

## Chapter 3

### The Comparative Method in Legal Research: The Art of Justifying Choices

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*The [comparative] method is not complicated. In fact, it is so simple that I have for long hesitated to dignify it with the term 'method'*<sup>1</sup>

#### **I – Introduction**

Comparative law is a thriving area in the study of the law which has attracted, in the last decades, a growing interest in legal scholarship and legal education.<sup>2</sup> The expanding literature published in quality specialised outlets as well as a steadfast number of research events organised by universities, research institutes and other numerous organisations all attest the phenomenon.<sup>3</sup> It is difficult to find an academic law curriculum which does not comprise a course in comparative law in some form, whether as an introductory course in the first years of study, or as a more

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<sup>1</sup> JC Reitz, 'How to Do Comparative Law?' (1996) 46 *American Journal of Comparative Law* 617, 635.

<sup>2</sup> The statement is not new. See, for example, WJ Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly* 485; E Öricü, 'Developing Comparative Law' in E Öricü and D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 43. For a selection of works on comparative law (excluding works specifically on methodology), see, among others, K Zweigert and H Kötz, *An Introduction to Comparative Law* (OUP 1998); M Reimann and R Zimmermann, *The Oxford Handbook of Comparative Law* (OUP 2006); E Öricü and D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007); J Smits, *Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar 2012); M Adams and J Bomhoff, *Practice and Theory in Comparative Law* (CUP 2014); M Siems, *Comparative Law* (CUP 2014).

<sup>3</sup> Two of the most prominent (i.e. high impact factor) law journals, namely the *American Journal of Comparative Law* and the *International and Comparative Law Quarterly*, contain 'comparative' in their title. The most prominent and oldest organisation dealing with comparative law is the International Academy of Comparative Law founded after the First World War and whose aim is the comparative study of legal systems. At European level, prestigious research centres such as the Max Plank Institute for Comparative and International Private Law in Hamburg, and the Max Plank Institute for Comparative Public Law and International Law in Heidelberg, are good examples. At national level, organisations such as the Society of Legal Scholars (within the UK and Ireland) and its comparative law section, and the domestically-based Irish Society of Comparative Law, promote events and research in comparative law.

substantial course at a later stage. A comparative perspective may also be embedded, in a more or less systematic way, in the study of the different subjects of law (i.e. contract law, commercial law, constitutional law, family law, procedural law...). Comparative legal studies are also increasingly being pursued at doctoral level. In a sense, 'we are all comparatists now',<sup>4</sup> or bound to be.

There are various reasons why a legal scholar might want to undertake a research project in comparative law. One of these reasons could be that the scholar wishes 'to give an edge' to her research. It is often the case that a research topic not strictly on international law or European law would include a comparative law dimension.<sup>5</sup> This is a valid reason on the face of it. Because the discipline of law is becoming more cosmopolitan in a so-called 'globalised' environment, discarding an external outlook in a doctoral thesis would be perceived as fairly short-sighted and would deprive the work of a more ambitious relevance. As a matter of fact, resorting to comparative law constitutes a strategic choice made by the researcher. Doctoral students have to be strategic in their choices (of topic, supervisors etc.) and now almost all doctoral programmes include a research plan as well as a professional career development plan in an effort to rationalise the whole PhD experience which outcome is geared towards the employability of the graduate student whether in academia or outside of it. The choice of comparative legal studies is itself being dictated by a combination of both the researcher's own interest in the area and her long-term professional plan. The researcher's own interest might be triggered, for example, by an in-country experience as an international exchange student, making her want to retain a connection with the foreign legal system. As a professional, the researcher might wish to pursue

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<sup>4</sup> W Twining, 'Globalisation and Comparative Law' in Özüncü and Nelken (n 2) 84. For a more nuanced view, see Wilson, for whom '(...) comparative law has, more often than not, been seen as an extension of the study of national law' and '[l]ooking at law from a comparative point of view (...) still remains a specialism (...) [and] [i]t cannot yet be said that it has become part and parcel of the orientation of law students or legal scholars, let alone legal practitioners'. See G Wilson 'Comparative Legal Scholarship' in M McConville and W Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 87, 101.

<sup>5</sup> Although this observation is not scientifically or statistically proven here.

comparative law in an academic career or in a non-academic setting such as, for example, in the context of a domestic law reform commission post, or in a job in an international or European organisation,<sup>6</sup> or in international law firm requiring technical competences in another legal system. Besides these deliberate reasons, it must be said that resorting to comparative law brings one of the most intellectually challenging experiences in the study of the law. This is due not only to the ‘de-parochialising role’<sup>7</sup> of comparative law but also to the imperative for the researcher to reach a high level of abstraction in order to attempt to make sense of the differences and similarities between the legal systems compared and map out solutions to the legal issue under examination.

One would expect that the prominence acquired by comparative law would be associated with the emergence of a solid standard method. That is not the case. Despite a more systematic literature discussing the challenges of an appropriate method in comparative research,<sup>8</sup> there is (still) no definition of what the method of comparative law is, let alone, to some extent, what comparative law is. As Kamba put it in 1974, ‘comparative law still lacks a clearly formulated and widely accepted theoretical framework within which specific comparative legal studies and research may be undertaken in a meaningful and effective manner’.<sup>9</sup> More than two decades after that statement, Zweigert and Kötz declared that there was ‘very little systematic writing about the method of comparative law’.<sup>10</sup> A few years later, Örüçü could still argue that ‘the basic problems have remained the same. There is no one definition of what comparative law and comparative

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<sup>6</sup> One can think, for instance, of the Research Unit of the European Court of Human Rights which conducts, although on a non-systematic basis, comparative research of the 47 legal systems of the Council of Europe, thereby assisting the Court in bringing more rigour to its comparative work, in relation to the consensus approach in particular. See S Flogaitis, T Swart, J Fraser, *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 93.

<sup>7</sup> Twining (n 4) 72.

<sup>8</sup> Two of the most recent works on the methodology of comparative law include P Giuseppe Monateri (ed), *Methods of Comparative Law* (Edward Elgar 2012), and G Samuel, *An Introduction to Comparative Law Theory and Method* (Hart 2014). See also M Van Hoecke, *Epistemology and Methodology of Comparative Law* (Hart 2004). Most comparatists nowadays include method as part of their scholarship.

<sup>9</sup> Kamba (n 2) 485.

<sup>10</sup> Zweigert and Kötz (n 2) 33.

method are'.<sup>11</sup> It is not a coincidence then that, in the most recent and exhaustive attempt to shed light on the issue, Samuel does not purport to provide a definitive theory on method, but rather outlines a 'methodological road map' for the research student in comparative law.<sup>12</sup> Like as in any other area of law, the issue of method is crucial. And because every legal scholar—as all other lawyers, whether practising lawyers, judges or legislators—will be confronted with foreign legal material, one must be equipped with the basics in this respect. Since the comparative method does not rest on an agreed framework, it is open-ended and will necessarily be 'dictated by the strategy of the comparative lawyer'.<sup>13</sup> This element of strategy is the core of the argument here: the method used by the researcher will be valid only in so far as it is organised and explained. In other words, the researcher in comparative law, while going through the different stages of the comparative analysis, has to set her own parameters of research within the theoretical framework provided in the comparative law literature and has to justify the direction she chooses to give as regards her methodological choices. In short, the researcher has to master the art of justifying her choices about why and how she uses comparative law.

The aim of this chapter is not to propose a comprehensive theory on the comparative method (which will require a more extensive study), nor to offer *the* definitive method for comparative legal research (which, as seen above, is impossible and, in any case, objectionable). Rather I aim to provide a critical explanation of the main conceptual tools on how the issue of method in comparative law has been approached by bringing to the fore the justificatory argument thereby assisting the researcher in refining her own approach. The first part outlines what I call the 'theoretical core' of comparative law, which refers to the meaning and purposes (or functions) of comparative law to the extent that these inform methodological issues. The second part

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<sup>11</sup> Öricü (n 2) 43.

<sup>12</sup> Samuel, 'Concluding Remarks: A Methodological Road Map?' in Samuel (n 8) 173ff.

<sup>13</sup> Öricü (n 2) 48.

examines the method *per se* and aims at deconstructing the different stages of the process of comparison.

## **II - Theoretical Core of Comparative Law: Meaning and Purpose**

Embarking on a comparative legal project implies addressing a number of questions, namely the ‘WH questions’: What does comparative law mean? Why does one undertake it? How can one carry out a valuable and effective comparison? These questions have been the subject of numerous theoretical expositions about the interrelationship between the meaning, purpose and method of comparative law. These expositions have generated what I term a ‘theoretical core’ about comparative law, that is, a body of theoretical knowledge that can be taught and learned about comparative law.<sup>14</sup> The object of the following developments is to provide a concise account of the meaning and purpose of comparative law, before explaining what is envisaged as its method.

### *A. Meaning of comparative law*

Simply stated, comparative law means the application of the comparative technique to the field of law. However, the definition is not as straightforward as it seems, since it requires addressing a set of subsequent questions, such as, what is understood by law? what is comparison? and indeed, is comparative law reducible to a technique?<sup>15</sup> This has entailed an interesting epistemological debate around the issue of whether comparative law is simply a process to be

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<sup>14</sup> In addition to the examination of these questions, the theoretical core arguably includes the corpus of knowledge about legal families and the one relating to the historical development of comparative law.

<sup>15</sup> Even the name ‘comparative law’ is not uncontroversial. Some other expressions have been used as better reflecting what comparative law actually is, such as the ‘comparative study of law’ or ‘comparative legal study and research’ (Kamba (n 2) 487), or ‘comparative analysis of law’ or ‘comparative legal studies’ (Örücü (n 2) 46-47).

applied to the discipline of law, or a distinct branch with its own knowledge content and purpose—in other words, whether comparative law is a legal method or a legal science in its own right.

*i. Method or science?*

The understanding of comparative law as a science dates back to the formative stage, when early 20th century scholars would argue that the object of comparative law was the ‘discovery of concepts and principles common to all “civilised” systems of law, that is to say, universal concepts and principles which constitute what [could be] called *droit idéal relatif* or an ideal relative law. At the time, for the proponents of such a meaning, the object of comparative law had ‘a purely scientific object’, which was to explain the ‘causes which underlie the origin, development and extinction of legal institutions’.<sup>16</sup> Comparative law would then be regarded as detached from the different branches of law to constitute its own branch of legal scholarship and appear as ‘a science of knowledge with its own separate sphere; an independent science, producing theoretical distillate’.<sup>17</sup>

However, this has long been questioned, with one of the main reasons being that comparative law has no defined subject matter and does not produce any rules or principles of law—even if it is correct to assume that using comparative law may assist in drafting or changing rules in national, European or international law. Comparative law is not a legal system or a set of norms applicable in a particular field or territory. Some voices have insisted that the subject of comparative law would be better off in finding its audience by ‘penetrating other subjects of law

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<sup>16</sup> Kamba (n 2) 488.

<sup>17</sup> Örüçü (n 2) 44.

than [by] trying to assert its own continued independence'.<sup>18</sup> Today, it is generally agreed that comparative law is actually a method and dissenting 'voices questioning the fashioning of comparative law as method remain largely marginal'.<sup>19</sup>

*ii. Method and knowledge progression*

There is more to comparative law than the mere application of a technique though. Comparative law is an ambitious intellectual activity which has law as its object and comparison as its process.<sup>20</sup> Deconstructing the approach proposed by Samuel—that of 'a process in which the comparatist takes several objects in order to study them within a "scientific" framework in which the object (...) being studied is viewed in terms of the "other" [and] it is the contrast between the domestic and the "other" that generates knowledge progression'<sup>21</sup>—one can see the key correlation between method and knowledge progression. Comparative law is not simply acquiring knowledge of another legal system; it is not 'an introduction to French, English, German, Chinese or whatever law'.<sup>22</sup> It is not either applying a comparative dimension via another research method in law. According to Samuel, it is 'not a particular form of legal history, or legal philosophy or theory, or sociology of law', although it can be combined with the use of other research methods in law such as the historical method or the socio-legal method, for example.<sup>23</sup> As 'a method of looking at law',<sup>24</sup> comparative law aims at reaching 'higher grounds' in the sense that it is not limited to the understanding of another legal system, and the better understanding of the researcher's own legal system. It also aims at understanding the discipline

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<sup>18</sup> B Markesinis, 'Comparative Law: A Subject in Search of an Audience' (1990) 53 *Modern Law Review* 1, 21. As Markesinis put it, 'the comparative method may have more of a future by penetrating other subjects than by trying to assert its own continued independence under the unconvincing title of comparative law'.

<sup>19</sup> See the positions of Pierre Legrand and Alan Watson cited in Simone Glanert, 'Method?' in Monateri (n 8) 63.

<sup>20</sup> Zweigert and Kötz cited in Örüçü (n 2) 44.

<sup>21</sup> Samuel (n 8) 11.

<sup>22</sup> *ibid* 10.

<sup>23</sup> *ibid*. See Chapters 4 and 5 of this collection for the historical method, and Chapter 7 for the socio-legal method.

<sup>24</sup> Örüçü (n 2) 46.

of law, not just in its technicalities, but also in its epistemological and ontological dimensions by critically reflecting on the origin, nature and limits of the law itself. In other words, the comparative enterprise aims at fulfilling ‘the essential task of furthering the universal knowledge and understanding of the phenomenon of law’.<sup>25</sup> The comparative method thus inscribes itself in a scientific framework aimed at knowledge progression. In that respect, several scholars have viewed comparative law as a stand-alone discipline, or as the ‘critical method of legal science’.<sup>26</sup> Because it is capable of generating its own knowledge about law, comparative law can acquire its substance and become ‘an elected field of research’, where the confrontation of the different tools and methodologies at use arguably results in the development of analytical thinking about the law, and ‘produce a growing body of critical understanding, a framework for thinkable thoughts and global strategies’.<sup>27</sup>

When one is clear that comparative law is an integrated intellectual process carrying its potentialities as regards the contours of the legal discipline, one has to ask herself why she is resorting to it and why is comparative law relevant to her project.

### *B. Purpose of comparative law*

Determining the purpose of one’s comparative legal project is key, since it largely dictates the method of comparison. The reasons for resorting to comparative law are diverse since these reasons very much depend on who undertakes the comparative legal research—whether a

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<sup>25</sup> Örüçü (n 2) 44; Samuel (n 8) 25.

<sup>26</sup> Örüçü (n 2) 44.

<sup>27</sup> Monateri (n 8) 3. See also, Picard, who claims that comparative law used to be only a method, but has now shaped into a proper area of law, capable of producing a coherent and autonomous body of norms with prescriptive effects; comparative law has thus acquired a substance which envisages law in its generality as detached from the traditional paradigms derived from positive state law. See E Picard, ‘La Comparaison en Droit Constitutionnel et en Droit Administratif: Du Droit Comparé comme Méthode au Droit Comparé comme Substance’ (2015) 2 *Revue Internationale de Droit Comparé* 317, 320.



scholar, a policy or law-maker, or a judge—arguably all animated by the common endeavour of making the law better.

*i. Diversity of purposes*

Comparatists have identified an array of purposes attributed to comparative law. For instance, for Örüçü, these objectives may range from ‘aiding law reform and policy development, providing a tool of research to reach a universal theory of law, giving a critical perspective to students and an aid to international law practice, facilitating international unification and harmonisation of laws, helping courts to fill gaps in the law and even working towards the furthering of world peace and tolerance’.<sup>28</sup> In short, these objectives can be of practical, sociological, political and pedagogical nature,<sup>29</sup> depending on the comparatist involved—for example, a policy-maker or legislator would pursue a practical and political objective geared towards law reform and policy development, while a legal academic would pursue a pedagogical objective aimed at providing students with a critical perspective on the domestic legal system by contrasting it with the foreign legal system. The legitimacy of comparative law can be controversial though, notably for its use by courts, including international courts, when they tend to use it as a source of persuasive authority to fill in the gaps in the law.<sup>30</sup>

Contemporary leading comparatists are of the view that comparative law cannot be restricted to practical objectives only. In that regard, comparative academic legal research has arguably a more open-ended objective and the legal scholar enjoys the enviable position of a comparatist who can

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<sup>28</sup> Örüçü (n 2) 44, 53-56.

<sup>29</sup> *ibid.*

<sup>30</sup> See M Andenas and D Fairgrieve, ‘Intent on Making Mischief: Seven Ways of Using Comparative Law’ in Monateri (n 8) 25, 26. See also the use of comparative law by the European Court of Human Rights to rule on the presence or absence of consensus on a particular matter, and as a source of information for European judges in the search for an appropriate answer to a given question. See K Dzehtsiarou, ‘Comparative Law in the Reasoning of the European Court of Human Rights’ (2010) 10 University College Dublin Law Review 109-40.

go about her research without being bound by an imperative of ‘result’ (i.e. a judgment, a policy, a law) to produce. However, this must be nuanced. Legal research projects, if meaningful, shall tend towards providing findings that can be used in policy-making and /or court (for example, the citation of a scholarly article in a judgment is a proof of academic excellence). Besides, the professionalisation of doctoral studies, especially if benefiting from generous public funding or from private sponsorship, implies a clearly articulated goal of the legal research project. The researcher will need to justify why she is resorting to the comparative law method. This can be explained plainly by stating that the initial hypothesis concerning a particular legal issue will be tested through the comparative method to achieve the expected outcome, and to advance knowledge on the particular legal issue. This can be done from a purely technical perspective (for example, in suggesting solutions to issues in international private law, or in transnational legal issues in general), or from a more policy-based and socially-based perspective (for example, in proposing normatively preferable best practices, theories or policy frameworks etc., with a view to promote legislation, or work towards a project of harmonization or unification of law).

To be sure—and in line with the idea of knowledge progression mentioned above—the confrontation of legal rules and institutions of one’s own legal system with external legal rules and institutions certainly increases ‘intellectual interaction and borrowings’,<sup>31</sup> hereby enhancing a capacity for self-reflection. The function of comparative law is then to develop a critical understanding in two respects: first, in respect of the legal systems compared—that is the foreign legal system(s) examined and the researcher’s own legal system—and secondly, in respect of the general knowledge of the law and the understanding of the law in context. As a matter of fact, some would argue that law is comparative by nature or, to say it differently, that the process of

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<sup>31</sup> B Markesinis, *The Coming Together of the Common Law and the Civil Law* (Hart 2000) 49.

comparison is ingrained in the discipline of law as per the statement by Sacco for who ‘comparison begins at home’.<sup>32</sup>

*ii. Improving the law*

Certainly comparative law, like any other method of legal research, aims to make suggestions on how the law can be improved. The overarching aim of a quest for ‘better law’ through the use of comparative law comprises different kinds of objectives as developed by Siems. First, comparative law may help improve law ‘technically’, which is typical of a ‘functional-technical perspective of comparative law’—that is when one looks at two or more legal systems presuming that the law would lead to a similar result, and chooses the best one (for example, the one which provides more legal certainty); secondly, comparative law may help improve a particular social problem or policy, which is typical of a ‘socio-legal functionalism’ approach to comparative law; thirdly, comparative law may act as a trigger for legal changes, such as ‘introducing a new social or economic policy or a re-balancing of group interests’, because the foreign law provides a better response to a particular evolution of society.<sup>33</sup>

However, the use of the comparative method in legal research must not transform itself into a systematic quest for *the* better law. The practical and intellectual benefits of resorting to comparative law would be negated if definitive cross-cultural statements were made about the

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<sup>32</sup> R Sacco, cited in Samuel (n 8) 20. From an historical point of view, Picard argues that modernity created the necessity to compare laws and legal systems; before then, law equated to justice and came into existence precisely by the confrontation of different legal sources necessarily entailing comparisons. Then, when modern states imposed positivism, law was identified formally by being posed by a sovereign authority; there was thus no need to compare to do justice; comparison was just necessary as a matter of curiosity, for knowledge acquisition, until it became relevant again in modern times. See Picard (n 27) 324.

<sup>33</sup> M Siems, ‘Bringing in Foreign Ideas: The Quest for “Better Law” in Implicit Comparative Law’ (2014) 9 Journal of Comparative Law 119, 120-24.

quality of legal rules; indeed, one has to resist the ‘fascination of ranking legal systems’.<sup>34</sup> Each law is deeply embedded in its historical, social, cultural and economic context, and there is no such thing as ‘the better law’. On the contrary, the task of the comparatist is to join forces with other disciplines (for example, economists) in order to cooperate and ‘verify the possibility of constructing a meaningful, universal benchmark exempted from partisan preconceptions’ about the law.<sup>35</sup> In short, comparative law demands an open and tolerant mind as the path towards a critical mind-set.<sup>36</sup>

### **III – Method of Comparative Law *Stricto Sensu*. Deconstructing the Comparative Analysis**

Since comparative law is, by nature, process-related, the question of method is clearly of importance. As Samuel puts it, ‘any project involving comparative legal studies is particularly method sensitive’ since ‘different methodological schemes can produce different forms of knowledge’.<sup>37</sup> Outlining a method is a prerequisite before embarking on any meaningful comparative legal research. However, one would be at pains to find prescriptive theories on the matter since ‘method remains woefully under-theorized’.<sup>38</sup> It is even the case that comparatists, whether in the private or public law field, are reluctant to promote any specific method and, as Glenn declares, ‘[t]here is no exclusive method and much to be said about the virtues, and

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<sup>34</sup> P Giuseppe Monateri, ‘Introduction’ in Monateri (n 8) 3. See the aberration of the World Bank’s ‘Doing Business’ report, which came to the conclusion that the common law-based systems were superior to the civil law-based systems. See B Fauvarque-Cosson and AJ Kerhuel, ‘Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law’ (2009) 57 *American Journal of Comparative Law* 811.

<sup>35</sup> Monateri (n 8) 3.

<sup>36</sup> See Örüçü (n 2) 54-55, where she argues that ‘comparative law serves the purpose of broadening the mind of the law student and helps in the development of tolerance’ and provides ‘the breadth necessary for the development of critical minds’. See also below about the interdisciplinary dimension of legal studies.

<sup>37</sup> Samuel (n 8) 28.

<sup>38</sup> Glanert (n 19) 63.

defects, of different methods'.<sup>39</sup> Each author (including this one), or group of authors in a number of edited collections, adds to the mix by exposing her or their view on method.

The aim then is not to propose an overall theory on the comparative method or to explain, once and for all, how comparative legal research ought to be carried out. Rather the aim is to provide suggestions on how to approach the issue which remains, after all, a matter of choice and strategy of the researcher. Indeed, the lack of consensus over method results in a kind of emancipatory latitude afforded to the researcher and I concur with Glanert who argues that comparatists should be allowed 'to reclaim an agential space as they assume responsibility for their own strategic decisions, instead of reflexively implementing a given methodological agenda'.<sup>40</sup>

#### A. *One's research, one's strategy, one's method*

In general terms, a method is a particular way or procedure for approaching or accomplishing something.<sup>41</sup> In comparative law, these two dimensions of 'approaching' and 'accomplishing' reflect the correlation between the issue of method, on the one hand, and the issue of determining meaning and purpose, on the other hand: a procedure for approaching comparative law necessarily reflects how one envisages comparative law (meaning); a procedure for accomplishing comparative law reflects the goal one wants to achieve by using comparative law (purpose).

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<sup>39</sup> Patrick Glenn, cited in Glanert (n 19) 62. See also Kamba (n 2) 511, who states that 'it is not possible, nor would it be prudent to attempt to prescribe specific comparative procedures to be followed. The most that one can do is to suggest some broad pointers towards a meaningful technique or techniques'.

<sup>40</sup> Glanert (n 19) 81.

<sup>41</sup> See 'Method', Oxford Dictionaries online <[www.oxforddictionaries.com/definition/english/method](http://www.oxforddictionaries.com/definition/english/method)> accessed 4 March 2016. Oxford English Dictionary online <[www.oed.com](http://www.oed.com)>.. Interestingly, the French definition given in the authoritative dictionary is much more encompassing and includes 'rationalised reasoning with a view to reach a truth (method as different from theory)'; 'a set of logically structured principles, rules and steps which aim to achieve an objective (for example, the scientific method); 'a way or procedure of conducting, in a reasoned manner, an activity or a task, and, by extension, the body of rules which allows for the training in this procedure'.

In my view, a method or methodology<sup>42</sup> in comparative legal research should aim at organising one's research, that is her approach in selecting material, and analysing and exposing her findings. In other words, the researcher has to ask herself what is the intellectual framework for the comparative exercise, and has to pitch the right level of intelligibility for such an exercise. This intellectual flexibility offered to the researcher is both exciting and puzzling.<sup>43</sup> The challenge then is: how much freedom does the comparatist allow herself and how does she deal with the number of practical challenges that will compound the research? The statement by Palmer about a 'sliding scale of methods' encapsulates what this is about. By advocating that comparative law should be accessible and flexible, Palmer warns of the necessity to customise one's research: '(...) there is a sliding scale of methods [as opposed to a one size fit for all method] and (...) the best approach will always be adapted in terms of specific purposes of the research, the subjective abilities of the researcher and the affordability of the costs'.<sup>44</sup>

### *B. Intellectual freedom*

The application of the comparative technique to the field of law by way of juxtaposing and contrasting the law—generally branches or aspects of it—of two or more legal systems<sup>45</sup> consists of a number of stages. There is no agreement in legal scholarship on the number of these stages. A spectrum of these—from a concise three-staged operation<sup>46</sup> to a detailed eight step

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<sup>42</sup> A methodology is an organised set or system of methods used in a particular area of study or activity. Comparatists often use methodology (or methodologies) when they refer to several methods developed in the field.

<sup>43</sup> See O Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 *Law Quarterly Review* 40, 41: 'On the professor of comparative law the Gods have bestowed the most dangerous of their gifts, the gift of freedom'.

<sup>44</sup> V Palmer, 'From Leretholi to Lando: Some Examples of Comparative Law Methodology' (2004) 4 *Global Jurist Frontiers* 1, 29. See also J Husa, 'About the Methodology of Comparative Law: Some Comments Concerning Wonderland' (2007) Maastricht Faculty of Law Working Paper 5/2007.

<sup>45</sup> Kamba (n 2) 486. See also, Samuel (n 8) 'What is "Comparison"?' 45ff.

<sup>46</sup> Kamba (n 2) 511-12.

process<sup>47</sup>—may assist in framing one’s intellectual framework. The first method suggested by Kamba reflects purely intellectual stages which might be conflated in the course of the comparative analysis. Initially, the descriptive phase aims at explaining the legal norms, concepts and institutions in the legal systems compared, and can extend to explaining the socio-economic problems and the legal solutions provided by these systems; then, the second stage seeks to identify the similarities and differences between the legal systems compared; lastly, the explanatory phase aims at providing an account for these similarities and differences, and allows to test the researcher’s hypothesis.

The other method suggested by de Cruz is a more detailed ‘notice of use’ containing both intellectual and practical steps. The following paragraphs propose a number of steps inspired by de Cruz’s method of comparison.

1. The first step is the identification and the preliminary phrasing of *the problem*, that is the legal issue which will be explored in the course of the research. The starting point is often intuitive, stemming from the observation of a ‘real life’ problem that faces individuals in society, or societies as a whole. Most of the time, the idea will require the researcher to do some ground research (for example, in newspapers, in statute books) to identify and translate the ‘real life’ problem into legal terms. An example would be the issue of the right to water. From receiving one’s first water charge bill in the post, one might wonder: Why is there now an obligation to pay for water? and why have several hundreds of people taken it to the street to refuse to do so (!)? Is this a first in Ireland, historically speaking? What are the reasons for introducing this tax? Is (access to) water a right? How is the right to have access to water protected by law? The identification of a legal issue might have emerged from these preliminary reflections, either phrased as a tax

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<sup>47</sup> P de Cruz, *Comparative Law in A Changing World* (2nd edn, Cavendish 1999) 235-39.

law issue (for example, the creation of new taxes by the State: legal, economic and social reasons and implications) or as an environmental law issue (for example, the right to water: compliance and enforcement in domestic and international law).

1.2. The second step is about *the choice of comparators*, that is the identification of the foreign jurisdiction(s), and if possible, the parent legal family to which it or they belong(s). In our example, the researcher might want to examine one or more legal systems about the water tax; if it is one legal system, it might be, for example, the UK because of the familiarity with the language and proximity of the Irish legal tradition with the British legal tradition; if it is more than one legal system, it might be, for example, the UK and France because of the relevance of examining a neighbouring country together with a European continental system in order to give the research a good scope. This is a key stage where the researcher needs to decide on the scope of the research in terms of the number of comparators,<sup>48</sup> and in terms of sub-areas of the legal issue examined (for example, whether she will undertake a systematic comparison or not, whether she will examine institutions and rules of the foreign legal system, or just institutions).<sup>49</sup> The full *research question* should be framed at this stage.

1.3. The third step has to do with *research material proper sensu* and, in particular the strategy to get access to the most relevant, authoritative and up-to-date primary and secondary sources about the foreign jurisdiction(s).<sup>50</sup> The type of sources might be different from

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<sup>48</sup> A researcher might be trained in more than one legal system. For example, students trained in dual degrees in Irish/English Law and French Law graduate with two law degrees – in that sense, they are both common lawyers and civil lawyers. Their ‘own legal system’ or ‘home jurisdiction’ might in fact encompass two legal systems; if later on they embark on comparative legal research, these graduates might wish to expand to a third comparator, that is to a legal system they would consider as ‘foreign’ in the sense of one in which they were not trained.

<sup>49</sup> One experience shared by a PhD student is that a systematic comparative study is not always possible. For example, about a topic on Costs in Administrative Law in Ireland, a systematic comparison between costs in England and Wales and costs in Ireland would be too large a project to undertake, even in the context of a PhD thesis. Rather, the choice has been made to dedicate some sections of the PhD to the comparative aspects, those which are the most useful to highlight differences in the respective rules in both jurisdictions (i.e. Ireland and England and Wales) in order to usefully analyse and critique a particular set of legal rules. I express my thanks to Irish Research Council Doctoral Scholar, Miriam Keane, for her comments on this.

<sup>50</sup> The researcher needs a mixture of information and sources such as legislation, case law, official reports, scholarly articles, press articles, etc.



those used in the home jurisdiction. In our example, the researcher might need to examine a Tax Code and other administrative regulations if choosing to compare with a continental system. This is another important step in terms of justifying the scope of the comparison. The researcher might decide to only adopt the doctrinal method; most of the time, however, she will expand her study to other methods (for example, the historical method, or the socio-legal method) and, accordingly, look for appropriate sources and material and resort to other kinds of data by, for example, using surveys, interviews, focus groups in empirical studies.<sup>51</sup> This is at this stage that the *interdisciplinarity* of the research needs to be framed.

**1.4.** The fourth step is the start of the intellectual process *per se*, that is the *analytical comparison*, where it is suggested to organise the material ‘in accordance with headings reflecting the legal philosophy and the ideology of the legal system being investigated’, and contrasting it with the home legal system in order to identify a set of similarities and differences between the two (or more) legal systems.<sup>52</sup> This is done by the mapping out of possible answers to address the legal issue by ‘comparing carefully the different approaches, bearing in mind possible cultural differences or socio-economic factors, where relevant, and exploring any other non-legal factors’,<sup>53</sup> as well as critically analysing the legal principles in terms of their intrinsic meaning. The research question can be refined at this stage.<sup>54</sup>

**1.5.** The final step is the end of the analytical comparison with the production of *findings*, that is the researcher’s conclusions. These should be exposed in ‘a comparative framework with caveats, if necessary, and a critical commentary, wherever relevant, and [related] to

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<sup>51</sup> See Chapters 8 to 10 of this collection for more on these methods.

<sup>52</sup> De Cruz (n 47) 237.

<sup>53</sup> *ibid* 238.

<sup>54</sup> We choose to conflate the several steps proposed by de Cruz in this regard into the single heading of analytical comparison.

the original purpose of [the enquiry]'.<sup>55</sup> These conclusions should also be justified 'so that future researchers will be able to see the approach [...] adopted, and why [it was adopted]'.<sup>56</sup>

The different questions that the researcher has to ask herself—namely, how to choose which legal systems to be compared; how to assess, measure and explain similarities and differences between the systems under review; how deep the comparative analysis should be; what weight should comparative law have—<sup>57</sup> are very much about making choices and justifying them. In this regard, one must be aware of the criticisms aimed at comparative research produced by legal academics; they are, in some places, accused of not saying what they do and how they do it; and when they do—say what they do—and venture outside the doctrinal legal method by resorting to cognate disciplines (in social sciences, for example) in order to understand the broader legal, social and cultural context in which law operates, academics are often accused of not doing it properly because they do not apply rigorous standards.<sup>58</sup> Still, the interdisciplinary feature of comparative law has gained more prevalence and researchers are strongly encouraged to use methods of other disciplines than law (for example, sociology, psychology, economy...) in that respect.<sup>59</sup> Leading contemporary comparatists exhort researchers to resort to 'implicit comparative law', which is based on the understanding that there is a necessity to refer to disciplines other than law such as comparative politics, comparative sociology or comparative economics, because these disciplines also deal with questions that compare and evaluate legal differences and arguably present 'the advantage [to be less] hesitant than legal research in making

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<sup>55</sup> De Cruz (n 47) 238. This five-step action plan is not meant to appear as such in the research itself. It is, however, important to phrase it as such, since such an action plan might be useful, for example, in funding applications' narratives which often require detailed 'work plans' of one's research project.

<sup>56</sup> *ibid.*

<sup>57</sup> See also, M Claes and M de Visser, 'Reflections on Comparative Method in European Constitutional Law' in Adams and Bomhoff (n 2) 145.

<sup>58</sup> T Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 *Legal Education Review* (journal name should not be in italics)173.

<sup>59</sup> See, for example, A Peters and H Schwenke, 'Comparative Law Beyond Post-Modernism' (2000) 49 *International and Comparative Law Quarterly* 800, 832; J Husa, 'Interdisciplinary Comparative Law: Between Scylla and Charybdis?' 9 (2014) *Journal of Comparative Law* 28.

legal and policy recommendations based on cross-country comparisons'.<sup>60</sup> Hence the necessity to explain and justify each step of the research process, namely the stage of the literature review, the stage of framing the research question, the stage of choosing the comparables and comparators, and the stage of choosing which other method(s) will be used.

### *C. Practical challenges*

In addition to putting in place the intellectual framework for the research, the researcher needs to spend time on thinking how she proposes to address two types of practical challenges, namely one of time management and expertise building, and the other of access to and selection of information. First, the researcher has to decide how much time she will allocate to acquiring expertise in the foreign legal system, bearing in mind that the time spent on the other legal system is time not spent on keeping up to date with one's own. In other words, the task of becoming a bi(multi)jurist and, if relevant, bi(multi)lingual in one or more other legal systems, has implications, most notably cost implications.

Secondly, as regards the issue of access to sources—legal and non-legal sources—the problem has changed. With the advent of new technologies and the quasi systematic use of online research on the Internet, the issue has morphed from an issue of finding information to one of finding too much of it and having to select the appropriate research material. As Wilson put it, the 'time when the energies of comparative legal scholars were (...) taken up in the search of information [which was] slow and difficult work' has reversed from a shortage to 'a surfeit of information'.<sup>61</sup> While, in theory, there is no more hindrance to a comprehensive and up-to-date research in foreign legal material, in practice, this part of the comparative enterprise will require a

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<sup>60</sup> Siems (n 33) 144.

<sup>61</sup> Wilson (n 4) 98.

careful and rigorous selection. This will include cross-checking references and sources to retain only the most updated and authoritative ones.<sup>62</sup> In addition, ‘individuals, groups, institutions and cultures will be judged not for their assiduity in collecting information but for the creative use they make of it’.<sup>63</sup> Both issues of expertise and selection of sources therefore require the elaboration of a strategy as part of the justificatory exercise of the comparative research. Such strategy can be phrased in terms of caveats in the methodology part of the project.

#### **IV – Conclusion**

The use of comparative law is no longer marginal and has largely pervaded legal scholarship. This is due notably to the necessity of understanding the more complex context in which the law operates locally, nationally, and internationally, which has transformed the system of validity of norms and their hierarchy. This is also increasingly related to the urge to address societal concerns. Yet, with no agreement on its meaning (i.e. comparative law as strictly a method or as a discipline in its own right), its purpose (i.e. not one identifiable purpose but a multiplicity of them), or method (i.e. different approaches), comparative law remains an open-ended matter which makes it fascinating but also challenging to deal with.

Since the method for comparative legal research ‘needs to be treated as a central element of “legal method”’,<sup>64</sup> steps need to be processed according to a framework which explains and justifies the choices made by the researcher. In other words, if one wants her study in comparative law to have scientific value and to contribute to knowledge progression, the method dictates that the researcher has to *expand* her research to the context and variables she thinks are appropriate to the research question, while, at the same time, *limit* it by a rigorous justificatory

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<sup>62</sup> N Witzleb and others, ‘Comparative Law and the Internet’ (1999) 3 Electronic Journal of Comparative Law 2.

<sup>63</sup> Wilson (n 4) 98.

<sup>64</sup> Twining (n 4) 84.

exercise. This is not (yet again) a definitive method which is provided here, but it is hoped that these lines will contribute to adding another perspective to the numerous studies in the field.