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1. Introduction: Comparative legal methodology in context

The first purpose of this book is to open up a reflection on legal methodology in relation to those of other (mostly, but not exclusively, social) sciences. Methodology, then, must be placed here in a wider epistemological context, looking towards the ways in which sociology, anthropology, history, economics, literature (and other disciplines) approach their own ways of producing knowledge. Such a perspective is not normally to be found in works on legal methods. The second purpose of this book is to use the insights of comparative legal studies in this connection. Comparison has an equally epistemological function in other disciplines closely related to culture, such as literature, linguistics or history, where it appears as a means of furthering knowledge. In the field of law, the ways in which one perceives and engages with foreign law – which in effect means entering into contact and conversation with an unfamiliar or indeed incomprehensible culture and mentality – raise some challenging issues. These are the combined effects of *comparison* as a debated epistemological approach, as applied to *law* along with its own set of distinctive, and equally controversial, methods.

1.1 OUTLINING THE CHALLENGES

In the past half-century, the social and human sciences have lived through various crises, ruptures and ‘turns’ which have contested notions of truth, objectivity, the transparency or neutrality of language, society, and indeed, the very idea of an epistemology and its underlying scientific or legalist model. As we moved into the ‘era of the post-’,¹ the legitimacy of traditionally foundational notions became increasingly challenged by critical, colonial, race or feminist studies, while more recently still, while the ‘post’ may now have come to refer to the later advent of ‘techno-feudalism’² and the looming horizon of climatic disaster (both possibly recomposing the current episteme), the very survival

¹ Xifaras (2016).

² Varoufakis (2023).

of established modern knowledge processes is called into question both by technological developments in artificial intelligence (AI) that affect the primacy of human reason, and by the existential need of humanity to develop a new 'down-to-Earth' regime of science and politics for the planetary commons or the Earth.³

Yet these tensions have remained by and large uncharted in the field of law. This is a scientific, political or ontological enigma in itself. In this respect, much may be due to legality's in-between status among various species of modern knowledge, stemming from its own long (dialectical?) historical trajectory, sometimes as a form of natural or social science, at others as a largely discursive practice within the sphere of the humanities.⁴ The elasticity of law can be seen either as a weakness in respect of other more recent, scientific disciplines, seemingly more attuned to the needs of contemporary societies, or on the contrary as a strength in its ability to doubt, navigate and adapt to the increasing complexity and acceleration of a changing (cultural and natural) world. Is legal normativity as we know it losing relevance because it is too slow or overly attuned to the past, or can such qualities be seen, on the contrary, as a sign of 'resilience'?

While such philosophical puzzles are far beyond the confines of this book, they are related nevertheless in various ways to the question of comparative method. This is because, as this book is designed to show, legal comparison requires an interdisciplinary perspective and must be sensitive to broader concerns affecting other areas of knowledge. At the same time, this interaction is not one-way. Comparative law has insights for other disciplines that also appeal to comparative knowledge. Thus, in order to prepare the terrain for our reflection on comparative legal methodology, several very brief clarifications are called for. These points explain the general structure (plan) of this work and the choice of focus for each of its chapters.

1.2 PRELIMINARY CLARIFICATIONS

Regarding preliminary clarifications, the first point is that 'comparative law' – or according to a more meaningful expression linked to the turn to 'studies' within the humanities, 'comparative legal studies' (to which terminology we return below) - is *an angle of inquiry* involving different legal traditions, with a specifically epistemological (furthering knowledge) aim. As will be seen, it may engage with law on many registers (literal content, meaning, functions, structures, concepts, histories, language, symbolic significance, cultural

³ Latour (2017).

⁴ See, for example, Kelley (1990).

context and more), but it is not an area or ‘branch’ of positive law (as are tax law, private law, international law and the like) that can be recognised as such as a matter of professional practice. Any given sub-field may subscribe to an overarching or specific toolbox of legal methods, but these are not the object of our reflection here. Nor do we consider the ways in which courts or law-makers more generally gain access to and understand ‘foreign law’, whether in deciding specific cross-border cases (as in the conflict of laws), or in initiating legislative reforms (as in policy expertise). True, much comparative law has been about obtaining information on a variety of legal systems or various components thereof. While this may have its practical uses when such information is considered in its context, the focus here is on knowledge as opposed to the collection of judicial or legislative data. We reflect below on various modes of engagement with the act of comparing different legal phenomena – which raises the further question of what we understand as legality in this process, and how we should understand difference.

Secondly, the methodologies explored here are not to be understood in the usual rather narrow sense that draws only on literature from within the discipline of law (internal legal perspective). The latter tends to turn upon modes of reasoning deemed by law itself at a given point and in a given context to provide the appropriate framing of its own ‘operations’ and thereby to engage, ultimately, with what it perceives as its external reality (facts, society...).⁵ The most traditional examples of these modes are often expressed as choices between oppositional pairs (induction v deduction in relating law to fact; formalist v consequentialist textual interpretation; codification v judge-made law as mandated by conceptions of the separation of powers, etc). Our more extended exploration will borrow from sociology, anthropology, history, economics, fiction, art, and film studies, linguistics and other disciplines increasingly reassembled today as the ‘political humanities’ (in which law is also, sometimes, now included). This broadened scope of inquiry may not come as a surprise within comparative legal scholarship as reshaped fairly recently, notably through insights from critical theory and cultural studies. However, it does call for reflection on what it is that justifies such inroads into other areas of knowledge in the course of comparison, and on whether law can still assert an epistemological autonomy in respect of these other disciplines.

Thirdly, therefore, an important part of this interdisciplinary encounter will be an exploration of the modes of access to knowledge, understanding, reasoning and veridiction that are specific to law (and its specific operations or modes of accessing reality). But this raises a further set of issues. How (if at all) do

⁵ Or so it is thought, or judicially decided, that law so deems: see Teubner (1988).

legal methodologies differ from those to be found in philosophy, anthropology, politics or indeed more specifically on other registers (such as religion or ethics) we identify as normative? Why indeed does law appear so frequently to be immune to, or indeed lag behind, the various critical ‘turns’ that stir so many other fields? To what extent, conversely, have other areas of knowledge built upon epistemological contributions from legal thought and practice?

Fourthly, it is difficult, as already suggested above, to inquire into comparative legal methodology without a prior investigation of law’s methods in general, and indeed what we mean by legality itself. At this stage a radical paradox appears. If the frontiers of law are linked in some way to the methodologies it deploys, then comparative legal studies as a discipline presuppose that certain modes of knowledge or reasoning can be identified as legal and subjected to comparison. Yet surely one of the very points of the latter is to aid in this identification, including beyond the consensual confines of the modern Western tradition, to include radically different epistemologies or ontologies? The comparatist may therefore have to deal with the fluid or elusive identity of the very object under investigation.

A fifth observation, connected to the previous concern, is that as a matter both of internal analysis within legal thought and as viewed from an external perspective of other disciplines, the importance of Roman law, with its structures and taxonomies, in modern thought (whether in law or in other fields of knowledge) is often largely overlooked. Over time, the Romans invented law (*ius*) as a ‘specific mode of prescriptivity’ in response to a need for social stability.⁶ This is why we will make extensive use of Roman law sources – not to support the claim (much favoured in the millennium debate about the need for a common civil code for Europe) that current national legal systems in Europe are in any way reincarnations of a *ius commune*, but to draw attention to the history of the various epistemological models and schemes that modern law continues to deploy.⁷

Lastly, as may therefore be apparent, the starting point here is not to take for granted the various classificatory enterprises of the world’s legal systems which have featured prominently in much comparative work in law – and which mostly assume the continuing centrality of the grand historical civil law/common law divide. Very deliberately, the standard debates in comparative law are *not* the focus of this book.⁸ Indeed, if the very question of compar-

⁶ Schiavone (2008), (2017).

⁷ See further Jones (1940).

⁸ Nor indeed are standard debates in legal theory (positivism v natural law, realist theories v formalist theories and so on). Legal theory is of course always there in the background, but the approach in this book is – if the word ‘theory’ is to be used – more on ‘secondary theories’ (see Cauquelin (2010)), that is those

ative methodology is important, it is precisely because none of the supposedly scientific categorisations traditionally used can possibly be said to be natural, neutral, or innocent of ideological premises. This assertion would hardly be controversial in many other disciplinary fields. However, as will become apparent, legal scholarship remains by and large aloof from debates that are reshaping other fields of knowledge. Yet, paying further attention to interdisciplinary insights has potentially significant consequences for legal reasoning in general. Singularly, of course, it also reflects back on ways of engaging with specific epistemological challenges, controversies and political debates in legal comparison, which are both the entry and end point of the developments that follow.

1.3 PLAN OF THE WORK

This book is divided into two unequal Parts. Part I presents an overview of comparative legal methodology and its contemporary challenges. This is a lawyer's bird's-eye perspective as to 'the state of the art'.

As a threshold matter, Chapter 2 will outline some of the crucial epistemological puzzles faced by comparative law as a discipline. Various new contexts and turns in other fields of knowledge stem from increasing critique of the theoretical foundations of modern thought and might seem of necessity to enlarge and enrich the grammar of comparative legal studies; yet this has rarely been the case. This is why Chapter 3 will attempt to identify and clarify some of the conceptual language developed within the social sciences and the humanities, and which is now of potential relevance within the field of law. Here, we will indicate what is meant by various epistemological terms, among which the 'schemes of intelligibility' that will be developed in the second Part of the book. Chapters 4 and 5 address the notion of 'model' in similar terms and provide a repertory of the main examples of the models to be found in legal reasoning. Here ends the basic cartography of legal method.

Part II envisages comparative legal methodology from a quite different perspective, external to the law. The general framework is provided by the epistemological schemes of intelligibility familiar today in the (social and natural) sciences (functionalist, causal, structuralist...) and the humanities (hermeneutical, dialectical, actional, ontological...). It will be seen in the course of these chapters that all these schemes tend to cross disciplinary boundaries. Law's own in-between location within this great division of knowledge means that it borrows from, or contributes to, each one. These insights will help locate its

concerning how one engages with law. These secondary theories are, in this book, regarded more as methods or schemes of intelligibility than theories.

specific set of methodological models within these broad schemes and suggest ways in which they may intervene in the exercise of legal comparison.

Chapter 6 will examine the causal scheme that still dominates in the natural sciences despite a number of challenges and controversies. It has gained considerable traction in the social sciences, including in the ways in which the latter view the law. Law's own rule model gives credence to this vision, through the widespread representation of the syllogism as a deductive or cause-effect operation (particularly in civilian legal systems), but unexpected support for a causal vision of social phenomena has come in turn, from comparative law, in subscribing to the idea that there is a relationship of cause and effect between legal tradition and economic efficiency.

Chapter 7 addresses the functional scheme, which is central in the social sciences. It has entered various spheres of legal reasoning and theory through this channel, notably (once again) under the influence of economics. It has pride of place, however, in comparative law, where it has become the dominant approach. From this angle, it is argued that all societies are confronted with a series of common problems, to which law provides an answer through a variety of institutions that can therefore be considered as commensurable, beyond differences in form, context and means. But, this is not unproblematic to the extent that it tends to minimise the importance of culture and is challenged radically on these grounds today by a hermeneutical scheme (below).

Chapter 8 will turn to structuralism, which is arguably the most important epistemological framework in the natural, social and human sciences. While this scheme of engagement is to be traced to cultural anthropology ('the mother of all comparison'), it is paradoxically overlooked by comparative lawyers – and yet it has a significant if unconscious place in comparative legal thinking. Moreover, structural linguistics have provided important insights on modes of reasoning in law, implying, however, that the linkage of language and law involves in turn considerable cultural variations within the latter. At the same time, the evolution of structuralist theory within the human and social sciences and the shift (rupture or evolution?) to post-structuralism affects this particular framework, with ripples that carry over into comparative law

Chapter 9 will follow with a discussion of hermeneutics, which draws on the methodologies usually associated with the human rather than the social sciences. While the age of legal humanism seems long past, hermeneutics are now the main challenger in comparative law to the dominant functional method. This hermeneutical shift has equally resulted in a reorientation from a naturalist or scientific paradigm (in which positivism was nurtured) to a specifically cultural one, relinking the law to the arts. This makes way for the linguistic turn, also associated with post-structuralism and cultural studies, in which the universe(s) of legal norms occupy a significant place. This change in the orientation of legal comparison is highly significant today in view of the

debates that pit universalism against cultural relativism, particularly if the idea of legal culture is allowed to extend to non-modern or ('non-exotic') cosmologies or worldviews.

The focus of Chapter 10 will examine the dialectical scheme, a methodology that has a long history as a method developed in particular by Roman and medieval jurists, and as a philosophy. While it might seem surprising to take a step back at this point to the very origins of the modern legal tradition, the interest of this particular scheme is not 'merely' historical. The constant oscillation of legal argument between opposing poles is emblematic of law's specific mode of existence or ontology, and moreover provides significant insights into the place and legitimacy of law within a democratic system. Borrowing from ideas that first surfaced in literary studies before spreading to the broader humanities, it opens up space in comparative legal studies for a dialectical approach to intertextuality.

Chapter 11 will engage with the actionalist or interactional scheme, of which the central axis is the human being and his or her actions. This has generated an approach in sociology known as methodological individualism. The contemporary political-economic implications of this particular model are linked to the spread of neoliberalism and further engage the problem of agency in the anthropocene – in other words the paralysis of public or collective action by legal means. A countermove has come from actor-network theory, which goes beyond the political economy to overturn the foundational premises of modernity itself. Law is deeply though often invisibly involved in both of these approaches.

This brings us to our brief, open conclusions, in Chapter 12, which is devoted to ontologies. They lead us from Roman law, once more, to the fundamental assumptions of 'what exists' underlying different methodological approaches. We see how various fields of knowledge – emblematically law – construct reality in certain ways. In other words, what is generally understood as 'merely' methodological may well embody or embed a particular vision of our normative world.⁹ Aided today by the ontological turn in anthropology, this approach enriches comparative law as a means of understanding our complex and sometimes barbaric world. Given the limits (affordances!) of a simple Introduction,

⁹ Legal philosophy is beyond the remit of this book, but these epistemological questions have evident legal-philosophical overtones. For instance, 'natural law' theories come with various ways of engaging with legal knowledge (say, as divine reason, or transcendent rights, enshrined in the law and mandating various modes of legal interpretation), so that the underlying philosophy is actually, as it were, engrammed in the methodological model.

we have to conclude at this point, stressing the importance for comparative lawyers of methodological pluralism.¹⁰

Here then is the gist. There is no one method, scheme, programme, theory, or philosophy which a researcher *ought* to employ. Much depends on the research question being pursued, since different methodological approaches generate different knowledge outcomes. This insight, which may be evident in the context of the empirical sciences, is very often ignored in legal – and comparative legal – studies. Yet it is of crucial importance today, when the collaborative production of knowledge across the whole intellectual board, including the law, requires a radical revisiting: in what Isabelle Stengers has named ‘our catastrophic times’, we need correlatively to resist ‘the coming barbarism’.¹¹ Here, comparative law makes us aware that we have reached the ultimate limits of what we understand today as law in the modern Western legal tradition.

1.4 TRIGGER WARNING

As should be evident now, in the chapters that follow there will be many references to work beyond the discipline of law. This implies that (comparative) lawyers, if they are to have a solid foundation in methodology and epistemology, will need to be familiar with work in the social and human sciences, if not also in the natural sciences. Such an expectation has attracted criticism. One French comparatist has posited that ‘it is impossible to be both a comparatist and a good French lawyer’, for ‘it seems not only unrealistic but also counterproductive to insist that French comparatists become interdisciplinary specialists or social scientists’.¹² True, certainly.

However, it must be kept in mind that, in the context of applications for major research grants in law, the assessing panels will often comprise social and human science experts from various countries.¹³ Sociologists, anthropologists,

¹⁰ See also Scarciglia (2023).

¹¹ Stengers (2015).

¹² Fauvarque-Cosson (2019), at 50.

¹³ Certainly in the United Kingdom, many of the grant-awarding bodies will have social scientists and humanities specialists on their assessment panels and in recent years have not looked favourably on purely doctrinal work such as law textbooks. In the EU, the composition of ERC panels has, likewise, a distinctly interdisciplinary, empirical and non-doctrinal flavour. Whether the assessment model and parameters really always favour cutting-edge research projects is another, controversial, matter. However, certainly, simply writing one sentence asserting that the researcher will use the ‘comparative’ or the ‘dogmatic’ method – in which the researcher will be on a quest, say, for ‘better solutions’ – will, in all likelihood, be treated with derision.

economists and the like will expect the methodology section in the application file to consist of a good many paragraphs indicating a sophisticated knowledge of methodology in the social sciences, in addition to insights pertaining to various cultural traditions. Does this mean that comparative law is now becoming too difficult for many lawyers? Well, as one leading comparatist once observed, ‘who said comparative law was easy?’ It is not easy, and that is the challenge. Indeed, Pierre Legrand, referencing Samuel Beckett, says that the best that one can hope for is ‘to fail better’. One cannot ever really ‘know’ the ‘other’ because one is trapped within one’s own culture and legal mentality.¹⁴ But, as Legrand also says, ‘Beckett teaches one that although one must resign oneself to one’s cognitive limits, one’s resignation cannot take the form of an abdication.’¹⁵

Moreover, it is not just lawyers and jurists who find themselves in this ‘failing better’ position. As Michael Richardson writes in his book on ‘otherness’ in Hollywood cinema:

Who or what is the ‘Other’? Any answer to this question needs first to determine the position of the ‘Self’ in relation to it. The self is always implicated in the other and indeed it may be said that the *I* can never know the *Other* precisely because it is nothing but a projection of the self. It is, in fact, an essential element of self-awareness: there can be no Self without an ‘Other’ against which to measure itself.¹⁶

Indeed, cinema also provides us with just such an analogy about the ‘self’ and the ‘other’. In the film *Out of the Past* (1947) the *femme fatale* (Jane Greer) says to her past private eye lover (Robert Mitchum) that she never told him anything other than what she was. ‘You just wanted’, she continued, ‘to imagine who I was’. This illustration from film studies shows how the self had projected itself on to the other. However unlikely or unfamiliar a source when thinking about methods of production of legal knowledge, it suggests that other disciplines have things to say that are directly relevant to legal epistemology. This means that comparative lawyers are not, then, isolated, with only other lawyers as company. The primary aim of this book is to draw attention to the broader epistemic community of comparatists in general, in which they need to occupy their place. But we also emphasise the fruitlessness for all lawyers of engaging in comparative and interdisciplinary work.

¹⁴ Legrand (2022), at 1–46.

¹⁵ *Ibid.*, at 36.

¹⁶ Richardson (2010), at 12.