Methodological Aspects of Comparative Law

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A. Introduction

Let us start our journey into the methodological aspects of comparative law with a basic question: 'What is a method?' A method is a means of obtaining data – information classified into usable conceptual units – and a means of ordering and measuring this data. Observation, documentary research, questionnaires, in-depth interviews, context analysis, and statistical operations are all examples of methods.[1] By definition, the obvious method appears to be comparison i.e. juxtaposing, contrasting and comparing.[2] But the question: 'How is this comparison to be carried out?' has no fixed answer.

'Comparison' as a way of looking, a mode of approaching material, a part of the process of cognition, is used in all the fields of study, be they social sciences or natural sciences. Thus, used alone, the 'comparative method' can be employed in various fields of discourse. In this sense it is an empirical, descriptive research design using 'comparison' as a technique of cognisance.[3]

We know that the everyday process of thinking involves the making of a series of comparisons which involves a process of contrasting and comparing, juxtaposing the unknown and the known, and comprehending the phenomena around us by observing differences and similarities: 'Just as the qualities of a yellow, its hue, brilliance and tone are perceived and sharpened most truly by placing it first on or beside another yellow and secondly by placing it in contrast to purple, so we explore the world around us.'[4]

When the term 'comparative' is added to the name of a subdivision of a field such as comparative linguistics, comparative architecture or comparative

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1 G. K. Roberts, What is Comparative Politics? 51 (1972); D. Kennedy, *The Methods and the Politics*, *in* P. Legrand & R. Munday (Eds.), Comparative Legal Studies: Traditions and Transitions 345-433 (2003); J. LaPalombara, *Parsimony and Empiricism in Comparative Politics*, *in* R. T. Holt & J. E. Turner (Eds.), The Methodology of Comparative Research 123-149 (1972).

2 R. Sefton-Green, *Compare and Contrast: Monstre a deux têtes*, 54 R.I.D.C, 85-95 (2002).

3 E. Örücü, *Diachronic and Synchronic Comparative Law – Method and Object of Comparative Law*, *in* H. W. Blom & R. J. de Folter (Eds.), Methode en Object in de Rechtswetenchappen, Opstellen over filosofie en recht 57-72 (1986). *See also* E. Örücü, Symbiosis Between Comparative Law and Legal Theory – Limitations of Legal Methodology, Mededelingen van het Juridisch Instituut No: 16 Erasmus Universiteit Rotterdam (1982).

4 Örücü, *Diachronic and Synchronic Comparative Law*, *supra* note 3 at 57.

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religions, it denotes an area of study. In these cases, the word 'comparative' in the title no longer indicates simply a method, but an independent branch of that science. In our case, this would be the legal science. The branch then develops it own methods. It must be stressed, however, that comparative lawyers have not 'invented' their methods or the 'process' of the methods and techniques used in this area. They have rather borrowed the methods, such as the historical, empirical, functional, structural, statistical, thematic and evolutionary from other disciplines and have applied them to the problems of comparative law research.[5]

It is now widely accepted that there is no one standard method to be followed. The question then is, which methods can and should be used and which methods are being used by comparative lawyers? When and with what expectations?

Methodology is riddled with problems. These problems have been considered in different ways by different comparative lawyers and the methodology which is used has been referred to in a number of ways: 'Functional equivalence' and the 'problem-oriented' approach,[6] 'model-building', 'common core' studies and the 'factual' approach,[7] the 'multi-axial method' made up of the historical, functional and dogmatic axes and the law as a system of rules in a national context[8] and 'method in action'[9] are just some of the approaches to the question put forward in the last century: 'How to compare?'. By employing a 'system dynamics' approach, comparative law research is moving towards the exploration of backgrounds, contexts and interrelationships.[10] This has been called by some 'post-modernist'[11] methodology.

B. What is to be Compared and by What Method[12]

The next question in any comparative analysis is: 'What is to be compared?' Since the essence of comparison is the recognition and explanation of significant similarities and differences between the subjects of the study, it is essential to

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5 M. Zelditch, *Intelligible Comparisons*, *in* I. Vallier (Ed.), Comparative Methods in Sociology 267-307 (1971). *See also* E. Oyen (Ed.), Comparative Methodology: Theory and Practice in International Social Research (1990); F. J. M. Feldbrugge, *Sociological Research Methods and Comparative Law*, *in* M. Rotondi (Ed.), Inchieste di Diritto Comparato: Aims and Methods of Comparative Law, Vol. 2, 211-244 (1975).

6 K. Zweigert, *Methodological Problems in Comparative Law*, 7 Israel Law Review 465-474 (1972).

7 R. B. Schlesinger (Ed.), Formation of Contracts: a Study on the Common Core of Legal Systems, (1968); M. Bussani, *Current Trends in European Comparative Law: The Common Core Approach*, 21 Hastings Int. & Comp. L.R. 785 (1998).

8 F. Schmidt, *The Need for a Multi-axial Method in Comparative Law*, *in* J.C.B. Mohr (Ed.), Festschrift für Konrad Zweigert 525-536 (1981).

9 M. Ancel, Utilité et methodes du droit comparé (1971).

10 V. V. Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology,* 4(2) Global Jurist Frontiers 1-29 (2004), www.bepress.com/gj/frontiers/vol4/iss2/art1.

11 *See* for an analysis, A. Peters & H. Schwenke, *Comparative Law Beyond Post-modernism*, 49 International and Comparative Law Quarterly 800-834 (2000).

12 I have dealt with the topic of methodology, among other works, in E. Örücü, *Methodology of Comparative Law*, *in* J. M. Smits (Ed.), Elgar Encyclopedia of Comparative Law 442-454 (2006).

identify the phenomena which are to be compared. The answer to the above question depends on a choice between three approaches, namely, macro-level, meso-level and micro-level comparison. When the approach is macro-comparative, the 'normal' unit of the comparison is the 'system'. But the choice can lie between this macro-focus and the 'structure', which involves a meso or micro-legal focus. This choice is not dogmatic but strategic.

Black-letter-law-oriented and rule-based traditional comparative law research is normative, structural, and positivistic. This advocates the reading of statutes, cases, parliamentary debates and doctrinal works, and it regards the description of data and the identification of similarities and differences to be the final stages of the inquiry. However, such a rule based approach is not satisfactory for those concerned with law in action and law in interaction with social and cultural systems, that is, 'context oriented comparative law research', the claim being that this would lead only to partial truth. Thus, the context should be the essence of any comparison. Those involved in creative comparative law research may also be interested in suggesting 'core concepts' and pointing out the ways to 'ideal systems', or at least to the 'better law' approach.

There have been complaints that, on the whole, comparative lawyers are concerned with description, analysis and explanation but not with evaluation and prescription.[13] Although, there is scope for evaluation and prescription in relation to the search for the 'better law'; for many the legitimacy of this activity remains questionable. They regard venturing beyond the 'common core' as going beyond the limits of neutral comparativism, as the 'better law' is seen to imply an evaluation and a choice according to a desired outcome which is determined by the value system of a comparatist, or more frequently, a group of comparatists working on a project to make recommendations for legislative reform or drawing up of a European instrument.

When one accepts that there is no one methodological paradigm, then a plurality of methods can be practised. I believe that the availability of a multiplicity of approaches can only enrich research possibilities. As the comparative law research is open-ended, the methodology is determined by the strategy of the comparative lawyer. The important thing, then, is to look to what a comparative lawyer does.

C. Which Methods Should Be Used and for What Purposes?

Now our question becomes: 'Which methods should be used and for what purposes?' We know that comparative research is carried out for a number of purposes. The methodology and techniques differ according to these purposes. For example, in law reform by legislators or the courts, comparative law is a provider of a pool of models, foreign law being used to modernise and improve the law at home. Looking preferably to the legal systems which are socio-culturally

[13] W. Twining, *Comparative Law and Legal Theory: the Country and Western Tradition*, *in* I. D. Edge (Ed.), Comparative Law in Global Perspective 21-76, at 34 (2000).

and legal-culturally similar, the comparatist is led to systems that share the same problem but deal with the problem in different ways, better ways or more efficient ways. This task will determine the methodology to be used.

In harmonisation or unification projects, in which many comparative lawyers are involved, the choice of systems will be pre-determined through political considerations. The comparative lawyer, here, presents the necessary changes to the legal systems or institutions which are to be harmonised, in order to smooth the process. Before an approximation is suggested, a thorough knowledge of the systems to be harmonised or unified is required. If the two or more systems, which are to be harmonised, are socio-culturally and/or legal-culturally diverse, then more problems are likely to be encountered. Another kind of comparative law methodology must be used in such projects.

In tracing relationships between – this work is usually carried out by legal historian comparatists – historically related systems, colonies, borrowers, recipients and systems related in any other way are studied vis-a-vis the institutions that have moved, in order to understand the changes that have taken place in the moving institution. Comparatists will seek explanations for the movement and the change for which both vertical and horizontal comparisons will be needed. The specific problems are a lack of appreciation of social history and anachronism. Here, the choice of the systems is pre-determined by history and the methodology to be used will be different from the other activities above.

For pure theoretical research, to enhance understanding of legal phenomena and create legal knowledge, the choice is open and extreme positions will be sought, as the more diverse the systems, the more intriguing the findings. Here the methodology used will differ again.

Today, most of the comparative law work is carried out at the level of micro-comparison. Within Europe, a large number of comparatists are involved in projects aimed at harmonisation of a number of fields of law by creating 'common cores', 'general principles' or the planning of 'European Codes'. It is widely accepted that at the level of such micro-comparison, the true basis of comparative law is 'functional equivalence'. For instance, the Commission on European Family Law (CEFL), working on harmonising a number of areas of family law such as divorce, maintenance, custody and parental responsibility, has adopted as its method the 'comparative research-based drafting of principles', having been inspired by the American Restatements, and seeks for 'functional equivalents'.[14] A team of specialists from twenty-six jurisdictions target legislators, who might be in the process of modernising their national family laws, with the hope to create a source of inspiration. In concert with this hope, both the 'common core' and the 'better law' approaches are adopted. They draft questionnaires employing the functional approach, draw up national reports reflecting both the law in the books and law in action, draft the Principles having chosen between the 'common core' and 'better law' approaches and then publish these Principles. The drafters choose 'the best', 'the more functional' and the 'most efficient' rules,

[14] *See* K. Boele-Woelki, *Comparative Research-Based Drafting of Principles of European Family Law*, *in* M. Faure, J. Smits & H. Schneider (Eds.), Towards a European Ius Commune in Legal Education and Research 183 (2002).

the touchstone being the modernisation of the law. The overall justification lies in the shared notions of human rights in Europe, with additional emphasis on 'increasing choice'. Thus the options are: the common core is found and selected as the best solution; the common core is found, but a better solution is selected; the common core is found, but the selection is left to national law; no common core is found and a 'best solution' is selected, and finally no common core is found and the solution is left to national law.

Two currents of functionalism are on offer: the 'functionalist method', one of the best-known working tools in traditional comparative law, and 'functionalism' in the sense that law responds to human needs and therefore all rules and institutions have the aim or function of answering those needs.[15]

The question to be answered by the functional-institutional approach is: 'Which institution in system B performs an equivalent function to the one under survey in system A?' From the answer to this question, the concept of 'functional equivalence' emerges. For example, if an institution called 'divorce' i.e. an institution that frees an individual from the bond of a marital relationship within which she or he does not want to stay, is under survey in system A, the comparative lawyer would be looking for an institution performing an equivalent function in system B. Thus, comparative lawyers seek for institutions performing the same role or solving the same problem, in other words, having 'functional comparability'. What is undertaken here is also the 'functional juxtaposition' of comparable solutions. Functional inquiry also corresponds to the utilitarian approach to comparative law.

The other side of the coin is the problem-solving approach. In this approach the question to be answered is: 'How is a specific social or legal problem, encountered both in society A and society B resolved?' that is, 'Which legal or other institutions are developed to cope with this problem?' For instance, how is the problem of looking after a wife, who would otherwise be destitute after the termination of marriage, resolved in society A and B? This problem may be tackled in various ways: by alimony, by state social security or by the family of the needy spouse. Springing from the same belief as the 'functionalist' approach, this approach also regards similar problems to have similar solutions across the legal systems, though reached through different routes. It is said that, 'the fact that the problem is one and the same warrants the comparability'.[16]

According to the functionalist-institutionalist approach, the above questions, once answered, are translated into functional questions. In sum, the underlying assumptions in both the questions are that there are shared problems or needs in all the societies, that they are met somewhere in each society and that the means of solving these problems may be different in different societies but are comparable as their functions are equivalent. One starts with a social problem or a need in one society, discovers the institution that deals with it and then looks for other institutions (legal or otherwise) in other societies which are functionally

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[15] M. Graziadei, *The Functionalist Heritage*, Chapter 5 *in* P. Legrand & R. Munday (Eds.), Comparative Legal Studies: Traditions and Transitions 100-127 (2003).

[16] M. Schmitthoff, *The Science of Comparative Law*, 7 The Cambridge Law Journal 94-110 (1939).

equivalent i-e which deal with the same problem or need. Or one starts with an institution in one society and asks 'What is the purpose or function of this institution in this society?' Having ascertained that, one looks for a functionally equivalent institution in the second and then, if so wished, in a third society.

The issue can be put in another way: the approach should be factual. The factual approach tells us that similarity of factual needs – the problem – met by different legal systems makes those legal systems comparable. It is said that to be meaningfully comparable, institutions should be solving the same factual problem.[17] For instance, the Trento Project, which seeks to broaden the scope of the Cornell Project[18] beyond contract law, has put the emphasis on contract, property and tort with a number of sub-topics, such as commercial trusts, mistake and fraud in contract law, security rights in moveable property, pure economic loss, enforceability of promises, good faith, and strict liability in tort law. This Project relies on the factual approach, that is, fact-based in-depth research methodology, presenting a number of cases, fifteen to thirty to date, to national reporters and asking for solutions offered by their legal systems.[19]

Another version of this approach is the universalist approach to human needs. This approach expresses the belief that social problems are universal and laws respond to these needs in various ways but the end results are comparable. Here, comparability benefits from the findings of similarity as it can then develop further on '*praesumptio similitudinis*', the starting point being a 'concrete problem' and the focus being on the same facts.

In the 'factual approach' therefore, if facts are not the same there is no comparability. In the 'universalist approach', the similarity of the solutions is paramount. If this is not the case, there would be no place for comparisons. This is the reason why, until recently, certain areas such as family law, where moral and religious values are prominent, have been neglected.

An intriguing question can be whether a comparative lawyer could not, for example, compare a divorce case with an eviction case if the intention is to find out how courts deal with cases in general and develop an understanding of how long cases take in court or how judgements are written? Could one not compare, for instance, an English statute on taxation, town and country planning and matrimonial causes with three pieces of German legislation on entirely different topics, if trying to establish how such documents are prepared and how long or detailed they are, in order to develop an understanding of such a source of law? Such examples could be infinite.[20]

In addition, when institutional facts, encountered in one legal system, have no comparable counterpart in the other legal system, the functional approach may not be satisfactory. Would this mean, therefore, that comparisons must be carried out between legal systems of some similarity? If the countries under comparison have social orders that are entirely different to one another, then legal rules that regulate situations specific to only one of the societies must be separated from the

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17 K. Zweigert & H. Kötz, An Introduction to Comparative Law, 3rd ed., trans. T. Weir (1998).
18 Schlesinger , *supra* note 7.
19 Bussani, *supra* note 7 at 785.
20 *See also* M Bogdan, Comparative Law 58 (1994).

legal rules that regulate shared situations. According to this approach, those in the first category are not comparable, whereas those in the second are. If we are to accept this, it can be claimed that comparative lawyers can only work in systems that are in some way related. This unfortunately allocates to the comparative law researcher rather a limited role.

However, we know that the 'functionalist method' in any of its forms, is not the sole approach available to comparative law research, notwithstanding the fact that it has recently gained a special place in common core studies in Europe.[21]

Now, if 'law' only means a body of rules and comparison at the micro-level is directed at these rules, then the usefulness of the functional approach cannot be denied, since a body of rules is created for the purpose of solving human problems most of which are shared.[22] Thus for example, in the context of the European Union, where comparative law is a driving force with a decisive role in the harmonisation process, the 'functional comparative analysis method' shifts the focus from the 'vertical' to the 'horizontal' and provides the potential for convergence of both the legal systems and the legal methods of the member states. This process leads to gradual and eventual legal integration. Thus, to build on similarities may not be only decisive, but also desirable.

However, other approaches are required where the comparison is of 'different' and 'context'; the comparison must extend beyond functionally equivalent rules. For example, it has been accepted that the functional-institutional approach does not solve the issue of comparability as between a western legal system and a religious system or a developing legal system. Moreover, if there is a problem in one legal system with no counterpart in another, the functional approach faces another dilemma. There are yet other fundamental criticisms of this approach: the limitation of subject areas that can be compared and the fact that many areas of law are beyond the scope of comparison since they are regarded as 'not lending themselves to comparison', being determined by specific histories, mores, ethical values, political ideologies, cultural differences or religious beliefs. 'One institution or rule with many functions' is another problem.

It has been suggested recently that 'the post-modern critique of functionalism, coined as "better-solution-comparativism", is primarily directed against the implied or outspoken universalism of functionalism, its "agenda of sameness",' in order to yield results of similarity and avoid 'challenging questions about the role of law in society'.[23] These claims which are seen to be related to cultural 'framework-relativist' thinking, 'according to which legal thought, language and

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[21] Most of these projects are in a number of fields of private law and range from the Lando Commission on European Contract law that prepared the principles of European Contract Law; UNIDROIT on a very similar project, the Principles for International Commercial Contracts; Von Bar Study Group on the European Civil Code; Gandolfi's Code of Contract Law; Trento Common Core of European Private Law; Spier and Koziol group dealing with causation among other things; the *acquis communautaire* Group, the SECOLA, to the Commission on European Family Law.

[22] J. Husa, *Farewell to Functionalism or Methodological Tolerance?*, 67 Rabels Zeitschrift für auslandisches und internationales Privatrecht 446 (2003).

[23] Peters & Schwenke, *supra* note 11, at 827.

judgements are determined by greatly differing and ultimately irreconcilable frameworks', point to the fact that the functional approach underestimates differences.[24]

A comparative law researcher can cast her nets as wide as she may wish, to include the comparison of the 'ordinary', the 'extra-ordinary', the 'similar' and the 'different'. The basis from which she works is the assumption that 'everything is comparable'. Yet, the fact that any one thing can be compared with any other thing has not prevented comparative lawyers from discussing, though inconclusively, the concepts of 'comparability' and 'methodology'. The discussions start with the claim that 'things to be compared must be comparable', and revolve around the words, 'like' and 'similar'. 'Like must be compared with like' and '*similia similibus*', are two well-established maxims of comparative law. We must then ask the question: What is 'like' in law? How 'like' do things have to be to be 'comparable'? Further, what is meant by 'only comparables can be meaningfully compared' and by concepts such as 'reasonably comparable', 'sufficiently comparable' or 'fruitfully comparable'?

The assumption underlying the Paris Congress of 1900, which was seen as the starting point of methodological and scientific comparative law proper, might have been that only 'similar' things can be compared. However, this is not the approach that is taken today. For instance, would comparing diverse legal systems, legal institutions or legal rules and coming to the conclusion that they are not 'like', not be 'meaningful' or 'fruitful'?

The term *tertium comparationis* is widely used by comparative law scholars to indicate a common comparative denominator as the third unit besides the two legal *comparanda*, that is, the elements to be compared, the *comparatum* and the *comparandum*. Comparability is seen to be closely related to *tertium comparationis*. Depending on the presence of common elements that render judicial phenomena 'meaningfully comparable'; comparability is equated with *tertium comparationis*. Then it becomes axiomatic that the objects of comparison must have common characteristics that serve as the common denominator, the *tertium comparationis*. Can we answer the question, what should the comparative lawyer consider as *tertium comparationis*? The answer could be the 'common function' between institutions and rules, or the 'common goal' they are meant to achieve, or the 'problem', or the 'factual situation' they are created to solve or the 'solutions' offered. As we observe, this question does not have a conclusive answer either.

Another problem to consider is that at the level of macro-comparison, the issue of 'comparability' has been resolved by many comparative lawyers with the argument that the comparison must extend to the same evolutionary stage of different legal systems under comparison and that they should be at the same stage of development, whether, economic, social or legal. However, there is nothing in the logic of comparative inquiry, dictating that comparison be limited to any specific level or unit. Therefore, at the macro-level, 'comparability' may

[24] *Id.*, at 828. *See also* G. Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 Harv. Intern. LJ, 411-455 (1985).

be relative to the interests of the comparative lawyer. It is the aim of the specific comparative study that determines the choice of legal systems to be compared. Nor is there a necessity to carry out comparative research only in groups of legal systems with broadly shared attributes.

D. Methodological Blueprints

Let us now look at some methodological blueprints suggested by comparatists.

Reitz[25] for instance, offers the use of nine principles for carrying out comparative work: draw explicit comparison; concentrate on similarities and differences but in assessing the significance of the difference take into account functional equivalence; observe the distinctive characteristic of each individual legal system and also commonalities in dealing with the particular subject researched; push the analysis into broader levels of abstraction; give reasons and analyse the significance of similarities and differences; describe the normal conceptual world of the lawyers, look at all the sources and consider the gap between the law in the books and law in action; have linguistic skills and, if need be, anthropology skills in order to collect information (though a comparatist can also rely – if the two skills are lacking – on secondary literature); organise with emphasis on explicit comparison; and undertake research in the spirit of respect for the 'other'. The first principle considers the relation between comparative law and foreign law, principles two to five consider the basic techniques of comparing. Principles six to eight are specific guidelines that indicate the ninth as good practice.

I am an academic comparative lawyer and a generalist. I suggest, as a blueprint, the following steps to be followed in most academic comparative law research. Having decided on the scope of the comparison, the first step is choosing and identifying the concepts. These will serve as the units of inquiry and the containers of the data. Concepts, to become the units of a comparison, should be identified and defined. There should be extensive information, sufficiently precise to be meaningfully compared. Here, there may be problems such as concept construction and definition; level of abstraction and classification; languages of comparison and measurement; and problems of translation and cross-cultural terminology.

Conceptualisation, the first step, precedes description and comparison, identification, explanation, measurement and confirmation (theorising or theory-testing), which are the other steps or phases in a simple process of comparison. Conceptualisation is the recognition of the need for a level of abstraction of concepts. Choice of systems necessitates choice between an intra-cultural comparison (of legal systems rooted in similar cultural traditions and operating in similar socio-economic conditions) and cross-cultural comparison. Therefore, the classification of legal systems,[26] a problematic activity itself, constitutes an important aspect of comparative law and should be treated at the stage of

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[25] J. C. Reitz, *How to do Comparative Law?*, 46 American Journal of Comparative Law 617-636 (1998).

[26] *See* E. Örücü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, *in* M van

conceptualisation. If the choice is meso or micro-comparison, then the various characteristics of a legal system (the structure, the sources of law, judicial systems and the judiciary, the legal profession, and so on; the various branches of national laws; institutions and concepts including general principles of law; the historical development of legal systems) could be selected as topics.

This would be one type of methodology already discussed: the comparison of equivalent institutions and concepts. This approach assumes parallelism of social problems. We know that the search for equivalents (*similia similibus*) cannot be confined to institutions with similar or identical names, since terminology may offer no assistance. Functional equivalence comes to aid in such circumstances. In the conceptualisation process, a choice has to be made between different strategies of comparative inquiry: functional comparison, a structural comparison, an institutional comparison involving differential explanation in the later stages of the process or a psychological approach, behaviour oriented focus, area study approach, problem based orientation, 'most similar' or 'most different' approach, or multi-approach strategy.

Once the comparatist has chosen what to compare, has established, defined and classified the concepts - paying attention to translation and cross-culture problems - and chosen the relevant strategy and approach, she can move to the second phase in the process. This is the descriptive phase which may take the form of a description of the norm, concepts and institutions of the systems concerned. It may also consist of the examination of the socio-economic problems and the solutions provided by the systems in question. This is the stage of collection of data on the basis of carefully constructed classificatory schemes.

Observation is the first tool in this phase. This is the earliest type of 'comparative method'. However, problems of observer-effect,[27] difficulties of language and access and appreciation of cultural differences exist here. The second tool is sample survey. This standard tool for acquisition of cross-cultural data is flexible.

The third step is the identification phase. This phase is concerned with the identification or discernment of differences and similarities between the phenomena under comparison on the basis of collected and classified data. This can also be called the classification phase. Here content analysis is made, the result of the inferential form of measurement.

It is obvious that contrasting is the first task of comparing. Comparable concepts and rules are first to be described and then juxtaposed. The empirical school suggests that the appropriate method begins with the facts, 'the problem', rather than with hypotheses, and ends in description. Similarities and differences brought to light by this juxtaposing, contrasting and comparing are then identified. This is a down-to-earth approach, which the present day lawyer is well equipped

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Hoecke (Ed.), Epistemology and Methodology of Comparative Law 359-375 (2004). *See also* E. Örücü, The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century 133-149 (2004).

[27] 'Observer-effect', in the form of 'participant observer' or 'non-participant observer', brings the prejudices and attitudes of the comparatist into the comparison. Awareness of this problem is part of the solution.

to handle. A practising lawyer for instance, who is involved in identifying the difference and similarity between a domestic and a foreign rule may use this three step approach.

Yet comparative inquiry par excellence, should not end at description, but move on into explanation where the real comparison starts, and on into confirmation of findings. This gives rise to a need for hypotheses. For this reason, it has been said that the directly comparative phase of the methodology is the fourth, the explanatory phase.[28] In the explanatory phase, divergences and resemblances are accounted for. A comparatist's own outlook is important here. This outlook could be a jurisprudential outlook, sociologically or historically oriented or textually concentrated. For the explanation to be accurate a socio-cultural overview is essential. Comparison concentrated on textual or formal rules can give an incomplete or distorted picture. Also when one is engaged in meso or micro-comparison, the topic under comparison must be placed in the context of the entire legal system in the explanatory phase. This means that micro-comparison can only be completed within the framework of the whole system, that is, macro-comparison.

In this phase simulation can also be used. The main purpose of simulation is to understand interactions of the components of a system under different conditions or constraints, or of various systems under the same conditions and constraints. It is particularly useful in macro-level comparisons. The explanatory phase consists of formulation of interrelationships involving political, economic, cultural and other social phenomena as tentative hypotheses. As already stated, at this stage context is indispensable for understanding, and the help of historians, anthropologists, economists, or cognitive psychologists may be needed. However, it must never be forgotten that the creativity of the comparative lawyer cannot be replaced by any of those specialists.

Finally, one moves to the last stage, the confirmation of such hypotheses and cumulative 'acceptance' of various basic propositions. This is the theory-testing and the arrival at a set of final statements. The purpose of specific comparative analysis may be to test or suggest propositions which can be used by extension to explain all cases (if only on a probability basis) at a level of generality. Here, the presumption of similarity (*praesumptio similitudinis*) can be used as a means of testing the result, evaluating problems and practical solutions in more than one legal system.

In sum, a comparative lawyer must collect and describe data on the basis of carefully constructed classificatory schemes, discover and describe uniformities and differences on the basis of such data, formulate interrelationships between component elements of the process and other social phenomena as tentative hypotheses and subsequently verify the tentative hypotheses by rigorous empirical observation, and construct the cumulative 'acceptance' of various basic propositions.

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[28] J. H. Merryman, *Comparative Law and Scientific Explanation*, *in* J. N. Hazard & W. J. Wagner (Eds.), Law in the U.S.A. in Social and Technical Revolution 81-104 (1974); also in J. H. Merryman, The Loneliness of the Comparative Lawyer 478-502 (1999).

As to evaluation – which is not a step in my blueprint – it is only the purpose of the research that can determine the superior value of one solution rather than another, as the findings have to be pitched against what the researcher regards as the touchstone. For instance, is the comparatist looking for the most 'efficient' rule and therefore using the 'law and economics' approach as the touchstone, or is she looking for other values such as 'cheapness of procedure', 'speed of procedure', 'better protection of the victim', 'cost-effectiveness', 'user-friendliness' and so on? What is being looked for, will determine the evaluation of the solutions found. One could also re-visit the 'better-law' approach in this context. If evaluation was to be considered as a step,[29] then it should take its place after explanation, but before confirmation.

E. Limits of Comparativism

Comparativism has its limits. The first category of limits is related to the comparative lawyer herself and the second arises from extrinsic factors. There are a number of issues to look at in each category. Some of these issues are more important than others.[30] For instance, the limits of comparativism related to the comparative lawyer herself can be a possible lack of a deep level of knowledge of languages, pitfalls related to translation, especially translation of culture-specific concepts, and 'cultural deficit'.

In its extreme form, the so-called 'contrarian challenge', which advocates that the comparative lawyer should only be interested in difference,[31] assumes an epistemological pessimism that could even lead to a denial of comparativism as each culture is unique. In this extreme position, cultural differences might bar comparative law research altogether. Since any attempt at understanding the 'other' would only lead to misconceptions and misleading results, the 'other', the 'untranslatable', would always remain a mystery. In its more flexible form, however, comparative law does work but the comparative lawyer must only be interested in differences between systems and ignore the similarities. Thus, there is a natural link between the 'contrarian challenge' and the 'difference theory'. It has been suggested that one solution to this problem is 'cultural immersion'.[32] Another suggestion is to develop 'an organic method' to be used to contextualise objects of comparison.[33]

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[29] *See* D. Kokkini-Iatridou, *Some Methodological Aspects of Comparative Law*, 33 NILR 143-194 (1986).

[30] Örücü, The Enigma, *supra* note 26, at 161-170.

[31] P. Legrand, *How to Compare Now?*, 16 Legal Studies 232-242 (1996).

[32] V. G. Curran, *Cultural Immersion; Difference and Categories in US Comparative Law*, 46 American Journal of Comparative Law 43-92 (1998).

[33] *See* Palmer, *supra* note 10, at 5-11.

F. Concluding Remarks

It would be reductivist of one to say that 'comparison' itself is the method, since so many methodological options exist today. As Michele Graziadei notes, 'no one could have foreseen the plurality of methods which are currently being practised when comparative law was thought to be a method in itself'.[34] Most of these options are contextual approaches, such as analysis of existing rules and institutions in 'historic', 'cultural', 'economic' or 'political' terms. Some of these approaches are now dubbed 'post-modernist', intermingled with legal realism. Whereas the functional method was developed and adopted to do away with 'the local dimension' of rules by reducing them to their operative description 'freed from the context' of their own systems; contextual approaches specifically stress the 'local dimension'.

Since there is no single method or single perspective exclusive to comparative law, we cannot talk of one 'comparative law method' or 'comparative law methodology' or even one 'methodology of comparative law', but of 'methods employed in comparative law research'. Comparatists working in the area of legislative law reform, comparatists in the area of law application and academic comparatists have different goals. Therefore a single method for all would be unworkable. The very act of comparison is obviously a method, a method of analysing data for purposes of understanding and explaining. This is so, whether one regards comparative law as a method and technique in itself or as a social science. As demonstrated however, methodology is more than a simple decision 'to compare', although obviously, this is the starting point and the *raison d'être* of being a comparatist.

In any area of study, the application of the suitable method for a particular piece of research is the pre-requisite for success. In comparative law research it has an additional importance. Whether the specific comparative inquiry effectively serves the purpose or purposes that the comparatist has decided to emphasise, the accuracy and value of the results secured and the validity of conclusions drawn, will depend on the choice of the suitable method. Just think of the methodology employed by those involved in 'common core' projects or projects delivering general 'principles' in a specific area of law or a practicing lawyer making a case for his client which involves the application of foreign law. What could be the ultimate test in evaluating any method used? Does the technique employed, adequately and effectively, fulfil the object or objects of the comparatist? Does it, for example, promote the better understanding of one's own law, the formulation of reliable theories of law, the promotion of law reform, harmonisation or unification, or convincing a court to rely or not to rely on a foreign judgment? If the answer is negative, then the method used was either unsystematic or inadequate.

Practical orientation, dogmatic orientation, law and society orientation and creative comparative law have come to the foreground as a result of recent changes

[34] Graziadei, *supra* note 15, at 101. *See also* Husa, *supra* note 22, at 446.

in theoretical and methodological outlook and ways in which methodological questions are posed. All these orientations have different methodological consequences.

However, whichever approach is used, some problems inherent to comparative law will not go away. These can be summarised as typology of legal families versus legal culture/social culture; cross-cultural terminology and appreciation of cross-cultural concepts; the extent of knowledge needed to appreciate legal, political, social and cultural contexts; appreciation of differences; language and translation; limits of functional equivalence; the use and misuse of foreign models; assurance of access, and observer effect, that is, ourselves.