

COMPARATIVE LAW AS METHOD AND THE METHOD OF COMPARATIVE LAW

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SUMMARY

This article is a late draft of the identically titled second chapter of Maurice Adams and Dirk Heirbaut (eds.), *The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke*, Hart Publishing, Oxford and Portland, Oregon 2014, 37-52. It addresses both the justificatory role of comparative law within legal research (comparative law as method) and the method of comparative law itself. In this connection two questions will be answered:

1. Is comparative law a method, or a set of methods, for legal research?
2. Does comparative law have a proper method of its own?

In answering these two questions, the article develops an account of the nature of a scientific method and the relation between method and methodology.

Keywords: comparative law, methodology, scientific method

1. INTRODUCTION

Comparative law is a discipline within legal research that has gained considerable popularity during the last decades, a popularity that has no doubt profited from the efforts to harmonise the law of the Member States of the European Union.² This growing popularity has spawned an increase in attention, both for the justificatory role of comparative law within legal research (comparative law as method) and for the method of comparative law itself. In this contribution these two issues will both be addressed, in an attempt to answer two questions:

1. Is comparative law a method, or a set of methods, for legal research?
2. Does comparative law have a proper method of its own?

These two questions will be answered in respectively the sections 3 and 4 of this article. As foundation for the arguments of these two sections, section 2 will address the nature of a scientific method. In a sense, this ‘foundational’ section contains the core of this article’s argument.

But let us, before continuing the argument, first make the notion of comparative law more precise, and adopt a broad notion in order not to prejudice the results of our argument. For the purpose of the present article, comparative is assumed to *the comparison of the law of different jurisdictions, legal families, or legal traditions, with a special eye for the similarities and the differences*.

To avoid a possible misunderstanding it may be useful to point out first that the two questions only deal with the narrow issue of comparative law in connection with legal method, and not primarily with the questions whether comparative law is valuable or useful in some other function than as legal method.

¹ The author wants to thank Jaakko Husa and Maurice Adams for valuable comments on a draft version of this article, which allowed him to formulate the main message better.

² See M Van Hoecke, ‘Legal cultures, legal traditions and comparative law’ (2006) *Nederlands tijdschrift voor rechtsfilosofie en rechtstheorie*, 331-334 and Jan Smits, *The Making of European Private Law* (Intersentia, Antwerpen, 2002).

2. WHAT IS A SCIENTIFIC METHOD?

2.1 Method and methodology

Before addressing the nature of a scientific³ method in some detail it may be useful to point out a possible terminological confusion between a method and methodology. As will be argued below, a method is basically a set of standards by means of which the relevance of arguments can be evaluated. These standards have implications for the way in which scientific research is to be conducted. The term 'method' is consequently sometimes also used for the way in which a particular investigation is carried out.

Methodology is the study of the proper standards for scientific arguments. It is not a standard itself, but rather a discipline that belongs to, or borders on, the philosophy of science, and – as we will soon see – on ontology. This article contains a study in methodology.

If method and methodology are confused, and in particular if a method is denoted as a methodology, it is easy to overlook that a method needs to be justified.⁴ One sometimes encounters legal research which pays attention to the method that was employed, but which devotes little or no attention to the question why this method is suitable for the kind of research that was performed. Awareness that every method requires an underlying methodology may lead to an increased attention for the choice of a method (or methods) and in this way to better legal research.

2.2 Method in two senses

When considering the nature of scientific method, the first thing that spring to one's mind is a particular way of doing research.⁵ A method may contain guidelines on how to conduct an interview, on the statistical techniques that must be used to extract information from a data set, on the tests that need to be performed to diagnose a disease, on the circumstances under which an experiment may be conducted, on the sources and interpretation maxims that must be used to establish a claim in law, and so on ...

All of these guidelines belong to a scientific method indeed, but I will argue that they only do so in a derived sense. Underneath the guidelines lies a theory about good reasons in scientific discussions. The guidelines are meant to ensure that research in which the guidelines are respected will lead to relevant information concerning the question that the research aims to answer. If an interview is conducted wrongly, the interviewer may influence the answers that she will receive in an improper way and the answers cannot provide relevant information. If the wrong statistical techniques are used, the results will not be relevant for the question the researcher wants to answer. If an experiment is conducted under wrong circumstances, the outcome of the experiment will be unreliable and therefore irrelevant. If a lawyer bases his research on the wrong sources (or no sources at all) he cannot be sure to arrive at a right answer to his question, and so on ...

³ The notion of 'science' adopted here is that of the tradition in which there can be sciences in the humanities, and not only physical sciences.

⁴ The work of Jan Smits, Jan M. Smits, *The Mind and Method of the Legal Academic* (Cheltenham, Edward Elgar, 2012) illustrates that confusing method and methodology does not necessarily lead to such an oversight. On page 109 Smits writes about the unclear *methodology* used by lawyers, but in the subsequent sections Smits shows an acute awareness of the relevancy of a domain theory for a research *method* (italics added).

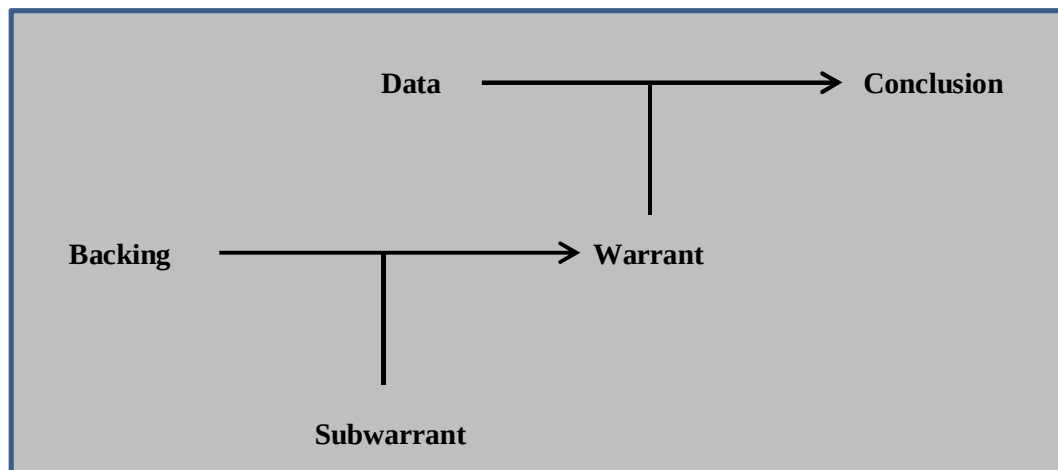
⁵ The Encyclopedia Britannica defines scientific method as '... mathematical and experimental techniques employed in the natural sciences; more specifically, techniques used in the construction and testing of scientific hypotheses' (<http://www.britannica.com/EBchecked/topic/528929/scientific-method>; last consulted on 25 March 2013).

Kuno Lorenz defines a 'Methode' as '... ein nach Mittel und Zweck planmässiges (= methodisches) Verfahren, das zu technischer Fertigkeit bei der Lösung theoretischer und praktischer Aufgaben führt ...' Lemma 'Methode' in Jürgen Mittelstrass (Hrsg.), *Enzyklopädie Philosophie und Wissenschaftstheorie* (J.B. Metzler, Stuttgart, 1995) Teil 2, 876.

The claim concerning scientific method that is put forward here is that a method consists first and foremost of one or more standards by means of which the relevance of information as support for a particular conclusion can be evaluated. In a derived sense, a method is a set of guidelines on how research is to be conducted in order to obtain this relevant information.

2.3 Toulmin-scheme

In a critical discussion of the traditional syllogistic model of arguments, Toulmin developed a scheme that represents the lay-out of arguments as he saw it.⁶ This ‘Toulmin scheme’ has become quite influential in argumentation theory⁷ and it can also be used to provide more insight in the nature of a scientific method. A slightly adapted version of the scheme looks as follows:



The main idea behind this schema is that the two ‘premises’ in a syllogistic argument fulfil different roles. One premise, represented as ‘Data’, contains factual information. The other premise, represented as ‘Warrant’, indicates that the data are relevant for the conclusion. A legal example would be that the data contain the information that Harold is a shop lifter, and that the warrant informs us that shop lifters are punishable. Together the data and the warrant allow us to derive, provisionally, that Harold is punishable. Notice that in Toulmin’s interpretation the warrant is not a statement. It does, for instance, not tell us that all shop lifters are punishable. It indicates that the fact that somebody is a shop lifter warrants us to conclude that this person is punishable.

The warrant indicates which data are relevant for the conclusion. The set of all warrants for the conclusion that somebody is punishable determines the set of facts from which punishability can be concluded. This makes it possible to formulate guidelines for collecting data that support a particular

⁶ Stephen Toulmin, ‘The Layout of Arguments’ in his *The Uses of Argument* (Cambridge, Cambridge University Press, 1958), 94-145.

⁷ See David Hitchcock and Bart Verheij (eds.), *Arguing on the Toulmin Model. New Essays in Argument Analysis and Evaluation* (Springer, Dordrecht, 2006).

conclusion. Such a guideline might for instance be: collect data that show that somebody did something that was declared punishable in the Penal Code.

Warrants are a kind of inference rules. They inform us what can be concluded from particular data, or – the other way round – what kind of data is required in order to support a particular conclusion. Warrants are *not* descriptive sentences that can be true or false. It is therefore not possible to establish the ‘truth’ of a warrant by means of sensory perception or any other technique to acquire factual information. However, the use of a warrant can be *justified* by adducing information which links the data to the conclusion of the warrant. Such information might for instance be that the Penal Code contains a provision that makes shop lifters punishable. This information consists of data, but Toulmin uses a special name (‘backing’) for the data that support the use of a warrant. Since a backing also consists of data, its relevance must be supported by another warrant. In the scheme above this is indicated as ‘subwarrant’.⁸

2.4 Method and domain

The backing of a warrant must make plausible that the facts that are identified by the warrant as relevant for the conclusion are relevant indeed. As Toulmin already pointed out, this makes backings domain dependent.⁹ An inference rule (warrant) in the field of logic needs a different kind of support than one in the field of history, and an inference rule in physics requires another justification than one in law. It may also be the case that rules from different jurisdictions or different legal traditions need different justifications. This is an important observation and to make its implications explicit we will take a closer look at some examples.

LOGIC

In deductive logic, an argument is valid if it is (logically) impossible that all the premises of the argument are true while the conclusion is false. A system of deductive logic is usually characterised in two ways. One way (the semantics) focuses on the truth values of the premises and the conclusion of arguments. Semantics makes it possible to determine whether a particular sentence (the intended conclusion of an argument) must be true if a set of other sentences (the intended premises of the argument) are true.

The other way (the inference system) contains one or more inference rules. These inference rules specify which sentences may be derived from one or more (other) sentences. An important demand on logical systems is that the inference rules only allow the derivation of conclusions which must be true if the premises from which they were derived are true. The inference system must ‘match’ with the semantics. Logical systems which satisfy this demand are called ‘sound’.¹⁰ Soundness is a crucial characteristic for systems of deductive logic and therefore the justification of an inference rule consists in pointing out that the rule only allows to derive true conclusions from true premises. The backing for a logical inference rule (warrant) should therefore contain that information.

⁸ Toulmin himself does not discuss the notion of a subwarrant, but the account of it given here sits well in his model of argumentation.

Obviously, the subwarrant can also be supported by a backing and a subsubwarrant, and so on Toulmin’s model of argumentation is hierarchical and suffers from the drawback that it may lead to an infinite regress. This problem can be solved by replacing the hierarchical model by a coherentist one, but a discussion of this possibility is beyond the scope of this paper. Interested readers are referred to Jaap C. Hage, ‘The Method of a Truly Normative Legal Science’, in Mark Van Hoecke (ed.), *Methodologies of Legal Research. What Kind of method for What Kind of Discipline?* (Hart, Oxford, 2011), 19-44 and to Jaap Hage, ‘Three kinds of coherentism’ in Michal Araszkiewicz and Jaromír Šavelka (eds.), *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence* (Dordrecht, Springer, 2013), 1-32.

⁹ *The Uses of Argument*, 104.

¹⁰ Nicholas J.J. Smith, *Logic. The laws of truth* (Princeton University Press, Princeton, 2012), 358.

PHYSICS

The warrants in physics are the physical laws which physical research aims to discover. There are several ways in which the adoption of such laws can be justified. One is that a law is derived from other laws. A famous example is that Kepler's laws about the movement of planets around the sun are justified by deriving them from Newtonian mechanics.¹¹ A second way is to argue that empirical data inductively support the adoption of a law.¹² And a third way is to argue that a hypothetical law has been tested thoroughly by deriving observable consequences from it, but was nevertheless not falsified.¹³

In particular the second and the third way of justifying the adoption of a physical law are based on the assumption that the laws themselves may not be amenable to perception, but that their effects are. The question is then how to 'derive' the law from its observable effects. The inductive/support approach and the deductive/falsification approach differ fundamentally in their answers to this question, but they share the presupposition that the justification of physical laws lies in an argument based on the observable effects of the presumed laws.

SOCIAL SCIENCES

One of the aims of social sciences is to make human behaviour understandable.¹⁴ These sciences may, for example, be used to explain why people in a cemetery are dressed in black. A possible explanation would be based on the warrant that people who attend funerals are often dressed in black, and this warrant can be supported by the data that people who attend funerals tend to be mourning and that black is the conventional colour to show mourning. These data show that wearing black is a rational thing to do under the circumstances. In general data which show that a warrant is in conformity with the demands of rationality are suitable to justify the use of this warrant.

LAW

In law, warrants are often legal rules. The adoption of a rule as a valid legal one can, according to legal positivists, be justified by pointing out that the rule can be found in a recognised source of law, such as a judicial decision, legislation, or a treaty.¹⁵ There are also other legal warrants, such as legal principles, which are identified on the basis of their content, not their origin.¹⁶

IN GENERAL

As the above examples illustrate, different knowledge domains require different kinds of data to support warrants that allow inferences in these domains. The reason is that the relevancy of data as support for a warrant depends on the nature of the domain. The use of a warrant should lead to true, or at least reliable conclusions, and warrants should therefore only be accepted if their use does lead to such conclusions. The nature of a knowledge domain determines what kind of warrants satisfy this

¹¹ See http://en.wikipedia.org/wiki/Kepler's_laws_of_planetary_motion#Relation_to_Newton's_laws (last consulted on 14 July 2013).

¹² Gerrit Haas, 'Induktion', in *Enzyklopädie Philosophie und Wissenschaftstheorie* 2, 232-234 and A.F. Chalmers, *What is this thing called Science?*, 3rd ed. (Hackett, Indianapolis, 1999), 41-58.

¹³ Chalmers, *What is this thing called Science?*, 59-73.

¹⁴ More ambitious accounts of social science aim for finding laws that govern social reality, just like the laws in physical reality. See Harold Kincaid, 'Defending Laws in the Social Sciences', in Michael Martin and Lee C. McIntyre (eds.), *Readings in the philosophy of social science* (MIT Press, Cambridge, 1994), 111-130.

¹⁵ Joseph Raz, 'Legal Positivism and the Sources of Law' in his *The Authority of Law* (Clarendon Press, Oxford, 1979), 37-52.

¹⁶ R Dworkin, 'The Model of Rules I', in his *Taking Rights Seriously* (Duckworth, London, 1978), 14-45.

condition and therefore also which facts must be present if a warrant is to be acceptable. Let me illustrate this at the hand of the above examples.

In deductive logic the domain is completely determined by the semantics which determine the truth values of sentences. Therefore the inference must be adapted to the semantics.

In physics the warrants (the laws) must match the facts, or – better- our observational knowledge about them. That is why physics is considered to be an empirical science and why the facts which match the conditions and the conclusions of physical warrants count as evidence for the acceptability of these warrants.

In social sciences, at least where they are concerned with the understanding of human behaviour, it is presupposed that humans mostly act rationally. Therefore data which show some behaviour to be rational support warrants that connect factual situations with human behaviour.

In law, finally, the fashionable presupposition is that those rules are valid legal rules which stem from an official source of law. Data about what these sources are and about the origin of rules (the warrants) in these sources (e.g. this rule can be found in the Code Civil, Article such and such) are for that reason relevant to support a rule as warrant in legal arguments.

The four knowledge domains, logic, physics, social science, and law, have been selected as examples because they are quite different in nature. These differences between the domains are reflected in the kinds of warrants (laws, rules) which can be used to obtain knowledge in these domains. Or, to say the same thing in method-related terminology, the nature of knowledge domains is an important determinant for the methods to be used in obtaining knowledge about these domains.

METHOD AND RESEARCH QUESTIONS

Not only the knowledge domain determines the proper method to use in answering research questions; the questions themselves are important too. The point can be illustrated by means of a legal example. Even if one assumes that the content of the law is determined by the sources that underlie a legal system, it still makes a difference for the method that is to be used whether the research question is descriptive, explanatory, or evaluative. The method to look up the law in handbooks, in case law, or in legislation is better suited to answer the question what the content of the law is than to explain or evaluate this content. The law may be explained by means of historical data (which problem led to the legislation in question?), by political developments (e.g. the conquest of Europe by Napoleon), or by (legal-) economic considerations (which rules serve the interests of the land-owning nobility?; which rule is the most efficient one?). And law may be evaluated by predicting the consequences of rules and measuring them against some standard (which rules will promote transnational trade within Europe?).

3. COMPARATIVE LAW AS METHOD

After the lengthy introduction about the nature of scientific method it is time to address the first question which this article aims to answer, namely the question whether comparative law is itself a method. Does comparative law research provide us with, in Toulmin's terminology, data that support a conclusion about some other topic. The main alternative for the view that comparative law is a method is that it is a research topic itself. In that case the question needs to be addressed which data are relevant to answer comparative law questions, the question after the method of comparative law. That will be the topic for the next section.¹⁷

¹⁷ The theoretical possibility that comparative law neither is, nor has, a method will be ignored here.

3.1 Heuristics and justification

If a method is primarily an indication of which data are relevant to support conclusions in a knowledge domain, then method belongs to the field of justification, as opposed to that of heuristics. The distinction between heuristics and justification (or legitimation, for that matter) has sometimes been depicted as that between two phases in a research project, and has on that interpretation rightly been criticised for separating two processes which are in time inseparable. But it is also possible – and in this author's eyes better – to interpret the distinction as being between a process of hypothesis formulation and the 'logic' of justification. Justification in this interpretation is not a process but an argument, and can as such be sharply distinguished from the process of hypothesis formulation.

So, if comparative law is seen as a method, it has nothing to do with the *process* of doing comparative research. On this view, comparative law is seen as an amount of data which is typically collected by doing comparative legal research and which are relevant for some conclusion. If one sees comparative law as a process of doing research, then comparative law is *on this view* not a method.

If comparative law is considered to be a method then the next question is which conclusions can be supported or justified by data obtained from comparative law research.¹⁸

3.2 Which conclusions are supported by the results of comparative law?

Obviously many kinds of conclusions can be supported by the results of comparative law. To mention just an example, one might draw conclusions about the desirability to educate more lawyers in one country in comparison to another country, based on an investigation about the relative complexity of the countries' legal systems. Rather than trying to list all possible conclusions for which comparative law research might provide relevant data – an impossible task – it seems more useful to characterise in general some issues for which comparative law may, or may not provide supportive information. The more interesting questions for our present purposes are legal ones. The question is then narrowed down to *whether comparative law is a legal method*.

Let me start by excluding an important field. It is obvious that comparative law research provides interesting results for comparative law questions. For instance, one should conduct comparative research if one wants to know whether and how the 'defects of will' (e.g. fraud and mistake) are regulated differently in Germany and in the UK.¹⁹ But then comparative law does not function as a method for some particular domain, but rather as the object of research.²⁰

That comparative law is a legal method is not obvious.²¹ Most legal questions deal with the content of a particular legal system, whether it be national, subnational, supranational, or international. Why would comparative information be relevant for the answers to these questions? One would expect that answers on questions about the positive law of a particular legal system can be answered on the basis

¹⁸ Notice the difference between this method-related question and the wider question addressed by Zweigert and Kötz (K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Clarendon Press, Oxford, 1998), 13f.) after the functions of comparative law.

¹⁹ See Ruth Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press, Cambridge, 2005).

²⁰ I mention this obvious seeming point since I discovered that PhD-students in Maastricht considered the results of comparative law relevant for their research, because the topics of their PhD-theses were comparative by nature.

²¹ Here my view seems to diverge from that of Maurice Adams in his 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in Van Hoecke, *Methodologies of Legal Research*, 229-240. However, Adams informed me in comments on a draft version of this article that he hardly considers comparative law worthy of the classification 'method'.

of information about this legal system alone, and that comparative information does not have much to offer in this connection.²²

McEvoy's List

Illustrative in this connection is the list of purposes to which comparative law can be put, drawn up by McEvoy.²³ McEvoy lists (and discusses) the following purposes: to find out whether

- European law can be harmonised or unified;
- a particular body of laws (e.g. the laws of the EU member States) can become a system;
- whether the human mind is universal within the broader context of cultural groups and academic disciplines;
- law *should* be harmonised.

One may agree or disagree with this list of purposes, but neither one of these questions is a typical legal one. With the exception of the third question, they all have law as their topic, but not one of them deals with the content of law.

Von Bar's Discussion

In a paper about the comparative law of obligations²⁴, Von Bar directly addresses the question to what extent comparative law is used in typical legal contexts. His observations are that 'courts rarely make use of comparative law based arguments', and that legislators sometimes use comparative law:

1. where this can add to the support for a political decision that has already been taken;
2. in cases where the national law must harmonise with foreign law because of coordination issues; and
3. to draw inspiration from to solve rather narrow, but socially pressing problems.

From these three ways in which legislator use comparative law, only the second one (harmonisation) is a case where comparative law data provide a reason why legislation should be made and for its content. We will still return to the inspiration issue. But the main 'legal' use of comparative law is according to Von Bar made in academic writings. Von Bar does not indicate, however, whether this use is to justify scientific conclusions and if so which kinds of conclusions. He does mention the use of comparative law as research object, though.

In Search for Better Law

A major motivation for conducting comparative law research is to find good, if not the best possible law.²⁵ The idea is that information about rules in foreign systems tells us something about the quality of these rules and about the possibility and the desirability of adopting these rules in one's own legal system. And indeed, information about how a rule, or – more probable – a set of rules, works and under which boundary conditions, can be very helpful in evaluating these rules as possible candidates for the own legal system. It should not be forgotten that for this purpose the comparative law data should be complemented by one or more standards at the hand of which the evaluation takes place

²² But cf. Jan Smits, 'Comparative Law and its Influence on National Legal systems', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006), 513-538.

²³ Sebastian McEvoy, 'Descriptive and purposive categories of comparative law', in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (Elgar, Cheltenham, 2012), 144-162.

²⁴ Christian von Bar, 'Comparative Law of Obligations: Methodology and Epistemology' in Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Hart, Oxford, 2004), 123-136.

²⁵ Zweigert and Kötz, *An Introduction to Comparative Law*, 15.

(one cannot just ‘see’ whether a rule functions well), but this does not detract from the relevancy of comparative law data and therefore of fruitfulness of comparative law as a method.

Notice, however, that this function of comparative law does not lie in describing the law or in justifying legal solutions for particular kinds of cases, but in evaluating rules as possible candidates for some legal system. Only if one treats legal science as a truly normative science, as a science that aims at answering questions such as ‘What is the right thing to do?’, this function of comparative law also supports the description of law.²⁶

EXPLAINING THE CONTENT OF LAW

There is one branch of comparative law research which clearly contributes to the explanation of the content of law, and that is research on legal transplants.²⁷ Another type of explanatory research for which comparative law may be useful is the attempt to explain developments in law from factors, legal or non-legal. If particular factors go in hand in hand with particular developments in law in a similar way in different jurisdictions, this provides support for the conclusion that these factors caused the developments.

HARMONISATION OF LAW IN EUROPE

A particularly important source of inspiration for comparative law research has been the attempts to harmonise law, in particular private law, in Europe. And yet, it is not clear on beforehand how comparative law data would be relevant for conclusions about harmonisation. McEvoy writes that such data would be relevant for deciding whether European law can be harmonised, but if that is true, then only under particular assumptions.

European private law can ‘easily’ be harmonised by introducing one civil code that is declared binding for all the EU Member States. The content of that code could, within certain boundaries of what is reasonable, be arbitrary. Most likely, there would be much resistance against such a move and there is much to be said against introducing a civil code in this way. But if one wants information that is relevant for answering the question how a uniform European civil code can successfully be introduced, the required information would be of the prediction type. It should answer the question under which circumstances, including the content of the code, a uniform private law code can be introduced in Europe without causing too much resistance. It seems doubtful whether comparative law research would provide the most relevant information in this connection.

Things would of course be different if Europe strives for a common private law which is by and large the greatest common factor of the private law systems of the Member States. Some proposals, such as the Draft Common Frame of Reference²⁸, may create this impression. Whether such compromises lead to good law remains to be seen, though.²⁹

Much more likely is that comparative research inspires the design of suitable European private law. But providing inspiration belongs to the field of heuristics, rather than to the field of legitimation and method.

²⁶ See Jaap Hage, ‘The Method of a Truly Normative Legal Science’, in Van Hoecke, *Methodologies of Legal Research*, 19-44.

²⁷ Jörg Fedtke, ‘Legal Transplants’, in Jan M Smits (ed.), *Elgar Encyclopedia of Comparative Law*, 2nd ed. (Edward Elgar, Northampton, 2012), 550-554 and Michele Graziadei, ‘Comparative Law as the Study of transplants and Receptions’, in M Reimann and R Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006), 441-476.

²⁸ Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*,. Outline Edition (Sellier European Law Publishers, München, 2009).

²⁹ See Rudolf Rijgersberg en Hester van der Kaaij, ‘A Plea for Rigorous Conceptual Analysis as a Central Method in Transnational Law Design’, *Recht en Methode in onderzoek en onderwijs*, 2013-1, 48-60.

3.3 Comparative law as a heuristic tool³⁰

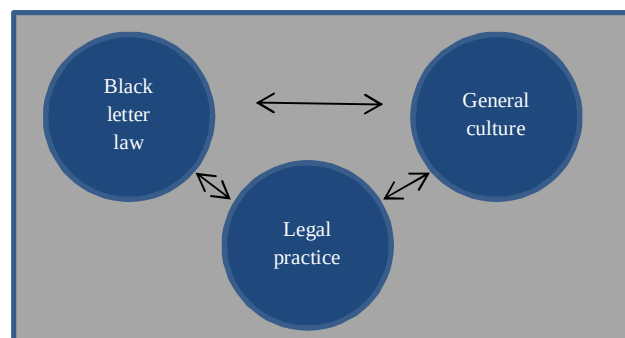
Scientific method has to do with the testing and selection of hypotheses, and requires a set of pre-existing hypotheses as the fuel on which to run. Scientific method does *not* generate the hypotheses itself; there is no method for framing correct hypotheses. Still the availability of good hypotheses is crucial for science, because scientific method consists of selecting the best hypothesis from the available ones. Without good ‘fuel’ the process of generating good scientific knowledge does not fly. Although there is no method which can guarantee the production of good hypotheses, there are techniques to increase the chance that good hypotheses are generated. Such techniques are called ‘heuristics’.³¹ Heuristics can take many forms, varying from having a good night sleep, via taking some alcoholic drinks to increase inspiration, to studying the already available hypotheses and their shortcomings.

In particular this last heuristic is often very fruitful. Indeed, it is seldom possible to devise fruitful hypotheses as potential answers to research questions if one is not familiar with the problem field and the theories (that is: as yet non-refuted hypotheses) circulating in it. Here lies an important role for comparative law, because it is well possible to view the law of different jurisdictions as so many hypotheses about the most viable solution for some societal problem.³² The experiences with these regulations provide indications about the quality of the solutions, and suggest what should be maintained and where improvement is desirable. In other words, *the study of comparative law can be a valuable heuristic tool*. That has nothing to do, however, with comparative law as a method.

4. THE METHOD OF COMPARATIVE LAW

4.1 The need for ‘deep level’ comparison

The literature of comparative law contains many contributions which claim to deal with the method(s) of comparative law. A large part of the discussion deals with the issue how ‘deep’ the comparison between different systems should go.³³ The nature of the issue is perhaps most easily illustrated by means of a small schema:



³⁰ This subsection was taken from Jaap Hage, 'Comparative Law and Legal Science', in A.W. Heringa and B. Akkermans (eds.), *Educating European Lawyers* (Intersentia, Cambridge, 2011), 65-77.

³¹ The idea of heuristics was elaborated in Imre Lakatos, 'Falsification and the Methodology of Scientific Research Programs' in I. Lakatos and A. Musgrave (eds.), *Criticism and the Growth of Knowledge* (Cambridge University Press, Cambridge, 1970), 91-196. More recently it has gained widespread popularity in artificial intelligence, in connection with intelligent search. Cf. John Haugeland, *Artificial Intelligence. The very idea* (MIT Press, Cambridge, 1989), 176-179.

³² This is also stressed in Smits, 'Comparative Law and its Influence on National Legal Systems'

³³ Cf the title of Van Hoecke's insightful paper 'Deep Level Comparative Law' in Van Hoecke, *Epistemology and Methodology of Comparative Law*, 165-196.

Part of the law of a jurisdiction is black letter law (treaties, legislation, case law). The operation of this black letter law depends on how legal agents (judges, barristers, legislators, etc.) use it in their work. And this depends in turn on the general culture of a country or a region within which the law and the legal agents must function. Moreover, the law and the behaviour of legal agents are themselves determinants of the general culture. So what we have in fact is a complex interrelation between - at least³⁴ - general culture, black letter law, and the work of legal agents. The discussion on how comparative law research should be conducted deals to a large extent with the question what should be taken along in the research. Is it possible, or - rather - desirable to compare only individuals rules or doctrines of black letter law, or should also be taken into account how these rules are used in legal practice, or should even be looked at the background general culture too ('deep level' comparison). A related question is whether it is really possible for a comparativist to understand a foreign culture and therefore - assuming the relevance of this culture for the investigation - to understand foreign law. As we will see, these questions, formulated in a general way, make little sense.

4.2 If comparative law is a method

If comparative law is used as a method, that is if comparative data are used as reasons to support a particular conclusion, it depends on the conclusion that is supported which comparative data are precisely required. For example, if the research question is whether the legislation of a particular country has been influenced by the legislation of another country, it does not make sense to look at the way in which legal agents deal with this legislation, or even at the different cultures in which the legislation must function. This may become different, though, if one also wants to *explain* why such influence was present. And if the question is whether it makes sense to transplant insolvency law or marital law from Germany to China, it is almost certain that the general culture must be taken into account too. If comparative law functions as a method, the reason why comparative law was adopted will also indicate what kind of comparative law should be used.

4.3 If comparison is the research question

It is very well possible that comparative research is not done in order to answer non-comparative questions, but that comparison itself constitutes the purpose of an investigation. This is for instance the case if one wants to know whether the definitions of crimes are more concrete in one country than in another country, what the role of good faith is in the contract law of different jurisdictions³⁵, what the relation is between intention and negligence (culpa) in criminal law³⁶, or how the law of different jurisdictions deals with divorce.

If an investigation is aimed at answering such comparative research questions, it depends on one's view of the research domain and on the research question which data are relevant for answering the question. For instance, if one wants to compare the definitions of crimes in the United Kingdom with those of Polynesia one must first decide how to deal with crime definitions in the common law, a decision which must be based on a view about the principle of legality in criminal law and its relation to judge-defined crimes. This is part of a theory about the nature of criminal law. And if one wants to investigate how different jurisdictions deal with divorce, one must decide - and make one's research question accordingly more specific - whether the question only concerns the law, or whether it takes in the law as part of the different cultures in general. Depending on how the law is defined and on the research question that must be answered, different sets of data may be relevant and different ways of

³⁴ No doubt it can be argued that even more factors are at work in this interaction, but the three mentioned ones figure most prominently in the comparativist literature.

³⁵ Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge University Press, Cambridge, 2000).

³⁶ George P. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, New York, 1998).

conducting research may be appropriate. But there is no generally applicable method for conducting research that aims at answering comparative law questions.³⁷

5. CONCLUSIONS

Two questions were central in this article:

1. Is comparative law a method for legal research?
2. Does comparative law have a proper method of its own?

By way of an extensive preliminary, the second section of this article addressed the nature of a scientific method. The first step in this connection was to distinguish between method in the primary sense and method in a derived sense.

Method in the primary sense is a set of standards that determine what are relevant data on the basis of which research question are to be answered. This characterisation of scientific method was elaborated at the hand of the 'Toulmin-scheme', in particular the distinction between data and warrant.

Method in the derived sense consists of a number of concrete guidelines on how to conduct research, and more in particular on which data to collect and how to collect them.

At the hand of the Toulmin-scheme it was argued that the appropriate method depends on the knowledge domain, and on the research question that is to be answered.

The first of the two research questions of this article was answered cautiously in the affirmative. Comparative law can play some role in evaluating actual or potential rules of law, for instance by showing what the effects of these rules are in different jurisdictions. Although the attempts to harmonise European private law have no doubt boosted comparative law research, it is not very clear how this kind of research would contribute to this harmonisation, unless as a source of inspiration.

There is, finally, a clear role for comparative law data in explaining the content of law, especially where legal transplants are at stake.

So there are some legal research questions for which data resulting from comparative law research are relevant in the sense that they can be used to justify the answers. But possibly comparative law plays a more important role as a source of inspiration to formulate hypotheses which must derive their justification from other kinds of research.

The second of the questions has no general answer. There are many ways of conducting proper comparative law research, but the method for doing so depends strongly on the purpose for which comparative law research is performed (whether comparative law is used as method itself, or as a heuristic tool), on the view one has of the particular domain on which the comparative research is performed, and on the research question one aims to answer. But the conclusion must be that there is no such thing as *the single proper way* of conducting comparative law research.

³⁷ A similar view seems to transpire from the title of Van Hoecke, *Methodologies of Legal Research. What Kind of Method for What Kind of Discipline?*