Semantical Discordances of Comparison in Law Negatively Defined

Comparative Law as Methodology vs 'Comparative Law Methodology' as Tautology

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Abstract: Defining comparative law is difficult simply because it is polysemic and contingent in nature. A framework for refinement, differentiation and affirmation is represented by the negative paradigm. Comparative law's inadequacy to designate the subject is best exemplified by the following neologism, 'Comparative Law Methodology'. It is argued the latter phrase is distinguished from the former by a redundant lexical addition. Thus, this triad translates a latent divide between object and method already contained in the former idiom. Morphological observations of the distinctive features of a terminology indicate these can be affected alternatively from subservience to precedence by diachronic semantical variations. Modern comparatists naturally concerned with the ascertainment of explicit methodological frameworks extending beyond tacit use improperly refer to this tautological expression.

Keywords: Comparative law theory and method, Epistemology, Linguistics, Philology, Semantics.

Le poète compare, il
n'explique ni ne décrit.
[…] Baudelaire
ne décrit jamais, il évoque, et il y a toute la différence
du monde entre décrire et évoquer. […]
— En poésie, les mots évoquent d'une part,
signifient de l'autre.
ÉMILE BENVENISTE, *Baudelaire*[1]

1.Introduction

1.1 Epistemic imperative of characterisation: scholarship's reluctance to abandon an inadequate terminology

Comparative Law contains all aspirations of comparatists who, unlike poets, describe and explain law

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[1] E. BENVENISTE, *Baudelaire*, in C. LAPLANTINE, *Émile Benveniste : poétique de la théorie - Publication et transcription des manuscrits inédits d'une poétique de Baudelaire (Doctoral Thesis, Annexes F.1)*, Saint-Denis, 2008, 15, f°9 [f°115]; 20, f°3 [f°197]; and 22, f°32 [f°284] [original manuscript emphasis and lines].

elsewhere in different legal traditions and in relation one to another. Despite this radical methodical opposition, "[n]ot even poetry – poetry! – is ensconced within a strictly local paradigm" dissentingly asserts Professor Pierre Legrand who considers this art a "cosmopolitan endeavour".[2] Comparing both disciplines reveals that these arguably share the latter commonality of a spatially unrestricted territory. Their methods though appear to be diametrically divergent, or are they really? Legal terminology's purpose is to *signify* strictly and unequivocally. However, 'comparative law' as an incredibly diverse and polysemic vocable *evocates* various notions, perhaps to the jurists' dismay. Thus, to which extent does the 'proper word' inadequately designate the discipline? Also, are there alternative "designations any other than the 'proper word' if they evocate better"? [3] Are there consensually predominant phrases or terminologies deemed more appropriate? Are there otherwise designations that should be discarded completely? These are the few questions guiding the inquiry presented in this article.

At the edge of a century of modern 'comparative law', undertaking an inventory of the discipline's attributes and progress was customary. In this regard, a noted scholar in the field – despite his reluctance to engage in what he deemed a sterile debate – identified its detrimental semantical "identity crisis".[4] It remains true today that the inadequacy of the expression reflects a resolute diversity of opinions.[5] Another scholar, focusing on the practical objects of the discipline, earlier admitted philology would more aptly define the phrase.[6] While a third one suggested more appropriate alternative designations as the 'comparison of laws', 'comparative study of law or laws' or 'comparative legal study and research'.[7]

This state of confusion also impedes on the subject's progress.[8] If disagreement in exact sciences on terminology is less frequent than in law, the nature of legal scholarship and absence of standardisation regarding the ambit of 'comparative law' make it an incredibly broad area encompassing various endeavours – at times illegitimately – that would require more appropriate designations. Therefore, there is indeed a paramount epistemic necessity to properly designate in order to define the subject. What is certainly incidental for scholars occupied with the more practical aspects of the discipline should not be disregarded as such by specialists when an increasing number of lawyers incorporate comparative argumentations into their studies. Thus far extends the critique of those who refrain from adding perhaps more confusion than sense to an already labyrinthine literature. They do not completely disserve the discipline by choosing to let this issue pending, perpetually debatable in a sense, for there is perhaps no common ground for agreement on this matter despite the apparent common denomination.

If comparative law, *droit comparé*, *rechtsvergleichung*, *derecho comparado*, *diritto comparato*, appear laconic, limpid, and *prima facie* axiomatic due to their systematic use in scholarship, these idiomatic phrases are nonetheless constantly criticised by jurists.[9] Perhaps projecting their own methodological, linguistic, and substantive difficulties on the expression, the latter seem to return to these labels and lament the conundrum resulting from such a simple compound! This is not to suggest at all that these and other labels in different languages are equivalent or that each separate term constituting these terminologies implies the same meaning. As Professor Basil Markesinis arguably puts it, "if you wish to bring the word comparative into the picture, you must speak of method [noun] – Rechtsvergleichung – and not as the French do, of *droit comparé* [adjective]".[10] Similarly, and more recently, some French scholars expressly preferred the term of

[2] P. LEGRAND, *Negative Comparative Law: A Strong Programme for Weak Thought*, Cambridge, 2022, p. 237.
[3] E. BENVENISTE, *op. cit.*, 22, f°59 [f°311]: "*Le principe de l'énonciation poétique est de procurer le contact le plus étroit possible – idéalement l'identification – avec ce qui est évoqué : s'il est question d'une source, qu'on croit y baigner ses lèvres. C'est une des conditions essentielles du jeu poétique : que le mot ne signifie pas (~~seulement~~), mais qu'il évoque. Par suite on pourra recourir à des désignations tout autres que le « mot propre » si elles évoquent mieux*".
[4] X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Opening Remarks*, in *Tulane Law Review*, Vol. 75, 2001, p. 863. See also, M. REIMANN, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, in *American Journal of Comparative Law*, Vol. 50, 2002, p. 686.
[5] J. HUSA, *Introduction to Comparative Law*, Oxford, 2023, p. 1. See also, K. KERAMEUS, *Comparative Law and Comparative Lawyers: Opening Remarks*, in *Tulane Law Rev*, Vol. 75, 2001, p. 866; X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Closing Remarks*, in *Tulane Law Review*, Vol. 75, 2001, p. 1235.
[6] M. SCHMITTHOFF, *The Science of Comparative Law*, in Cambridge Law Journal, Vol. 7, 1939, 95.
[7] W. J. KAMBA, *Comparative Law: A Theoretical Framework*, in International and Comparative Law Quarterly, Vol. 23, 1974, p. 487.
[8] *Ibidem*, p. 486; M. REIMANN, *op. cit.*, pp. 672–3, 686.
[9] X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Closing Remarks*, *op. cit*., pp. 1235–6.
[10] B. MARKESINIS, *Scholarship, Reputation of Scholarship and Legacy: Provocative Reflections from a Comparatist's*

"*comparatisme*" over "*droit comparé*" as the former "refers to the *method* consisting in the simultaneous study of legal systems".[11]

Another cause of complaint could be that the adjective 'comparative' is misleading in law as it suggests a systematism empirically denied by both practice and scholarship altogether.[12] The vocable's contracted form makes it difficult to distinguish from traditional legal subjects such as 'competition law' in the minds of students expecting a fixed set of rules to be presented to them under this heading. To compare, etymologically, is to set similar things side by side to emphasise similarity or difference. Thus, according to the authors of an introductory textbook, comparative law would be "an intellectual activity with law as its object and comparison as its process".[13] On this point there should be in principle no contention. For some, comparison would be 'simply' that.[14] However, 'scholarship comparing legal phenomena' does not qualify all activities falling within the purview of 'comparative law'. Experience offers countless examples of self-proclaimed works pretending to be comparative that are simply not. These attempts to compare are conducted for a purpose certainly deemed useful by their instigator(s). Indeed, what would be critically missing from these studies is not a focus on foreign law(s) as an object but, generally, regard for important aspects of the 'comparison process' in the first place, and a 'systematic' consistency under a more scrupulous scrutiny.[15] In short, these lack method, let alone the presence of explicit referential frameworks.

Minor traces of comparison here and there do not qualify a production as comparative.[16] Furthermore, the validity of *implicit* comparison defended by some as conforming with the canons of the discipline should be rejected as quasi-comparison.[17] This approach effectively brings closer aspects pertaining to different legal traditions – a prerequisite for explicit comparison – but draws no observations from these. This analysis cannot bear on a single legal tradition of course, as the act of *comparing* requires at least two or more terms unless such comparison is historical or vertical. Therefore, the study of a single legal tradition foreign to the observing subject results in an internal, implicit comparison. If not externalised, that is, explicitly opposed and contrasted with one's own or another tradition, it simply does not meet the requirements of 'comparative law'.

Implicit descriptiveness effectively still is comparative law's rudimentary methodological trait – despite its constantly decried shortcomings. In order to overcome these, the method using logical deduction requires a further two essential argumentative phases of 'identification' and 'explanation' of similarities and differences giving comparison a fuller meaning.[18] If implicit comparison has a relative utility, it would be because description is rarely devoid of dogmatic or parochial prejudice.[19] Indeed, the objectivity and detachment required for scientific studies are perhaps not attributes of legal comparatists considering the mental habits necessarily ingrained by their training in a specific legal tradition resulting in an ethnocentric or even imperialistic encounter.[20]

On the one hand, the relative validity of the expression 'comparative law' in case the enterprise is macro-comparative, that is, concerned with a holistic study of the legal traditions of the world may not necessarily seem problematic. Yet, macro-comparison is not solely concerned with the sum of different national laws and

Point of View, in *Irish Jurist*, Vol. 38, 2003, p. 9 [original emphasis].

[11] J.-B. BUSAALL, F. CHERFOUH, G. GUYON, *Du comparatisme au droit comparé, regards historiques, Introduction*, in *Revue Clio@Themis*, Vol. 13, 2017, p. 1 [translated by the author; emphasis added].

[12] G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, Oxford, 2014, pp. 6, 173; P. GLENN, *Against Method?*, in M. ADAMS, D. HEIRBAUT (eds.), *The Method and Culture of Comparative Law*, Oxford, 2014, p. 177; P. FEYERABEND, *Against Method*, London, 2010, p. 7; K. ZWEIGERT, *Methodological Problems in Comparative Law*, in *Israel Law Review*, Vol. 7, 1972, p. 465.

[13] K. ZWEIGERT, H. KÖTZ, T. WEIR (tr.), *An Introduction to Comparative Law*, Oxford, 1998, p. 2.

[14] S. A. SMITH, *Comparative Legal Scholarship as Ordinary Legal Scholarship*, in Journal of Comparative Law, Vol. 5, 2010, p. 336.

[15] W. J. KAMBA, *op. cit.*, pp. 486, 489, 506.

[16] X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Closing Remarks*, *op. cit.*, p. 1236; K. ZWEIGERT, H. KÖTZ, T. WEIR (tr.), *op. cit.*, p. 6; W. J. KAMBA, *op. cit.*, pp. 505–6.

[17] X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Closing Remarks*, *op. cit.*, pp. 1235.

[18] W. J. KAMBA, *op. cit.*, pp. 511–2, 517.

[19] K. ZWEIGERT, *op. cit.*, p. 467.

[20] G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, *op. cit.*, pp. 6, 9; G. SAMUEL, *Taking Methods Seriously (Part Two)*, in *Journal of Comparative Law*, 2, 2007, pp. 230–1; P. LEGRAND, *How to Compare Now*, in *Journal of Legal Studies*, Vol. 16, 1996, p. 238; P. LEGRAND, *Comparative Legal Studies and Commitment to Theory*, in *Modern Law Review*, Vol. 58, 1995, pp. 262–3.

investigates more than rules of law as it considers primary causes of ontological differentiation. Studies concerned with visual representations of law and justice, for instance, although not strictly legal, but socio-legal, ethnological, historical, and interdisciplinary, are often conducted by jurists themselves and encompass considerations relevant to comparatists.[21]

On the other hand, for any given branch of law under a micro-comparative study, a variable term is introduced to the denomination, e.g., comparative 'contract' law, comparative 'tort' law, comparative 'criminal' law. Are these areas of scholarship contained within the denomination of comparative law or independent from it? One can assume that the study of these branches from a comparative standpoint is subsumed under the overarching discipline represented by the terms of 'comparative law' as they should. Yet some partisans of these designations claim the idiosyncrasies of their methodology such as, for instance, constitutionalists. To be perfectly unequivocal, there is no single method of conducting comparison in law or 'scheme of intelligibility' using a terminology coined in social sciences.[22] It is argued that despite the diversity of paths to follow to reach the goals of the comparative task, there should be no unnecessary divisions or exclusive categories confiscated by any branch of law.[23]

1.2 Diachronic alteration of semantical structures: defining terminology negatively and positively

A more deeply concerning and recurrent issue in the field is the inability to define the subject. Accurately defining conditions success of any enterprise and comparison in law is certainly not the least demanding. Jurists confronted with the thorny question 'what is comparative law' often 'kick into touch' in favour of a paradigm shift considering instead 'what is *being compared* in law' thereby focusing on a particular subject matter or on individual methods, i.e., '*how to* compare in law'. This paper focuses on the first question, however, both incidental questions seemingly contribute to answer the main question. To understand comparative law today, one should consider its inherently contingent meaning.

The answer to this primary question requires to be framed positively, obviously by reference to some negative aspects of what 'comparative law' is not. Recently, this negative approach has been examined by Pierre Legrand who relies on Plato, Aristotle and Aquinas to state that an affirmative proposition or enunciation precedes and is superior to the "less informative and harder to process" but also potentially 'parasitic' and 'fallow' negative statement having nonetheless the virtue of permitting 'differentiation'.[24] Contrastingly, Professor Rachel Giora considers "[n]egation often functions as an attenuator rather than a suppressor. As such, it prompts *default* automatic interpretations […] which prompts metaphoricity, or internal incongruity, which prompts sarcasm. [Therefore,] sarcastic interpretation, […] will be processed *faster* than nondefault, nonattenuated (yet sarcastically biased) affirmatives".[25]

In legal scholarship, it is a custom to refer to Kahn-Freund's nihilist definition given upon taking the Chair of Comparative Law at Oxford, stating that the subject "*has* the somewhat unusual characteristic that it does *not* exist"![26] In itself and in isolation, this negative statement could be considered useless if not resituated in its context. Perhaps Kahn-Freund used this negation to assist his audience in internally and expeditiously dispelling all their presumptions on comparative law as a *subject* asserted positively immediately before the negation and as suggested by the title of his inaugural lecture. The wider context in which this sarcastic assertion was made is addressed in this paper. If not a subject, it has been identified by Kahn-Freund as method(s). Furthermore, there is compelling evidence as of late, both individually and institutionally, of a resurgence of the subject's methodological dimension. Defining entails setting forth a certain set of

[21] C. SCHWÖBEL-PATEL, R. KNOX (ed.), *Aesthetics and Counter-Aesthetics of International Justice*, Coventry, 2024.
[22] M. ADAMS, J. GRIFFITHS, *Against 'Comparative Method': Explaining Similarities and Differences*, in M. ADAMS, J. BOMHOFF (eds.), *Practice and Theory in Comparative* Law, Cambridge, 2012, pp. 279, 301.
[23] K. BOELE-WOELKI, D. P. FERNÁNDEZ ARROYO (eds.), *The Past, Present and Future of Comparative Law*, Paris, 2018.
[24] P. LEGRAND, *Negative Comparative Law, op. cit.*, 370–1. See also, L. R. HORN, H. WANSING, *Negation*, in *Stanford Encyclopaedia of Philosophy*, 2020: https://plato.stanford.edu/entries/negation/ (accessed: 14/06/2024) Section 1.2 'Negation in natural language: markedness and asymmetry' for extracts of the classical authors mentioned.
[25] R. GIORA, *The Creativity of Negation, On Default Metaphorical, Sarcastic, and Metaphorically Sarcastic Constructions*, in W. XU, J. R. TAYLOR (eds.), *The Routledge Handbook of Cognitive Linguistics*, New York, 2021, pp. 127–8 ['default': bold in the original text; 'faster': emphasis added].
[26] O. KAHN-FREUND, *Comparative Law as an Academic Subject*, in *Law Quarterly Review*, Vol. 82, 1966, 41 [emphasis added]. See also more recently to the same effect, B. MARKESINIS, *op. cit.*, p. 9.

characteristics and decisive traits. It is interesting to note that while Kahn-Freund's definition was accepted by "common consent" at the time he expressed it, partially explaining his rather emboldened address, Reimann for instance taking note of its relative adequacy continuously met by a broad consensus within the scholarly community until today, denied its accuracy and relevance thirty-six years later, early in the 21st century, attributing a proper domain to the subject.[27]

Diachronic considerations are significant in shaping terminology on any given topic. Accordingly, comparative law has been, in effect, the fertile ground for changing designations intended to adequately characterise the subject. Take for instance the phrase 'comparative jurisprudence' used in the 19th century as the main designation for the discipline.[28] A perfectly valid terminology at a given time may be considered partially inadequate or simply obsolete at another given time. A nomenclature can also contain various acceptations and – although formally static and intact in appearance – what it entails may be subject to fluctuation. In this regard, modern comparative law's motto could be *fluctuat nec mergitur* akin to the city of Paris where was hosted more than a century ago during the 1900 Universal Exhibition, the seminal First International Congress of Comparative Law. Proponents of the prevalent scientific nature of the subject under the impulse of Lambert and Saleilles were then challenged by Pollock whose definition essentially does not differ from Kahn-Freund's although expressed sixty-six years prior.[29]

To comparatists of course, and lawyers more generally, the results of comparative investigations should not be seen as purely monolithic and unaffected by the passage of time no matter how appealing this assumption can be for categorisation and explanation. Instead, these should be examined from the far more accurate perspective of the dynamics of divergence and convergence as alternating trends.[30] Even if the answers to these investigations are essentially sought for understanding law, considerations drawn from other disciplines such as anthropology, ethnology, history, linguistics, philosophy, politics and sociology extend far beyond the remit of 'law' *stricto sensu*. They require an inquisitive mindset and a *multidisciplinary* approach that the traditionally and conventionally accepted expression omits.[31] Therefore, the reductive view of former President of the International Academy of Comparative Law, Professor Kerameus, considering the terms of 'comparative law' "fully justified and suitabl[e]" is challenged.[32]

This critique is not intended to lead to an auto-da-fé of textbooks soberly entitled 'comparative law'.[33] The crux of this inquiry is to raise awareness regarding the expression's inadequacy by reference to a negative example. Terminology dictates the direction, intensity, and interests in given aspects of a discipline. Hence, a taxonomic word choice invariably determines the initial focus setting arbitrary limits only crossed by an inquisitive ethos. Comparative law, due to its polysemic nature, appears to suffer from two excesses. Thus, it often fails to encapsulate the full meaning of its objects, and otherwise evocates omnipotence and ubiquity. Therefore, it is argued the subject's reduction to its methodological dimension as a tool is only one possible acceptation of the terminology – irrespective of the insoluble semantic discord feebly attempting to reduce *comparing* (verb in action) to what would subjectively best *evocate* it, either a noun (*comparison*) or an adjective (*comparative*) that is besides the *practical* yet theoretical concerns of comparatists. Finally, the formula 'Comparative Law Methodology' is arguably inconsistent for setting methodology *outside* of 'comparative law' and is met with a strong rebuttal.

[27] M. REIMANN, *op. cit.*, pp. 683–4.
[28] F. POLLOCK, *History of Comparative Jurisprudence*, in *Journal of the Society of Comparative Legislation*, Vol. 5, No.1, 1903, pp. 74–89.
[29] F. POLLOCK, in *Congrès international de droit comparé, Procès-verbaux des séances et documents*, Vol. 1, Paris, 1905, 60. The difference would be the reference to the term "*science propre*" instead of "subject".
[30] J. H. MERRYMAN, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, in Stanford Journal of International Law, 17, 1981, p. 358.
[31] G. SAMUEL, *Taking Methods Seriously (Part One)*, in *Journal of Comparative Law*, 2, 2007, 94–5; G. SAMUEL, *Taking Methods Seriously (Part Two)*, *op. cit.*, pp. 235–6; G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, *op.* cit., p. 35.
[32] K. KERAMEUS, *op. cit.*, pp. 866.
[33] M. SIEMS, *Comparative Law*, Cambridge, 2022. Since a picture is worth a thousand words, 3rd edition book cover alone portraying dissected apples and oranges (plain in 1st and 2nd editions) should dissuade from such an idea…

2. Terminological inconsistencies of comparison in law: emancipated or erring methods?

> *Oportet ingenii aciem ad res minimas et maxime faciles totam convertere, atque in illis diutius immorari, donec assuescamus veritatem distincte et perspicue intueri. […] Si quaestionem perfecte intelligamus, illa est ab omni superfluo conceptu abstrahenda, ad simplicissimam revocanda…*
> RENÉ DESCARTES, *Regulae ad directionem ingenii*[34]

2.1 Comparative Law's inadequacy to characterise the scope of the subject

The loose and vague terms of 'comparative law' appear all-encompassing and unspecific since the act of 'comparing' is accompanied by a reference to the field of 'law' as a whole, suggesting a complete and homogenous taxonomic entity.[35] In fact, this may seem a truism but the least specific an expression is despite its laconic formulation, the more it may lead to confusion. A positive consequence of this broad terminology is that it seemingly contains all aspects of comparison in law. The obvious downside of a notion that would be too broad would be scattered information leaving uninitiated newcomers having to find a needle in a haystack. Underpinning an admittedly tacitly accepted and flawed general qualification is the acknowledgment that the contours of the subject are perhaps as susceptible of agreement as there is consensus in law and juridical 'science' in any given jurisdiction, let alone globally. Divergencies on an appropriate standard or common appellation other than 'comparative law' may well also be defeated by the diversity of modern languages composing the world's community.

Modern comparison in law requires more, in fact, much more than considering a study object from a purely authoritative standpoint, by engaging in *interdisciplinarity*.[36] However, lawyers mostly concerned with law as an authoritative body of rules because of their education at either universities or vocational institutions alike – despite their pretentions to nurture a critical mind that is a necessary mental habit for undertaking comparative law work – are seemingly unable to emancipate themselves from a purely descriptive approach.[37] Comparison in law is also more than a comparison of rules of law. Some even consider a necessity for the discipline to operate beyond a formalistic and authoritative approach to law centred around legislation or cases – i.e., black letter law.[38] Others, for the past fifty years, have been active militants for the universal adoption of a dubious scheme of intelligibility – known as functionalist – involving an inquiry into the common problems faced in different legal traditions, allegedly met by common answers, supposing homogeneity and a uniform human nature.[39] Proponents of the functionalist dogma, well aware of the insufficiencies of their approach rely on the existence of 'systems' belonging to a common cultural heritage allegedly sharing common values (e.g. Western nations) – having achieved at least a similar level of development – or else be 'system-neutral'.[40] This exclusivist approach is known to Legrand as 'positivist' as opposed to a 'cultural' paradigm inclusive of the irreducible diversity of otherness in all its uniqueness, and the former is stigmatised by him as representing the narrow and "neophobic" views of a "philistin[e]" crowd…[41]

Another approach best defended by Smith, Van Hoecke and others considers comparison in law as *orthodox*

[34] R. DESCARTES, *Règles pour la direction de l'esprit*, Paris, 2016, Rules IX and XIII, 120, 154. See also, J. COTTINGHAM, R. STOOTHOFF, D. MURDOCH (trs.), *The Philosophical Writings of Descartes*, Vol. 1, Cambridge, 1985, pp. 33, 51.
[35] U. MATTEI, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, in American Journal of Comparative Law, Vol. 45, 1997, p. 5.
[36] P. LEGRAND, *How to Compare Now*, *op. cit*., p. 238.
[37] J. BELL, *Legal Research and the Distinctiveness of Comparative Law*, in M. VAN HOECKE (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, Oxford, 2011, 158; M. LASSER, *The Question of Understanding*, in P. LEGRAND, R. MUNDAY (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003, p. 238.
[38] M. VAN HOECKE, *Deep Level Comparative Law*, in M. VAN HOECKE (ed.), *Epistemology and Methodology of Comparative Law*, Oxford, 2004, pp. 165–95.
[39] K. ZWEIGERT, H. KÖTZ, T. WEIR (tr.), *op. cit.*, p. 34; E. ÖRÜCÜ, *Methodological Aspects of Comparative Law*, in European Journal of Law Reform, Vol. 8, 2006, pp. 33–7.
[40] K. ZWEIGERT, *op. cit.*, 474; K. ZWEIGERT, H. KÖTZ, T. WEIR (tr.), *op. cit.*, pp. 33–40.
[41] P. LEGRAND, *Negative Comparative Law*, cit., 2. See also for an earlier positivist response, J. GORDLEY, *Comparison, Law, and Culture: A Response to Pierre Legrand*, in American Journal of Comparative Law, Vol. 65, 2017, pp. 133–80.

legal scholarship comparing legal phenomena, deriving its methods from classic legal research with an extra touch of regard to cultural sensitivities and heteronomies.[42] As a result of this presumption, holding symposia and publishing reviews to the effect of discussing comparative scholarship at length would be counterintuitive. In fact, such practice reveals instead that the problems arising from the comparison process, i.e., questions deriving from the interrogation 'how to compare in law' are far from being obvious and second nature. It appears "questions about the implications of conducting legal research based on a comparative law axiological framework" are still central to these events giving rise to "multiple interpretations" and interrogations.[43] Furthermore, a recurrent emphasis on methodological aspects related to comparison in law indicates a growing concern regarding their ascertainability.

Despite a permanent reluctance to attribute a larger domain than methodological to comparative law, the subject has gained significance in scholarship negating claims confining it to a mere set of methods.[44] Lawyers accustomed to a fixed set of rules to be contained and presented in traditional legal subjects have constantly been hesitant to attribute a proper status to 'comparative law'.[45] The uncertain nature of its geographical scope and substantive focus would apparently suggest otherwise since there are "no generally accepted theoretical frames, established terminology or aims set in comparative law".[46] However, think for a moment of a subject such as philosophy. It is generally not denied it is a subject simply because of its vastness. The same goes for what is commonly referred to as 'comparative law' seen by some both "as a discipline and as a form of legal research".[47] This subject necessarily comes with the caveat that it is not only as diverse as comparatists who set forth their comparative study, but the proposed questions and extent of answers provided by legal comparatists are necessarily limited in one's work, detailed in another's, or simply left unconsidered in the realm of possibility.

Whether the subject can pretend to be qualified as a science begs the question whether law, legal or juridical 'science' is at all a science.[48] The *scientificity* debate depends on perceptions concerning the influence of science and rationality on the subject that, as explained in the foregoing developments, would be minimal.[49] Furthermore, even following the assumption that comparative law would also be, according to some, a proper subject or a branch of science, arguments justifying the independence and affirmation of 'methodology' as a standalone epistemologically differentiated entity are unconvincing.[50] The immediate consequence of the current state of scholarship reinforces the argument according to which the methodological aspects of the discipline are constitutive of its principal facet. However, disregarding the results yielded by the comparative approach as incidental and a byproduct of the comparative enterprise is inept. In mathematics, the solution is equally as important as the reasoning process leading to the answer and proves or disproves the method. In law, although some claim comparison is only conducted for a practical purpose to achieve a specific goal, emphasis on method implies that validity of findings depends upon the validity of the route(s) taken to reach the destination.[51]

[42] S. A. SMITH, *op. cit.*, 336; M. VAN HOECKE (ed.), *Methodologies of Legal Research*, *op. cit.*, v. See also, G. SAMUEL, *Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?* in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, *op. cit.*, p. 207.
[43] F. PETROSINO, *Roundtable for the Semiotics of Law – Panel on Comparative Law and Methodology*, in Comparative Law and Language, Vol. 2, No. 1, 2023, p. 105.
[44] M. REIMANN, *op. cit.*, pp. 683–4.
[45] U. MATTEI, *Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, in American Journal of Comparative Law, Vol. 50, Supplement, 2002, p. 87.
[46] J. HUSA, *op. cit.*, p. 1.
[47] *Ibidem*.
[48] L. REID, *The Judge as Lawmaker*, in Journal of the Society of Public Teachers of Law, Vol. 12, 1972–3, 29: "law is as much an art as a science".
[49] See P. LEGRAND, *Negative Comparative Law*, cit., 386–8 on the 'Strong Programme' and 'weak tought'.
[50] G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, cit., 2: "method and methodology are to be distinguished from the substance of a discipline". The danger here is that this segregation – if not reconciled with substantive law – risks to preclude method from fulfilling its primary purpose. The *raison d'être* of a method is to be of practical use. It is essentially to serve as the basis for comparative investigations in law.
[51] M. SCHMITTHOFF, *op. cit.*, p. 99.

2.2 'Comparative Law Methodology': inept attempt at differentiation and affirmation or tautology?

Lately, a phrase constantly uttered by comparatists concerned with the methodological dimension of comparison in law consisting of three words is 'Comparative Law Methodology'. Using capital letters, the expression appears to be empowered as an independent field of knowledge. It seems pertinent to insist on the fact that this paper is not concerned with methods. In other words, it strictly does not aim to answer the question 'how to compare' in law. This article challenges problematic conceptions on the meaning of the expression and as *comparative law* is so commonly equated to its *methodological* dimension, the triad 'Comparative Law Methodology' is critically examined. A primary observation argues its inherent unsuitability for adding the term *methodology* as a suffix when it is essentially already contained in the traditional appellation. Indeed, once again, *comparative law* for many scholars includes *methodology* and for some, it would be just that. Why then the recurrent need to distinguish both which does not seem to be accidental nor isolated?[52]

A few observations are required before answering this question. It is the relevance of the distinction that is discussed here. First, by reference to three examples driven by individual and institutional impetus, illustrating recent trends pleading for a mainstream use of, and an affirmative reliance on, methods of comparison in law. Then, the neologism is critically examined by reference to the traditional dichotomies of the subject. Finally, the conclusion is negative and open-ended as it may be difficult to refrain from referring both to the terms of 'comparative law' and of 'comparative law methodology' that are widely used more for the sake of convenience than accuracy.

'Comparative Law Methodology', a convenient triptych emphasising the methodological dimension of the subject has been a "common focal element" under discussion during the 23rd International Roundtable for the Semiotics of Law recently held in Rome, Italy in late May 2023.[53] This concern for the development of a methodological framework crystallised in 2020 in the form of a new open-source journal under the aegis of the International Academy of Comparative Law entitled *Ius Comparatum*, that would equate to the Latin form of the French formula. This recent publication under the auspices of the Academy only came to fruition almost a century after its creation finally providing a consistent platform for a global scholarly community inclusive of younger researchers to discuss related substantive legal subjects. Its specificity consists in the explicit formulation by authors of their particular methodological choices. This confirms a well initiated trend by the Academy as testified by the inaugural event of 15 May 2017 celebrating the careers of 'five great comparatists' during which a roundtable specifically discussed 'comparative law methodology' as one of three crucial topics.[54] The same year, in a special dossier on the theme *Du comparatisme au droit comparé, regards historiques*, the term of "*comparatisme*" expressly preferred over "*droit comparé*" indicates the latter phrase allegedly fails to *signify* for some "the *method* consisting in the simultaneous study of legal systems, and more technically, […] the opposition of institutional, doctrinal or practice models".[55]

These examples representing a globally consistent intellectual agenda recognising the preponderance of methodology in the scholarly activities revolving around comparison in law illustrate the need to situate the subject beyond a detrimental formalistic terminology. The semantic inadequacy of the traditional formula clearly reveals adverse consequences for the intelligibility of the discipline.

Comparative Law is inadequate to signify the activity resulting from comparison in law. Indeed, if 'comparative law' was purely a method, eliciting the idiom by adding the term 'methodology' would be tautological – something akin to a 'method's methodology' or the 'methodology of methodology'...[56] While it is the purpose of methodology to determine the scope and inner workings of a method, the triad could be valid if 'comparative law' had a definite and structurally consistent set of methods. However, divergencies and disagreements on methods for comparison in law are clearly incompatible with the formulation of '*a*'

[52] A valid epistemological distinction can already be drawn: 'comparative' as the methodology; 'law' as its object.
[53] F. PETROSINO, *op. cit.*, p. 105.
[54] K. BOELE-WOELKI, D. P. FERNÁNDEZ ARROYO (eds.), *op. cit.*, pp. v-vi, x-xi.
[55] J.-B. BUSAALL, F. CHERFOUH, G. GUYON, *op. cit.*, 1 [translated by the author; emphasis added]. Same paragraph concludes "*la méthode* 'du' *droit comparé*" (*article partitif*, equivalent to the preposition 'of'). This incongruity marks the distinction drawn as irrelevant: method is *intrinsic* to 'comparative law' and not *specific* to "*comparatisme*".
[56] From a purely semantical standpoint, 'comparative law methodology' suggests 'comparative law' would be the object – instead of 'law' alone – on which 'methodology' applies, additionally to the already present notion of 'methodology' represented by the isolated term 'comparative'. Also, if 'comparative law' = 'methodology' then 'comparative law methodology' = 'methodology methodology'.

methodology in a discipline allegedly still not having "attained a certain fullness and orderliness" to use Kant's conception of an accomplished logical science.[57] It is the consistent use of method leading to its 'completion' and the 'elimination' of both "mistakes and of confused thoughts" that comparative law is still missing.[58] Comparative law is not there yet, if it ever will be.

Comparative Law Methodology is also undoubtedly unsuitable. Regardless of the claims concerning the nature of 'comparative law', this compound adds an element of confusion rather than facilitation. Its only positive aspect – from a concrete standpoint – would be emphasising the necessity to focus on methods. Nonetheless, not doing away with the traditional idiom signifying methodology is a problem. Those three words put together equivocally reinforce the highly disputed dichotomy confining 'comparative law' as either a mere method of conducting comparison in law, or a proper discipline as explained in the foregoing developments.

This might seem a moot point but following the 23rd International Roundtable, a recent article in a special issue of *Comparative Law and Language* journal containing a summary of the event where the triad was used extensively is entitled 'Comparative Law *and* Methodology'. The use of the coordinating conjunction '*and*' situating methodology *outside* of 'comparative law' may be confusing especially since 'comparative law' is seen in this example in '*its*' methodological dimension as a '*tool*' suggesting it is intrinsic rather than extrinsic.[59]

Comparison in law calls into the application of a specific method unless envisaged strictly under an anarchistic epistemological paradigm.[60] The latter case could not be the chosen option for those who refer to 'methodology' as a guiding yardstick unless they are completely unfamiliar with the principle of non-contradiction. Furthermore, the imperative necessity to objectivise a method is paramount in a comparative legal discourse as there is an obligation to comply with ethical requirements for any scholarly production.[61] Hence, for jurists operating within a modern rationalist theory of knowledge, the explicit formulation of a concrete though subjective methodology is also imperative and unconditional.[62]

Consequently, comparison in law intrinsically relies on methods regardless of effective reliance on, and affirmation of, methodological frameworks particular to each comparatist or comparative studies. In other words, this methodological requirement is not waived by the inability of jurists to effectively use, or satisfactorily explain, their chosen methods. This standard remains an essential part of the comparison discourse despite its potential absence in any given study.

In conclusion, '*comparative law methodology*' on top of being tautological is certainly inadequate. This schismatic redundancy – as opposed to comparative law *as* methodology – contrastingly translates an ecumenical and illusory impulse tending to an agreement on a common methodological framework. Instead of speaking of *a* common *methodology* that would be objective and universal in reach within the discipline of law, it seems more pertinent to speak of *methodologies* in the plural form as these would better represent individual initiatives responding to the needs of scholars and jurists undertaking comparative investigations.[63] Finally, the ascertainment of explicit methodologies requires no consensus and certainly need not come at the expense of an inept compound considerably complicating the already problematic phrase of '*comparative law*'.

[57] I. KANT, *De Mundi Sensibilis atque Intelligibilis Forma et Principiis* in D. WALFORD, R. MEERBOTE (eds.), *Theoretical Philosophy, 1755–1770*, Cambridge, 1992, p. 406.
[58] *Ibidem*. See on the unreliability of methodology in comparative law, K. ZWEIGERT, *op. cit.*, p. 465; P. GLENN, *op. cit.*, 177. On a 'state of experimenting', G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, *op. cit.*, pp. 3, 6.
[59] F. PETROSINO, *op. cit.*, pp. 107, 105 [emphasis added].
[60] R. DESCARTES, *op. cit.*, Rule IV, 88 (French) and J. COTTINGHAM, R. STOOTHOFF, D. MURDOCH (trs.), *op. cit.*, p. 15 (English); P. FEYERABEND, *op. cit.*, pp. 11–2, 17.
[61] O. KAHN-FREUND, *op. cit.*, p. 41.
[62] S. GLANERT, *Method?*, in P. G. MONATERI (ed.), *Methods of Comparative Law*, Cheltenham, 2012, pp. 67–8.
[63] *Ibidem*, pp. 66–8.

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