can be made between two phases. In the first phase, comprehensive legal transplants often concerned entire codes. For example, between 1880 and 1922, Japan copied large parts of the French codes (initially)

[165] See Vogel 2006: para. 140; Mattei et al. 2009: 913–20, also ibid. 378 (problem that codification of Islamic law turns a dynamic and pluralistic tradition into a static and rigid one). There has also been the emergence of transnational organisations supporting Islamic finance, see list at www.wdibf.com/organizations.html.

[166] See, e.g. Tamanaha 2001: 110; Glenn 2014: 312–13.

[167] Gillespie 2006: 15.

[168] See Tamanaha 1993a (e.g. referring to the caste system, community sanctions, community ownership rights).

and then the German codes, on criminal law, criminal procedure, civil law, civil procedure, commercial law and bankruptcy law.[169] To be sure, these latter codes were not mere copies of the German ones but included some modifications. It can also be argued that due to the need to translate and localise the Western laws, they created a degree of hybridity in Japanese law.[170] Still, overall, this first set of transplants led to a legal system which, as regards its formal laws, became part of the German variant of the civil law family.

Turkey is another example.[171] While the Ottoman law of the late nineteenth century included some elements of French civil law, the reforms of the Turkish Republic, established in 1922, led to a more comprehensive Westernisation of the law. The main codes came from Switzerland (civil law, civil procedure and bankruptcy law) and Germany (commercial law and criminal procedure). This influence continued, for instance, through translations of Swiss and German legal literature, and through refugees from Nazi Germany who became law professors at Turkish universities in the 1930s and 1940s. Some of the refugees also had an impact on the positive law: for example, the German-trained lawyer, and then professor at the University of Istanbul, Ernst Hirsch was the main adviser for the Turkish Commercial Code of 1957.[172]

The second phase is characterised by more piecemeal legal transplants, often now from the United States. In post-Second World War Japan, the US influence was profound and not always voluntary.[173] Initially, the United States put pressure on Japan to enact a democratic constitution, though it has also been said that some of those American ideas have been misunderstood and mistranslated.[174] Transplants by pressure also occurred later on: for example, in the Structural Impediment Initiative (SII) of the 1990s, the United States pressured Japan to make its law more open – for instance, by way of improving investors' rights.[175] Still, it is said that the main structure of today's Japanese law is closer to the (German) civil law than to the (US) common law.[176]

In other countries, too, we can observe selective but influential US transplants, for instance, in South Korea, the Philippines, Liberia and Israel.[177] In China, the shift to a market economy has led to an influx of some US law, but also of laws from other Western and Eastern countries,

[169] See, e.g. Ramseyer 2009: 1701. [170] Hasegawa 2015.
[171] For the following see Müller-Chen et al. 2015: 125–41; Örücü 1999: 81–4; Örücü 2006b: 265; Zweigert and Kötz 1998: 298–91.
[172] See Foljanty 2015: 1–2. [173] See, e.g. Kelemen and Sibbitt 2002.
[174] Inoue 1991. See also Inoue 2002 (for the contentious understanding of the term 'dignity' in the Japanese Constitution).
[175] See Siems 2008a: 317.
[176] Mattei et al. 2009: 199. See also Chapter 4 at Section C 3 (a), above.
[177] Mattei et al. 2009: 196; Mattei 1994: 207.

such as Germany, France, Japan and Taiwan.[178] Recent transplant experience in Turkey is also mixed: as a candidate country it has paid special attention to EU law, but there are also some examples of US legal transplants.[179]

(b) Law in Practice

Both of these phases are akin to the transplants in continental European and colonial countries: comprehensive transplants in the past, but more selective ones today, often with some transplants from the United States. The question remains whether these transplants 'fit' better or worse than in other countries? On the one hand, transplants in countries that were not under colonial occupation may work better, since they tend to be voluntary ones. On the other hand, Western legal transplants are more likely to be rejected in non-Western countries, nor have the countries discussed here experienced a diffusion of Western culture through one of the colonial empires.

Starting again with Japan, there is indeed the view that there is only a 'façade of Western law'.[180] Since both the transplanted law and the underlying Western vision of legal rationality are seen as alien to Japanese culture and society, it is said that Western law has often not been accepted, and that the law in books and in practice diverges widely.[181] Convergence is seen as unlikely, since Japanese legal thinking is held to show a particularly strong path dependency, and even to be unique.[182]

However, such scepticism should not be exaggerated. It was not the case that Japan only copied the legal texts of Western countries. Rather, the initial transplants happened in a period of general cultural modernisation in late nineteenth-century Japan.[183] Correspondingly, as far as the law is concerned, it also involved a reception of legal theory and doctrine,[184] fostered through close links between German and Japanese legal academics and practitioners.[185] More recently, legal practice has also moved closer together. The increasing need for international legal advice meant that since the late 1980s the establishment of foreign lawyers and the setting up of foreign–Japanese partnerships have been eased.[186] Moreover, socio-economic and cultural changes can be seen as forces for legal convergence, where convergence does not only refer to an approximation of the positive law but also to the way it is applied.[187]

The recent reforms in China have triggered similar responses. On the one hand, it has been called a 'myth that Western laws govern the social field to the

[178] See Kroncke 2016: 223; Jingen and DiMatteo 2016; Zhou and Siems 2015.
[179] See, e.g. Kayaalp 2012 (for diffusion of regulatory agencies).
[180] Ehrmann 1976: 47.
[181] Cf. the references in Siems 2008a: 258–9.
[182] Cf. Kitagawa 2006: 249–50.
[183] Cao 2016: 323–50 (presenting it as a positive cultural change).
[184] Kitagawa 1970 (English summary of monograph published in Japanese and German).
[185] E.g. through the East-Asian Society (OAG), established in 1873, see www.oag.jp.
[186] See Siems 2008a: 259–60.
[187] See Chapter 9 at Section A, below, as well as Chapter 6 at Section B 2 (b), above.

exclusion of all other law-founding elements',[188] with doubts about the judicial application and enforcement of the new laws.[189] On the other hand, there is some evidence that hitherto accepted statements about the Chinese understanding of law have to be re-thought. In the Chinese academia, Western conceptions of legal theory and philosophy are debated, and are being adopted to a not inconsiderable extent.[190] There have also been liberalisations for foreign law firms doing business in China, as well as joined academic institutions and programmes.[191] Moreover, a successful reception of foreign law does not exclude variation: for instance, it has been suggested that the principle of good faith, which was transplanted to Chinese contract law, can also incorporate Confucian ideas and values.[192]

In Turkey, the legal transplants of the 1920s were part of a programme to transform society. According to Mahmut Esat Bozkurt, the Minister of Justice of that time, the aim was to free the Turkish nation from 'thirteen centuries of ill beliefs and chaos, close the doors of an old civilisation, and enter the modern civilisation'.[193] As to its effectiveness, it is possible to provide some evidence that Swiss case law and academic writing were also considered.[194] However, overall, there have been doubts as to how comprehensive this shift has been. In family law, the Civil Code broke with most (though not all) Islamic traditions, but it is often said that it had limited effect and that customary practices continued.[195] Scholars have also examined how far the transplanted law has taken hold in the rural areas of Turkey. Unsurprisingly, the picture is a mixed one. While informal means of solving disputes continue to play a role, sometimes villagers also make use of the formal legal system, including disputes about family law.[196]

The overall result is that, in non-colonial non-Western countries, the experience of legal transplants shows many similarities to those of colonial and Western countries: laws have been frequently transplanted, affecting the local environment, but not in a complete and mechanical way.

C Normative Views and Discussion

The question remains whether legal transplants are desirable and should therefore be encouraged. This section provides an overview of the views of

[188] Menski 2006: 586. See also Chapter 4 at Section C 1, above.
[189] Jingen and DiMatteo 2016 (for contract law). See also the discussion about the rule of law in China in Chapter 11 at Section B 2, below.
[190] See Siems 2008a: 261. [191] See Liu et al. 2017. [192] See Wang and Xu 1999: 16.
[193] As translated in Yildirim 2005: 358. See also Özsunay 2011: 5; Örücü 2006b: 265 ('aim was to become European').
[194] Büyüksagis 2015: 681, 689.
[195] See, e.g. Menski 2006: 361–2; Cotterrell 2001: 89; Watson 2007: 9. For the Islamic elements see Yildirim 2005: 359.
[196] Starr 1978. See also Müller-Chen et al. 2015: 135–7; Örücü 2006b: 280.

optimists and pessimists, the main argumentative field and questions of transplant design. While this is done at a general level, it will also become clear that the desirability of a transplant ultimately depends on the circumstances of each case.

1 Views of Optimists and Pessimists

The optimists argue that legal transplants can help countries to address major economic and social problems. Such a positive view of legal transplants is shared by comparative lawyers who aim to strengthen the practical value of comparative law: for example, Basil Markesinis encourages us to 'increase intellectual interaction and borrowings'.[197] Beyond comparative law, economists and development organisations often follow an 'instrumentalist' and 'technological' view of the law and therefore support the use of legal transplants in order to solve social or economic problems, while dismissing opposition as 'parochialism'.[198]

The pessimists object that, in practice, legal transplants are often unfavourable to the incoming legal system. Two variants of such a view can be distinguished. On the one hand, the criticism can refer to the relationship between the transplanted and the previous law. Thus, it may be argued that foreign ideas have 'polluting or disrupting effects' on the domestic legal order,[199] and that legal transplants should really be called 'legal irritants'.[200] On the other hand, the negative effect may refer to the relationship between the transplanted law and the social, economic, cultural and political environment. Taking the view that there are complementarities between the law, society, culture and political process of a particular country, it follows that one should not simply copy laws from other countries.[201] Thus, according to this view, legal transplants often fail, for instance, due to lack of enforcement, side-lining or general unsuitability.[202]

However, this criticism goes too far if it is meant to imply a general rejection of legal transplants. In today's world, there are no 'pure legal systems'; rather, all of them have managed to incorporate ideas from various parts of the world.[203] Thus, the general scepticism about foreign influences being irritants is at least an exaggeration. With respect to the lack of 'fit' with current socio-economic and other conditions, one objection to this criticism is that this may sometimes be deliberate, since

[197] Markesinis 2000: 49.

[198] Buscaglia and Ratliff 2000: 31. Cf. Twining 2004: 26. This is closely related to Chapter 11, below (on 'comparative law and development'), where these views are discussed in more detail.

[199] Gutteridge 1949: 25.

[200] Teubner 1998. See also Chapter 3 at Section B 3 (c), above.

[201] See Ajani 2009: 11 (against instrumental use of law); Ahlering and Deakin 2007 (on institutional complementarities in law). See also Chapter 11 at Section C, below.

[202] Cf. Foster 2007: 273–4.

[203] See generally Chapter 4 at Section C, above (on hybrids), as well as Section B, above.

Table 8.1 Patterns of argument about legal transplants

	Character of law	Quality of decision	Procedural reasons
Pro	common core, *ius gentium*	tested ideas, functional approach	form of transnational coordination in globalised world
Contra	domestic character of law	misapplications, 'cherry picking'	dominant legal systems and power imbalances
Reply	foreign law not authoritative, aspirational approach	transplants are not about blind borrowing	procedural balance needed

legal transplants can aim to change the society in question. It other cases, it is necessary to consider the different environment of the transplant country and other contextual factors, as the following will show.

2 Mapping the Argumentative Field

Table 8.1 presents an overview of the general argumentative field of legal transplants. It derives from a similar overview mapping the specific patterns of argument about foreign court citations.[204] These general arguments are relevant for all types of legal transplants, notwithstanding differences in detail.

The first reason, referring to the character of law, starts with the universalist view of a 'common core' or '*ius gentium*' that all legal systems share.[205] It may therefore follow that all legal actors should aim for a global perspective that incorporates legal ideas from other countries. But critics argue that such an approach should, at least, not be possible for judges as they are bound by the (still largely) domestic character of the law as it 'is', and that doing otherwise would undermine national sovereignty and democracy.[206] This line of reasoning may not only reject direct influence through foreign citations, but also more indirect forms, such as the interaction with foreign judges in international networks, as it distances judges from their national audiences.[207] Yet, this criticism seems to attack a straw man as legal transplants are based on the idea that foreign law has an informational, not an authoritative, value and thus does not challenge

[204] Gelter and Siems 2014: 38.

[205] See Waldron 2012 (citation of foreign laws as ius gentium); Chapter 2 at Section B 2, above (for universalism in comparative law), Chapter 9 at Section C 3 (b) (for universal human rights) and Chapter 10 (for global law), below.

[206] E.g. McCrudden 2007: 387–9; Legrand 2006b: 417, 419. See also Coendet 2016: 479 (for the relevance of the 'is/ought divide') and Section B 1 (b), above (for the US debate).

[207] Frishman 2016. For judicial networks see also Chapter 10 at Section A 2 (a), below.

national sovereignty. It can also be objected that support for legal transplants is not based on the belief that universal rules exist but rather that commonalities are an emerging or aspirational endeavour.[208]

The second reason recommends looking at foreign law in order to obtain useful information to improve the quality of the domestic law. This line of reasoning relates to the aspired benefit for transplant countries, as already explained.[209] Critics, however, say that law is typically tightly linked to a particular society: thus, there is a high risk that the transplanted law is irreconcilable with the context of the transplant country and therefore ineffective or inappropriate.[210] There can also be a more deliberate misuse of information as actors in the transplant country may strategically choose a foreign law that already corresponds with their prior positions ('cherry picking').[211] However, again, this line of critique is not entirely fair. The benefit of tested ideas means that foreign law is not borrowed blindly or manipulatively.[212] Rather, the comparatist needs to assess as fully as possible how the foreign law would operate in the legal and extra-legal context of the transplant country.

The third reason is specifically about the impact of economic, social and cultural globalisation. For example, according to Justice Breyer, it is the 'nature of the world itself', not the 'cosmopolitanism of some jurists', that requires us to consider legal models from other countries.[213] It can also be suggested that, today, legal transplants can be used to create a pluralist transnational 'space', distinct from national legal systems.[214] The critics, however, regard such a positive view of globalisation as too naïve. For practical reasons, it is likely that transplant countries only consider the models of certain dominant legal systems, such as the parent companies of legal families (England, France, etc.). Moreover, there is bound to be disproportionate influence of politically and economically powerful countries, not dissimilar to the cultural US influence on eating and drinking habits ('McWorld', 'Coca-Colonization').[215] As a reply to this critique, it can then be suggested that there can be means to ensure procedural balance in the way foreign laws are considered, notwithstanding any political and practical obstacles the transplant country may face.

[208] Wheatle 2014: 1075 ('ius gentium as emerging but not truly existing'). See also Chapter 10 at Section A 2 (b), below (for global law).

[209] See Section A 2 (a), above.

[210] See Section A 3 (b), above, as well as Section 1 in this section.

[211] For judicial comparative law a frequent reference is to Chief Justice Roberts, confirmation hearings, available at http://transcripts.cnn.com/TRANSCRIPTS/0509/13/se.04.html ('if you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia, or wherever').

[212] Similarly, Rubin 2000: 108 ('little can be borrowed, but much can be learned, from foreign law'); Peck 2011: 775 ('policy markets: from diffusion to learning').

[213] Breyer 2015: 245. See also Section B 1 (b), above (for the US debate).

[214] Hendry 2013.

[215] For these terms see Barber 1995; Wagnleitner 1994. For examples of US influence see Sections B 1 (a), 2 (b) and 3 (a) above, and see Chapter 11, below (for the influence of developed on developing countries).

3 Designing and Preventing Transplants

The views and arguments of the previous sub-sections frequently referred to the need to consider the circumstances in which a transplant takes place. Other researchers have taken a similar position, with suggestions to design legal transplants in an intelligent way. This research has a positive dimension as far as it tries to establish how, technically, certain foreign rules can most effectively be transplanted. However, it also has a normative one as it tries to promote transplants that work well and should therefore be used by law-makers.

For example, it has been suggested to apply what is called an 'IKEA theory': laws need to be stripped of their social context before they can be transplanted and then recontextualised in the recipient country.[216] Specifically for legislative drafting, scholars have distinguished between 'transplant concept', 'transplant term' and 'transplant comparative research design' and have explored at which stage in the legislative process foreign legal ideas are best to be considered.[217] Others have suggested that the process after the transplantation is crucial, in particular how its operation may need to be refined and assessed in the transplant country.[218]

In some instances, the circumstances may lead to transplants that are not only ineffective but harmful or even 'malicious'. Thus, here, the normative question is whether and how such transplants can be prevented. This is an under-explored topic.[219] Three broad groups may be able to intervene: first, third countries and international organisations can try to exert influence on the origin and transplant countries. Secondly, within the origin and transplant countries, societal forces can play a role: thus, citizens, companies and interests groups can try to prevent malicious legal transplants. Thirdly, the current law-makers of the origin and transplant countries can try to influence the decisions of future law-makers, for example, directly through constitutional rules or indirectly through changes of societal conditions. Of course, there is no 'silver bullet' against malicious ideas and laws; rather, any solution has to identify precisely at which stage and with which tools intervention in the determinants for the success of the malicious legal transplant is possible.

[216] Michaels 2013b. See also Frankenberg 2012a.
[217] Xanthaki 2008; Lupo and Scaffardi 2014.
[218] Örücü 2002; Bellantuono 2012. See also Hiller and Grossfeld 2002: 179 (suggesting that judicial application of the transplanted law must be creative).
[219] For details see Siems 2018.

D Conclusion

Legal transplants were crucial for the emergence of legal families in Europe and in the way those models spread to other parts of the world. But legal transplants are even more topical today since, to quote Patrick Glenn, 'nowadays all traditions are in constant contact with one or more of the other legal traditions'.[220] These 'modern' transplants tend to differ from the old ones:

> Transplants are no longer adoptions of entire systems of law in a top-down fashion initiated by colonial forces. Instead, they come in different shapes and sizes, take place serially, and originate in a variety of sources.[221]

This implies, first, that legal transplants are now more often voluntary than in the past. This is not, however, to deny that there can be elements of involuntariness, for instance, if countries feel that they are under international political or economic pressure to implement certain policies. Secondly, legal families have become less important for contemporary legal transplants. This is not to say that common historical paths may not continue to play a role, but these are now often overlaid by trends of Americanisation, Europeanisation and internationalisation. Thirdly, there can be different dynamics in different areas of law. While legal transplants can and have played a role in all areas of law,[222] certain foreign models may be more popular in some areas of law than in others, as the examples of this chapter have illustrated.

These changes also impact on the question whether we can say that modern legal transplants typically 'work'. In the past, there have often been cases where legal transplants purely meant copying or translating a particular foreign legal text. Today, the main aim tends to be to transfer a particular policy – be it driven by the transplant or the origin country. Thus, the respective countries have an interest in the transplanted law working. While this aim could still be unfulfilled, a careful comparative analysis – going beyond the text of the positive law – can reduce this risk. Such a recommendation is also relevant for the normative question whether legal transplants should be used. Yet, as this latter question also depends on the details of the transplanted law, this chapter has taken the view that the desirability of a transplant ultimately depends on the circumstances of each case.

Supplementary Information

Questions for discussion. Why are legal transplants a popular topic of comparative law? Can it be said that legal transplants 'work'? What are the main patterns in the evolution of legal transplants across history? How are legal

[220] Glenn 2014: 42. Similarly, Michaels 2016: 355 (as states have lost their independence).
[221] Cohn 2010: 628. See also Section A, above.
[222] For a similar assessment see Perju 2012: 1311–13; Harding 2002: 45 (for South East Asia). For the counter-view see Section A 2 (c), above.

transplants related to other historical events? What are the main arguments in favour and against the use of legal transplants?

Suggestions for further reading. For the history of research on legal transplants: Cairns 2013. For taxonomies of transplants: Cohn 2010. For the relationship to legal diffusion: Twining 2004. For the critique that legal transplants are impossible: Legrand 1997b. For judicial dialogue as a legal transplant: contributions in Andenas and Fairgrieve 2015.

9

Convergence, Regionalisation and Internationalisation

In traditional comparative law, the countries of the comparison are similar to Leibniz' 'monads' – perceived to be elements of the universe which are fully internally determined and which do not interact with each other.[1] The occurrence of legal transplants already shows that legal systems are not fully 'sealed off', but it is also possible to go further and observe that today other legal systems are not merely possible models but 'both partners and competitors'.[2] Thus, it is the aim of this chapter to examine whether we may see a more fundamental change of legal systems, even if we still start with countries and states as the main units of comparative law.

Three topics are discussed in the following: Section A deals with the convergence of laws with examples from company and constitutional law. Section B is about the regionalisation of law as a form of state interaction, using the EU as the main example. Section C addresses the growing internationalisation of the law and its impact on state law, with the main example of human rights law. Section D concludes. The subsequent Chapter 10 on transnational and global law will then explore the need to go beyond changes to the country level in order to understand today's legal world.

The three topics of this chapter are not independent of each other. International and regional laws can be forces for the convergence of legal systems, regional laws are influenced by the rules that the countries of this region have in common, and international laws are dependent on the extent to which national legal systems implement and enforce them. These linkages will also be explained throughout this chapter.

A Convergence of Laws

The concept of 'convergence' can be motivated by applying the view of 'the end of history' to differences between legal systems. It is also necessary to understand the precise meaning of and the forces driving for convergence.

[1] Leibniz 1978 (original from 1714). [2] Auby 2017: 81, 143.

These conceptual topics are addressed in the first two sub-sections below. This is followed by a more applied perspective of law in the third sub-section as it discusses convergence in company and constitutional law, including the arguments speaking against convergence.

1 Motivation and Terminology

In 1989 Francis Fukuyama took the view that:

> What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.[3]

In a follow-up comment, twenty years later, Fukuyama asserts that there has been a continuing trend towards liberal democracy. Furthermore, he takes the view that cultural values have also been affected: specifically, Fukuyama refers to human rights, accountability of state powers and the rule of law to which non-Western societies have been converging.[4]

In legal scholarship, Henry Hansmann and Reinier Kraakman postulate that the historical differences in company law have faded in favour of approximation to the US model.[5] Similar views have been expressed by others. Jan Dalhuisen calls modern laws 'practical, technical and problem-solving' and notes that they do not differ greatly from country to country.[6] Lawrence Friedman takes the position:

> It seems obvious that a French lawyer and an English lawyer would have an easier time comparing notes on, say, urban planning, income tax deductions, or copyright protection for software, than they would discussing legal problems with a lawyer from the days of Henry VIII or Louis XIV, respectively. The legal worlds of those two kings are gone forever.[7]

Expressing such developments as 'convergence of laws' indicates that legal phenomena have become more similar. Therefore, it refers to a process and it does not imply that they are identical or that they will become so. This is an important point to stress since some of the literature follows a different but somehow misleading terminology. For example, when it is said that we may experience 'hybridisation' but not convergence as there cannot be a 'single best model',[8] the position here is that we do have convergence in such a scenario since such hybrids are bound to be less different from each other than pure units of comparison.

[3] Fukuyama 1989: 13. See also Fukuyama 1992.
[4] Fukuyama 2010; also Fukuyama 2014: 399–451 (spread of democracy but also considering 'political decay'). For human rights see also Section C 3, below, and for the rule of law see also Chapter 11 at Section B, below.
[5] Hansmann and Kraakman 2001. See also Section 3, below. [6] Dalhuisen 2004:128.
[7] Friedman 1996: 74. [8] Clift 2014: 228 (for economic convergence).

Legal transplants can play a role in this process of convergence. However, one can also imagine a situation where a transplant makes the legal systems of the world more dissimilar: say, if initially all countries but one have similar laws on a particular topic, but then half of the countries decide to transplant the law of the outlier, this will lead to the global divergence of legal systems.[9] There can also be convergence without legal transplants. For example, countries may cooperate together to solve a social problem and come up with a solution which is not yet found in any country.[10] Or the growing similarity in law may not be due to a legal transplant but rather the indirect result of the diffusion of other ideas and social phenomena.[11]

The relationship between legal harmonisation and convergence is not entirely clear, terminologically. Some regard harmonisation as a deliberate process whereas convergence is considered something that evolves spontaneously.[12] More frequently, however, convergence is seen as the wider term, thus, it is said that there are different types of convergence, some based on a deliberate programme for legal unification ('harmonisation'), as distinguished from 'natural' or 'evolutionary' convergence.[13] In any case, the non-deliberate forms of unification are usually the more interesting ones to examine since, if confirmed, they may show that formal harmonisation is not always necessary.

The literature has also suggested a number of more specific types of convergence. In political science, Colin Hay distinguishes between various causal chains within the framework of law-making, namely: input, paradigm, policy, legimatory-rhetoric, outcome and process convergence.[14] Similarly, the legal literature, in particular, in company law, has identified various types of convergence: formal, functional, contractual, hybrid, normative and institutional. Ronald Gilson takes it that in company law functional convergence is likelier than formal convergence:[15] while the underlying problems are similar, there are too many obstacles in the way of formal harmonisation, where 'functional' means that a comparable result is produced, with, say, incompetent managers being dismissed, but along different statutory paths. Alternatively, according to Gilson, there may be contractual convergence, where the formal differences may be functionally relevant, but equivalent effects can be reached through contractual arrangements. Paul Rose adds the concept of 'hybrid convergence' where a firm 'escapes' domestic law by shifting its registered seat to another country: here, approximation comes about because firms of various countries are subject to the same rules.[16] Going beyond legal rules, Curtis Milhaupt

[9] For a similar example see Dixon and Posner 2011: 408.
[10] Similarly, Finkin 2006: 1144 (for international labour law).
[11] Leckey 2017: 17. See also Section 2 (a), below. [12] Antokolskaia 2006: 21, 23.
[13] Merryman 1999: 26–32; de Cruz 2007: 510. See also Andenas et al. 2011: 576–8 (discussing the terms integration, homogenisation, convergence, unification and parallelism).
[14] Hay 2004. The following is based on Siems 2008a: 23–4. [15] Gilson 2001.
[16] Rose 2001: 134–5.

raises the question of 'normative convergence', referring to extra-legal norms,[17] and David Charny employs the term 'institutional convergence' where de facto the structures in firms become more similar.[18]

All of this makes it clear that the questions of whether there is convergence and whether it is desirable may not lead to simple 'yes/no' answers. Notwithstanding these nuances, the following will show that it is possible to identify the main 'convergence forces' at a general level.

2 Convergence Forces

(a) Convergence Through Congruence and Pressure

Some reasons for convergence are fairly obvious. For example, when international or regional organisations enact binding rules that their members have to implement, this will at least lead to a formal convergence of the respective rules. However, there are also less visible forces that can lead to convergence of the law, for example, growing cultural similarities that are gradually reflected in a similar legal treatment of certain areas of life in different countries. Table 9.1 summarises a list of possible convergence forces.[19] It also includes the column on 'how legal systems respond' to these forces. This is not meant to claim, of course, that there will be full convergence of all legal systems of the world. The focus on the impact on the law is also not meant to imply that there cannot also be a causal relationship that goes in the other direction (i.e. law shaping reality).[20]

'Convergence through congruence' can arise where the social, political and economic circumstances become similar internationally. Claims of a 'flat' world may often be exaggerated,[21] but there is also no denying the changes that have occurred. For example, in terms of economic policy, there are more market economies today than before the fall of communism.[22] Societies have become more integrated, for instance, through modern forms of communication and means of transport.[23] This further contributes to cultural approximations, and it has also been suggested that a transnational modern legal culture has emerged with characteristics such as instrumentalism, individualism and legalism.[24]

As far as these circumstances have become similar across countries, it is plausible to assume that the law also becomes more similar, being supported by communication and cooperation between law-makers. For convergence forces that are international phenomena, such as the Internet and global commerce,

[17] Milhaupt 2001. [18] Charny 1998: 165.

[19] Based on a corresponding analysis specifically for convergence in shareholder law, see Siems 2008a: 250–316 and the overview in Siems 2010b: 753.

[20] See Chapter 6 at Section A 2, above. [21] Cf. Twining 2009b: 39–40.

[22] Despite remaining differences, say, between liberal and coordinated market economies, see Chapter 12 at Section B 3, below.

[23] Lee and Olson 2010: 11–35 ('convergenomics').

[24] See Friedman 1994; Tamanaha 2001: 127; Cotterrell 2006: 717.

Table 9.1 Convergence forces

	Specific reasons	How legal systems respond
Convergence through congruence	– Internationalisation and growing interdependencies of societies and cultures (e.g. through modern forms of communication and means of transport) – Internationalisation of the economy and growing interdependencies (e.g. cross-border trade) – Internationalisation of private institutions (corporations, law firms, NGOs, etc.) – Convergence of economic policies – Convergence and transnationalisation of legal cultures (legal thinking, training, scholarship, etc.)	– Plausible to assume that the more similar the circumstances, the more similar the corresponding legal rules – Communication and cooperation with other countries in law-making increasing – International phenomena can indicate need for uniform solutions – Path dependencies weakening
Convergence through pressure	– Influence of international and regional organisations (including hard and soft law) – Influence of foreign states (including soft power, structural dependence, etc.) – Lobbying by companies, in particular multinational corporations (as well as by their stakeholders) – Lobbying by other interest groups (NGOs, etc.) – Regulatory competition and extra-territorial effects of laws become more frequent	– International influence and lobbying lead to convergence since desire to reduce transaction costs – National lobbying leads to convergence if in same direction – Extra-territoriality and regulatory competition can lead to convergence – Communication and weakening path dependencies: as for 'convergence through congruence'

uniform solutions are even more likely. All of this does not deny the relevance of path dependencies accounting for continuing differences between legal systems.[25] Yet, legal systems are not static. Thus, the withering of existing path dependencies can also be a reason for convergence in law.

With respect to 'convergence through pressure' both public and private entities play a role. The former includes unification by way of hard or soft law by international and regional organisations.[26] For other forms of influence, for example by foreign states but also companies, law firms, NGOs, etc., it is helpful to distinguish between influence of an international or national scope. In the former case, the entity will typically be interested in uniform rules, for example, in order to reduce the costs and risks associated with the

[25] For those see also Section 3 (b), below. [26] See also Sections B and C, below.

need to comply with different legal regimes.[27] In the latter case, the situation is more complicated. For instance, if in one country shareholders are the main lobbyists but in another one directors, company laws will stay diverse. Thus, here, convergence depends on the question of whether the power relationship between interest groups becomes more similar across countries.[28]

Finally, under certain conditions, regulatory competition and the extra-territorial effect of laws can lead to convergence. This crucially depends on the decisions taken by the relevant conflict of law rules. As this factor is of particular interest for comparative law, the following two sub-sections will elaborate on it more closely.

(b) Conflict of Laws and Extra-territoriality

For the conflict of law rules applicable to private law, also known as private international law, a broad distinction can be drawn between a 'European' and a (US) 'American' model.[29] The European model favours policy-neutral rules of conflict of laws agreed on a multilateral basis aimed to determine the applicable law with legal certainty. By contrast, the American approach uses unilateral rules of conflict of laws based on a country's own domestic interests. This is a crude distinction and in reality things are also often mixed but it offers a useful starting point for examining the relationship between conflict of laws and convergence.

As far as conflict of laws has the aim to decide clearly on the applicable law, the problem is how far this can really be achieved. The European approach has been criticised as being unrealistic in claiming 'process-based neutrality' and an 'apolitical nature'.[30] In practice, the Hague Conference on Private International Law has successfully proposed conventions on specific topics.[31] Yet, these rules have not led to a universal code of conflict of laws and there is also no means to ensure that common rules are applied in a uniform way. As a result, the need for legal certainty – given this uncertainty about conflict of law rules – can be a driving force for the convergence of substantive laws.

Other outcomes are, however, also possible. Problems of conflict of laws can be a motivation to switch from state-based legal orders to rules of transnational law, as far as this is feasible.[32] Scholars who view legal pluralism in a positive light may also argue in favour of overlapping legal orders.[33] This latter position finds some support in company and securities law in the following example: being listed at more than one stock exchange can be aimed at showing to

[27] For the benefits of uniformity see, e.g. Stephan 1999; Zweigert and Kötz 1998: 25; Sacco 2001: 172. But see also Section (c), below and McBarnet 2002 (practitioners appreciate choice provided by different legal systems).
[28] See Section 3 (a), below, for company law.
[29] See, e.g. Cuniberti 2017: 4–64; Reimann 2006: 1374–6. [30] Muir Watt 2014: 1.
[31] See www.hcch.net. [32] Juenger 2000. For transnational law see Chapter 10, below.
[33] Muir Watt 2014: 17; Husa 2015: 50. See also Chapter 5 at Section B 2, above

investors that a company not only wants to comply with the lax domestic rules but also the stricter foreign ones (called 'bonding effect'). This may then also be described as 'functional convergence' since results become functionally similar between companies from different countries.[34]

As far as countries decide unilaterally which laws they apply, the consequence is that domestic laws can have an effect beyond their borders. This shows in many areas of US private and public law. In US securities regulation, extra-territoriality is a frequent point of discussion: for example, the US rules on takeover bids apply if a certain proportion of the target's shareholders lives in the United States – regardless of the fact that the companies involved may be foreign and therefore also have to comply with their domestic takeover laws.[35] It can also be the case that it is the jurisdiction of US courts that is extra-territorial. A prominent example is the US Alien Tort Statute. It provides that US courts have jurisdiction 'of any civil action by an alien for a tort ... committed in violation of the law of nations or a treaty of the United States'.[36] Since the 1980s courts have used this provision on various occasions to decide on compensation for human rights violations that took place in other countries.[37]

The extra-territorial effect of legal rules is not limited to US law, however. In public law the general approach of domestic law-makers is to unilaterally define the scope of their laws. Traditionally, these laws have dealt with matters that are strictly territorial, but this is changing. Today, it can be seen as a general phenomenon that in an increasingly interconnected world more than one legal system may be applicable.[38] Here, then, one may also identify the trend that European law leads the way for topics such as health, safety and environmental risks[39] with businesses from other countries being obliged to comply with these standards. The relevance for convergence is that these businesses will ask their own law-makers to adjust to EU or US standards in order to avoid the need to comply with multiple sets of rules.

(c) Choice of Law and Regulatory Competition

Another way to address problems of the applicable law is to let individuals choose the applicable law, possibly even regardless of spatial circumstances. Such choice of law is usually possible in contract law, though conflict of laws rules may require compliance with some mandatory domestic laws, for instance, on consumer protection.[40] Other areas of private law provide further

[34] Coffee 1999: 650, 681.
[35] See Siems 2004b. For other questions of securities law see, e.g. Siems 2008a: 274–5.
[36] Alien Tort Statute, 28 USC § 1350.
[37] But recently US courts are said to have started backtracking, see Putnam 2016: 264–72; Kirshner 2012.
[38] Auby 2017: 16–19; Berman 2009: 235; Grossfeld and Eberle 2003: 296.
[39] Vogel 2012; also Bradford 2012 (as the 'Brussels effect').
[40] See, e.g. Cuniberti 2017: 399–408; Laval 2015 (on public policy exceptions and related concepts in EU and US law).

restrictions. For example, in family law it would not be possible to freely choose the legal rules of any foreign country, although there may be elements of choice in scenarios with an international dimension.[41]

For businesses, some choice of the applicable law can be possible. In company law, the main question is whether firms can freely choose their place of incorporation. Countries that follow the 'incorporation theory' recognise any company that is properly constituted according to the law of another country. By contrast, countries of the 'real-seat theory' seek to prevent the evasion of domestic law by requiring that a company has to be incorporated in the country of its headquarters. Thus, the situation in these countries is similar to those in tax law or labour law, where choice is tied in with being the resident of a country or having your factories or offices there.[42]

The important consequence of such choice is that it can stimulate 'regulatory competition' creating a 'law market', which Erin O'Hara and Larry Ribstein define as:

> ways that governing laws can be chosen by the mobility of at least some people, firms, and assets and the incentives of at least some states to compete for people, firms and their assets by creating desired laws.[43]

Both the demand and the supply of such a market have been extensively researched for a number of areas of law.[44] On the demand side, a frequently discussed question is which legal systems are most popular and why this is the case. The 'why' question can be a complex one because it cannot simply be assumed that individuals and firms compare the advantages and disadvantages of all legal systems. Rather, it is likely that other factors such as accessibility of information about foreign laws, the reputation of particular legal systems and the quality of its judiciary, play a decisive role. Empirical research on contract law, for example, has used data about the choice of law in arbitration. Here, as far as English, US, Singapore and Swiss law are found to be popular laws of choice, it may be argued that this could be related to their good quality, but these studies also find other factors to be relevant, such as the educational background of lawyers, language, and the seat of the arbitration.[45] Surveys of businesses and lawyers point in a similar direction of mixed considerations.[46]

Turning to the supply of different laws, it is not clear whether, why and how countries would really compete for the 'best law'. Clear benefits exist in some circumstances, for instance, when countries want to attract tax-paying

[41] Cf. Auby 2017: 88.

[42] For a comparative study of the law applicable to companies see Gerner-Beuerle et al. 2016. For the situation in the EU see also Section B 3 (c), below.

[43] O'Hara and Ribstein 2009: 65.

[44] See the following footnotes and, e.g. Rühl 2013 (for contract law); Schön 2005 (for company and tax law); Siems 2009b (for partnership law).

[45] Cuniberti 2016; Cuniberti 2014; Voigt 2008.

[46] Vogenauer 2013; Vogenauer 2008.

businesses, but not in others. There is also the possibility that countries may react defensively, for instance, in some company laws there are rules for 'pseudo-foreign corporations' trying to evade domestic legal rules.[47] In the context of this section, the relevant question is whether regulatory competition stimulates legal convergence. Often this is suggested: assuming that a particular legal system is 'better', it seems plausible to say that others may try to imitate it. The direction of this convergence may not be entirely clear, however: for instance, in company law some suggest a 'race to the bottom' since legislators are exposed to pressure from company founders and directors and therefore deregulate the law at the expense of shareholders, creditors and employees. The counter-view stresses that there can be a 'race to the top' because, as with other forms of competition, the market's invisible hand leads to an optimal pattern for corporate governance.[48]

But, it may also be suggested that regulatory competition can lead to divergence since competition stimulates innovation and specialisation as well as differentiation of legal systems according to different preferences. So, presumably it depends, as Anthony Ogus explains that:

> competition should exert pressure for a convergence of legal principles in those areas of law (e.g. contract, property and corporate law) which are predominantly facilitative. That is, because there is largely a homogeneity in the legal product being demanded, actors will search for the legal means of reaching desired outcomes at lowest cost ... In contrast, it is difficult to predict the impact of competition in relation to interventionist law (for example, tort and regulation). Here the legal product is heterogeneous, because in different jurisdictions it is likely that different preferences will exist as to the levels of protection to be supplied and of the costs which must be incurred.[49]

In addition, at a more general level, the relevance of regulatory competition means that law-makers are more motivated than otherwise to consider the use of foreign models. Thus, this too will stimulate the tendency of convergence. It is also a debate in which comparative legal scholarship can play a role given that one of its core aims is to provide policy recommendations.[50]

3 Examples: Company and Constitutional Law

(a) Arguments Showing Convergence

While company law and constitutional law seem to be very different, convergence in these two areas of law shows a number of parallels. The following will deal with four core topics for both of them: convergence of the main policies; convergence of the actual details of the law; convergence forces; and convergence of the law in practice.

[47] For the EU and US debate see, e.g. Borg-Barthet 2010: 593–4, 606–9.
[48] See the references in Siems 2008a: 298. [49] Ogus 1999: 420–1 (footnotes omitted).
[50] See Chapter 1 at Section A 2 and Chapter 2 at Section A 4, above.

In company law, first, Henry Hansmann and Reinier Kraakman suggest that the Anglo-American model of corporate governance has won the day.[51] This model is based on the idea of shareholder primacy as the main guiding principle of company law. The opposite models, which leave more flexibility to managers and directors or give more emphasis to the interests of other stakeholders, are seen as incompatible with today's market environment. However, one does not have to agree with Hansmann and Kraakman to show convergence in the general policy orientation of company law. Previous work explained that the laws of France, Germany, the United Kingdom, the United States, China and Japan all reflect a mixture of different ideal types of shareholders, namely, as 'owner', 'parliamentarian' and 'investor' Though legal systems may lay emphasis on one model type of shareholder, it was found that in all of the six legal systems, the overall legal situation is always a hybrid one.[52]

Secondly, in terms of the details of the law, it can be observed that, today, many law-makers follow a global model of 'good corporate governance'. For example, there is evidence showing that rules on independent directors, audit committees and derivative actions have been popular legal transplants in recent decades.[53] As already mentioned, there has also been considerable quantitative research showing convergence of company law rules at the aggregate level since countries have tended to increase the protection of shareholders over the last decades. Furthermore, this research also scrutinised the differences between variables that code specific legal issues of company law, here too, with the result of legal convergence in company law.[54]

Thirdly, previous work explained that especially for public companies 'convergence through congruence' acts as a strong convergence force. For example, the increased use of modern forms of communication, approximations in economic policy, company and shareholder structures, increasing cross-border investment and mergers, the liberalisation of capital markets and reforms in pension provisions, all account for growing legal similarities. In terms of 'convergence through pressure' it was found that the liberalisation of markets increases the pressure shareholders can exert internationally, whereas 'regulatory competition for company founders' and 'lobbying' play a secondary role.[55]

Fourthly, this work also demonstrated that current and future convergence also involve a 'convergence of law and reality'. When, in the past, provisions of company law were transplanted, the competent courts and authorities, and also the directors and shareholders involved, often lacked the practical

[51] Hansmann and Kraakman 2001. [52] See Siems 2008a: 225–6.
[53] See Siems 2008a: 134, 195, 222. [54] See Chapter 7 at Section C 3, above.
[55] Siems 2008a: 398–9.

experience of how to apply this law. But nowadays 'convergence through congruence' is based on a change in the factual circumstances, so that fewer contradictions between law and facts arise. And in 'convergence through pressure' interest groups lay weight on effective enforcement of the law, so that here too it will not only be formal convergence that will come about.[56]

For constitutional law, it may be suggested that the role of politics may make convergence less likely. Yet, here too, it is also possible to confirm the tendency of legal convergence. First, as regards the dominant legal policies, the idea of convergence has been summarised as follows:

> There has been a slow but steady spread of forms of democracy and of at least a minimalist understanding of the rule of law. Increasingly, there is a shared conception of a constitution as an instrument that represents fundamental law, derives its authority from a sovereign people and needs to be taken seriously by the organs of state, at least as far as public and international perception are concerned. In one form or another, the institution of judicial review of the constitutionality of state action, including legislation, is gaining acceptance.[57]

All of this is seen as a result of a process that started in the late eighteenth century, to be precise, due to a growing number of countries with democratic institutions and due to the migration of constitutional ideas based on a democratic model.[58] This does not imply that there are no variations between legal systems. Yet, the clear trend of the last two centuries goes in the direction of democratic political systems, together with the advancement of liberal market economies.

Secondly, researchers have also shown that the precise texts of written constitutions[59] have converged. It is said to be striking how similar the language of constitutional texts is.[60] Critics of the convergence hypothesis also acknowledge that at least the words of constitutions are often very similar. According to Günter Frankenberg:

> Constitutions across national boundaries, language barriers, epistemic communities, political constellations, and cultural contexts appear to share the same vocabulary, follow similar institutional paths, contain comparable elements, and share a basic design. Read ten constitutions and you know them all, at least you know the most common varieties of constitutional construction.[61]

[56] Siems 2008a: 399–400.
[57] Saunders 2009: 21. For rule of law reforms see also Chapter 11 at Section B, below.
[58] See Tushnet 2009; Goldsworthy 2006a: 116; Ginsburg and Dixon 2011: 2. For data on growing proportion of democracies see Gleditsch and Ward 2008; Wejnert 2013.
[59] Cf. Ginsburg and Dixon 2011: 4–5 (on different definitions of 'constitutional').
[60] Goodin 1996: 223.
[61] Frankenberg 2012a: 564. See also Frankenberg 2012b: 185–6; Frankenberg 2006b: 442.

Quantitative research too managed to show that the constitutions of most of the countries of the world have converged.[62] Within the context of the internationalisation of the law, a subsequent section of this chapter will also address convergence of human rights law.[63]

Thirdly, there is evidence of both 'convergence through congruence' and 'convergence through pressure'. A growing 'congruence' of countries is a relevant factor as far as constitutions are 'manifestations of a society's moral commitments'.[64] It can also be said that in many previously poor countries a wealthy middle class, the digital revolution and higher levels of education have contributed to the spread of economic and political rights.[65] More emphasis is, however, usually put on the impact of 'pressure', widely understood. As this pressure tends to have an international dimension, we may therefore speak about a shift from 'constitutional sovereignty', based on the national demos, to 'cosmopolitan' or even 'global' constitutionalism.[66]

For example, private activists and organisations, such as Human Rights Watch, lobby for improved protection of human rights; foreign governments and the international experts of the Venice Commission provide programmes for democracy assistance, in particular in the context of constitutional design for countries in transition; and international and regional organisations exert pressure, for example, the United Nations (e.g. through its United Nations Democracy Fund, UNDEF), the OSCE (Organization for Security and Co-operation in Europe) (through its Office for Democratic Institutions and Human Rights, ODIHR), the EU (through conditions for trade and aid) and the World Bank and the International Monetary Fund (IMF) (through funding conditions).[67] A provision in the Universal Declaration of Human Rights also refers to the protection of rights in a democratic society,[68] and a UN Guidance of the Secretary General from 2010 states that:

> [t]he UN has long advocated a concept of democracy that is holistic: encompassing the procedural and the substantive; formal institutions and informal processes; majorities and minorities; men and women; governments and civil society; the political and the economic; at the national and the local levels. It has been recognized as well that, while these norms and standards are both universal and essential to democracy, there is no one model … Indeed, the ideal of

[62] Law and Versteeg 2011: 1164 and see Chapter 7 at Section C 3, above.
[63] See Section C 3 (c), below.
[64] Davis and Trebilcock 2008: 905.
[65] See Dixon and Posner 2011: 409–10; Chang and Yeh 2012: 1170–2.
[66] See Walker 2015: 181; Hirschl 2014: 199; Somek 2014.
[67] See, e.g. Cassese 2012: 75–94; Chang and Yeh 2012: 1172–3; Nijzink et al. 2007: 57; Reynolds 2011 (on 'designing democracy'); Keck and Sikkink 1998 (on advocacy networks); de Visser 2015 (for the Venice Commission); http://ec.europa.eu/europeaid/ (for the European Instrument for Democracy and Human Rights, EIDHR, and the Cotonou Agreement); see also Chapter 11 at Section A, below (for IMF and World Bank).
[68] UDHR, art. 29(2).

> democracy is rooted in philosophies and traditions from many parts of the world.[69]

A further form of pressure is the desire to attract foreign capital, including human capital.[70] In particular, this may induce countries to provide constitutionally enshrined protections of property rights and the rule of law, a topic also to be discussed in the chapter on 'comparative law and development'. Finally, the extra-territorial effect of human rights law can lead to pressure on other countries to implement such rules, in particular as far as they are necessary to tackle global problems.[71]

Fourthly, there has also been some convergence beyond the black-letter law. For example, this may consider the role of courts. Scholars have observed that there is convergence in constitutional reasoning as well as a rise in judicial transplants, reflecting the common origins of constitutions and possibly also a universalist understanding of human rights and democracy.[72] A challenge to convergence is that formal rules providing democratic institutions do not mean that countries are well-functioning democracies. For example, in 'new' democracies constitutional law may be ineffective due to factors such as a weak civil society, and lack of democratic culture, fully free press and diverse political parties. It can also be the case that courts may not enforce rights and duties as well as in established democracies. However, courts have also played a positive role in the democratisation process in a number of countries, for instance, in South Africa, Ukraine, Pakistan, Taiwan and South Korea.[73] They may also have acted as substitutes where political institutions were inefficient, for example, in Columbia and India.[74] More generally, it can be said that recent decades have seen a growing pressure to provide meaningful forms of democratic representation.[75] A controversial sequentalist view holds that even in non-democratic countries 'rule of law' reforms have started a process that will eventually lead to democratic reforms, speculating about future developments in China.[76]

(b) Limitations of Convergence

Some critics doubt whether it is justified to talk about a convergence of legal systems. This criticism is addressed here as arguments pointing towards the limitations of convergence, in turn dealing with the question of convergence in

[69] UN 2010: 2. [70] See Law 2008; Tushnet 2009.
[71] Bhuta 2016: 10 and see Section C 3, below.
[72] Jakab et al. 2017: 782–91; Choudhry 1999: 833–9 and Chapter 7 at Section B 1 and Chapter 8 at Section B 1 (b), above (for judicial transplants) and Section C 3, below (for human rights).
[73] See Ginsburg 2010a: 179–88 (distinguishing between upstream triggers of democracy, downstream guarantors, downstream democratic consolidators and judicial irrelevance).
[74] Landau 2010; Dickson 2008: 12. For further examples see Kapiszewski et al. 2013.
[75] Cf. Nijzink et al. 2007: 70–1 (data showing that in Africa support for democracy is growing).
[76] Cf. Carothers 2010: 22 (rejecting this view). See also Chapter 12 at Section B 1, below.

the black-letter law and other modes of criticism, again with the examples of company and constitutional law.

First, it is possible to point towards reasons why the black-letter law of countries do not, and will not, converge. One can start with the suggestion that continuing legal differences reflect that countries will continue to differ in terms of their economies, cultures, societies, etc. For example, this argument may draw support from the views that there will be no monistic universal culture but a 'clash' of civilisations, that different forms of market economies do and will persist, and that even multinational companies have deep domestic roots.[77]

However, convergence does not imply identity, so it is not inconsistent to suggest convergence and accept that some differences persist. Thus, the more valid objection is that convergence forces may not always have an effect on the law. This often refers to the concept of path dependencies. This concept is a useful one since, on the one hand, it reminds us that history matters for the evolution of the law. On the other hand, it is not entirely deterministic as it accepts different degrees of path dependence. To illustrate those variations, the following analogy can be used:[78]

> A long time ago, a path was trodden through a wood. Attention was paid to keeping the path far enough away from wolves' dens not to be attacked by wolves. Later, this path was modernised into a road, even though by then no wolves were threatening travellers any longer. This makes various degrees of path dependence clear. First degree or weak path dependence is present where even today the way through the wood is efficient and contains no needless curves (though it is not the only efficient way through the wood). By contrast, with second or third degree path dependencies the route is inefficient from today's point of view. Second degree or semi-strong path dependence makes it not worthwhile on a cost comparison ripping up the path and building a new road. With third degree or strong path dependence it is different. Here too, however, the route is not changed, since for instance the road administration has not been convinced of the need to, or resistance from private groups (shopkeepers, etc.) stands in the way.

Examples for all three types of path-dependencies can be found in the development of company law. For instance, a weak path dependency exists in so far as the terminology of company laws is different but nonetheless leads to comparable results in terms of shareholder protection, 'harmless mutations' as called by Hansmann and Kraakman.[79] Semi-strong path dependence means that the costs of law reform would exceed their benefits. Here, for instance, one can think of the principle of minimum capital or the separation between supervisory and management boards, since changing such rules would make

[77] Huntington 1993 and Huntington 1996; Hall and Soskice 2001; Doremus et al. 1998.
[78] Siems 2008a: 293–4, based on Roe 1997. See also Bell 2013: 798.
[79] Hansmann and Kraakman 2001: 465–6. See also Chapter 2 at Section B 1 (b), above.

it necessary to revise many areas of company law.[80] A strong path dependence may be assumed for the question whether and how company law should consider the interests of stakeholders, such as employees, since here political considerations may hold legislators back from adopting the most economically efficient solution (whatever this may be).[81]

Path dependencies are also likely to play a role elsewhere. At a general level, it has been suggested that particularities of legal language and concepts can constitute semi-strong path dependencies: for example, countries tend to use analogies from their own existing legal tools when new problems arise.[82] Weak legal adaptability of law-making institutions and the impact of religious differences on legal rules can be cases of strong path dependency.[83]

Specifically with respect to constitutional law, lack of convergence may be explained by ideological and cultural differences in constitutional values, possibly also involving resistance against Western influence.[84] Religious differences may be particularly important as far as many majority Muslim countries do not strictly separate between state and religion and may provide for an Islamic supremacy clause in their constitutions.[85] However, it can also be noted that a study on comparative constitutions in Muslim countries found that even countries where Islam is declared to be the state religion tend to have many 'Western' constitutional rights, such as freedom of religion, expression, association and assembly.[86]

Beyond the discussion about path dependencies, scholars have identified more complex forms of legal evolution, for instance, inspired by game theory or a Darwinian theory developed by linguists, with convergence not the necessary outcome.[87] Evolutionary ideas have also been used to show that increased dialogue can stimulate experimentation and more selective transplants.[88] Another logical possibility is that evolution leads to 'polarisation' (or 'dual convergence'), meaning that groups of countries will share very similar laws.[89] However, at least in company and constitutional law, the studies cited above have shown that general convergence of legal rules does occur. Thus, while not dismissing the possibility of experimentations or polarisations, convergence seems to be a common outcome in some areas of law.

[80] See Siems 2008a: 295. [81] See Vranken 2015: 91; Bebchuk and Roe 1999: 150.
[82] Ogus 2002; Bell and Ibbetson 2014: 111–52 and Bell 2013: 792–3 (example of new risks in tort law).
[83] For the former see Siems 2006; for the latter see Menski 2006: 4, 16, 179, 195.
[84] See, e.g. Davis et al. 2015 (for variations in emphasis of values); Schneider 1995 (for impact of politics on German and US Constitutions); Figueroa 2011 (for backlash in modern Latin American constitutions); Ginsburg and Dixon 2011: 11–12 (also referring to age of constitutions).
[85] See Ahmed and Gouda 2015; Hirschl 2014: 215. [86] See Stahnke and Blitt 2005.
[87] Garoupa and Ogus 2006 (for the former); Smits 2011 (for the latter). See also Smits 2002b.
[88] See Saunders 2009: 18, 23; also Muir Watt 2006: 587 (how 'increased awareness of alterity may generate a need for identity and tradition').
[89] See Ginsburg and Dixon 2011: 8; Hay 2011: 320; Hay 2004.

A second question is whether it actually 'matters' that the positive law is converging. Two lines of critique can be distinguished. The first one is closely related to the view that legal transplants are largely irrelevant.[90] As in the transplant discussion, Pierre Legrand is a prominent voice: he takes the view that convergence only exists at a superficial level if one pretends that legal rules are completely unconnected to their cultural environment.[91] This is not to deny that legal change can happen but it materialises in a 'constructive cognitive process' without 'uniformisation' at a deeper level.[92]

Such a position is also possible in comparative constitutional law, in particular if one takes the view that a constitution cannot be understood outside its institutional context, or even that it is an expression of 'a particular nation's self-understanding'.[93] For example, the concept of balancing is a common feature of many constitutional systems, but it may mean something very different in the United States and in Germany since in the United States it is seen as a turn away from legal formality while in Germany it is seen as a strict legal test.[94] Even more so, it can be argued that a comparison of the constitutional text between countries of 'the West' and 'the East' is insufficient as far as Confucian concepts lead to a distinct system of mixed constitutionalism in the latter countries.[95]

But, again, the counter-argument is that these are certainly valid reasons that there will not be identity of legal cultures, while they may still become more similar. Aspects of legal culture and mentality are not static. This has already been discussed in one of the previous chapters where it was shown that it is misleading to suggest that differences between legal families are so fundamental that they exclude any exchange of ideas.[96] It has also been suggested that we may observe an emerging global legal language which incorporates terminologies from different legal traditions.[97]

The second line of critique argues from a more socio-legal perspective that in practice similar rules often have fundamentally different effects across countries. This argument can, at a general level, draw on some findings from other chapters of this book: there may often be functional differences despite formal similarities between developed and developing countries of the same legal family, and the export of foreign legal models for the promotion of development has often led to disappointing results.[98]

[90] See Chapter 8 at Section A 3 (b), above.
[91] Legrand 2005: 707–8; Legrand 2001b: 1037; Legrand 1996: 56–8. See also Chapter 5 at Section D 3, above.
[92] Legrand 2001b: 1042.
[93] See Tushnet 2006b: 68; Bui 2016: 14 ('indigenous model of constitutionalism').
[94] Bomhoff 2013. Other profound differences may relate to human rights, see Section C 3 (a), below.
[95] Bui 2016. For a related normative position regarding human rights see Section C 3 (b), below.
[96] See Chapter 4 at Section C and Chapter 5 at Section D, above. [97] Galdia 2009: 275–7.
[98] See Chapter 2 at Section C 3, above, and Chapter 11 at Section C, below.

With respect to constitutional law, it has been said that the role of constitutional and supreme courts can be very different. This can relate to differences in appointment procedures and jurisdiction,[99] but it can also be a result of the courts' adjudication since they may take different views as to the relationship between protecting the constitution and respecting the decisions of law-making institutions (i.e. judicial activism).[100]

More fundamentally, scholars refer to the very different historical, social and political foundations of constitutions.[101] These differences mean that constitutions pursue diverse aims in different parts of the world: whereas in the West a constitution is predominantly seen as a 'legal' document, in other countries it may be more akin to a manifesto (say, in the remaining socialist countries); an aspirational document (say, in countries in transition); a document to unite the country (say, in countries with ethnic tensions); or to consolidate the powers of the state (say, in countries under external threads); or to please donor countries (say, in the developing world).[102] All of this may suggest that in many countries constitutional protections of human rights and democratic processes are largely irrelevant in practice.[103]

However, it would go too far to conclude that there is no convergence. The convergence forces do not only steer countries towards legal convergence but also towards convergent constitutional practices. There can even be the situation that the formal constitutional law is diverse but that common circumstances influence the political reality of countries in a similar way.[104] As was already explained, such 'functional convergence' is also common elsewhere. For example, in company law it can be the case that similar rules are applied differently, but there is also the view that it is more likely that legal rules will remain somehow different but that the practical effects are similar.[105]

(c) Normative Positions

As there is disagreement about the question whether there *is* convergence, it is a matter of controversy whether laws *should* converge. In this normative

[99] See, e.g. Goldsworthy 2012: 710–14; Dickson 2008: 5; Harding et al. 2008: 12–14.

[100] See, e.g. Goldsworthy 2006b; Goldsworthy 2006a: 119; Goldsworthy 2012: 709–10; Dickson 2008: 11–13; Harding et al. 2008: 4.

[101] E.g. Rosenfeld 2012 (distinguishing between models based on 'constitutional identity'); Galligan and Versteeg 2013 (theories and case studies on different foundations).

[102] See Frankenberg 2006b: 451–5, 458–9; Frankenberg 2012b: 178–82; Law 2011b: 380; Chao-Chun Lin 2006: 300. See also Ginsburg and Simpser 2014 (for constitutions in authoritarian regimes).

[103] See also Mattei 2002: 276 (in Africa, a constitutional document is 'entirely irrelevant if the fundamental informal institutional constraints are not created and settled'); Law and Versteeg 2013 (for sham constitutions, i.e. those that promise much but deliver little); see also Section C 3, below (for human rights).

[104] Pettai and Madise 2007: 50 (on how in the Baltic countries, despite different laws, challenges of state-building and EU accession steered countries in the same direction).

[105] See Section 1, above.

debate some views sound fairly extreme. On the one hand, consider statements that harmonisation is like 'the extinction of animal and plant species that results from the destruction of natural habitat', that demanding it is 'almost as great a sacrifice as the abandonment of his national speech or religion', and that global uniformity of laws is 'terrifyingly totalitarian'.[106] On the other hand, John Burke asks us:

> Do we really need different rules about M&A between Italy and Kazakhstan? No, we do not. Do we need substantially different prospectus requirements for listing stocks at the LSE and NYSE? Clearly not is the reply. The same may be said of most disciplines of law: contract, tort, property, IP, anti-trust, and company law, including banking law. No legal system should contain a contrarian rule unless otherwise cogently rationalized.[107]

Both positions are, however, too radical, considering the diverse reasons why laws may converge. The critical view fails to consider the benefits of uniform law in terms of reduced transaction costs, in particular as far as there are no deep cultural differences at stake, for example, consider uniform rules for electricity plugs or traffic signs. It also overlooks the fact that legal convergence is something quite natural when extra-legal circumstances converge ('convergence through congruence'): for example, if we assume that the effects of global warming get more severe, it would be sensible if countries responded in a similar way.

By contrast, the affirmative view can be inappropriate as far 'convergence through pressure' creates common rules that do not have any objective advantages but are due to a power imbalance between the countries in question.[108] In other cases, too, laws should not converge if cultural, social and economic differences do not justify convergence. Finally, a general presumption in favour of uniformity overlooks the apparent benefit that a multiplicity of legal systems can stimulate legal innovations, at least as far as choice of the applicable law is possible.[109]

Overall, it becomes clear that the debate about the desirability of convergence is akin to the debate about the desirability of legal transplants. As in the previous chapter, the most appropriate response is therefore that any normative assessment ultimately depends on the circumstances of each case.[110] It also needs to be embedded within the wider debate about the future of regional and international law as either 'convergence-promoting' or 'divergence-accommodating'.[111] This leads us to the topics of the subsequent two sections: regionalisation and internationalisation.

[106] Hyland 1996: 193; Gutteridge 1949: 158; Watt 2012: 99. Similarly, Samuel 2014: 164; Santos 2004: 192; Legrand 2001b: 1037.
[107] Burke 2011. [108] Similarly, Mattei and Pes 2008: 277.
[109] For regulatory competition see Section 2 (c), above. [110] See Chapter 8 at Section C, above.
[111] Walker 2015: 56.

B Regionalisation

The terms 'region' and 'regionalisation' require the following clarifications: first, in the present context, we are interested in 'macro-regions', i.e. groups of countries which are in geographic vicinity, as distinguished from 'micro-regions' which are areas within one country.[112] Secondly, 'regionalisation' is sometimes said to refer to a natural growth of social integration, as distinguished from 'regionalism'.[113] However, it can also refer to the process through which regions emerge,[114] and that is how it will be used in this section. Its structure is as follows: it starts with the reasons for growing regionalisation discussed in the literature, followed by an overview of some of the main topics of comparative regionalisation. Finally, it discusses the EU as the most prominent example of profound regional integration.

1 Reasons for Regionalisation

Regional cooperation is not a new phenomenon.[115] However, it only became more widespread after the Second World War,[116] and some even suggest that now we observe a paradigm shift from the Westphalian world order of sovereign states to a regional world order.[117] There are a variety of reasons that can account for this trend towards regional cooperation.[118]

A first line of reasoning points towards the role of power politics. This may refer to a common threat that countries of a region face (e.g. in the Cold War Western Europe facing a threat from the Soviet Union); the belief that in a globalised economy single countries are unable to assure their autonomy towards multinational companies or more powerful countries, possibly leading to protectionist tools (e.g. the South American regional organisations and their relationship to the United States); or the ambition of one of the countries of the region to dominate the others (e.g. possibly, Germany in the EU, the United States in NAFTA).

More focused on the region itself is the argument that a region provides companies with a larger open market to sell their products and to attract investment (as well as citizens with more choice, more freedom to travel,

[112] De Lombaerde et al. 2010: 736. Another term is that of 'megaregions' referring to proposed agreements such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), see www.iilj.org/megareg/.

[113] Hurrell 1995.

[114] De Lombaerde et al. 2010: 737, 739.

[115] See Fazio 2007: 41–8 (reference to Lombard league, Hanseatic league, German Zollverein of 1834; Benelux of 1921).

[116] See, e.g. Schneider 2017; Duina and Morano-Foadi 2011; Mattei et al. 2009: 73–95. A useful resource for information about regions is the Regional Integration Knowledge System (RIKS), available at www.cris.unu.edu/riks/.

[117] Van Langenhove 2011: 127.

[118] The following structure is based on Hurrell 1995. See also Ravenhill 2011: 179–83, 196–9; Delmas-Marty 2009: 82–5; Duina and Morano-Foadi 2011: 562, 567; Gilpin 2001: 343; Fazio 2007: 53; Van Langenhove 2011: 5.

etc.). This is one of the main reasons for the current free trade agreements. Beyond free trade, the better ability of regional organisations to tackle common problems may be due to the corresponding limitations of individual states in a global economy and an increasingly internationalised society.

A region-focused integration may also be supported by a process that stimulates regional awareness. In addition, it has been suggested that economic integration may then only be an intermediate step if the actual objective is that it will 'spill-over' to other fields and deepen regional political integration. The EU may be seen as the main example of this so-called 'neofunctional' perspective, in particular due to the influence of pro-European institutions such as the European Commission and the Court of Justice.

By contrast, the now dominant 'intergovernmental' perspective refers to the fact that even in the EU it is the Member States who are the 'masters of the Treaties'. This leads to the final set of explanations that focus on developments at the level of the member countries. Regional organisations are more likely to arise when the cultural, economic, social and political structures are relatively similar. This may also be seen in the changing membership of regions. In Latin America, Chile left the Andean Community in 1976 with reference to incompatibilities of the region's economies, and Venezuela left in 2006 suggesting political differences.[119] In Europe, it is too early to assess the impact of the United Kingdom's Brexit referendum from June 2016; yet, here too, the internal dynamics of UK politics and a perceived difference from the rest of Europe are plausible explanatory factors.

Reflecting on these reasons for regionalisation, a cross-reference can be made to the forces suggested for legal convergence. For example, the line of reasoning that interdependence creates demand for regional cooperation and that regions are often formed by countries that have similar political structures, mirrors the reasons for 'convergence through congruence'; and theories that refer to the internal and external power relationships leading to regional collaboration are akin to the reasons for 'convergence through pressure'.[120] Thus, depending on the circumstances, the result of these forces may be convergence at the country level and/or a drive towards regionalisation.

2 Topics of Comparative Regionalisation

(a) Forms of Regional Cooperation Today

There exists considerable diversity in the forms of regional cooperation. Typologies may distinguish between the scope of cooperation (single or multiple topics), the formalisation of their structure (organisation or network) and

[119] See https://savioinperu.wordpress.com/2016/06/02/chile-an-example-as-to-why-the-uk-should-leave-remain-in-the-european-union-or-that-the-referendum-doesnt-really-matter-at-all/ and http://en.mercopress.com/2011/04/24/venezuela-formally-exits-andean-nations-and-waits-for-mercosur-incorporation.

[120] See Section A 2 (a), above.

the depth and success of their operation (cooperation or integration).[121] The following takes the forms of regional cooperation as they exist today as the main structural guidance, starting with formal forms of economic regional cooperation and then followed by other topics and forms.[122]

The most limited form of economic regionalism is where the agreement is about one or more specific aims. For example, the aim may be to harmonise legal rules in particular areas of law. This is the case for the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), which aims to harmonise business laws for sixteen countries of Central and Western Africa. Regional development banks such as the European Bank for Reconstruction and Development (EBRD) are further examples of this category. Other potential cases may be where the organisation consists of countries of the developed world (such as the Basel Committee on Banking Supervision); yet, linking those to a region (the 'West' or the 'Global North') is rather artificial; thus, it is preferable to classify them as international or transnational organisations.

Next, free-trade areas eliminate tariffs between its members. Examples are the North American Free Trade Association (NAFTA), the Gulf Cooperation Council (GCC) and the ASEAN Free Trade Area (AFTA). Customs unions have, in addition, a common external tariff. Examples are the South American unions MERCOSUR and Andean Community. It is also possible to have a customs union between a regional organisation and non-members: for example, the customs union between the EU and Turkey.

A common market is created when further barriers are removed, say, for the free movement of capital and services: for example, the European Union (EU), the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS) and the Caribbean Community (CARICOM). In addition, countries of a monetary union have a single currency, harmonised monetary and possibly also economic policies. These are today often sub-groups of countries belonging to a common market: for the aforementioned examples, these are the Eurozone, the West African Economic and Monetary Union (Uemoa), the Monetary and Economic Community of Central Africa (Cemac) and the Eastern Caribbean Currency Union (ECCU).

Regional cooperation is not limited to economic cooperation and integration. The EU has achieved some political integration which can be seen as a model for the African Union (AU) and the Union of South American Nations (UNASUR). Further examples of political cooperation are the Council of Europe (CoE), the Organization of American States (OAS) and the Arab League. The CoE, the OAS and the AU have also fostered regional

[121] See De Lombaerde 2011: 33, 41.

[122] For the following see, e.g. Economides and Wilson 2001: 164–6; Fazio 2007: 61–3; Ravenhill 2011: 175. For global law see also Auby 2017: 66–8 (growing weight of non-state players and emergence of non-state regulators).

cooperation to protect human rights, namely, through the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

Finally, in the debate about regionalisation, it is now often highlighted that there is a need to consider the role of non-state actors more closely and to go beyond formal regional agreements.[123] This means that for the types of regions mentioned so far it is seen as necessary also to consider how far businesses, NGOs, citizens, etc. shape the structure and purpose of these organisations. Furthermore, there can be forms of regionalisation that are mainly the result of non-state coalitions of these private actors. Thus, this 'new regionalism', as it is called, is particularly interested in the roles of and relationship between state and non-state actors. It is also in line with trends discussed elsewhere in this book, such as the role of (global) legal pluralism, private regimes of transnational and global law and bottom-up approaches to law and development.[124]

(b) Models, Diffusion and Design

In the literature, the European Union (EU) is often seen as a model for other regions, and the EU has also supported regionalism in other parts of the world.[125] For example, it can be noted that the EU went through various stages of economic and political integration. The EU may therefore be seen as a model of what other regions may want to do or may want to avoid, say, whether or not to go the path of a monetary union. The EU has also developed an extensive institutional structure which can be of interest for other regions, as it has been observed that regional agreements tend to move from 'less to more institutionalisation'.[126]

However, such an approach is also accused of a 'Eurocentric bias' and that it tends to ignore the fact that 'ideas often come from different places', not only the EU.[127] These arguments bear some resemblance to points discussed in the previous chapters, in particular the Eurocentrism of traditional comparative law, the mixture of legal traditions, and the use of legal transplants.[128] As to the substance of the objection, as often, it depends: for example, an analysis of the Andean Tribunal of Justice may want to consider the EU since this court is a close copy of its European counterpart.[129] But an analysis of how the Andean Community deals with specific problems of emerging economies in Latin America may want to engage in a comparison with MERCOSUR.

[123] For the following see Börzel 2016; Shaw et al. 2011; De Lombaerde et al. 2010: 732.
[124] See Chapter 5 at Section B 2, above, Chapter 10 and Chapter 11 at Section C 2, below.
[125] See, e.g. contributions in De Lombaerde and Schulz 2009.
[126] Duina and Morano-Foadi 2011: 566.
[127] De Lombaerde et al. 2010: 742; Duina and Morano-Foadi 2011: 565.
[128] See Chapter 2 at Section C 2, Chapter 4 at C 3 and Chapter 8 at Section C, above.
[129] See Alter and Helfer 2011; Alter et al. 2012.

For the more general question about the diffusion of ideas from one region to another a recent comparison found that, while there is some emulation of ideas, there are few examples of complete transplants of particular regional models.[130] This scepticism may confirm the view that the diverse interests of states are a main driving force of regionalisation. The spread of regional courts modelled after the European Court of Justice is, however, an important example of a widespread diffusion.[131] These courts go beyond conflict solution by arbitral bodies at the international sphere. They have therefore been identified as a 'game changer in regionalism' as they exemplify the commitment of a region to a common set of values.[132]

Since regional cooperation is largely a deliberate act, the design of regional structures is also a more general point of discussion. The corresponding choices relate to the reasons for and forms of regional cooperation mentioned above, but they also deal with more technical questions of institutional design.[133] A general issue to consider is whether the establishment of regional organisations should precede or succeed other developments. For example, it is discussed whether the development of strong economic ties and a regional identity should be seen as a precondition for successful institution building, or rather the result of such a process.[134]

In substance, there are many choices that regional organisations need to make and that can be scrutinised from a critical and comparative perspective. Just one example will be provided here: the uniform acts of the West-African regional association OHADA are strongly influenced by French business law. This has been criticised as mainly benefitting foreign investors while not giving consideration to the role of informal laws in Africa as well as matters of social justice.[135] It may also be problematic that one of OHADA's members, Cameroon, is geographically split between common and civil law: thus, OHADA's uniform laws written in the style of civil law legislation create a similar tension as the one we may observe in the EU,[136] to which we turn now.

3 The EU as an Example of Regional Integration

(a) Scope of Europeanisation

How far has regional integration advanced in the EU? Considering the EU as a 'region', its competences are relatively extensive: it has achieved a greater

[130] Risse 2016. [131] Alter 2012 (identifying eleven functioning copies of the ECJ).

[132] Alter and Hooghe 2016. For types of regional judicial/arbitral bodies see Baudenbacher and Clifton 2013. For the international sphere see Section C 1, below.

[133] See Lenz and Marks 2016.

[134] Baldwin 2012 (discussion of economic sequencing theory); Checkel 2016 (for regional identities).

[135] Gaudreault-DesBiens 2017; Hiez and Menétrey 2015. For similar objections in the context of law and development see Chapter 11 at Section C, below.

[136] See Mancuso 2008; Moore Dickerson 2010. For Cameroon see also Chapter 4 at Section C 3 (b), above.

level of economic integration than most other regions and it has also become involved in further areas, such as justice and home affairs, external relations, and environmental and public health matters. Within the framework of the Treaties, the EU can also enact new laws even if some of the Member States oppose them.[137]

However, it can also be suggested that, as regions such as the EU deepen their integration, it is more interesting to compare their powers with those of states.[138] Here, a study comparing the EU with twenty federal states found that the EU provides significantly less legal uniformity than these states: for example, it tends to provide less or no harmonisation for questions of social security, pension, welfare, education, criminal law, private law and the corresponding procedural laws.[139] But it is also possible to identify parallels between the EU and federal states, in particular the United States. For example, the European debate about the relationship between the union and the state level often uses the United States as a point of comparison.[140] From a US perspective, analogies have also been drawn between the growing role of rights and judicial enforcements and the 'adversarial legalism' of the United States: the European courts have played an important role in making EU law justiciable, and the trend towards a rights-based approach is seen as a logical development for a modern and diverse society replacing cooperative and corporatist forms of governance.[141]

In addition, the EU has fostered informal forms of policy convergence. The main idea is that 'deep' integration requires not only formal harmonisation of legal rules, but also more informal coordination in fields that have not been harmonised.[142] This development too can be related to the situation in the United States where there are means to achieve convergence in areas of law without federal legislation.[143]

A good example for the choices and mixtures between more and less formal forms of convergence – as well as its limitations – is the EU contract law. There has been piecemeal harmonisation of some topics, for instance, through directives on matters of consumer protection. But since complete formal harmonisation would not be feasible, suggestions for a future EU contract law have also emerged as an optional '29th regime' in addition to the contract

[137] This is associated with the EU being 'supranational', see Panke and Haubrich-Seco 2016: 501.
[138] De Lombaerde 2011: 47.
[139] Halberstam and Reimann 2012: 23–4 (index from 0 to 10: the EU scores 2.7; the average of the federal states is 4.4).
[140] E.g. Schütze 2009; Goldstein 2001 (for a historical perspective); Barnard 2000 (for regulatory competition). The first major study was Cappelletti et al. 1986.
[141] Kelemen 2011: 6, 12; also Stone Sweet 2004. See also Chapter 3 at Section C 2, above.
[142] This was initially explained in a White Paper on Governance, suggesting an 'open method of coordination'. See http://ec.europa.eu/culture/policy/strategic-framework/european-coop_en.
[143] E.g. through the National Conference of Commissioners on Uniform State Laws (NCCUSL) of the Uniform Law Commission, http://uniformlaws.org/, and the American Law Institute, www.ali.org. See now also the European Law Institute, www.europeanlawinstitute.eu.

laws of the 28 Member States. Such rules were initially drafted by a group of academics who called them Principles of European Contract Law (PECL) and the EU Commission subsequently suggested a proposal for an optional European sales law. However, this approach faced opposition from the European Council and there is now merely a proposal for a new directive to harmonise certain aspects of online contracts as those often have a cross-border dimension.[144]

In addition, following up from PECL, groups of academics have added further areas of law, incorporated the existing EU directives and consolidated everything into a Draft Common Frame of Reference (DCFR). The DCFR does look like a draft for a future European Civil Code, though the official position is that, at best, its rules may be as a '"toolbox" or a handbook to be used for the revision of existing and the preparation of new legislation in the area of contract law'.[145] Some success may be evidenced by the fact that European and domestic courts have made reference to the DCFR in some judgments.[146] Moreover, there are a number of 'even softer' comparative initiatives to stimulate the Europeanisation of contract law, for example, the Ius Commune Casebooks for the Common Law of Europe and the books of the Common Core project.[147] These developments lead to the general question how far a common European legal culture has emerged.

(b) Towards a European Legal Culture

As far as the EU has harmonised the law, it can be seen as a success that it has managed to create a legal order that incorporates elements from different legal traditions. At a general level, this may show that differences between common and civil law may be superseded by European commonalities. Another explanation refers to distinct features of the EU. If it is taken that judges and other practitioners dominate the common law tradition and scholars and legislators the civil law one, the secret of the EU's success may be that its law is predominantly a 'product of bureaucracy' for which 'economic and social aspects prevail over legal ones' (meaning the differences in style between common and civil law).[148]

A specific example where a form of 'hybridisation'[149] can be observed are the judgments of the Court of Justice of the EU (CJEU). Its concise style of

[144] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015)635 final.

[145] European Commission, *Second Progress Report on the Common Frame of Reference*, COM (2007)447 final. On the DCFR see also Chapter 7 at Section B 3, above.

[146] See Kalouta 2015.

[147] For the former see www.casebooks.eu. For the latter see Chapter 2 at Section B 3, above. See also Miller 2011: 3–14 (for different elements of Europeanisation); Hondius 2011 (calling for Europe-wide commentaries); Zimmermann 2006 (for the role of comparative law).

[148] Zeno-Zencovich and Vardi 2008. For the role of judges etc. see Chapter 3 at Section B 1, above.

[149] McEldowney 2010; Husa 2004: 28. Also called 'bijural', Breton and Trebilcock 2006, or 'polynomia', Husa 2012.

reasoning is akin to French courts, but it also uses a common-law style of relying on precedents and, in substance, has made use of some German concepts, such as the principle of proportionality.[150] The case law of the CJEU also shows how it is possible to use comparative reasoning incorporating ideas from different legal cultures. This is not only done where the Treaty obliges the CJEU to consider legal principles common to the Member States,[151] but also in other 'hard cases'.[152] In addition, the CJEU contributes to EU law as an autonomous legal order, thus, for example, deducing general principles from previous cases and reconciling discrepancies between different language versions of EU laws.[153]

A number of EU initiatives also aim to stimulate a truly European judiciary. In harmonised areas of law, courts increasingly cooperate, coordinated by the EU,[154] and the European Judicial Training Network promotes the exchange of knowledge between judges in Europe on a more general scale.[155] Initiatives of the EU Commission also foster the training of lawyers in EU law.[156] Another initiative is the Network of the Presidents of the Supreme Judicial Courts of the EU Member States which allows judges to search jurisprudence of higher courts in a translated form.[157]

These trends and initiatives are part of a more general desire to create a common European legal culture. Though some scholars point towards deep historical similarities between European legal cultures,[158] the dominant view is that efforts have to, and should, be undertaken to make legal education and scholarship more European.[159] There is, however, also a 'chicken and egg problem': for instance, law students will want to study the domestic law in their home countries as far as laws still differ between Member States – and these differences will remain as far as distinct national legal cultures impede full legal harmonisation.

In addition, it is not enough just to consider the importance of 'Euro-lawyers'.[160] It is clear that a European legal culture can hardly emerge without

[150] See, e.g. Husa 2004: 29; de Cruz 2007: 160–3.

[151] Treaty on the Functioning of the European Union (TFEU), art. 340 (for the non-contractual liability of Union organs); Treaty on European Union (TEU), art. 6(3) (for the protection of fundamental rights).

[152] See, e.g. Kiikeri 2001; Andenas and Fairgrieve 2012: 47–9; Bakardjieva Engelbrekt 2015: 94; as well as the special issue of the (2016) 64(4) *American Journal of Comparative Law*.

[153] See Bakardjieva Engelbrekt 2015: 95; Husa 2015: 77.

[154] European Judicial Networks in criminal matters (EJN) and civil and commercial matters (EJN-civil), see https://e-justice.europa.eu/content_legal_professions_and_justice_networks-20-en.do.

[155] See www.ejtn.eu.

[156] See http://ec.europa.eu/justice/criminal/european-judicial-training/index_en.htm.

[157] See http://network-presidents.eu/rpcsjue/.

[158] In particular, Wieacker 1990. See also Chapter 3 at Section C 3, above.

[159] Helleringer and Purnhagen 2014; Heringa and Akkermans 2011; Fauvarque-Cosson 2007; Smits 2007a. But also Monateri 2012: 18 (calling these 'biased, non neutral political projects').

[160] Vauchez 2015. See also Kauppi and Madsen 2013 ('transnational power elites' supporting European project).

a more general approximation of cultures in Europe. Here, to succeed, the EU needs to form a denser community of shared interests by way of persuading citizens of the European project.[161] Law may well play a part in it, as, for example, the (unsuccessful) project for a European constitution had the aim to foster such a common identity.[162]

(c) Critics and Design Choices

European integration has not been without its critics. Some of this criticism is best seen as political, for example, by those who regard the EU as a threat to national sovereignty and democratic representation. The academic challenges to EU harmonisation are akin to those directed against convergence more generally, for instance, criticising the creation of uniform rules despite jurisprudential differences and emphasising the value of legal diversity and experimentation.[163] Specifically, the harmonisation programme of the EU is seen as a challenge to the common law tradition, in particular as far as it concerns plans for a European Civil Code. Pierre Legrand, takes the position that such a code as a 'self-contained and self-referential system' would be an 'act of repression', excluding 'other approaches to legal knowledge' and eliminating 'the common law's world-view'.[164] But, a civil code that would replace existing laws is not on the agenda. It can therefore also be argued that, at present, it is the 'scientific' nature of the civil law that is disrupted by the 'non-systematic interference' of EU private law harmonisation.[165]

A major question for the future design of EU law is whether the EU should harmonise further areas of law in detail. There is no universal answer to the question about the optimal allocation of regulatory competences in regional settings.[166] A possible alternative to harmonisation is a model of regulatory competition. This is already a reality in some parts of EU law. For example, a series of decisions of the CJEU opened up the possibility of regulatory competition in company law, arguing that corporate mobility is protected by the freedom of establishment of the EU Treaty.[167] Regions may also decide to provide rules that can be chosen alternatively to those of its members: thus, 'horizontal competition' is supplemented by a 'vertical' one.[168] This may also be the case in EU company law since the Societas Europaea (SE) is an additional form of company available to cross-border businesses in the EU. Yet, there is the further twist that the SE is not a uniform type of company but

[161] Collins 2008: 18.
[162] Mann 2014: 56 (contrasting it with the economic rationales in the harmonisation of contract law).
[163] See, e.g. Niglia 2015; Smits 2010c; Deakin 2006.
[164] Legrand 1997a: 45, 53, 56; Legrand 1999: 111, 114; Legrand 2006a: 17. See also Legrand 1998a; Legrand 1998b; also Teubner 1998 (for good faith as a 'legal irritant' in English law).
[165] Banakas 2008: 545.
[166] See, e.g. Akkermans et al. 2015 (for areas of private law).
[167] Discussion in Gerner-Beuerle et al. 2016. For regulatory competition see also Section A 2 (c), above.
[168] Fauvarque-Cosson 2007: 3.

that it differs according to the Member State in which it is incorporated: thus, there are also various types of SEs competing with each other.[169]

Another important consideration is the impact of a growing regionalisation on the international legal system more generally. Here, the question has been raised whether regionalisation is a 'stepping stone' or a 'stumbling block' for international integration, both economically and politically. The optimists suggest that liberalisation of markets within one region creates a 'domino effect' for global markets. The sceptics, by contrast, see the danger of regions as 'economic fortresses' no longer being interested in global cooperation and liberalisation.[170] Thus, any assessment about the benefits, shortcomings and design of regionalisation also needs to consider the international dimension, to which we turn now.

C Internationalisation

Comparative law and public international law are, traditionally, of a different nature: one dealing with domestic laws and the other with binding sets of rules between nations. Yet, as this section will explain, today both fields are seen as more closely related. It starts with an introduction of the general impact of international law, followed by an overview of forms of comparative international law. Finally, the example of human rights law is used as an illustration of the internationalisation of the law, also returning to the trends of legal convergence and regionalisation.

This section was included in the second edition of this book given the growing interest in topics of 'comparative international law'. Since this term is a relatively new one, its precise borders are not yet entirely clear. The following understands it in a broad way and then distinguishes between forms of vertical and horizontal comparative international law. In the course of this section, it is also discussed how far concepts of comparative law, such as functionalism and legal transplants, are suitable for the international sphere.

1 General Impact of International Law

At a formal level, the impact of international law on domestic law can distinguish between countries as follows: some countries treat international and domestic law as a unity ('monism') while others require a transposition of international law into the domestic context ('dualism').[171] In substantive terms, the general impact of international law may simply be that it is one of the forces that leads to the convergence of laws. However, the relationship

[169] See Eidenmüller et al. 2011. [170] See Ravenhill 2011: 202–6.

[171] See, e.g. Verdier and Versteeg 2015: 532 (also for limitations of this taxonomy); Aust 2010: 75–6; Glenn 2013: 240.

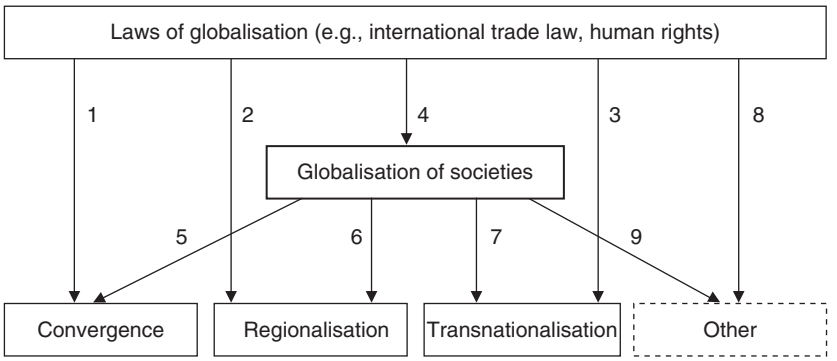

Figure 9.1 International law as the 'law of globalisation'

between international law and domestic legal systems – and, by implication, comparative law – has become a more complex one. A helpful device (see Figure 9.1) is to think about international law as 'the law of globalisation',[172] and then consider its possible effects on both law and society.

In Figure 9.1 the causal link (1) shows that international laws may directly lead to the convergence of the legal rules of a particular area of law. They may also stimulate regionalisation (2): for example, regional arrangements are acknowledged in the UN Charter and the World Trade Organization (WTO) allows for regional trade agreements under certain conditions.[173] International law can also be linked to transnational law (3): for example, the WTO may endorse privately drafted transnational law and the World Bank may make funding conditional upon compliance with transnational soft laws,[174] as will also be explained in the subsequent chapters.

In addition, international law can contribute to the globalisation of societies (4): for instance, the WTO framework has the aim to increase cross-border trade and services. These factual developments further contribute to the globalisation of laws, i.e. convergence, regionalisation or transnationalisation (5)–(7). For example, as cross-border investment increases, company ownership and investment patterns become more similar with the possible result of convergence in company law.[175]

Of course, one should not be naïve – or 'hyperglobalist'[176] – in always assuming such effects of the law. International laws and the globalisation of societies do not automatically lead to uniform rules. While international law should, in principle, have an effect, it is also possible that differences remain, for example, because its rules are not adequately enforced, or else, do not impact on deep-rooted characteristics of the domestic legal systems (8). As far as social,

[172] For this term see Boulle 2009. [173] See, e.g. Fazio 2007: 63; Ravenhill 2011: 177, 193–5.
[174] See, e.g. Cafaggi 2011: 42; Ohnesorge 2009. [175] See Section A 3 (a), above.
[176] Cf. Hay 2011: 317.

economic and cultural forces lead to the globalisation of societies, path dependencies may also mean that domestic legal rules remain unchanged (9).[177]

Figure 9.1 should not be read as implying that causalities cannot go in the reverse directions: for example, changes at the domestic level fostering the internationalisation of the law. A related limitation is that the divide between the domestic and the international has become increasingly blurred. For example, it has been said that globalisation has impacted on international law since the cooperation of independent sovereign states is now replaced by an interdependence of states.[178] In particular, this is reflected in the fact that dynamic and non-hierarchical forms of networked and experimental governance have supplemented traditional forms of international law.[179] Yet, often it is still possible to distinguish the domestic from the international level and therefore conduct vertical and horizontal comparisons, as the following will explain.

2 Forms of Comparative International Law

(a) Vertical Comparative International Law

First, vertical comparative international law can mean that the comparative/international lawyer compares rules of domestic and international law.[180] For example, in environmental law, it may be possible to compare, with functional tools, domestic rules with international ones, not yet implemented by this country.[181] In this comparison, the specific nature of international law then also plays a role, for example, whether an international organisation may put pressure on the country to sign up to its rules, thus pointing towards a possible 'downward diffusion'.

In such a vertical comparison, a possible recommendation may also be that the domestic rule should diffuse 'upwards' as a 'vertical legal transplant'. This has been discussed, for example, for the migration of the principle of proportionality to international investment law and the procedure of amicus curiae participation to the European Court of Human Rights.[182] Any such suggestion also has to consider the relevant context: for example, on the one hand, international law may aim to find a compromise between different legal models. On the other hand, it is possible that cultural differences which make solutions from different countries appear irreconcilable at the domestic level are less relevant when it comes to international law.[183]

[177] See Section A 3 (b), above.
[178] Hobe 2002: 386. See also Auby 2017: 105–6 (for 'shared' and 'cooperative' sovereignty).
[179] See, e.g. de Búrca et al. 2013; Fenwick et al. 2014; Auby 2017: 77–9.
[180] See Momirov and Fourie 2009; Scarciglia 2016: 127–9; Scarciglia 2015.
[181] Vermeylen 2015.
[182] Vadi 2015; Dolidze 2015 (also suggesting terms downward and upward diffusion).
[183] Forteau 2015: 499 (also on the work of the International Law Commission); Vadi 2015: 586–9 (for need to adapt to context).

A second form of vertical comparative international law starts with a question about rules of international law and uses domestic law in order to understand them. For example, when international laws are drafted based on legal concepts that already exist at the domestic level, the latter can be helpful for the interpretation of the former.[184] More specifically, some argue that lawyers from common-law countries need to consider that the mind-set of international treaties is predominantly 'civilian' in origin,[185] while others refer to variations across treaties as well as a possible common-law bias in their application.[186] It is also suggested to consider the role of national courts since they not only enforce international law but may also play a role in creating international rules.[187]

In two prominent cases, international rules explicitly require a comparative approach: the International Court of Justice (ICJ) must not only apply international conventions and customs[188] but also 'the general principles of law recognized by civilized nations', and the International Criminal Court (ICCt) must also apply the 'general principles of law derived by the Court from national laws of legal systems of the world'.[189] However, treating certain countries as more 'civilised' is rightly discredited today.[190] It is also hardly feasible to examine the rules of all legal systems of the world. A common approach is therefore to consider representative legal systems, for instance, those seen as the origin countries of the main legal families.[191] Such an approach may also be supported by the criteria of appointment to the ICJ and ICCt, namely, that these courts are to represent 'the principal legal systems of the world'.[192] This raises the question, however, whether the focus of traditional comparative law on major legal systems and legal families has not become outdated.[193] Thus, there is need to develop more robust approaches of selecting units in order to establish international generality.[194]

Furthermore, here too, it may be doubtful whether principles of national law can really be transferred to the international level. They may work perfectly

[184] See, e.g. Momirov and Naudé Fourie 2009: 295 (for domestic and interenational tort law).
[185] Blakesley et al. 2001: 4.
[186] For the first point see Mitchell and Powell 2011: 11. For the second one see Bohlander 2014 and Romano 2003. See also Picker 2013 (need for 'comparative legal cultural analysis' of international law).
[187] Roberts 2011 (with examples from Italy and the United States).
[188] See also Husa 2015: 82–5 (comparative approach for customary international law).
[189] ICJ Statute, art. 38(1)(c); ICCt Statute, art. 21(1)(c). For comparative law and the corresponding provision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) see Jain 2015.
[190] The phrase goes back to the Statute of the Permanent Court of International Justice (PCIJ) 1920, art. 38(3). For the debate in comparative law see Chapter 2 at Section B 2 (b), above.
[191] See discussion in Pellet in Zimmermann et al. 2006: Art. 38, para. 258 (for the ICJ); Ambos 2013: 77 (for the ICCt). See also *Right of Passage over Indian Territory (Portugal* v. *India)* [1957] ICJ Rep. 125, 141–2 ('the main systems of law').
[192] ICJ Statute, art. 9; ICCt Statute, art. 36(8)(a).
[193] See Chapter 3 at Section C and Chapter 4 at Section C, above.
[194] Linos 2015 (providing suggestions).

well in the domestic context but may not be suitable for the international one.[195] Comparative law also teaches us that legal differences are often related to social, economic or cultural ones: thus, given those differences, a principle may not be suitable.[196] To be sure, it can help that the focus is on 'general principles', not specific rules. This may make it easier to identify common ground and, then, to adapt the general principles to more specific rules of international law.[197]

Thirdly, vertical comparative international law can examine a specific institutional structure of international law in a comparative context. This can be particularly fruitful as we observe a growing constitutionalisation of these structures. For example, it is increasingly common that international adjudicatory bodies, be they arbitral bodies or courts/tribunals, accompany the respective rules of international law.[198] This mirrors the development for regional organisations discussed in the previous section. It also provides the possibility to compare these institutional structures with regional and domestic ones. For example, it can be examined how far international tribunals reflect the hybrid nature of the member countries. It is also possible to consider the position of individual judges, say, whether their origins from a particular legal system or legal family show certain biases in the application of international law.[199]

(b) Horizontal Comparative International Law

A first type of horizontal comparative international law compares units of the international level. Making such comparisons has become particularly relevant due to the increased fragmentation of international law.[200] A number of variants can be distinguished. In some cases, it is straightforward to compare sets of international rules that address the same topic but for different groups of countries. Here, many of the methods and tools of comparative law can be applied: for instance, a functional approach incorporating quantitative methods, a critical approach comparing power structures, and perspectives about diffusion of law and legal transplants.[201]

It can also be interesting to compare rules that do not deal with exactly the same subject matter, for example, how different international treaties deal with different types of environmental damages.[202] Some suggest that a comparison of branches of international law should not belong to comparative international law,[203] but it is preferable to differentiate. A previous chapter of

[195] Bothe and Ress 1980: 62.
[196] Ellis 2011: 959, 968. See also Chapter 6 at Section A 2 (a), above.
[197] Lauterpacht 1927 (early example for using models derived from domestic private law); Waldock 1962: 56 (for the second statement). See also Butler 2015: 243 (more emphasis on context in comparative law than in international law).
[198] See Romano et al. 2013; Koch 2003; Hobe 2002: 384.
[199] Cf. Zhang et al. 2016 (for judges of the Court of Justice of the EU).
[200] Butler 2015: 250.
[201] For these examples see Broude et al. 2016 (for investment treaties); Badawi 2016 (for regulation of armed conflict); Cotula 2015 (for investment treaties).
[202] Cf. Morgera 2015: 257.
[203] Damirli 2016: 75.

this book took the position that a comparison between domestic rules of the same state (say, comparing tort with criminal law) should not fall under the remit of comparative law.[204] The same line of reasoning can be applied here: comparative international law is not about any analysis of the relationship between any rules of international law but it requires units drafted by different organisations or parties.

This leads to the variant that a horizontal comparison can also be concerned with differences between international laws that go beyond specific legal rules. For example, research has been conducted on the form, substance and scope of international agreements, the governance, rule-making practices and approaches to impact assessment of international organisations, and details about international tribunals, say, whether they allow dissenting and separate opinions.[205] In parallel to the critical variant of postmodern comparative law, it is also possible to compare different ideological approaches to international law, say, socialist and capitalist ones.[206]

The second type of horizontal comparative international law is that the comparison is between states, as in conventional comparative law, yet with the aim to relate this comparison to international law. Clear examples are where the research question is about approaches of national actors to international law, for example, whether commitment to international courts reflects differences between legal families.[207]

In other cases, it is a sliding scale whether a topic belongs to comparative international law or 'just' comparative law with some international elements. Such studies may compare how domestic law-makers implement rules of international law, how domestic courts apply them and how those courts are also influenced by international courts.[208] Here, the question of whether those international rules have led to actual uniformity raises the usual topics of comparative law. For example, social and cultural differences and differences legal mentalities and legal language may explain differences,[209] and legal transplants and convergence forces may account for similarities.

3 Example: Human Rights Law

(a) Protection of Human Rights in the West

Today, human rights play a role in all parts of the world. Still, it is useful to start with the Western legal systems: France and the United States are often seen as

[204] See Chapter 5 at Section B 3, above.

[205] Guzman 2008: 119–81; OECD 2016; Garoupa and Ginsburg 2015: 182.

[206] Mamlyuk and Mattei 2011 (also referring to the Third World Approaches to International Law, TWAIL).

[207] Roberts et al. 2015: 469; Mitchell and Powell 2011 (for the example).

[208] For examples see Section 3 (b), below (implementation of international human rights law); Aust and Nolte 2016 (interpretation of international law by domestic courts); Mulder 2017a: 7 and Mulder 2017b: 735–42 (triangular relationship between domestic and European courts).

[209] For problems in the interpretation of multilingual laws see, e.g. Gambaro 2007; Cao 2007.

the origin countries of codified human rights.[210] Both of their catalogues include civil and political rights. In addition, in France but not in the United States, some social and economic rights are provided for, whereas in the United States, but not in France, cultural rights of minorities are more readily accepted.

In the nineteenth and twentieth centuries, human rights were incorporated in the constitutions of other continental European countries. Significant US influence can be identified in Germany after the Second World War, and in the Central and Eastern European countries after the fall of communism.[211] But these human rights catalogues are also distinctly 'European'. As in France, they often include social rights, and the German Constitution puts much emphasis on dignity as the pre-eminent constitutional value which can be seen as a reaction to the atrocities of the Third Reich.[212] By contrast, the United Kingdom does not have a constitutionally entrenched bill of rights.[213] However, it is subject to the European Convention on Human Rights (ECHR). Thus, the situation in the United Kingdom has been characterised by a complex evolution that tries to reconcile 'degrees of loyalty to European doctrine and reliance on Commonwealth sources of influence'.[214]

It has also been discussed more generally how the interaction between domestic and European courts has led to the emergence of fundamental rights 'as a lingua franca within and across European jurisdictions'.[215] Here, comparative law has an important role to play: the manner in which human rights laws are formulated gives judges considerable scope of interpretation; more specifically, the European Court of Human Rights (ECtHR) often considers whether a consensus exists in the way human rights are protected at the level of its member states.[216] This may be a challenging task given the differences between civil and common law countries in Europe. Yet, an empirical study has found that legal families are not a significant factor in disagreements between judges.[217] This is an important insight, given the growing internationalisation of human rights. It also confirms the position of this book that the traditional classification of legal families plays only a limited role in many areas of law.[218]

[210] For this and the following see Chen 2006: 489–90; Panditaratne 2006: 99; Scoffoni 2006: 76, 90 (also contrasting France with Canada and Spain).

[211] See, e.g. Schneider 2010; Barak-Erez 2009: 480–1.

[212] Whitman 2004. For persistent differences in the concept of privacy see Miller 2017.

[213] For comparisons with other common law countries see Goldsworthy 2006a; Lee 2011.

[214] Cohn 2010: 583.

[215] Lasser 2009b. See also von Staden 2012 (quantitative analysis of compliance with the judgments of the ECtHR).

[216] See, e.g. Dzehtsiarou 2010; Ambrus 2009 (but lack of consistency and transparency criticised).

[217] Arold 2007a; Arold 2007b.

[218] See Chapter 4 at Section C 3 (c), above.

The question of judicial review of acts of parliament is a potentially controversial one.[219] On the one hand, due to the concept of limited government, human rights should hold the state accountable, including the law-maker. On the other hand, it may be argued that, in a democracy, 'activist' and 'political' judges should not be allowed to challenge the will of the people as expressed by the primacy of parliament. There may also be other tools to ensure compliance with human rights: for example, constitutional checks and balances prior to the moment a law comes into force.

The US Supreme Court allowed judicial review of primary legislation in a landmark decision of 1803.[220] While in Australia and Israel judicial review has also been advanced by courts,[221] in most countries it was legislators who introduced or extended judicial review, often under US influence. Notably this was the case in Germany, Austria and Italy after the Second World War, in Canada in 1982, and in many Central and Eastern European countries after the fall of communism.[222] Only a few countries have been more hesitant. Notably this has been the case for the United Kingdom, which follows a relatively strict model of parliamentary sovereignty.[223] Initially, the situation in France was similar, but in 1958 a limited abstract form of judicial review was introduced and in 2010 a new form of constitutional review came into force.[224]

A distinction remains depending on whether or not countries have separate courts for constitutional review.[225] On the one hand, for example, in the United States, Sweden and Switzerland, the same courts deal with questions of constitutional and other areas of law. On the other hand, there is the model of separate constitutional courts (or constitutional councils) in, for instance, Austria, Germany, France and Italy. These are based on Hans Kelsen's suggestion that ordinary courts only have the task of applying, but not evaluating, parliamentary laws. This has further consequences, including, for instance, that appointments to a constitutional court require special procedures and that not all constitutional judges may be qualified lawyers.

Overall, it can be seen that, in the West, the protection of human rights has become accepted. This does not mean that all countries provide the same set of

[219] See, e.g. Kokott and Kaspar 2012: 796–805; Guarnieri and Pederzoli 2001: 13, 150, 186; Ginsburg 2012: 296–9; Shapiro and Stone Sweet 2002: 138–56.

[220] *Marbury* v. *Madison* 5 US 137 (1803). See also Koopmans 2003: 35, 51–7, 233 (for discussion about judicial restraint and activism in the United States).

[221] See Horwitz 2009: 543, 549.

[222] See Koopmans 2003: 40–4; Mattei et al. 2009: 524; Utter and Lundsgaard 1993; also Ginsburg 2012: 291–5 (distinguishing between three waves).

[223] See Koopmans 2003: 15; Glendon et al. 2016: 74–5; Horwitz 2009: 543 (yet also 'interpretation' of statutes to avoid 'constitutional' problems).

[224] For details see Hunter-Hénin 2011.

[225] For the following see Ferreres Comella 2011; Bell 2006a: 38, 99; Bell 2006b: 258; Tushnet 2006a: 1227, 1242–3; Twining et al. 2006: 135. See also Kelsen 1942 (comparing Austria and the United States).

human rights;[226] yet, it may indicate that convergence and regionalisation have led to a broadly similar Western model of human rights.

(b) Is the 'Western Model' a Suitable Global One?

The concept of human rights is said to be closely linked to the history of Europe and North America.[227] Landmarks for civil and political rights are the English Magna Carta Libertatum of 1215, the Age of Enlightenment (notably the philosophical work of John Locke, Jean-Jacques Rousseau and Immanuel Kant), the American Declaration of Independence of 1776 and the French Declaration of Human Rights of 1789. The nineteenth and twentieth centuries have also left their marks on human rights: for instance, reactions to the industrial revolution triggered the idea of social and economic rights, and those to fascism and Nazism the protection of ethnic and religious minorities.

According to 'cultural relativists', these Western origins mean that human rights are not 'universal' and that they should not be imposed on other cultures.[228] If such imposition occurs, this is sometimes also seen as a 'neo-imperial' endeavour, for example, in promoting property rights that mainly benefit international companies and investors.[229] Indeed, the non-universality of human rights may already be seen in the Western world, given the variation in the availability of economic, social, cultural and community rights. In other parts of the world, the very idea of individual human rights may be challenged. For example, such formal legal rights may not be appropriate for societies in Africa and the Middle East, which are based on kinship and other group-centred social structures, and where law and religion are not strictly separated.[230] It has also been said that 'Asian values' may be irreconcilable with human rights. For instance, reference is made to the collectivist and communitarian principles in Asian culture, the idea of thinking about what is 'good' (not what is 'right'), as well as 'a deep Asian spiritualism, historical practice of non-violence, and inner respect for the environment'.[231]

However, the globalisation of human rights also has its supporters. Human rights may be of Western origin, but this should not lead us to a 'genetic

[226] On the need for 'national margins of appreciation' (initially developed by the ECtHR) see, e.g. Delmas-Marty 2009: 47–51; Glenn 2009: 35; Peerenboom 2006: 39.

[227] For the following see van Genugten 2012: 205–6; Goldman 2008: 227, 233, 301–2; Chen 2006: 506.

[228] See, e.g. Steiner and Alston 2000: 366–402; Kennedy 2002: 114; Menski 2006: 13, 41–2; Fedtke 2008: 50; Cotterrell 2002.

[229] Mattei and Nader 2008: 153; Goldman 2008: 247; Obiora 1998: 673–4; Santos 2002: 44 (as 'globalization from above'). See also Chapter 11 at Section C, below.

[230] Mattei and Nader 2008: 144; Glenn 2014: 222; Muir Watt 2006: 598.

[231] For these points see Twining 2009a: 199 and Goldman 2008: 232–5; Pangalangan 2006: 347 and Glenn 2014: 337; Mamlyuk and Mattei 2011: 430. See also Steiner and Alston 2000: 538–53; Harding 2015: 815–16.

fallacy', as they may well reflect universal human principles.[232] A modified version of this view is that human rights are an expression of modernity and, therefore, in today's world, are transferable to non-Western countries. For example, in many of those countries today, state powers and the forces of free markets make individuals seek the protection provided by human rights. There is also some evidence that, as societies become wealthier, its citizens become more interested in civil and political rights.[233]

A compromise between these two views is that human rights can play a role throughout the world, but that they are not only of Western origin. According to this view, it is misleading to postulate isolated legal orders and, for instance, a strict dichotomy between European and Asian values.[234] It has also been suggested that the debate about 'Asian values' was largely rhetorical, since it was used by autocratic regimes in order to defend their poor human rights record against foreign criticism.[235] More specifically, scholars have shown that human rights are not simply a 'gift of the West to the rest',[236] but that they can also be reconciled with African, Asian, Islamic and other traditions.[237] Thus, according to this view, a global ethic and a dialogical human rights discourse are the way forward.[238]

(c) Internationalisation of Human Rights

The international regime of human rights, starting with the UN Universal Declaration of Human Rights of 1948 (UDHR), covers civil and political rights, economic, social and cultural rights, as well as some of the 'third generation' rights such as minority rights, women's rights, other group and community rights, as well as a right to development. The United Nations takes the view that countries have a duty to protect human rights 'regardless of their political, economic and cultural systems',[239] and most of the treaties and protocols have indeed been ratified by the majority of countries in the world.[240]

However, this does not mean that human rights are now entirely global. Human rights charters have also been developed at a regional level, starting with the ECHR in 1953. Some of those provisions reflect regional traditions: for instance, the African Charter includes duties of individuals owed to family

[232] E.g. Sharma 2006: 244; Headley 2008. See also F. von Benda-Beckmann 2009: 120, 126 (distinction between normative and empirical statements about universality).
[233] Chen 2006: 487, 506; Bloise 2010: 10; Friedman 1996: 85.
[234] Twining 2009a: 42, 414. See generally also Chapter 4 at Section C 2 (a), above.
[235] Twining 2009a: 199. [236] Baxi 2008: 33.
[237] Menski 2006: 489 ('clever lies and assertions to the effect that Africa had no indigenous concepts of good governance, and democracy, of human rights, and of justice'); Bui 2016: 12–13 (for Confucian thought); F. von Benda-Beckmann 2009: 118; Twining 2009a: 187, 393, 412.
[238] For these points see, e.g. Goldman 2008: 235–6; Twining 2009a: 430. Similarly, Santos 2002 (for a multicultural conception of human rights).
[239] UN General Assembly 1993: para. 5. [240] See http://indicators.ohchr.org/.

and society.[241] For the international rights which, in principle, should be universal some limitations are frequently discussed. For example, comparative studies on the Convention on the Elimination of Discrimination Against Women (CEDAW) have explored the variations of translating this convention into actual practice. Many countries of the Middle East have also entered reservations to the CEDAW as far as it is seen as incompatible with Islamic principles.[242]

It was already mentioned that the extensive quantitative work of comparative constitutional law has, by and large, found that the text of constitutions has converged around the world.[243] For human rights specifically, it has been found that countries have increased the constitutional protection of human rights overall and that this has happened along the lines of international laws such as the UDHR.[244] The availability of judicial review has also increased, with a trend towards specialised constitutional courts; yet, this development mainly seems to be a result of domestic developments.[245] For the question of whether international human rights laws lead to lower human rights violations, results are mixed. In some studies, some rights have been found to matter, but it also depends on other factors, such as the political system (democracies having an advantage) and the time passed after the enactment of the right (evidence of maturation).[246]

Beyond these quantitative studies, it is usually said that the availability of human rights provisions and judicial review does not mean that protection is effective and equivalent throughout the world.[247] At a general level, the problem is that some governments may regard constitutional provisions protecting human rights as merely symbolic and are unwilling to hold

[241] van Genugten 2012: 217–18. See also Heyns and Killander 2013.

[242] See Levitt and Merry 2009 and Merry 2006 (comparisons about operation 'on the ground'); Ali 2016: 146–205 and Ali 2006 (for Muslim countries); McCrudden 2015 (analysis showing little judicial dialogue about implementation of CEDAW).

[243] See Chapter 7 at Sections B 3 and C 3, above.

[244] Law and Versteeg 2011 (general convergence); Elkins et al. 2013 (for impact of international law); Jung et al. 2013 (for economic and social rights though some variation according to regions and legal traditions). Further references in Landman and Carvalho 2010: 86–8.

[245] Ginsburg and Versteeg 2014. For the spread of constitutional courts see also Garoupa and Ginsburg 2015: 141–66; Yeh and Chang 2014: 14. For types of judicial review see also the www.concourts.net.

[246] E.g. Chilton and Versteeg 2016 (effect for organisational political rights, not for individual political rights); Kaletski et al. 2016 (positive effect for right to health and education); Elkins et al. 2016 (as rights get older, performance improves); Chilton and Versteeg 2015 (no effect of constitutional torture prohibition); Law and Versteeg 2013 (no effect in general but democratic countries perform better); Cole 2013 (positive effect on de facto labour practices, not labour law in the books); Baumgartner 2011 (weak association between access to justice and human rights compliance); Simmons 2009 (positive effect; political matters; also based on case studies). For earlier research see references in Cole 2013: 167. For the 'law in practice' most of these studies make use of the CIRI Human Rights Data, available at www.humanrightsdata.com.

[247] For the following see Kennedy 2002: 116; Horwitz 2009: 542–5; Klug 2005: 92; Twining 2009a: 297; Posner 2014: 79–122.

themselves accountable. The availability of judicial review may not provide a remedy if access to justice requires the investment of significant financial resources or if judges are not sufficiently independent. Moreover, even when governments and judges are committed to implementing human rights, there is the question of how precisely this is done, since human rights laws often leave considerable scope for interpretation and the balancing of conflicting interests.

Analysing a selection of countries, how have human rights been implemented and how well do they work? For example, the protection of human rights in South Africa and India is said to work reasonably well.[248] In South Africa, foreign models have played a key part. The Bill of Rights of the South African Constitution of 1996 has been influenced by its German, US, Canadian and Indian counterparts. In its application, the South African Constitutional Court has also considered the case law of other countries: for instance, in considering the horizontal effect of human rights, it referred to the German Constitutional Court.[249] On the other hand, it has been suggested that the transformative experience of the South African Constitution may now be a model for other countries.[250]

The strong rights for religious and cultural minorities in the Indian Constitution of 1950 are said to be more related to the specific Indian historical context, namely, the growing tensions between Hindus and Muslims after gaining independence.[251] But the Indian Constitution can also be seen as following a general trend, since social, economic and cultural rights were also part of the UN Universal Declaration on Human Rights of 1948. The discussion about the Japanese Constitution of 1947 is similar as regards a provision granting an individual right to receive welfare. On the one hand, it could be something uniquely Japanese that was added to the US model the Japanese law-maker was compelled to follow.[252] On the other hand, this right can be related to the US New Deal legislation of the 1930s, the emerging European welfare states, and the discussions preceding the Universal Declaration on Human Rights in the post-war period.[253] To be sure, none of those provided a constitutionally enshrined right to receive welfare. But then, we must also consider that, in practice, Japanese courts are said to follow a cautious approach in enforcing human rights.[254]

[248] Singh et al. 2007 (specifically referring to health reforms); Young 2012: 200–7 (Indian Supreme Court as 'engaged court'); Maldonado 2013 (comparing 'activist' constitutional tribunals of India, South Africa and Colombia). But see also Kumar 2011 (on the impact of widespread corruption on human rights in India).

[249] Fedtke 2008; Moran 2006; Davis 2003.

[250] Hailbronner 2017.

[251] Baxi 2006: 385, 394. See also Menski 2006: 268–70.

[252] See Bloise 2010: 21, 24; Shigenori 2006: 146 (comparing it with the United States).

[253] See Bloise 2010: 16; Shigenori 2006: 140 (comparing it with Germany); Horwitz 2009: 536.

[254] See Shigenori 2006: 148; Law 2011a: 1440. But also Brown Hamano 1999: 483 (not 'a mere alien transplant that failed'); Kawagishi 2014: 109 (now 'slightly more significant role').

This cautiousness of Japanese courts raises the more general question of whether it shows the uniqueness of 'Asian values', possibly including a general reluctance to resort to litigation.[255] Statements on the lack of effectiveness of human rights protection in Hong Kong and Indonesia[256] may confirm this point. But there are also some counter-examples. The Supreme Court of the Philippines is seen as showing activism, compensating for the deficiencies of politics,[257] and, since the enactment of the South Korean Constitution of 1987, the Korean Constitutional Court is said to exercise 'high equilibrium judicial review', and is becoming 'a forum for groups seeking to advance social change as well as for individual disputes'.[258]

The overall picture is therefore that, today, human rights play a role in many parts of the world and that often this is due to the forces of convergence, regionalisation and internationalisation. This finding does not imply that human rights protection is identical, or indeed effective, throughout the world. The lack of complete uniformity may also be exactly what is appropriate in international human rights law. As it is central to human rights that they 'protect the free decisions of free people to justify and implement those rights in ways rooted in their own histories, experiences and cultures',[259] it is entirely plausible that the international level does not replace all others. It also means that in the field of human rights too, comparative law (and comparative international law) remains relevant.

D Conclusion

This chapter has shown that there is growing convergence, regionalisation and internationalisation of the law. There is therefore some justification for saying that differences between domestic legal systems have become less pronounced. For comparative law, it follows that, depending on the research question, a conventional approach of 'simply' comparing the similarities and differences of domestic laws can be uninteresting. Rather a shift in attention is needed. For example, understanding legal transplants and other forms of influence can often be crucial, also incorporating interdisciplinary approaches in order to identify the political, economic and social forces at play. And for policy recommendations, questions of international regulatory design become more relevant, in particular as far as different legal orders overlap.

This shift does not mean that previous approaches to comparative law have become irrelevant. As there is no 'end of history', some differences at the country level are likely to persist. As far as regional and international laws come into play, some of the traditional tools of comparative law, such as

[255] See Section (b) and Chapter 4 at Section C 2 (a), above.
[256] See Petersen 2006: 224; Juwana 2006: 365. [257] See Pangalangan 2006: 360.
[258] See Ginsburg 2003: 242; Chaihark 2006: 285–6 (on inspiration from German law).
[259] Donnelly 2013: 104 (suggesting a 'relative universality of human rights').

functionalism and legal families, can be relevant.[260] It is also useful to remind the comparatist that comparing requires different units: thus, despite the interdependence between (and within) the domestic, regional and international level, it is also necessary to keep the units separate for analytical reasons.[261]

Finally, we need to acknowledge an important limitation of the analysis of this chapter, namely, its focus on domestic state law – be it directly or mediated through the regional and international levels. Today, understanding the law is increasingly complex as we often have a 'network of national, transnational and international private and public norms' which involves 'a variety of institutions, norms, and dispute resolution processes located, and produced, at different structured sites around the world'.[262] Main elements of this complexity are rules of transnational and global law, to be discussed in the next chapter.

Supplementary Information

Questions for discussion. Why are convergence, regionalisation and internationalisation relevant for comparative law? Are convergence forces similar across areas of law? How can regional legal structures be compared? Which forms of comparative international law can be distinguished? How far are developments in human rights law an example of convergence, regionalisation and internationalisation?

Suggestions for further reading. For research identifying convergence in constitutional law: Law and Versteeg 2011; for company law: Siems 2008a. For examples of comparative regionalism: contributions in De Lombaerde and Schulz 2009. For a comparison of the constitutional tribunals of India, South Africa and Colombia: contributions in Maldonado 2013. For the emerging concept of 'comparative international law': Roberts et al. 2018.

[260] See, e.g. Sections B 3 (b), C 2 (a) and (b), above.
[261] Bakardjieva Engelbrekt 2015: 99.
[262] Ladeur 2004: 95–6; Snyder 1999: 343.

10

From Transnational Law to Global Law

The primary interest of much of traditional comparative law lies in exploring legal differences and similarities between countries. Thus, it may be argued that the emergence of transnational and global law presents a problem for comparative law as it becomes increasingly obsolete to compare laws at the state level. However, it is also possible to defend its relevance in today's legal world. As the following will explain, even for transnational and global law the state remains important. Moreover, changes to the legal configuration may not be harmful for comparative law; rather, Jaakko Husa suggests that 'the flexibility of comparative methodology may be an asset in today's transnational legal world'.[1] But do the methods and tools of comparative law have to change?[2] And what exactly are these new structures of transnational and global law?

This chapter discusses these possible paradigm shifts of law in general and comparative law in particular, as well as the policy question whether the emergence of transnational and global law are welcome developments. Section A starts with a general analysis of the possible retreat of the state and the rise of transnational and global law. This is followed by two more specific examples: Section B on transnational commercial law and Section C on global social indicators. Section D concludes.

A General Trends and Analysis

In this general section, the first two sub-sections explain the trends that form the basis of this chapter: challenges to state law and the rise of transnational and global law. This is followed by a discussion of the conceptual and normative implications of these trends. Examples are provided from different fields of law.

[1] Husa 2015: 55. See also Michaels 2016 ('transnationalising comparative law').

[2] See Zumbansen 2012b: 191–2 (limits for traditional comparative method); Auby 2017: 144 ('transforming comparative law methods').

1 Challenges to State Law and National Boundaries

Under international law, the state is defined as a person with a permanent population, a defined territory, government, and capacity to enter into relations with the other states.[3] For comparative law it may be important that the relationship between population and territory is not somehow random, but that the people of a particular country share the same culture and values, since this linkage is then also reflected in the differences and similarities between legal systems. Yet, the reality is often different. Some state borders are due to geographic boundaries, but those are rarely definitive ones as even some islands are divided into different states.[4] In many parts of the world, state borders have also been drawn in an arbitrary way, in particular those due to external divisions by colonial powers, with the result of weak national identities.[5] Thus, an initial problem with state-based comparisons is that many states are not coherent 'nation-states'. This is not a new phenomenon but it has become more pronounced as migration leads to more and more diverse societies today.

The main challenge is, however, to the state itself: here a frequent position is that its sovereignty has diminished through the forces of globalisation, leading to an 'erosion' (or 'retreat', 'decline', 'disaggregation', 'hollowing out') of the state.[6] This claim has a domestic and an international dimension though both also overlap. With respect to the domestic level, the state may be disaggregating since today state functions are often split between various parts, not only between the government, the legislature and the courts but also between regulatory agencies, public–private partnerships, self-regulatory bodies and other non-state entities. This is often called 'governance' (in contrast to 'government'), meaning that instead of mandatory and hierarchical legal norms cooperative and other innovative forms of law-making are used.[7] In addition, the privatisation of law-making challenges the notion that the state has a monopoly of governance power and that there is a strict distinction between the state and society.[8]

The disaggregation of the state is also said to continue at the international level. It is seen as the sign of a new 'transgovernmentalism' that not only do governments interact with each other but so do courts, regulatory agencies and

[3] Montevideo Convention on Rights and Duties of States 1933, art. 1, in force since 1934.
[4] For such divided islands see Baldacchino 2013.
[5] See Easterly 2006: 256–7 (for research on artificial states); Fukuyama 2014: 185–97, 322–34 (for the contribution of national identities to effective state governance).
[6] See, e.g. Santos and Rodriguez-Garavito 2005: 5 (eroding state power); Strange 1996 (retreat of the state); van Creveld 1999 (decline of state); Berman 2009: 236 (disaggregation of the state); Coe et al. 2013: 117 (hollowing out of the state); also Domingo 2010: 61 (death throes of the state).
[7] See, e.g. Rhodes 1997; Santos and Rodriguez-Garavito 2005: 5, 272. See also Section C, below.
[8] See Backer 2012a: 92–3; Calliess 2012; Tamanaha 2001: 129. For examples in transnational commercial law see Section B, below.

other public bodies.[9] The interdependence of societies also challenges national sovereignty: states have no choice but to collaborate, not only through international treaties, but also through more complex intergovernmental forms of global governance.[10] This includes the use of soft law which can refer to legal norms that do not have the form of a source of law or to all legal norms which are not enforceable (even if they are in the form of a formal legal source).[11] Due to the lack of a global government, the international sphere may also need to rely on private forms of law and regulation,[12] and given the power of multinational companies, credit agencies, investment funds, audit firms and other private organisations, it is expected that market forces, private regulatory bodies, contracts and arbitration may become the dominant forms of order in a 'borderless world'.[13]

Such changes to the law can also be related to the convergence forces introduced in the previous chapter.[14] For example, a 'congruence-related' reason is that the growth in cross-border economic activities points towards the use of transnational and global law rather than domestic law; and a related 'pressure-related' one is that these rules may be shaped by the interests of multinational corporations.[15] But, as in the previous chapter, it is also clear that there are limitations to these forces. Thus, some of the literature emphasises the need for a differentiated view, for example, identifying elements of state retreat but also state persistence and advance (compensating for the vulnerabilities in open economies), as well as variations between countries from different parts of the world.[16] Moreover, as will become apparent in the remainder of this chapter, states also play a key role in the emergence and design of transnational and global law.

2 Rise of Transnational and Global Law

(a) Transnationalisation Across Many Areas of Law

Today, transnational law can be found in many areas of law. It has been said that some progress to create a 'world law' has already been made in commercial law,[17] which will be the topic of the following section of this chapter. Some of the commercial law instruments also relate to other areas of law: for example, property law and secured credit.[18] In other fields of business law (widely

[9] See Gordon 2010: 507; Brummer 2014: 20. For courts see also Section 2 (b), below.
[10] See, e.g. Picciotto 2011; Gilpin 2001: 80, 390, 398; Darian-Smith 2013: 177–8.
[11] Blutman 2010: 606. [12] Mattli 2015: 287; Cafaggi 2011: 23. See also Section B 1, below.
[13] See Calliess and Hoffmann 2009: 119; Gilpin 2001: 8; Economides and Wilson 2001: 6. The term 'borderless world' is from Ohmae 1990.
[14] See Chapter 9 at Section A 2 (a), above. [15] For a list of factors see Berger 2000: 98.
[16] E.g. Auby 2017: 101–3; Levy 2015: 174–85; Clift 2014: 176, 272–4.
[17] Gordley and Von Mehren 2006: xxi. For the mechanisms that make commercial law particularly well-suited to evolve in a transnational context see Druzin 2014.
[18] See van Erp 2006: 1066–7 (on UNIDROIT Cape Town Convention on International Interests in Mobile Equipment and EBRD Model Law on Secured Transactions).

understood), transnational trends have been suggested in construction law and sports law.[19] Internet law is also a prominent case since topics such as the decision about top-level domain names, by their very nature, go beyond the borders of one country.[20]

Beyond business law, forms of cooperation in international crime, environmental policy and disaster response law have a transnational nature.[21] Constitutional law is today said to operate 'within an increasingly transnational legal environment'.[22] Family law may appear to be more locally embedded but a number of examples can be suggested as well: for instance, relating to problems of conflict of laws aiming to protect the rights of children.[23] A further important example is the law associated with religious communities transgressing national boundaries.[24] Problems can arise between these transnational personal laws and the domestic laws of residence. This issue has become topical for the role of Islam in Europe, for example, in relation to the powers of Shari'a councils and restrictions on wearing headscarves or full face veils in some countries.[25]

The rise in transnational judicial dialogue is also frequently discussed. Previous chapters dealt with research on cross-citations between courts,[26] but the notion of judicial dialogue captures wider changes. For instance, Anne-Marie Slaughter contemplates that the rise in transnational litigation has led to a global community of courts where foreign judges are accepted as fellow professionals.[27] Others suggest, for example, that comparative legal reasoning can be used to develop transnational rules,[28] and that judges should actively create globally applicable rules of conflicts of law.[29] Human rights are sometimes discussed as a special case. Here, international standards play an important role and we may even observe an emerging '*ius commune* of human rights' based on comparative reasoning;[30] for example, the South African Constitution even provides that courts 'must' consider international and 'may' consider foreign law for the purpose of interpreting human rights.[31]

However, it is suggested that Slaughter's phrase of a global community of courts goes too far, as such a global judicial community may, in her own words, also need to 'share the common values and principles that constitute the

[19] References in Michaels 2009b: 247. For transnational sports law see Duval 2013.
[20] See, e.g. Botzem and Hofmann 2010.
[21] See, e.g. Roberts 2007: 348; Busch and Tews 2005: 153–64; Feldman and Fish 2016.
[22] Jackson 2010. See also Section 3 (c), below. [23] References in Reimann 2006: 1377–8.
[24] See, e.g. Twining 2007: 85; Michaels 2009b: 252.
[25] See, e.g. Ali 2016: 206–32; Mattei et al. 2009: 248; Demleitner 1999: 752; also Bowen 2007 (anthropological study of the French position).
[26] See Chapter 7 at Section B 1 and Chapter 8 at Sections B 1 (b) and C 2, above.
[27] Slaughter 2003: 193. [28] Jemielniak and Mikłaszewicz 2010: 16.
[29] Lehmann 2011: 141–231.
[30] Harding and Leyland 2007: 328. See also Bahdi 2002 (on 'transjudicialism'). See also Chapter 9 at Section C 3, above (on the globalisation of human rights law).
[31] South African Constitution, s. 39(b) and (c). For its application see J. Foster 2010; Smithey 2001.

normative understandings of a community'.[32] Thus, it is preferable to regard such new judicial networks as 'transnational' and not as 'global'. Such a line of reasoning is sometimes also used more generally: problems have become global and international but national law cannot address them and global law is not available – thus transnational laws emerge.[33] Yet, in detail, it is also possible to identify variants of both transnational and global law.

(b) Variants of Transnational and Global Law

In a general sense, 'transnational law' may refer to any law which transcends state laws.[34] It is therefore different from plain domestic laws, but it may include regional and international laws. Yet, more narrowly, the focus is usually not on laws which are only relevant to a particular territory, such as a region. Transnational law also has a different focus than traditional international law since its main concern is not international treaties and conventions which emanate from sovereign states.

Still, transnational law is a broad category that includes various types of legal rules. For example, writing about transnational commercial law, Roy Goode defines it as rules, from whatever source, which govern international commercial transactions and which are common to at least a significant number of legal systems, including, for instance, unwritten customs, contractually incorporated rules and trade terms promulgated by international organisations, standard term contracts and restatements of scholars.[35]

More generally, the following variants of transnational law can be distinguished, based on the private or public level where the transnational element may be found.[36] At the private level, transnational law can emerge through contracts between firms which are based in different countries, or through agreements about moral and ethical questions between individuals who belong to the same religious community but live in different countries. It is also possible that non-state organisations draft rules aimed to be used irrespective of national borders. For instance, these organisations may be industry groups, NGOs, religious organisations or groups of academics. The audience for their rules can be private parties who adopt them, say, as codifications of trade usages, model contracts or codes of conduct. Such documents can also be model laws with the aim to encourage law-makers to adopt these rules.

With respect to the public level, states and intergovernmental organisations may coordinate laws which have a transnational dimension on an informal basis (possibly together with coopted private parties). For example, they may

[32] Slaughter 2003: 215. [33] Halliday and Shaffer 2015: 4, 33; Shaffer 2013: 7.
[34] See, e.g. Senn 2011: 197–8; Hantrais 2009: 3; Jessup 1956: 2.
[35] Goode et al. 2015: para. 1.02; also paras. 1.55–1.62. See also Goode 2005: 539; Trakman 2011 (suggesting a plural conception of transnational commercial law).
[36] For similar classifications see Cafaggi 2011: 32–8; Smits 2010a: 2–6; Berman 2009: 230; Friedman 1996: 70.

agree on recommendations which are aimed at law-makers, courts, individuals or firms. Such agreements can also concern cooperation about the practical application of the law, for example, in matters of cross-border law enforcement. Finally, in some instances, it is said that formally binding rules can be classified as transnational rather than international law. For example, when states and intergovernmental organisations agree on treaties dealing explicitly with matters that have a cross-border dimension, this can be regarded as transnational law, as distinguished from international laws which aim to harmonise domestic laws. It has also been suggested that the rules enacted by court-like bodies of international (or regional) organisations are an element of transnational law, as distinguished from the international laws which set up these organisations.[37]

The term 'transnational legal order' (or 'transnational legal ordering') has recently become popular in the literature.[38] It is meant to indicate that transnational law is not a distinct body of law. Rather the core interest should be on developing tools to assess 'the transnational construction and flow of legal norms and their implications for state change'. In other words, the focus is here on the transnational processes that create legal norms which go beyond the state level. The term 'order' is, in this context, then seen as helpful as it asks us to identify the 'problems and remedial outcomes sought by proponents of transnational legal orders'.[39]

Some scholars characterise the term 'global law' in a similar way as being interested in procedural structures and dynamics. For example, it has been identified with the global 'struggle for law' between competing actors, the emerging global 'points of control', and the norms which 'organise fracture' in a polycentric world.[40] Analysing global law from such a procedural perspective also means that it is possible to say that, at present, we may just see 'intimations of global law':[41] thus, it is a term that has a more forward-looking dimension than transnational law.

A related approach prefers the term 'global law' as it endorses its aspirational substantive nature. In contrast to the business-orientation of transnational law, global law is said to reflect the 'publicness of law' in a global space, such as the aspiration for 'justice as it affects humanity as a whole' and the need to tackle global environmental problems.[42] Thus, this position is akin to concerns for 'humanity's law' and 'global justice'.[43] At a practical (and theoretical) level, it is also related to normative discussions about global administrative law and global constitutionalism, to be addressed in the next sub-section.

[37] Tuori 2014: 19, 21 (also including the EU).
[38] For the following see Shaffer 2016; Zumbansen 2016; Shaffer 2013: 5, 213.
[39] Halliday and Shaffer 2015: 8. See also the functional approach, discussed in Chapter 2 at Sections A 1 (a) and B 1, above.
[40] Frydman 2014; Backer 2012b. [41] Walker 2014.
[42] Goodwin 2012: 273; Domingo 2010: xvii; Casini 2016: 30. See also Garcia 2016.
[43] Teitel 2011; Sen 2009.

By contrast to the literature mentioned so far, 'global law' can also be presented as something which already exists today. This is not meant to claim that there is a coherent 'global legal system'; yet, it can be said that there is now an emerging 'global legal sphere'.[44] For example, it is possible to use the term 'global law' for the changing structure of international law,[45] or for rules which emerge as a new global common law (or new *ius gentium*).[46] More specifically, it can be suggested that some laws discussed under the heading of 'transnational law' have reached the threshold of 'global law'. For example, the rules about Internet domains and websites are global in the sense that they apply to any place in the world where someone accesses a particular website. It is also helpful to distinguish cases of such general uniformity from scenarios of transnational law where multiple sets of rules compete for acceptance. Thus, both terms, 'transnational law' and 'global law', have their legitimate scope.

3 Implications of Transnational and Global Law

(a) Conceptual Implications

Much of the literature about the conceptual implications of the rise of transnational and global law starts with the statement that the state and the local have not become irrelevant. Transnational and global law are not autonomous in relation to the state.[47] This is clear as far as the state is directly involved in the creation of those rules, but the state's position is also important where they have been created privately. Transnational rules of private law depend on the extent to which the state provides freedom of contract, or possibly even the choice of non-state law as a separate legal order.[48] Beyond choice of substantive law, transnational contracts often provide for arbitration – thus, raising questions about the choice between different arbitral tribunals and between those and state courts.[49]

For the relationship between transnational (or global) law and the local level, it may be tempting to use the popular term of 'glocalisation', meaning that the former rules have to be adjusted in order to fit into the particularities of the local. However, there is some scepticism whether, in the present context, such hierarchical thinking makes sense, as we may rather have a 'myriad public and private arrangements that constitute a legal kaleidoscope'.[50] In addition,

[44] For these terms see Auby 2017: 97 (also ibid. 159: 'global law under construction').
[45] Ziccardi Capaldo 2008.
[46] See Glenn 2006 (though calling them 'transnational'); Waldron 2012 (for 'modern ius gentium)'.
[47] Zumbansen 2012a: 23 (for transnational constitutionalism); Shaffer 2013: 28 (state not retreating but reshaped).
[48] As now in Art. 3 of the (non-binding) Principles on Choice of Law in International Commercial Contracts 2015 of the Hague Conference on Private International Law. See also Laval 2015.
[49] See also Section B 2, below.
[50] Scamardella 2016; Shaffer 2016: 243 (polycentric, not hierarchical).

there is the criticism that it is not the case that global (or transnational) law are simply superimposed onto the local; rather, global legal orders are also seen as a form of local law as they too have to be created in a particular place.[51]

As a consequence, theorists of transnational and global law have developed new concepts in order to capture this new legal world. For example, the complexity of legal change involving transnational law is described by the notion of 'recursivity': 'it is a multidirectional, diachronic process . . . in which the transnational and local are held in tension'.[52] It is also important to consider the relevant actors. The phrase often used here is that of a 'settling' of a transnational rule if actors accept it as authoritative.[53] Furthermore, the literature mentions that transnational laws may be unstable due to resistance by some actors as well as conflicts with other norms. Thus, this dynamic 'interlegality' poses challenges to transnational and global law-makers since they cannot simply rely on setting fixed rules.[54]

For the tools of comparative law, the emergence of transnational and global law poses a challenge to the traditional approach of comparing state-based laws. Some of these tools are, however, fairly generic so that they may have some use. For example, akin to a legal transplant, a particular transnational norm may have its origins in one of the domestic legal systems.[55] It is also possible that legal families are a relevant consideration: for instance, it has been suggested that common law countries are more receptive to soft forms of transnational law than civil law ones.[56]

However, there are also limitations to these tools. Legal transplants usually assume a unilateral relationship between origin and transplant country, not the 'interlegality' of transnational and global law.[57] For legal families, a limitation is that many transnational and global laws are of a technical and specialised nature and therefore unrelated to the 'stores of tradition' associated with legal families.[58] In addition, it is a typical feature of transnational and global law that, due to the key involvement of private parties, it is often not clear how far those rules should really be classified as 'law'.[59] Thus, a more interdisciplinary approach than under traditional comparative law is needed in order to compare and assess rules of transnational and global law.

In parallel to horizontal comparative international law,[60] it is possible to compare different sets of transnational and global law drafted by different organisations or parties. Such comparisons can also incorporate the specific issues which are at stake in these fields. For example, a comparison of

[51] Lindahl 2013: 264. [52] Shaffer 2013: 14. See also Halliday and Shaffer 2015: 37–42, 513–16.
[53] Halliday and Shaffer 2015: 15, 476.
[54] See Michaels 2009b: 254; Halliday and Shaffer 2015: 490, 500; Cottrell and Trubek 2012.
[55] For examples see Chapter 8 at Section B 1 (a) and Chapter 9 at Section C 3 (c), above.
[56] Fazio 2007: 234. Similarly, Gaudreault-DesBiens 2010: 171–2 (for recognition of Shari'a-based adjudication in common and civil law).
[57] Nelken 2007b: 14. [58] Teubner 1997: 7.
[59] See, e.g. Schultz 2014. See also Chapter 5 at Section B 2, above (for legal pluralism).
[60] See Chapter 9 at Section C 2 (b), above.

transnational regulatory standards examined whether states, firms or NGOs have been the key actors, finding a decline of state influence in recent years.[61] Another study mapped the concordance of transnational law with national norms and local acceptance identifying scenarios where national norms follow transnational law without local acceptance, but also those of local acceptance without corresponding national norms.[62] In the course of this chapter, it will also be shown that the notion of 'legitimacy' can be a fruitful criterion to compare rules of transnational and global law from a normative perspective.[63]

(b) Normative Implications

It follows from the discussions so far that loss of sovereignty and the unorderly nature of transnational and global law can be sources of concern. The loss of sovereignty also has substantive implications. As the globalisation of economies and societies reduces the power of the state, say, to influence the way multinational companies operate, domestic laws on democratic participation, human rights and corporate governance become less relevant.[64] There may also be problems in other fields. For example, if religious groups decide on matters regardless of state borders, this may risk the fragmentation of modern multicultural societies.[65]

A particular problem is the segmented nature of transnational and global laws. As each of those laws only covers a particular topic, it includes some interests while excluding others. Thus, there is the risk that the social considerations of some stakeholders are disregarded.[66] Correspondingly, the relationship between different areas of transnational law can be a dysfunctional one. For instance, it has been suggested that there may be 'asynchrony' due to the different speeds at which these laws develop,[67] as well as the emergence of policy conflicts due to the different rationalities, such as economic and non-economic ones, on which transnational instruments are based.[68]

Another way to present the problem with transnational and global law is to refer to the need for legitimacy in a normative sense. Such legitimacy can be conceptualised as a threefold requirement. First, input (or source-based) legitimacy refers to aspects such as the expertise of the law-making authority and sufficient forms of accountability. Secondly, output (or substantive) legitimacy can be assessed by theories of justice as well as criteria of efficiency.

[61] Abbott and Snidal 2009. [62] Block-Lieb and Halliday 2015: 95.
[63] See Sections (b) and then C, below.
[64] See, e.g. Goodhart 2005: 73–92 (for democracy); Delmas-Marty 2003: 1–27 (for tension between economy and human rights); Siems 2008a: 239–40 (for company law); Fox 2002 (on the limits of national laws in a globalised economy).
[65] Turner 2011: 151, 173. [66] Lindahl 2013: 222. See also Mattli 2015.
[67] Delmas-Marty 2009: 119.
[68] Fischer-Lescano and Teubner 2004: 1004, 1013. Reconciling such aims is also an important topic of 'law and development', see Chapter 11, below.

Thirdly, throughput (or procedural) legitimacy refers to fair and transparent procedures, which can also include claims for democratic legitimacy.[69]

To some extent, this general concept of legitimacy can apply here. For example, in the transnational context, the requirements of input, output and throughput legitimacy can be understood as referring to the inclusiveness of wide stakeholder participation, expertise-based effectiveness in solving international public policy problems and validation of transnational governance through procedural fairness and impartiality.[70] And the technocratic nature of much of transnational law may lead to a side-lining of national legislatures and problems of democratic legitimacy.[71] As a response to private law-making, and as a case of input legitimacy, it is also suggested that the mismatch between private rule-making and public policy goals can require 'hybrid governance' involving both private and public institutions.[72]

Further complications emerge due to the multiplicity of interests in the transnational sphere. For instance, it can be noted that 'too much' input legitimacy can be counter-productive for output legitimacy since numerous diverse interests make it difficult to achieve a meaningful consensus.[73] The question 'legitimacy for whom?' is also more complex here since it requires to give consideration to more than the representatives of one country.[74] Indeed, to put it in more general terms, it is said, that here 'mandates are uncertain, and it is not clear on whose behalf they purport to act and to whom accountability should be owed'.[75]

Others refer to different, though related, normative prerequisites. For example, scholarship in international law and global governance suggests the need for a 'global administrative law' which would transpose domestic administrative requirements to the global sphere, such as the limitation of power, the principle of proportionality and the protection of human rights.[76] Going further is the suggestion to implement democratic legitimacy in a global constitutional order as a form of 'global constitutionalism'.[77] There is also extensive research in the field of law and development on the need for a fair and balanced law, for example, as regards the possibility of counter-hegemonic global laws and the aim to implement principles of global justice.[78]

The specific literature on transnational and global law provides further normative suggestions. For example, Paul Schiff Berman's 'cosmopolitan pluralist approach'[79] proposes procedural mechanisms in order to manage

[69] Beisheim and Dingwerth 2008; Bodansky 1999. For legitimacy in a sociological sense see Section C 2, below.
[70] See summary in Quack 2010: 6–8. [71] Brummer 2014: 20, 196. [72] Mattli 2015: 287.
[73] Kelly 2008: 623. [74] Karlsson-Vinkhuyzen and Vihma 2009: 408–9. [75] Black 2008: 143.
[76] For a summary see Kuo 2018. [77] E.g. O'Donoghue 2014; Zumbansen 2012a.
[78] See Chapter 11, below and Section 2 (b), above. See also Halliday and Shaffer 2015: 478 (transnational legal orders can also be used for anti-hegemonic purposes).
[79] Berman 2012. See also Berman 2009.

multiplicity. This does not aim for uniformity or a hierarchy between norms but for a 'productive interaction' among those multiple legal regimes. It can involve a variety of forms of such interactions: dialectical legal interactions; margins of appreciation; limited autonomy regimes; subsidiarity schemes; hybrid participation arrangements; mutual recognition regimes; safe harbour agreements; and regime interaction.[80] Mireille Delmas-Marty's 'ordered pluralism' also rejects imposed uniformity but accepts the need for a legal order which can tackle the problems of today's world. This should be done in the spirit of pluralism through pragmatic steps, making differences compatible, and with a gradual process towards more and more common rules.[81]

It can be concluded that, on the one hand, there is an extensive literature which addresses the general normative challenges posed by transnational and global law today. On the other hand, reflecting on these suggestions, it is unlikely to give a 'one-size-fits-all' assessment for all possible circumstances where transnational or global law can play a role. Thus, the subsequent sections of this chapter reconsider some of the debates within the context of two paradigmatic cases, transnational commercial law and global social indicators.

B Transnational Commercial Law

The field of transnational commercial law is the most prominent example of transnational law. It includes a variety of themes of substantive law as well as international commercial arbitration, as the first two sub-sections of this section explain. This is followed by a discussion about the feasibility and legitimacy of private law-making in this field.

1 Variations of Transnational Commercial Law

The idea of a transnational commercial law dates back to the common medieval merchant law ('*lex mercatoria*'). The *lex mercatoria* did not replace local laws but was a separate, though loose, legal order which was created by the merchants themselves, for instance, by way of commercial customs and the creation of financial instruments. In the nineteenth century, the codification of commercial laws in Europe made the *lex mercatoria* fade away, despite attempts to keep the international nature of commercial law alive.[82]

[80] Berman 2012: 152–89. Similarly, Woodman 2008: 37–40 (options for relationship between secular and personal religious laws: create uniform law, leave norm conflicts unresolved, allow their agglomeration, or try to integrate them).

[81] Delmas-Marty 2009; also Delmas-Marty 2003: 74 ('ordering pluralism').

[82] In particular by Leone Levi, see Gutteridge 1949: 146; de Cruz 2007: 16.

After the Second World War, a new (or modern) *lex mercatoria* is said to have emerged – but it is not entirely clear how this term should be understood. One view, aligned to the informal nature of the old *lex mercatoria*, takes the position that the *lex mercatoria* is about private transnational law-making of commercial actors, in particular standardised contracts and customary private law.[83] However, this is unlikely to be the full picture. It can validly be said that more formal aspects of transnational commercial law are at least as important as these informal ones. For example, this may refer to international conventions and uniform laws and rules, or the role of international commercial arbitration.[84] In addition, the emphasis on private law-making underplays the continuing role of the state for international commercial law. In particular, it is said that private parties depend on the recognition of private law-making by the state, and need the state when it comes to the enforcement of contractual provisions.[85]

Some have attempted to distil and formulate general doctrines of transnational commercial law.[86] Yet, the difficulty is that transnational commercial law derives from various, more or less private and informal, sources. Thus, a more evolutionary picture is preferable. According to Gralf-Peter Calliess and Peer Zumbansen, transnational commercial law operates similar to a model of a 'rough consensus and running code': a rule is put forward followed by a process of consent and refinement.[87] This process may also lead to a 'creeping codification of the *lex mercatoria*'.[88] In this sense, the following will start with informal forms of transnational commercial law and then turn to more formal ones which tend to involve codified rules.

So, to begin with, contractual practice has an increasingly transnational nature. This comprises not just diverse individual contracts. Rather, international corporations and law firms have gradually used more and more similar contracts around the world, often said to be based on an Anglo-Saxon style of drafting.[89] In addition, multinational companies may use the same codes of conduct for dealings with their international business partners. For example, these may specify certain environmental and labour standards in order to respond to concerns from consumers, or because the laws of some of the

[83] See Zumbansen in EE 2012: 904 ('transnationalists'); Wiener 1999: 161 ('autonomist approach'), also ibid. 20 ('from public to private international governance'); Collins 2015: 386 (associating this with a common law view of the *lex mercatoria*).

[84] See Stone Sweet 2006; Collins 2015: 385–6 (associating this with the German and French view of the *lex mercatoria*).

[85] See, e.g. Goode 2005: 547 (contracts cannot create law); Stone Sweet 2006: 637 (on enforcement); Zumbansen in EE 2012: 904 ('traditionalists'); Wiener 1999: 161 ('positivist position'). See also Section 3, below.

[86] Goode et al. 2015: para. 20.01.

[87] Calliess and Zumbansen 2010.

[88] Berger 2010. See also Michaels 2007 (calling it the 'new new lex mercatoria').

[89] See McBarnet 2002 (on transnational transactions); Moss 2007: 2 (on Anglo-Saxon models); Markesinis and Fedtke 2009: 324 and Goldman 2008: 295 (on importance of in-house lawyers and other practitioners).

countries in which they do business require them to comply with those standards anyway.[90]

Codes of conduct may also refer to standards developed by non-state organisations and groups, for example, those of the International Organization for Standardization (ISO) and the various fair-trade associations.[91] Such uniform rules which firms can, but do not have to, use also exist in relation to various other topics of commercial law. Frequent examples are the instruments of the International Chamber of Commerce (ICC): in particular, the Incoterms that clarify certain terms which may be used in international sales contracts, as well as the Uniform Customs and Practices for Documentary Credits.[92] More specialised codes or standard contracts are, for example, the Wolfsberg Principles developed by a group of banks to address problems of money laundering, and the master documents by the International Swap and Derivatives Association (ISDA), representing various financial institutions and investment firms.[93]

Codifications of transnational commercial law can also involve states and intergovernmental organisations. At a modest level this means involvement in the drafting of a particular instrument but not that this instrument is binding for countries, firms or individuals. An example is the UNIDROIT Principles of International Commercial Contracts. UNIDROIT is an intergovernmental organisation with sixty-three Member States. The Principles of International Commercial Contracts, however, have not the form of a binding international convention. Rather, they are aimed at the parties of international contracts and arbitral tribunals in order to identify common standards of international business contracts.[94] Other examples are the UN Global Compact, the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multilateral Enterprises as recommendations aimed at multinational corporations.[95]

One step further are international agreements which are implemented into domestic laws but where it is left to firms and individuals whether they want to opt in or opt out of these provisions. The main example is the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG), prepared by the United Nations Commission on International Trade Law (UNCITRAL). It applies to international sale contracts if the law of one of the contracting parties of the convention (eighty-five at present) would be applicable; yet, parties can exclude or vary the application of the CISG. The CISG is also seen as a successful example of a blend between common

[90] See Lin 2009; Lindahl 2013: 56–8; Toffel et al. 2015 (analysis of differences in compliance with such codes). For the role of private law making by multinational companies in 'law and development' see Chapter 11 at Section C 2, below.

[91] See www.iso.org, www.fairtrade.net and, e.g. Delimatsis 2015. [92] See www.iccwbo.org.

[93] See www.wolfsberg-principles.com; www.isda.org. [94] See Goldman 2008: 281, 287.

[95] See www.unglobalcompact.org, www.business-humanrights.org/en/un-guiding-principles and www.oecd.org/corporate/mne/.

and civil law, in terms of its drafting process,[96] its terminology[97] and its substance, for instance, concerning controversial concepts such as good faith and specific performance.[98] In addition, according to its Article 7, the application of the CISG has to consider its international character and the need to promote its uniform interpretation.

Some of the instruments mentioned in the previous two paragraphs have also had an impact on domestic reforms of contract and commercial law.[99] Other international agreements have the explicit and primary aim to be implemented into domestic laws. Such agreements may be international hard law, i.e. conventions and treaties: in the field of international commercial law examples are the various conventions by UNIDROIT and the Hague Conference on Private International Law.[100] However, transnational soft law may also become domestic hard law: for instance, UNCITRAL has drafted a number of model laws on topics such as international credit transfers, electronic signatures and electronic commerce.[101] Furthermore, international soft laws are influential in accounting, banking and securities law, in particular the International Financial Reporting Standards (IFRS), the rules on bank capital adequacy of the Basel Committee on Banking Supervision (BCBS), the recommendation on money laundering of the Financial Action Task Force (FATF), and the principles on securities regulation of the International Organization of Securities Commissions (IOSCO) – noting that some of these rules have been co-drafted by private groups or sub-state units.[102]

There can also be further hybrids between forms of transnational commercial law. For example, consider the 'networked governance' of the G20/OECD Principles of Corporate Governance,[103] as illustrated in Figure 10.1.[104] These Principles are the result of cooperation between the OECD and the G20, and they have also been influenced by other private and public institutions. They are mainly aimed at law-makers in emerging and less developed economies, which do not belong to the thirty-five member countries of the OECD. In addition, they are intended for private

[96] For this see Gerber 2001 (on Rabel's involvement); Herings and Kanning 2008: 260 (on US influence). See also Ogus 2006: 273 (United Kingdom opposed CISG to protect role of English law for international transactions).

[97] Eiselen 2010: 104.

[98] See Chianale 2016: 30; Huber 2006: 940–2; Shapiro and Stone Sweet 2002: 308.

[99] See Estrella-Faria 2016 (for the UNIDROIT Principles of International Commercial Contracts); Chianale 2016 (for the CISG).

[100] See http://unidroit.org/ and www.hcch.net/.

[101] See www.uncitral.org/uncitral/en/uncitral_texts.html.

[102] See www.ifrs.org, www.bis.org/bcbs/, www.fatf-gafi.org, www.iosco.org. See also Chiapello and Medjad 2009: 460 (on co-regulation in accounting law); Brummer 2010 (on difference between soft law in international finance and hard law of WTO).

[103] See www.oecd.org/corporate/principles-corporate-governance.htm.

[104] Based on Siems and Alvarez Macotela 2017 (with further explanations). For networked governance see also Fenwick et al. 2014.

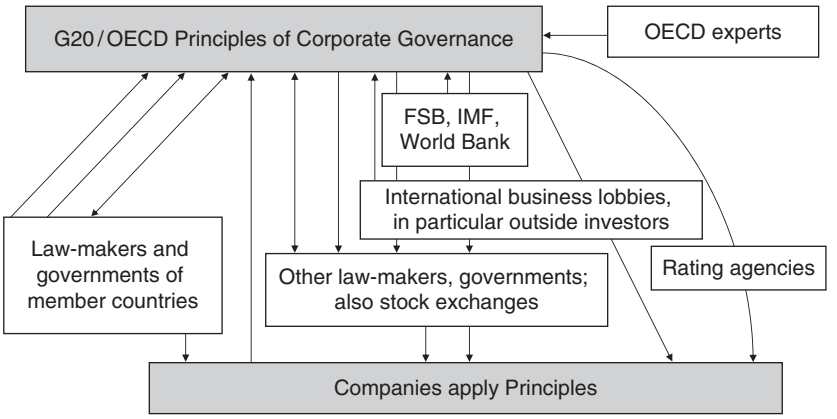

Figure 10.1 Overview of the functioning of the G20/OECD Principles

parties as guidance for good practice. Thus, on the one hand, a country may have enacted mandatory rules following the Principles. On the other hand, it may have left the implementation of the Principles, or parts of them, to the companies themselves, and the companies may then be interested in implementing the Principles voluntarily in order to attract foreign investments.

2 International Commercial Arbitration in Particular

International commercial arbitration deserves special attention since it may enable parties to 'circumvent' or 'lift-off' from national legal institutions.[105] Here, a variety of transnational instruments can be identified. Most countries of the world have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which ensures that state courts recognise arbitral awards save for a public policy defence.[106] In terms of procedure, the Rules on the Taking of Evidence in International Commercial Arbitration by the International Bar Association apply if parties agree on them.[107] By contrast, the UNCITRAL Model Law on International Commercial Arbitration is addressed to law-makers – and if they follow this model (which many do), it means that parties have considerable freedom to design how disputes are arbitrated.[108]

[105] Lin 2009: 712; Wai 2002. See also McConnaughay 1999: 453.
[106] See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.
[107] See www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. See also Dodson and Klebba 2011: 18 (on mixing of common and civil law practices in arbitration proceedings).
[108] See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. On its success see Zekoll 2006: 1349.

The use of arbitration complicates the competition between legal systems. As far as arbitrators compete with state courts, the growing use of arbitration is bound to reduce the number of proceedings at state courts.[109] It has also been shown that revisions of arbitration laws based on the UNCITRAL Model Law have led to more arbitration proceedings in these countries.[110] In addition, one can examine the competition between the major institutional (as opposed to 'ad hoc') arbitration centres: traditionally, the main institutional arbitration centres were located in Europe, in particular in London, Paris and Geneva, but in recent years arbitration centres have grown significantly in Asia, in particular in Hong Kong, Singapore and Shanghai.[111]

Turning to the substantive law that arbitrators apply, it has been found that the chosen law is typically linked to the domestic law of the place of arbitration.[112] Disputes dealt by international arbitration often also make use of substantive principles of transnational commercial law.[113] In addition, it has been observed that international arbitrators are, to some extent, willing to 'transnationalise' rules according to the circumstances of the case. For example, when parties are from civil and common law jurisdictions, arbitrators are inclined to search for a compromise that is acceptable under both legal traditions.[114]

A problem for research on the role of arbitrators is that proceedings are private and awards are not published. Still, there is some empirical research, also with a comparative dimension. The path-breaking study by Yves Dezalay and Bryant Garth, dating from the mid-1990s, draws a broad distinction between two types of arbitrators who compete with each other, but together also foster the use of international arbitration. On the one hand, there are the 'grand old men' of arbitration, often Europeans with an academic background. On the other hand, 'modern technocrats' are more often from the United States and keen on pursuing economic interests. In particular, this competition takes place over the use of arbitration in developing and transition economies where their interests are also supported by local experts, thus promoting the transnationalisation of this field.[115]

More recently, a study compared attitudes and results of international arbitration and state courts. It also found a transnationalisation through

[109] See Hoffmann and Maurer 2010 (data for Germany and the United Kingdom). On regulatory competition between litigation and arbitration see Wagner 2013.

[110] Drahozal 2004.

[111] See the data on their caseload at http://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/ and the surveys available at www.arbitration.qmul.ac.uk.

[112] Eidenmüller 2011: 723. Similarly for litigation, see Calliess and Hoffmann 2009: 115. On choice of law in arbitration see Chapter 9 at Section A 2 (c), above.

[113] See Goode et al. 2015: para. 19.113.

[114] Jemielniak 2018. See also Jemielniak 2014: 125–47 (for use of comparative method in international commercial arbitration).

[115] Dezalay and Garth 1996. For their related work on lawyers see Section 3, below.

international arbitration as its close-knit culture influences the reasoning of arbitrators, for example, since arbitrators valued party autonomy more than state courts would do.[116] Another study analysed whether arbitrators in China, Hong Kong, South Korea, Japan, Singapore and Malaysia act and think differently from those in Europe and North America. The overall finding was that they showed a slightly higher willingness to suggest reconciliation but without departing from general transnational standards.[117] There is also some evidence that civil law arbitrators are more likely to encourage settlement than common law ones – a result in line with the more active role of judges in the former countries.[118]

3 Feasibility and Legitimacy of Private Law-making

A main policy question raised by transnational law is whether it gives too much power to private law-making, for instance, in the examples provided in this section, but also in other areas of law, such as the transnational reach of the norms of religious communities.

The reasons why these private forms of transnational law have emerged relate both to the deficiencies of state laws and to the benefits of private law-making. For instance, on the one hand, it is said that 'national legal systems have failed to keep pace with evolving international practice' and that judges 'simply nationalise disputes'.[119] On the other hand, private law-making is said to 'take into account the needs of international commercial relations', it is not 'branded by . . . national origins', and arbitrators and other adjudicators 'stick closer to the parties' agreement'.[120] More general benefits are the liberality and flexibility of private law-making: it more easily allows exceptions in justified cases, enforcement mechanisms can be more varied, and it can be adapted more easily to changing circumstances than state law.[121]

However, critics point out that there are various practical problems with private law-making in transnational law. Its 'softness' may mean that it is not entirely clear when it is applicable, for example, as far as it includes customary rules. It may also be ineffective given the lack of adequate enforcement.[122] Furthermore, if participants from different countries agree on a common text, this document may only be phrased in very abstract and broad terms with the apparent risk that there are conflicting interpretations around the world; for instance, common and civil lawyers may understand a term such as 'equity

[116] Karton 2013 (based on case analyses and interviews).
[117] Ali 2011a and Ali 2011b (based on interviews and surveys).
[118] Fan and Jemielniak 2016: 557–62 and see Chapter 3 at Section B 2 (d), above.
[119] Goode et al. 2015: para. 4.74 and Shapiro and Stone Sweet 2002: 333.
[120] Berger 2000: 91; Chiapello and Medjad 2009: 455; O'Hara and Ribstein 2009: 88.
[121] See, e.g. Berger 2000: 97, 101; Siems 2008a: 388.
[122] See Jordan 2013 (in the context of the global financial crisis of 2008).

remedies' very differently.[123] A transnational instrument may also not 'work' adequately due to a cultural mismatch. This has been suggested for arbitration in particular: in the developed countries of the West arbitrators may have a common ethic and they may agree with the aim to achieve predictable and clear results, whereas in developing countries of Asia there may be insufficient experience in arbitration and the desire for predictable results may be less important than not 'to lose one's face'.[124]

Another line of objections is more directly directed against the legitimacy of private law-making in transnational law. As far as democracies are concerned, the apparent problem is that private law-making undermines the supremacy of parliaments.[125] Such criticism can also be put in a more general way as a problem of accountability: private parties typically act in respect of what is good for themselves without giving consideration to the interests of the common good and outsiders.[126] The risk is therefore that transnational commercial law is infected with severe power imbalances and inequalities, in particular, since businesses may be better able to exert their influence than consumers, employees and other stakeholders.[127] Thus, according to some, it shows the problems of global capitalism where economic interests are strongly protected but not social ones, in particular as far as transnational commercial laws favour multinational enterprises over the public interests of developing countries.[128]

Some of these points of criticism need to be qualified, however, with much depending on how exactly instruments of transnational commercial law are structured and applied. As for its practical aspects, first, there have been various initiatives to foster the communication of court decisions and arbitral awards dealing with instruments of transnational law. For example, databases on decisions applying the CISG and the UNCITRAL model laws[129] can reduce divergent applications. A similar effect follows from the transnationalisation of legal scholarship and education, with a number of institutions offering international courses on transnational law.[130] Private actors (arbitrators, lawyers, etc.) also shape the legal infrastructure across borders, thus becoming brokers

[123] Goode et al. 2015: para. 21.05 ('creeping re-nationalization of transnational texts'); Legrand 1998c: 250–1; Mattila 2013: 345; Goddard 2009: 171. See also Chapter 2 at Section A 2 (b), above.

[124] Arvind 2010: 83–4 (for India); McConnaughay 1999: 503–13 (for China and Japan).

[125] See, e.g. Backer 2012a: 95–6; Teubner 1997: 3 and Section A 3 (b), above.

[126] Collins 2013: 130–1; Lin 2009: 742–3.

[127] See generally Eidenmüller 2011: 737, 745; Darian-Smith 2013: 53. More specifically Stephan 1999: 780 (on 'pro-bank rules' of the UCP); Siems 2008a: 389 (for corporate governance codes).

[128] Cutler 2013; Cutler 2003; also Rodriguez-Garavito 2005: 78 (hard law for business interests but only soft strategies for social concerns).

[129] See www.cisg.law.pace.edu, www.globalsaleslaw.org/index.cfm?pageID=28, www.unilex.info and www.uncitral.org/uncitral/en/case_law.html.

[130] See, e.g. the growing number of universities participating in the Vis Arbitral Moot at https://vismoot.pace.edu/.

for transnational commercial law and practice, possibly also for the benefit of society at large.[131]

Moreover, many of the transnational instruments are accompanied by institutional structures to support their uniform application. These may provide formal ways of dispute resolution, for example in domain names disputes and in derivative trading,[132] but there are also other structures, such as the CISG Advisory Council which provides advice on the interpretation of the CISG, and the system of National Contact Points which mediates in disputes about the OECD's Guidelines for Multinational Corporations.[133]

It can also be noted that doubts about the effectiveness of transnational soft law need not to be dealt with abstractly. Since its success depends on whether private participants or national legislatures take up such principles, these dynamics may bring out whether and to what extent there is a need for this and effective enforcement is guaranteed.[134] Some of the scepticism may then be found to be superseded. For example, the view that there is insufficient experience in arbitration in Asia is now largely obsolete given the trends mentioned in the previous sub-section. As far as there is diverse application in practice, it can also be suggested that such legal pluralism may not only be inevitable[135] but appropriate, as it shows that transnational laws can and do adapt to the local context.

Many of the legitimacy concerns are based on the view that transnational commercial law constitutes an 'autonomous regime' independent of the state.[136] Yet, often the picture is a mixed one. It can be said that the flexibility that private persons and institutions have is only possible if the state has allowed it in advance.[137] Alternatively, the process may be said to be reversed, namely, that private self-regulation is subsequently embedded in more formal institutional structures.[138] In any case, on the one hand, domestic legislatures continue to play a crucial role: it is for them to decide whether to recognise private law-making, and how to deal with regulatory conflicts between public and private norms.[139] On the other hand, state courts have to decide on transnational private law-making: for example, whether to use such norms as guidance for the positive law, or whether to oppose them, for instance, on grounds of public policy.[140]

[131] Dezalay and Garth 2011a (on how international lawyers may bridge economic regulation and human rights); Dezalay and Garth 2011b (on the role they play for the rule of law). See also the review article by Regan 2016.

[132] See www.icann.org/en/help/dndr/udrp/providers and http://dc.isda.org/.

[133] See www.cisg-ac.org and www.oecd.org/daf/inv/mne/ncps.htm.

[134] See already Siems 2008a: 389.

[135] See Berman 2016 for CISG.

[136] See Senn 2011: 199–200; also Moore 1986: 15 (on anthropologists claiming that international law resembles 'primitive multigroup arenas'), and Sections A 1 and 3 (a), above.

[137] Santos 2004: 211; also Wai 2002 (on the role of private international law).

[138] Botzem and Hofmann 2010 (case studies on Internet governance and financial reporting).

[139] See, e.g. Wielsch 2012; Bomhoff and Meuwese 2011 (calling the latter the 'meta-regulation of transnational law').

[140] See, e.g. Büthe and Mattli 2011: 205 (on the ISO standards as guidance); Collins 2015 (on the *ordre public*); Benvenisti and Downs 2012 (on relationship between national courts and transnational private regulatory bodies).

In addition, as far as private law-making does play a role, this should not automatically be seen as illegitimate. There are problems that transcend national borders and therefore call for transnational (or even global) law, but states may be unable to keep pace with these developments.[141] Thus, private transnational law-making can be a necessary 'second-best' solution. The question is then how this can be done in an acceptable way. Here, a first point to consider is that in transnational commercial law many topics primarily call for special technical expertise: thus, the lack of political legitimacy may not be that significant for the actual result. In other cases, it is important that transnational law does not overlook the interests of important stakeholders. Again, this may lead to a mixture of private and state law-making, for example, requiring that the former fulfils certain requirements of procedural justice and fairness. Finally, in the international context, transnational commercial laws can raise concerns about power imbalances between the business interests of actors from developed countries and the public interests of developing countries. This final point relates to the general debate about law and development which will be the topic of the next chapter.

C Global Social Indicators

Global social indicators have proliferated in recent years.[142] They are discussed here as an example of global law since they have 'law-like' functions and aim for global acceptance. This section starts with definitions and variations of indicators, followed by a general debate about their legitimacy and then, returning to the different types of indicators, implications for the assessment of their legitimacy.[143]

1 Definitions and Variations of Indicators

While there is no full consensus about the meaning of the term 'indicators', it is helpful to present some definitions suggested in practice and academia. According to the OECD:

> In general terms, an indicator is a quantitative or a qualitative measure derived from a series of observed facts that can reveal relative positions (e.g. of a country) in a given area. When evaluated at regular intervals, an indicator can point out the direction of change across different units and through time. In the context of policy analysis ... indicators are useful in identifying trends and drawing attention to particular issues. They can also be helpful in setting policy priorities and in benchmarking or monitoring performance.[144]

[141] Friedman 2001: 359 (on the globalisation of risk); Calliess 2007 (on transnational contract law); Pirie 2014: 103 (formalism and legalism as facilitating commercial relations).

[142] For data on this evolution see Kelley and Simmons 2018 (calling them 'global performance assessments' and 'global performance indicators').

[143] Parts of the following are elaborated in Siems and Nelken 2017.

[144] OECD 2013: 13.

The alternatives 'quantitative or qualitative' are, however, not shared by everyone as, usually, the emphasis is on quantitative measures, often by way of ratings and rankings. For example, according to definitions from the academic literature, an indicator is 'a special use of statistics to develop quantifiable ways of assessing and comparing characteristics among groups, organizations and nations',[145] or 'a named collection of rank-ordered data that purports to represent the past or projected performance of different units'.[146]

A previous chapter of this book discussed, within the context of 'numerical comparative law', some measurements of law which can be classified as indicators. However, it should be noted that most measurements of law are not indicators. The specific notion of indicators means that numbers are used with the normative aim of setting general standards, as the definitions show. This does not mean that this division is always absolute. For example, the quantifications of law in the studies by La Porta et al. and Djankov et al. which 'merely' tried to understand the relationship between legal rules and financial development were subsequently incorporated into the benchmarks and rankings of the World Bank's Doing Business Reports, thus being transformed into indicators.[147]

This section is specifically concerned with global social indicators. By 'global' it is meant that these indicators have a global ambition, i.e. the drafters aim for their implementation anywhere in the world. The term 'social indicators' can be defined as 'numerical measures that describe the well-being of individuals or communities', for example in order 'to describe and evaluate community well-being in terms of social, economic, and psychological welfare'.[148]

Finally, in this section the core interest is on indicators which raise general concerns about legitimacy. Table 10.1 provides examples of such indicators from four broad fields: good governance and rule of law; personal rights and economic freedom; human development and political stability; and performance of educational and commercial entities. It can also be seen that they concern a variety of different drafters, addressees and beneficiaries. Those differences can be the subject of a comparative analysis, as will be shown further in this section.

2 Relevance of the Legitimacy of Indicators

In the debate about global social indicators, critics often focus on the substantive dimension of indicators which are seen as one-sided, for example, in their emphasis on the promotion of business interests, while supporters then often respond that what is needed are procedural rules in the design of these

[145] Merry 2011: 84. [146] Davis et al. 2015: 4. See also Davis et al. 2012.
[147] See Chapter 7, above, in particular Section D 4.
[148] National Oceanic and Atmospheric Administration (NOAA), Office of Science and Technology, available at www.st.nmfs.noaa.gov/humandimensions/social-indicators/.

Table 10.1 Examples of global social indicators

Fields	Examples	Drafters	Addressees – main beneficiaries
Good governance and rule of law	Worldwide Governance Indicators (WGI)	World Bank	Countries – donors, citizens
	Doing Business Reports (DBR)	World Bank	Countries (and sub-units)– donors, investors
	Corruption Perception Index (CPI)	Transparency International	Countries – citizens, NGOs
	Rule of Law Index	World Justice Project	Countries – citizens
	Index of Legal Certainty	Foundation pour le Droit Continental	Countries – donors, academics
Personal rights and economic freedom	World Press Freedom Index	Reporters without Borders	Countries – journalists, NGOs
	Global Slavery Index	Walk Free Foundation	Countries – NGOs
	Global Competitiveness Report	World Economic Forum	Countries – corporations, investors
	Economic Freedom of the World	Fraser Institute	Countries – corporations, business lobbies
	Indicators of Employment Protection	OECD	Countries – corporations, citizens
Human development and political stability	Human Development Index (HDI)	United Nations Development Programme	Countries – citizens, donors, NGOs
	Happy Planet Index	New Economics Foundation	Countries – citizens, academics
	Good Country Index	Good Country	Countries – citizens, academics
	International Country Risk Guide (ICRG)	Political Risk Services	Countries – corporations, investors
	Fragile States Index (formerly Failed States Index)	Fund for Peace	Countries – NGOs, academics
Performance of educational and commercial entities	U-Multirank	EU (sponsor)	Universities – students
	THE World University Rankings	Times Higher Education	Universities – students
	UN Global Compact	United Nations	Corporations – stakeholders
	ISO 26000 on social responsibility	International Organization for Standardization	Organisations – stakeholders
	GRI Guidelines for the sustainability reports	Global Reporting Initiative	Organisations – stakeholders

indicators so as to ensure a balance of the respective interests.[149] The term 'legitimacy' is occasionally mentioned in this literature but without in-depth discussion, while Kevin Davis and colleagues urge further research on 'their influence and perceived legitimacy'.[150]

The phrase 'perceived legitimacy' can be seen as a reference to the sociological (or empirical) notion of legitimacy. It goes back to Max Weber who stated that 'social action ... may be guided by the belief in the existence of a legitimate order'.[151] Thus, having laws which the public believes to be legitimate is important since the state may not be able or willing to enforce those by force, and since other reasons for compliance (such as habit and expediency) may not always be sufficient. This 'relevance of people's perceptions of the rightfulness and appropriateness of authority for their acceptance and support for political and social order'[152] has been confirmed in recent psychological research on everyday compliance with the law.[153]

It is also important to assess the normative legitimacy[154] of global social indicators due to their 'law-like' features.[155] A combination of reasons accounts for their law-like effectiveness (with details differing between indicators): the presentation as numbers (rankings, ratings, etc.) makes it straightforward to evaluate compliance, in particular to compare performance; technology has facilitated the data collection and availability of such information; the repeated collection of data creates incentives for learning and adaption; drafters often have expertise and authority on the matters in question; and publicity together with market and political forces create pressure for compliance.[156]

This normative legitimacy can be linked to the sociological notion of legitimacy. For state law, the connection is that a high degree of voluntary compliance means that the state is best able to pursue the long-term goals of society.[157] An even stronger link exists for global social indicators as a private form of governance, since, due to the typical lack of state enforcement, their success crucially depends on the perception as being legitimate.[158] Thus, it is an inherent feature of indicators that the drafters aim for them to be 'successful' due to their persuasive strength and their own expertise, power and prestige.

Global social indicators also face some specific concerns of normative legitimacy. The numerical nature of indicators makes them effective but also

[149] For the general discussion see, e.g. the contributions in Rottenburg et al. 2015; Merry et al. 2015; Cooley and Snyder 2015; special issues on 'Global Social Indicators: Constructing Transnational Legitimacy' in (2017) 13(4) *International Journal of Law in Context*; 'Indicators as Political Spaces' in (2015) 12(1) *International Organization Law Review*; and 'Global Law and Indicators' in (2015) 47(1) *Journal of Legal Pluralism and Unofficial Law*.

[150] Davis et al. 2015: 22. [151] Weber 1968: 81 (original from 1922). [152] Quack 2010: 8.

[153] Tyler 2008: 717. [154] See Sections A 3 b and B 3, above.

[155] See also Perez 2015 ('fuzzy law','quasi-legal'); Kelley and Simmons 2015 (as soft law).

[156] E.g. Merry 2016: 1–43; Kelley and Simmons 2015. See also Chapter 7 at Section D 4, above.

[157] Tyler 2008: 716. [158] Beisheim and Dingwerth 2008: 3.

disguises the political choices on which they are based.[159] As regards their global nature, they face the problem of a lack of global democratic structures and their need to accommodate different socio-economic systems. Thus, a high degree of factual effectiveness can be problematic from a normative perspective as far as there is a lack of democratic participation and accountability and, in the international sphere, a risk of neoliberal economic imperialism.[160] Another tension is how far indicators can effectively, and legitimately, aspire for global relevance. This can be phrased as a paradox: 'in order to be globally commensurate, they cannot be rooted in local contexts, but in order to accurately reflect local situations, they need to be'.[161]

How can, and should, law-makers then react to global social indicators? While there are some similarities between indicators and (other) international legal instruments, it is also clear that there are considerable differences, for example, at the production stage.[162] Another distinct consideration is that legitimate indicators need to 'get the numbers right': thus, international codes of good practice and ethics for statistics may be needed. It may also be possible to regulate some of the procedural aspects of indicators, aiming to improve their 'throughput legitimacy'.[163]

Finally, it is not just the case that law may restrict or regulate indicators but it can also foster their success as far as it provides an 'aura' of legitimacy.[164] This has both a sociological and a normative dimension. Once a particular indicator is legally embedded, users and other stakeholders are more likely to consider it as legitimate. Law-makers also contribute to the normative legitimacy of indicators since, with their 'legalisation', it is then not merely the power or persuasion of the drafter that matters, but also the law-maker who acts on behalf of the users of those indicators.

3 Comparing the Legitimacy of Indicators

Indicators are relevant for comparative law as a means of 'drawing comparisons between places',[165] a topic discussed in Chapter 7 on 'numerical comparative law'. Another question is how to compare the specific law-like features of global social indicators. Marta Infantino suggests that 'comparative law techniques, although traditionally deployed for the comparison of legal systems and rules, can be fruitfully applied'.[166] It is also possible to use the specific topic of the legitimacy of indicators as a way to compare and evaluate them.

[159] Similarly, Merry 2016: 19–20 (false specificity; camouflage of political considerations).
[160] Scamardella 2015 (neo-imperialism); Krever 2013 (neoliberal conception of law); Perry-Kessaris 2011 (economics imperialism).
[161] Merry and Wood 2015: 217. [162] Davis et al. 2015: 18–19.
[163] For this aspect of legitimacy see Section A 3 (a), above.
[164] Bernstein 2004: 10–14 ('legitimacy as legalisation').
[165] *United Nations Rule of Law Indicators Implementation Guide and Project Tools 2011*, p. 1, available at www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf.
[166] Infantino 2015: 122. See also Section A 3 a, above.

Considering the selection of indicators summarised in Table 10.1, it is suggested that, at least, the following ten dimensions can be identified.

First, these indicators differ in the way they make use of objective data (e.g. the OECD Indicators of Employment Protection), subjective data (e.g. the Corruption Perception Index) or combinations of both (e.g. the WGI). Regardless of the method, many of those indicators have been criticised due to problems of measurement and aggregation.[167] Naturally, such flaws are detrimental to the legitimacy of the indicator in question. Apart from such general measurement problems, subjective data can have a possible advantage in terms of procedural legitimacy since surveys can involve the potential users of the indicator at an early stage.

Second, as we have seen, the effectiveness of an indicator is correlated with its sociological legitimacy. A distinction may therefore be made between indicators by drafters which are economically and politically powerful (such as the World Bank) and others which merely rely on persuasion (e.g. the Good Country Index). However, from the perspective of normative legitimacy, it can also be said that these latter indicators may be preferable since they raise fewer concerns about the lack of global structures of democratic governance.

Third, the drafters of the indicators can be international public bodies (such as the World Bank, the United Nations, OECD, European Union) or private ones. The former can have an advantage as far their structures reflect the input legitimacy of their members. However, private bodies too may benefit from their high reputation, for example, the ISO.[168] It can also be the case that the independence and neutrality of a private body fosters its credibility and therefore the input and output legitimacy of the indicator, as for instance may be the case for Reporters Without Borders and its Press Freedom Index.

Fourth, many indicators take the country as the unit of comparison while others address private entities such as universities or corporations (e.g. the global university rankings; the GRI guidelines). In terms of legitimacy, the former indicators may be criticised as far as they bypass principles of international law and democratic participation at the domestic level. Similar concerns about the latter indicators may be more indirect, for example, when the indicator determines the behaviour of the unit and there is little the state in which the unit is based can do to prevent it (e.g. one may think about the global university rankings). Drafters may then respond by way of developing forms of participation and transparency in order to strengthen the indicators' legitimacy.[169]

[167] E.g. Arndt and Oman 2006: 49–76 (for the WGI). See also Chapter 7 at Section D, above.
[168] For standards see also Section B 2 above.
[169] Beisheim and Dingwerth 2008 (for the GRI).

Fifth, indicators may be divided into those which aim to benefit specific groups and those which have a wider range of potential beneficiaries. Often this may derive from the content of the indicators: for example, the Global Competitiveness Report is more focused on economic interests while the Happy Planet Index is a wide-ranging one. Drafters influence how narrow or wide they design their indicators. For example, having a wide scope can be beneficial to the procedural and substantive legitimacy of an indicator as far as it manages to balance all of the relevant interests. However, there is also a trade-off since an indicator which tries to please everyone may become too diffuse to be of use for any of the beneficiaries. The very success of an indicator may also depend on its limited ambition as a mainly technical tool.

Sixth, going beyond the specific drafters, addressees and beneficiaries, some indicators are embedded in a broader network of institutions which support the indicator, while others have a 'slimmer' support structure, such as many of the indicators drafted by private groups. An example of the former are the World Bank's indicators since the main shareholders of the World Bank, other donor institutions, financial institutions, corporations and NGOs all influence the role these indicators play in donor countries.[170] The legitimacy of such indicators may benefit from such a network as far as it makes the indicator more effective and accountable to a larger constituency.

Seventh, while all of the indicators discussed here have a global ambition, not all of them can said to be equally relevant at a global level. For example, the Index of Legal Certainty aims to defend the French civil law model of the world,[171] the global university rankings are mainly focused on Anglophone institutions,[172] and the Failed State Index is mainly relevant for the assessment of countries at the bottom of this list. Broad indicators such as the Rule of Law Index are 'more global' in their ambition but can face the problem of possible mismatches between the indicator and the local context, with the potential to reduce the indicators' legitimacy. The precise design of indicators can then also play an important role: for example, whether they mainly operate by way of global rankings or in a contextual way.[173]

Eighthly, a distinction can be made according to the focus of indicators on economic or wider social goals, for example, consider the Global Competitive Report on the hand, and the UN Global Compact on the other. It also follows that indicators are not necessarily 'left-wing' or 'right-wing'. This is not to say

[170] Similarly, Dubois and Nowlan 2010 (referring to the World Bank's structured decision-making).

[171] See Chapter 7 at Section D 4, above.

[172] E.g. they tend to consider publications in Anglophone journals only.

[173] See, e.g. OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation 2012*, p. III, available at www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf ('the indicators and methods described in this Guide are primarily meant to inform more comprehensive assessments and are neither designed nor suitable for ranking the human rights performance of states').

that there may not be differences. For example, indicators which support economic interests have a natural advantage as far as they are supported by influential multinational corporations. Thus, some indicators are clearly skewed towards economic interests, not dissimilar to other norms of transnational and global law.[174]

Ninth, some indicators have a unique subject matter while others have to compete with indicators which cover similar topics. Examples of the first type are the Global Slavery Index and the Index of Legal Certainty, while the indicators on rule of law and university rankings compete in a crowded field. The general expectation is that indicators which operate in a 'market for indicators' are more likely to be legitimate than 'monopolistic indicators' since their drafters face pressure to fix, at least, technical flaws. But it is also possible that multiple organisations which work on the same topic operate in a cartel-like structure, with the result that flaws or biases remain.[175] Thus, as regards the relationship between indicators, a variety of effects are possible, such as 'cooperation, mutual reinforcement, mimicry, competition and counter-hegemonic moves'.[176]

Tenth, indicators differ in the extent to which they have a system of checks and balances. For example, the World Bank's DBRs initially included an employment law sub-index which penalised countries with high levels of employment protection. After considerable protest, the World Bank decided to drop this sub-index from its DBR rankings.[177] In preparation for the recent versions of the DBR the World Bank also engaged with some of the critics of its report (including the author of this book). This openness to criticism is certainly beneficial for the legitimacy of an indicator.

Overall, it can be seen that the legitimacy of global social indicators shows various nuances which drafters and users of indicators, as well as domestic and international law-makers, need to consider. It should also be noted that the ten dimensions identified here are not independent of each other as there are often trade-offs between increasing the legitimacy in one of those dimensions while decreasing it in another one. Comparing indicators with alternative ways of achieving the same aim, the 'law-like' nature of indicators means that, in principle, law-makers could also address the issues in question. However, the reason indicators have emerged is often that local and national legislation would not be sufficient and that agreement on international legal norms has not been feasible. Thus, indicators may be seen as an effective way to organise a particular field. Due to their soft legal nature, they also have an inbuilt mechanism of checks-and-balances: if a drafter were to ignore all criticism, the perceived legitimacy of its indicator would suffer. But there can also be circumstances where legal intervention may be necessary: for example, where

[174] See Sections A 2 (b) and B 3, above.
[175] Parallel to the indicators of the 'big three' credit rating agencies, see Infantino 2016: 363.
[176] Infantino 2016: 353. [177] See Chapter 7 at Section D 4, above.

an indicator is contrary to certain values (human rights, etc.), law-makers may want to intervene and enact mandatory laws in order to counter the effect of the indicator in question.

D Conclusion

In the past, the problem of state borders was mainly described as one of removing legal rules which were 'obstacles to free and cordial intercourse between the nations'.[178] Transnational and global law go further: while there is no 'end of state',[179] it is the case that state law is weakening. Thus, traditional approaches to comparative law which only deal with comparisons between countries can be misleading as they would over-emphasise the role of state law in today's world. Even more, they may fail to consider the dynamics of legal rules today: fragmentation, dispersion and the possibility that transformations happen any time.[180]

This chapter explained these developments as a trend towards transnational and global law. Despite extensive research in recent years, uncertainties remain how these forms of law should be understood. In the debate about transnational law, the main issues at stake are the conceptualisation and evaluation of these new transnational laws. With respect to global law, the uncertainty is more profound as some regard it as an aspirational category only. However, this chapter took the view that some global law can be identified, in particular if one adopts a wide perspective of what constitutes legal rules. It is also suggested that there is a trend from transnational law to global law stimulated by the rise of private, informal and soft laws.

For comparative law, these new transnational and global laws can become part of a comparative analysis. Here, then, the relationship between these norms is a key topic. This goes beyond the possibility of legal transplants and has to explore the political, economic, social and cultural forces at stake. This line of research may also often include a prognostic dimension about the future evolution of the law in order to be able to assess whether or not these forces drive the legal world in the right direction. Thus, while history is seen as of crucial importance for much of traditional comparative law, transnational and global law turn our attention to the future.

The next chapter addresses 'Comparative Law and Development'. It also offers a further perspective on the topics discussed here. In the present chapter the emergence of forms of 'governance' was seen as a possible reason for a weakening of formal state law.[181] But in the development context there is also the concept of 'good governance', and it is suggested that this 'has given the state a new lease of life even among its strongest adversaries', for

[178] Gutteridge 1949: 156. [179] See Sections A 1 and 3 (a), above. [180] Senn 2011: 212.
[181] See Section A 1, above.

example, by way of urging countries to have an effective 'rule of law'[182] – as the next chapter will explain.

Supplementary Information

Questions for discussion. Why are transnational and global law relevant for comparative law? What are the core concepts and variants of transnational law? Is transnational law the solution to a problem or a problem in itself? How can the concept of 'global law' be understood? What conceptual and normative dimensions of global social indicators are relevant for comparative law?

Suggestions for further reading. For a theoretical perspective on transnational legal orders: Shaffer 2016. For the related concept of a new legal pluralism: Berman 2009. For the idea of a 'rough consensus and running code' in transnational private law: Calliess and Zumbansen 2010. For the possibility of global law: Walker 2014. For global social indicators: Siems and Nelken 2017.

[182] von Benda-Beckmann et al. 2009b: 6.

11

Comparative Law and Development

There are two ways of understanding the title of this chapter: it can either mean 'comparative law' *and* development, or it can refer to *comparative* 'law and development'. Both variants are addressed in the following. In the sense of 'comparative law' *and* development, the chapter considers how insights drawn from comparative law can assist development policy. This reflects the aim of traditional comparative law to provide policy recommendations, yet it also responds to the criticism that traditionalists tend to ignore countries in the developing world.[1] In the sense of *comparative* 'law and development', it is submitted that there is more than one concept of 'law and development': for instance, one may distinguish between law and economic development and law and human development, or between top-down and bottom-up approaches.

This chapter is structured as follows: to set the scene, Section A outlines the evolving ideas of law and development. Section B deals specifically with the relationship between the rule of law and development, in particular its 'thin' or 'thick' versions as applied in different countries. Section C turns to the critics of law and development, and Section D concludes. Case studies from China, Russia and Afghanistan will be used to illustrate the debate about the rule of law reforms.

A Evolving Ideas of 'Law and Development'

The mainstream narrative is that law and development is associated with post-Second World War initiatives led by the United States and international organisations such as the World Bank ('Washington Consensus'). However, we may have reached a new phase now ('Post-Washington Consensus), as the second part of this section will discuss.

1 Towards the 'Washington Consensus'

The literature on law and development typically distinguishes between various phases starting in the 1930s or, more frequently, after the Second World War.[2]

[1] See Chapter 2 at Sections A 1 (b), B 1 (c) and C 2, above.

[2] See, e.g. Cooter and Schäfer 2011: 196 (1930–75; 1975–90; 1990–2000; since 2000); Kennedy 2008 (1945–70; 1970–80; 1980–95; 1995–2005); Trubek 2007 (state-led, socialist and neoliberal

Yet these ideas can also be characterised in more evolutionary terms, going back further in time.

The general notion of 'development' is a prominent feature of the Enlightenment's optimism in shaping the course of history.[3] This can be seen as a predecessor of the view that development often occurs in stages. For example, in the discourse about economic development, the usual process is said to be one where agrarian societies are succeeded by pre-industrial, industrial and finally information societies.[4] In legal research, Sir Henry Maine's *Ancient Law* provided a parallel evolutionary view that related legal development to the level of civilisation: 'primitive societies' were said to have a pre-customary law which then becomes customary law and finally positive law in progressive societies.[5] In particular, Maine famously suggested that societies move from rights and obligations that derive from 'status' to 'contract'.[6] Similarly, but more explicitly, Max Weber related the economic success of the capitalist economies of the West to their formal-rational legal systems supported by professional legal institutions – and distinguished those from forms of order of non-Western countries.[7] In their pure form, Maine and Weber's views are today seen as inappropriate and ethnocentric as they assume a superiority of Western laws and institutions.[8] Yet the desire for clear rules, professional institutions and effective enforcement of contracts remains an important element of contemporary approaches to law and development.

After the Second World War, the development discourse was often phrased as the need for countries to 'modernise' in order to stimulate their development, subsequently coined 'modernisation theory'.[9] How exactly this could be achieved has, however, varied across time. In the first three decades, external help and an active state were often seen as crucial for economic development. In Western Europe, foreign aid from the United States, along with the emerging European integration and the positive role of the state in upholding a liberal economic order, contributed to the fairly rapid reconstruction.[10] Many Latin American countries pursued a strategy of 'import substitution', meaning the attempt both to foster domestic production and to reduce foreign imports.[11] More specifically related to 'law and development' were

phases of the last fifty years); Trubek 2014 (1965–80; since late 1980s); Cao 2016: 69–130 (1960s and 70s; since 1980s).

[3] See Glenn 2001: 40. [4] Cf. Gilpin 2001: 176–7; Easterly 2006: 21.

[5] Maine 1861. See also Donovan 2008: 42–4; Zweigert and Kötz 1998: 9; David 1985: 4; Tamanaha 2001: 32; de Cruz 2007: 228.

[6] Maine 1861: 100.

[7] Weber 1968: 641–900 (original from 1922). He also refers to the role of religion, e.g. in Weber 2008 (original from 1905).

[8] On Maine see, e.g. Corcodel 2014: 93; Menski 2006: 88; Bennett 2006: 652; Riles 1999: 228. On Weber see, e.g. White 2001: 52–3 and Chapter 12 at Section C 1, below.

[9] See Nolte 2015.

[10] The role of the state was emphasised in the German 'ordoliberal' model: see Schnyder and Siems 2013.

[11] E.g. Prebisch 1959.

US initiatives to promote law reform in Africa and Latin America. Here, the focus was not on the positive rules but on a modernisation of institutions, such as legal education and the legal profession.[12]

This 'first wave' of law and development was, however, not seen as very successful, in particular due to the apparent mismatch between the US models and the local conditions in Africa and Latin America.[13] It is therefore not clear whether these initiatives really had a positive economic and social effect on the countries in question. In the late 1960s and the 1970s, there was also a backlash against the influence of the United States. This reaction had a strong political dimension. For instance, the 'dependency theory' and the 'world systems theory' argue that the poverty of African and Latin American countries was mainly a result of their exploitation by Western countries.[14] Similar to the dependency theory, though less radical, was the establishment of the UN Conference on Trade and Development (UNCTAD) in 1964 aimed at promoting a 'development-friendly integration of developing countries into the world economy'.[15]

Yet in the late 1970s, with the politics of Ronald Reagan in the United States and Margaret Thatcher in the United Kingdom, a fairly radical version of economic liberalism became the dominant paradigm. The corresponding economic policy for development has been termed the 'Washington Consensus', referring to the seat of the US Treasury, the World Bank Group and the International Monetary Fund (IMF).[16] Among the typical recommendations of this 'consensus' were the liberalisation of trade and investment, the reduction of public spending, privatisation, deregulation and strong protection of property rights.

From the outset, these policies were controversial. The desire for liberalisation of trade and investment was, according to dependency and world systems theories, entirely for the benefit of the developed world but detrimental to developing countries. As far as the Washington Consensus advocated reduction of public spending, privatisation and deregulation, such a relatively weak and passive state was challenged by the notion of the 'developmental state'. This term refers to the role which an active state plays for economic development. It was initially used for Japan's post-war experience as the activities of its Ministry of International Trade and Industry (MITI) were said to have accounted for Japan's economic miracle; subsequently, similar ideas have been suggested for the positive experience of other East Asian countries.[17]

[12] See, e.g. Kroncke 2012: 492; Trubek and Santos 2006: 5; Dezalay and Garth 2002: 245; Mattei and Nader 2008: 72; Krishnan 2012 (specifically on the reforms sponsored by the Ford Foundation in Africa); also Gardner 1980 (calling it 'legal imperialism').

[13] Trubek and Galanter 1974. See also the literature cited in the previous note.

[14] E.g. Cardoso and Faletto 1979; Wallerstein 1979. See also Merino Acuña 2012.

[15] See http://unctad.org/en/Pages/AboutUs.aspx and UNCTAD 2006.

[16] Williamson 1989. See also Trubek and Santos 2006: 6–7.

[17] Johnson 1982 (for Japan). For comparisons see Clift 2014: 183–94 and Section B 2, below.

The Washington Consensus' protection of property rights is directly related to legal rules, but, as a typical feature of recent trends in law and development, it has mainly been shaped by economists (and has often been overlooked by legal scholars).[18] For example, the Peruvian economist Hernando de Soto and his think-tank Institute for Liberty and Democracy, on the one hand, emphasise that economic development depends on formal protection of property since informality tends to foster corruption and inefficiencies. On the other hand, they suggest that law should be business-friendly: for example, it should not impose excessive formalities to have a business registered.[19] Similar but more specific suggestions to foster economic development can be found in books by Kenneth Dam, and Bob Cooter and Hans-Bernd Schäfer, both referring to the need for secure property rights, rules of investor protection and an effective judicial system.[20] Empirical work by economists claims to have found that those and related reasons are more decisive for economic development than, for example, geographic and cultural differences.[21] Here, the role of law is often phrased in terms of the importance of 'institutions' and 'governance' which includes some political factors such as the accountability of the government and political stability.[22]

International development organisations have played an important part in this phase. When the World Bank and the IMF provide funds to countries, this is often made conditional upon structural improvements of their legal systems.[23] The World Bank and the IMF also produce so-called Reports on the Observance of Standards and Codes (ROSCs) in which they examine whether countries follow international soft laws, such as the G20/OECD Principles of Corporate Governance and the FATF anti-money laundering recommendations.[24] In addition, various parts of the World Bank Group have developed quantitative comparative measures on laws and law enforcement. These were already discussed earlier in this book,[25] notably the Doing Business Reports and the World Bank's Worldwide Governance Indicators.

[18] Barros 2010: 2 (for de Soto). See also Dezalay and Garth 2002 (on the role of economists in development practice). See also Chapter 12 at Section B 3, below.

[19] See, e.g. de Soto 1989; de Soto 2000; de Soto 2008; and www.ild.org.pe.

[20] Dam 2006; Cooter and Schäfer 2011. For the role of formal property rights see also Trebilcock and Prado 2014: 63–70.

[21] E.g. Acemoglu et al. 2002; Acemoglu et al. 2005; Rodrik et al. 2004. See also Haggard et al. 2008: 208.

[22] See also Acemoglu and Robinson 2012 (suggesting that inclusive states produce better laws and institutions); Collier 2007: 135–56 (recommending international legal prototypes to tackle 'bad governance'); Barro 1997 (using political stability as a measure of strong property rights).

[23] See www.worldbank.org/conditionality and www.imf.org/external/np/exr/facts/conditio.htm.

[24] See www.worldbank.org/en/programs/rosc and www.imf.org/external/NP/rosc/rosc.aspx. For these examples see Chapter 10 at Section B 1, above.

[25] See Chapter 7 at Section D 4 and Chapter 10 at Section C, above.

2 'Post-Washington Consensus'

Since the 1990s, approaches critical to the Washington consensus started playing a more pronounced role. This has led to at least some changes to the prior 'consensus', and therefore a possible 'Post-Washington Consensus'.[26]

For example, in 1993 the World Bank established an Inspection Panel which enables private parties to complain about negative effects of projects funded by the World Bank.[27] This is in line with the emergence of compliance committees, inspection panels and dispute settlement bodies in other international groups and organisations.[28] Moreover, in 1998 the World Bank launched a new initiative, called the Comprehensive Development Framework (CDF). This CDF emphasises a shift from 'short-term macroeconomic stabilisation and balance-of-payment corrections' to 'longer-term structural and social considerations, such as expanding and improving education and health facilities, maintaining infrastructure, and training a new generation of public officials', all of this being based on a partnership between 'governments, donors, civil society, the private sector and other stakeholders'.[29] There is also said to be a growing recognition of the relevance of human rights for the fulfilment of the World Bank's obligations.[30]

This does not mean that the World Bank has undergone a complete paradigm shift. The articles of agreement of the divisions of the World Bank Group limit their activities: they are not allowed to interfere in the political affairs of the recipient countries, and they must ensure that the proceeds are only used according to 'considerations of economy and efficiency' but 'without regard to political or other non-economic influences or considerations'.[31] It has also been doubted whether the CDF is taken seriously enough since parts of the World Bank Group, in particular, those associated with the Doing Business Report, are said to focus only on economic development and to apply a 'one size fits all' approach.[32] Thus, the current approach of the World Bank is best regarded as a mixed one, as different parts of the group follow different priorities in terms of law and development.[33]

[26] The first prominent use of this term was by Stiglitz 1998. See also Rodrik 2006: 978 (calling it the 'augmented' Washington Consensus).

[27] See www.worldbank.org/inspectionpanel.

[28] See Cassese 2010: 771 and Shapiro and Stone Sweet 2002: 75 (both drawing parallels with previous versions of the French Conseil d' État); de Jong and Stoter 2009: 312 (on sceptics of the work of the inspection panel). See also Chapter 9 at Section C 2 (a), above.

[29] These quotes are from https://web.archive.org/web/20121111030016/www.worldbank.org/cdf. See also Clegg 2013 (for growing, though limited, stakeholder engagement of World Bank and IMF).

[30] See van Genugten 2015 (also for the IMF).

[31] IBRD Articles of Agreement, arts. 4(10), 3(5)(b). Similar are IDA Articles of Agreement, arts. 5(6), 5(1)(g); IFC Articles of Agreement, art. 3(9). See also Danino 2006.

[32] Faundez 2010; also Rittich 2004.

[33] Sarfaty 2009; Santos 2006: 258–9; Ohnesorge 2009: 1624.

Of course, countries and other organisations also play an important role. The competent government departments, government-sponsored agencies and development banks of developed countries (and macro-regional organisations such as the EU) not only provide development aid, but also try to influence the laws of recipient countries. This can mean that there is a 'battle of advisors' since every country tends to promote its own legal rules.[34] But there are also similar objectives as far as most Western countries aim to promote democratic constitutions and human rights.[35] By contrast, the growing influence of China in the developing countries of Africa and Asia is more economically oriented: thus, it does not aim for 'law and development' beyond securing its own investments.[36]

At a global level, the goals of the Millennium Declaration, adopted by the UN General Assembly in 2000, cover a variety of economic and non-economic topics, for example, equality and solidarity, the protection of human rights and the environment ('sustainable development').[37] These general aims were specified further in the Millennium Development Goals and then the Sustainable Development Goals.[38] To these goals, the UN also added indicators, whereby the Sustainable Development Indicators include a number of topics that measure the implementation of legal rules, for example, on anti-discrimination policies, access to justice and the rule of law.[39] Other UN bodies also promote a wide notion of development, for example, the UN Development Programme (UNDP), in particular through its Human Development Indicators (HDI).[40] The UN agency for human settlements (UN-Habitat) also urges countries to implement legal reforms that provide 'socially and environmentally sustainable towns and cities', in particular for the world's urban poor.[41]

Wider non-economic interests are also supported by intergovernmental agencies such as the World Health Organization (WHO), the International Labour Organization (ILO), the Intergovernmental Panel on Climate Change (IPCC), as well as NGOs and other private groups such as Greenpeace, Amnesty International, Oxfam and the World Social Forum.[42] In addition, the balance between economic and non-economic interests is a frequent topic

[34] Schimmelfennig 2012 (for rule of law promotion by the United States, EU, United Kingdom, France, Germany).
[35] See also Chapter 9 at Sections A 3 and C 3, above.
[36] For China's non-intervention policy see Condon 2012.
[37] See www.un.org/millennium/declaration/ares552e.htm. The concept of sustainable development goes back to World Commission on Environment and Development 1987.
[38] See www.un.org/millenniumgoals/ and https://sustainabledevelopment.un.org/sdgs.
[39] See ss. 5.1, 10.3 and 16.3 of the draft indicators, available at https://sustainabledevelopment.un.org/topics/indicators.
[40] See http://hdr.undp.org/en/data/ and see Chapter 10 at Section C, above.
[41] See www.unhabitat.org. See also McAuslan 2003: 106–33 (discussing this approach of 'bringing the law back in').
[42] For a good overview see Yeates and Holden 2009.

of the World Trade Organization (WTO), albeit, with developed, transitioning and developing countries disagreeing on major policy issues.[43]

The main intellectual basis for this emerging comprehensive and people-centred view of development comes from Amartya Sen, the winner of the Nobel Memorial Prize in Economic Sciences in 1998.[44] His suggestion is that of 'development as freedom', meaning that the main aim should be to enable everyone 'to be able to do and be'. This requires elementary 'capabilities',[45] not simply income and wealth, but, for example, education, social security, personal liberties, equal opportunities and fairness. A report, co-authored by Sen, also refers to subjective well-being ('happiness') as a possible measure of social progress.[46] Specifically for law and development, Sen's view thus implies that the essence of courts and rights is not primarily to secure existing entitlements but also to provide justice for the poor.[47] As a result, law and justice are not merely seen as a means to another end (say, for economic development); rather, they are an important part of the development process on their own.[48]

B Development and the Rule of Law

As already seen in the previous section, the relevance of law is often emphasised in the general debate about development policy. Frequently, this is associated with programmes supporting the rule of law. For example, the rule of law is sponsored by various national, regional and international organisations and agencies, such as USAID, the American Bar Association, the European Bank for Reconstruction and Development, the World Bank Group and the UN.[49] This section provides a general discussion of these rule of law initiatives and their application to developments in China, Russia and Afghanistan.

1 Typology and Purpose(s)

Initiatives promoting the rule of law are said to have been well received since they 'enjoy wider acceptance across ideologies, religions and political regimes

[43] See, e.g. Lang 2011; Gilpin 2001: 229–32.

[44] Sen 1999. See also Twining 2009a: 219–24; Tamanaha 2011b: 232–3; Ordor 2015: 336.

[45] For this concept see also Nussbaum 2011 and the website of the Human Development and Capability Association, available at www.hd-ca.org.

[46] Stiglitz et al. 2008 (report commissioned by the French government). For legal policy and the growing field of 'happiness studies' see also Huang 2010.

[47] Armytage 2009: 10. For programmes on legal empowerment of the poor see also Sections B 1 and C 4, below.

[48] Sen 2006: 40. See also Sen 2009; Trubek 2014: 319–20.

[49] Finnegan 2006: 110; Armytage 2009: 5; Humphreys 2010: 123–38, 155 (in particular on the United States and the World Bank); Schimmelfennig 2012 (comparative analysis).

than democracy and many allegedly universal human rights'.[50] But this is a contentious statement, considering disagreements about the scope of the rule of law. Some attempts have been made to provide general definitions, for example, that the rule of law addresses the 'problem of arbitrary power' and that it aims to establish a 'collective control of power' as a kind of 'social equality'.[51] More often, however, literature and practice use lists of criteria, though with some doubts on which specific elements should be included.[52] A convenient way to organise them is between procedural (or formal) and substantive criteria. The distinction between a thin and thick version may be seen as related, namely, that a thin version is mainly procedural while a thick one also includes substantive criteria. Yet, as will be shown, it can also be said that the thickness of the rule of law is a matter of debate for both procedural and substantive criteria.

Starting with the procedural aspects, the 'rule of law' can be distinguished from the 'rule by law', the latter meaning that the head of state just uses the law in an opportunistic way in order to implement his or her wishes. By contrast, the rule of law requires that there are clear, transparent, general and prospective laws which apply to everyone (even the ruler). This requirement also implies a preference for unified formal laws, as opposed to pluralistic systems with customary and other informal laws.[53]

In addition, institutions have to apply these laws in a reliable and equal way: for example, the judiciary, the public prosecution, the police and the administrative authorities.[54] These institutions, and their constituents, should not overstep their powers. In particular, this makes it necessary to prevent corruption, usually defined as the abuse of public power for personal gain.[55] The problem of corruption is said to be particularly severe in the developing world since it tends to be reinforced by inequality and poverty.[56]

The rule of law literature often discusses the judiciary in more detail. Frequent topics are the structure of courts, the operation of trials and the availability of access to justice and effective law enforcement. A typical recommendation is that of judicial independence, with various sub-categories suggested, such as internal and external, structural and behavioural, and institutional, personal, functional and financial independence.[57] Less frequently, reference is made to the role of legal education and practising lawyers. But it is clear that without appropriate

[50] Peerenboom et al. 2012: 316. [51] Krygier 2016; Gowder 2016.

[52] For the following see Trebilcock and Prado 2014: 49–50; Møller and Skaaning 2014: 13–27; Tamanaha 2004: 91; Trebilcock and Daniels 2008: 29–37; Carothers 2010: 21; Krygier 2012: 235–40; Santos 2006: 258–9; McCorquodale 2010.

[53] So explicitly World Development Report 2017: 15.

[54] See, e.g. Trebilcock and Prado 2014: 50–5; Trebilcock and Daniels 2008.

[55] See, e.g. www.transparency.org/what-is-corruption/.

[56] See Trebilcock and Prado 2014: 147–62; Uslander 2008; Kumar 2011.

[57] Peerenboom 2010a: 71; Dam 2006: 106, 111; Andenas and Fairgrieve 2006: 23.

legal education, however this may be structured, legal institutions cannot function well. Recent research has also elaborated on the role of practising lawyers for the rule of law, not only in terms of representing their clients, but also as brokers between different interests and as local activists representing the interests of the poor.[58]

It is more controversial whether those procedural aspects of the rule of law also include standards about the way laws are enacted. Sometimes it is said that certain principles of 'good governance', such as checks and balances, should be available. Typically, this leads to the requirement that law-making should be based on principles of democratic legitimacy.[59] Yet, making democracy a sub-category of the rule of law seems to stretch this term too far. It is also not in line with the approach of international organisations such as the UN and the World Bank which try to promote the rule of law in democratic as well as non-democratic countries.

Beyond procedural (or formal) aspects, most concepts of the rule of law embrace some substantive criteria. In one variant this refers to secure property rights,[60] and possibly also some more specific aspects of business law which are seen as preconditions for economic development.[61] Such a view may then be associated with the political 'right' and economic liberalism since it mainly benefits business interests and, in an international context, the countries and foreign investors of the developed world.[62] But, today, it is more common to suggest that the rule of law also means something like 'rule of good law'.[63] Typically, this will refer to at least some ideas of 'justice',[64] however this may be defined.

Controversial is the relationship between the rule of law and human rights. The Preamble to the Universal Declaration of Human Rights of 1948 states that 'human rights should be protected by the rule of law', from which one may infer that they are not themselves part of the rule of law. Yet, a UN report from 2004 takes the position that the rule of law refers to laws 'which are consistent with international human rights norms and standards'.[65] A book by the late British judge Lord Bingham also includes 'adequate protection of fundamental human rights' as one of the elements of the rule of law.[66] It may also be said that some of the procedural elements of the rule of law, for instance, the right

[58] Munger et al. 2014; Munger 2012; Dezalay and Garth 2011b. See also Daniels and Trebilcock 2004: 115, 117, 126–7.

[59] E.g. Sarkar 2009: 165 and Humphreys 2010: 204 (both also referring to need to build a civil society).

[60] See Mattei and Nader 2008: 14.

[61] Sarkar 2009: 165 (referring to structural legal reform, e.g. commercial law reform, privatisation, capital market development and microfinance).

[62] Ohnesorge 2007: 103 ('neoliberal rule of law'); Mattei and Nader 2008 (developed world 'plunders' resources of developing countries); and see Section C, below.

[63] Shapiro and Stone Sweet 2002: 166. [64] Tamanaha 2004: 91.

[65] See www.un.org/ruleoflaw/what-is-the-rule-of-law/.

[66] Bingham 2010b. See also McCorquodale 2010: 29.

to a fair trial, are typically seen as a human right anyway.[67] Naturally, including topics such as freedom of speech and a free press would be more controversial in some parts of the world. In addition, some extend the rule of law to rights to social welfare, which would then make the rule of law a 'progressive programme'.[68]

These controversies can be related to the question about the actual function of the rule of law. Three positions can be distinguished. The first view is a conceptual one, namely, that compliance with the rule of law explains why certain countries have been economically successful. This view goes back to Max Weber, who argued that the rationality and predictability of Western legal systems contributed to the rise of capitalism.[69] More recently, the historian Niall Ferguson identified the rule of law and representative government to be one of the six 'killer apps' that were key to Western ascendency, in particular due to private property rights and representation of property owners in elected legislatures.[70] Quantitative research has found that many of the elements said to belong to the rule of law are positively correlated with economic prosperity, though whether there is a causal direction is less certain.[71] There is also a positive correlation between the rule of law and survey data on 'happiness', controlling for the effect of economic development.[72]

Secondly, the rule of law may be used as a target that countries are encouraged to achieve. The rationale for this target may be moral or ethical, as far as the rule of law is seen as reflecting universal ideas of justice that have an intrinsic value,[73] not just 'Western liberal ideas'.[74] But, here too, the main reason may be an economic one. In particular, it has been argued that the World Bank and the United States follow a formal definition of the rule of law that values it only for its 'ability to provide a stable investment environment and the predictability necessary for markets to operate'[75] and as a 'necessary precursor for a country's integration into the global economy'.[76]

[67] See, e.g. International Covenant on Civil and Political Rights 1966, art. 14; European Convention on Human Rights, art. 6.

[68] Cf. Tamanaha 2011b: 220, 239 (on use of the rule of law by both conservatives and progressives).

[69] See Section A 1, above and Chapter 12 at Section C 1, below.

[70] Ferguson 2011; also Ferguson 2012. Similarly, Fukuyama 2014: 42–3 (as one of elements of political development). The historical variant of the New Institutional Economics also refers to the role of institutions, e.g. North 1990.

[71] World Development Report 2017: 96; Acemoglu et al. 2014; Haggard et al. 2008: 211; Daniels and Trebilcock 2004: 102; McCorquodale 2010: 38. For the causality debate see also Chapter 7 at Section A, above and Chapter 12 at Section B 3, below.

[72] Veenhoven 2012: 460–1. For the data see http://worlddatabaseofhappiness.eur.nl.

[73] See Tamanaha 2004: 137; Daniels and Trebilcock 2004: 104; Gopal 2009: 54. See also Section A 2, above (for Sen) and more generally Chapter 9 at Section C 3 (b), above (for human rights).

[74] Chen 2016: 1021 (therefore reluctant use in China).

[75] Krever 2011: 288. Similarly, Barron 2005: 15 (at the heart formal definition).

[76] Humphreys 2010: 215, also 139–40 (economic position inconsistent with the conceptual origins of the rule of law).

However, it has also been suggested that the economic aim is like a Trojan horse as these reforms will then 'take on a life of their own'.[77] Some organisations have also developed indicators with both ethical and economic elements. Naturally, this is the case for those who try to combine all possible elements of the rule of law, outlined above.[78] The World Justice Project even goes as far as saying that the rule of law can lead to the 'eradication of poverty, violence, corruption, pandemics and other threats to civil society'.[79] There are also mixed rationalities for the various principles on judicial integrity and independence, drafted by private groups, for instance, groups of judges, but also the UN:[80] here, the aspiration may be that those principles can help economic development,[81] but they are also based on the belief that judicial integrity has an intrinsic value.

Thirdly, criticising such a view, it can be suggested that effectively promoting the rule of law does not mean imposing international 'best practices', but developing rules that are appropriate for the country in question.[82] Such a view can also be associated with a position that regards the rule of law as 'a culture and daily practice' arising from the 'struggles within each society'.[83]

For example, it has been observed about judicial independence that it is 'an instrumental value, not an end in itself', that 'giving more independence to corrupt judges, makes things worse', and that it is very much a feature of individualist societies with a technocratic model of judicial determination which may not be desired elsewhere.[84] It has also been argued that judicial independence may be weaker (or at least different) in civil than in common law countries, since in the former's career judiciaries some monitoring of younger judges is inherently useful.[85] Political differences also play a crucial role: for instance, it has been said that judicial independence is a way to enforce legislative deals in multiparty systems whereas in countries where one party is dominant other forms of control, such as a career judiciary, are more suitable.[86] And in authoritarian regimes the use of judicial independence may have

[77] Stephenson 2000: 78.

[78] See in particular the WGI and the WJP discussed in Chapter 7 at Section C 4, above. For indicators more generally see also Chapter 10 at Section C, above. For quantitative measurements of the rule of law see also Section 3, below.

[79] See http://worldjusticeproject.org/sites/default/files/files/introduction_key_findings.pdf.

[80] Resources at www.judicialintegritygroup.org.

[81] E.g. La Porta et al. 2004.

[82] Zumbansen 2018; Garapon 2010: 37; Peerenboom 2010a: 72; Hendley 2004: 611 (no 'silver bullet').

[83] International Development Law Organization (IDLO), available at www.idlo.int/what-we-do/rule-law and Munger et al. 2014: 355. See also Kahn 2003 (rule of law as cultural practice); Bell 2006c: 1272 (comparing English 'rule of law' with French 'l'état de droit' and German 'Rechtsstaat').

[84] For these quotes see Ruskola 2002: 231 note 219 (with reference to Ramseyer 1994); Peerenboom 2010a: 10; Garapon 2010: 44; Zhu 2010: 57. For the final point see also the empirical work by Licht et al. 2007.

[85] See Guarnieri 2010: 236–7; Shapiro 1981: 151, 156; also Joireman 2004 (presenting quantitative evidence). But there are also differences between common law countries, see Lee 2011.

[86] Ramseyer and Rasmusen 2003: 125–6.

Table 11.1 Examples, variants and functions of the rule of law

Example	Relevant variant of the rule of law	Main function of rule of law in debate
China, since 1980s	Mainly formal and thin	Explanation for economic development
Russia, since 1990s	Mainly substantive and thick	International target for countries in transition
Afghanistan, since 2000s	Mainly substantive and thick	Rules appropriate for country in question

strategic reasons that are quite different from those in democratic countries.[87]

Thus, instead of international blueprints, the suggestion is that a starting point is asking the question of 'what is wrong?'.[88] Examples of such an approach are the initiatives to improve access to justice supported by the United Nations Development Programme on legal empowerment of the poor.[89] Here, what matters is that law reformers identify the relevant problem precisely: for instance, it may then be explored whether weaknesses in access to justice derive from deficient procedural rules, poor protective rights, lack of qualified and accessible lawyers, or power imbalances between individuals and multinational corporations.[90]

2 Rule of Law in China, Russia and Afghanistan

The following three examples deal with rule of law developments in periods of transition in China, Russia and Afghanistan. These examples serve as test cases for showing the spread of the rule of law idea and whether these reforms can be seen as successful. They are also directly related to the different functions and variants outlined in the previous section, as Table 11.1 illustrates.

The People's Republic of China is frequently cited as an example showing that rapid economic development in the last thirty years did *not* require compliance with the rule of law. In particular, it is said to be 'impossible to make the case' that formal legal institutions, such as strong protection of property rights, have contributed to China's economic success.[91] This lack of a rule of law is distinguished from the use of a 'rule by law', being in line with the pre-communist

[87] See further Section 2, below. [88] Garapon 2010: 48.

[89] See www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/legal-empowerment-strategies-at-work.html. See also the World Bank's Justice for the Poor programme, discussed in Section C 4, below.

[90] See also Gramatikov and Porter 2011; Dias and Welch 2009; Baxi 2009: 94.

[91] Clarke et al. 2008: 376; also Clarke 2003; Upham 2009; Trebilcock and Veel 2008: 441; Allen et al. 2005; Allen and Qian 2010.

preference of Chinese law for coercion and criminal sanctions.[92] It has also been suggested that the idea of norms that bind the ruler of a country is tied to cultures where religion plays (or used to play) a strong role, which is not said to be the case for China and other East Asian countries.[93]

Thus, exploring how Chinese society 'works' and what explains China's recent economic progress, some claim that there is now an alternative Chinese model for development, called the 'Beijing Consensus'.[94] For example, this may refer to reasons such as the role of informal institutions, such as personal connections, business networks, trust and mediation,[95] political decentralisation and the corresponding competition between local governments,[96] the ability and willingness of government officials to solve disputes,[97] as well as the general benefits of stability associated with a strong state committed to economic development.[98]

However, the rule of law has also made some progress in China, at least as a 'thin' version that excludes political rights, Western-style democracy and, for the most part, accountability of the ruling elite.[99] The apparent parallel is to the development of other countries in East and South East Asia. Singapore in particular has often been seen as an example of a well-functioning legal system without the move towards a multiparty democracy.[100] A more general study on the role of law in Asian economic development between 1960 and 1995 also found that legal institutions mattered in order to achieve the respective economic policies that these countries were trying to pursue.[101]

This trend can most clearly be seen in a 2014 Party communique referring to the aim to implement a 'socialist rule of law with Chinese characteristics'.[102] The 'socialist' elements show in frequent references of this document to the role of the Party. Indeed, it is only a minority view in China that control mechanisms of the rule of law should be seen as restrictions to the Party's role.[103] However, the communique also endorses more conventional aspects of the rule of law, such as the role of the constitution and the judiciary and the advance of 'law-based governance'. The growing use of legislation also shows

[92] Cf. Glenn 2014: 321–5; Mattei and Nader 2008: 72; Ruskola 2002: 189.
[93] Fukuyama 2014: 11–12. For the role of culture see also the Afghan case, discussed below.
[94] For the discussion see Chen 2017.
[95] See Chapter 4 at Section C 1, above.
[96] C. Xu 2011; Daniels and Trebilcock 2004: 108.
[97] Du 2011: 281 (thus, replacing courts).
[98] Du 2011: 267 ('helping-hand regulatory state'); Yulin and Peerenboom 2010: 110, 120; Fukuyama 2014: 354–85. Generally also Gilson and Milhaupt 2011 (on 'economically benevolent dictators'); Trebilcock and Prado 2014: 135, 180 (on role of bureaucracies and 'new developmental state').
[99] Yu 2014; Head 2010; Peerenboom 2002. More sceptical still Lubman 1999.
[100] See, e.g. Silverstein 2008; Harding and Carter 2003. More sceptical Rajah 2012 (Singapore has an 'authoritarian rule of law' that is 'liberal in form but illiberal in content').
[101] Pistor and Wellons 1999. But see also Section C 1, below.
[102] Communique of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China, 23 October 2014, available at www.china.org.cn/china/fourth_plenary_session/2014–12/02/content_34208801.htm. See also Garrick and Chang Bennett 2016.
[103] Seppänen 2016 (analysing the ideological divisions of the rule of law discourse in Chinese legal academia); Li 2016 (for power of Party over other state institutions).

in the developments of the last three decades: for example, modern Chinese business laws have strengthened the protection of shareholders and creditors, and special laws have been enacted to stimulate international investments and joint ventures.[104]

A frequent point of discussion is the role of courts and lawyers in today's China. Empirical data show that judicial enforcement has become more important, and that the number of law students, lawyers and judges has increased.[105] Recent research has also rejected 'wholesale denunciations of a lack of judicial independence'.[106] Clearly, one has to distinguish between cases: while in political cases, or in those that involve important socio-economic issues, individual judges may be put under pressure, this is different for the mass of more routine ones.[107] There are also pronounced regional differences, as research has shown that professionalism and independence has grown in Shanghai and other commercial centres.[108] Finally, it is helpful to distinguish between the different elements of judicial independence, for example, trends pointing towards the strengthened role of merit for recruitment and promotions but also formal and informal hierarchies and the intervention of local party committees that may restrict individual judges.[109]

There is disagreement on why these developments towards the rule of law have occurred. First, a cynical response is that non-democratic regimes mainly grant some powers to judges to facilitate the enforcement of controversial policies, to control administrative personnel and to subjugate political opponents.[110] Secondly, a more positive but equally strategic interpretation is that there is a genuine interest to improve property rights and law enforcement in order to stimulate international trade and investment – and possibly also to respond to pressure by foreign states and domestic economic elites.[111] Thirdly, it is possible to go further and say that in the increasingly differentiated Chinese society, morals and custom can no longer meet the interest in a stable order, and therefore improvements in the rule of law respond to a more comprehensive emphasis on law in the population.[112]

[104] Zhou and Siems 2015; Yao and Yueh 2009: 754, 756. See also Chapter 8 at Section B 3, above (for legal transplants).

[105] For the former see Clarke et al. 2008; Liebman 2013. For the latter see Gu 2014: 502–4; Yu 2014: 52–9.

[106] Peerenboom 2010a: 4.

[107] Yulin and Peerenboom 2010; Guarnieri 2010: 239 (calling this a 'bifurcated structure'). See also Stern 2013 (on environmental litigation, as sitting 'near the boundary of the politically permissible'); Li 2017 (developing a 'power logic' based on power relations between litigants and court).

[108] Pei et al. 2010; Henderson 2010: 31.

[109] See Peerenboom 2010a: 74–9; Guarnieri 2010: 243; Gu 2014: 498, 501.

[110] Ginsburg 2010c: 249–50. For a detailed analysis of courts in authoritarian regimes see Ginsburg and Moustafa 2008; Root and May 2008.

[111] Kroncke 2016: 228–32 (US influence); Y. Wang 2014 (need for cooperation from interest groups that hold valuable mobile assets); Gu 2014: 519 (domestic influence). See also Harding and Nicholson 2011: 2–4 (on reasons for new courts and judicialisation of disputes in Asia).

[112] Dam 2006: 12–13. See also Chapter 4 at Section C 2 (a), above.

It seems likely that all three reasons play a role. The question remains how far it can be said that any improvements to the rule of law have really 'mattered', given the fact that they only occurred after or parallel to China's recent economic growth. Yet, this 'wrong' sequence does not prove that law plays no role in economic development. Simple causal models overlook the fact that the economy and the law typically co-evolve.[113] It has also been suggested that the sustainability of economic growth in China now depends on improvements to the rule of law: it can reduce its over-reliance on export-led growth,[114] and if such improvements were not to happen, entrenched interest groups, such as corrupt officials, may 'block the reform, obstruct development, and even threaten the political stability of the nation'.[115] Thus, the Chinese experience should not be seen as evidence that the rule of law does not matter.

In Russia, by contrast, it may be argued that legal reform based on an international model of the rule of law was supposed to come first. In the early 1990s, Russia, as well as the other countries of the former Soviet sphere of influence, faced the challenge of how to move to modern market economies as quickly as possible. The hope was that the rule of law, as apparently successful in Western Europe and North America, could be an important tool. Yet, as we will see, this has not been a smooth transition.

The fall of communism did not mean that in Eastern Europe and Russia entirely new legal systems had to be created. To some extent, socialist laws and institutions could be modified and, to a further extent, countries could return to their pre-communist legal heritage.[116] But it was also inevitable to transplant new laws, in particular on economic matters.[117] Law reform has also addressed institutional aspects, in Russia, for example, leading to new courts, such as the Constitutional Court established in 1991, new administrative bodies such as media complaint councils,[118] as well as an expansion of legal education and training.[119] To be sure, quick institutional reforms are unlikely to work perfectly. Thus, it was suggested that arbitration could be a temporary substitute,[120] and in company law the Russian legislator explicitly followed the model of a 'self-enforcing law' that aimed to provide shareholder protection with minimal need to resort to courts.[121]

[113] For China see Chen et al. 2017; Clarke et al. 2008: 378. More generally see Armour et al. 2009b; Siems and Deakin 2010: 135 and Chapter 12 at Section B 3, below.
[114] Kurkchiyan 2010: 1.
[115] C. Xu 2011: 1140; also Dam 2006: 77. See also Section C 2, below (on the middle-income trap).
[116] See Kühn 2006: 228 (on use of pre-communist legal heritage); Hendley 2004: 607 (legal systems could be 'de-Sovietised'); Bowring 2008: 198–204 (jury system reinstated, returning to previous practice).
[117] Ajani 1995; Waelde and Gunderson 1994. See also Trubek 2014: 313 (for US influence).
[118] Kurkchiyan 2009.
[119] Hendley 2009: 251; also van Erp 2007: 400 (for reforms in Eastern Europe).
[120] Rubin 1994. [121] Based on advice by US academics, see Black and Kraakman 1996.

Critics point to various problems of the rule of law in Russia. Some of these are said to be related to the communist or even pre-communist legal heritage of an authoritarian use of law, for instance, that Tsarist Russia had no tradition of 'law-boundedness' and that the 'rule of law had no place in the Soviet political system'.[122] Blame has also been attributed to the process of transition, such as its disregard of local conditions, its elite-driven, instrumentalist or even neoliberal nature, and its belief in a 'big bang' in the legal sphere, as well as a 'shock therapy' in the economic one, as opposed to the more gradual changes in a country like China.[123]

More specifically, the most frequent points of criticism are: first, some laws are said to be circumvented or disrespected, which may also be seen as a not-so-paradoxical response to a strongly positivist legal tradition that allows limited flexibility in the application of legal rules.[124] Secondly, corruption is said to be widespread, in particular in business, politics and bureaucracy but also in the judiciary.[125] Thirdly, judges are not seen as independent as far as the Kremlin uses criminal trials to persecute political opponents.[126] Fourthly, human rights are not sufficiently protected. Despite Russia's ratification of the European Convention on Human Rights, citizens and companies are said to be 'subject to arbitrary and capricious interference by the state'.[127]

Some observers, however, provide a cautiously more positive assessment. According to Kathryn Hendley, Russia has 'surely moved closer to the ideal of the "rule of law"', given its 'profound institutional reforms' since the fall of communism.[128] Though Hendley does not deny the political influence in high-profile cases, the day-to-day reality of courts and litigants is said to be a different one. Focusing on civil litigation, her empirical research found that litigants are most concerned about 'the time, money, and the emotional energy required to see a lawsuit through to its conclusion'.[129] Data also show that the number of civil cases has increased significantly. Thus, the most common problem is the 'avalanche of cases' that courts have to cope with, rather than a general distrust in the Russian legal system.[130] Finally, Hendley challenges the view that litigation is something alien to Russia, as newly available archival records show the use of litigation in private matters in the Tsarist and Soviet periods.[131]

[122] Kahn 2005: 375, 380; also van Erp 2007: 400; Kurkchiyan 2010: 15.
[123] Glinavos 2010 (for 'neoliberalism'); Peerenboom 2010a: 84; also Peerenboom 2010b (comparing Eastern Europe with China). For the mass privatisations see Boycko et al. 1997. For the general choice between gradualism and 'big bang' see Trebilcock 2016: 336–7; Trebilcock and Prado 2014: 174–5; Buscaglia and Ratliff 2000: 16–17.
[124] Kurkchiyan 2009: 355; Galligan 2003: 1, 7; Kühn 2006: 229.
[125] Kurkchiyan 2007: 75; Hendley 2009: 252.
[126] Edwards 2009; Hendley 2009: 241.
[127] Kahn 2005: 354–5. For more recent assessments see www.hrw.org/europecentral-asia/russia.
[128] Hendley 2006: 347.
[129] Hendley 2009: 243 (in contrast to fears of political interference, ibid. 249).
[130] Hendley 2013; also Hendley 2009: 243.
[131] Hendley 2015: 547.

A more ambiguously positive assessment is the one by Maria Popova. Her research examined disputes on electoral registration and defamation suits against media companies in Russia and the Ukraine between 1998 and 2004. These were potentially politically contentious cases. Yet, it was found that in Russia courts decided more independently than in the Ukraine. The lack of independence in the Ukraine is explained by the fear of the incumbent government of losing its grip on power. By contrast, the Russian government did not face serious political competition and it could therefore intervene less frequently in the operation of courts.[132] Research by Peter Solomon points in a similar direction: although judicial independence is formally accepted in Russia, informal practices may be employed in the interests of the government and connected private parties.[133]

As a result, a mixed picture emerges, not entirely dissimilar to the situation in China and the 'dual state' of other autocratic political regimes.[134] The question of whether weaknesses of the rule of law 'mattered' may also invite a similar answer. Clearly, other factors, such as the prevalence of natural resources (oil, gas, etc.), have led to some economic growth despite these weaknesses, but this does not mean that corruption and other deficiencies of the rule of law do not impede foreign and domestic investment.[135] Finally, the Russian case illustrates a more deliberate attempt than the Chinese one to transplant an international model of the rule of law. Apparently this has not worked perfectly, but it cannot be said for sure how far this is due to the model or factors intrinsic to Russia.[136]

The literature on rule-of-law initiatives in post-2001 Afghanistan also tends to focus on their failures, in particular, the alleged naivety of Western powers and international organisations about transplanting their version of the rule of law to Afghanistan.[137] However, starting with the international agreements and official documents, it can be seen that local conditions were meant to play a prominent role. The Bonn Agreement from December 2001 referred to the aim 'to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions'.[138] And in the recommendations from the Rome Conference on the Rule of Law in Afghanistan from July 2007 it was stated that rule of law initiatives should be 'consistent with Afghan needs and realities' and that they should 'embrace and

[132] Popova 2012. [133] Solomon 2015: 429.

[134] The latter notion originates from Fraenkel 1941.

[135] See Kurkchiyan 2010: 2 (for many entrepreneurs it is still a 'no go zone'). Edwards 2009: 41 (citing a Canadian attorney: 'Until the rule of law is established in Russia, I won't be back').

[136] Cf. Gilpin 2001: 335–6 (on possible reasons on 'what went wrong').

[137] E.g. the contributions in Mason 2011; also Jupp 2013 and Ahmed 2005 (on problems with the newly introduced Criminal Procedure Code).

[138] Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement) of 5 December 2001, art. 2(2), available at www.un.org/News/dh/latest/afghan/afghan-agree.htm.

engage Afghan legal context, culture, customs and the Islamic foundation of the legal system of Afghanistan'.[139]

More specifically, codified laws were re-introduced, after they had been abolished by the Taliban in 1992. Notably, this led to the Constitution of 2004 which emphasises the role of Islam but also observance of the Universal Declaration of Human Rights.[140] In particular, there are provisions on the rights and status of women, due to a large extent to the influence of foreign officials and other external actors.[141] Other laws were initially drafted with assistance from the Italian government, and those also reflect more general Western influence.[142] International actors, for example, the UN, NATO and the World Bank, have given special emphasis to re-establishing a legal infrastructure to apply and enforce state laws. This refers to technical tasks, such as building court houses and prisons, and helping to set up institutions to train judges, prosecutors, lawyers, police and army personnel in the new laws.[143] It also includes field support for the implementation of legal and institutional reforms.[144]

In the general law and development literature, it is sometimes discussed whether there may be cultural constraints to the rule of law.[145] In Afghanistan, international advisors would not want to take the view that their initiatives are bound to fail due to mismatches with the local culture. Rather, at least, the aim is to initiate changes to Afghanistan's legal culture. It is clear that practices and perceptions play a crucial role for establishing the rule of law.[146] A Rule of Law Officer of the US military even phrases this as a 'commitment to indoctrinate both Afghan government officials and the population with the firm belief in the rule of law'.[147] Crucially, this also acknowledges the need to address widespread problems of corruption.[148]

All of this seems to be aimed at a fairly 'thick' version of the rule of law, but subsequent developments suggested a less ambitious approach. The judges of state courts are said to rely 'on nothing more than their own personal

[139] Joint Recommendations 2007, available at http://mfa.gov.af/Content/files/Romejointrecommandations.pdf.

[140] These are in arts. 1, 2, 3 and 7. An English version of the Constitution is available at http://supremecourt.gov.af.

[141] Al-Ali 2011: 80–2. See, e.g. art. 22 (equal rights) and art. 44 (education for women).

[142] See Hartmann and Klonowiecka-Milart 2011. For the Italian influence see Ahmed 2005; Jupp 2013: 59–61.

[143] See, e.g. United Nations Assistance Mission in Afghanistan (UNAMA), available at http://unama.unmissions.org/; Wyler and Katzman 2010; Jupp 2013: 57–8; C. Wang 2014: 223. But also Cao 2016: 444–5 (criticising lack of focus on legal education).

[144] E.g. the NATO Rule of Law Field Support Mission (NROLFSM) and the US Rule of Law Field Force-Afghanistan (US-ROLFF-A), see www.isaf.nato.int/images/media/PDFs/110930rol background.pdf.

[145] Trebilcock and Prado 2014: 57–8.

[146] See Krygier 2011. See also Section C 1, below.

[147] As quoted in Tasikas 2007: 53.

[148] See Islamic Republic of Afghanistan 2008: 146–7; C. Wang 2014: 213. For problems of corruption in post-conflict state building see also Rose-Ackerman and Palifka 2016: 316–40.

intuition', not the newly enacted laws.[149] Moreover, forms of mediation, such as councils of elders, have continued to play an important role in practice. Since these mechanisms are based on traditional cultural standards, they tend to pay no attention to state laws, including the Constitution: for instance, the rights of women.[150] The initial expectation may have been that state courts would soon replace these forms of mediation. Yet, since this did not happen, and since the customary system can help in stabilising the country, traditional forms of mediation are now seen as potentially beneficial as far as some form of collaboration with formal institutions of justice can be achieved.[151]

An even more severe problem is how to deal with provincial, regional and local powers, including the Taliban. Since these powers may have no respect for human rights, democracy, independent courts and other elements of a thick version of the rule of law, any concessions may be seen as a failure.[152] But, *realpolitik* suggests that they are crucial to social order and state building and that it is equally crucial to address the apparent conflicts between those groups and the central government. Such an approach may also be confirmed by historical experience showing that throughout its history the central government of Afghanistan had to negotiate and collaborate with such local centres of power.[153] Ideally, this would also include a process of transitional justice, but here too there may be a need to be pragmatic since punishment of all past wrongs may be counter to the need for reconciliation.[154]

It can therefore be concluded that, temporarily, measures to improve human security and to create an effective Afghan state may be more important than having an accountable state with a thick version of the rule of law. In this regard, it is also important to note that the concept of human security is understood widely, not limited to military actions, and extending to institutional and legal solutions.[155] For example, in an ethnically divided country such as Afghanistan, a constitution with a well-designed federal structure may provide a common national identity while giving a core voice to local

[149] Jupp 2013: 69 (citing a Prosecutions Caseworker Adviser in 2009).

[150] For this tension see Center for Policy and Human Development 2007: 91–110 and the conference organised by the US Institute of Peace in 2006, materials available at www.usip.org/rule-law/conference-the-relationship-between-state-and-non-state-justice-systems-in-afghanistan.

[151] See, e.g. C. Wang 2014: 231–42 (positive evaluation of the 'bottom-up' National Solidarity Program); Jupp 2013: 77–8 (tribal courts increasingly accepted for minor criminal offences); Martins 2011: 16 (need to strengthen traditional dispute resolution in order to promote security and stability). For comparisons with other fragile states see Isser 2011; Albrecht et al. 2011.

[152] Mason 2011. See also Peerenboom et al. 2012: 307 ('downgrading of democracy' in development discourse); Humphreys 2010: 149–62 ('rule of law' becomes mere 'law and order').

[153] See Ahmed 2005: 105–6.

[154] For this tension see, e.g. McAuliffe 2010; Yusuf 2010.

[155] See Darian-Smith 2013: 257–63.

interests.[156] In one of the main documents that outlined the development strategy for Afghanistan, it was also indicated that security too 'requires good governance, justice and the rule of law'.[157] Yet, how this can be practically achieved has remained a challenge.

3 Conceptual and Methodological Postscript

The meaning of the phrase 'rule of law' is ambiguous but does it therefore mean that it should be avoided? The beginning of this section explained that it is indeed necessary to be clear about the formal and substantive elements and the thin and thick variants of this concept. Thus, at least, any discussion about the rule of law needs to have a theoretical understanding of its aspired scope and role. This section also pointed out that the rule of law is frequently used in the discourse about law and development. Thus, given this practical relevance, it is a valid topic to explore how this is done across countries.

This section discussed in three case studies rule of law reforms in China, Russia and Afghanistan. Scrutinising the situation in individual countries has the limitation that it cannot provide a general answer to 'big questions' such as whether improvements in the rule of law stimulate economic development. It may therefore be suggested that a preferred approach would be to make use of the growing resource of quantitative indicators on topics of the rule of law. Previous chapters of this book mentioned some rule of law measurements, such as those from the World Justice Project (WJP) and the World Bank's Worldwide Governance Indicators (WGI).[158] The literature has used these indicators in order to compare countries.[159] It has also compared these indicators between themselves, finding a high correlation between different ways to measure the rule of law, as well as a moderately high correlation between the rule of law and other data, such as measurements of democracy and GDP per capita.[160]

There are, however, some intrinsic limitations to those data. For example, the three countries discussed in this section have almost flat lines in the WGI rule of law indicator for the last twenty years. Thus, this indicator does not seem to capture the more or less successful reform initiatives which have taken place. It is also revealing that donors do not merely rely on such general quantitative measures. For example, in the 2000s, a diagnostic project by the United States Agency for International Development (USAID) evaluated the law reforms after the fall of communism by way of country reports that consist

[156] See Trebilcock and Prado 2014: 104–9. For the role of national identities for effective state orders see also Fukuyama 2014: 185–97, 322–34.

[157] London Conference on Afghanistan, Afghanistan Compact of 31 January – 1 February 2006, available at www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf.

[158] See Chapter 7 at Section D 4 and Chapter 10 at Section C, above.

[159] E.g. Møller and Skaaning 2014: 69–7, 113–26; Joireman 2004.

[160] E.g. Versteeg and Ginsburg 2017; Møller and Skaaning 2014: 64–8.

of a numerical score but also narrative reports on various areas of commercial law.[161]

A common theme of the three case studies has been the international and/or foreign influence on domestic rule of law reforms. The relationship between the international and the domestic level is also not a merely unilateral one. Researchers have examined the interaction between both levels in more detail, for example, the national origins of an international rule of law and the national contestations of its application.[162] In addition, the previous chapter of this book has shown that the growing transnational and global levels challenge and complicate the relationship between legal norms. Thus, it may also be possible to use such transnational and global norms in order to bypass deficiencies at the domestic level.[163]

C Critics of 'Law and Development'

The first section of this chapter explained that the supporters of 'law and development' are not a uniform group, and the second section discussed different ways of thinking about rule of law reform. Yet, the critics of law and development mainly see the similarities between present and past approaches, in particular referring to the influence of the United States, the World Bank, as well as other Western countries and international organisations.[164] The following discusses their objections and how they relate to more general topics of comparative law.

1 Law Does Not 'Work'

The mainstream view is that law, in particular the protection of property rights, matters for economic development. The bases for this assessment are models as well as qualitative and quantitative empirical evidence.[165] However, some quantitative scholarship has also found that other aspects, such as politics, culture and capital account liberalisation, are more important for financial development than legal rules.[166] Thus, it is worth exploring the substance of two of the alternative explanations in more detail.

First, proponents of the 'law matters' view are often said to ignore the crucial role of culture.[167] For example, the rule of law is said to rely on cultural attitudes, namely, a 'prevailing ethic of voluntary compliance with judicial

[161] See https://web.archive.org/web/20150506102758/http://egateg.usaid.gov/bizclir. For the need of qualitative impact assessments of law see also Taylor 2007: 88.
[162] See Kanetake and Nollkaemper 2016.
[163] See Trebilcock and Prado 2014: 76–7, 142–3.
[164] E.g. Rittich 2016; Trubek 2015; Nader 2006.
[165] See Section A, above and Chapter 12 at Section B 3, below.
[166] See Pagano and Volpin 2001; Stulz and Williamson 2003; Chinn and Ito 2006.
[167] See Barros 2010 (and contributions in this book).

rulings'.[168] Such reasoning can also be related to some of the general debates about comparative law: the positive view about law and development assumes a largely functionalist perspective of the law which has been challenged by cultural and other postmodern approaches.[169]

A strong version of the cultural counter-argument is that social norms and ideas, as well as other economic and cultural factors, directly determine behaviour, irrespective of whether they are also channelled through legal rules and institutions.[170] A weaker variant is that law reform can only be effective if it is part of wider cultural changes. Thus, what may be suggested is that the main aim should be, for example, to nurture changes to 'cultural norms and practices that impede human rights, reinforce entrenched power structures, and perpetuate traditional inequalities'.[171]

Secondly, it could be politics that is really decisive since good legal rules may only be a reflection of the 'configuration of interests that drives governmental decision-making'.[172] In particular, it may the case that it is most important to have an effective (or even a 'strong') state. Conversely, focusing on specific legal issues may be misleading if the real problems are due to systemic political problems of developing countries.[173]

The experience of East Asian countries is sometimes seen as confirming this critique. For example, critics refer to the 'unattractive civil litigation' in South Korea and Taiwan, and Asian-style democracies and autocratic regimes where 'the law exists not to limit the state but to serve its power'.[174] The discussion about the role of the rule of law in China was already mentioned in the previous section but two further statements illustrate this point: in a book from the late 1960s a Chinese lawyer is quoted as saying that 'China has always known that law is not good enough to govern a society. She knew it twenty-five hundred years ago, and she knows it today'.[175] Much the same can be found in the current literature, for instance, when, referring to China, it is suggested that 'in dynamic environments disadvantages of legal mechanisms can outweigh their advantages'.[176]

However, these lines of reasoning do not challenge the core idea of 'law and development'. To start with, these objections are mainly concerned with the question of whether property rights and a well-designed business law matter for economic development. Many, however, would say that law also serves the

[168] Tamanaha 2011b: 223. Similarly, Carothers 2010: 25 (decisive how citizens relate to state authority and to each other). See also Section B 2, above (for Afghanistan).
[169] See Chapter 2 and Chapter 5, above.
[170] Davis and Trebilcock 2008: 897 (summarising this view); McCloskey 2016 (emphasising the role of ideas); also Pistor et al. 2010: 256 (need to consider prevailing social norms); Trebilcock and Prado 2014: 17–31 (distinguishing between economic, cultural, geographic and institutional theories of development).
[171] Cao 2016: 186–7, also ibid. 3 and 449 (rejecting both law focus and cultural relativism).
[172] Goodpaster 2007: 132. [173] Easterly 2014.
[174] Ohnesorge 2007: 105; Carothers 2006: 5. See also Gilson and Milhaupt 2011; Ginsburg 2000.
[175] Cohen 1968: 4. [176] Allen and Qian 2010: 141.

aim of creating a fair and just society and to increase human capabilities and happiness, in particular if we consider other legal fields such as the rule of law, social welfare and environmental law.[177] A further counter-argument is that law can be a means in itself. In other words, the issue at stake is then not simply that of 'law in development' but of 'law as development'.[178]

Finally, with respect to question about law as a means of economic development, it is not the best advice to follow the view that law does not matter. Quantitative research as well as case studies can be used to show either position: that law matters or that it does not.[179] Thus, a risk-averse country should be interested in its law since it may at least be possible that sensible law reform stimulates economic development. Another plausible response is that the ambiguity of the evidence only shows that it depends on the precise law, circumstances and desired effect whether or not law matters. Such a position is in line with findings from socio-legal comparative law.[180] It also leads us to the following three counter-arguments dealing with more specific modalities of law and development.

2 Against 'Top-Down' Approaches

Western countries and international organisations are often accused of a 'top-down' approach to law and development, meaning that they try to impose Western or global standards on developing countries and that they 'regard legal pluralism as a "problem"'.[181] This mirrors the view of critics in development economics who challenge the wisdom of top-down international development, for instance, by way of predominantly relying on foreign aid.[182]

Imposed 'top-down' legal uniformity invites the general criticism that law is not something technical but that a country's legal system reflects its 'common identity' and 'sense of justice'.[183] It can also be seen as undue interference in the national sovereignty and democratic accountability of countries in the developing world. A variant of this criticism by political activists associates such an approach with post-colonialism and neo-imperialism, referring to top-down law and development as a form of plunder by hegemonic international actors.[184] These hegemonic actors are not only said to be foreign states and

[177] See Sections A 2 and B 1 above and 4, below. [178] Ordor 2015: 335.
[179] See also Chapter 12 at Section B 3, below. [180] See Chapter 6, above.
[181] Sage and Woolcock 2012: 2; also Wojkowska 2006: 5 (little support for informal justice systems).
[182] Easterly 2001; Easterly 2006; Shirley 2008. See also Erbeznik 2011 (for possible negative effects of foreign aid on rule of law reform); Easterly 2014 (criticising the influence of experts).
[183] Menski 2007: 210; IUC Global Legal Standards Research Group 2009: 5. See also Chapter 5 and Chapter 9 at Section A 3 (c), above.
[184] In particular Mattei and Nader 2008; also Ngugi 2006 (on the World Bank); Brooks 2003 ('new imperialism'); Gardner 1980 ('legal imperialism'); Mattei 2003 ('imperial law'); Riles 2006: 792 (on post-colonialism); Baxi 2003 (on colonialism); Merry 2004: 583 (unequal power similar to colonial laws); López-Medina 2012: 360–5 (examples for political use of rule of law).

international organisations but also multinational corporations and law firms. For example, powerful multinationals may be able to impose their interests on the governments of developing countries,[185] or they may even be able to create special legal regimes that operate independently of those of their host countries.[186] The operation of global elite law firms in developing countries may also be seen as a 'top-down' approach, in particular as far as they absorb local law firms.[187]

By contrast, these critics point towards the merits of 'bottom-up' approaches which often includes the use of informal forms of laws. The starting point is to understand at the 'micro-level' how law organises everyday life in a given society.[188] For example, writing about judicial reform programmes, these are urged to be 'home-grown and internally driven' with significant participation of the local stakeholders, whereas international donors should only play a minor role.[189] Specifically on informal law, the conceptual position is that of legal pluralism supporting a 'sustainable diversity of laws'.[190] The general advantages of such informality can be summarised as follows:

> In contrast to most state legal institutions in development contexts, these institutions are *of* the community, closer in derivation and proximity, and hence more accessible to members of the community. Its norms and processes, its modes of decision making, are understood by members of the community. The proceedings are less costly, more timely, and often do not require the intermediation of legal professionals. The decision makers are known to or recognized by the community.[191]

The literature has also attempted to show more closely how well such informal rules can work, for example, analysing the situation in Southern Sudan and Afghanistan,[192] and with many examples of how specific local groups use informal (as well as formal) law to pursue legitimate interests.[193] In addition, it has been explored how 'bottom-up' approaches can progress to the international level. This has been called 'subaltern cosmopolitanism', for instance, referring to the way NGOs and transnational advocacy networks may

[185] Cotula 2011 and Chapter 10 at Sections A 1 and B 3, above.

[186] Ferrando 2014; Ferrando 2013. This may be seen as another example of a 'horizontally divided legal system', see Chapter 4 at Section C 3 (b), above (and note that SEZs can also derive from outside pressure).

[187] Garth 2016 and Chapter 10 at Section B 3, above. See also the Harvard-based project on Globalization, Lawyers, and Emerging Economies (GLEE), www.law.harvard.edu/programs/plp/pages/glee.php.

[188] Banakar 2009: 82.

[189] Armytage 2009; also Gopal 2009: 66; Carothers 2006: 4.

[190] Glenn 2011; Glenn 2001: 50; also Menski 2006: 583 (in Asia state not seen as the only law-making agent). Generally on legal pluralism see Chapter 5 at Section B 2, above.

[191] Tamanaha 2011a: 7; also Gauri 2009 (on benefits of local institutions); Wojkowska 2006: 5, 13 (for benefits of informal justice systems and problems with formal ones).

[192] Pimentel 2010; Schmeidl 2011.

[193] Santos and Rodriguez-Garavito 2005 (and contributions in this book).

stimulate 'emancipation' from 'hegemonic' and 'neoliberal' models of globalisation, law and development.[194]

However, it is suggested that this binary view of bottom-up 'good' and top-down 'bad' is too simplistic. Traditional customary law can have the advantage of being the best 'fit' for the community in question, but it can also have substantive drawbacks. It may be 'inherently racial in origin, despotic in operation, and often discriminatory and unfair in outcome', it may be oppressive 'requiring an undesirable degree of conformity', and it may fail to address the 'needs of children, women and the disadvantaged'.[195] Codified customary law can face additional problems, for example, it may be misunderstood, deliberately distorted and captured by elites.[196] Customary law also becomes less suitable as populations become more heterogeneous due to urbanisation and migration.[197]

Local and informal law can sometimes substitute for the lack of formal rules and institutions. However, they also face a number of limitations. When a problem arises between different local legal orders of the same country, it makes sense to let state law deal with the conflict of those laws.[198] In addition, transnational business transactions need laws that are not restricted to a specific indigenous community and which can make use of means of third-party enforcement.[199] It is often also said that it may be feasible for a developing country to rely on informal rules and institutions at the beginning, but as a country 'moves up the development curve' formal rules and institutions are needed in order to avoid the 'middle-income trap'.[200]

Moreover, discrediting everything 'top-down' is not helpful. The position that each country 'must write its own history' can be regarded as an 'extreme form of relativism'.[201] As far as the law is concerned, the analysis of legal transplants[202] shows that the use of foreign models is something quite natural for all legal systems of the world. It is also possible that considerations of the local environment support such transplants. For instance, it has been said that the citizens of developing countries may appreciate Western laws, given that today it is 'impossible for them to live some autochthonous culture in isolation from the rest of the world' – whereas resistance against transplants may mainly come from those who are more interested in their vested interests than the common good.[203]

[194] Santos 2004: 239, 251; Santos and Rodriguez-Garavito 2005; Santos 2005; also Rajagopal 2003. For cosmopolitanism see also Chapter 13 at Section B 3, below

[195] Odinkalu 2006: 141; Moore 1986: 38; Twining 2009a: 358 (quoting Don McKinnon, then Secretary-General of the Commonwealth Secretariat).

[196] Mancuso 2015: 26; Wojkowska 2006: 20. See also Chapter 4 at Section C 3 (a), above.

[197] Botero 2014: 197. [198] See Tamanaha 2011a: 8. [199] Ramanujam and Caivano 2016: 314.

[200] Trebilcock and Prado 2014: 72–6; Peerenboom and Ginsburg 2014. [201] Trebilcock 2016.

[202] See Chapter 8, above.

[203] Michaels 2009a: 790 (for the quote); Nelken 2001: 49 (for the risk to 'romanticise' the idea of resistance).

In addition, Western influence may address some of the structural internal problems of developing countries. It has been observed that the debate about the real problems of developing countries has shifted from topics of legal pluralism and colonial law to 'the nature of citizenship and diffusion of justice in rapidly but unevenly developing economies and urbanising societies'.[204] Many African states are also said to suffer from clientelism, corruption and state decay;[205] and more generally, it has been suggested that the lack of a competitive party system and competitive markets contributes to many problems of the developing world.[206] Thus, change may be welcomed even if it is triggered by foreign influence, including Western-based laws.

To conclude, it is most appropriate to follow the intermediate position that it cannot be generalised whether top-down or bottom-up law reform (or formal or informal laws) are preferable.[207] Such an approach has also been identified in the recent works of international development agencies, which show more interest in legal pluralism, in particular in informal forms of dispute resolution.[208] It is also in line with the mixture of formal and informal rules in transnational and global law.[209] Thus, effective development policy is often a joined endeavour, not merely top-down or bottom-up and not merely based on formal or informal laws. In this respect, it is correct that critics point towards the involvement of 'subaltern' groups such as NGOs; however, 'elites' also have an important role to play for a country's development as they have the heightened status and means to shape society.[210]

3 Western Law Out-of-Context

As far as law and development is based on models from Western legal systems, another line of criticism is that use of those models may be inappropriate in other parts of the world. On the one hand, this refers to the problem that 'prepacked reforms'[211] pay no attention to the way new and old law, including a country's legal culture and institutions, relate to each other. For example, reforms that strengthen formal property rights are insufficient if institutions such as courts, land and commercial registers do not adequately support and enforce them.[212] If formal property laws are added to informal regimes, this may result in legal confusion, for instance, if it is not clear who the 'real' owner is – or, even worse, if the holder of informal ownership is expropriated without

[204] Harding 2015: 816.
[205] Van de Walle 2001. See also Fukuyama 2014: 287–96 (problem of 'weak states').
[206] Weingast 2010 referring to North et al. 2009.
[207] For a similar assessment see Trebilcock 2016: 346; F. von Benda-Beckmann 2006: 63; Kennedy 2003b.
[208] Hammergren 2014: 129–66; Faundez 2011; Sage and Woolcock 2012: 2. See also Section B 2, above (for Afghanistan).
[209] See Chapter 10, above. [210] Amsden et al. 2012. [211] Trubek 2007: 238.
[212] Trebilcock and Veel 2008; Prado and Trebilcock 2009. See also G. Xu 2011: 351–5 (on costs and benefits of formal property rights).

compensation.[213] Furthermore, judicial reforms may not work as expected, for example, due to lack of appropriate training, financial resources and resistance from powerful vested interests. This could be seen in the rule of law developments in China, Russia and Afghanistan, but many further examples would also be available.[214]

On the other hand, the imported Western law may 'clash' with the society and culture of the country in question. In contrast to the position that the law does not have any effect (mentioned above), the view here is that law may have an effect but, from a normative perspective, it is seen as disruptive, dysfunctional and therefore inappropriate. This line of reasoning is based on the thinking that law does not exist in isolation of 'history, culture, human and material resources, religious and ethnic composition, demographics, knowledge, economic conditions, politics [etc.]'.[215] Development agencies and Western countries are therefore accused of overlooking this context-specificity of the law, in particular economists using standardised performance measures of law reform.[216]

However, again, these lines of criticism go too far. Previous chapters have shown that legal transplants and mixtures are common features of most, if not all, legal systems of the world.[217] Thus, the mere fact that a legal idea is 'Western' does not speak against it. In line with what has been said in previous chapters about changes to legal culture, it is also worth quoting from a policy brief by the World Bank:

> Legal culture is often considered as a given feature of the local environment to which proposed legal reform projects must adapt; many argue that legal and judicial reform programs must be tailored to fit local legal culture or they will fail. Other times, the prevailing legal culture itself may be the object of reform, rather than merely a constraint.[218]

It follows that the main challenge is to design reforms of both law and legal culture in an intelligent way. For example, it is clear that not everything can be changed over night. Thus, reforms have to be sequenced, for example, starting with law-making institutions, then law-enforcement institutions, then commercial laws, and then social and environmental standards – and all considering the relationship to existing laws and institutions.[219]

[213] G. Xu 2011: 355–8; McAuslan 2003: 64–77; Kelley 2008. See also Tamanaha 2004: 140 (formal legality may clash with local norms and institutions).

[214] See Section B 2, above; Chodosh 2005: 68–77 (for India and Indonesia); Lindsey 2007 (various case studies).

[215] Tamanaha 2011b: 219.

[216] Gillespie and Nicholson 2012; Taylor 2007; Mattei and Nader 2008: 47, 89.

[217] See Chapter 4 at Section C 3 and Chapter 8, above.

[218] Legal Culture and Judicial Reform, available at http://go.worldbank.org/MESX38R0U0. See also Chapter 8 at Section A 1 and Chapter 9 at Section A 2 (a), above.

[219] See Trebilcock 2016: 350; Trebilcock and Prado 2014: 58–61; Ordor 2015: 344. See also Section B 2, above (for contrast between China and Russia); Chapter 8 at Section C 3, above (for design of legal transplants); Chapter 12 at Section B 3, below (for institutional complementarities).

The linkage between law and society and how it relates to law and development invites three comments. First, context-specificity may be challenged by those who claim that functional similarities show universalism, and that widespread legal transplants show law's independence from society. Both are frequent claims in comparative law (though they are not the positions of this book).[220] Secondly, it does not seem too far-fetched to identify some global commonalities directly relevant for law and development:

> The battle of the rule of law against arbitrary government takes place in every human society, when those with power seek to expand their discretion (and control), and their subjects resist . . . Struggle for freedom usually begins with the demand for written laws, to constrain the discretion of those in authority, then proceeds to the pursuit of just laws, a much more difficult undertaking.[221]

Even religious laws may be no exception, for example, as far as it can be shown that there is an Islamic form of the rule of law since Islamic law backs government accountability, access to justice and many fundamental rights.[222] Thirdly, law reforms using foreign models may be precisely aimed at changing the society in question. To be sure, this is not an easy task since it requires understanding at a 'micro-level' why people behave as they do, and at a 'macro-level' how a country's society may react to possible foreign laws.[223]

As a result, Western laws can offer suitable guidance for developing countries. However, it is also clear that the experience of similar non-Western countries can be helpful, in particular if those countries had previously incorporated Western laws and institutions in a successful way. For example, Botswana, Costa Rica and Singapore are often seen as role models for developing countries in Africa, Latin America and South East Asia.[224] The topic in question also plays a crucial role. For example, the colonial history of Africa has led to the frequent problem of competing land claims: thus, successful models from other African countries are likely to be the best guide for any law reform on this matter.[225] This need for a differentiated view as regards the most suitable substantive model leads us to the final topic of this chapter.

4 'Wrong' Legal Rules and Institutions

A recent World Bank report on 'Governance and Law' states that 'law is not an unqualified good': on the one hand, it may empower change, provide order,

[220] See Chapter 2 at Sections B and C and Chapter 6 at Section A 2, above.
[221] Sellers 2010: 2.
[222] Kuran 2010b; also Ehrmann 1976: 28.
[223] See Seidman and Seidman 2007 and Peerenboom et al. 2012 (without using the terms 'micro' and 'macro').
[224] See Leith 2005 (for Botswana); Fukuyama 2014: 270–84 (for Costa Rica); Section B 2, above (for Singapore). See also Trebilcock and Prado 2014: 42 (learning from similar developing countries).
[225] Cf. Evers et al. 2005 (comparison of settling land claims in Africa).

build legitimacy and structure contests; on the other hand, it may reinforce existing power, create conflict and exacerbate confusion, undermine legitimacy, and distract from real sites of contest.[226] Thus, the World Bank acknowledges that it is possible to choose the 'wrong' legal rules and institutions. This is interesting to note as the World Bank, together with the United States and other developed countries, is frequently criticised as promoting legal rules and institutions which are 'not very good'.

On a general level, this criticism can be related to their preference for Western laws, in particular in its Anglo-Saxon, i.e. common law, variant. Such rules may not always be preferable. For example, it has been suggested that the judicial design of civil law countries with more active judges is more suitable for emerging legal systems, since the latter countries tend to have an underdeveloped private bar.[227] Beyond common and civil law, strengths and weaknesses can be identified in all legal traditions. For example, according to Patrick Glenn, chthonic law would criticise civil and common law for the way they deal with the environment, Islamic law would criticise them for their treatment of the poor, whereas Western lawyers would criticise Islamic law for their limitations on human expression and speech.[228] Similarly, a policy report by a group of international academic lawyers illustrates the benefits of 'non-mainstream' legal systems as follows:

> Think about the role of workers in the former Yugoslavian corporate governance, or the variety of alternative visions of property in Andean cultures, or the institutional settings that allow the social capital represented by elderly people be put to value in many African societies, or the legal institutions of solidarity and long term commitment in Islamic finance, or the open access to culture and social knowledge in the traditional Asian resistance to intellectual property rights.[229]

Thus, at this general level, it can be said that the diversity of legal systems around the world should provide an incentive to learn from abroad. This learning should not be asymmetrical – in particular, it should also include 'reverse learning' from countries who are typically only seen as importers of Western laws.[230]

In substance, the main point of criticism is that of one-sided laws promoted by law and development. Frequent themes are the 'capitalist' focus on privatisation, property rights, contract law, ease of doing business, and the corresponding disregard of resource preservation and social rights.[231] The same is said to happen at the international level where international investors and

[226] World Development Report 2017: 97.
[227] Koch 2004. See also Chapter 2 at Section C 4, above.
[228] Glenn 2014: 375.
[229] IUC Global Legal Standards Research Group 2009: 14.
[230] Santos and Rodriguez-Garavito 2005; Nelken 2007a: 35; Hantrais 2009: 15 (for social sciences more generally).
[231] Mattei and Nader 2008: 7, 48; Rose 2010; Santos 2005: 35; Rodriguez-Garavito 2005: 78.

corporations push for open borders to the detriment of other interests.[232] In all of this, law is seen as a de-political, instrumental and technocratic tool in the service of markets and economic growth, not a means of accountability, justice, equity and fairness, or even empowerment of the poor.[233]

These points of criticism raise important concerns, for instance, the usefulness of reverse learning and the need to consider non-economic interests. It is also clear that, despite common problems, there is no universal set of rules that can simply be applied everywhere in the world.[234] Indeed, there is now a trend towards experimental micro-approaches, for instance, as researchers try to establish by way of randomised controlled trials which precise tools are most suitable.[235] The World Bank's Justice for the Poor programme too has been associated with such an evidence-based experimental approach.[236] However, the high internal validity of experiments goes hand in hand with a lower external validity: thus, this new experimentalism does not make it obsolete to identify good legal rules and institutions with a general comparative approach.

Finally, it is suggested that some critics tend to exaggerate. It is misleading to attribute all negative features to Western legal systems and by doing so 're-orientalise' the non-Western legal world. It is also problematic to reject law and development as a whole. As the previous sections of this chapter have shown, there are various nuances: for instance, the work of the UNDP, Sen's 'development as freedom' and thick versions of the rule of law clearly aim for more than 'neoliberal' economic development. This does not deny that there are also examples of one-sided development policy worth criticising. However, for example, this should not be seen as a reason to discredit protection of property rights as merely serving business interests, since strong property rights can also help citizens against corrupt officials and criminals: here, clearly, 'too little' law is as bad as 'too much'.[237]

D Conclusion

At times, the law and development discourse tends to be dominated by schematic and absolute claims. For example, consider the views that there are a number of phases of law and development; that there are distinct types of rule of law; that there is evidence that law does or does not work for development; that there is a choice to be made between formal and informal laws; and that law and development does or does not promote 'the right' legal rules.

[232] Mattei and Nader 2008: 61, 69; Santos 2005: 34; Muir Watt 2006: 602–3.
[233] Rittich 2016: 824–6; Kroncke 2012: 524; Gopal 2009: 56, 60; Legrand 2006c: 528; Gramatikov and Porter 2011 (for the final point).
[234] See also Trebilcock and Prado 2014: 215 ('middle-level generalisations'); Hammergren 2014: 222 ('middle-range theory').
[235] Banerjee and Duflo 2011 and www.povertyactionlab.org.
[236] Desai and Woolcock 2015 and see http://go.worldbank.org/IMMQE3ET20.
[237] Cf. McAuslan 2003: 149.

The position taken in this chapter is that these claims are often misleading. To start with, it has been shown that law and development evolved gradually, with various changes in the main actors and in the substance of this process. The discussion about the rule of law identified possible components and motivations, while it was also illustrated, using three examples, that these often overlap with claims about the failures and successes of rule of law reforms difficult to make. The critics of law and development raise a number of valid concerns; yet, they also tend to exaggerate, thus, their arguments cannot be said to have shown that law is bound to be useless or even harmful for development.

A further purpose of this chapter has been to relate the debate about law and development to comparative law. While, in the past, comparatists often excluded developing countries from their analysis, in today's world such an approach is no longer satisfactory. Yet, it is also important to be aware that dealing with countries that face major economic and non-economic challenges requires critical awareness of the core concepts of law and development. This chapter sought to provide such an introduction. At the same time, the more implicit purpose has been to make the case for 'reverse learning' from comparative law. As has been shown, many topics of comparative law, in particular those discussed in Part III, such as legal transplants, convergence of laws and transnational and global law, but also others, such as functionalism, legal pluralism, the relevance of cultural differences, socio-legal and numerical comparative law,[238] are of natural interest for the discussion on law and development.

Supplementary Information

Questions for discussion. What is the relationship between law and development and comparative law? Why is the rule of law seen as a cornerstone of development policy? Do examples of recent transition economies confirm or refute the importance of rule of law reforms for development? Is there something fundamentally wrong with the way law and development is conceived? Do topics of law and development require an interdisciplinary approach?

Suggestions for further reading. For an overview of the field of law and development: Trebilcock and Prado 2014. For a policy-oriented document: World Development Report 2017. For a case study of recent developments in China: Chen et al. 2017. For the early 'crisis' of law and development: Trubek and Galanter 1974. For more recent radical criticism: Mattei and Nader 2008.

[238] See Chapter 2 at Section B 2, Chapter 5 at Sections B 2 and C 2, Chapter 6 and Chapter 7, above.

Part IV
Comparative Law as an Open Subject

Parts II and III of this book discussed new approaches and topics that have entered contemporary research on comparative law. These are welcome developments. Yet more can be done, as comparative law is an 'open subject' that can absorb further research not traditionally included. In particular, it is suggested that research in other disciplines that deals with legal topics in a comparative fashion can be regarded as 'implicit comparative law'.

Such a suggestion is in line with some of the general statements found in the literature, arguing that comparative law should become more interdisciplinary.[1] It may also reflect the view that comparative law is not only a legal subject, but that it also belongs to the general comparative sciences.[2] More provocatively, it has been suggested that 'the most interesting ... comparative legal research has for some time been taking place outside law schools'.[3] But even if one does not agree with this statement, it is clearly valuable to consider the research of other disciplines on comparative legal topics.

Chapter 12 elaborates on the idea of 'implicit comparative law' using examples from comparative politics, economics, sociology, anthropology and psychology. Its main focus is on academic research but 'implicit comparative law' can also include indicators and other policy-oriented comparisons, discussed elsewhere in this book.[4] Yet, even with such a restriction, the limitation is that this chapter cannot be a comprehensive treatment of relevant research from other fields. Thus, Chapter 13 reflects more generally on the direction that research on comparative law may take in the future.

[1] See Chapter 1 at Section B 3, above. [2] Cf. Constantinesco 1971: 249.
[3] Muir Watt 2011: 131. [4] See Chapter 7 at Section C 4 and Chapter 10 at Section C, above.

12

Implicit Comparative Law

The aim of this chapter is to map how other comparative fields have produced a remarkable amount of research that should be of interest to comparative lawyers. It should also be noted, however, that the present account of 'implicit comparative law' is highly condensed and selective. Thus, while this chapter can provide a critical introduction into these areas of research, it is clear that it may well be possible to write entire books about many of its themes.

The chapter is structured as follows: Section A outlines some of the core methodological questions of comparative research in the social sciences, showing both similarities and differences to the methods of comparative law. The two subsequent sections turn to the main theme of this chapter, namely, research from other disciplines that 'implicitly' deals with topics of comparative law. Section B deals with comparative studies of states and their components, mainly drawing on research from comparative politics and economics. Section C addresses comparative studies of societies and cultures, with its main examples from comparative sociology, anthropology and psychology. Section D concludes.

A Introduction to Comparative Research in the Social Sciences

The comparative method is said to be a tool applicable in all social sciences.[1] The following outlines a number of common themes that most of these comparative studies discuss. This is not meant to imply that there is uniformity in the use of comparative methods within the social sciences: yet, this diversity may indeed be an advantage, considering the statement by Ran Hirschl that 'despite (or perhaps because of) bitter debates about approaches and methods' there is now a rich framework to conduct comparative research in the social sciences.[2]

1 Main Rationales for a Comparative Approach

In comparative law, a frequent starting point is to identify the purposes of comparative law.[3] Corresponding discussions can be found in the other

[1] Przeworski and Teune 1970: 86. [2] Hirschl 2014: 15. [3] See Chapter 1 at Section A 2, above.

comparative social sciences. A broad distinction can be made between comparative research which is interested in particular units for their own sake, on the one hand, and research that uses comparative information as a tool to establish relations between variables, on the other.[4]

To start with the former rationale, a comparatist may engage in a contextual description of a limited number of cases, such as countries, societies or cultures, with an emphasis on understanding the particularities of these units. She may also try to classify countries, to track trends – such as convergences and divergences – or to identify certain phenomena as universal. Such research originating from an interest in the units in question can overlap with research in area studies; its interest in understanding particularities is also typical for an approach that aims to connect the social sciences with the humanities.[5] As far as legal scholarship is concerned, it can be associated with cultural approaches to comparative law, discussed earlier in this book.[6]

By contrast, comparative analysis as a tool is interested in comparative cases in order to test theory-driven research questions. In particular, this may provide evidence for causal relationships, similar to experimental research in the natural sciences. Ideally, these findings will have a high degree of external validity, being valid on a global scale: thus, such research has the ambition to make general statements about social life.[7] But even with this ambition, it can also be interesting to find that certain regularities are system-specific. Moreover, such comparisons may be used in order to inform state policy decisions or other choices of any unit of comparison.[8] At a basic level, this may just show the availability of various policy options, but it can also indicate more specifically what consequences certain actions have and what constraints need to be considered.

2 Main Types of Comparative Research

The two rationales outlined in the previous sub-section often correspond to qualitative and quantitative comparative research. Yet, the association is not complete: it can also be suggested that, instead of a binary choice, there is a continuum of methods, from an in-depth analysis to universalist-positivist approaches.[9]

[4] For the following see Landman 2002: 891; Azarian 2011: 116–18 with reference to Tilly 1984. Specifically on hypothesis testing: Hantrais 2009: 5–6, 49; Smelser 1976: 174.

[5] Cf. Selznick 2008 (for a humanist social science).

[6] See Chapter 5 at Section C 2, above.

[7] Thus, it aims to be 'nomothetic' like the natural sciences, not 'idiographic' like the humanities. The terms 'positivist' and 'interpretive' (or 'interpretative') are sometimes used in a similar sense, e.g. Clift 2014: 292–4.

[8] References in Hantrais 2009: ix, 118–20.

[9] Similarly, Hantrais 2009: 56–8. See also Goertz and Mahoney 2012 (for the general divide between qualitative and quantitative research in the social sciences).

Some take the view that qualitative comparative research can even focus on a single case if this particular case is related to a wider comparative framework – for example, if the aim is to examine whether this case confirms or refutes previous research on other countries or societies.[10] Typically, however, a comparative qualitative study would deal with a limited number of cases in detail, aiming to explain their diversity.[11] Variations in qualitative research, however, complicate the picture. First, it should be noted that comparative qualitative and case-study research are not identical, as, for example, a case study may include quantitative time-series data. Secondly, qualitative research may also deal with a large number of cases, for instance, where research is aimed at outlining all cultures of the world.[12] Thirdly, while most qualitative researchers are reluctant to draw causal conclusions from case studies,[13] others are specifically interested in possible causal relationships. In particular, this may follow from historical comparative research or a logical analysis of relationships between variables.[14]

Quantitative comparative research, too, can be either descriptive or inferential. Descriptive statistics can provide interesting information on countries and other units of comparison. But, usually, inferential statistics that show causal relationships, i.e. regression analysis, are seen as more interesting. Conducting such regression analysis requires a relatively large number of units – say, all countries of the world – in order to identify general patterns. Moreover, in order to be able to establish robust causal relationships, advanced statistical tools may be needed (e.g. panel data analysis).[15]

Which method would a comparatist choose? A first determinant is the type of question she attempts to answer.[16] It is therefore inevitable that research methods differ within the social sciences, since some disciplines are more interested in generalities and others in particularities of the specific local context. Secondly, the availability of information can exclude certain methods. A frequent discussion in comparative studies is the problem of 'many variables but small N'.[17] For instance, assume that a comparatist has analysed five countries in detail, finding that there are many possible reasons why these countries differ. Here, regression analysis is excluded since it requires the precise opposite, i.e. many observations, or 'large N', but only a limited

[10] E.g. Landman 2008: 28; Bradshaw and Wallace 1991.

[11] In particular, Lijphart 1971 (distinguishing comparative from statistical and case study method); Sartori 1991: 252 (single case not comparative).

[12] An early example was Spencer 1873–81. For a more recent one see the Human Relations Area Files (HRAF), available at www.yale.edu/hraf/.

[13] See Smelser 1976: 199; Collier and Mahoney 1996.

[14] See Section 3, below.

[15] This refers to a dataset that compares units but also has a time dimension. Statistical details are beyond the scope of this chapter, but see also Section B 3, below.

[16] Cf. also Dogan 2004: 335 ('For instance, a reply to the question "Is the gap between poor and rich countries increasing?" has to be based on solid statistical data, carefully analysed. On the other hand, when Samuel Huntington asks, "Will more countries become democratic?", the analytical reasoning becomes more important than the statistical evidence').

[17] Smelser 1976: 36; Goldthorpe 1997.

number of explanatory variables. Thirdly, each method has its advantages and disadvantages. For example, quantitative researchers tend to say that only they can provide hard evidence for certain regularities, whereas qualitative studies are just too subjective. Yet, qualitative researchers may respond that the social world is, in any case, too complex to deduce rules akin to the natural sciences or even mathematics, whereas deep qualitative research may at least help us in the understanding of the world.[18]

As these arguments do not provide a clear answer, a possible suggestion is to mix methods. Such methodically eclectic 'mixed methods' have recently become more popular, in particular in comparative studies.[19] Applying both quantitative and qualitative methods may enable the researcher to reduce the disadvantages of both methods. What is more, both methods can facilitate each other: for example, qualitative research can generate a hypothesis that can be tested with quantitative data, and any quantitative data also have to be interpreted through use of qualitative information.

3 Methods, Continued: History, Logic and Concepts

According to one school of thought, historical research is fundamentally different from comparative approaches. Exploring a country's history inevitably highlights the uniqueness of events; thus, research dealing with more than one country's history may at best be able to juxtapose certain differences. In other words: 'historians deal with the unique while [other] social scientists look for generalisations'.[20] But, according to others, historical research can at least have an implicit comparative dimension. It can identify historical connections between countries or other units of comparison. For instance, this may be done for reasons of classification.[21] Historical evidence can also help researchers explore how far countries have influenced each other and how far they have remained distinct – for example, in considering the impact of colonialism.[22]

Going further, it has been suggested that one can use comparative historical evidence in order to identify causal regularities. Thus, the aim is to develop, and confirm or reject, general theories about the occurrence of events across countries.[23] For example, a researcher may consider a number of historical

[18] See, e.g. Steinmetz 2004; Hantrais 2009: 97–105 (in particular ibid. 100: 'qualitative researchers know more about less, quantitative researchers know less about more'); Thelen and Mahoney 2015: 27 (trade-off between internal and external validity).

[19] See Berg-Schlosser 2012; Hantrais 2009: 96; Berry et al. 2011: 279; Widner 1998: 744.

[20] Smelser 1976: 203. See also Azarian 2011: 116–17; Hantrais 2009: 39. In anthropology, Franz Boas' 'historical particularism' is similar, see Section C 2, below.

[21] See Hammel 1980: 150–1; also Hall 1963: 30–1 (historical method used to explain legal families).

[22] See, e.g. Benton 2002 (on colonial cultures and law).

[23] E.g. Kiser and Hechter 1991. See also Mahoney and Rueschemeyer 2003; Skocpol and Somers 1980.

examples for a particular type of event, and then code the causal factors for each of the examples as 'yes' or 'no', or rank them in terms of importance.[24] Thus, on the one hand, such comparative-historical analysis is confident that it is possible to identify such factors at the macro-level (so history is not only about individual agents). On the other hand, it does not start with a fixed hypothesis to be tested but aims to generate theories by way of examining the historical events in question.[25]

Applying quantitative methods to historical events can face the problem that, often, many causal factors play a role, while only a small number of cases are available. The previous section already mentioned this problem of 'many variables but small N' as a general problem in comparative social sciences. For these circumstances Charles Ragin has developed a method called Qualitative Comparative Analysis (QCA) that uses a formalised logical tool, Boolean algebra, in order to identify causal regularities. In a nutshell, QCA means that, with the help of a computer program, it is established which combinations of conditions may be decisive and how these combinations may be simplified. It also involves expert knowledge of the comparative researcher on plausible causal combinations.[26] QCA is therefore a mixture between quantitative and qualitative approaches.

Another response to rich cross-country information is to say that a conceptual approach is needed in order to group diverse phenomena into manageable categories.[27] In particular, a conceptual framework with 'ideal types' may be employed to ascertain which data from different units of comparison can be related.[28] Max Weber's historical and conceptual research, explained later in this chapter, is a good example of such an approach. But concepts are also crucial for quantitative researchers, because theoretical models about the relationship between variables form the basis of understanding what can be tested with comparative quantitative data.

4 Choice of Units of Comparison

In the social sciences, a great variety of units can be and have been compared. A convenient division is one according to scales. For example, the units may be political units: starting with villages, towns, cities, to economic zones and other sub-units of countries, as well as countries and nations, macro-regions and other transnational organisations. A more factual approach considers units

[24] Mahoney 1999. See also van den Baembussche 1989 (reviewing the historical method of the French Annales School).
[25] Thelen and Mahoney 2015: 4.
[26] See, e.g. Ragin 1987; Ragin 1998; Berg-Schlosser 2012: 85–110; also Kogut and Ragin 2006 (applying QCA to reception of legal transplants) and Chapter 7 at Section B 3, above (on research by Arvind and Stirton).
[27] In particular Rose 1991; also Zelditch 1971: 273–88 (on comparability).
[28] See, e.g. Smelser 1976: 54–5.

such as local communities, cultures, societies and organisations, but also broader geographic regions, language groups, networks or even civilisations.[29]

These latter groups are likely to be related to the former ones, though it would be contentious to claim that, say, the borders of a particular country correspond to a particular culture or society.[30] Another potentially contentious issue is whether comparison of neighbourhoods, families or individuals should be included. It may be said that, literally, here too, comparative research is conducted.[31] However, in the comparative research in the social sciences discussed here, the implicit assumption is that comparative studies are about units of a somewhat larger size.

The literature has also identified further complexities. It can be revealing to compare different levels, such as 'mini-states' and 'mega-cities', or macro-regions and 'mega-countries'.[32] Another frequent suggestion is that globalising trends make it necessary to understand the relationship between the levels more closely: for example, whether and how the international level shapes the lower levels, in particular the weakening of the national level.[33] More fundamentally, a 'cosmopolitan view' suggests that it is time to dissolve the 'onion model' of such levels and layers.[34] Relatedly, a growing field of research explores the relevance of the transnational level, for example, transnational communities and transnational forms of governance.[35]

Another question concerns which specific units to compare. In practice, it may often happen that comparatists simply 'tend to round up the usual suspects when starting a project'.[36] Yet, there is also a rich theoretical literature on this topic. Following John Stuart Mill, a conventional distinction is between a comparison of very different cases, on the one hand, and of very similar ones, on the other.[37] According to Mill, the choice depends on the variable of interest, i.e. the variable that the researcher is trying to explain. When units share this variable, it is useful to have very different cases, making it possible to identify the one factor on which all these cases agree as the decisive cause (thus, called 'method of agreement' or 'most different cases'). By contrast, when units do not share this variable, choosing similar cases that differ in just one causal

[29] See, e.g. Hantrais 2009: 2, 49, 51, 53, 92; Smelser 1976: 168; Hopkins and Wallerstein 1967. For work on entire civilisations see Toynbee 1934–61 and Chapter 4 at Section A, above.

[30] See further Section C 2, below, as well as Chapter 10 at Section A 1, above (for 'nation-states').

[31] Wiseman and Popov 2015: 6.

[32] See Dogan 2002: 85–8 (mini-states and mega-cities); Ebbinghaus 1998 (on EU and vertical analysis with other levels). See also Chapter 9 at Section C 2, above (on comparative international law).

[33] See, e.g. Coe et al. 2013: 19; Hantrais 2009: 13, 47; Widner 1998: 741. See also Chapter 10 at Section A 1, above.

[34] Beck and Sznaider 2010: 389. Similarly, Glenn 2009; Glenn 2013. See also Chapter 13 at Section B 3, below.

[35] See, e.g. Djelic and Quack 2010 and Chapter 10, above.

[36] Peters 2013: 59.

[37] Mill 2006 (original from 1843). Mill also suggested two further categories (not discussed here), depending on the degree to which certain phenomena are fulfilled.

condition can explain that this difference is indeed the decisive one (thus, called 'method of difference' or 'most similar cases').

Qualitative research frequently uses the category of 'most similar cases'. In particular, the detailed analysis inherent in qualitative research often means that the researcher only examines a limited number of cases, such as countries that are in the same geographical area or have close historical ties. It is often said that such an approach enables the researcher to engage in a 'controlled comparison', analysing the effect of the remaining differences.[38] But there are also other types of qualitative research. An example of 'most different cases' would be to compare that which unites recent economic success stories from different parts of the world.[39] There are also other suggested criteria: for example, 'prototypical', 'most difficult' or 'outlier' cases.[40] And if there are only a limited number of actual cases, it can be suggested to add counterfactuals or other thought experiments as units to the comparison.[41]

Today's quantitative comparative research builds on Mill's categories, but rarely makes explicit reference to them. The reason is that, throughout the last century, new tools of statistical control have been developed that can account for both similar and different cases.[42] Thus, the quantitative researcher typically wants to include as many units of comparison as possible. For example, she may wish to engage in a world-wide comparison of all countries, societies or cultures.[43] The advantage of such a comprehensive approach is that it can lead to a truly global finding, whereas comparisons limited to particular regions or cultures may not be generalisable.

To conclude, it can be seen that all topics discussed in this section are closely connected, in particular the aim, the method and the units of a comparative analysis. Preferences differ across disciplines. Yet, today, most disciplines include, for instance, both quantitative and qualitative forms of comparative research. These topics are revisited in the following sections, also showing the links between areas of comparative law and those of other comparative studies.

B Comparative Studies of States and their Components

Many disciplines compare states and their components, for example, political science, economics, development studies and sociology. Frequent topics include the search for 'the best' form of government, comparisons of 'the state in action' and assessments of policy choices. These are discussed in the

[38] See, e.g. Berg-Schlosser 2012: 36; Hantrais 2009: 88; Peters 1998: 36–41; Hammel 1980: 150.
[39] Landman 2002: 906. See also DeFelice 1986 (against restriction of comparative politics to similar cases).
[40] Hirschl 2014: 256–67. [41] Peters 2013: 77–8. [42] Bollen et al. 1993: 337.
[43] See, e.g. Peters 2013: 61 (in statistical analysis the commonly held view is that 'more is better'); Dogan 2004: 327 (world-wide analysis); Sartori 1970: 1044 (distinguishing between high, medium and low level categories).

following, preceded by brief explanations of why each of these topics is of interest for comparative law.

1 Determining 'the Best' Form of Government

Most comparative lawyers take the view that an evaluation about the 'best rules' can, if cautiously made, be part of a comparative analysis.[44] Such evaluations are also frequent in the context of law and development, for example, in recommendations about rule of law reforms.[45] But, as it is rare that comparative lawyers deal with the seen-as-too-political question about the best form of government, research in comparative politics can be a useful complement. In addition, research on forms of government may aim towards classifications, and is thus related to research into legal families.[46]

In Ancient Greece, Plato, Aristotle and Polybius classified and compared forms of government.[47] Aristotle's analysis of the constitutions of Greek towns has been particularly influential. He distinguished between the number of rulers on the one hand, and the quality of governments on the other, leading to three 'good' types (monarchy, aristocracy, polity) and three 'corrupt' ones (tyranny, oligarchy, democracy). Yet, Aristotle also indicated that there was not an objectively best form of government, and that differences in government reflected differences in mentality.

In modern times, too, it is not always clear whether the main aim is understanding or evaluation. Montesquieu's book *The Spirit of Laws* is, on the one hand, openly 'relativist', as national legal differences are seen as strongly related to other factors. Notably, Montesquieu suggested that laws do – and should – reflect the climate, geography, culture and character of a nation.[48] On the other hand, Montesquieu offers some explicit and some implicit critique, in particular where he deals with the distinction between despotic, monarchical and republican governments. He explicitly rejects the despotism that he associates with the Orient, but his book is also interpreted as a 'thinly veiled critique of [the] monarchical absolutism' of eighteenth-century France.[49]

The work by Alexis de Tocqueville provides another example of a positive-normative mix. Writing in the nineteenth century, de Tocqueville's main interest was in the legal and political institutions of the United States – for example, its federal structure, its frequent use of juries and its reliance on case law. While only in some instances did he make explicit comparisons to France

[44] See Chapter 2 at Section A 4, above.
[45] See Chapter 11 at Section B, above.
[46] See Chapter 3 and Chapter 4, above.
[47] See, e.g. Dannemann 2006: 396–7 (on Plato); Sica 2006: xxv (on Polybius); Sica 2006: xxiv; Welzel and Inglehart 2007: 298 (on Aristotle).
[48] Montesquieu 1914 (original from 1748). See also Dannemann 2006: 385; Menski 2006: 86; Moore 2005: 12; Launay 2001: 23; Richter 1969: 133–5.
[49] Launay 2001: 25.

and other countries – also relating those differences to cultural ones[50] – de Tocqueville explains in his memoirs that he 'did not write a page without thinking of her' (i.e. France).[51] The preface of de Tocqueville's book *Democracy in America* also indicates the normative dimension of his writings: while France should not 'make a servile copy' of US institutions, the latter's 'principles of order, of the balance of powers, of true liberty, of deep and sincere respect for right' are explicitly seen as worth borrowing.[52]

Some more recent research has continued to examine one country from a comparative perspective,[53] while current debates also frequently engage in a more general comparison of various forms of government. Such research tends to be of a quantitative nature. For example, the Polity IV Project provides world-wide data on many political regimes, distinguishing between full democracy, democracy, open anocracy, closed anocracy and autocracy.[54] These datasets can then be used to show that there is a positive correlation between the level of democracy, on the one hand, and economic growth, security and safety, on the other.[55] To be sure, it is not suggested that there is a perfect correlation. The development of emerging and transition economies provides some counter-examples: for example, China has grown quicker than India, Russia and countries in Latin America.[56] It has also been suggested that weak democracies cause various problems: for example, in comparing such a democracy with a stable 'benevolent autocracy', it may be said that the former is more likely to give in to special-interest privileges, and that rulers are more inclined to violate human rights in order to stay in power.[57]

Very controversial is the question of causality. On the one hand, there is the view that economic development often stimulates democracy, i.e. democracy is usually the second step,[58] while it is also clear that other factors, too, play a role in the emergence of democracy.[59] On the other hand, researchers have found

[50] Cf. the discussion in Smelser 1976: 9, 20, 25, 29.
[51] de Tocqueville 1861: 359.
[52] de Tocqueville 1994 (original from 1848): lxv.
[53] E.g. Lipset 1973; Lipset 1996 (on US exceptionalism). See also Chapter 3 at Section C 2, above.
[54] Polity IV Project: Political Regime Characteristics and Transitions, 1800–2015, available at www.systemicpeace.org/polityproject.html. Another example is the project on Varieties of Democracy, www.v-dem.net. References to further quantitative work in Landman and Carvalho 2010: 66.
[55] See, e.g. Geddes 2007; Przeworski and Limongi 1993.
[56] See, e.g. Gilpin 2001: 329; Linz and Stepan 1996.
[57] Barro 1997: 3; Fein 1987. Similarly, Easterly et al. 2006 (for mass killings); Chapter 11 at Section B 2, above (comparing Russia and Ukraine). See also Libman 2012 (for a review of literature on the possible non-linear relationship between democracy and growth); Collier and Levitsky 1997 (for different types of democracies).
[58] Lipset 1959. For the debate see also Trebilcock and Prado 2014: 87–96; Landman 2008: 99–129; Zakaria 2003; Rueschemeyer et al. 1992.
[59] See, e.g. Moore 1993 (role of educated middle class); Beramendi 2007: 759–62 (federal structure); Levitsky and Way 2010 (role of ties to the West); Haber and Menaldo 2011 (discussing research on the role of natural resources).

that democracy typically leads to long-run prosperity, and that it may also promote peace and reduce conflict.[60]

An objection to both of these views is that there are many shades of democracy. Researchers have tried to identify the effects of such differences, possibly enabling some kind of constitutional engineering that predicts the outcomes of certain constitutional structures.[61] Some of those studies examine the effect of specific choices: for example, parliamentarism, as opposed to presidentialism, is seen as fostering political stability as well as economic and human development;[62] and proportional representation, as opposed to majority vote, is seen as leading to larger government spending and more frequent political compromise.[63] Other studies use aggregates: for example, the extent to which a country is a 'consensus democracy' is seen as being associated with less violence and better social welfare,[64] and the extent to which a political structure is 'supermajoritarian' is seen as being positively correlated with policies that are more stable, and yet also with higher levels of income inequality.[65]

A potential problem with these and other categories is that formal constitutional rules and constitutional practice often diverge. Traditionally, lawyers, including comparative lawyers, are mainly interested in the formal rules. Thus, research on how the state 'works' also needs to be considered, as the subsequent sub-section explains.

2 Comparing 'the State in Action'

While traditional comparative law tends to be fairly 'legalistic', it is not uncommon that comparatists also consider the law in practice, be it at a supplementary level or as the core of the analysis.[66] Another reason for examining 'the state in action' is that it can challenge the hypothesis, suggested by some comparative lawyers, that law is independent from politics, making legal transplants straightforward in practice.[67] Moreover, there are specific links between comparative politics and constitutional law. For example, it is suggested that 'comparative constitutional law has to take account of political science to the extent that it explains, at least in part, the context in which the

[60] E.g. Acemoglu et al. 2018; Halperin et al. 2010; Feng 2003; Rigobon and Rodrik 2005 (also on the relationship between growth, democracy and the rule of law).

[61] Sartori 1997: 199. See also Ginsburg and Huq 2016 (on how to assess constitutional performance); Hirschl 2014: 176–9 (for constitutional design); Landman 2008: 218–19.

[62] Linz 1990. For the debate see also Fukuyama 2008; Wiarda and Polk 2012: 168–70.

[63] Persson and Tabellini 2003; also Lacey 2008 (relating these to differences in incarceration).

[64] Lijphart 1999: 244, 258–71, 293–300.

[65] McGann 2007: 193–4. A similar approach is to rank systems in terms of their aggregate number of veto players: see Fukuyama 2007: 29; also Fukuyama 2014: 488–505 (on 'vetocracy' in the United States).

[66] See Chapter 2 at Sections A 3 (b) and C 3, above.

[67] See Chapter 8 at Section A 3 (a), above.

political system operates'.[68] Here, trends in comparative politics also play a role as, since the 1980s, it is said to have become more interested in the way state institutions work. In particular, there has been a shift from emphasising universal relationships to an emphasis on the role of context.[69]

The following addresses three broad topics of 'the state in action'. The first is the way law-making works in different countries. Starting with the role of the parliament, the question of 'legislative power' distinguishes between strong and weak legislators – for example, the United States on the one hand and France on the other.[70] One may also compare whether parliamentarians are more inclined to public or to private interests,[71] and whether they tend to act in a more partisan or in more a consensus-oriented way.[72] Of course, the law-making process also includes other stakeholders, with the form and intensity of participation differing between countries. For example, it is said that the 'notice-and-comment' rule-making in the United States is more open to those interests than the more 'ad hoc' use of civil society committees in Germany and other continental European countries.[73]

Furthermore, these input-based topics can be related to the output of the legislative process. This can examine differences in the style of legislative drafting or in the number of laws enacted,[74] or it may look at the substantive orientation of the law: for example, whether laws favour certain interests or how government spending compares across countries.[75] For a comparative analysis of the governance process from input to output, a recent monograph also suggests revitalising the concept of functionalism in political science. Its main argument is that functionalism can be used to understand how different national models achieve effective governance by way of goal setting, resource mobilisation, decision-making, implementation and feedback.[76] There is also a link to functional ideas in comparative policy studies as those, amongst others, aim to explore why and when particular policy concerns emerge.[77]

Secondly, non-legal comparative research on administrative practices often starts with the problem that rulers may be tempted to appoint friends, family members and political allies to positions of power. The counter-model is that of a professional and politically neutral 'Weberian' civil service, initially

[68] Harding and Leyland 2007: 322. Similarly, Hirschl 2014; Tushnet 2006a: 1229.
[69] See March and Olsen 2006; Mair 1996: 315, 328.
[70] Arter 2007: xvi. See also Fish and Kroenig 2009 (on their Parliamentary Powers Index); Kreppel 2014: 90, 93 (classification based on activity and autonomy).
[71] Cf. Siems 2008a: 234–6. [72] Pedersen 2010: 645.
[73] Streeck 2006 (in particular, on forms of 'corporatism'); Rose-Ackermann 1995.
[74] On the former topic see, e.g. Xanthaki 2014: 199–212; Xanthaki 2012; Dale 1988. On the latter see Chapter 7 at Section C 1, above.
[75] See, e.g. Pizzorusso 1988: 64–9; World Handbook of Political and Social Indicators, available at www.icpsr.umich.edu/icpsrweb/ICPSR/series/60.
[76] Peters and Pierre 2016. For functionalism in the social sciences generally see Chapter 2 at Section B 1, above.
[77] E.g. Engeli and Allison 2014; Baumgartner et al. 2008.

associated with Prussia in Germany.[78] The implementation of an independent and meritocratic bureaucracy has remained a frequent topic of comparative public management.[79] Going further, researchers have developed more elaborate models: for example, by distinguishing those bureaucracies that mainly aim to implement pre-defined programmes from those that aim towards client satisfaction, consumer participation, conflict resolution and cost-effective results.[80]

From a comparative perspective, it can then be observed that some administrative trends have spread across the world, while persisting differences may be related to historical path dependencies and different conceptions of the state.[81] Trends may also be identified for other administrative questions. For example, research in political science frequently explores the diffusion of independent regulatory agencies from the United States to other parts of the world,[82] and regulatory impact assessments are said to be another example of such diffusion.[83]

Comparative administrative practices are not only a topic of comparative politics and government. Economists (as well as political scientists) have tried to quantify how effectively administrative enforcement operates in different countries, using both input and output measures.[84] Pierre Bourdieu and other sociologists have explored the question of who 'really' runs the state, by, for example, examining the power networks of higher civil service elites in a comparative fashion.[85] Criminologists (as well as other social scientists) have been interested in the way prisons operate, and how the use of prisons relates to social and moral trends.[86] In addition, research on the operation of the police and public prosecution services[87] provides a link to the next category.

Thirdly, it is not only legal scholars who are interested in the way courts and judges 'work'. In political science, frequent catch-phrases include that of a 'judicialisation of politics' and a 'politicisation of the judiciary'.[88] For economists, courts are often seen as protectors of property rights, but also as a means to gradually adapt the law to changing circumstances.[89] Comparative criminologists also research a mix of court and adjudication related questions,

[78] Fukuyama 2014: 52–80. For Weber see also Smelser 1976: 117, 120–3 (as distinguished from traditional, or patriachic, and charismatic authority) and Section C 1, below.

[79] E.g. Evans and Rauch 1999 (finding a positive effect on growth); Boittin et al. 2016 (comparing the United States and China). See also Hughes 2012: 43–73 (overview of traditional model of public administration).

[80] See Adler and Stendahl 2012: 257.

[81] See, e.g. Hood 2000.

[82] See, e.g. Jordana et al. 2011 and Chapter 8 at Section B 1 (a), above.

[83] Wiener and Ribeiro 2016.

[84] See Aubyn 2008. See also Chapter 7 at Section D 2, above.

[85] Bourdieu 1996.

[86] Pakes 2012. See also Foucault 1977.

[87] E.g. Johnson 2001 (on prosecuting crime in Japan).

[88] Dressel and Mietzner 2012: 396 (on Thailand). See also the subsequent notes.

[89] Djankov et al. 2003a. See also Engert and Smith 2009 and Chapter 6 at Section A 2 (a), above (for legal adaptability) and Chapter 9 at Section A 3 (a), above (for the positive role of courts in democratisation).

such as policy transfers in crime control and the spread of 'problem-solving courts', causal factors explaining prison rates, and the relationship between criminal punishment and modern societies.[90]

In detail, for example, such comparative research explores the participants of the trial in an empirical way: it researches how law clerks and référendaires assist the judges of the highest US and EU courts,[91] and whether differences in de iure are reflected in de facto judicial independence.[92] Another frequent topic is the judicialisation of constitutional courts: research includes, for example, legal comparisons aggregating information on judicial independence and judicial review;[93] more factual comparisons dealing with judicial activism;[94] research on what drives and who benefits from the rise in judicial power;[95] as well as research on the relationship between judicial review and democratic accountability of legislature and executive.[96]

More generally, the judiciary, as well as the legal profession as a whole, are all said to play an important role in the emergence of 'Western political liberalism', referring to basic legal freedoms, moderate state powers and a stable civil society.[97] But this possible causal relationship does not necessarily mean that Western political liberalism should be seen as the main aspiration of other parts of the world. Policy choices also include a number of variations within the group of Western countries, as the following explains.

3 Classifying and Evaluating Policy Choices

Classifying countries in terms of policy choices is closely related to the way legal systems are classified into legal families. Neither in comparative law nor in other disciplines are these classifications beyond doubt,[98] but they may have the advantage that they correspond to a convenient middle way, that 'rejects the extremes of universalism and particularism'.[99] Moreover, classifications can be seen as test cases to determine which of the respective models is preferable. This relates such research to comparative legal research that aims to evaluate policy decisions, in particular – but not only – in the context of comparative law and development.[100]

[90] Jones and Newburn 2007 (on policy transfers); Nolan 2009 (on drug courts, domestic violence courts, mental health courts, etc.); Nelken 2010: 68–71 (on prison rates and related statistics). See also Chapter 6 at Section C 2 (b), above.
[91] Kenney 2000. [92] Feld and Voigt 2003; also Hayo and Voigt 2007.
[93] Rios-Figueroa and Taylor 2006 (comparing Brazil and Mexico). See also Ferejohn et al. 2007.
[94] Huneeus et al. 2010. [95] Hirschl 2008; Hirschl 2004; Stone Sweet 2000.
[96] Rose-Ackerman et al. 2015; Jordao and Rose-Ackerman 2014.
[97] Halliday 2010. See also Halliday and Karpik 1998; Halliday et al. 2007.
[98] For comparative law see Chapter 4, above. [99] Rose 1991: 447 (for comparative politics).
[100] See Chapter 2 at Section A 4 and Chapter 11, above. See also Bellantuono 2012 (calling for a policy-oriented comparative law incorporating research by political scientists and economists).

In comparative politics, political economy and social policy, two partly overlapping classifications have been particularly influential. The first one is the distinction between 'three worlds of welfare capitalism' by Gøsta Esping-Andersen.[101] In contrast to previous research on comparative welfare systems, this was not simply based on measures of aggregate spending, but on a variety of substantive policies such as pensions, sickness and unemployment benefits. The classification by Esping-Andersen distinguishes between the liberal welfare systems of Anglo-Saxon countries, a conservative-corporatist category applicable to most continental European countries, and the social-democratic Scandinavian countries. Subsequently, it has been argued that Mediterranean countries such as France and Spain deserve a separate category.[102] Also, if one includes countries of the developing world, further categories may be necessary, such as regimes of 'informal security' and 'insecurity'.[103]

These categories should not be thought of as static. Researchers have shown how models of the welfare state have diffused within Europe,[104] and social security is said to have become more than a mere European phenomenon in recent years.[105] Potentially problematic is the impact of economic globalisation on the welfare state. The fear may be that competitive pressures lead to a 'neoliberal' state with a reduced public sector, but also a willingness to expand the state through regulation of the private sector.[106] However, the literature also shows how changes are mediated by cultural traditions and political structures.[107] Whether and how distinctions between welfare states have weakened or strengthened in recent times is therefore, ultimately, an empirical question. It may also not lead to a single answer as there are different approaches to the measurement of social welfare.[108]

The second main classification is that of 'varieties of capitalism'. According to Peter Hall and David Soskice, the main distinction lies between liberal market economies such as the United Kingdom and the United States, on the one hand, and coordinated (or organised) market economies such as Germany and Japan, on the other. A typical feature of the former countries is the use of competitive markets, whereas the latter rely more on collaborative relationships.[109] In addition, the concept of 'institutional complementarities'

[101] Esping-Andersen 1990. For related topics see, e.g. Steinmo 1993 (on taxation policy); Holzinger et al. 2008 (on environmental policy). More generally on comparative public policy see, e.g. Clasen 2004; Castles 1993 (using the phrase 'families of nations').

[102] Castles 2004: 26. [103] Suggested by Wood and Gough 2006.

[104] Manning and Shaw 1999. [105] Pennings in EE 2012: 805.

[106] Cf. Pedersen 2010 (on research on the institutional competiveness of nations); Clift 2014: 172 (for the rise of the 'regulatory state') and 270 (for the view of a 'race to the bottom').

[107] E.g. Jreisat 2012; Swank 2002.

[108] E.g. Clift 2014: 177–80, 274–8 and Hay 2011: 324–5, 328 (aggregate data on state expenditure, workforce employed, and social spending across countries); Scruggs 2006 (comparative study on individual generosity of welfare); Hacker 2002 (in United States often 'private social benefits' with government support as substitute).

[109] Hall and Soskice 2001: 6.

plays an important role. This implies, first, that the differences between these two groups are relatively stable, for instance, referring to the notion of path dependency.[110] Secondly, it follows that the main divide is confirmed in many institutional features. For example, being a coordinated market economy is seen as related to strong employment protection, support of incremental innovation, sectoral training schemes, coalition governments and high levels of social welfare.[111] Legal scholars have also suggested that the varieties of capitalism distinction can explain the conceptual differences in many areas of law.[112]

It is sometimes thought that the economic fortunes of the respective countries may show which of the varieties of capitalism wins the day.[113] Others object that it cannot be said that one of the models triumphs. Rather, it is seen as more likely that 'institutional complementarities reinforce differences', that both varieties of capitalism have 'comparative institutional advantages', and that we may rather observe a dual convergence around these two models.[114] It is also worth noting that the division into just two models is not beyond doubt. Hall and Soskice themselves indicate that, within the group of coordinated market economies, we can distinguish between countries with industry-based and group-based coordination.[115] Others suggest further categories: for example, a category of governed market economies, as in today's China,[116] or three categories for the northern, western and southern countries of continental Europe.[117] There are also more radical critics of the varieties of capitalism literature, who refer, for example, to the hybrid nature of many countries (thus, doubting complementarities), the dynamic nature of political economies, and further varieties within the two main models.[118]

Today's comparative economic research on policy choices resembles these two classifications. Considering the history of economic thinking, this is not self-evident. Neo-classical economics was (and to a large extent still is) concerned with general theories and models, not variations across countries,

[110] See Clift 2014: 105–8 and Chapter 9 at Section A 3 (b), above.

[111] Hall and Soskice 2001: 17, 19, 39, 50. See also Hall and Gingerich 2009 (confirming institutional complementarities with empirical data).

[112] Kennedy 2012: 46–8 (on corporate law, labour law, welfare law, civil procedure); Casper 2001 (on contract law); Tate 2001 (on liability law). See also Pistor 2005 (on link between varieties of capitalism and legal families); Mucciarelli 2017 (limited relevance for employee protection in insolvencies). For politics and comparative law see also Chapter 5 at Section D 1, above.

[113] Cf. Clift 2014: 110–14 (as 'functionalist temptation'); Gilpin 2001: 175.

[114] Hall and Soskice 2001: 37; Hay 2004. See also Chapter 9 at Section A 3 (b), above.

[115] Hall and Soskice 2001: 34. Hall and Gingerich 2009: 478–9 also refer to a third category of 'mixed market economies' of mainly southern European countries.

[116] See Weiss 2010: 184.

[117] Amable 2003 (Scandinavian welfare state, Rhine capitalism and Mediterranean model, in addition to the market-based Anglo-Saxon model and the meso-corporatist model of Asia).

[118] Clift 2014: 228; Campbell 2010: 102–6; Deeg and Jackson 2007; Konzelmann and Fovargue-Davies 2013 (on 'varieties of liberalism'). See also the review by Ebbinghaus 2015.

assuming that markets can be analysed independent of political and legal structures.[119] From a different perspective, Marxist economics regarded law as the mere result of economic factors from which it could be followed that law did not shape differences between countries.[120]

However, the role of legal differences has gradually come to the focus of economists, starting in the 1970s. For example, theories of endogenous economic growth have considered how institutions can foster innovation and growth.[121] The New Institutional Economics has addressed, amongst others, how both informal and formal institutions set the rules of the game for the economy, also highlighting the importance of property rights and contract enforcement.[122] In addition, research on developing and transition economies has discussed whether and how such institutions can stimulate economic growth.[123]

Comparative economics in a narrower sense emerged prior to the fall of communism with research on the distinction between capitalist and socialist countries.[124] Subsequently, in the 1990s, a new field of research emerged, often called 'law and finance'.[125] This approach tries to quantify how well the laws of different countries protect certain interests, such as those of shareholders or creditors. The resulting data can then be used to test which legal institutions matter for the growth of financial markets. Such research has also found that the quality of legal institutions varies systematically with the 'origin' of a country's legal system (i.e. whether it falls into the English 'common law', or French, German or Scandinavian 'civil law' systems). It is therefore contended that legal origins determine the financing of corporate growth, and, through that and other channels, the nature of the financial system and ultimately overall economic growth.

This 'law and finance' research has the appeal that it seems to be in line with some other findings. The continuing relevance of legal origins, and how those differ, can be explained by the concept of path dependency.[126] This may also explain the better performance of the common law over the civil law world. At a general level, it may matter that case law, being more typical in the former countries, is more efficient than statute law, since it enables a decentralised, bottom-up construction of the legal order.[127] Moreover, it may be of benefit to the common law that it relies more on markets than the state – as the authors

[119] See Gilpin 2001: 104; Clift 2014: 1. [120] Cf. Donovan 2008: 47 (law as dependent variable).
[121] See Gilpin 2001: 116; Economides and Wilson 2001: 27.
[122] E.g. North 1990: 3; M. Aoki 2001: 5; Williamson 2000: 596. See also Cole 2013 (on various uses of term 'institutions'); G. Xu 2011: 341–2; Milhaupt and Pistor 2008: 18.
[123] See Chapter 11 at Sections A and B 1, above, and e.g. Beck and Laeven 2006 (on the experience of transition economies).
[124] Cf. Dallago 2004; Djankov et al. 2003b.
[125] The first paper was La Porta et al. 1998. See also Beck et al. 2003; La Porta et al. 2008; Siems and Deakin 2010.
[126] See, e.g. Rodrik 2007 and Chapter 9 at Section A 3 (b), above.
[127] See, e.g. Zywicki and Stringham 2011; Mahoney 2001 (with references to Hayek).

of the legal-origin view express it, 'when markets do or can work well, it is better to support than to replace them'.[128]

However, the 'law and finance' view of the economic superiority of the common law cannot be taken for granted. Previous chapters have already explained that the very basis of the law and finance research – the legal origin classifications and the coding and aggregation of legal rules – have critical flaws.[129] There is also more to be said about the causal claims made by this line of research. To start with, other researchers have challenged the specific effect of legal origins by showing, for example, that colonial duration, open trade and political factors such as a competitive party system, political stability and an effective bureaucracy, are what really drives institutional and economic differences.[130] More fundamental still is the 'causality puzzle': does law influence society or vice versa? The plausible response is that there are multiple causal relationships with various feedback mechanisms.[131] Often, it can then be found that the institutions that today's economists regard as relevant for development only emerged in the West after their own economic development.[132] Making empirical claims about the effect of the law based on comparative time-series data is also said to be doubtful since law reforms do not occur randomly in one country but not in others.[133]

Another major problem is the treatment of legal origins in the law and finance studies. The dual causality between legal origins and law, on the one hand, and law and financial development, on the other, is inconsistent, since the latter but not the former would subscribe to an instrumentalist use of laws.[134] Thus, as law and finance scholars find that there are profound differences between legal origins, this may indicate that different institutions are needed in different legal origins.[135] It is also crucial to consider how the effect of similar legal changes can differ. Previous chapters mentioned research that referred to the relevance of familiarity with the transplanted rule.[136] There can also be further variations, for example, it has been found that countries with

[128] La Porta et al. 2008: 327. See also Mahoney 2001: 511.
[129] See Chapter 3 at Section C, Chapter 4 at Section C and Chapter 7 at Section D 1, above.
[130] Olsson 2009 (on effect of colonial duration); Klerman et al. 2011 (on identity of colonial power); Rajan and Zingales 2003 (on relevance of free flow of capital and goods); Weingast 2010 and North et al. 2009 (on role of a competitive party system and competitive markets); Roe and Siegel 2011 (on political instability); Charron et al. 2012 (on differences in state infrastructure). See also Chapter 11 at Section C 1, above.
[131] Chong and Calderon 2000; also M. Aoki 2013: 235–6 (institutions as co-evolving with economic-demographic variables).
[132] Chang 2011: 476. See also Chapter 6 at Section C 1 (b), above (for company and commercial law).
[133] Spamann 2015: 141.
[134] Whytock 2009: 1902. See also Garoupa and Pargendler 2014: 60 (lack of sound theory).
[135] See Chang 2011: 486 (as problem of sample heterogeneity of econometric studies).
[136] See Chapter 4 at Section A 2 and Chapter 8 at Section A 2 (c), above.

a longer statehood experience are better able to implement transplanted laws than other countries.[137]

Finally, even assuming such causalities, it can be objected that simple reliance on 'what works' for financial development is insufficient; in other words, just asking about 'what works' disregards the fact that legal systems are also about what is 'right'.[138] For example, if one uses measures of low poverty rates, income equality and social health as dependent variables, it may well be the case that civil law countries outperform common law ones.[139] And while economic modelling has been used to show that the adversarial system of common law trials is more economically efficient than the (alleged) 'inquisitorial' style of civil law countries,[140] other economic theorists have found that it can lead to 'potentially large inequalities'.[141]

As a preliminary conclusion, this also points towards the following lessons about studying other comparative disciplines: on the one hand, the comparative lawyer should be open to other disciplines, which includes openness towards different methods and a willingness to find unexpected results. On the other hand, as far as other disciplines make claims about genuine issues of comparative law, the comparative lawyer can use her expertise to challenge such views in a constructive way. Ideally, such a dialogue between disciplines would be beneficial to both sides.

C Comparative Studies of Societies and Cultures

In the previous section, it was straightforward to identify states as the relevant units of comparison, mainly drawing on research in comparative politics and economics. The present section is mainly based on research in sociology, anthropology and psychology, and here it is more difficult to choose the appropriate point of comparison. The starting point of such research is often the individual human being, but each individual is also part of larger social and cultural structures, raising the questions of how those 'micro' and 'macro' levels are related to each other, and how both relate to state structures.[142] The following presents the diversity of results and methods in three steps: it starts with research on societies and cultures that contributes to an

[137] Ang and Fredriksson 2017.

[138] Cf. Nelken 2010: 26 ('in Anglo-American countries something is right because it works; in other countries a response works because it is right'); Nelken 2007a: 124–5 ('different popular ideas in different countries about the purposes of law and what is to be expected from it').

[139] Ferguson et al. 2017; Sachs 2008: 258. See also Kenworthy 2010: 411–15 (on general relationship between institutions and inequality) and Chapter 11 at Section A 2, above (on Amartya Sen).

[140] Massenot 2011. See also Chapter 3 at Section B 2 (d), above (for civil procedure).

[141] Deffains and Demougin 2008 (comparing criminal court settings).

[142] Cf. Peters 2013: 46–9 and Welzel and Inglehart 2007: 303–4 (for the 'ecological' and 'individualistic' fallacies); Berry et al. 2011: 295 (for research finding high correlation between culture at individual and country level); Landman 2008: 19, 41–5 (also for the 'structure-agency problem' in political science).

understanding of both differences and similarities between legal systems, followed by research on legal universalities and singularities, and attempts to quantify legal mentalities.

1 Understanding Differences and Similarities Between Legal Systems

In comparative law, the most frequent position is that there are both similarities and differences between countries. Thus, for example, a comparatist may find that, for a particular legal question, countries A and B are similar, but both are different from country C. This distinguishes such a position from the more radical counter-views that either all legal systems are unique or that all are essentially similar. A corresponding position is taken by many studies that compare societies and cultures.[143] Thus, as far as those studies also deal with legal questions, they are akin to such comparative legal research. In addition, information on cultural or societal factors can be important for the question of whether there are functional similarities despite formal legal differences, also a core topic of comparative law.[144]

The foundational sociological research by Émile Durkheim and Max Weber provides good examples of research that tries to understand differences and similarities between societies, also giving attention to the law. Durkheim distinguished between, on the one hand, pre-modern collective societies with mechanical solidarity and a preference for repressive sanctions by way of penal law, and, on the other hand, modern societies with organic solidarity, deriving from an increased division of labour, and a preference for restitutionary sanctions by way of private and commercial law.[145] While recent trends do not confirm that modern (and postmodern) societies use less criminal law,[146] Durkheim's research is still considered ground-breaking in incorporating law as an integrated and conscious part of society, and in fostering an empirical and objective approach to sociology.[147]

Max Weber's research has equally been both influential and controversial. Amongst others, Weber developed a typology of socio-legal systems, distinguishing between two dimensions: on the one hand, formal and substantive (or informal), and, on the other hand, rational and irrational.[148] It is seen as damaging for a society to be based on irrationality, be it that it is formal – for example, using oracles – or that it is informal – for example, deciding conflicts in an arbitrary way. With respect to rational regimes, Weber prefers the formality of rules to the informality of principles, values and traditions.

[143] Cf. Hantrais 2009: 5, 38 ('societal method could be seen as presenting a middle way between the extremes of universalism and culturalism').
[144] See Chapter 2 at Section B 1 (b), above.
[145] Durkheim 1947. See also Donovan 2008: 49–50; Moore 2005: 40–1; Smelser 1976: 78–113.
[146] See Chapter 6 at Section C 2 (b), above.
[147] See Smelser 1976: 46, 74; Tamanaha 2001: 34.
[148] For this and the following see Riles 2006: 779–82; Donovan 2008: 52; White 2001: 40–2; Smelser 1976: 116–50. The main work is Weber 1968 (original from 1922).

These 'ideal types' are seen as related to different countries and regions. Irrationality is associated with Asian and African cultures, for example, referring to Confucian ethics in China and the 'Khadi justice' of Islamic law. Informal rationality is associated with England, and formal rationality is seen as typical for the modern Roman-based codes of continental Europe. The latter category is then associated with a successful capitalist economy, while Weber also refers to other causal factors related to modern capitalism.[149]

At a general level, Weber has been criticised for the tendency to isolate cultures and to impose the use of Western concepts on the analysis of other parts of the world.[150] More specifically, his disrespect for Chinese and Islamic law has been challenged. Weber's view that only modern Western societies are based on a system of rational law mediated by a professional class of lawyers is seen as inaccurate, since in China too 'technically qualified experts' – here, in Confucian ethics – were essential for creating a stable normative order.[151] The alleged arbitrariness and irrationality of the Khadi justice of Islamic law may be related to the traditional lack of written judgments and appeals, and the particularised way of deciding cases.[152] Yet, it is today widely held that Weber's criticism is inaccurate or even 'orientalist', as Islamic law is also based on doctrines and regularities that consider its historical and socio-cultural context in a non-arbitrary way.[153]

Despite this criticism, Weber's research has remained influential. For example, in today's research, Richard Vogler suggests that different forms of criminal justice can be related to Weberian ideal types, and Roger Cotterrell relates Weberian types of social action to the likelihood of legal transplants in different areas of law.[154] More generally, Weber's influence can also be identified in the notions of legal families, and how modern laws can stimulate development.[155] In this respect, it has been argued that Weber seems to have an 'England problem' because a case-based common law system may be seen as less 'formally rational' than continental law, while England was at the forefront of economic development in the industrialisation of the eighteenth and nineteenth century. However, it is also possible to reconcile Weber with the English case if one places the emphasis on the fact that England did have formal procedural rules and assured rights when it developed economically.[156]

[149] For example, the 'protestant ethic', see Weber 2008 (original from 1905). Similarly, the empirical work by Stulz and Williamson 2003. See also Chapter 6 at Section C 1 (b), above (for research on Islamic law by Kuran).

[150] Gephart 2011: 18. See also White 2001: 52–3.

[151] Qian 2010: 44.

[152] Cf. Shapiro 1981: 194–222; Glenn 2014: 188.

[153] Nader 2009: 62; Mattei and Nader 2008: 110; Ahmed 2005: 115; Rosen 1989: 18; Shapiro 1981: 194 ('image of a somewhat scruffy Muslim holy man sitting under a tree and deciding cases on a purely ad hoc basis as the morality or equities of the conflict struck him'). For 'legal orientalism' see also Chapter 4 at Section C 1, above.

[154] Vogler 2005 (distinguishing between popular, adversarial and inquisitorial justice); Cotterrell 2001: 82 (traditional, affective, purpose rational and value rational types of action).

[155] See Chapter 4 at Section B 1 and Chapter 11 at Section A 1, above.

[156] See discussion in Siems 2017b: 123–4.

In anthropology, cultural studies and cross-cultural psychology, classifications have also remained relatively popular.[157] Many studies have tried to develop categories of cultures. These may be based on clearly observable characteristics – for example, one may reasonably assume that cultural and linguistic entities are closely related.[158] There is also the prominent view that there are deep cognitive differences between 'Eastern' (i.e. Asian) and 'Western' cultures,[159] while others use further differentiations (e.g. Western, Eastern European, Middle Eastern, Sub-Saharan African, Latin American, Southern Asian, Eastern Asian).[160] More substantive typologies distinguish, for instance, between 'progress-prone' and 'progress-resistant' cultures, 'tight' and 'loose' cultures as regards social conformity, and 'authority-ranking', 'egalitarian', 'market-pricing' and 'torn' cultures.[161] This line of studies may also touch on the relationship between cultures and institutions (including the law),[162] while the following will elaborate on anthropological classifications that have considered the law in more detail.

Until the 1960s, legal anthropology often distinguished between more and less advanced societies – for example, between 'simple societies with multiplex social relationships and technologically complex societies with single-interest social relationships'.[163] Subsequent anthropologists have suggested more substantive criteria. Some of those relate to cultural and/or geographic categories: for example, Katherine Newman compared the law and economics of pre-industrial societies, distinguishing between food collectors, pastoral societies and cultivators; Clifford Geertz examined how the specifics of Islamic, Indic and Malaysian cultures relate to different legal sensibilities; and Wolfgang Fikentscher suggested the categories of pre-axial, East and South Asian, Western, Muslim, Marxist and National Socialist modes of thought, including legal thought.[164] Three examples of explicitly law-related categories include Philip Gulliver's distinction between regimes of judicial and political dispute resolution, Paul Bohannan's classification of unicentric, bicentric and multicentric process models, and Keith Otterbein's distinction

[157] But see also Section 2, below.
[158] Hantrais 2009: 53. Now discredited are references to race, see Glenn 2014: 37–8.
[159] Nisbett 2003. Further references in Berry et al. 2011: 17, 122–3, 147–50, 363.
[160] Vignoles et al. 2016 (also emphasising variations within these regions).
[161] For these examples see Grondona 2000; Triandis 1994: 160; Gannon and Pillai 2010. For further typologies see Chanchani and Theivananthampillai 2004.
[162] See, e.g. Gelfand et al. 2011 ('tight nations' have harsher punishments and fewer polical rights and civil liberties); Gannon and Pillai 2010: 574 ('Frequently cultural values determine the legal system, the education system, the political governance system, and the dominant family system, as we would expect. At other times key leaders can change the culture itself to bring it into conformity with the institutions they champion'). For a dual relationship see also Chapter 6 at Section A 2, above.
[163] Chodosh 1999: 1097–8 (with reference to Max Gluckman and others).
[164] Newman 1983; Geertz 1983: 169; Fikentscher 2004: 189–466. For Fikentscher see also Chapter 5 at Section C 1 (a), above.

between countries that use capital punishments for reasons of 'group survival', 'confrontation' and 'political legitimacy'.[165]

Comparing religious cultures can also lead to categories with a comparative legal dimension. For example, Jacques Vanderlinden suggests that the Christian, Islamic and Jewish faiths regard revelation as their main source; Buddhist, Confucian and Daoist faiths have legal science; and Hinduism has custom.[166] Other researchers have explained that, in particular, Islamic law and common law share certain similarities, for example, a gradual way of reasoning.[167] Furthermore, developing categories across religions, one may determine, for example, how countries differ in the relationship between state and religion,[168] how groups of countries perform in the protection of human rights,[169] and whether differences in the extent of religiosity are related to the quality of legal institutions.[170]

The more general question remains why, beyond obvious reasons of geography and language, particular cultures and societies are similar. In anthropology, this is often discussed in connection with 'Galton's problem'.[171] It derives from a disagreement between Sir Edward Tylor and Francis Galton at an event in 1889: Tylor presented his anthropological research in order to show deep commonalities between cultures, but Galton objected that these similarities could equally be due to cross-cultural borrowing. In the twentieth century, the concept of cultural diffusion has become a frequent topic of research in social sciences. Sociologists have explored how ideas are communicated and received across societies, identifying, for example, possible channels of communication and stages of adaptation.[172] Economists also use concepts of demand and supply as they relate to ideas,[173] evolutionary psychologists distinguish between genetic and cultural evolution,[174] and critical geographers encourage us to consider the influence of 'discursive paradigms, ideational circuits, institutional frameworks, and power structures'.[175] All of this is of interest for comparative law, as the spread of ideas may lead to socio-cultural changes that, in

[165] Gulliver 1979; Bohannan 1965; Otterbein 1986 (based on the HRAF, see above note 12).
[166] Vanderlinden 2002: 181.
[167] Makdisi 1999: 1696–717; Quraishi 2006. See also Chapter 8 at Section B 2 (a), above.
[168] Hirschl 2011: 435–7 (distinguishing between eight models of state and religion relations); Cook 2014: 309–60 (comparing role of state in Islam, Hinduism and Catholicism). See also note 80 in Chapter 10 at Section A 3 (b), above.
[169] Cole 2016 (Christian countries better on civil liberties; no relationship between different religions and protection of bodily integrity).
[170] Berggren and Bjørnskov 2013 (finding that religiosity is negatively related to institutions).
[171] Naroll 1965. See also Hantrais 2009: 64.
[172] E.g. Rogers 2003; Parsons 1966. See also Twining 2004; Twining 2005. This could also be related to research on migration and law: see, e.g. Coutin 2000.
[173] See Brown 2015.
[174] Boyd and Richerson 1985. See also Du Laing 2011; Berry et al. 2011: 266–7.
[175] Peck 2011: 785.

turn, determine legal changes which, in turn, may explain differences and similarities between legal systems.

2 Showing Legal Universalities and Singularities

In traditional comparative law, there is some support for legal universalities, whereas postmodern comparative law often takes the counter-view of legal singularities.[176] These two views also play a role in a number of further topics of comparative law, such as the transferability of human rights and the globalisation of rules in the context of comparative law and development.[177] It is therefore interesting that some research in anthropology and other social sciences also takes the view that there is some universality in law, whereas others favour singularities. To be sure, as many of those researchers accept that there are both similarities and differences, the contrast between the 'radical' views discussed in this sub-section, and the views discussed in the previous one, should not be overstated.

Anthropology has a natural affiliation with universalities as far as it aims for the 'elucidation of the human condition'.[178] For example, in the late nineteenth century, the comparative legal anthropology of Albert Hermann Post saw, in the legal customs of all cultures, evidence for general forms of human organisation.[179] In the early to mid-twentieth century, Bronislaw Malinowski and Alfred Radcliffe-Brown found that Western and non-Western cultures shared aspirations for order and solidarity, even if some of the latter societies lacked law in a narrow-formal sense.[180] A similar position was taken by Max Gluckman, but, in addition, he also claimed that legal concepts such as ownership, the doctrine of liability and the logic of judicial reasoning of Western laws could be found in the African societies of his study.[181]

The problem with such research may be that, traditionally, anthropologists mainly conduct fieldwork in one particular place, being concerned with the in-depth, personal observations of a limited group of persons. Thus, the extent to which such empirical findings can identify what applies to all human beings is doubtful. Some attempts have been made to go further. The long-term project on Human Relations Area Files at Yale University has collected information on

[176] See Chapter 2 at Section B 2 and Chapter 5, above.
[177] See Chapter 9 at Section C 3 and Chapter 11 at Sections B and C 3, above.
[178] Donovan 2008: xiv. See also Pirie 2014: 105 (it seeks 'patterns and continuities in social forms').
[179] Post 1884: XI.
[180] Malinowski 1926; Radcliffe-Brown 1951. See also Donovan 2008: 69–78; Caterina 2004: 1529–45 (suggesting an 'innate basis of reciprocity', with references to Malinowski and others); Pospisil 1971: 341 ('there is no basic qualitative difference between tribal (primitive) and civilized law').
[181] Gluckman 1955. See also Donovan 2008: 100–11; Bennett 2006: 650. For critical positions see Edge 2000: 9–10 ('over-eager readiness' to interpret customary law of East Africa as akin to English law); Moore 2005: 346 (customary law as 'composite colonial construction').

a large number of cultures.[182] Specifically related to a legal topic, a project coordinated by Laura Nader and Harry Todd examined dispute resolution in ten societies in different parts of the world. This was based on a standardised data collection method; yet, the resulting book does not contain a conclusion that attempts to identify what features these dispute resolution processes have in common.[183]

Research on human commonalities has, at least, had the impact that, in contemporary anthropology, it is seen as inappropriate to treat certain cultures and societies as 'primitive' or 'childlike'.[184] Some contemporary anthropologists, such as Maurice Bloch, also reject the view that 'different cultures or societies have fundamentally different systems of thought'.[185] A further legacy is that cultural differences are not seen as obstacles that can never be overcome. For example, according to Sally Engle Merry, one should not 'misread' culture as hindering the globalisation of human rights.[186] This does not imply that the local context is irrelevant, but that such differences are subject to the 'transnational circulation of people and ideas' leading to transformations of 'the world we live in'.[187]

Some scholars in other disciplines also suggest universalist views with relevance to law. In political philosophy, the idea of a common law of nations is an early example.[188] In comparative criminology, universals may concern cross-cultural approaches to crime prevention.[189] Psychology can also be universal if the 'evidence of shared patterns in the structure of human intelligence or behavior' points towards a 'similarity of social arrangements, including law'.[190] For example, according to Owen Jones and colleagues, it is the 'unique brain signature of the human animal, written by evolutionary processes' that has shaped the architecture of law, as evidenced, for example, in shared institutions of justice and, thus, the shunning of physical aggression, theft and fraud.[191] In a number of articles, Julie De Coninck also suggests that the findings of behavioural economics can be used to show that physical

[182] See www.yale.edu/hraf/. For a critical summary see Berry et al. 2011: 234–7. A related project, though with a different method and coverage, is the Standard Cross Cultural Sample (SCCS), available at http://eclectic.ss.uci.edu/~drwhite/sccs/.

[183] Nader and Todd 1978. See also Donovan 2008: 135–47, 179–80.

[184] Rosen 2006: 60–1. Similarly for the role of anthropology for comparative law, Menski 2006: 390 and Grossfeld 2005: 245.

[185] Bloch 1977: 279. See also Caterina 2004: 1517–18.

[186] Merry 2003: 68. Similarly, Brems 2001.

[187] Merry 2006: 44. See also Chapter 9 at Section C 3 (c), above.

[188] Richter 1969: 142 (discussing Jean Bodin).

[189] See research discussed in Nelken 2010: 19, 28, 40.

[190] Muir Watt 2012: 272. Similarly, Berry et al. 2011: 6–8, 11–12, 288–94 (supporting a 'moderate universalism'); Henrich et al. 2010: 62 (rejecting 'radical versions of interpretivism and cultural relativity'). For a more specific example see, e.g. Fiske 1991 (suggesting four elementary mental modes in all cultures). The counter-view is often related to concepts of 'indigenous psychology', see Berry et al. 2011: 18–20, 286–8, 298; Hantrais 2009: 41.

[191] Jones 2001: 873–4 (for the quote); Robinson et al. 2007 (for the examples). See also Du Laing 2011: 689–92.

possession of an object may be a universal factor that is relevant for the structure of property rights.[192]

The particularist counter-view is that it is precisely the aim of comparative research to challenge ethnocentric views that assume that what is familiar is also universal.[193] The emphasis is therefore on how 'spatial specificity' and 'local knowledge' account for legal and other differences.[194] For example, Bruno Latour explicitly rejects the view that social scientists should aim for reduction, and that descriptions can be 'too particular, too idiosyncratic, too localized'.[195] Such a 'relativist' position has also been associated with one of the founding fathers of anthropology, Franz Boas, given his scepticism towards universalist ideas.[196] After the Second World War, the American Anthropological Association rejected the concept of universal human rights.[197] Academic writings by Paul Bohannan and E.E. Evans-Pritchard emphasised cultural differences or even uniqueness – for example, Bohannan strongly opposing Gluckman's use of Western legal concepts for non-Western societies.[198] National character studies of specific countries had similar tendencies, for example, Ruth Benedict's book on the nationalism and militarism of Japan in the time of the Second World War.[199]

The politics behind the rejection of universalism is related to the history of anthropological research. In the late nineteenth century, the colonial powers saw anthropology as a useful tool to identify local customs and to use those as a way of administrative control.[200] Thus, it can be suggested that the Western-universalist world vision of anthropology is very much a product of a past age. Since the mid-twentieth century, the problem of a potential Western fieldworker bias has also been extensively discussed. The main distinction is between the perspective of outsiders ('etic') and insiders ('emic'), with the frequent suggestion that the anthropological researcher should try to develop an 'emic' understanding.[201] Yet, becoming a complete 'insider' would be an unrealistic requirement for anthropological researchers of other cultures. Thus, the best possible advice is to be aware of the challenges of cross-cultural research – for

[192] De Coninck 2011; De Coninck 2010: 344; De Coninck 2009: 15.

[193] Moore 1986: 12. Generally see also Rosen 2012: 73; Hantrais 2009: 40; Elder 1976.

[194] Holder and Harrison 2003; Geertz 1983. See also Darian-Smith 2013: 167.

[195] Latour 2005: 137.

[196] Boas 1896 and see Merry 2003: 65; Berry et al. 2011: 230.

[197] American Anthropological Association 1947. Today it follows a more mixed position, see www.americananthro.org/ParticipateAndAdvocate/CommitteeDetail.aspx?ItemNumber=2218.

[198] Evans-Pritchard 1963: 17; Bohannan 1957. For the Gluckman-Bohannan debate see also Adams 2014: 89–96; Donovan 2008: 164–7.

[199] Benedict 1946 (with brief comparisons with Western countries). The concept of a country's 'national character' can also be associated with Johann Gottfried Herder (1744–1803). For research in psychology see Peabody 1985 (comparing the national characters of six countries). For the concept of the 'nation-state' see also Chapter 10 at Section A 1, above.

[200] See Donovan 2008: 59; Mattei and Nader 2008: 102; Tamanaha 2001: 113–15. See also Chapter 4 at Section C 3 (a), above.

[201] See, e.g. Berry et al. 2011: 23–4; Hantrais 2009: 78–9, 100–1; Hyland 2009: 94; Graziadei 2009: 733; Ainsworth 1996: 27, 33.

example, on how social, linguistic and ethical differences affect our understanding of different cultures.[202]

In recent years, interpretative and postmodern approaches to anthropology have also been sceptical about 'positivist' claims of universality.[203] This does not deny the role of forces that go beyond particular cultural units: for example, a typical statement may be that 'bounded cultural groups' are also 'embedded in regional and global forces'.[204] In addition, legal anthropology has broadened its field of interest: topics can now concern all types of societies and places, including modern societies and transnational fields, for example, international arbitration, global financial markets and governance.[205]

It would also no longer be accurate to identify all 'particularists' as having a relativist position, because contemporary anthropologists do not shy away from making policy recommendations. For example, they discuss how to address global and local power structures, and how to improve the situation of the ethnographic informant, but also how to incorporate aspects of culture into the law, and how to use traditions as a defence against injustice.[206] All of this shows that the discussion has moved beyond radical views of universalism and particularism. It may also be said that problems of similarities and differences, as well as universalism and particularism, would properly have to start with empirical information on what individuals think and do across units of comparison – to which we turn next.

3 Measuring Legal Mentalities and their Relevance

The importance of alleged or real differences in legal mentalities is a frequent topic of postmodern comparative law, and it can also be related to many other topics, such as legal families and legal transplants.[207] Trying to measure legal mentalities also overlaps with themes of numerical comparative law.[208] Moreover, the research discussed in the following may not only try to measure how legal mentalities differ, but also to find out how such differences may be related to other socio-economic differences: thus, this also provides a link to socio-legal comparative law.[209]

The general background of many of such measurements is provided by comparative surveys that collect information on a variety of topics such as income, education, work, family relations and crime.[210] Those surveys often include questions with direct relation to law, and Chapter 7 on numerical

[202] Books on qualitative cross-cultural research provide such guidance, e.g. Minkov and Hofstede 2013; Liamputtong 2010.
[203] See Hantrais 2009: 107; Donovan 2008: 20; Darian-Smith 2004: 548.
[204] Darian-Smith 2004: 550.
[205] See generally Moore 2005: 346–67 and for the examples see Riles 2008; Riles 2013; Merry 2016: 8–9.
[206] See, e.g. Moore 2005: 352; Donovan 2008: xi, 209–30; Mattei and Nader 2008: 202.
[207] See, e.g. Chapter 5 at Section C 4, Chapter 4 at Section B 2, and Chapter 8 at Section A 3, above.
[208] See Chapter 7, above. [209] See Chapter 6, above. [210] See Hantrais 2009: 26.

comparative law already discussed some examples, such as the various social and value surveys.[211] Another prominent example is Geert Hofstede's survey-based research on national cultures.[212] Similar to some of the studies reported in the previous sub-sections, it is then also possible to aggregate and compare the answers, for example, between respondents from developed and developing countries, or between respondent from different geographic regions.[213]

Cross-national surveys face various challenges. The literature discusses, for instance, problems such as the comparability of translations, differences in response styles, and lack of context for broad survey questions.[214] An alternative to surveys is to conduct the same psychological experiment in different societies. Of course, here too, the problem is whether a particular experiment can work across cultures. Still, recent research suggests that there is an urgent need for more extensive use of such studies, as psychologists have mainly conducted experiments with the easiest-to-reach participants, namely, Western university students.[215]

It is frequently suggested that research on human behaviour can be helpful for the understanding of legal systems. In the non-quantitative literature, it is, for example, suggested that 'an English judge is not only a judge; she is also English', that the national character of the Germans accounts for their preference for rigid rules, and that different behavioural patterns amongst consumers account for diverse effects of legal rules.[216] Research has also indicated how legal differences may shape behavioural ones. For example, it has been suggested that corrupt legal regimes make people behave in a friendlier way, since they rely on informal networks;[217] and a more general literature also discusses how legal rules become internalised and how institutions can change perceptions of one's identity.[218]

With this background information, the following examples aim to illustrate how researchers have quantified opinions and attitudes related to legal mentalities. First, it is often discussed that differences in approaches to individualism, as measured by Hofstede, can account for differences in the rule of law and the protection of property rights. For example, James Gibson and Gregory Caldeira's research on European legal cultures found that individualism and support for liberty are positively correlated, and that there are

[211] See Chapter 7 at Section D 3, above.

[212] See http://geert-hofstede.com/national-culture.html. For other datasets see http://usdkexpats.org/theory/schwartzs-culture-model; https://culture-emotion-lab.stanford.edu/projects/toolsmaterials/affect-valuation-index/.

[213] Minkov and Hofstede 2013: 409–33. See also Fan and Jemielniak 2016: 572–7 (on differences between Asian and other countries).

[214] See, e.g. Jowell et al. 2007; Jowell 1998; Hantrais 2009: 78–83; Berry et al. 2011: 106, 114, 293; Minkov and Hofstede 2013: 93–122.

[215] Henrich et al. 2010. See also De Coninck 2011: 725.

[216] Legrand 1999: 73–4; Legrand 1997a: 47; Weatherill in EE 2012: 241.

[217] de Soto 2008: 6.

[218] Schauer 2012: 225; Varshney 2007: 289–90.

further positive correlations between support for the rule of law and indicators of modernisation.[219] International comparisons usually find that common-law legal systems, in particular the United States, are both more individualistic and more reliant on the rule of law than other legal families.[220] Corresponding findings have been made for specific questions of business law, for example, that individualist countries, which are often common-law countries, provide higher levels of shareholder protection and impose fewer restrictions to the entry of new firms.[221]

Second, comparative research on the 'amount of law' can be seen as complementary. Also drawing on the Hofstede data, Amanda Perry-Kessaris observes that countries with a higher score in the category 'uncertainty avoidance' will have more laws than others, but also that laws are potentially under enforced. The United Kingdom is seen as a contrasting example as it has a low 'uncertainty avoidance' score, a tendency not to rely on formal statutory law, but an effective rule of law.[222] Research by economists has also considered the role of 'trust', using data from the World Values Surveys, with the finding that distrust leads to more demand for and higher levels of regulation.[223] Similarly, psychological studies on different forms of morality suggest that law and 'non-law' can be substitutes: while secular Western populations have a morality based on justice, personal choice and individual rights, other societies have 'ethics of community' and 'ethics of divinity' with less reliance on law.[224] The law has also been found to reflect that in some countries, but not in others, people attribute certain accidents to human action, thus explaining corresponding rules of compensation.[225]

Third, forms of government have been related to the information collected in value surveys. For example, Eric Posner and Adrian Vermeule were interested in whether populations which have positive views about strong leaders also tend to be non-democratic ones: yet, using the variables of the World Values Survey, such a correlation could not be confirmed.[226] Similarly, another group of researchers did not find that the low trust in legislatures in Latin America, as measured by the Latinbarometer, was related to the type and stability of the political regime.[227] By contrast, a study examining attitudes in Asian countries, using the Asian Barometer, observed that the population of

[219] Gibson and Caldeira 1996. See also Klasing 2013 (finding that individualism matters for institutional quality).

[220] Licht et al. 2007. For similar legal research see Chase 1997: 865; Ehrmann 1976: 40. For research in economics, arguing that this is a causal relationship see Davis and Abdurazokzoda 2016 (using linguistic variations as instrumental variable).

[221] Licht et al. 2005; Davis and Williamson 2016. See also Chapter 6 at Section C 1 (b), above.

[222] Perry-Kessaris 2002: 296–7. See also Chapter 7 at Section C 1, above (for amount of law).

[223] Pinotti 2012; Aghion et al. 2010.

[224] See Henrich et al. 2010: 71–3. See also Chapter 6 at Section A 2, above.

[225] Mehra 2013 (for experiment conducted in United States and Japan). This can also be interpreted as challenging the functionalism of traditional comparative law, see Chapter 2 at Section B 1, above.

[226] Posner and Vermeule 2012 (on 'tyrannophobia').

[227] Huneeus et al. 2007: 150–1.

autocratic countries, but not democratic ones, supported a 'paternalistic' relationship between the government and the people. This is an important finding, as it can be read as refuting the view that 'Asian values' are bound to lead to particular constitutional rules and structures.[228]

Fourth, general attitudes towards the law have been examined by means of surveys and experiments. The survey studies often relate these attitudes to the notion of 'legal consciousness', defined as the way individuals 'mobilise, invent, and interpret legal meanings and signs'.[229] They show, for example, that opinions about the law are often related to those about a country's politics: so respondents from countries with negative opinions about political authorities also tend to have a negative view about making use of the law.[230] The other side of the coin are variations of honesty among people from different countries. A much-cited natural experiment used data from parking violation by UN diplomats: it found that diplomats from high corruption countries were more likely to use their diplomatic immunity as a shield for unpaid parking violations.[231] Experimental studies have reached more mixed results, with only some of them confirming a link between the level of corruption of a country and the frequency of cheating in experiments.[232]

Fifth, there is extensive research on the relationship between crime, punishment and different legal mentalities. Only a few examples can be provided here. Starting with comparative information about crime, an experimental study conducted in five countries found a positive correlation between trust in a society and abstention from theft, while another study did not find that differences between the values of respondents from Muslim and non-Muslim countries were strongly related to differences in criminal behaviour.[233] Linking values to actual differences in criminal punishment, a study suggests that the public supports harsher sanctions in countries with relatively soft sanctions, but not in countries with harsher ones.[234] Finally, many experimental studies aim to explain differences in the willingness to punish behaviour, for example, finding that larger communities are more willing to punish unfairness and that communities with a weak rule of law are more willing to punish pro-social behaviour.[235]

[228] Shin 2011. See Chapter 9 at Section C 3 (b), above (for the debate about human rights and 'Asian values').

[229] Silbey 2015: 726.

[230] Hertogh and Kurkchiyan 2016. For the underlying surveys see Grødeland and Miller 2015 and Kurkchiyan 2011.

[231] Fisman and Miguel 2007.

[232] E.g. Barr and Serra 2010 (different results for foreign undergraduate and postgraduate students in United Kingdom); Gächter and Schulz 2016 (reporting robust link based on experiment in twenty-three countries); studies by Sven Steinmo and colleagues at www.willingtopay.eu (ongoing project with mixed results so far).

[233] Ahn et al. 2016; Fish 2011.

[234] Newman 1976/2008.

[235] Henrich et al. 2014; Herrmann et al. 2008. See also De Coninck 2011: 725–6.

A possible objection to research related to legal mentalities is that, in recent decades, individual identities may have become more loosely connected to the place where people live and work. Yet, in contrast to statements by comparative lawyers about deep-seated differences, the research outlined in this section has the advantage that it presents us with scientific tools to test how far global trends have indeed had such an effect. Such research can also improve our understanding on how the 'micro-level' of individual thinking and behaviour is related to the 'macro-levels' of cultures, societies and legal systems.

D Conclusion

The discussion in this chapter has shown that there is a considerable research on comparative law in other disciplines: clearly, comparative law seems to be too important to be left to comparative lawyers! Increasingly, given the availability of electronic publications that may simply be found with search engines on the Web, even traditional comparative lawyers have become aware of this fact. But, then, comparative lawyers may be deeply puzzled by the methods and findings of such 'implicit' comparative legal research originating from other disciplines.

It was therefore the aim of this chapter to provide a critical introduction to the methods of these comparative disciplines and some of their main research. A number of topics may have been familiar to comparative lawyers, for example, the frequent discussion about universality versus specificity, in particular the different emphasis on either similarities or differences between countries, cultures, societies or other units of comparison. Other themes may have been less familiar. For example, establishing causal relationships based on comparative legal information is common practice in non-legal research, whereas many comparative lawyers tend to feel more at home in describing and interpreting legal rules from different countries. Non-law comparative disciplines also tend to be less hesitant than comparative law in making wide-reaching legal and policy recommendations based on cross-country comparisons.[236]

Comparative lawyers also have to be aware that other disciplines, even if they use a more scientific method and terminology, hardly provide certainty. There is wide variation in the social sciences, ranging from 'universalist' to 'relativist' views, often (though not always) related to the use of 'robust' quantitative methods on the one hand versus 'deep' qualitative methods on the other. Of course, it is unlikely that one camp gets everything right and the other one everything wrong. Thus, it is suggested that comparative lawyers should adopt a position that tries to incorporate diverse methods and views into their thinking. In so doing, 'implicit' comparative law will become

[236] This quest for 'better law' is elaborated in Siems 2014b.

'explicit'. Thus, comparative law will be a field where there is 'primacy of the topic over the perspective'.[237] It can and should also become more contextual and cosmopolitan, as the final chapter of this book will explain in more detail.

Supplementary Information

Questions for discussion. What is the main idea of 'implicit comparative law'? Are the methods of other comparative social sciences fundamentally different from those of comparative law? Apart from comparative law, which fields deal with the state in a comparative perspective? How far is comparative research on societies and cultures relevant for comparative law? Is it possible to measure differences in legal mentalities?

Suggestions for further reading. For general perspectives on comparative research across the social sciences: Hantrais 2009 and Smelser 1976. For social sciences and constitutional law and politics: Hirschl 2014. For an overview of cross-cultural research (not specifically related to law): Minkov and Hofstede 2013. For an article that revisits the themes of this chapter under the perspective of the search for 'better law': Siems 2014b.

[237] Simon and Sparks 2013: 4 (using this phrase for the field 'punishment and society').

13

Reflections and Outlook

The statement that 'comparative law is an "open subject" that can absorb further research not traditionally included'[1] means that there is a high degree of flexibility in the method and scope of comparative law. However, this does not imply a methodological relativism where 'anything goes'. Treating methods seriously also leads to the need to reflect about advantages and disadvantages of certain methods. This position is reaffirmed in this final chapter. It will continue the discussion about the role of other disciplines for comparative law while also providing some general suggestions for comparative law research.

Section A on 'reflections' revisits the themes of this book. It also presents tentative guidance on the diversity of questions and methods of comparative law. Section B on 'outlook' suggests that interdisciplinarity and cosmopolitanism should be two of the defining features of a future comparative law. Section C concludes.

A Reflections

1 Revisiting the Topics of This Book

Part I on 'traditional comparative law' (Chapters 2 to 4) included some critical remarks on the conventional method of comparative law, notably functionalism. The subsequent discussions in this book have shown that, today, comparative lawyers use a variety of further methods. Additional challenges come from other disciplines, so far as these are typically more empirically oriented. As a result, while the traditional method still has its scope of application, it is suggested that it is no longer the 'default option', and that a comparatist needs to justify the method she plans to employ.

The first part also dealt with the notion of distinct legal families, while also challenging its validity. The treatment of 'global' developments has further raised doubts about the view that today's legal world can be securely divided into common law, civil law and other legal families. Moreover, the debate

[1] See Part IV prologue, above.

about differences and similarities, as well as universalism and singularities in other disciplines, points towards the conclusion that one's perception of whether countries belong together in certain groups is often a matter of interpretation. For example, if there are four countries (a, b, c and d), and they score on a particular measure (min 0, max 1) with (a) 0.35, (b) 0.36, (c) 0.40, (d) 0.50, it could be said that (a) and (b) belong to the same 'family' as the difference is just 0.01, but it is also possible to claim 'universalism' as all countries score between 0.35 and 0.50, or to claim singularities as the four countries do not have identical scores.

Part II on 'extending the methods of comparative law' (Chapters 5 to 7) reflected on the general changes in legal research, which in many countries now also includes postmodern, socio-legal and numerical methods. It was said that these were welcome developments. Moreover, the subsequent discussion about other disciplines may point towards a further shift. For example, a comparative lawyer may decide not simply to engage in socio-legal comparative law, but to do a sociological study that includes comparative legal information; or she may not simply engage in numerical comparative law, but conduct an econometric analysis that incorporates legal data from various countries.

In appropriate research projects, making this second step can be valuable, but the comparative lawyer does not need to have an inferiority complex. For instance, researchers in economics and other disciplines may tell her that it is essential to prove causal relationships between certain legal differences and social, cultural or economic ones. Yet, the comparative lawyer may then insist that the context and content of the legal rules in question are too complex to claim such a causal relationship. Thus, in this respect, not fully embracing every method from every other discipline is not necessarily a disadvantage. Moreover, understanding the methods from a variety of disciplines can be helpful as it is unlikely that 'positivist' methods, say, always get it right and 'interpretive' ones are always wrong (or vice versa).

Part III on 'global comparative law' (Chapters 8 to 11) started with a discussion about legal transplants. While the trend has shifted away from simply copying foreign laws, legal transplants are still a useful conceptual tool. Here, research in other fields can also be helpful, as it can show the availability and advantages of certain policy choices. The subsequent chapters dealing with convergence, regionalisation, internationalisation, transnational and global law, and law and development, have an even stronger interdisciplinary dimension, as these topics are not only rooted in legal questions.

There would be various ways in which those topics could be further explored. For example, the relationship between comparative law and research in geography and international relations is still largely under-explored.[2]

[2] See, e.g. Kedar 2014 (for geography and critical comparative law); Halliday and Shaffer 2015: 21–4 (for transnational law and international relations).

Globalisation has also been associated with a growing role of local governments and other forms of decentralisation:[3] thus, contrary to the established approach of comparative law, it could be rewarding for comparatists to consider differences below the state level more closely, also drawing on research from other disciplines.[4]

The topics in the third part also illustrate the dynamic nature of comparative law. The substance of comparative law is said to be shaped by 'broad intellectual or theoretical trends and movements, by societal developments and the political climate'.[5] In particular, we cannot know for sure how the geopolitical landscape and global governance structures will evolve in the future. This reaffirms the need for a comparatist to pay attention to real-world developments, and to how they may impact on the concepts and tools of comparative law. It follows that, while the chapters of the third part had a focus on substantive topics, they also demonstrated how a contextual approach is necessary in order to apply the tools of comparative law to the international, regional, transnational and global levels.

In Chapter 11 (in Part IV), it was acknowledged that its account of 'implicit comparative law' was highly selective. In particular, the main examples of this chapter drew on comparative research in the social sciences. The reason for choosing these examples was that, in these fields, there are a number of instances where non-legal researchers have dealt with topics of a genuine comparative legal nature. By contrast, the inspiration that comparative lawyers can gain from the humanities and natural sciences is more about non-legal phenomena that can also be of interest to comparative lawyers. For example, in the humanities, there is a large body of literature on textual interpretation that can help comparative lawyers in their understanding of different legal systems.[6] Natural sciences can also be relevant: for instance, it has been suggested that comparative law may consider work by neurologists in order to understand the 'brain processes of someone engaged in legal reasoning'.[7]

2 Diversity of Questions and Methods

Another way to reflect on the themes of comparative law, as discussed in this book, is to summarise the types of questions that can be asked for each of the main topics. This has been done in Table 13.1. The examples of such questions (in *italics*) are drafted in a general fashion while they can easily be rephrased so

[3] Auby 2017: 110–13.

[4] See, e.g. Mitton 2016 (econometric research on differences between sub-nations); Kantor et al. 2012 (comparing governance of London, New York, Paris and Tokyo); Greenhouse et al. 1994 (anthropological research on law and community in three US towns).

[5] Peters and Schwenke 2000: 829.

[6] For examples see Chapter 5 at Sections B 1 and D 2 and 3, above.

[7] Hage in EE 2012: 521. See also Pardolesi and Granieri 2013: 18–24 (suggesting similarities between comparative law and natural sciences).

Table 13.1 Overview of topics and questions of comparative law

Parts and chapters of this book	Examples of possible research questions	Examples of use of research from other disciplines
I. Traditional comparative law		
2. Comparative legal method	*How is a specific legal problem addressed in specific countries? Why are laws different and can one of them be regarded as better?*	Political science and economics provide evidence-based policy recommendations, e.g. for constitutional and business laws.
3. Common law and civil law	*Do common and civil law countries address specific problems in a functionally different way? Or is this divide mainly about questions of legal methods?*	Law and finance research analyses relevance of 'legal origins'. Political science discusses whether the United States may be exceptional.
4. Mapping the world's legal systems	*How can global taxonomies of legal systems be constructed? Do mixtures merely blur the lines or challenge the nature of such taxonomies?*	Some classifications in political science and cultural studies also deal with legal issues. Anthropology relevant for 'non-Western societies'.
II. Extending the methods of comparative law		
5. Postmodern comparative law	*Are there deep-level differences between legal systems not captured by a functional approach? How far is the comparison of legal systems influenced by personal and political biases?*	Anthropology aims to understand deep difference between countries (or even singularities). Linguistics and literature studies also aim for understanding of foreign units.
6. Socio-legal comparative law	*Can comparative insights help us to explain why the law is applied in a particular way? Can socio-legal insights help us to explain why the law differs between countries on a particular issue?*	Understanding social, economic, political and cultural context can make extensive use of research from other social sciences.
7. Numerical comparative law	*Do quantitative methods enable wider comparisons than other methods? Do they confirm or refute results using other methods, and why is this the case?*	Statistics and econometrics as means of data evaluation. Quantitative methods accepted in many academic disciplines.
III. Global comparative law		
8. Legal transplants	*How far is a particular issue due to foreign influence, both as regards the black-letter law and its application in practice? Can it be said to be the case that this transplant has been successful?*	Diffusion of ideas also a topic in cultural and business studies. Psychology can evaluate whether legal mentalities change.

Continued

Table 13.1 Continued

Parts and chapters of this book	Examples of possible research questions	Examples of use of research from other disciplines
9. Convergence, regionalisation and internationalisation	*How far did convergence, regionalisation and internationalisation have an effect on differences between legal systems? How can comparative methods be applied for the analysis of these trends?*	Cultural studies, anthropology and psychology may identify global similarities. International relations and geography also research internationalisation and regionalisation.
10. From transnational law to global law	*Why have transnational and global norms emerged? How far can comparisons be used to understand and evaluate these new norms?*	Global governance as an interdisciplinary field. International business studies examine soft laws.
11. Comparative law and development	*Is it possible to use legal models from the 'Global North' for the benefit of development in the 'Global South'? Or should legal systems be free from such influence?*	Development policy as an interdisciplinary field. Relevance of economic efficiency and/or global ethics.
IV. Comparative law as an open subject		
12. Implicit comparative law	*How can countries tackle particular economic and social problem? How can we understand diversity of societies and cultures?*	Intrinsically interdisciplinary topics with 'law' being part of the discussion.

as to apply to specific areas of law and topics.[8] It is also clear that comparative projects will often combine multiple questions, for example, starting with a functional comparison but then also considering socio-legal aspects and the impact of relevant norms of transnational law.

Table 13.1 relates the themes of this book to these possible research questions. It aims to provide guidance in indicating that different questions (the second column) point towards different methods and concepts of comparative law (the first column). However, there is also diversity within these concepts and methods (say, within postmodern comparative law) and the possibility of choice between them (say, between postmodern and socio-legal approaches). For the comparatist this means that she needs to be familiar with a variety of methods in order to justify her approach.

The examples and corresponding themes of the chapters also show the diversity of questions and approaches in comparative law today. This diversity reflects some of the discussions in the first chapter of this book, namely, the different aims a comparative study can pursue and the lack of uniformity

[8] For a similar overview, specifically dealing with comparative company law, see Siems 2017a.

between the main general books on comparative law.[9] Despite the suggestion for 'a sound theoretical canon of comparative law',[10] it is also preferable that the methods of comparative law are flexible and open. Indeed, it may often be useful to combine different research strategies. Given the constant changes in the legal (and non-legal) world, it is also clear that comparative law will always develop new concepts and methods that will go beyond the status quo.

The final line of Table 13.1 refers to two examples which are not about questions which are specifically about the law. This is based on the understanding that legal scholarship can validly start with a question that is not about the law as such.[11] Such research necessarily has an interdisciplinary dimension. In addition, the final column of Table 13.1 reiterates the possibility and relevance of research from other disciplines for any question of comparative law. As in the previous chapter, it is mainly based on examples from the social sciences,[12] but it also contains some examples from the humanities and natural sciences. These examples are of course only a selection of the ways other disciplines can interact with comparative law. The next section will also continue the discussion on the promises of interdisciplinary approaches for the future of comparative law.

B Outlook

1 The Future of Comparative Law?

In a recent article, I engaged in the speculation about the future of comparative law in the next century.[13] I suggested that, perhaps, a time-traveller to the twenty-second century would be surprised how little comparative law will have changed. Considering the literature from the last hundred years, it can be seen that the discipline of comparative law has evolved very slowly, with many topics remaining, for instance, the unification of legal systems and the common/civil law divide. This is also a result of the way academic publications work more generally, fostering conservatism and only gradual change. With respect to the law itself, it is worth noting that some of the main codes of civil law countries and some of the main case law of common law countries have survived centuries: again, it could therefore be suggested that they may well still be there in the twenty-second century.

However, comparative law is a field that faces a number of challenges today. It is often disregarded by legal practice; it often does not go beyond collecting information about foreign law; it only imperfectly incorporates research from other disciplines; and its country-focus has become increasingly obsolete.[14] Some of these problems might well become more pronounced in the future.

[9] See Chapter 1 at Sections A 2 and B 1, above. [10] Reimann 2002: 695–7.
[11] For such 'non-legal' research topics in law see Siems 2008b: 162–3.
[12] See also the preliminary remarks in Chapter 12 at Sections B and C, above.
[13] Siems 2016b. [14] Siems 2007b (speculating about 'the end of comparative law').

For example, the availability of information online will make it even easier to access any law from any country and therefore regard foreign law as a text not unlike domestic law.[15] And, analysing the law based on country differences (as well as legal families) will become less relevant due to the growing collaboration between countries, the potential convergence of state models, and the growing importance of transnational and global law.

Instead, other names for legal research beyond domestic law are on the rise, such as global law, transnational law and legal pluralism, as also discussed in this book.[16] And for teaching, there is the model of a 'transsystemic approach' which abandons traditional attachments to specific jurisdictions and deals with juridical problems as transcending legal traditions.[17] In the future, it is also likely that many topics that today belong to 'comparative law' will just become part of research and teaching on 'law'. It will be nothing special to look beyond one's own borders (as far as borders will still be relevant). Incorporation of comparative law into 'normal' legal research is also fostered by the fact that comparatists are at the forefront of many themes that are bound to become more relevant in the future, such as the interaction between multiple layers of norms, the mixture of different legal cultures, and the increased diversity of forms of law.

With respect to comparative law itself, it is clear that it needs to react to this changing environment. For example, future comparatists may compare the interaction between multi-level legal orders and not merely laws that operate in a particular geographic area, such as those of different countries. The following will also suggest that interdisciplinarity and cosmopolitanism can and should be themes and strategies for the future of comparative law.

2 Interdisciplinarity and Comparative Law

The themes of comparative law are partly related to those of general, i.e. non-comparative, legal research, for example, to the question of how to interpret and understand legal rules. They also partly overlap with those of other, i.e. non-legal, comparative disciplines, for example, as those other disciplines may discuss legal differences within the context of their specific field (comparative politics, comparative economics, comparative sociology, comparative linguistics, etc.). There are also some distinct themes of comparative law, for example, the notion of legal families. Thus, as

[15] Riles 2015: 155 ('Increasingly, there is a view that, in order to understand what one needs to know about foreign law, there is no need for fine-grained comparative descriptions – one can simply use a web search engine to consult a collectively produced online database').

[16] See Chapter 5 at Section B 2 and Chapter 10 at Section A 2, above.

[17] For this practice at McGill University see www.mcgill.ca/centre-crepeau/projects/transsystemic.

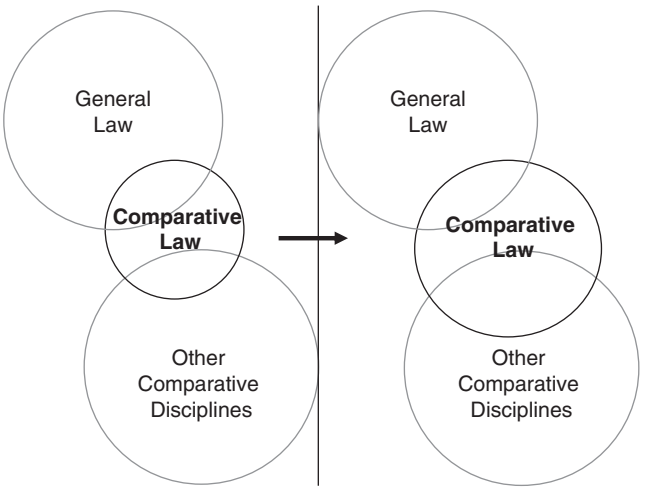

Figure 13.1 Relationship between 'comparative law', 'law' and 'other comparative disciplines'

Figure 13.1 shows, 'comparative law', partly but not fully, overlaps with (general) 'law' and 'other comparative disciplines'.

It was the aim of this book to steer comparative law into a more contextual direction. In particular, it is suggested that linking comparative law with research in other comparative disciplines is a promising way forward as there are many ways in which comparative lawyers can benefit from a more interdisciplinary perspective.[18] Figure 13.1 illustrates this ambition. It can be seen that extending the scope of comparative law towards other comparative disciplines increases the overlap between those and comparative law. Thus, the suggestion is to increase the scope for 'comparative law and . . ..' research as a transversal field using insights from any comparative discipline.

Most comparative lawyers are, in the first instance, trained in law. Thus, the obvious challenge is the lack of familiarity with other disciplines. However, it is not suggested that all comparative legal research has to become fully interdisciplinary. There are different levels of interdisciplinary legal research, ranging from basic to advanced types, and which of these types a legal researcher chooses depends on the nature of the problem and her own skills and preferences.[19] It is also suggested that comparative lawyers are specifically equipped for the challenges of learning the unfamiliar. It has been said that the 'experience of incomprehension must play a central role in the comparative experience',[20] and much the same applies to the future of comparative law and its relationship to other academic disciplines.

[18] See, e.g. Chapter 12 as well as Table 13.1, above.

[19] See Siems 2009a (identifying one basic and three advanced types of interdisciplinary legal research).

[20] Samuel 2014: 55.

Finally, there should not only be 'one-way traffic' as regards the relationship between comparative law and other disciplines.[21] While in the present non-legal literature there are some references to comparative law, this is often done in a sketchy way. For example, in Linda Hantrais' cross-disciplinary book on comparative research,[22] some of the main textbooks of comparative law are mentioned, but overall research in comparative politics and sociology is apparently seen as more interesting. More problematically, research by financial economists on the relationship between law and finance uses some concepts of comparative law, such as the divide between civil and common law, but fundamentally misunderstands what these categories mean.[23]

Thus, there is a need for genuine cross-disciplinary communication.[24] Of course, this is a general desire, not limited to the relationship between comparative law and other comparative disciplines. The problem is that today's universities are typically compartmentalised into faculties, departments and schools, while researchers are also encouraged to cross the boundaries of academic disciplines.[25] To be sure, there are ways of overcoming this tension: for example, it can be fruitful to establish joined centres, networks and conferences that operate across disciplines. It is suggested that comparative law can be an important element in such initiatives.

The question remains whether the aim should be to develop a generic method of comparative studies. It has been said that, in the past, Auguste Comte, John Stuart Mill, Max Weber and others tried to engage in 'discipline-free comparative research'.[26] Yet, we have also seen that disciplinary preferences for particular types of research often reflect different types of research questions.[27] Thus, it is preferable to say that interdisciplinarity reaffirms methodological pluralism, with possible complementarities between different approaches.

3 Cosmopolitanism and Comparative Law

This book started with the statement that comparative law can make legal research more cosmopolitan.[28] At the very end of the book, it seems appropriate to return to the concept of cosmopolitanism, reviewing its origins and meaning, followed by the way it can contribute to core themes of comparative law.

[21] Cf. also Sacco 1990: 161–5 (service of comparative law for social sciences).
[22] Hantrais 2009.
[23] See Chapter 4 at Sections B 2, C 2 (a), Chapter 7 at Section D 1 and Chapter 12 at Section B 3, above.
[24] For the risk that interdisciplinarity can lead to 'scientific imperialism' see Mäki 2013.
[25] See, e.g. Siems and MacSíthigh 2012 (specifically on the position of 'law' within the structure of universities); Riles 2015 (specifically on collaboration beyond comparative law today).
[26] Hantrais 2009: 24. [27] See Chapter 12, above. [28] See Chapter 1 prologue, above.

In the literature on cosmopolitanism[29] the usual starting point is the reference to Diogenes who declared himself to be 'a citizen of the world'. This seems to make a descriptive statement but the discussion about cosmopolitanism often also has a normative dimension. The corresponding view of a 'moral cosmopolitanism' can be associated with Immanuel Kant's political philosophy but also more recent debates about international law, development policy and global justice. From the perspective of the political left, it is noteworthy that there is a line of criticism starting with Marx and Engels which associates the global reach of capitalism with a cosmopolitan perspective.[30] However, there is also the view that cosmopolitanism can be 'vernacular', 'subaltern' and 'critical' in opposing neoliberal models of globalisation.[31] In another twist, it now appears that the political right has turned against cosmopolitanism: in the words of the Prime Minister of the United Kingdom Theresa May, 'if you believe you're a citizen of the world, you're a citizen of nowhere'.[32]

Another dichotomy is related to the question whether cosmopolitanism refers to universal phenomena. The classical universalism of Diogenes can be associated with universalism, as well as the 'technocratic universalism' of international organisations. However, it is also suggested that, today, the main position is a post-universalist one, as can be seen in the idea of a 'rooted cosmopolitanism'.[33] In this context we may then also have a split between a positive and a normative perspective again: thus, on the one hand, cosmopolitanism may refer to a state of the world as the 'cosmopolitan condition'; on the other hand, it can be a 'cosmopolitan outlook' as an aspirational way to perceive and shape the world.[34]

For comparative law, cosmopolitanism is useful as guidance for many of its substantive topics. Like comparative law, cosmopolitanism is interested in global topics without suggesting global uniformity. Thus, on the one hand, it can be used to identify and evaluate changes to the role of the state and legal families 'with the idea that human beings can belong anywhere, humanity has shared predicaments and we find our community with others in exploring how these predicaments can be faced in common'.[35] On the other hand, it is not naïve about universalism. Thus, it is consistent with cosmopolitanism not only to consider the global level but, for example, to reflect about the 'cosmopolitan

[29] For the following see, e.g. Taraborelli 2015; Delanty 2012; Delanty 2009; Fine 2007.

[30] See, e.g. Delanty 2009: 44 (referring to statement in the Communist Manifesto that 'the bourgeoisie has through its exploitation of the world market given a cosmopolitan character to production and consumption in every country'); Douglas-Scott 2013: 156 (referring to Hardt and Negri, as well as Antonio Gramsci).

[31] See Remaud 2013 and Part III prologue, above.

[32] Theresa May, Conservative Party Conference speech 2016, available at http://press.conservatives.com/post/151378268295/prime-minister-the-good-that-government-can-do.

[33] Appiah 2006 and see Kroncke 2016: 235 (contrasting 'technocratic universalism' and 'true cosmopolitanism').

[34] Terms by Fine 2007: 134.

[35] Fine 2007: x.

state' and other ways the global (or, the international, regional or transnational) and the local interact in a pluralist way.[36]

In addition, taking a cosmopolitan perspective has implications for the method of comparative law. Adding this concept may complicate comparative law, but it can also provide guidance for methodological questions. It is helpful that cosmopolitanism does not follow the position that there is an irreconcilable gap between 'us' and 'them' which would make it impossible to understand foreign ideas and cultures. Rather, it 'presents an openness to other peoples, cultures and experiences', accepting the potential of mixtures between one's own and foreign (legal) cultures.[37] However, cosmopolitanism is not naïve in simply assuming that the same tools of understanding work everywhere in the world. Thus, researchers of a cosmopolitan spirit should be curious about diverse ways of understanding and should explore the use of new methods in order to expand their horizons. With such a spirt, cosmopolitanism then also has a cross-disciplinary dimension in fostering interdisciplinary research and collaboration.

Finally, it is suggested that the variations in the understanding of the term 'cosmopolitanism' are rather an advantage than a disadvantage. For example, the debate as to whether cosmopolitanism is closely associated with the rise of international capitalism or whether it is more rooted and vernacular can be related to the discussion about the main players in, and the right approach to, development policy.[38] The variation of positive and normative approaches to cosmopolitanism is also helpful as it reflects a similar dichotomy in comparative law, namely, the analysis of what the law is and how it operates in practice, on the one hand, and the possibility of policy recommendations, on the other.[39]

C Conclusion

Comparative law does not have a strict and unchangeable subject matter. Thus, to start with, it was the position of this book that the existing methods and topics of comparative law had to be considered to a significant degree. This book has therefore aimed for a fair treatment of a range of comparative law topics, from more traditional ones such as functionalism and legal families, to new methods such as postmodern and socio-legal ones, to the various elements of global comparative law (legal transplants, convergence, transnational law, etc.). The extensive (though, naturally, incomplete) list of references in the subsequent pages also reflects this position.

However, the fact that the subject matter of comparative law is not fixed also means that there is a considerable degree of subjectivity in the way in which it

[36] Glenn 2013; Glenn 2009; Beck and Sznaider 2010; Berman 2012 ('cosmopolitan pluralist approach').
[37] Douglas-Scott 2013: 329. For cultural hybridity see, e.g. Burke 2009.
[38] See Chapter 11, above. [39] See Chapter 2 and Chapter 6, above.

can be understood. It follows that each author can steer the field of comparative law in a particular direction. The aspiration of this book can be phrased as a call for a cosmopolitan perspective to comparative law. In short, its main positions were that it was mainly sceptical about comparative law's traditional method and the notion of distinct legal families; it was cautiously supportive of postmodern and numerical methods. More unconditional support was expressed for socio-legal comparative law, the need to consider the global dimension of comparative law, for example, researching topics such as convergence of laws, transnational law and law and development, and ways to increase the interdisciplinarity of comparative law.

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