

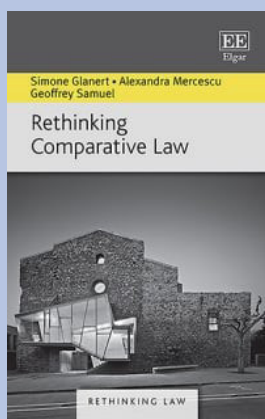
---

**RETHINKING COMPARATIVE LAW (2021)**  
**SIMONE GLANERT, ALEXANDRA MERCESCU AND**  
**GEOFFREY SAMUEL**

JAAKKO HUSA

University of Helsinki

---



Simone Glanert, Alexandra Mercescu, Geoffrey Samuel (2021) *Rethinking Comparative Law* is published by Edward Elgar priced at £100.

ISBN 978 1 78643 946 8

---

Front covers of books often tend to be more artistic and less about what they say in relation to the content of the book itself. The front cover of this book is an architectural black and white photo of a building that consists of three different elements. The authors aver that the front cover picture situates the book project to excellent effect. Three elements can indeed be found inside the covers of the book, but these elements do not mix. Importantly, the authors openly admit that they would not want to present a deceitful consensus. Even though undoubtedly this starting point is intellectually admirable, it does bring about difficulties for the reader who ends up reading the chapters more as separate essays than as a book arranged according to a somewhat coherent view. In the epilogue, the authors declare that book's 'fragmented and unsystematic approach ... seeks opinionatedly to distance itself from epistemic strategies that have governed comparative law's intellectual life for many decades' (302).

Incontestably, the authors do not lack scholarly courage and boldness, even though at times the reader may wonder if some of the

courage resembles that of Don Quixote. Regardless, the book is clearly an important contribution in the field of comparative law as broadly understood. This is a theoretically challenging, serious piece of legal scholarship on comparative law/comparative legal studies. The book seeks to rethink comparative study of law by providing both teachers and students with intellectual tools enabling them to study foreign law in a meaningful manner.

Even though chapters are separate essays, the underlying idea that binds the three scholars together is the notion that comparative law research should be undertaken meaningfully. In this regard, the book is an addition to a rich and voluminous literature that draws intellectual inspiration from the idea according to which comparative law research is done poorly. Following this line of thinking, comparative study of law is in a constant state of malaise, and something must be done about it. In this, the famous textbook of Konrad Zweigert and Hein Kötz is a symbol of malaise and a target for discussions and arguments that seek to criticize the Zweigert and Kötz paradigm.

As someone who has been working in the field of comparative law from the mid-1990s, I must admit that I fail to see that Zweigert's and Kötz's textbook really holds such a strong position among the rank of comparative law scholars today. Then again, many of the ideas that these German scholars express in their book are still present in the field, so in this regard attacking their views makes sense. Regardless, perhaps it would be time to move on and leave the outdated Zweigert and Kötz paradigm where it rightly belongs, namely, to the intellectual history of comparative law scholarship. Notwithstanding, none of the comments above is to undermine the scholarly quality and usefulness of this book.

The first chapter, written by Samuel, asks provocatively: does law exist? He admits that this question may seem somewhat esoteric even among critical comparative law scholars. Samuel discusses so-called fiction theory, which he ends up defending as an epistemological attitude. This means that a scholar chooses to act as if ideas about law are true and as if law exists. Essentially, the idea is to avoid the difficult philosophical question about law's existence and simply act *as if* law is real. This, it is explained, is a legitimate fiction. Importantly, Samuel does not claim to offer a definitive answer but, rather, seeks to stimulate rethinking about law as an object of comparative study.

The second chapter, written by Glanert, addresses the illusion of law's autonomy and the comparative study of law. The nature of the discussion is critical as the main points are presented against the idea according

to which the comparatist could operate as an objective or neutral observer, conceiving foreign law from an epistemic point of view from nowhere. Glanert speaks for an essentially hermeneutic understanding of epistemology as she relies on Gadamerian notions. What this means in practice is to underline the comparatist's historical and epistemological situatedness of understanding law.

In the third chapter, Samuel focuses on the methodology of comparative law and analyses methodologies as programme orientations. Here the key idea is to look at methodology not from the viewpoint of a particular method in a technical sense but to conceive broader research programmes or paradigms. The crucial starting point is that comparative lawyers need to go beyond traditional methods of doctrinal legal scholarship based on the idea of the authority of law. The established research programmes that are presented and analysed are structural programmes (legal concepts seen in relation to other elements of a legal system), functional programmes (focusing on social functions of legal rules), causal programmes (law and economics, legal origins), actionalist programmes (stressing the role of individual legal actors), and legal consciousness programmes (seeking to develop law). Instead of arguing in favour of any of these programmes, Samuel points out that the comparatist needs to be aware of the differences and tensions between them.

Chapter 4, written by Glanert, continues the discussion on method but assumes a different point of view and a more sceptical take on comparative methods. Crucially, she criticizes the focus on method in comparative law scholarship. Moreover, she fundamentally doubts the epistemological usefulness of method. Glanert relies on Feyerabend, Derrida and—again—Gadamer when she warns about the limits and dangers of scientification and commodification of the method-oriented notion of comparative law.

The following chapter by Mercescu directs the discussion towards an issue that was referred to in the earlier chapters: interdisciplinarity. The key argument is that the comparatist cannot rely on disciplinary monolingualism. Put differently, the chapter is a call for more interdisciplinarity in the comparative study of law. By combining the importance of culture for the comparative study of law and the paradigm change from a more doctrinal towards a more context-sensitive study of law, she argues that it is not enough for the comparatist to merely absorb the vocabulary of a non-legal discipline. Instead, she speaks for critical interdisciplinarity, which means openness toward other than legal approaches to law and sensitivity toward other fields of knowledge. I read this as an attempt not to reduce other disciplines to mere methods in a

technical sense but openness towards the substantive content of other disciplines. At the same time, interdisciplinarity does not require that the legal scholar should abandon law.

In chapter 6, Samuel compares comparisons. What this means in practice is that he examines how other disciplines have dealt with the issue of comparison. First, epistemological issues in historiography are addressed. Next, Samuel discusses comparative literature. A special issue that is analysed is the inequality of status, which concerns how the relationship between Western law and customary law has been conceived in comparative law scholarship. Finally, the analysis concerns cinema studies where comparison forms a natural part of scholarly work but seems to take place without a theory. The central conclusion is that merely looking at foreign law is not really comparison but simply referencing. Consequently, much of what is labelled as comparative law is not really comparative but a mere description of foreign law in the form of references to it.

The following chapter, written by Glanert, places the problem on the translatability of law in the focus. The starting point for discussion is that comparatists have not paid sufficient attention to the central role of translation in the comparative study of law. The key argument is that, if one ventures to study law comparatively, then one needs to pay careful attention to translation of foreign law. Interestingly, she defends the idea of an 'alienating' strategy that seeks purposefully to create a feeling of strangeness. The motive behind this kind of 'bad' translation is to preserve the alienness of foreign law and not to hide it behind 'too' good a translation that makes foreign appear too familiar in the target language. As much as I find this idea intellectually appealing, I must admit that it seems to go against what translators see as their job. Then again, if one accepts the theoretical reasons on which her point is based on, then it becomes difficult to reject the idea of 'alienating' translation at face value.

Chapter 8, also by Glanert, continues the hermeneutically oriented discussion on comparative law and the challenge of understanding foreign law. Her analysis employs bullfighting as an illustration of the difficulties involved. Here, she neither defends nor praises bullfighting as such but, rather, asks to what extent is it possible for the comparatist to meaningfully understand the French regulatory framework of *corridas* (bullfighting). Importantly, Glanert criticizes the conventional insider-outsider distinction against the backdrop of comparative study of law. Finally, she claims that even though the comparatist must make every effort to understand foreign law, at the end of the day it is impossible to

reach a truly genuine complete understanding of foreign law. Again, this is a theoretically sound argument, but the reader cannot but wonder if anyone ever in any legal system has a complete understanding of the law. In other words, there seems to be an implicit assumption that it would be possible to have a complete, in my view clearly fictional, understanding of law, against which the understanding of the comparatist should be measured. None of this is to undermine the scholarly discussion in this chapter. Yet, it might be a good idea also to inject a certain everyday realism into highly learned discussions on the comparative study of law.

In the following chapter, Mercescu discusses the notion of culture and criticizes its use as a cultural defence in legal practice. Essentially, she argues that the theoretical utility of culture for comparative study of law is different from the way culture is used in the courtroom. What is more, she claims that ‘the majority of comparatists have proved themselves reluctant to embrace culture’ (209). As a result, this chapter has a double-edged critical nature. Importantly, Mercescu draws a conclusion according to which there are differences between cultural practices, which in turn means that some cultural practices cannot be justified. This is basically very much an identical argument to that presented by H Patrick Glenn in his *Legal Traditions of the World*, although Mercescu does not cite Glenn. The take of culture is that the law is thoroughly cultural as to its nature.

Chapter 10, written by Samuel, takes the reader to the beach. This surprising and insightful discussion is based on the idea of moving beyond theory and methodology and looking at comparative law in action. What follows is certainly not a comparison of black-letter law but, instead, challenging scholarship on the legal notion of the beach. Samuel discusses the heritage of Roman law, the distinction between public and private law, the Feudal English model, and then takes the analysis to the level of legal mentality and method. The overall conclusion is that ‘[T]here is no absolute “truth” as to what the law is concerning beaches’ (249). The fact that a beach can be both a private and a public space at the same time is not, however, a problem as it proves the importance of epistemic and legal tolerance. Curiously perhaps, Samuel does not cite Glenn here, yet underlining tolerance is very much what the late Glenn argued in *Legal Traditions of the World*.

In the next chapter, Mercescu criticizes the possibilities of quantifying law. The focus is targeted toward the theory of legal origins. Criticism is, essentially, epistemological as it fundamentally doubts comparisons based on quantifying and measuring. She also claims that comparative lawyers have had a tendency to see themselves as closer to ‘sociologists

and political scientists who themselves argued for metric comparisons' (253). Without going into the details of this chapter, it can be said that Mercescu is highly suspicious of measuring and quantifying legal rules across countries. Scholarship by Rafael La Porta and Ors is analysed and criticized from the point of view of culturally focused (ie Legrandian) comparative law. Interestingly, she does not distinguish between different knowledge interests even though it seems clear that a quantitative comparative study of law seeks to produce very different knowledge from that to be gleaned from culturally oriented comparative law. I find it difficult to swallow that comparative study of law would allow only one kind of knowledge interest that would always and necessarily be that of culturally oriented comparative law.

The final chapter, also written by Mercescu, is a detailed critique of David S Law's idea of generic constitutional law. The theoretical basis of the arguments against Law's idea stems from a cultural view of comparative law. In my view, the discussion in this chapter is the same as in the previous chapter because the core of criticism is directed against quantifying law for numerical comparative research. Criticizing the idea of generic law seems like an extension of the cultural argument underlining the cultural differences across countries.

A brief afterword reiterates what was already said in the preface.

All in all, this is a book that can be recommended for those interested in serious comparative study of law. It contains fascinating and intellectually stimulating ideas and critique that may, indeed, help to rethink or reshape the endeavour of comparative law as a form of dedicated scholarship. However, it is a bit hard to believe that this book would be of interest to legal scholars who have less passionate views on comparative law. That is, in my view, also the greatest problem of the book: it calls for a rethink about comparative law, but the style of demanding and theoretically thick scholarship will probably not appeal to a great number of legal scholars who are interested in more modest comparisons. In this sense, one can ask who it really is that Samuel, Glanert and Mercescu call upon to rethink comparative law? Moreover, Glanert's and Mercescu's chapters are also somewhat merciless towards comparative lawyers as the undertone seems to imply that, if you do not take this or that into account, then you are doing it wrong. Treading carefully here is needed as their arguments make sense and their scholarship is on a very high level indeed. The problem is that their style of scholarship does not feel engaging and inspiring. Then again, alas, that probably applies to comparative law scholarship in general.

To conclude, it would seem like a good idea to rethink comparative law so that it would appeal to a large group of legal scholars and not just the tribe of its devotees. Or as Vernon Valentine Palmer says: '[T]he message from Mount Olympus must not be that comparative law is always forbidding and difficult.' Then again, as I readily admit, this may be the very message of *Rethinking Comparative Law*.

### **About the Author**

**Jaakko Husa** is Professor in Law and Globalization at the University of Helsinki, titular member of the International Academy of Comparative Law, and a member of the Finnish Academy of Science and Letters. Currently, he serves as the President of the Finnish Committee for Comparative Law and as a Vice Dean (research) of the Helsinki Faculty of Law. He has held visiting positions at Edinburgh University, Hong Kong University, Riga Graduate School of Law and Maastricht University. He has published extensively on the theory and methodology of comparative law, comparative legal linguistics, comparative constitutional studies and comparative legal history. His most recent book in English is *Advanced Introduction to Law and Globalisation* (2018). His next book is entitled *Interdisciplinary Comparative Law* (forthcoming 2022). Professor Husa is also a co-editor of the forthcoming 2023 edition of the Elgar Encyclopedia of Comparative Law.

Email: [jaakko.husa@helsinki.fi](mailto:jaakko.husa@helsinki.fi).

### **References Cited**

- Patrick Glenn (2014) *Legal Traditions of the World* Oxford: Oxford University Press.
- Palmer, Vernon Valentine (2005) 'From Lerotholi to Lando' 53 *American Journal of Comparative Law* 261.