

PROLOGUE—THE ‘MALAISE’ OF COMPARATIVE LAW

The enterprise of comparative law is familiar yet its conceptual whereabouts remain somewhat obscure. The purpose of this book is to reconstruct extant comparative law scholarship into a systematic account of comparative law as an autonomous academic discipline. The object of that discipline is neither to harmonize world law, nor to emphasize its cultural diversity, two opposite aims often advanced for comparative law, but to understand each legal system on its own terms. The specificity of each system indeed is uniquely elucidated in and through its contrast with the others. Moreover, the reconstruction exercise proposed involves bridging comparative law and contemporary legal theory insofar as it makes explicit fundamental assumptions about the nature of law that are currently implicit in comparative law scholarship. As such, it would also serve to show how comparative law and legal theory both stand to benefit from being exposed to the other

The historical and abiding importance of comparative legal studies is well established.¹ For as long as there have been states, judges and legislators have looked to the law of other states for inspiration in the making and the application of their own law. Comparative law has also played a central role in the harmonization and unification of domestic law within federated states, as well as between states involved in cross-border punctual or longer term joint ventures. The contribution of comparative law at the international level has been similarly significant. As private international law seeks to coordinate the domestic law of the world’s nations or transnational law more generally, it cannot but involve heavy doses of comparative legal knowledge. As for public international law, it has always tapped more or less directly into “the law of the civilized nations.”² On the academic front, comparative law has long been drawn upon for the purpose of supporting or refuting philosophical, economic, sociological, anthropological and other theories about law,³ as it indeed offers an invaluable “reservoir of institutional alternatives not merely theoretical but actually tested by legal history.”⁴

¹ An elaborate typology of the various historical and contemporary uses of comparative law can be found in Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L. J. 411 (1985). See also: Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477 (1995); MICHAEL BOGDAN, *COMPARATIVE LAW* 18 (1994); Ferdinand F. Stone, *The End to Be Served by Comparative Law*, 25 TUL. L. REV. 325 (1951); George A. Bermann, *The Discipline of Comparative Law in the United States*, 51 REVUE INTERNATIONALE DE DROIT COMPARÉ [R. I. D. C.] 1041, 1042 (1999) (Fr.); Hein Kötz, *Comparative Law in Germany Today*, 51 R. I. D. C. 753, 761-66 (1999); David J. Gerber, *System Dynamics: Toward a Language of Comparative Law*, 46 AM. J. COMP. L. 719, 720-21 (1998); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002); MATHIAS SIEMS, *COMPARATIVE LAW* 2-5 (2014); *COMPARING COMPARATIVE LAW* (Samantha Besson *et al.* eds., 2017).

² Statute of the International Court of Justice, June 26, 1945, art. 38 (1) (c), 59 Stat. 1055, T.S. No. 993, reprinted in 3 *Bevans* 1179.

³ In legal philosophy, similarities and differences in the world’s legal systems have respectively been advanced as evidence for (*e.g.* James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 AM. J. COMP. L. 607 (1998); *TOWARDS UNIVERSAL LAW – TRENDS IN NATIONAL EUROPEAN AND INTERNATIONAL LAWMAKING* (Nils Jareborg ed., 1995); R. SALEILLES, *CONCEPTION ET OBJET DE LA SCIENCE JURIDIQUE DU DROIT COMPARÉ*, 173, vol. I (1905-07); GIORGIO DEL VECCHIO, *HUMANITÉ ET UNITÉ DU DROIT: ESSAIS DE PHILOSOPHIE JURIDIQUE* (1963)) and against (*e.g.* Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L. J. 737 (1999); Vivian Grosswald Curran, *Dealing in*

The interest in comparative law moreover has risen to unprecedented levels over the last decades.⁵ The dramatic increase in cross-border activity attending the rise of globalization has led to the creation of a plethora of transnational institutions and partnerships that are both the outcome and the source of considerable comparative legal work, in fields as diverse as trade, finance, crime control, civil responsibility, human rights, environmental protection and intellectual property. Countless comparative legal studies have been produced in the context of such historic political events as German reunification and European unification, as well as in connection with the numerous development initiatives led by the World Bank. Comparative law scholars have likewise been central players in the latest waves of constitutional, private law and criminal justice reforms in Asian, African and Latin American countries.

Recent trends in legal education confirm the rising prominence of comparative law in all aspects of domestic, transnational and international legal reform.⁶ Whereas the law school curriculum traditionally contained nothing but domestic law courses, foreign and comparative law offerings are now a standard fare. Even domestic law courses, moreover, are commonly being taught from a comparative perspective. Transnational student and faculty recruitment and exchanges are fast proliferating, as are comparative and foreign law mootings, journals and internships, and most faculty research, regardless of the field, now draws on foreign law to some extent.

The voluminous comparative law literature accumulated to date however remains highly fragmented, and its theoretical foundations and overall scholarly purpose(s), at times difficult to ascertain. A cursory examination of that literature confirms that the issues for investigation, the jurisdictions and representative materials identified, and the comparison criteria, often are selected haphazardly or based on factors of convenience (linguistic abilities, availability of documents, domains of expertise, etc.), fuelling enduring questions as to the scientific value of the whole enterprise.⁷ The very status of

Difference: Comparative Law's Potential for Broadening Legal Perspectives, 46 AM. J. COMP. L. 657, 661, 663, 666-67 (1998); Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785 (1982)) universalistic theories about the nature of law.

⁴ UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* ix (1997).

⁵ GLOBAL MODERNITIES (Mike Featherstone, Scott Lash & Roland Robertson eds., 1995); VOLKMAR GESSNER & ALI CEM BUDAK, *EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW* (1998); William Twining, *Globalization and Comparative Law*, 6 MAASTRICHT J. EUR. & COMP. L. 217 (1999); *COMPARATIVE LAW IN THE 21ST CENTURY* (Andrew Harding & Esin Öricü eds., 2002); Horatia Muir Watt, *Globalization and Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 579 (Mathias Reimann & Reinhard Zimmermann eds., 2006). The political importance of comparative law however may have been declining: Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law*, in Reimann & Zimmermann eds., *id.*, 539, 577-78; M.M. Siems, *The End of Comparative Law*, 2 J. COMP. L. 133, 137 (2007); Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 777-78 (2009).

⁶ See generally: Catherine Valcke, *Global Law Teaching*, 54 J. LEG. EDUC. 160 (2004); *THE LAW SCHOOL – GLOBAL ISSUES, LOCAL QUESTIONS* (Fiona Cownie ed., 1999); Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INT'L L. J.* 1239 (1998); ANTHONY O'DONNELL & RICHARD JOHNSTONE, *DEVELOPING A CROSS-CULTURAL LAW CURRICULUM* (1997); Alberto Bernabe-Riefkohl, *Tomorrow's Law Schools: Globalization and Legal Education*, 32 *SAN DIEGO L. REV.* 137 (1995).

⁷ Jaro Mayda, *Some Critical Reflections on Contemporary Comparative Law*, 39 *Revista Juridica de la Universidad de Puerto Rico* 431 (1970); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO*

comparative law as an academic discipline indeed is periodically called into question.⁸ In particular, it has been said that comparative law scholarship is bereft of the usual hallmarks of a discipline proper, *viz.* some measure of consensus on analytic premises and overall direction, a somewhat constant and transparent methodology, a pool of problems, designated criteria and parameters with which to test hypotheses and control for scholarship quality, etc. As a discipline, comparative law hence would in fact be deeply ‘malaised’⁹: far from a somewhat unified “scholarly tradition susceptible of transmission to succeeding generations” and a “shared foundation on which each can build”¹⁰, it would amount to no more than “a chance to satisfy idle curiosity,”¹¹ the product of “a blind eye to everything but surfaces,”¹² on par with “stamp collecting, accounting, and baseball statistic hoarding.”¹³

Reactions to this indictment vary widely. Some have seen in it a welcome impetus for fresh and broadened reflection on the object and nature of comparative law, in time leading to the elaboration of new conceptual foundations, if not a shift towards altogether new directions.¹⁴ In that spirit, a wave of literature has emerged which offers

COMPARATIVE LAW, 10-16 (2nd ed. 1993); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1898, 1961-90 (1994-95); John Henry Merryman, *Comparative Law Scholarship*, 21 HASTINGS INT’L & COMP. L. REV. 771 (1998); Étienne Picard, *L’état du droit comparé en France, en 1999*, 4 R. I. D. C. 885, 888-89 (1999); Bermann, *supra* note 1, at 1044 (“... virtually all recent assessments of the discipline in the legal literature find it wanting in basic ways. Even discounting for the fact that academic literature is always more likely to bear witness to dissatisfactions than satisfactions, the assessments are conspicuously negative.”); GEOFFREY SAMUEL, AN INTRODUCTION TO COMPARATIVE LAW THEORY AND METHOD 15 (2014) (“a tradition ... that can at best be described as theoretically weak and at worst startlingly trivial”). These traditional critiques admittedly may lack traction as against such more recent streams of comparative law scholarship as the ‘legal origins’ literature (surveyed in *Legal Origin Symposium* 57 AM. J. COMP. L. (2009)), whose analytic frameworks and overall purposes are, by all accounts, carefully articulated. Whether such recent streams might not be better slotted within comparative economics/comparative sociology than within comparative law however remains an open question.

⁸ Otta Kahn-Freund, *Comparative Law as an Academic Subject*, 82 L. Q. REV. 40, 41 (1966); Arthur T. Von Mehren, *An Academic Tradition for Comparative Law?*, 19 AM. J. COMP. L. 624 (1971); Basil Markesinis, *Comparative Law – A Subject in Search of an Audience*, 53 MOD. L. REV. 1 (1990); Nora V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. OF COMP. L. 647 (1998); Reimann, *supra* note 1; Gordley, *supra* note 3; SIEMS, *supra* note 1, at 5-6; SAMUEL, *supra* note 7, at 8-10; JAAKKO HUSA, A NEW INTRODUCTION TO COMPARATIVE LAW 1-2 (2015); GÜNTER FRANKENBERG, COMPARATIVE LAW AS CRITIQUE 9-13 (2016) (questioning the notion of ‘discipline’ altogether).

⁹ Frankenberg, *supra* note 1, at 624ff; WATSON, *supra* note 7; Ewald, *supra* note 7; Vivian Grosswald Curran, *Law and the Legal Origins Thesis: “[N]on scholae sed vitae discimus”*, 57 AM. J. COMP. L. 863 (2009) (referring to comparative law’s “existential angst”, at 863); Harding & Örüçü, *supra* note 5, at xii (“a sense of mid-life crisis”).

¹⁰ Von Mehren, *supra* note 8, at 624.

¹¹ W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INT’L & COMP. L. Q. 485, 489 (1974).

¹² Lawrence M. Friedman, *Some Thoughts on Comparative Legal Culture*, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 49 (John Henry Merryman & David S. Clark eds., 1990).

¹³ Ewald, *supra* note 7, at 1961.

¹⁴ *E.g.*: Hubert Izdebski, *Le rôle du droit dans les sociétés contemporaines: essai d’une approche sociologique du droit comparé*, 3 R. I. D. C. 563 (1988); Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXF. J. LEG. STUD. 101 (1989); Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262 (1995); Geoffrey Samuel, *Comparative Law and Jurisprudence*, 47 INT. & COMP. L. QUART. 817 (1998); Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT’L &

theoretical reflections on the main process issues facing comparative lawyers, *viz.* whether to compare entire legal systems ('macro comparisons') or only some of their components ('micro comparisons'), whether to focus on cross-jurisdictional similarities or differences, what legal materials to investigate in each jurisdiction and from what perspective, how to delineate and select relevant legal systems, and so on.¹⁵ A few scholars have even undertaken to construct more systematic models for comparative law—'legal transplants'¹⁶, 'legal formants'¹⁷, 'comparative jurisprudence'¹⁸, 'legal cultures'¹⁹—based on their respective conceptions of its ultimate purpose. Importantly,

COMP. L. Q. 495, 495-97 (1998); Twining, *supra* note 5, at 217; Lawrence Rosen, *Beyond Compare*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 493 (Pierre Legrand & Roderick Munday eds., 2003); Mark Van Hoecke, *Deep Level Comparative Law*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 65 (Mark Van Hoecke ed., 2004); Annelise Riles, *Comparative Law and Socio-Legal Studies*, in Reimann & Zimmermann eds., *supra* note 5, 775; Frankenberg, *supra* note 1.

¹⁵ *E.g.*: SAMUEL, *supra* note 7; Harding & Örüçü, *supra* note 5; Legrand & Munday, *supra* note 14; THEMES IN COMPARATIVE LAW (Peter Birks & Arianna Pretto eds., 2004); EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW (Mark Van Hoecke ed., 2004).; Reimann & Zimmermann eds., *supra* note 5; COMPARE LES DROITS, RÉGLEMENT (Pierre Legrand ed., 2009); THEORISING THE GLOBAL LEGAL ORDER (Andrew Halpin & Volker Roeben eds., 2009); PRACTICE AND THEORY IN COMPARATIVE LAW (Maurice Adams & Jacco Bomhoff eds., 2012); METHODOLOGIES OF LEGAL RESEARCH: WHICH KIND OF METHOD FOR WHAT KIND OF DISCIPLINE? (Mark Van Hoecke ed., 2011); METHODS OF COMPARATIVE LAW (Pier Giuseppe Monateri ed., 2012).

¹⁶ WATSON, *supra* note 7 (comparative law as legal history, aimed at tracking the evolution of legal rules across time and territory). For critical discussions: William B. Ewald, *The American Revolution and the Evolution of Law*, 42 AM. J. COMP. L. SUPP. 1701 (1994); Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in *ADAPTING LEGAL CULTURES* 241 (David Nelken & Johannes Feest eds., 2001); William Twining, *Social Science and Diffusion of Law*, 32 J. L. & SOC. 203 (2005); JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* (2016).

¹⁷ Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (Part I), 343 (Part II) (1991) (comparative law as study in legal function, investigating all factors causally impacting court decisions). See likewise: ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, vol. I (2nd ed. 1945). For critical discussions: Michele Graziadei, *The Functionalist Heritage*, in Legrand & Munday eds. 100, *supra* note 14; Geoffrey Samuel, *Dépasser le fonctionnalisme*, in Legrand ed., *supra* note 15, at 409; Ralf Michaels, *The Functional Method of Comparative Law*, in Reimann & Zimmermann eds., *supra* note 5, at 339; RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* 112 (2009) RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* 63-98 (2009).

¹⁸ Ewald, *supra* note 16 (comparative law as comparison of forms of legal reasoning). For critical discussions: James Q. Whitman, *The neo-Romantic Turn*, in Legrand & Munday eds. 312, esp. 334-36, 343-44; James Gordley, *Comparative Law and Legal History*, in Reimann & Zimmermann eds. 753, *supra* note 5, at 765-66.

¹⁹ PIERRE LEGRAND, *FRAGMENTS ON LAW-AS-CULTURE* (1999); LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* (1975); BERNHARD GROßFELD, *MACHT UND OHNMACHT DER RECHTSVERGLEICHUNG (THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW)* (Tony Weir transl. Oxford University Press, 1990); *COMPARATIVE LEGAL CULTURES* (Csaba Varga ed., 1992); *COMPARING LEGAL CULTURES* (David Nelken ed., 1997); LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* (2006); JOHN BELL, *FRENCH LEGAL CULTURES* (2001); Van Hoecke & Warrington, *supra* note 14; Riles, *supra* note 14, at 796-99; HUSA, *supra* note 8; SIEMS, *supra* note 1; FRANKENBERG, *supra* note 8; MITCHEL DE S.-O.-L'E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2005); Sherali Munshi, *Comparative Law and Decolonizing Critique* (August 24, 2017): <https://ssrn.com/abstract=3025595>. For critical discussions: William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"*, 46 AM. J. COMP. L. 701 (1998); Alan Watson, *Legal Transplants and European Private Law*, 4.4 ELECTRONIC J. COMP. L. (2000)

while these scholars obviously disagree as to said purpose, they are all agreed that comparative law must be redesigned from the top down—from *a priori* reflection on what comparative law *should* look like, come what may of the existing stock of scholarship.²⁰

Others are much less concerned by the malaise indictment. In their view, the fragmentation and apparent theoretical randomness of extant scholarship only serves to confirm what should have been suspected all along, namely, that comparative law never was, or even aspired to be, a discipline proper, structured around a single overall purpose. Rather, it was always meant to be just a method—extending the scope of investigation beyond the domestic realm—that could be tailored to a variety of extraneous disciplinary purposes, be they economic, philosophical, anthropological or any other.²¹ The existing scholarship would thus be, not so much devoid of scholarly purpose as informed by a variety of competing purposes, none of which need be specifically legal.²² In the view of this second group of observers, then, the real malaise lies not in the failure to find a single unifying conception for comparative law but in the persistent search for one that does not exist. And the best strategy forward in fact would be to proceed from the ground up: the multiple purposes underlying the current stock of scholarship first need to be exposed and sorted out in order for the true scientific value of that scholarship (and of comparative law as a whole) to eventually come to light.

As I see it, the malaise of comparative law, if any, boils down to a bifurcation overload. That is, on each of the process issues listed above, legal comparatists tend to divide into two camps, as if these issues indeed were either/or questions.²³ On whether to privilege macro or micro comparisons, the ‘legal family’²⁴ treatises and more recent ‘legal origins’²⁵ scholarship side with the first whereas the notorious ‘common core’²⁶

(<http://www.ejcl.org/44/art44-2.html>); Ruth Sefton-Green, *Compare and Contrast: Monstre à deux têtes*, 54 R.I.D.C. 85 (2002).

²⁰ E.g., Ewald, *supra* note 7, at 1975-90, esp. 1990; WATSON, *supra* note 7, at 10-16.

²¹ HAROLD C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH* 2 (2nd ed. 1949) (“its employment should not be hampered by confining it to specified categories”); PETER DE CRUZ, *A MODERN APPROACH TO COMPARATIVE LAW* 3 (1993) (“a method of study”); RUDOLF B. SCHLESINGER *ET AL*, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 2 (6th ed. 1998) (“... primarily a method, a way of looking at legal problems, legal institutions, and entire legal systems”); John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 625 (1998) (an “appendage of social science”); William P. Alford, *On the Limits of “Grand Theory” in Comparative Law*, 61 WASH. L. REV. 945 (1986); Joachim Zekoll, *Kant and Comparative Law—Some Reflections on a Reform Effort*, 70 TUL. L. REV. 2719, 2736 (1996); Mads Andenas & Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, in Monateri ed., *supra* note 15, at 25.

²² See the debate over whether ‘comparative law’ (singular) would be best renamed ‘comparative legal studies’ (plural): SIEMS, *supra* note 1, at 5-6; FRANKENBERG, *supra* note 8, at 11; HUSA, *supra* note 8, at 17.

²³ See Samuel’s list of what he rightly describes as the ‘methodological dichotomies’ of the comparative law literature: SAMUEL, *supra* note 7, at 4.

²⁴ See generally: KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., Oxford University Press 3rd ed. 1998); Jaakko Husa, *Classification of Legal Families Today - Is it Time for a Memorial Hymn?*, 56 R.I.D.C. 11 (2004), esp. 14-16; LÉONTIN-JEAN CONSTANTINESCO, *TRAITÉ DE DROIT COMPARÉ*, vol. I, p. 154, note 161 (1972); Esin Öricü, *Family Trees for Legal Systems: Towards a Contemporary Approach, Epistemology and Methodology of Comparative Law*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 359, 361 (Mark Van Hoecke ed., 2004); Mariana Pargendler, *The Rise and Decline of Legal Families* 60 AMERICAN JOURNAL OF COMPARATIVE LAW 1043 (2012).

²⁵ *Legal Origin Symposium*, *supra* note 7.

projects and the ‘legal transplant’²⁷ literature side with the second. On whether to emphasize similarities or differences, the common core projects and some legal family treatises ostensibly fall under the first whereas the ‘legal formants’²⁸ and ‘legal cultures’²⁹ literatures resolutely align with the second. Concerning the materials for investigation, the common core projects and the legal transplants literature target the ‘law in books’ while the legal formants and legal cultures literatures centre on the ‘law in action.’ On the issue of perspective, the ‘comparative jurisprudence’³⁰ scholarship and legal culture literature militate for an internal, participant (‘expressivist’, ‘hermeneutic’ or ‘constructivist’) outlook on foreign law, in contrast with the legal transplants, legal formants and legal origins scholars, who favour an external, observer (‘functionalist’, ‘causal’ or ‘cognitivist’) standpoint. Concerning the legal systems to be canvassed, any one legal transplant project typically limits itself to a small number of somewhat analogous legal systems³¹ whereas the legal culture literature and some legal family treatises reach more broadly, in fact encompassing systems that are as widely dissimilar as possible.³² And whereas the new wave of ‘legal pluralists’ advocate a loose, strictly epistemic conception of legal systems, mainstream comparatists seem to want to hang on to the Westphalian, territorial conception.³³

The bifurcation moreover persists, I would suggest, as we move from the groundwork of comparative law to the more theoretical scholarship, for the latter itself splits, as explained, into two streams respectively propounding a top down and a bottom up approach.³⁴ And zooming out further still, so as to capture the groundwork and theoretical scholarship at once, we notice that these likewise are quite neatly demarcated from one another: as legal comparatists tend to be either field workers (‘doing it’) or theorists (‘talking about it’)³⁵—few are both—the groundwork typically is, as indicated, largely *a*-theoretical whereas the theoretical scholarship in contrast comes across as *strictly* theoretical, *i.e.* detached from any field work.

If that diagnosis of the malaise of comparative law is sound, the key to reconstructing it into an autonomous discipline arguably lies in some kind of synthesis. It indeed seems odd that legal comparatists should have to choose between cross-system

²⁶ *E.g.*, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, THE UNIDROIT PRINCIPLES (2004); FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (Rudolf B. Schlesinger & Pierre G. Bonassies eds., 1968); INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (André Tunc ed., 1983) (17 volumes covering 150 states); THE COMMON CORE OF EUROPEAN PRIVATE LAW (Mauro Bussani & Uggo Mattei eds., 2003).

²⁷ *Supra* note 16.

²⁸ *Supra* note 17.

²⁹ *Supra* note 19.

³⁰ *Supra* note 18.

³¹ WATSON, *supra* note 7, at 5.

³² *E.g.* COMPARATIVE LEGAL STUDIES IN ASIA (Penelope Nicholson & Sarah Biddulph eds., 2008)

³³ See generally: John Griffiths, *What is Legal Pluralism?* 24 J. LEG. PLURALISM & UNOFFICIAL LAW 1 (1986); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443 (1992); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE (1995); BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001); WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (2000); EMMANUEL MELISSARIS, UBIQUITOUS LAW: LEGAL THEORY AND THE SPACE FOR LEGAL PLURALISM (2009).

³⁴ *Supra*, text accompanying notes 20, 21 and 22.

³⁵ HUSA, *supra* note 8, at 18-9. Likewise: Maurice Adams & Jacco Bomhoff, *Comparing law: practice and theory*, in Adams & Bomhoff eds. 1, *supra* note 15; SAMUEL, *supra* note 7, at 19-20.

similarities and differences: insofar as these are just counterparts of one another, one would expect comparative law to attend to both. After all, the very process of comparison is possible only as between objects that are distinct *yet also* somewhat alike.³⁶ And it likewise is difficult to see what might prevent comparatists from engaging with the foreign ‘law in books’ *as well as* the foreign ‘law in action’, given that each arguably shines light on the other. Similarly, one would be hard pressed to think of a comparative law project that would be best conducted *exclusively* from an internal or external perspective. Law being a practice, a rich understanding of it presumably requires looking, at least to some extent, to what the participants aim to express through it. But this does not preclude also examining its actual impact on the ground, since concerns about that impact typically motivate legal actors. What the law expresses indeed most likely is somewhat related to how it functions, and conversely. To be sure, from the moment the scope of study widens beyond just one national legal practice, an external perspective simply becomes unavoidable. Comparison presupposes the possibility of viewing the objects compared side-by-side, which presumably requires standing outside them all. If anything, then, comparing legal systems seems to call for some kind of a *mix* of internal and external perspectives. This in turn might suggest that the best conceptualization of such systems would correspondingly comprise a material *and* an epistemic dimension. Finally, why wouldn’t investigating a small number of very similar, or a large number of very dissimilar, legal systems be *equally* legitimate comparative law projects? Could it not be that some pointed legal issues are best explored through the (micro) comparisons of otherwise similar legal systems while larger questions call for more broadly scoped (macro) comparisons? If that is the case, wouldn’t any self-respecting discipline of comparative law have to offer guidance on micro and macro projects alike?

Similar remarks come to mind concerning the debate over the proper way to proceed to rebuild comparative law, moreover. While a heavy dose of the conceptual rebuilding proposed by the ‘fresh start’ scholars does seem both inevitable and desirable, such rebuilding could hardly proceed without any regard to what already exists. For one, an analytic framework that might account for the work produced to date as well as guide future research clearly would, all else being equal, prove superior to one that does only the latter. And whereas reflection from first principles might achieve the latter, it would likely fail to account for the existing scholarship. Conversely, a purely inductive method might work descriptively but would likely do little on a prescriptive level. Admittedly, while it is theoretically possible that what has come to be accepted as ‘comparative law scholarship’ in fact is, as the most virulent critics have claimed, so theoretically random as to be altogether undeserving of that label, that is unlikely. More likely, comparative lawyers have been straggling along on a somewhat instinctive basis, at times perhaps even losing track of where they were going, but without for that matter running completely off course. If so, their work is bound to be of at least *some* relevance to any purported theory ‘of comparative law’. In this respect, it is worth noting that whereas scholars and practitioners form distinct groups in domestic law, in comparative law (like in legal history, legal philosophy, etc.) these groups are in fact one and the same: the

³⁶ Sefton-Green, *supra* note 19.

practice of comparative law *is* its scholarship.³⁷ As a result, to ignore the scholarship here effectively would amount to ignoring the only practice there is. The deductive/inductive split running through the current debate over the reconstruction of comparative law hence seems no more warranted than the divisions pervading the comparative groundwork.³⁸

This book aims to bridge these various divisions by offering a comprehensive account of comparative law that distils and merges the strengths on each of their two sides. It aims to show, in particular, that it is possible to view extant comparative law scholarship as simultaneously and coherently attending (even if only implicitly) to legal similarities *and* differences, to the ‘law in books’ *and* the ‘law in action’, to the material *and* epistemic dimensions of legal systems, as housing narrow- *and* broad-scoped, and micro *and* macro, projects alike, as calling for a mix of internal *and* external perspectives, as speaking to both past *and* future research, etc.

Such an account first involves us going back to basics and revisiting the ‘law’ in ‘comparative law’. That is, before reflecting on the ins and outs of ‘*comparative law*’, it might prove useful to firm up what is here meant by ‘law’.³⁹ Relatively little work has been done that tries to connect, in any systematic fashion, the theoretical work on comparative law with existing theories about law in general.⁴⁰ That is puzzling, to say the least, given that any theory of ‘comparative law’ cannot but presuppose a particular theory of ‘law’. What is more, greater reflection on the ‘law’ underneath ‘comparative law’ might prove pointedly helpful for the purpose of resolving the divisions afflicting the latter. For it may be that these divisions denote an inadequate (perhaps just incomplete or conflicted) theorization of law. A thoroughly hybrid conception of law, one that would smoothly merge apparently antithetical dimensions, presumably would open the door to a conception of comparative law that would likewise prove unified rather than bifurcated.⁴¹ If so, one path to unifying comparative law would lie in legal theory pure and simple. Thus, whereas comparative legal knowledge as mentioned has long contributed to legal theory, the time may have come for legal theory to return the favour.

³⁷ Neil Walker makes a similar point with respect to global law: NEIL WALKER, *INTIMATIONS OF GLOBAL LAW* 148-49 (2015). But see: BASIL MARKESINIS, *ENGAGING WITH FOREIGN LAW* (2009), esp. 28ff (“(d) *The Practitioner Comparatist: An Untapped Gold Mine*”).

³⁸ For a suggestion that comparative law indeed involves a form of practical wisdom (Aristotelian *prudentia*), defying clear theory/practice dichotomization, see: *supra* note 14.

³⁹ See however: Ralf Michaels, *A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller’s Contributions to the Jurisprudence of Transnational Dispute Resolution—A Reply to Thomas Schultz*, 2 J. INT. DISPUTE SETTLEMENT 417 (2011) (suggesting that ‘law’ and ‘comparative law’ need not rest on the same theoretic foundations).

⁴⁰ See however: John Bell, *Comparative Law and Legal Theory*, in *PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS* 19 (Werner Krawietz, Neil MacCormick & Georg Henrik von Wright eds., 1994); Ewald, *supra* note 7; SAMUEL, *supra* note 7, at 121-51; JACCO BOMHOFF, *BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE* (2013); Whitman, *supra* note 18; Michaels, *supra* note 39.

⁴¹ In the same vein, Adler and Pouliot describe, in the field of international relations, their central notion of ‘community of practice’ as “[o]vercoming dichotomies in social theory”: Emanuel Adler & Vincent Pouliot, *International practices: introduction and framework*, in *INTERNATIONAL PRACTICES* 3, 12 (Emanuel Adler & Vincent Pouliot eds., 2011).

The book accordingly opens with a particular, hybrid conception of law. Drawing on the Aristotelian intellectual tradition pursued through the Enlightenment and German idealism in particular, this approach, which I call ‘law as collective commitment’, conceptualizes law as a social practice that both reflects and constitutes a community’s commitment to governing itself in accordance with certain shared ideals. As a *practice* embodying *ideals*, law as collective commitment combines a material and an ideal dimension, very much in line with Kant and Hegel’s teachings, and with such later accounts of law as those penned by Lon Fuller, Ronald Dworkin, Neil MacCormick, Jeremy Waldron, Nigel Simmonds and Gerald Postema.

Chapter 1 first analyses law in terms of six formal features—effectiveness, argumentativeness, coherence, publicness, formality and normativity—all of which are shown to derive from the central notion of ‘collective commitment’, and its attendant premises: citizen equality and citizen-official reciprocity. Thereafter, in Part II, these six features are synthesized into what will hopefully prove a smooth blend of material and ideal. The argument there proceeds through the contrasting of law as collective commitment with two antithetical legal ideal-types, constructed for the occasion, *viz.* the ‘natural law ideal-type’, on one hand, and the ‘positivist ideal-type’, on the other. Whereas the natural law and positivist ideal-types indeed respectively are ideal and material through and through, I argue that law as collective commitment in contrast is a truly hybrid, ideal *cum* material, conception.

The remaining chapters aim to establish that the corresponding hybrid conception of comparative law—comparative law as comparison of the collective commitments underlying the world’s legal systems—transcends, or even pre-empts, the various divides described above. Chapter 2 considers the extent to which law as conceptualized in Chapter 1 is amenable to comparison. More specifically, I there argue that the hybridity of law as collective commitment is the key to legal systems possessing the combination of distinctness and commonality required for their “meaningful comparison”, by which I mean a comparison holding the potential of yielding new knowledge about either or both of the systems compared and/or legal systems in general. Whereas under radical natural law, legal systems exhibit commonality but insufficient distinctness, and conversely boast distinctness but insufficient commonality under radical positivism, they are adequately distinct *and* common under law as collective commitment. Chapter 3 takes on the epistemological issue of the proper perspective from which to engage foreign legal systems and aims to show that, while comparative law as comparative collective commitment entails that outsiders contribute valuable insights to the local understanding of legal systems, such contributions necessarily proceed from a movement of back and forth between the foreign (external) and local (internal) perspectives on the understanding in question. On the issue of the proper delineation of legal systems, Chapter 4 first argues that comparative law as comparative collective commitment motions to a largely internal, for self-defining, conception of the legal system as epistemic community yet one that remains externally anchored in material considerations of time and space (territory, jurisdiction, coercion, etc), which combination causes legal systems to be structured much like bee swarms. We thereafter stand back to consider how these swarm-like structures interact in the global universe, which causes us to engage with the legal pluralism debate as to whether non-state entities can qualify as ‘legal systems’ proper. Finally, Chapter 5 offers a methodology for comparing legal systems that operationalizes

the ideal/material analytic framework laid out in the previous chapters insofar as it too oscillates between internal and external, expressivism and functionalism, similar and different, micro and macro. In the way of epilogue, our concluding chapter sums up the account of comparative law as comparative collective commitments and outlines that, against critics' predictions, comparative law so conceived meets the requirements of an autonomous academic discipline.

The argumentative strategy deployed throughout these chapters likewise harbours synthetic aspirations insofar as it combines a deductive and an inductive method. At the same time as I here reflect on the ideas inherent in 'comparison' and comparison in 'law' from the top down, I aim to show that these ideas are to some extent implicitly present in the comparative law scholarship produced to date. In particular, I aim to show that that scholarship already contains the various possible conceptual justifications for overcoming the above divisions. Given this combined top down and ground up approach, comparative law as comparative collective commitments here is not so much 'constructed' as 'reconstructed' from existing materials.

This reconstruction arguably carries important theoretical and practical implications. From a theoretical standpoint, it promises a most effective response to the malaise critics given that, if comparative law can be 'cured' merely by making explicit what is present in it implicitly, it actually is in much better shape than they have claimed. A successful reconstruction would serve to establish that comparative law is not theoretically *empty* so much as theoretically *non-explicit*—not so much *flawed* as *non-understood*. From a practical standpoint, it would serve to provide guidance to all who engage in comparative legal studies in the pursuit of a specifically legal purpose. It would also entail that the general call for legal comparatists to reflect more deeply on the theoretical whereabouts of their work must be somewhat qualified, as theorization would then have to be a collective rather than individual aspiration. That is, explicit theory clearly is an invaluable source of guidance, and as it falls to the (collective) discipline of comparative law to provide that guidance, it also falls to it to articulate the theory. But it may be that not every comparatist needs to be involved in theory formulation. If good comparative law theory can be implicit, it simply follows that not *every* comparatist needs to fully articulate, or even grasp or care to grasp, the theoretical commitments underlying their work.⁴²

Finally, there is yet another purpose to this book, and that is to contribute to legal theory. As mentioned, whereas comparative law has long serviced legal theory, the reverse has yet to happen in any serious and systematic way. Had legal theorists cared to cross over into the comparative realm, they might have realized that their theories carry less than full traction as against at least some of law's many dimensions. Legal philosophers have focused on a possible universal dimension (a moral ideal, an institutional structure, a social function, etc.) and in comparison have neglected the many differences between legal systems. Legal anthropologists and sociologists in contrast

⁴² ZWEIGERT & KÖTZ, *supra* note 24, at 33; Adrian Popovici, *Droit comparé et enseignement du droit - Aperçu de l'enseignement, au Québec, du droit compare, et de l'enseignement comparatif du droit*, 36 REVUE JURIDIQUE THEMIS [R. J. T.] 803, 807-08 (2002). Of course, insofar as theory and practice indeed might be symbiotically interconnected, in that good scholarship would be based in good theory yet good theory would itself feed on good scholarship, anyone producing good scholarship in a sense necessarily contributes, at least implicitly, to theory building.

have paid great attention to the political, economic, or cultural specifics of legal systems while tending to discount what these systems might have in common. Legal historians have followed the movements of legal rules through time and territory, noting patterns of convergence and divergence, but have typically abstained from commenting on the larger significance of these patterns for our understanding of law and legal systems. And so on. It is my hope that the account of comparative law developed in the coming chapters might help these various theorists to break free from such insularity. Because to compare entails seeing the similar *and* the different, any form of legal comparison cannot but engage the commonality as well as the specificity of law. Insofar as law is recognized as being at least to some extent dynamic, a proper understanding of legal similarities and differences necessarily involves tracking these over time and across territories, and conversely. Comparative law thus cannot but shed light on the interaction of a number of legal dimensions that generally tend to be examined independently of one another.

Most immediately, of course, should it be established that the working conception of law used here succeeds at accounting for an entire area of legal studies that had hitherto withstood theorization, that fact alone might cause legal theorists to contemplate the possibility that that conception might ultimately be *right*, rather than just *plausible*.



Detailed Description of Chapter Contents

(Possibly for publisher's benefit only)

Part I of **Chapter 1** analyses law as collective commitments in terms of six formal features—effectiveness, argumentativeness, coherence, publicness, formality and normativity—all of which indeed can be derived from the central notions of commitment and citizen equality. Whereas all human institutions are to some extent intentional, the product of deliberation, law is more than just ‘intention’ insofar as it is amenable to systematic collective enforcement: law making pertains not just to contemplating or wishing for a certain state of affairs but also to committing to deploying the means to realize that state of affairs, to make it *effective*. The second of law’s essential features is its argumentative quality, it being an exchange of *reasons*, a *justificatory* debate. If law is a commitment, enforceable intention, the officials have an obligation both to support their enforcement decisions with arguments that the citizens can accept as valid and to debate with them what those arguments might be. Law as collective commitment further specifies, moreover, that the arguments being exchanged must be *coherent* as well as *public*. Legal arguments must be coherent in the sense of being both comprehensible and not inconsistent with one another; they must be public in the sense of being transparent and in that of reflecting the commitments of the entire community rather than the private aspirations of some or even all of its individual members. The fifth feature is *formality* (or ‘institutionality’): as the tangible manifestation of law’s intentionality, institutional markers make it possible for all to see and debate what are and are not the community’s collective commitments—to rope off the ‘legal’ from the ‘non-legal’, as it were. The sixth and final feature is normativity—law embodying *ideals*, some of which are peculiar to particular communities while others are common to them all. Because these contingent and non-contingent ideals indeed are ‘ideals’, law is bound always to remain

aspirational to some extent: it motions to a state of affairs that *ex hypothesi* never can be fully realized. Part II draws on German idealism to bring these six features together, into what will hopefully be a smooth synthesis of material and ideal. The argument here proceeds through a systematic contrast of law as commitment with radical natural law, on one hand, and radical positivism, on the other.

Chapter 2 opens with a reflection on comparability and meaningful comparison. As not all comparisons are meaningful, the requirements for meaningful comparison most likely are more stringent than those for mere comparability. It is contended that in order for any two entities to be comparable, they must be distinct yet also connected, with the intensity of that connection being unimportant: so long as the entities are connected *in some way*, they are comparable. A particular degree of connectedness however is necessary for the comparison to be meaningful in addition to just possible. I describe as ‘meaningful’ any comparison the outcome of which is not fully determinable from the outset, and argue that where the entities are connected either too thickly or too thinly, the comparison, though technically possible, cannot be meaningful in that sense. It is concluded that for legal systems to be amenable to meaningful comparison it must be possible to conceptualize them as entities that are both (1) distinct and (2) adequately connected. The rest of the chapter is devoted to arguing that such conceptualization is unavailable under either of the natural law or positivist ideal-types laid out in Chapter 2 whereas it is available under our hybrid conception of law as collective commitment. That argument takes the form of an incursion into system theory, which teaches that systems come in different varieties, only some of which, I argue, meet our two requirements. The legal systems of natural law correspond to what system theorists call ‘synthetic systems’, which fail to meet the distinctness requirement (Part II), whereas the legal systems of positivism, as ‘cybernetic organic systems’, fail to meet the connectedness requirement (Part III). In contrast, the legal systems of law as collective commitment, as ‘autopoietic organic systems’, are here shown to meet both requirements (Part IV). It therefore seems that, of these three conceptions, only law as collective commitment allows for the possibility of meaningful legal comparison.

Chapter 3 takes on every comparatist’s main epistemological dilemma: whether to investigate foreign law from an external (cognitivist) or internal (constructivist) perspective, or some combination thereof. Part I briefly recounts the history of that debate in the humanities in general, with particular emphasis on the philosophy of history. Part II transposes the debate onto the study of law, suggesting that the natural law and positivism ideal-types both motion to an external perspective whereas law as collective commitment mandates an unequivocal internal perspective—the legal actors’ own. Two classic objections to adopting an internal perspective in law are thereafter reviewed. According to the ‘heterogeneity objection’, the deep and insuperable disagreement among legal actors as to how their law should be interpreted suggests that there is no single ‘internal’ view of it that can be identified as somehow superior to any other. As for the ‘subjectivity objection’, it provides that whichever views the actors hold of their law necessarily are subjective, and hence devoid of normative weight. It is suggested that the heterogeneity objection simply misses the mark as it mistakes the internal perspective, an essentially interpretive attitude, for a matter of empirical determination. With respect to the subjectivity objection, it is submitted that a certain form of actor subjectivity is both inevitable and necessary given that collective debate

ultimately arises from subjective disagreement. As for the less desirable, opportunistic forms of actor subjectivity, these are somewhat mitigated by law's publicness requirement, which contributes to filtering out individual positions not justifiable in terms of collective legal ideals. Part III moves the analysis to the comparative context, wherein the individual seeking an internal understanding of one body of law is already acquainted with another. The standard objection against that move (the 'home-bias objection') charges that one cannot possibly understand two bodies of law on the inside, as the cultural lenses attending the first will necessarily colour the understanding of the second, which latter understanding accordingly cannot but differ from that of the local actors. It is argued in response that, while an outsider's understanding of the law does differ from the local understanding, both can nonetheless be described as internal. Under comparative law as comparative collective commitments, comparative lawyers indeed are, like the local actors, full participants in the reconstruction of the local law, though their way of proceeding (constant in-and-out movement) and the character of their contribution (comparative) are markedly different. Most importantly, comparative lawyers differ from local lawyers in that they reconstruct several bodies of local law (however many they are comparing) at once while also participating in the construction of the discipline of comparative law. Finally, Part IV aims to show that much of the comparative law scholarship produced to date bears witness to the arguments offered in Part III.

The discussion of Chapter 3 naturally raises the question of the proper delineation of legal systems: if all who participate in law's reconstruction are to be considered legal actors proper, where do legal systems begin and end? This is the question addressed in **Chapter 4**, which more specifically looks to the identification of the spatial, temporal and demographic contours of legal systems as the objects of analysis under comparative law as comparative collective commitments. Here again comparatists face the dilemma of whether to proceed externally, by just adopting the traditional Westphalian mapping of legal systems as territory-based nation-states, or else internally, by accepting as 'legal system' whatever is locally determined as such. Harking back to Chapter 3, Part I of Chapter 4 advocates an internal delineation of legal systems. As 'autopoietic organic systems' (Chapter 3), the legal systems of comparative law as comparative collective commitments are largely *self*-defining. After all, the legal actors' own treatment of boundary issues is as revealing of their collective commitments as is their treatment of any other legal issue. Legal systems on that account accordingly are fuzzy and fickle. They are fuzzy in that their elements belong to them not categorically but as a matter of degree; they are fickle in that they change constantly, along with the legal materials that constitute them. They take on a diversity of geographic configurations—some encompassing more than one state (the Commonwealth, Europe) or less than one (provincial law, municipal law); others qualifying as such despite being demographically or thematically, rather than territorially, defined (law applicable exclusively to certain groups of citizens or certain types of transactions) or despite combining an array of legal traditions within the same territory (the so-called 'mixed jurisdictions'). They also are temporally relative, as confirmed by the reports from colonial history concerning the challenges involved in pinpointing precisely when legal systems come in and out of existence. Finally, they can clash and/or intersect with one another, as when judges from different jurisdictions invoke the same body of authorities

or when judges from the same jurisdiction invoke authorities from different jurisdictions. At the same time, the internal delineation of legal systems does not (*contra* some legal pluralist claims) result in their being severed from any kind of material anchors. As Part II aims to show, a strictly ideal delineation of legal systems is neither conceptually workable nor consonant with practice. On the conceptual front, it is recalled that our base definition of law as collective commitment (effectiveness, argumentativeness, coherence, publicness, formality and normativity) places firm if minimal *a priori* limits on what can qualify as a legal system for present purposes. In particular, that definition insures that the legal systems of comparative law as comparative collective commitments, however elusive their contours may be, retain a clear institutional focus. They accordingly possess a persistent measure of tangibility, in particular, some kind of temporal relevance and connection to territory, as is pointedly confirmed in practice, through the debates surrounding forum and applicable law determinations in private international law and such ubiquitous municipal doctrines as extra-territoriality, limitation periods and rules against perpetuities.

Chapter 5 crystallizes the discussion of the previous chapters into a proposed tripartite methodology for comparative legal studies, sequentially addressing the start-up, reconstruction and overall comparison stages of the comparative process. Part I discusses the choice of topic and legal systems, and the identification of the relevant materials in each system. The challenge at this early stage is to secure an appropriate '*tertium comparationis*', or neutral vantage point from which to enter the various systems, one that will avoid rigging the analysis in favour of one of them. As legal labels ('contract', 'contract law', 'private law') are not standardized across systems, they offer notoriously poor such entry points. Many comparatists accordingly have instead resorted to problem-based legal research, wherein the various materials identified for comparison are not those earmarked with particular labels so much as those typically deployed to respond to particular problems. The requisite 'effectiveness' of law under the present account entails that such functionalistic research method ought to be available under comparative law as comparative collective commitments, which method is consequently endorsed and defended. Part II recounts the process by which the materials gathered are thereafter analysed and interpreted through micro comparisons. Functionalism is of little use at this stage, as it only speaks to law's function and is hence ill-equipped to explain why legal systems have historically deployed different means to resolve similar social problems. Comparative lawyers are therefore advised to turn to a hermeneutic approach, which in contrast zooms in on such differences. Whereas it is often claimed that cross-system variations are best explained by reference to non-legal (cultural, historical, economic, etc.) factors, legal hermeneutics aim to make sense of each set of materials on its own terms, each set being tentatively reconstructed into a distinct coherent discourse. As such reconstruction exercise necessarily involves relating the various materials to one another and to the set's peculiar grammar and ideals, such grammar and ideals—the systems' respective collective commitments—are bound to come to light. Part III discusses the immediately ensuing question of the extent to which if at all legal systems meaningful on their own yet perhaps no other terms, thus potentially incommensurable, can possibly be compared among themselves in the context of macro comparisons. It is there argued that, contrary to received wisdom, it does not follow from comparisons necessarily involving an external perspective (whence all the entities can be gleaned at once—Chapter 2) that

the standards used in those comparisons must likewise be externally determined. Drawing on the economic literature on proportionality, which distinguishes comparability from commensurability, I suggest that it is possible to compare (externally) the extents to which various legal systems have lived up to their respectively incommensurable (internal) commitments. While such proportional (rather than cardinal) comparisons clearly are comparisons proper, they do not encroach, and if anything might serve to preserve and reinforce, the internal integrity of the systems involved. Particular attention is here drawn to the ‘legal family’ and ‘legal origins’ literatures, both of which have been accused of comparing legal systems as against externally imposed criteria, thus contributing to conveying ultimately distorted understandings of these systems.

The book closes with an **Epilogue** outlining that our proposed account of comparative law meets the standard requirements for an autonomous academic discipline. That is, comparative law as comparative collective commitments boasts a distinct area of knowledge and inferential purpose, a transparent process, a pre-established methodological framework and *a priori* uncertain conclusions. At least, comparative law so conceptualized fares, by these standards, as well as any other well established such discipline. The chapter closes with some general remarks on the upshot of our discussion for legal theory.