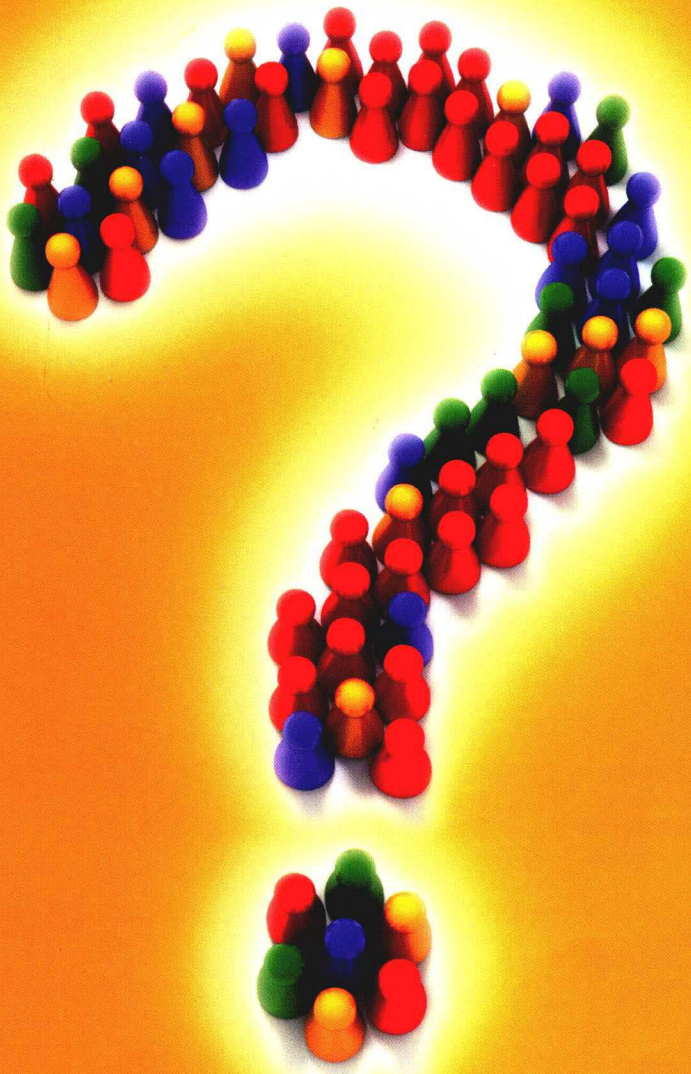

Research Methodologies
in EU and International Law

obert Cryer, Tamara Hervey and Bal Sokhi-Bulley
with Alexandra Bohm

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1

Introduction: What is a 'Methodology'?

I Introduction: The Aims of the Book

'Why do I need theory – my PhD is complex enough without it?'

'Where can I find ideas about what to do to solve my research problems?'

'I'm not a theorist – what's the point in theory unless it is useful for my specific research project?'

'What is a (legal) research methodology anyway?'

'How can I help my PhD students to devise and successfully complete their PhD projects?'

PhD students and their supervisors (including those in law schools) often ask these kinds of questions. Our aim in this book is to present a practical and theoretically informed approach to grappling with such questions, for those working either alone or, ideally, in collaboration with others who are interested in EU law, international law, or legal research methodologies.

The book arose from our experiences, in both undertaking and supervising PhDs in EU and international law, and teaching and participating in modules on Legal Research Methods. Law PhD students required to follow such a module seem to us to fall into two distinct camps: those who self-identify as 'theory people' and 'the rest'.[1] To generalise, this latter group seem to feel that theory, particularly that which some call 'capital T' Theory, is the arcane preserve of a small group of self-identified theorists (or Theorists), and thus external to what most law PhD students or other academics do. But our experience of teaching, and learning, about legal research methods and supervising students led us to an increasing conviction that theory (or methodology) is fundamentally practical. Theory (or methodology) relates directly to the formation of research projects, and then to the practicalities of carrying out research – what research questions we ask, what data we use, how we pursue our research agendas, how we explain why we examined what we did, or why we went about it in a particular way. As such, theory (or methodology) has practical consequences for research. Thus, for us, developing an understanding of different possible theoretical and/or methodological positions which inform international or EU legal research is all about the

[1] We are not, here speaking of either side as the 'Other' in a normative sense even though some who self-identify on either side may do so. Our comment is meant solely as a factual observation.

essentially practical activity of enhancing our capacities as international or EU legal scholars, and improving the outcomes of our research and writing endeavours (including PhD theses). It should come as no surprise to readers then that we have little time for those who use theory to mystify and oversell mediocre ideas, or simply to sound clever.

We also noticed that law students in general (there are, of course, exceptions) tend to be less methodologically self-aware, less good at articulating the approach underpinning their projects or proposed projects, than those in other social science disciplines. For individual law PhD students, this can pose problems at *viva voce* examinations, which often involve questions that are essentially about methodology, such as – why did you choose this project, what is important about it, what kinds of questions were you interested in asking? Reflecting on these kinds of questions requires us to be explicit about the theoretical assumptions we make about the nature and qualities of law in general – and EU and international law to be more specific – that we make when setting out on our projects. Our assumptions, essentially our approaches, underpin the kind of legal research questions that we each think are valid or interesting. They also inform what we do when we are carrying out our research. Many law PhD students seem to lack the vocabulary and confidence to explore these matters – although they have often embarked upon, or even completed, worthwhile and interesting projects. The imperative in the Research Excellence Framework (REF) era for legal scholars to be successful in attracting funding for their research, which often requires applicants to explain the theoretical/methodological underpinnings of their projects to those who are frequently not within their own discipline, is also becoming increasingly pressing. This book therefore also aims to contribute to the intellectual space within which EU and international law scholars reflect on the unique contribution to the academy of *legal* research methodologies.

The book follows the completion of an AHRC-funded research project on *Legal Research Methodologies in EU and International Law*[2] and its two workshops (29–30 June 2007, University of Nottingham; 27–28 June 2008, University of Sheffield). The research project's direct and substantive pedagogical aim was to enhance the methodological understanding and capabilities of three groups of scholars working in EU and international law: PhD students, staff at the early stages of their research careers, and more established members of staff who are PhD supervisors. The book seeks to extend that aim to a scholarly community beyond those who were able to participate in the workshops.

The book consists of three parts. Three introductory chapters consider what we mean by 'theory', 'methodology' and 'approach' in the context of research projects in EU and international law. These chapters introduce different kinds of research questions or types of projects, in particular, the distinction between expository and evaluative research. We then introduce the main organising device for the book: a list of types of legal research methodologies, or approaches, or

[2] Project ID 06/160/S 1.

theories, that are used in international or EU legal scholarship, or both. The list is not intended to be exhaustive, and we recognise (and discuss) the limitations of listing or labelling approaches in this way. However, we think that such a list (or one like it) plays a useful heuristic role, and enables us to talk to each other about methodology, and to understand and locate scholarly literature (such as our own work in progress, including PhD theses) in our fields in ways that assist us in the intellectual and practical pursuit of our own projects. Although most of the book considers EU and international law together, we draw out some differences (as we see them) between those two (sub)disciplines, in terms of methodologies.[3] We also explain the boundaries of the book: we have not included literature in languages other than English, and we have not included a detailed discussion of comparative law.

The second part of the book consists of an introduction to our list of legal research methodologies used in EU and international law. This introduction is designed to be used alongside other reading, and discussion of and reflection on that reading. For each of the methodologies, we have included a reference to two readings, which either exemplify, or explain, the methodology, in the field of either EU or international law. We strongly encourage readers to read the book *alongside* and *at the same time as* the readings to which we refer. It will not be easy to understand the approach being discussed without doing this, and it would be easy to gain a superficial understanding which risks being a misunderstanding. Alongside the readings, we have included some questions for readers to consider. These are aimed at assisting readers to 'get beyond' reading the piece for substantive understanding (which is what law students learn to do on their undergraduate and postgraduate taught programmes, and is, of course, a valuable skill in itself), and learn to read for methodological understanding. Writing down the answers to the questions and discussing them with someone else may help readers to reach these understandings more quickly.

For this reason, we envisage that, while readers may wish to use this book to reflect on the questions it raises, and their own projects (PhD or otherwise) in the context of those questions, as a solitary pursuit, or an exercise in self-assessment, the book will probably work best where it is used to support some sort of collaborative activity. For instance, supervisors may wish to set some of the readings and exercises to be completed and discussed in supervision sessions. Supervisors, like us, may wish to do the exercises themselves, as well as asking their PhD students to complete them, in particular in group based sessions. It was an important part of the project to break down the barriers between 'them' (students) and 'us' (supervisors) – we are all engaged in scholarly endeavours and can continue to learn from reflection on scholarship in our fields. Groups of students, early career academics or other scholars may wish to get together in workshops or seminars to

[3] One area where this has become a matter of current controversy is in relation to UN and EU responses to terrorism, and the interrelationship between international law, EU law and human rights law, see, eg G de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal* 1.

discuss the readings. We have included in the appendices a number of exercises and activities that can be used to promote or encourage such discussions. The participants in the project workshops greatly enjoyed carrying out these activities, and felt they learned a great deal from them, despite, in some cases, initial reluctance to engage. Here are some of the things that students said in the feedback:

> 'The group exercises were more useful than I expected.'
>
> 'The workshop . . . supported and encouraged me to reflect on my theoretical approach to my work and to learn from others' experience.'
>
> 'Each session was both fun and informative and has given me ideas on how to strengthen and sharpen my research.'
>
> 'The workshop exceeded my expectations. It has been a highly didactic experience which gave me insights on my own work as well as the work of others.'
>
> 'The workshop surpassed my expectations. I feel I understand myself and my thesis better.'

This positive view of using the materials in a collaborative and discursive setting, such as a workshop, was also reflected in feedback from academic staff members:

> 'I was hoping that this would be a relaxed forum in which students would be given a chance to chat freely about theory – including potentially why they were commonly put off by it – and in which we could all get new ideas about approaches others are using. I think the workshop was great in achieving this – I think it is easy for students to decide they want to be "doctrinal" just by fear of getting lost in theory, and this type of information forum where the idea is not to all claim that we are "theorists", but to explain if and how we try to use theory, is particularly helpful.'
>
> 'the project was about making a link between theory and method, and helping us to think about "method in practice" . . . the workshop was very practical, introductory, innovative'.
>
> 'I certainly gained from the workshop – it has helped me to reflect more on my own methodologies/theoretical approaches.'
>
> 'Most beneficial: helping to (re)think my place on the theoretical spectrum. Great workshop. I wish I'd had such an opportunity as a student.'

Of course we hope that this book will encourage a similar response to the workshops from which it stems. The workshops that provided the basis for this book fed into our understanding that the book would be of assistance to all staff and students interested in improving their work or their doctorates. In fact, we ought to highlight here that we would be very interested to hear from any readers who do use the book, especially collaboratively, in particular in terms of what worked, and what did not work, for their group, and why this was the case.

II 'Theory'/'Methodology'/'Approach'?

This book is about research 'methodologies' in EU and international law. But we also speak of 'theories' and of 'approaches' to these (sub)disciplines. To some extent, we have used the terms 'theory', 'methodology' and 'approach' synonymously. We rejected the use of the word 'theory' alone because in our experience many legal scholars, including the majority of PhD students in law, are uncomfortable with expressly identifying themselves as theorists. (This is also true of at least one of the book's authors!) Part of the aim of the book is to dispel this fear or unease with 'theory'; to show that the gap between theory and practice/practical relevance to a PhD or other research project is not as fundamental as many make it out to be. Every legal research project begins from a theoretical basis or bases, whether such bases are articulated or not. The theoretical basis of a project will inform how law is conceptualised in the project, which in turn will determine what kinds of research questions are deemed meaningful or useful, what data is examined and how it is analysed (the method). Often these are arrived at unconsciously, usually on the basis of how a subject was first taught to you, and/or what you gravitate towards naturally because it interests you. We believe, however, that it is better to be open about the bases of research and to think about them than to leave them unaddressed and uncritically accepted.

By 'methodology', we mean something different from, although related to, 'method'. For us, and we appreciate that others use these terms differently, the method is the way in which a research project is pursued – what you *actually do* to enhance your knowledge, test your thesis, or answer your research question. 'Method' has empirical and sociological connotations – that is, is the method a qualitative or quantitative analysis? Is it comparative? What methods of data collection are used – literature review, documentary analysis, observation, case studies, interviews? For us, 'methodology' has theoretical connotations. Moreover, methodology is closely related to what we understand the field of enquiry (that is, international or EU law) to be. Methodology guides our thinking or questioning of, or within, that field or both. To put it very crudely, and to give an example, if we believe law to be the written product of deliberations and negotiations between specific institutions (let us say on the EU side, the European Commission, European Parliament and Council, or on the international side, multilateral treaty negotiations), then the way we research law – our methodology – will involve the analysis of the texts produced through those deliberations and negotiations. It will not be interested in the effects that law has on social life. To give another example, in the international arena, if we believe law to be the morally correct means for organising international relations (let us say with respect to States involved in armed conflicts), then our methodology for researching law in that sense will include analysis of what a 'morally correct' way of engaging in such conflicts denotes in this context. And further, it will perhaps include an analysis of how this accepted norm of 'morally correct' has or has not come about.

III Reading for Methodology Rather than Reading for Substance

Thus, 'theory' and 'methodology' are closely bound up together. They inform the overall 'approach' that our legal research projects take. We think we can identify a number of such approaches that are used in international and EU legal research, and have compiled a list of them that forms the content of the second part of the book. Readers are presented with a brief introduction to each approach and then given sample readings which either explain it or demonstrate its use – one in EU law and one in international law. Some of the readings explain the approach in general; others are examples of scholarship in that tradition. Further reading suggestions are included under each heading.

As you read, it will probably be of use to ponder, and jot down answers to the following generic questions:

What is/are the research question(s) the author asks in this piece?
Why should a reader or publisher be interested?
What sources/data were used? How were they used?
What assumptions does the author make about law and legal research?
What type of research questions can this approach answer?
What are the benefits and drawbacks of this approach?
What would the approach look like, if applied in the substantive area of your PhD?

As we said above, these questions (and others more specific to the individual readings) are designed to encourage the practice of thinking methodologically – about the (sub)discipline(s) (of EU and international law) and where a particular piece of scholarship might 'fit' within that (sub)discipline. That conscious reflection about where an author is 'coming from' assists us to be more self-aware, and consequently, to produce better research in EU or international law.

2

Thinking about Research and Scholarship

I Introduction: Thinking about Legal Scholarship

To begin with, we suggest that readers may find it useful to read the piece below by Fisher et al, which reflects on methodology and legal scholarship generally:

E Fisher, B Lange, E Scotford, and C Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* 213–50 (published online at jel.oxfordjournals.org).

The article by Elizabeth Fisher, Bettina Lange, Eloise Scotford and Cinnamon Carlarne discusses methodological problems which arise in the scholarship of environmental law and the influence of these problems on environmental law scholarship. Although the article makes specific reference to environmental law (UK, European and international)[1] in examples of treaties and directives, its comments on scholarship which does not adequately address methodological issues (and its suggestions for how to redress this) are useful for all areas of legal study. Indeed, the authors frequently point out that the problems which they are discussing are in fact general problems of legal scholarship, but which they claim that environmental law suffers from more particularly.

Fisher et al describe methodology as amounting to a systematic procedure that a scholar applies as part of an intellectual enterprise, and draw attention to David Feldman's description of good scholarship as requiring a focus on methodology, critical reflection and communication.[2] They note that 'a commitment to the *value* of methodology is not a commitment to a particular methodology, but is a commitment to developing methods that are "best suited" to the type of questions asked'.[3] This is a key theme which emerges more than once in our suggested readings.

Fisher et al then identify five steps which they believe will help environmental (and other) law scholars to address these challenges:

[1] E Fisher, B Lange, E Scotford, and C Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* 213–50, 215.

[2] D Feldman, 'The Nature of Legal Scholarship' (1989) 52 *Modern Law Review* 498–517, cited in Fisher et al, n 1 above, 216.

[3] ibid 227.

1. reflecting on the relationship between choice of method and research questions asked;
2. mapping the subject;
3. engaging with more general debates over legal methodology;
4. getting to grips with interdisciplinarity; and
5. having a more explicit debate about how to assess the quality of environmental law scholarship.

With regard to the relationship between methodology and research questions, their point is that not only should methodologies be appropriate to answer our research questions but 'our implicit or explicit methodological perspectives also steer us towards particular types of research question'.[4] Our choice of methodology will have 'scholarly consequences'[5] and our choice of method should therefore be well thought through and should be made clear. Related to this is the need for scholars of specific branches of law to engage with the general debates about legal methodology.[6] We would agree that all scholars can gain from such engagement, and this book is our contribution to assisting those processes.

II The Relationships Between Research Questions and Methodology

We agree with Fisher, Lange, Scotford and Carlarne on the importance of reflecting on the choice of methodology and the interrelationship between that choice and the research questions asked in a project. The research questions that you pursue, the data or information that you bring to bear to answer them, and what you actually do (the method) need to be in a supportive 'triangular' relationship with one another. Methods and data must actually support the research questions that are being asked. Often the early stages of a (law) PhD consist in adjusting the research questions so as to be consistent with what turns out to be feasible in terms of methods and data. This adjustment may continue throughout the life of a project. A successful (PhD) project will have clearly articulated research questions, pursued through appropriate methods and using appropriate data. The choice of research questions, through a process of refinement, is an important (ongoing) stage in the realisation of a research project.

What about methodology? Is that also simply a matter of choice? Our answer is yes, and no. We think that, for each of us, the choice of theory/methodology/approach – like the research projects we elect to pursue – is a matter of personal

[4] ibid 224.
[5] ibid 245.
[6] ibid 246.

style.[7] Our choice of style reflects our professional and personal goals. In that sense, methodology is a matter of choice.

But in another sense, it is not. Through working on this project, we have agreed that we absolutely reject the idea that legal scholars may simply 'choose' any methodology and 'apply' it to their research questions. Rather, we hope that readers following the readings suggested in the book will see (or may already agree) that theory/methodology and the practice of research are intimately bound up together. (If you disagree, we would like to hear from you to discuss this further.) Thus there is no question of simple application of an approach to a question. The questions that a legal scholar is interested in are already based in the theoretical approaches that will help that scholar to answer those questions. One point of the exercises in this book is to help readers to decipher what questions they are asking in their research, to help ascertain which methodology/ies or approach(es) would best help them answer those questions, but also to think further about what questions they are asking, and if they are the ones they want to ask (and research). Another way to approach this activity, which the exercises in this book also support, is to help readers become better at recognising and articulating the methodologies or approaches to which they are naturally drawn. These approaches themselves inform the types of questions that we think are interesting or worthwhile. As one academic participant in our workshops put it:

> I became aware, over time, that other approaches just 'felt wrong'. That is why the types of research question that I am interested in tend to fit within constructivist approaches to international legal scholarship.

As readers formulate and refine their research questions, it may help to think about the distinction between expository and evaluative (or small 'c' critical) scholarship. Essentially, expository scholarship is answering descriptive questions about the way the (legal) world is. For example, what is the law on migrant patients in the EU? What is the international legal regime applicable to Antarctica? Does international law permit the use of force in anticipatory (or peremptory) self-defence? What is the effect of international law on terrorism? 'Descriptive' should not be mistaken for 'simple' in this context – the analysis concerned may be highly complex. Evaluative scholarship is in some way providing an assessment of the way the (legal) world is, and, either implicitly or explicitly, subjecting the law to appraisal either from the point of view of coherence with earlier law, other areas of law, or from an external viewpoint, and where shortfalls are identified, suggesting how things might be improved. Is the law on EU citizenship consistent with EU social security legislation? Does EU consumer contract law protect consumers adequately? How can international law act more effectively to prevent shipping disasters from polluting the environment? Or should international law reflect a different balance between trade and the environment? The assessment in

[7] K Abbott, 'International Relations Theory, International Law and the Regime Governing Atrocities in Internal Conflicts' in S Ratner and A-M Slaughter (eds), *The Methods of International Law* (Buffalo NY, ASIL/Hein, 2004) 131.

evaluative scholarship may be by reference to an external standard (external critique) such as equal dignity of all humans, or it may be by reference to a standard set by the law itself (internal or 'immanent' critique). The standard of internal critique may be explicitly stated in the relevant law, for example, the aim of EU environmental law is to improve the quality of Europe's environment, or it may be implicit, such as a standard of consistency between different systems of rules which govern a particular area of life. Of course, a particular research project (especially one of PhD length) may include both expository and evaluative questions, but they are different, and may require different types of methodology.

III Introducing 'the List'

The second part of the book is organised around our list of research methodologies used in EU and international legal scholarship. Our list is as follows:

The Main Jurisprudential Approaches

A Natural Law
B Legal Positivism

Extensions and Negations I:[8] Modern and Critical Approaches

C Modern Approaches

- Liberalism
- Cosmopolitanism
- Constitutionalism
- 'New Governance'
- Idealist

D Critical Approaches

- Marxism
- Feminism
- Queer Theory
- Postcolonial Theory
- Critical Theory

Extensions and Negations II: 'Law and'

G Law and International Relations/Political Science

- Liberalism
- Constructivism

[8] This heading is taken from J Penner et al, *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Oxford, Oxford University Press, 2005), who split the textbook into two parts, Part I (The Main Jurisprudential Approaches) and Part II (Extensions and Negations).

H Law and Economics
I Law and Sociology
J Law and History
K Law and Geography
L Law and Literature

IV Why This List?

The first thing to observe is that this list is by no means exhaustive, definitive or uncontroversial. The list was reached after long hours of deliberation, debate and frustration! We have continued to refine it right up to the submission of the manuscript for publication, and in some senses it will always be a 'work in progress' as our disciplines themselves develop.

We drew on various sources for inspiration. General legal theory/jurisprudence textbooks revealed that there is no accepted way of presenting legal theoretical methods; everyone takes a different approach. To an extent, although we have attempted to provide something of a *tour d'horizon*, the approaches listed here are, perhaps not surprisingly, influenced by our own research interests and experiences – hence we include, for example, the categories of 'new governance', 'feminism', 'critical theory' (with particular mention of Foucault and law) and 'law and history'.

In the international law context, our task of determining what to include was made easier by the fact that there is something approaching an 'accepted canon' of international law theories, methodologies or approaches. This was our starting point. For instance, Steven Ratner and Anne-Marie Slaughter put together a stimulating edited collection[9] by asking each contributor to tackle the same topic (the individual accountability for violations of human dignity committed in internal conflict) from the point of view of a different 'method' of international law. By 'method' they mean 'the application of a conceptual apparatus or framework – a theory of international law – to the concrete problems faced by the international community'.[10] This is what we call a 'theory', 'methodology' or 'approach'. Their list (legal positivism; New Haven school; international legal process; critical legal studies; international law and international relations; feminist jurisprudence; Third World approaches to international law; law and economics) is similar to our starting point.

However, in the context of EU law, our task was made more challenging (and more fun!) by the fact that there is no such 'accepted canon'. We discuss this further below, in chapter three. For now, we outline some of the issues that we had to tackle when deliberating this list.

[9] Ratner and Slaughter, n 7 above.
[10] ibid 3.

V Discussion of the List

A Inclusions in, and Exclusions from, the List

Any list has to stop somewhere. What did we leave out? And why? There are approaches to EU and international legal scholarship that we have not included in the list. Readers may notice gaps they consider disappointing. In part, our choices reflect (consciously or otherwise) our own interests and expertise and the approaches that are currently deployed in scholarship in EU and international law. But we recognise that the absence of much literature in an area is not, in itself, a justification for excluding an approach. Indeed, the absence of much work on point leaves a great deal of room for innovative scholarship. However, the practicalities of how many approaches can be covered in one book meant that judgement calls had to be made on inclusions and exclusions, and some can (and will) disagree with where we drew the boundaries.

We decided not to include comparative law, partly to keep the project manageable, but also since, in our view, comparative law is a subject in itself and thus has its own theories and methods. We discuss the relationship between this subject and EU and international law further in chapter three. Several of the academic partners to the original project on which this book is based were disappointed about this omission. They pointed out that, in both EU and international law scholarship, there is a tradition of using comparative methods.[11] We agree, and we think there is scope for a similar project, based on comparative law, and would encourage its pursuit by those better qualified than us to do so.

Finally, we have only included literature in the English language. This was for two main reasons, both in some ways practical. The first is that, as mentioned above, this book is intended to be read alongside the literature referred to below. We cannot anticipate the linguistic skills of everyone who will read this book, and it is our intention that everyone who reads it will be able to engage with the literature to which we refer. The only assumption we can make is that everyone who reads this book can read material in the same language as that in which this book is published. The second reason is that we had to draw lines somewhere around our project. We are also limited by our own skill-sets. It hardly needs saying that if readers are able to engage with non-English language literature, this will enrich their research projects.

B Incommensurability

The second challenge we faced when deliberating the list was that of incommensurability. A list implies that the items listed are of a category – legal research

[11] See, for instance, K Lenaerts, 'Interlocking Legal Orders in the EU and Comparative Law' (2003) *International & Comparative Law Quarterly* 873–906; M Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford, Oxford University Press, 2009).