The Power of Comparative Law:

What Type of Units Can Comparative Law Compare?

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Abstract. What can comparative law compare? It is relatively uncontroversial that certain topics are included in its scope. For example, there is little doubt that any comparison between legal rules of different countries belongs to the field of comparative law. Beyond this traditional scope, some comparatists include further topics, for example, suggesting that legal systems of the past, sub-national laws and informal forms of dispute resolutions can also be possible units of comparative law. But why stop here? As many legal topics involve elements of comparison, it may only be logical to make any *comparison in law* part of the field of comparative law. However, such a suggestion about the broadening of comparative law also needs to assess whether the methods and concepts of comparative law can be suitable for other than the conventional units. Therefore, this article will discuss both the possible extensions to the scope of comparative law and the corresponding power of comparative law to deal with these new units of comparison.

Keywords: comparative law, units of comparison, foreign law, comparative methods, legal research

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INTRODUCTION

There are two ways to present the scope of comparative law. On the one hand, comparative law can be seen as a field of research with certain core topics as they have evolved over time, such as the divide between civil and common law countries, the search for functional similarities between the laws of different countries, and the occurrence of legal transplants.[1] Thus, this line of reasoning identifies the scope of comparative law in an inductive way. On the other hand, using a deductive line of reasoning, it may be suggested that the scope of comparative law can be considerably broader. It has been suggested that comparative thinking is inherent in any field research.[2] According to Maurice Adams, legal scholarship is no exception:

> "Nearly any claim we make as lawyers, as well as every distinction we draw, will implicitly or explicitly be set against something else. A legal arrangement can only be qualified as satisfactory or good because there is another arrangement by which it can be measured; such an arrangement is never good just in and of itself. When judges are looking for principles to help decide on an unprecedented or unregulated situation, they tend to rely on analogical reasoning, ie they apply a rule for a comparable situation, be it a real or hypothetical one, to the situation at hand. ... Comparing, in other words, is a fundamental principle of legal research".[3]

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[1] *See, e.g.*, the handbooks: MATHIAS REIMANN & REINHARD ZIMMERMANN (eds.), THE OXFORD HANDBOOK OF COMPARATIVE LAW (2006; 2nd edn. 2019 forthcoming); JAN M. SMITS (ed.), *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (2nd edn. 2012).

[2] *See* Guy E. Swanson, *Frameworks for Comparative Research: Structural Anthropology and the Theory of Action* in COMPARATIVE METHODS IN SOCIOLOGY 141, 145 (Ivan Vallier ed., 1971) ("thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research").

[3] Maurice Adams, *Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law* in METHODOLOGIES OF LEGAL RESEARCH 229, 229–30 (Mark Van Hoecke ed., 2011).

This debate about the scope of comparative law as an academic field is of natural relevance for the type of articles comparative law journals may accept, and the topics which are included in comparative law courses. It also matters for the future relevance of comparative law. For example, do we believe that the twenty-first century is (already) the "era of comparative law"[4] or do we think that comparative law needs to broaden its appeal in order to remain relevant?[5]

In this article, the analysis about the scope of comparative law will follow the question: what can comparative law compare? It is relatively uncontroversial that certain topics are included in the scope of comparative law. For example, there is little doubt that any comparison between legal rules of different countries belongs to the field of comparative law (e.g., a comparison between English and French contract law or between US and Japanese constitutional law). Beyond this traditional scope, some comparatists allow further topics, for example, suggesting that legal systems of the past, sub-national laws and informal forms of dispute resolutions can be possible units of comparative law.[6] Moreover, if we take the view that comparative law can extend to any comparison in law, many further topics may be included, as this article will discuss.

It also needs to be considered that any decision about the relevant units of comparative law is bound to be related to the corresponding methods and concepts of comparative law. While certain methods and concepts may work perfectly well for a narrow range of units, this may be different if we expand the scope of comparative law. In the present context, it is therefore necessary to investigate *the power of comparative law* to deal with possible new units of comparison[7] – and, if this answer is in the affirmative, this may then also mean that insights from comparative law can make important contributions to many other areas of research.

The structure of this article is as follows: Part I discusses the conventional scope of comparative law and possible extensions to new units. Reviewing how the current literature has accepted some extensions in an ad-hoc fashion, it aims to show how far common themes can be identified in the debate about an extended scope of comparative law. Part II addresses the corresponding power of comparative law to deal with these new units. Thus, it connects the discussion about the relevance and scope of comparative law as an academic field with its diverse methods and concepts. Finally, the conclusion reflects on the wider implications of the findings for comparative law and its current and future relationship to other fields.

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[4] ESIN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW: VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY* 216 (2004).

[5] *See infra* II B 3.

[6] *See infra* I. B.

[7] Thus, here, the term "power" refers to the ability of methods and concepts to achieve a particular aim, not power relations (as in Reza Banakar, *Power, Culture and Method in Comparative Law* [review of Örücü & Nelken, Comparative Law: A Handbook] 5 INT' J. L. CONTEXT 69 (2009)) or the practical achievements of comparative law as a discipline (as in BERNHARD GROSSFELD, MACHT UND OHNMACHT DER RECHTSVERGLEICHUNG (1984)).

I. CONVENTIONAL AND POTENTIAL NEW UNITS

As a general term of social science research, a "unit of analysis" is defined as the "subject (the who or what) of study about which an analyst may generalize", such as "countries, international alliances, schools, communities, interest groups and voters".[8] Comparative law, as well as other comparative disciplines, use the term "unit" to refer to the "units of comparison", i.e. the two or more subjects that are compared.[9] More specifically, it is said that comparative law requires separate units, while it is not necessary that these units are independent of each other; for example, comparatists can and do compare units that have influenced each other through legal transplants or hierarchical relationships.[10]

Of course, these general definitions do not tell us which precise units we can include in research of comparative law. Thus, this section starts with an overview of the conventional units of traditional comparative law. Subsequently, it discusses *possible* new units, reasons that support their inclusion as well as counter-arguments (while the ultimate answer to the question whether these units *should* belong to comparative law is addressed in the subsequent Part II).

A. Overview of conventional units of comparative law

The comparative law literature frequently distinguishes between traditional and other (postmodern, critical, empirical etc.) approaches.[11] Of course, using such categories does not mean that there are no differences within the group of traditional comparative legal scholarship. 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, harmonization of laws, and the relationship between law and the state, and Pierre Legrand identifies its "doxa" with the functional approach by Zweigert and Kötz.[12]

The most common traditional form of comparative law is a comparison between the positive state laws of "Western countries" – in the words of William Twining the "country

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[8] Karen J. Long, *Unit of Analysis* in THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS 1157 (Michael S. Lewis-Beck, Alan Bryman & Tim Futing Liao eds., 2004).

[9] *E.g.*, Esin Örücü, *Developing Comparative Law*, in COMPARATIVE LAW: A HANDBOOK 43, 56 (Esin Örücü and David Nelken eds., 2007); Jürgen Schriewer, *Comparative Social Science: Characteristic Problems and Changing Problem Solutions* 42 COMP. EDUCATION 299, 319 (2006).

[10] Antonina Bakardjieva Engelbrekt, *Comparative Law and European Law: the End of an Era, a New Beginning, or Time to Face the Methodological Challenges?* 61 SCANDINAVIAN STUD. L. 87, 99 (2015).

[11] *E.g.*, Dagmar Schieck, *Comparative Law and European Harmonisation – a Match Made in Heaven or Uneasy Bedfellows?* 21 EUROP. BUS. L. REV. 203 (2010); Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information* 40 HARV. INT'L L.J. 221 (1999) and the following footnotes.

[12] Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 355 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Banakar, *supra* note 7, at 73; Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies* 27 CARDOZO L. REV. 631, 632 (2005)

and Western tradition" of comparative law.[13] The relevant law in such a comparison can be a particular legal rule based on statute or case law. A conventional way to identify the relevant legal rules is the functional approach: thus, the starting point is a scenario of facts and the relevant question is which legal rules countries use in order to address those facts.[14]

A further element of functionalism is that the result of the comparative analysis is often that the legal rules may differ but that the practical results are similar. In particular, this finding of a "presumption of similarity" is suggested for comparisons of private-law rules between Western common and civil law countries.[15] More generally, it can also be said that in the most common traditional form of comparative law there is a preference for comparing common and civil law countries, 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".[16]

Two modest extensions can also be included as conventional units of comparative law. First, although there is a preference for the comparison of legal rules, other elements of "law"[17] have traditionally also been the subject of cross-country comparison. Thus, this comparison can also concern, for example, questions about the structure of the legal system (e.g., prevalence of case law or statutory law), law's institutions and actors (courts, solicitors etc.), and differences in legal reasoning and methods.[18]

Second, despite the preference for comparisons between Western countries, other countries may be included within the conventional units of comparative law as far as those countries have adopted a legal system modelled after Western state-based law. For example, contemporary Japanese law is typically seen as a product of legal transplants, initially from Germany and other civil law countries and after the Second World War

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[13] William Twining, *Comparative Law and Legal Theory: The Country and Western Tradition*, in *Comparative Law in Global Perspective* 21 (Ian Edge ed., 2000).

[14] This approach can most clearly be seen in the publications of the Common Core project, *see* www.common-core.org. *See* also David J. Gerber, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language*, in *Rethinking the Masters of Comparative Law* 190, 199 (Annelise Riles ed., 2001) quoting 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".

[15] KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 40 (3rd edn, 1998) (as "*praesumptio similitudinis*").

[16] Vernon Valentine Palmer, *Mixed Jurisdictions* in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 65–591 (Jan M. Smits ed., 2nd edn. 2012) and Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code* 65 LA. L. REV. 678, 680 (2005).

[17] For the relevance of the "what is law?" question for comparative law *see* CATHERINE VALCKE, COMPARING LAW: COMPARATIVE LAW AS RECONSTRUCTION OF COLLECTIVE COMMITMENTS 18–59 (2018); GEOFFREY SAMUEL, AN INTRODUCTION TO COMPARATIVE LAW THEORY AND METHOD 121–51 (2014).

[18] *See, e.g.*, THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW 19–24 (2012); JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW (2006); Jacco Bomhoff, *Comparing Legal Argument*, in PRACTICE AND THEORY IN COMPARATIVE LAW 74 (Maurice Adams and Jacco Bomhoff eds., 2012).

from the US.[19] Thus, it has been a frequent topic of comparative law to compare Japanese law with, for example, German and US law. This can also address questions about the institutional structure of the law: for instance, there has been extensive research about litigation rates in Japan in comparison with those of European and North American jurisdictions.[20]

B. Possible new units

As this section will discuss, some researchers have accepted certain non-traditional units within the scope of comparative law. Yet, this has been done in an ad-hoc fashion; thus, it is the aim of this section to provide a first general analysis of possible new units. As a heuristic device, these possible extensions will be presented as units which derive from other fields of research, namely, legal history, sociology, literature and cultural studies, domestic (i.e. non-comparative) legal studies, and international law

1. New units overlapping with legal history

It is commonly held that there is a close relationship between comparative law and legal history.[21] Notably this is the case in the explanatory part of a comparative analysis as legal history can explain how and why different legal solutions have emerged (together with analysis of the cultural, social and economic context of the law).[22] However, the question at stake here is whether this overlap with legal history could go further since legal systems of the past may themselves be valid units of comparison. In the comparative law literature, such "diachronic comparisons"[23] are sometimes included, but there are also a number of variants to be considered:

To start with, some research compares multiple new laws and then adds one old law to the comparison. For example, a comparison of European countries may add Roman law in order to show whether similarities between current laws can be related to elements

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[19] *See, e.g.*, Ko Hasegawa, *Normative Translation in the Heterogeneity of Law* 6 TRANSNAT'L LEGAL THEORY 501 (2015); J. Mark Ramseyer, *Mixing-and-Matching Across (Legal) Family Lines* BYU L. REV. 1701 (2009).

[20] *E.g.*, J. MARK RAMSEYER, SECOND-BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW (2015); Erhard Blankenburg, *Civil Litigation Rates as Indicators for Legal Culture*, in COMPARING LEGAL CULTURES 41 (David Nelken ed., 1997).

[21] *E.g.*, JAAKKO HUSA, A NEW INTRODUCTION TO COMPARATIVE LAW 35–6 (2015); Mark Van Hoecke, *Methodology of Comparative Legal Research* LAW & METHOD 1, 18 (2015).

[22] ZWEIGERT & KÖTZ, *supra* note 15, at 36. See also REZA BANAKAR, NORMATIVITY IN LEGAL SOCIOLOGY: METHODOLOGICAL REFLECTIONS ON LAW AND REGULATION IN LATE MODERNITY 146 (2015) (contextualization as "indispensable methodological characteristic of all comparative studies of law").

[23] Giuseppe Martinico, *Time and Comparative Law before Courts: The Subversive Function of the Diachronic Comparison* 3 THE THEORY AND PRACTICE OF LEGISLATION 195 (2015); Sebastian McEvoy, *Descriptive and Purposive Categories of Comparative Law*, in METHODS OF COMPARATIVE LAW 144, 150 (Pier Giuseppe Monateri ed., 2012).

of Roman law.[24] Here, it is clear that such research presents a study of comparative law as it includes the comparison of two or more contemporary legal systems in any case.

The situation is different where we just have one contemporary legal system which is compared with one or more legal systems of the past. 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 which faced a similar situation in the past. This is a frequently discussed position in the field of law & development. Here, on the one hand, it may be held that the past experience of Western countries can offer suitable guidance for countries in the developing world. On the other hand, 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.[25]

Such research is certainly useful, but it is also possible to reject the view that it should be classified as comparative law. The main analysis may be the past experience of various legal systems, for example, whether it shows that there are one or multiple ways to economic prosperity. Thus, it may mainly be seen as an exercise of legal history (or, indeed, law & development), not comparative law.

This line of reasoning becomes even more pertinent if we consider research that examines two or more legal developments which took place entirely in the past, for example, the codifications of major Codes in European countries in the 19th century.[26] Here, some comparatists may argue that we have both comparative law and legal history.[27] But it can also be suggested that this is simply research of comparative legal history – and thus, a sub-category of legal history, not comparative law.[28]

The final possible extension to be discussed in this sub-section is research which compares the current and the past law of the same country. Here too, some suggest that this belongs to comparative law.[29] Two evident counter-arguments are (i) that this may just be "normal" legal history as it traces the evolution of one country's law across time and

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[24] *See, e.g.*, REINHARD ZIMMERMANN & SIMON WHITTAKER (eds.), GOOD FAITH IN EUROPEAN CONTRACT LAW (2000) (study of the Common Core project which includes a chapter on Roman law).

[25] *See, e.g.*, J. CLARK LEITH, WHY BOTSWANA PROSPERED (2005); FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE FRENCH REVOLUTION TO THE PRESENT 270–84 (2014) (for Costa Rica); Andrew J. Harding and Connie Carter, *The Singapore Model of Law and Development: Cutting Through Complexity*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY 191 (John Hatchard & Amanda Perry-Kessaris eds., 2003).

[26] JEAN-LOUIS HALPÉRIN, FIVE LEGAL REVOLUTIONS SINCE THE 17TH CENTURY: AN ANALYSIS OF A GLOBAL LEGAL HISTORY 38–49 (2014). For another example *see* JOHN OWEN HALEY LAW'S POLITICAL FOUNDATIONS: RIVERS, RIFLES, RICE, AND RELIGION (2016) (emergence of law in China, Japan and Western legal traditions).

[27] HUSA, *supra* note 21, at 35, 165 ("it is almost impossible to separate comparative legal history from comparative law").

[28] *See* also ZWEIGERT & KÖTZ, *supra* note 15, at 8 (distinguishing comparative law and legal history).

[29] MICHAEL BOGDAN, CONCISE INTRODUCTION TO COMPARATIVE LAW 25 (2013).

(ii) that this lacks comparative law's aim to understand foreign law.[30] However, these counter-arguments may not be fully valid when the analysis concerns legal systems of the very distance past, say, a comparison of the laws of Ancient and modern Egypt. As with the other examples mentioned in this sub-section (and many of the following ones), it is also at least possible to follow a literal understanding of the term "comparative law" and therefore extend it to any comparison in law.

2. New units overlapping with sociology

The discussion about the relationship between comparative law and sociology shows some parallels to the relationship between comparative law and legal history. To start with, it can be said that sociological (or socio-legal) insights are often part of comparative law in order to explain differences and similarities between legal systems. It is also possible that sociological information about the law becomes the main focus of the analysis. For example, such research may explore the participants of the trial in an empirical and comparative way (e.g., how clerks assist judges in different countries).[31]

A more distinct situation of a possible new unit is research which compares a legal phenomenon of one country with a mere social phenomenon of another country. Such research has sometimes been included in studies of comparative law, in particular as far as non-Western countries are part of the analysis. For instance, in the 1980s, a course at Stanford University (and a subsequent publication) compared the US, China, Egypt and Botswana using functional questions 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?"[32] In today's world, and even more so in the future, it is also conceivable that a particular issue is addressed by legal rules in one country, while another country uses forms of technological management (which may or may not be underpinned by legal rules).[33]

Such comparisons assume that a problem may be addressed by either legal or extra-legal means; yet, it is also possible that a problem is not perceived as relevant in the social environment of a particular country, for instance consider the question whether adultery is regarded as a "problem" that the legal system, or indeed any ethical and moral standards, should address.[34] In such circumstances, we would therefore compare the existence of a rule in one country with its absence in another one.

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[30] For the latter argument *see* also *infra* II A.

[31] Sally J. Kenney, *Supreme Court Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court* 33 COMP. POLITICAL STUD. 593 (2000).

[32] James Lovell Gibbs, *Law in Radically Different Countries: An Experimental Course on Comparative Law* 25 AM. BEHAVIORAL SCIENTIST 37 (1981). *See* also JOHN H. BARTON, JAMES LOWELL GIBBS JR, VICTOR H. LI & JOHN HENRY MERRYMAN, LAW IN RADICALLY DIFFERENT CULTURES (1983).

[33] For the latter *see e.g.* Roger Brownsword, *In the Year 2061: From Law to Technological Management* 7 LAW, INNOVATION & TECHNOLOGY 1 (2015).

[34] For this limitation of legal functionalism *see, e.g.*, RICHARD HYLAND, GIFTS, A STUDY IN COMPARATIVE LAW 69–73 (2009); Bernard Rudden, *Comparing the Priorities of Different Legal Systems* 3 ASIA

However, the inclusion of research on "non-law" units in comparative law is also not a matter of course. It may be suggested that this type of research should better remain within fields such as sociology, anthropology and religious studies. For example, in anthropology, Simon Roberts observed that "societies differ widely as to the kinds of behavior which are approved or tolerated and hence also in the amount of tension and quarrelling that will be felt acceptable", with corresponding differences about the use of legal means;[35] and other anthropological research has related such differences to various classifications of societies.[36] Comparisons of religious traditions may also have a legal dimension as far as religious rules are incorporated into the legal system, for example, in Islamic law.[37] Yet, here too it may be argued that this legal sub-topic does not make these studies part of comparative law due to the latter's conventional focus on secular legal systems.[38]

As far as non-legal phenomena are accepted as units of comparative law, it can further be suggested that this could include a comparison of law and "non law" of the same country. For example, the research question would then be how different persons of the same country solve specific conflicts, say, the ones cited above in the Stanford project. This could distinguish between groups of society with some persons preferring judicial proceedings but others non-legal forms of dispute resolutions, be it arbitration, mediation or the use of customary or religious authorities and traditions. Or, even more contentiously, it may be said that a comparison of the "law in the books" and the "law in practice" is a form of comparative law, in particular if some groups of society strictly follow the formal rules while others apply them in a modified manner.

Including such comparison of law and "non law" of the same country within the scope of comparative law may draw on the acceptance of functionalism as a tool of traditional comparative law.[39] Such an inclusive approach would also address the challenge of legal pluralism. According to Brian Tamanaha, legal pluralism raises the problem how far it is feasible to consider everything that can contribute to social order, for instance, whether

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PACIFIC L. REV. Special issue 1, 143 (1994); LEONTIN-JEAN CONSTANTINESCO, RECHTSVERGLEICHUNG, BAND III: DIE RECHTSVERGLEICHENDE WISSENSCHAFT 54–8 (1983).

[35] SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY 35–6 (2nd edn. 2013).

[36] For an overview *see* Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology* 84 IOWA L. REV. 1025, 1097–8 (1999). For details *see e.g.* WOLFGANG FIKENTSCHER, MODES OF THOUGHT: A STUDY IN THE ANTHROPOLOGY OF LAW AND RELIGION (2004).

[37] For comparisons with other traditions *see, e.g.*, Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition and Reason in Islamic and American Jurisprudence* 28 CARDOZO L. REV. 67 (2006); Jacques Vanderlinden, *Religious Laws as Systems of Law – A Comparatist's View*, in RELIGION, LAW AND TRADITION: COMPARATIVE STUDIES IN RELIGIOUS LAW 165 (Andrew Huxley ed., 2002).

[38] See *supra* I A and *infra* II A.

[39] See *supra* I A.

to include means such as "language, customs, moral norms, and etiquette".[40] However, if we take the position that any element of society can be included in comparative law, it would not matter in this regard whether we classify certain units of comparison as "law" or other social phenomena.

3. New units overlapping with literature and cultural studies

Literature and cultural studies do not feature prominently in traditional comparative law. However, in critical, hermeneutic and postmodern comparative law,[41] there is a greater openness for an extension to such studies. For example, works of art, in particular literature and film, are said to be revealing for comparative lawyers.[42] 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.[43]

It is also possible to go further and suggest that, even if there has been no impact on the actual law of a particular country, works from literature and cultural studies can be units of comparative law. So, here, to start with, works of fiction may be used to compare existing laws with laws as they exist in the human imagination. Insights from literature and films can also identify "virtual transplants", for example, when individuals of foreign countries believe that trial proceedings in their own country are akin to those watched in Hollywood movies.[44] Moreover, it has been suggested that even the "virtual law" of computer games and online worlds can be a point of comparison for comparative law.[45]

It could be objected that, in essence, such research is "just" cultural studies in context, namely that the researcher focusses on a particular work of fiction which is then contextualized with information about the laws of existing countries. However, it may also be said that it is at least similar to comparative law if and when the fictional law is closely

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[40] BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 180 (2001). See also Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global* 30 SYDNEY L. REV. 375 (2008).

[41] For these different terminologies, *see e.g.* GÜNTER FRANKENBERG. COMPARATIVE LAW AS CRITIQUE (2016); MATHIAS SIEMS, COMPARATIVE LAW 115–46 (2nd edn. 2018); Alessandro Somma, *At the Patient's Beside? Considerations on the Methods of Comparative Law*, THE CARDOZO ELECTRONIC LAW BULLETIN, vol. 13 (2007), available at www.jus.unitn.it/cardozo/Review/2007/somma2.pdf.

[42] *E.g.*, Greta Olson, *De-Americanizing Law and Literature Narratives: Opening Up the Story* 22 LAW & LITERATURE 338 (2010); Joseph W. Dellapenna, *Peasants, Tanners, and Psychiatrists: Using Films to Teach Comparative Law* INT'L J. OF LEGAL INFORMATION, vol. 36, iss. 1, art. 10 (2008).

[43] *See e.g.* Daniel Siemens, *Popular Dramas Between Transgression and Order: Criminal Trials and Their Publics in the Nineteenth and Twentieth Centuries in Global Perspective*, in THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE 555 (Paul Knepper & Anja Johansen eds., 2016); Pierre Legrand, *Comparative Legal Studies and the Matter of Authenticity* 1 J. COMP. L. 365, 368 (2006) (even fantasies sustained by a culture are a valuable clue for comparatist).

[44] David Nelken, *Signaling Conformity: Changing Norms in Japan and China* 27 MICH. J. INT'L L. 933, 940 (2006); UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL 208 (2008).

[45] James Grimmelmann, *Virtual Worlds as Comparative Law* 47 N.Y.L. SCH. L. REV. 147 (2004).

related to an existing legal system. For example, a comparison between crime dramas and actual legal rules of criminal procedures may consider that the presentation of "law" in the former is bound to reflect the existing law of its country of origin (say, the US jury system in US court dramas).

A further new unit could concern research which "merely" compares fictional laws. These units could be works of fiction from different countries; for example, researchers have examined how juries are presented in films from the UK and the US.[46] It is also possible to go even further and compare the law in works of fiction where there is no immediate connection to real countries, say between Star Wars and Star Trek, or between Lord of the Rings and Game of Thrones. Here, it may then depend on the specific topic whether such a comparison would also incorporate some cross-references to existing laws. In support of a view that would include such studies in comparative law, it may be said that using examples from fiction is in line with the general insight that thought experiments are helpful devices in many academic fields, including legal research.[47] A book on comparative research in political science specifically suggests that if there are only a limited number of actual cases, one should add counterfactuals or other thought experiments as units to the comparison.[48] Moreover, for comparative law, it can be argued that even a description of a particular "real" law is always the comparatist's own "invention" as a subjective presentation of this particular set of rules.[49]

4. New units overlapping with domestic legal studies

Research which "merely" concerns topics of domestic law (or, more generally, just one country's law) may be seen as the opposite of research in *comparative* law. However, here too, there are a number of cases where this opposition may be put in doubt.

The first one is a situation where it may be said that only on the surface there is "just" a treatment of one country but that, implicitly, this research is done in a comparative fashion.[50] In general comparative studies, it is said that descriptive words such as "democratic" or "densely populated" are implicit comparisons.[51] Similarly, studies of foreign

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[46] Nancy Marder, *Juries in Film and Television*, in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY (Nicole Rafter & Michelle Brown eds., 2018).

[47] Maks Del Mar, *Thought Experiments in Law Practice and Theory* (17 July 2017), blog post at https://junkyardofthemind.com/blog/2017/7/17/thought-experiments-in-law-practice-and-theory with reference to MICHAEL T. STUART, YIFTACH FEHIGE & JAMES ROBERT BROWN (eds.), THE ROUTLEDGE COMPANION TO THOUGHT EXPERIMENTS (2017).

[48] B. GUY PETERS STRATEGIES FOR COMPARATIVE RESEARCH IN POLITICAL SCIENCE 77–8 (2013).

[49] Pierre Legrand, *Negative Comparative Law* 10 J. COMP. L. 405, 423 (2015).

[50] See also Kate Glover & Roderick A. Macdonald, *Implicit Comparative Law* 43 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE 123 (2013).

[51] NEIL J. SMELSER, COMPARATIVE METHODS IN THE SOCIAL SCIENCES 3 (1976).

law can have a comparative dimension because authors are bound to use terms and concepts of their own legal systems as points of reference.[52] As a more specific example, reference can be made to the writings by Alexis de Tocqueville: his main interest was in the legal and political institutions of the US, 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 and other countries, de Tocqueville explains in his memoirs that he "did not write a page without thinking of her" (i.e. France).[53]

Secondly, comparative law is traditionally focused on the country level, but in most countries, law making is not fully centralized. This is most obvious in federal countries, say, in the US where some publications compare the rules of state laws,[54] but there are also local laws elsewhere – and, indeed, it has been argued that globalization is associated with a growing role of local governments and other forms of decentralization.[55] Research on differences below the country level can also take inspiration from other disciplines. For example, Robert Putnam's pioneering work on the role of social capital for the success of democracies was based on a comparative study of regional governments in Italy,[56] and anthropological research by Carol Greenhouse and colleagues analyzed the relationship between law and community in three US towns.[57]

Thirdly, and more generally, it may be said that comparative law can be concerned with "all formally articulated instances of systemic institutional governance".[58] Notably, this may include an examination of legal variations through private law making within the same country. For example, as private law is partly based on default rules, it is possible to compare standard form contracts between different industries[59] or articles of association between different firms.[60] These examples can also be related to the relevance of legal pluralism for comparative law, in particular as far as these privately created rules are regarded as law.[61] In contrast to other forms of legal pluralism,[62] the fact that here we

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[52] Teemu Ruskola, *Legal Orientalism* 101 MICH. L. REV. 179, 192 (2002); WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 187–8 (2000).

[53] ALEXIS DE TOCQUEVILLE, MEMOIR, LETTERS, AND REMAINS OF ALEXIS DE TOCQUEVILLE, VOL. 2 359 (1861). His main work was ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1848).

[54] *E.g.*, in US corporate law, *see* Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?* 22 J.L. ECON. & ORG. 340 (2006); David Mace Roberts & Rob Pivnick, *Table of the Corporate Tape: Delaware, Nevada and Texas* 52 BAYLOR L. REV. 46 (2000).

[55] JEAN-BERNARD AUBY, GLOBALISATION, LAW AND THE STATE 110–3 (2017).

[56] ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIL TRADITIONS IN MODERN ITALY (1993).

[57] CAROL J. GREENHOUSE, BARBARA YNGVESSON & DAVID M. ENGEL, LAW AND COMMUNITY IN THREE AMERICAN TOWNS (1994).

[58] Matthew Grellette & Catherine Valcke, *Comparative Law and Legal Diversity – Theorising about the Edges of Law* 5 TRANSNAT'L LEGAL THEORY 557, 573 (2014).

[59] Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements* 4 J. EMPIRICAL LEGAL STUDIES 677 (2007).

[60] Iain MacNeil & Li Xiao, *"Comply or Explain": Market Discipline and Non-Compliance with the Combined Code* 14 CORPORATE GOVERNANCE: AN INT'L REV. 486 (2006).

[61] For example, Article 1103 of the French Code Civil states that "Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits".

[62] *See supra* I B 2.

have a horizontal comparison – and not a complex network of rules of various sources – may make this example more closely related to other studies of comparative law. Still, the difference remains that this research does not have the foreign dimension which is a distinctive feature of most of current comparative law.

Fourthly, and most contentiously, comparative law may also include internal comparisons between different areas of law.[63] 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 behavior.[64] Consequently, a comparison between two or more countries would not be necessary for a comparative analysis (and, if it is included, it leads to the variant of *comparative*-comparative law[65]). In favor of such an extension, it can be argued that comparisons are a general form of knowledge formation.[66] It may also be in line with the view that we should think about comparative law as a variant of legal research more generally, not a unique and distinct method.[67] However, if one followed this view, it may also mean that much of general legal scholarship would be regarded as belonging to comparative law – and such an expansion of the scope of comparative law may not be to its advantage as it may question comparative law as a distinct field of research.

5. New units overlapping with international law

Comparative law and international law are, traditionally, of a different nature: one dealing with domestic laws and the other with binding rules between nations. Yet, there has now been a growing interest in forms of "comparative international law"[68] and it may indeed

[63] *See* McEvoy, *supra* note 23, at 145–9 (calling these internal and heterogeneous comparisons).

[64] Matthew Dyson, *Ligations Divide and Conquer: Using Legal Domains in Comparative Legal Studies*, in GENEVIÈVE HELLERINGER & KAI PURNHAGEN (eds.), TOWARDS A EUROPEAN LEGAL CULTURE 115 (2014). *See* also MATTHEW DYSON (ed.), COMPARING TORT AND CRIME: LEARNING FROM ACROSS AND WITHIN LEGAL SYSTEMS (2015) and the *Symposium Legal Domains and Comparative Law* 17 EDINBURGH L. REV. 420–30 (2013).

[65] For this term *see* Jacco Bomhoff, *Beyond Proportionality: Thinking Comparatively About Constitutional Review and Punitiveness*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 148 (Vicki Jackson & Mark Tushnet eds., 2017) (comparing US and European models of constitutional review with a US-European comparison of punitiveness).

[66] Husa, *supra* note 21, at 60–2. *See* also *supra* Introduction.

[67] *E.g.*, Maurice Adams & John Griffiths, *Against Comparative Method*, in PRACTICE AND THEORY IN COMPARATIVE LAW 279 (Maurice Adams & Jacco Bomhoff eds., 2012); John Bell, *Legal Research and the Distinctiveness of Comparative Law*, in METHODOLOGIES OF LEGAL RESEARCH (Mark Van Hoecke ed., 2011); Stephen A. Smith, *Comparative Legal Scholarship as Ordinary Legal Scholarship* 5/2 J. COMP. L. 331 (2010).

[68] *See* the following footnotes as well as the contributions in ANTHEA ROBERTS, PAUL B. STEPHAN, PIERRE-HUGUES VERDIER, & MILA VERSTEEG (eds.) COMPARATIVE INTERNATIONAL LAW (2018) and the special issue of the AM. J. INT'L L. vol. 109, no. 3 (July 2015).

be suggested that rules and institutions of international law (as well as transnational and regional law)[69] could be relevant units of comparative law.

The following variants can be distinguished:

A vertical form of comparative international law concerns the comparison of rules or institutional structures of international law with those of domestic law. For example, it may be possible to functionally compare domestic rules with international rules not yet implemented by this country,[70] or with the rules that this country has implemented in divergence from the relevant international rules.[71] As it is increasingly common that international adjudicate bodies accompany the respective rules of international law,[72] it is also possible to compare them with domestic judicial and arbitral bodies. It may be objected that such a comparison between different levels creates a mismatch as the context of international and domestic law are different. However, it can then also be responded that this relevance of context can be precisely the aim of the comparative study: for example, it may observe that international law intends to find a compromise between different legal models, while it is also possible that cultural differences which make solutions from different countries appear irreconcilable at the domestic level are less relevant when it comes to the international one.[73]

A horizontal comparison of international law is relatively straight-forward where different international rules address the same topic. Due to the increased fragmentation of international law,[74] this can be particularly relevant where different rules apply to different groups of countries; for example, consider the growing number of investment treaties. Although this may be seen as a mere sub-category of international law, the relevance of country differences can also make such research similar to comparative law. Moreover, it has been suggested that some tools of comparative law may be suitable: for instance, a

[69] The following will focus on the example of international law. For transnational law it can also be noted that it often has the nature of private norms, similar to those discussed in *supra* I B 4.

[70] For international and domestic environmental law *see* Saskia Vermeylen, *Comparative Environmental Law and Orientalism: Reading Beyond the "Text" of Traditional Knowledge Protection* 24 REV. EUROP. COMMUNITY & INT'L ENVIRONMENTAL L. 304 (2015).

[71] This can also be relevant for the implementation of EU directives, *see* Jule Mulder, *New Challenges for European Comparative Law: The Judicial Reception of EU Non-Discrimination Law and a turn to a Multi-layered Culturally-informed Comparative Law Method for a better Understanding of the EU Harmonization* 18 GERMAN L. J. 721 (2017).

[72] *See e.g.* Cesare P. R. Romano, Karen J. Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues, and Players*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 3 (Cesare P. R. Romano, Karen J. Alter & Chrisanthi Avgerou eds., 2013).

[73] Mathias Forteau, *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission* 109 AM. J. INT'L L. 498 (2015); Valentina Vadi, *The Migration of Constitutional Ideas to Regional and International Economic Law: The Case of Proportionality* 35 NW. J. INT'L L. & BUS. 557, 586–9 (2015) (for need to adapt to context). A similar situation arises where international law makes use of comparative law, *e.g.*, ICJ Statute, art. 38(1)(c) and *see* Jaye Ellis, *General Principles and Comparative Law* 22 EUROP. J. INT'L L. 949 (2011).

[74] William E. Butler, *Comparative International Law* 10 J. COMP. L. 241, 250 (2015).

functional approach incorporating quantitative methods, a critical approach comparing power structures, and perspectives about diffusion of law and legal transplants.[75]

Another horizontal variant is a comparison between rules and institutions of international law as regards different topics. This difference in the topics may concern a variation of a common theme, for example, a comparison how different international treaties deal with different types of environmental damages.[76] The difference can also be a more profound one with a comparison performed at the "meta level": for example, comparative research has been conducted on the (i) ideologies of international law, (ii) the form, substance and scope of international agreements, (iii) the governance, rule-making practices and approaches to impact assessment of international organizations, (iv) details about international tribunals, say, whether they allow dissenting and separate opinions, and (v) the main actors behind transnational regulatory standards.[77] Here too, the question remains whether this should be seen as belonging to international law, comparative law or both. The dividing line may also be similar to the corresponding discussion about domestic legal studies, namely whether comparative law can include comparisons of laws enacted by the same law maker.[78]

C. Summary of possible new units

The analysis of the previous section has shown that there is a trend towards a greater willingness to include new units in comparative legal research. So far, this movement has been rather implicit; thus, it was the aim of this section to consolidate the discussion and show how far common themes can be identified in the debate about extensions of the scope of comparative law. Doing so, the text has referred to arguments in favor and against such extensions, while the ultimate answer to the question whether these units should belong to comparative law is addressed in the subsequent Part.

Without claiming to be exhaustive, the following will focus on 14 possible new units as identified in this Part. These are, in abbreviated form, *from the legal history category*: (i) "new and old law of different countries", (ii) "old laws of different countries" and (iii) "new and old law of same country"; *from the sociology category*: (iv) "law and non-law

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[75] For these examples *see* Tomer Broude, Yoram Z. Haftel & Alexander Thompson, *Who Cares About Regulatory Space in BITs? A Comparative International Approach*, in Roberts *et al*., *supra* note 68, at 527–46; Nesrine Badawi, *Regulation of Armed Conflict: Critical Comparativism* 37 THIRD WORLD Q. 1990 (2016); Lorenzo Cotula, *Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties* 24 REV. EUROP. COMMUNITY & INT'L ENVIRONMENTAL L. 278 (2015).

[76] *Cf.* Elisa Morgera, Global Environmental Law and Comparative Legal Methods 24 REV. EUROP. COMMUNITY & INT'L ENVIRONMENTAL L. 254, 257 (2015).

[77] For these examples, *see* Boris N. Mamlyuk & Ugo Mattei, Comparative International Law 36 BROOK. J. INT'L L. 385 (2011); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 119–81 (2008); OECD, INTERNATIONAL REGULATORY CO-OPERATION: THE ROLE OF INTERNATIONAL ORGANISATIONS IN FOSTERING BETTER RULES OF GLOBALISATION (2016); NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY 182 (2015); Kenneth Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in THE POLITICS OF GLOBAL REGULATION 44 (Walter Mattli & Ngaire Woods eds., 2009).

[78] *See supra* I B 4.

of different countries" and (v) "law and non-law of same country"; *from the literature and cultural studies category*: (vi) "existing law and fictional law" and (vii) "fictional laws"; *from the domestic legal studies category*: (viii) "foreign country implicit", (ix) "local laws", (x) "private law making", and (xi) "different areas of law"; *and from the international law category*: (xii) "domestic and international law", (xiii) "different international law same topic" and (xiv) "different international law different topic".

II. SHOULD THESE NEW UNITS BELONG TO COMPARATIVE LAW?

Classifying research as belonging to comparative law – and not, for example, (only) legal history or international law – does not imply an assessment about the quality of a particular piece of research. Rather, the subsequent analysis will, in the first instance, follow the question whether the methods and concepts of comparative law are suitable for the new units identified in the previous part. In addition, it will be discussed how far pragmatic considerations have a role to play.

A. Methods and concepts of comparative law today

As there is diversity in the more theoretical and the more practical aims of comparative law,[79] comparative lawyers often disagree about the methods and concepts of comparative law It is also clear that, as the legal (and non-legal) world constantly changes, so too do the methods and concepts of comparative law.[80] This section cannot provide an exhaustive evaluation of all possible variants. Rather, the more modest aim is to take the existing body of knowledge of comparative law as a starting point and identify (not to endorse or dismiss) representative methods and concepts that are frequently discussed in the comparative law literature.

First, the benefits and shortcomings of a *functional approach* are a core topic of comparative law. At the most basic level, this approach is used to identify a common ground ("tertium comparationis") between two or more legal systems. Thus, a frequent recommendation is that the starting point of a comparative analysis should be a scenario of facts followed by the question which legal rules different countries use to address those facts. It is also possible, though disputed, to construe further elements from functionalism, for example, that, across the world, laws usually have a functional agenda in pursuing particular goals.[81]

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[79] *See, e.g.*, H. Patrick Glenn, *The Aims of Comparative Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 65–74 (Jan M. Smits ed., 2nd edn. 2012).

[80] For the need to develop new concepts *see* also *infra* II. B 2 and 3.

[81] For the general discussion (including critiques) *see, e.g.*, SAMUEL, supra note 17, at 65–178; Michaels, *supra* note 12; Julie De Coninck, *The Functional Method of Comparative Law: Quo Vadis?* 74 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 318 (2010). For legal functionalism and its limitations *see* also the references in *supra* I. A and I. B 2.

Second, *legal families* are often at the center of debates in comparative law. Some of the main comparative law books are structured according to legal families, for example, with chapters on the common law, the civil law, religious legal systems etc.[82] In substance, legal families can be useful for projects of comparative law as they enable researchers to explain why groups of countries have similar or different positive laws (or similar or different legal mentalities etc.). For studies that address a large number of countries, legal families are also a good way to structure the presentation, namely that it is assumed that laws and legal mentalities of countries of the same legal family are similar unless stated otherwise (while critics challenge the relevance of such broad country groupings today[83]).

Third, the concepts of *legal transplants and diffusion* also aim to make sense of the complexity of the legal world. The use of legal transplants can be associated with the belonging of countries to the same legal family, but this is not always the case. For example, it is often debated whether we observe an Americanization of legal systems in both common and civil law countries.[84] Some comparatists also emphasize that the frequency of legal transplants shows that legal change is often unrelated to the socio-economic context of the transplant country.[85] The concept of "legal transplants" has remained controversial, in particular as far as it is understood to assume that the transplanted law is identical in the origin and the transplant country.[86] Thus, adding the term "legal diffusion" to this category has the aim to capture more indirect and intermediated forms of influence.[87]

Fourth, comparative law is typically concerned with the understanding of a *foreign country and legal culture*. This is seen as a distinct challenge for researchers of comparative law as they "have to be able to reconstruct the meaning of legal rules that are foreign to them".[88] Correspondingly, some comparative law scholarship then also discusses how cross-cultural understanding can be achieved, for example, the need for an immersion

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[82] *E.g.*, RENÉ DAVID, MARIE GORÉ & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (12th edn. 2016); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (5th edn. 2014).

[83] For critical positions *see e.g*. Mariana Pargendler, *The Rise and Decline of Legal Families* 60 AM. J. COMP. L. 1043 (2012); SIEMS, *supra* note 41, at 94–109.

[84] *E.g.*, Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure* 45 HARV. INT'L L.J. 1 (2004); R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese Law* 23 U. PA. J. INT'L ECON. L. 269 (2002); Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in LEGAL CULTURE AND THE LEGAL PROFESSION 137 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

[85] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2nd edn. 1993); ALAN WATSON, LAW, SOCIETY, REALITY (2007).

[86] The main challenge was by Pierre Legrand, *The Impossibility of Legal Transplants* 4 MAASTRICHT J. EUROP. & COMP. L. 111 (1997).

[87] William Twining, *Diffusion of Law: A Global Perspective* 49 J. LEGAL PLURALISM 1 (2004).

[88] Adams, *supra* note 3, at 239. See also UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW 175 (7th edn. 2009) ("At home, every experienced lawyer is a 'practicing anthropologis'… but when one tries to penetrate into a foreign system, no such intuition or experience is available to serve as a guide.").

into a foreign legal culture (as opposed to mere superficial understanding of the black letter rules),[89] while other researchers put an emphasis on the inevitable limitations of one's own understanding of foreign law.[90]

Fifth, the interest of comparative law in *socio-legal relations* is due to the fact that the multiplicity of laws under investigation can foster our understanding about the relationship between law and society. For example, a frequent debate is whether law is primarily a reflection of society or whether it is primarily a means to shape society in a particular way.[91] Comparative law is therefore interested in making use of information about law and society in a comparative context.[92] Such research can then also be extended to empirical methods: for example, there is now a growing field of quantitative research that has aimed to test hypotheses about socio-legal relations with comparative data (despite concerns how far this can really show causal relationships).[93]

Sixth, comparative law often recommends *law reforms by transplant*. While it is clear that comparative law should compare the laws under investigation, it is usually suggested that comparative law should not shy away from policy recommendations for law reform.[94] This view also acknowledges that simply copying foreign legal models does not work well if the foreign model leads to a mismatch with the existing legal and extra-legal context of domestic law. However, if transplants are well chosen and designed, it is often held that foreign experience can provide helpful information for law making.[95]

Seventh, policy recommendations may also consider the *possibility of unified rules*. Comparative law has a long tradition of advancing the case for harmonization and convergence.[96] Here too, this position should not advocate a naïve approach: thus, a frequent view is that comparative law can help us to answer two questions: first, whether there should be unified rules at all, and, second, if this is affirmed, what the substance of these

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[89] Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law* 46 AM. J. COMP. L. 43 (1998).

[90] Legrand, *supra* note 49, at 408 ("to interpret foreign law is immediately and necessarily to disfigure it").

[91] In comparative law (*e.g.* SIEMS, *supra* note 41, at 150–3) as well as in other fields (*e.g.* Alberto Chong & Cesar Calderon, *Causality and Feedback Between Institutional Measures and Economic Growth* 12 ECONOMICS AND POLITICS 69 (2000)).

[92] *See* DAVID S. CLARK (ed.), COMPARATIVE LAW AND SOCIETY (2012).

[93] For an overview of the use and misuse of quantitative methods in comparative law *see* Holger Spamann, *Empirical Comparative Law* 11 ANNUAL REV. LAW & SOCIAL SCIENCE 131 (2015).

[94] ZWEIGERT & KÖTZ, *supra* note 15, at 47 ("the comparatist is in the best position to follow his comparative researches with a critical evaluation'; and then: 'if he does not, no one else will do it"). This is rejected by others, *e.g*. Legrand, *supra* note 43, at 448 ("[t]here cannot be a 'better' law. The very notion is fallacious. Who could finally and definitively say what it is?").

[95] For the design of legal transplants *see*, *e.g*., NICOLA LUPO & LUCIA SCAFFARDI (eds.), COMPARATIVE LAW IN LEGISLATIVE DRAFTING: THE INCREASING IMPORTANCE OF DIALOGUE AMONGST PARLIAMENTS (2014); Helen Xanthaki, *Legal Transplants in Legislation: Defusing the Trap* 57 INT'L & COMP. L. Q. 659 (2008).

[96] *See* Christophe Jamin, *Saleilles' and Lambert's Old Dream Revisited* 50 AM. J. COMP. L. 701 (2002).

unified rules should be. Together with the previous category, such research can also be seen as advocating for an applied comparative law.[97]

B. Is comparative law suitable for new units?

The present section returns to the 14 possible new units identified in the previous Part.[98] Specifically, the aim is to examine how far comparative law has the power to deal with these new units of comparison. Thus, this will connect the discussion about the relevance and scope of comparative as an academic field with its methods and concepts. It will do so in three steps: first, it will present a table that maps the possible new units with the methods and concepts of comparative law outlined in the previous section. This aims to show how far these methods/concepts can potentially be relevant. Second, this section will turn to the actual question how legal researchers may make use of this matrix of new units and methods/concepts of comparative law. It will also contemplate how far comparative law may need to adjust its methods and concepts to these units. The third and final sub-section will then present the author's own position as regards the inclusion of the new units.

1. Mapping units and methods/concepts

Table 1 displays a matrix of the possible 14 new units and the seven methods and concepts of comparative law, as outlined above. The black, grey and white shading of the cells refers to the likely relevance of those methods and concepts for the new units: black means "yes", white "no", and grey designates ambiguous cases.

[97] David Louis Finnegan, *Applied Comparative Law and Judicial Reform* 8 T.M. COOLEY J. PRAC. & CLINICAL L. 97 (2006); Roberto Pardolesi & Massimiliano Granieri, *The Future of Law Professors and Comparative Law* 21 NATIONAL ITALIAN AMERICAN BAR ASSOCIATION JOURNAL 1 (2013) (aim of comparative law to devise norms).

[98] See *supra* I. C.

Table 1: Possible new units and methods/concepts of comparative law

	functional comparison	legal families	legal transplants & diffusion	foreign country & legal culture	socio-legal relations	law reforms by transplant	possibility of unified rules
new and old law of diff. countries							
old laws of different countries							
new and old law of same country							
law and non-law of diff. countries							
law and non-law of same country							
existing law and fictional law							
fictional laws							
foreign country implicit							
local laws							
private law making							
different areas of law							
domestic and international law							
different int'l law same topic							
different int'l law different topic							

The shading of the cells of Table 1 is mostly self-explanatory; yet, the following comments may be helpful. The category "legal families" refers to the traditional way countries are classified in the literature; thus, it is about the research of the existing laws of two or more countries, not for example fictional legal families. The category of "legal transplants and diffusion" is open about the type of rules that may have diffused, for example, it also considers that fictional, local or internationals laws may have influenced (and be influenced) by other laws. For the category of "foreign country and legal culture" the focus is on units that are directly relevant for the understanding of a foreign country. Similarly, the "possibility of unified rules" only leads to a full score when this can be the direct result of the comparison, in particular research of existing laws on the same topic enacted by different law makers.

Some of the intermediate fields are due to the fact that it depends on the specific project whether a particular method and concept applies, for example, for "foreign country and legal culture" whether the new unit concerns the home country of the comparatist or a foreign country; and for fictional laws it depends on their relationship to existing legal systems (e.g., whether it is about comparing US and French court dramas, or comparing the law in Star Wars and Star Trek). In other instances, the reason for an intermediate score is that the method or concept can only work with limitations. For example, for different domestic areas of law (or different topics of international law), it may be said that one can "transplant" an idea from one area of law to another one, say, how to determine negligence in tort and criminal law; yet, this argues at a different level than transplants of laws on the same topic.

2. Making sense of this matrix and its limitations

The matrix of Table 1 shows that, to some extent, some of the methods and concepts of comparative law can be relevant for the new units. This appreciation of the value of comparative law may be clear for comparative legal scholars. However, in many respects, comparative law has remained a niche subject;[99] thus, this table can be particularly revealing for legal and non-legal scholars in other fields as they research topics related to these new units.

Table 1 may also be used as a heuristic tool for the question whether comparative law should embrace these new units. To start with, it is clear that none of the rows of this table is entirely black or white: thus, this confirms this article's choice of these units as ambiguous cases. Some comparatists may then argue, however, that only some of the categories should matter: for example, referring to the names of prominent proponents of the seven methods and concepts, it may be said that "*Rabel*ian comparative law" would focus on the column "functional comparison", "*David*ian comparative law" on "legal families", "*Watson*ian comparative law" on "legal transplants and diffusion", "*Legrand*ian comparative law" on "foreign country and legal culture", "*Nelken*ian comparative law" on "socio-legal relations", "*Kötz*ian comparative law" on "law reforms by transplant" and "*Lambert*ian comparative law" on the "possibility of unified rules".[100]

By contrast, if one takes the position that all of the seven methods and concepts are plausible indicators for comparative law, an aggregate may lead to a split between the new units. The following seven units may be rather "*in*" (with the aggregate numbers in brackets, coding grey as 0.5): "different international laws same topic" (6), "new and old law of different countries" and "law and non-law of different countries" (5.5), "local laws" and "domestic and international law" (5), "old laws of different countries" (4.5), and "private law making" (4). And the following seven units may are rather be "*out*":

[99] *See infra* II. B 3.

[100] This refers to Ernst Rabel, René David, Alan Watson, Pierre Legrand, David Nelken, Hein Kötz and Édouard Lambert (of course, other names could also have been used).

"new and old law of same country" and "existing law and fictional law" (3.5), "different international law different topic" (3), "law and non-law of same country" and "different areas of law" (2.5), "foreign country implicit" and "fictional laws" (2). Yet, such an aggregation may be seen as somehow arbitrary as it assumes that all indicators are of equal importance and that the cut-off point can simply be set at the half value.

A more general objection may be that the causal relation should be the reverse: first, it should be determined which units are valuable to compare, and, second, comparative law should adjust its methods and concepts to these units (or, if necessary, develop new ones). For example, depending on the topic in question, the table could be expanded to the right by way of adding new methods and concepts that can also apply to these new units. As the new units overlap with other fields, it is also likely that methods and concepts from these fields (legal history, sociology, cultural studies, international law etc.) are relevant and may be combined with those of comparative law.

As far as the question posed in the title of this article is concerned ("what type of units can comparative law compare?"), it is also suggested that that the guidance of Table 1 should not be seen as the final word, as the following will explain.

3. What should be the future scope of comparative law?

Comparative law has evolved very slowly over the last century.[101] Many methods and concepts have remained, for instance, the quest for unified legal rules 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. All of this may mean that there is a degree of stability in the methods and concepts of comparative law as they have been identified at the beginning of this section.[102]

However, comparative law is also 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 is increasingly seen as obsolete.[103] Some of these problems might well become more pronounced in the future. For example, the availability of information online will make it easier to access any law from any country and therefore regard foreign

[101] For the path dependency of comparative law as an academic field see Mathias Siems, *Comparative Law in the 22nd Century* 23 MAASTRICHT J. EUROP & COMP. L. 359 (2016).

[102] *Supra* II A.

[103] Many comparative lawyers are skeptical about the status quo of the field, *see e.g.* the references *supra* notes 41 and 49; also Mathias Siems, *The End of Comparative Law* 2/2 J. COMP. L. 133 (2007).

law as a text not unlike domestic law.[104] Also, analyzing 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 impact of transnational and global law.[105]

Thus, comparative law cannot remain static if it wants to survive in a future legal world. For example, only allowing comparisons of legal rules of different countries does not reflect the changing legal configurations today, such as the growing importance of legal pluralism, international, regional, transnational and global law for topics of comparative law.[106] In this regard, it has also been suggested that "the flexibility of comparative methodology may be an asset in today's transnational legal world".[107] For example, there is the possibility that, here too, legal families are a relevant consideration as common law countries may be more receptive to soft forms of transnational law than civil law countries.[108]

More generally, considering the information presented in Table 1, it can be seen that for each of the new units at least two of the methods/concepts of comparative law are relevant. This shows the power of comparative law to expand its scope. Thus, in principle, it makes sense to include *all* of the new units since researching those units can benefit from some of the main methods and concepts of comparative law.

Implementing such an extension also makes comparative law more relevant for related fields, considering the overlaps with legal history, sociology, literature etc. identified in the previous Part. It is also likely that many topics that today belong to "comparative law" will, in the future, just become part of research and teaching on "law" as it will be nothing special to look beyond one's own borders. The incorporation of comparative law into "normal" legal research is also fostered by the fact that comparatists are at the forefront of many new themes, such as the interaction between multiple layers of norms, the mixture of different legal cultures, and the increased diversity of forms of law. Thus, as a preliminary conclusion, it can be said that the power of comparative law to say something useful about the new units is one of its main strengths.

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[104] Annelise Riles, *From Comparison to Collaboration: Experiments with a New Scholarly and Political Form* (2015) 78 LAW & CONTEMP. PROBS. 147 at 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").

[105] For these trends and their relationship to comparative law *see e.g.* Horatia Muir Watt, *Globalization and Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 579 (Mathias Reimann & Reinhard Zimmermann eds., 2006); SIEMS, *supra* note 41, at 262–331; AUBY, *supra* note 55.

[106] *See* also Ralf Michaels, *Transnationalizing Comparative Law* 23 MAASTRICHT J. EUROP. & COMP. L. 352 (2016); Peer Zumbansen, *Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance*, in PRACTICE AND THEORY IN COMPARATIVE LAW 186 (Maurice Adams & Jacco Bomhoff eds., 2012).

[107] HUSA, *supra* note 21, at 55.

[108] SILVIA FAZIO, THE HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW 234 (2007).

C. Pragmatic considerations: does "comparative law" mean "comparative law"?

The previous section advocated a wide perspective of comparative law as it can incorporate the new units identified in this article. However, it is also necessary to acknowledge the possibility of pragmatic adjustments. For example, a law lecturer who offers a ten-hour course on comparative law may not be able to cover all of the new units. Likewise, there are constraints in terms of available time slots for conferences; and, a treatise on comparative law may be constrained by the publisher's word limit. Thus, the appropriate response could be that every comparatist can just define "comparative law" as they find it appropriate. In other worlds, it could be suggested that comparative law may simply mean whatever a comparatist wants to call comparative law.

Such subjectivity may also be related to the diverse understanding of the field of comparative law across countries. For example, in the French-language literature, following the approach by René David,[109] most general comparative law books have legal families as their main point of interest. Following Rodolfo Sacco's work,[110] general books on comparative law published in Italian often have a strong methodological dimension, but some have their main focus on the legal families of the world. In Germany, following Konrad Zweigert and Hein Kötz,[111] the dominant structure is that of a general methodical part followed by a treatment of legal families and other substantive law topics. Finally, three recent books written in English show the tendency of a strong focus on the methods of comparative law,[112] rather than, for example, the taxonomies of legal families.

However, it is not suggested that "anything goes". Rather, the comparatist should justify the reasons that account for the inclusion or exclusion of particular topics. This should start, at the basic level, with a satisfactory understanding of the terms "law" and "comparison".[113] As far as comparative law can refer to a field of research with an existing body of knowledge,[114] it is suggested that the information presented in Table 1 can be used to explain which particular units create more or less need to go beyond the existing methods and concepts of comparative law. In addition, possible considerations and choices can relate to the particular context and activity in which comparative law is conducted:

For treatises on comparative law, it is an intrinsic advantage that they can explicitly incorporate the discussion about the possible limits of comparative law as one of its topics. As far as choices are made, a relevant consideration may be that comparative law can justify its field by saying that it poses distinct challenges to research and compare foreign laws. There may therefore be a reluctance to expand the scope to units for which many of these considerations would not be relevant, such as a comparison of different areas of law

[109] *See* DAVID *et al*., *supra* note 82.

[110] RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO (4th edn. 1990).

[111] ZWEIGERT & KÖTZ, *supra* note 15.

[112] SAMUEL, *supra* note 17; HUSA, *supra* note 21; SIEMS, *supra* note 41.

[113] As emphasized by Adams, Samuel and Valcke: *see supra* notes 3 and 17.

[114] *See supra* Introduction and II. A.

enacted by the same law maker.[115] Yet, it can also be legitimate to take the opposite view, for example arguing that these different areas can be distinct domains which possess their own "procedural, cultural, substantive and result-related characteristics".[116]

Further relevant general considerations are likely to be the general focus of the publisher, the specific series in which the book is included, and the relationship to other books by the same publisher or in the same series. A possible pragmatic consideration may also be the existing target market, for example, how far the main readership expects that certain topics are included in or excluded from the typical scope of comparative law. However, such a position may also be contentious as an author may want to aspire to do the opposite, namely to steer the academic field of comparative law in new directions.

For teaching comparative law, the external constraints are likely to be even more pronounced, for example, whether the course is offered for undergraduate, postgraduate or research students, where the students are from, as well as their prior knowledge and experience with topics of comparative law. There is also a considerable diversity in the way courses on comparative law and related topics are structured which is likely to reflect on the inclusion or exclusion of the new units. For example, consider a university that offers courses on "Introduction to Comparative Law" and "Courts, Law and Politics in Comparative Perspective",[117] or "Comparative Law and Comparative Legal Research" and "Comparative Constitutional Law",[118] or "Comparative Law and Comparative Legal Linguistics" and "Comparative Contract and Commercial Law";[119] as well as universities that "only" teach comparative law as it relates to particular subject fields, say, "Comparative Public Law" and "Comparative Private Law".[120]

Some conferences and journals of comparative have specializations that can influence how far it makes sense to cover the new units. For example, calling a journal Global Journal of Comparative Law[121] indicates that there is a relative openness to forms of ordering that are different from Western secular state laws. There are also a number of "comparative law &" journals, which may point towards the inclusion of certain units. For example, journals that combine comparative and international law[122] are likely to be open to new units that overlap with international law. For the European Journal of Comparative Law and Governance, for example, it may also be likely that many of the new units are included as it is said to accept "multi-disciplinary studies on societal governance issues".[123]

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[115] *See supra* I. B 4 and 5.

[116] Dyson, supra note 64.

[117] *See* www.lusi.lancaster.ac.uk/CoursesHandbook/ModuleDetails/OnlineModules?yearId=000115.

[118] *See* https://student.uva.nl/binaries/content/assets/studentensites/fdr/rechten-bachelors-en-masters/oer/ter-ma-fdr-english-2017-2018.pdf.

[119] *See* https://old.daug9vsk.lv/news2014/RGSL_buklets.pdf.

[120] *See* www.luiss.edu/sites/www.luiss.it/files/Brochure-GIURISPRUDENZA-2015-2016.pdf.

[121] *See* www.brill.com/global-journal-comparative-law.

[122] Such as www.cambridge.org/core/journals/international-and-comparative-law-quarterly.

[123] *See* www.brill.com/publications/journals/european-journal-comparative-law-and-governance.

Beyond such specific cases, many conferences and journals have the general aim to cover "comparative law", for example, the International Congress of Comparative Law and the events of the national organizations of comparative law,[124] as well as journals such as the American Journal of Comparative Law, the Journal of Comparative Law and the Comparative Law Review. Here, it is suggested that they should be open towards the inclusion of the new units identified in this article. As has been shown, these new units can make use of some of the methods and concepts of comparative law. Moreover, being inclusive has the benefit that giving consideration to topics that overlap with other fields (legal history, sociology, literature etc.) can promote innovative research in comparative law.

CONCLUSION

The current literature sometimes discusses whether comparative law should incorporate units that go beyond its traditional "country and state law" focus. However, there has not yet been a consolidated investigation of possible new units and the reasons for and against their inclusion. This article aimed to fill this gap. It provided a detailed mapping of possible new units. As a heuristic device, it identified units that overlap with other fields of research, namely, legal history, sociology, literature and cultural studies, domestic (i.e. non-comparative) legal studies, and international law – with the result that a total of 14 new units could, in principle, be included in comparative law. The subsequent discussion outlined seven methods and concepts of comparative law in order to discuss whether or not these new units should indeed become part of comparative law.

In the process of writing this article, various titles were contemplated but eventually disregarded. On the one hand, these were, for example, "Comparative law as a generic method of legal research", "Generic comparative law" and "The ubiquity of comparative law". These titles would have suggested that any comparison in law should, as a matter of principle, be seen as an exercise of comparative law. However, this mere formal argument would have been a rather thin line of reasoning. On the other hand, titles were contemplated such as "The scope of comparative law", "The limits of comparative law" or even "Not comparative law". These titles would have alluded to a position that there are certain units that comparative law should not address, while other units firmly belong to comparative law. However, this binary approach would have been too restrictive and not be in line with the diversity of comparative law today.

By contrast, the title "the power of comparative law" aims to make both a more substantive and a more pragmatic contribution. It aims to say that there are good reasons to consider these new units since comparative law has the power to contribute to their re-

[124] For the International Academy of Comparative Law *see* www.iuscomparatum.org with information about the national committees at https://aidc-iacl.org/national-committees/.

search. The overall suggestion is therefore that comparative law should broaden its acceptance of possible new units. This position, however, also acknowledges that there remains considerable discretion of how far, pragmatically, a comparatist wishes to include some of the new units in a particular context of teaching and research.

Overall, this article advocates an extended scope of comparative law due to the power of comparative law to deal with units not traditionally included. While it has taken the question about the scope of comparative law as a starting point, it also aimed to show that comparative law should not be seen as niche subject that is only relevant for small set of self-contained topics. Rather, it is beneficial to appreciate, and to increase, the overlap between comparative law and other fields. Thus, it is argued that the methods and insights from comparative law can make important contributions to many other areas of legal research, such as legal history and international law, as well to those further afield, such as sociology and cultural studies. Such intra- and interdisciplinary studies could then, on the one hand, incorporate insights of comparative law – as this article has illustrated by way of considering some of its methods and concepts. On the hand, such research is likely to broaden the methodological toolbox of comparative law, incorporating insights from these other field of legal and non-legal research: thus, this too, should be a topic of future research.