# Methodology of comparative law today : from paradoxes to flexibility ?

Jaakko Husa

**Résumé**

L'article présente une critique envers les positions normatives, rigides et paradoxales dans le débat méthodologique de droit comparé aujourd'hui. L'auteur étudie les différentes possibilités d'une nouvelle approche pour concevoir une méthodologie. Il fait une analyse des méthodologies de tendance générale ainsi que des méthodologies en dehors de celle-ci. Les contradictions entre les deux sont considérées comme artificielles par rapport à leur caractère fondamental. Ce que l'auteur propose est un procédé plus ouvert pour la création de méthodologie; celui-ci serait capable d'échapper à une partie des problèmes se trouvant aux deux extrémités du débat méthodologique. Cela évoque l'idée d'une échelle méthodologique et, en outre, défend le travail d'équipe multidisciplinaire dans le domaine de droit comparatif. Il est proposé que la nature tout ou rien du débat méthodologique soit évitée à cause de son caractère irréaliste et parce qu'elle reflète la mauvaise image de soi de l'étude comparative du droit.

**Abstract**

This article criticises overtly normative, rigid and paradoxical positions found within the methodological debate of comparative law and comparative legal studies today. The author studies possibilities for a new method by which to conceive the nature of methodology concerning comparative study of law. The article advocates for a common sense based flexible understanding of comparative late modern methodology. Both mainstream and non-mainstream methodologies are analysed from a theoretical point of view. Methodological contradictions between these two are regarded to be artificial as to their foundational nature. The author makes suggestions for a more open way by which to conceive methodology, which is capable of evading some of the problems found at the extreme ends of the methodological debate between functionalistic and culturally/ contextually-oriented schools of thought. The author's argument invokes the idea of methodological scale and, furthermore, defends multidisciplinary teamwork in comparative study of law. According to this line of thinking, this article suggests that all-or-nothing nature of methodological debate should be avoided because it is unrealistic and reflects poor self-image of comparative study of law.

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# METHODOLOGY OF COMPARATIVE LAW TODAY: FROM PARADOXES TO FLEXIBILITY?[*]

Jaakko HUSA[**]

L'article présente une critique envers les positions normatives, rigides et paradoxales dans le débat méthodologique de droit comparé aujourd'hui. L'auteur étudie les différentes possibilités d'une nouvelle approche pour concevoir une méthodologie. Il fait une analyse des méthodologies de tendance générale ainsi que des méthodologies en dehors de celle-ci. Les contradictions entre les deux sont considérées comme artificielles par rapport à leur caractère fondamental. Ce que l'auteur propose est un procédé plus ouvert pour la création de méthodologie ; celui-ci serait capable d'échapper à une partie des problèmes se trouvant aux deux extrémités du débat méthodologique. Cela évoque l'idée d'une échelle méthodologique et, en outre, défend le travail d'équipe multidisciplinaire dans le domaine de droit comparatif. Il est proposé que la nature *tout ou rien* du débat méthodologique soit évitée à cause de son caractère irréaliste et parce qu'elle reflète la mauvaise image de soi de l'étude comparative du droit.

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*the idea of methodological scale and, furthermore, defends multidisciplinary teamwork in comparative study of law. According to this line of thinking, this article suggests that all-or-nothing nature of methodological debate should be avoided because it is unrealistic and reflects poor self-image of comparative study of law.*

## I. INTRODUCTION

This article explores some of the underlying paradoxes behind certain kinds of methodologies found in the comparative study of law. Here these methodological understandings or sets of assumptions are analysed by the help of a flexible understanding of methodology; though this flexibility does not equate to an acceptance of an 'anything goes' methodology in a Feyerabendian sense, as his view can be seen as being faulty in some of the major conclusions he came to[1]. The tenor here is an effort to try to advocate a certain kind of common-sense-approach that hopes to address the following question: what could the nature of comparative law methodology become? To be sure, this is a different question to one which concerns method itself. Furthermore, the present theme is connected to the larger question concerning the nature of methodologies i.e. are they destined to remain rigid and normative as we are accustomed to seeing them. This view concerning the very nature of methodology is challenged in this article.

The focus in this article is on the scholarly comparative study of law; other, more practical, elements are left out of the discussion[2]. Further, what follows is written specifically from a methodological point of view. This approach obviously is problematic if one takes into account that comparative texts are written by people and not by methods. However, here, people are not the centre of analysis[3]. But what is method ? Method is here understood to be an orderly and systematic manner in which research is done and, in accord, methodology is the field that deals with questions concerning methods, in this case especially methods of comparative study of law[4]. The

[1] The thesis of Paul Feyerabend was that methodological « anarchism helps to achieve more progress in any one of the senses one cares to choose ». P. FEYERABEND, *Against Method* (3rd edn, 1996) at 18.

[2] E.g., today it is much more obvious than previously that comparative law is an internationally essential reference point for judicial decision-making. For more details, see G. CANIVET, M. ANDENAS and D. FAIRGRIEVE (eds.), *Comparative Law before the Courts* (2004).

[3] Cf. D. KENNEDY, « New Approaches to Comparative Law Comparativism and International Governance » (1997) *Utah Law Review,* 547-48.

[4] The word *method* comes from Greek and is a combination of two words: along or with (μετά) and way or road (οδός). From this you can derive « way to go along the road » or « certain

expression 'comparative study of law' covers both comparative law and comparative legal studies.

The argument in this article is developed in a simple manner in order to make the message easily understandable and accessible. However, this means that the author has 'cut corners' in favour of developing the argument. Hence, what follows is a personal view and not an objective description of facts as they 'really are' as if conceived from 'a view from nowhere' as a philosopher of science would say[5]. Relevant themes are presented in a dense crystallized form which may cause voices of disaccord from some readers who might have sympathy for the methodologies under scrutiny. With these shortcomings in mind, the author hopes that this sort of crude core-centred approach will offer fresh insight into something that most comparative lawyers and legal scholars think they already know about *i.e.* the constitution of their method.

The structure of this article is simple. After a concise introduction (I) the theoretical framing of the theme is presented (II), followed by an analysis of paradoxes concerning orthodox approach (III) and non-orthodox approach (IV). In these parts the methodological teachings of functionalism in comparative law and Legrand's version of comparative law are looked into. The next chapter (V) contains contemplation over what we possibly may have instead of methodological paradoxes. In this part, the fundamental idea of methodological flexibility is invoked. Finally, the article closes with a short conclusion (VI).

## II. FRAMING THE WORLD: RULE *vs*. CONTEXT

Comparative law and comparative legal studies are today vast fields with different scholarly orientations, inner debates and even schools of thought with very different academic orientations. To name a few: there are those who seek similarities, those who prefer to stress differences, those who are interested in western law, those who are interested in non-western law, there are generalists and there are country-specialists[6]. As an academic discipline comparative study of law has developed a wide range of internal styles and methodological debates reflecting the same debates that take place in legal academia in general[7]. Accordingly, it is difficult to make any

manner to follow the way » (μέθοδος), so it contains the idea according to which things are done systemically in a certain premeditated manner (i.e. methodically or μεθοδικός).

[5] See for more details T.NAGEL, *A View From Nowhere* (1986).

[6] See, e.g., A. PETERS & H. SCHWENKE, « Comparative Law beyond Post-Modernism » (2000) 4-9 *International and Comparative Law Quarterly* 800-802.

[7] Cf. KENNEDY, above n 3 at 593.

clear distinctions or groupings within these strands. However, there are many such divisions which place people and their publications into pigeonholes[8]. Obviously, the present article may also be interpreted as an attempt at pigeonholing although it is certainly not the objective[9].

Swedish legal historian Kjell Åke Modeér, for instance, has identified two main strands within comparative study of law. According to this grouping the early 20th century was fundamental to the formation of modern comparative law schools. Here we find the Conference in Paris in 1900 in which the different lines of thinking first emerged from the academic business of studying law comparatively. The two main schools, in the methodological sense, are rule-oriented and contextual in approach[10]. Clearly, there are other distinctions and other names, but here we will use these two since they suffice for the purpose of the present argument. Besides, it must be borne in mind that we do not have official or any generally accepted definition of comparative study of law[11]. Further, there may be even great differences between US and European ideas about comparative law as to its accessibility and the very intelligibility of methodological debate[12]. David Kennedy has undoubtedly a point when saying that 'Comparative law is a diverse tradition, riven by methodological disagreements and differences of emphasis and style'[13].

Rule-oriented comparison of law seems to be embedded in western secularization, urbanisation, and industrialization. These are general factors behind the intellectual base of rule-oriented comparison which we today are familiar most commonly by the name 'functional comparative law' or 'functionalism in comparative law'[14]. Besides this main-strand of

[8] See, e.g., E. ÖRÜCÜ, « Unde venit, quo tendit Comparative Law? » *in* A. HARDING & E. ÖRÜCÜ (eds.), *Comparative Law in the 21st Century* (2002) at 1-17.

[9] KENNEDY, above n 3 p. 547 describes this sort of methodological writing in general : « It engages the discipline on its own terms, accepting its sense of what's in and out, who's good and bad, what's new and old ».

[10] K. Å. MODEÉR, « Östersjöområdets rättsliga kartor – rättskulturella konstruktioner i förändring » in *Festskrift till Lars Björne* (2004) at 194-5.

[11] Cf. M. BOGDAN, « On the Value and Method of Rule-Comparison in Comparative Law » in *Festschrift für Erik Jayme* (2004) at 1234-35.

[12] One of the most prominent US opponents of functionalism in comparative law, Vivian Curran, has pointed that harsh critique of functionalism may have much more ground in US than it does in Europe where comparatists are accustomed to different languages and cultures. See V. CURRAN, « Standing on the Shoulders of Schlesinger : The Trento Common Core of European Private Law Project » (2002) 2 *Global Jurist Frontiers* no. 2, art. 2. See also KENNEDY, above n 1 at 581 (with similar views on the differences between US and Europe).

[13] KENNEDY, above n 1 at 581.William Ewald says that these extreme poles have « given rise to a characteristic style of comparative scholarship ». See W. EWALD, « Comparative Jurisprudence I » (1995) 143 *Pennsylvania Law Review* p. 1894.

[14] However, there are many functionalisms in comparative law. See M.GRAZIAIDEI, « The Functionalist Heritage » in P. LEGRAND & R. MUNDAY (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) at 100-127.

comparative law there has been, albeit in the shadows of the mainstream, another school of thought having a different sort of methodological and theoretical premise than those of the rule-oriented comparison. According to Modeér's distinction, this school puts more weight on the context of law and legal system and has done so, more or less, since 1900. Clearly, in contextual approach greater weight is put on the various factors that surround law[15].

Perhaps I may, already at this early stage, make clear my suspicion that in some relevant manner the point of views of methodologists and legal historians may be different. Accordingly, some of what is claimed in this article may appear a little anachronistic for legal historians. And, as much as I tend to feel sympathy for the division between the rule-oriented and contextual approaches I, nevertheless, suspect that in its pedagogical beauty it may fail to conceive of certain shades of grey in its persistence of conceiving comparative study of law in terms of black and white i.e. as a dichotomy. I will return to this point at the end of the article in the conclusion.

Anyway, be that as it may, there really is something disturbing about the functional approach in comparative law. This gives one a somewhat uncomfortable feeling whilst reading these sorts of methodological groupings; not because these groupings are necessarily wrong but because these groupings tend to oversimplify things by squeezing the plethora of scholarship into binary positions. But, what is it that actually gives one the feeling of discontent with functionalism?

## III. PARADOX OF FUNCTIONALISM

It is, I assume, largely accepted that the so-called functional approach in comparative law has been the mainstream and, even, perhaps, some sort of paradigm of a metaphysical sort[16]. But, even though it has been around

[15] In a very broad sense we may, perhaps, say that this division is at least remotely reflected in the difference between the concepts of « comparative law' and 'comparative legal studies ». See also R. MUNDAY, « Accounting for an Encounter » in P. LEGRAND & R. MUNDAY (eds) *Comparative Legal Studies: Traditions and Transitions* (2003) at 3-28.

[16] As Margaret Masterman has pointed out Thomas Kuhn used originally the concept of paradigm in twenty-one senses. However, Masterman discerned in her analysis three main types of paradigms : metaphysical, sociological and construct (or artefact). M. MASTERMAN, « The Nature of Paradigm » in I. LAKATOS & A. MUSGRAVE (eds) *Criticism and Growth of Knowledge* (3rd Impression 1995) at 65.

for decades it has not ceased to gain support[17]. Many place it, without a shadow of a doubt, within ranks they see united under the banner of the orthodox approach. Further, there does not seem to be great differences in opinion when it comes to describing what some of the major features of functionalism are. Even while there is, of course, some variation many would most likely feel quite comfortable in claiming that functionalism is especially interested in rules and institutions i.e. the formal side of legal system and law. Accordingly, many would say that functionalism is not specifically interested in the context of law. To say this is, nevertheless, paradoxical. Hence, we need to look back at the history of this school in order to shed some light upon this matter.

The role of Ernst Rabel (1874-1955) was very important to the rule-oriented school of thought[18]. It may be said that some of his theoretical ideas about comparative study of law have been very influential, although Otto Kahn-Freund or Rudolf B. Schlesinger could also have been apt starting points for our purposes here. As many of the 20th Century comparatists, Rabel came from the tradition of conflict of laws i.e. international private law[19]. Basically, international private law approach is fundamentally in opposition to those approaches that stress the importance of a cultural framework, hence, hindering meaningful comparative law studies[20]. This orientation can be seen in Rabel's quality as a comparatist; instead of theoretical and methodological discourse he was rather interested in practical questions. Even so, his methodological relevance cannot be denied. In his fine analysis of Rabel's intellectual profile, David J. Gerber manages to put Rabel's methodological core idea into a few dense words when he says that :

"…prescription for the comparatists was, in its essence, simple: look at how a problem is solved in two or more legal systems and explore the differences and similarities in the respective treatments of the problem"[21].

According to Gerber Rabel's main idea was to penetrate through obstacles caused by language. So, for Rabel information concerning foreign law was of genuine value if it was contextualised. This, in turn, means that the written text was not enough for comparative study of law because conceptual and linguistic analysis did not suffice. The official and formal

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[17] See, e.g., J. C. REITZ, « How to do Comparative Law » (1998) 46 *American Journal of Comparative Law* 617-36 and P. de CRUZ, *Comparative Law in a Changing World* (2nd edn, 1999).

[18] Cf. PETERS & SCHWENKE, above n 6 at 808.

[19] See, e.g., E. RABEL, *The Conflict of Laws: A Comparative Study* (1945). See even KENNEDY, above n 3 at 581-92.

[20] See also PETERS & SCHWENKE, above n 6 at 802.

[21] D. J. GERBER, « Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language » in A. RILES (ed), *Rethinking the Masters of Comparative Law* (2001) at 199.

legal language with its rules and principles did not explain very much about how problems were solved by foreign law in legal reality *i.e.* without information of legal practice we had 'a skeleton without muscles'[22]. One needs also information about how these principles and rules are related to facts of the legal problem at hand. So, the actual application of norm appears to be of great relevance for comparison. Today this is evident in the prevailing version of functionalism as, for example, for Zweigert and Kötz it is of importance to point out explicitly in their methodology that comparatists ought to study facts *behind* the law[23]. Further, the idea is to look at not only functions but also at the 'respective legal systems and the broader cultures of which they are a part'[24].

So clearly, Rabel (as well his followers) was also interested in the context of law, *but*, in practice he did not offer much guidance for how to analyze context. The word *but* is nodal here. From there it follows that the principal value and even great importance of context is yet affirmed, but it is still not genuinely given a proper role in the practice of comparative (functional) study of law[25]. Further, this also means that these sort of methodological lenses exclude many things from our field of vision as Gerber points out[26]. However, in methodological core-analysis the main problem seems to be that functionalism's practice appears to disregard the theoretical teachings of functional theory of comparative law.

The outcome, in a theoretical sense, is a fundamental paradox and a sort of epistemic wound that never really heals; accordingly, it invites disappointment and various forms of critiques. This paradox is, I daresay, later reflected in many ways in the leading orthodoxy of today, namely, the comparative law orthodoxy presented by Konrad Zweigert and Hein Kötz[27]. According to them, 'The basic methodological principle of comparative law

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[22] In his own words,« Ein Gesetz ist ohne die zugehörig Rechtsprechung wie ein Skelett ohne muskel. Und die nerve sind die Herrschende Lehrmeinungen ». E. RABEL, « Aufgabe und Notwendigkeit der Rechtsvergleichung » (1924) *Rheinische Zeitschrift für Zivil- und Prozessrecht* 279-301. Quote here taken from K. ZWEIGERT & H.-J. PUTTFARKEN (eds), *Rechtsvergleichung* (1978) at 88.

[23] See G. SAMUEL, « Epistemology of Comparative Law: Contributions from the Sciences and Social Sciences » in M. Van HOECKE (ed), *Epistemology and Methodology of Comparative Law* (2004) at 39.

[24] REITZ, above n 17 at 626.

[25] GERBER, above n 21 at 199-200. Gerber, however, says that he (Rabel) « sought to make comparative law "realistic". His central message was that the words of law…can obstruct our view of what is actually happening ».

[26] *Ibid.* at 205-7.

[27] K. ZWEIGERT & H. KÖTZ, *An Introduction to Comparative Law* (3 edn, 1998). I will disregard here the fact that it was actually Zweigert who had a larger role in developing their functional method. See especially Konrad ZWEIGERT « Méthodologie du droit comparé » (1960) 1 *Mélanges J. Maury* 579-96.

is that of *functionality*[28]…' Their significance, too, has been very important and their position in the mainstream elemental. If we stress the methodological dimension of their work we may say that, basically, they continue along the path first pioneered by Rabel[29], a fact which they openly admit themselves.

As is well know, at the heart of the functionalist approach of Zweigert and Kötz is said to be the attempt to find *norms* (or legal institutions), which are serving a certain social function. So, here we find the underlying idea of function and, furthermore, functionalism is by its methodological nature clearly a method that relies first and foremost on comparison[30]. This is certainly the strongest side of functionalism: if one is interested in comparing law/legal systems in an orderly and systematic manner (i.e. scientifically if you like) some sort of functionalism is sure to provide a relevant methodological possibility for comparatists no matter how much critique we may present against it. Much of the critique nevertheless, can not achieve the same clarity in a methodological sense even though it can produce an important point of views and critique of functionalism[31]. On the other hand, it is apparently in the bloodline of functionalism to stress indeed the importance of *systematic* information[32].

It is important to note that functional comparative law's concentration on rules and institutions does not imply limiting comparative study to written law only. Rules and institutions in a functional sense *should* be a part of the larger cultural, social, economic and ideological whole[33]. The point of departure for comparison ought to be, therefore, not the written rule of statutory law (or a precedent of court) but the socio-legal function. This point of departure is needed in order to avoid (or an attempt to avoid) the problem that one perceives the foreign systems mainly through the mind-set of one's own legal system[34]. If one, nevertheless, looks into functional comparative law's practice it may be accused of making the very notion of

[28] ZWEIGERT & KÖTZ, above n 27 at 34.

[29] The description (here) concerning the theoretical core of functional comparative law is based on the present authors article « Farewell to Functionalism or Methodological Tolerance? » (2003) 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 419-447. However, this text has undergone some important modifications.

[30] See N. LUHMANN, *Social Systems* (1995) at 53-55. However, we may question as to how much Luhmann's ideas concerning functionalism have really affected the comparative study of law.

[31] See, e.g., V. CURRAN, « Cultural Immersion: Difference and Categories in U.S. Comparative Law » (1998) 46 *American Journal of Comparative Law* 43-92.

[32] See e.g., REITZ, above n 17 at 632-33.

[33] This basic idea is repeated in many standard comparative law textbooks as, e.g., M. BOGDAN, *Comparative Law* (1994) at 68-77 (listing such explanatory factors of law as the economic system, political system and ideology, religion, history, geography, demography, other means of control, and accidental and unknown factors).

[34] Cf. B. GROSSFELD, *The Strenght and Weakness of Comparative Law* (1990) at 9.

law itself conform to a certain kind of image that is culture-specific[35]. Even so, this argument can not be stretched as to claim that functionalism *necessarily* is an agenda of sameness[36]. On the other hand, the lack of agenda of sameness does not necessarily prevent accusing functional comparative law of an attempt to participate something far more complex i.e. international governance[37]. But, the last mentioned topic cannot be dealt with here.

If we follow the thinking of Zweigert and Kötz, the methodological skeleton-idea is roughly as follows: A solution to legal problems can be provided by a custom or by some other social practice not necessarily in an identifiable legal form. The comparatist is thus, in the ideal case that is, trying to find in a foreign system the norms, which are functionally equivalent to those other rules or principles that have been taken into comparison from the other systems[38]. The paramount question is: what socio-legal function does the norm under study fulfil in its own societal context? Now, if you follow this line of thinking further, then, you end up with something like John C. Reitz argued when he said that in order to be a good comparative lawyer one should :

"…normally devote substantial effort to exploring the degree to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison"[39].

If we look at Zweigert and Kötz's construction from a theoretical point of view, then, an underlying methodological idea appears to be to try to reach comparability of rules and institutions by studying them as a part of larger socio-legal context and placing them in an external comparative framework[40]. This, nevertheless, requires a comparatist to be detached from his own legal preconceptions and to discover more neutral (or at least less biased) concepts which make it possible to describe legal problems in a comparative framework[41]. But, these considerations give rise to a more concrete question: how should the method work in practice i.e. what is its process? What are the road signs of this approach i.e. what is its way to go along the road?

As a whole, the process of comparative law according to the theory of Zweigert and Kötz is, roughly, as follows: 1) Pose a functional question

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[35] See e.g., SAMUEL, above n 23 at 43.

[36] See PETERS & SCHWENKE, above n 6 at 827.

[37] See for more details KENNEDY, above n 3 at 581, who describes « the practice of comparative law as an intellectual and technical project of rulership ».

[38] ZWEIGERT & KÖTZ, above n 27 at 35-36. See also GRAZIAIDEI, above n 14 at 101-103.

[39] REITZ, above n 17 at 621.

[40] Indeed, sometimes, an almost frustrating wailing about the *tertium comparationis* seems to be typical of many of the studies one may regard as being part of the orthodoxy.

[41] Cf. KENNEDY, above n 3 at 586, footnote 69.

(how is – loosely understood – socio-legal problem X solved)[42], 2) present the systems and their way of solving problem X, 3) list similarities and differences in ways of solving X, 4) adopt a new point of view from which to consider explanations of differences and similarities, and 5) evaluate critically discoveries (and sometimes judge which of the solutions is "best")[43]. If one follows this scheme, then, the context of law should actually come into play when a comparatist tries to explain his findings and moves to 'the causes of the legal similarities or differences which he has discovered'[44].

What they are suggesting on the level of theory (part I of their thick textbook, originally dating from the beginning of 1970s) is said to be the most elaborated and well-thought out versions of the functional method of comparative law. As Mark van Hoecke and Mark Warrington say, Zweigert and Kötz give a balanced synthesis of comparative law literature while offering the most advanced approach of traditional comparative law[45]. Yes, indeed, that really is what they do. The difficulty, nevertheless, is obvious: the rest of their book does not *really* meet the relatively high standards presented in the theoretical part of the book. To put it bluntly, context plays a minor role whereas formal rules steel the show.

Of course, this state of affairs is reflected elsewhere because their book is an archetypical example of the state of matters. However, because of its significance (e.g. numerous translations and new editions) it is paradigmatically weighty. It hints at something very important about the whole way of thinking in functionalism. So, this is the paradox of functionalism i.e. in its theory it recognizes the importance and relevance of context of law but in its practice it fails to live according to the high standards it sets for itself[46]. But, its even more severe cardinal sin seems to be the overtly optimistic belief in the similarity of different systems and societies[47]. For some, this is simply too much even while, if looked from the point view of epistemology and methodology, this idea may be rational in its *own* intellectual context: if one thinks that problems are universal, then one

[42] « If we find that different countries meet the same need in different ways, we must ask why ». ZWEIGERT & KÖTZ, above n 27 at 44.

[43] See, e.g., BOGDAN, above n 33 at 78-81.

[44] ZWEIGERT & KÖTZ, above n 27 at 11.

[45] M. van HOECKE & M. WARRINGTON, « Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law » (1998) 47 *International and Comparative Law Quarterly* 495.

[46] Cf. GRAZIAIDEI, above n 14 at 110-11.

[47] « …what every comparatist learns, namely, that the legal system of every society faces essentially the same problems ». ZWEIGERT & KÖTZ, above n 27 at 34. Of course, ZWEIGERT & KÖTZ are not alone with this idea. See, e.g., J. GORDLEY, « Is Comparative Law a Distinct Discipline? » (1998) 46 *American Journal of Comparative Law* 606-17.

has to think also that in similar types of societies the legal ways to respond these problems will produce quite similar results. However, as Anne Peters and Heiner Schwenke argue functionalism does not mean denying that law can have many functions and that its functions can be also antagonistic as to their nature[48].

There is no easy way out of this similarity-problem, but one thing should be kept in mind; it is not for certain that a contextual or non-orthodox approach would deny this sort of similarity either. However, the international private law generated ethics of orthodox comparative law seems to underline what is similar. This is, of course, no surprise to those who are willing to, both, place weight *in theory* and *in practice*[49]. However, a great deal of so-called non-orthodox or non-rule-oriented approaches seem to lead to a methodological paradox too. Albeit, a paradox of a different type. Let us now turn to the contextual approach.

## IV. PARADOX OF CONTEXTUAL APPROACH

To speak of new or non-mainstream approaches is in a certain sense awkward because many times they do not present any clear approach (i.e. systematic manner as how to proceed in research) in a methodological sense. Instead, they offer but an accumulation of academic aggression against the orthodoxy. Simply, many of them exist in order to be *contra,* not *pro,* their condition *sine qua non* is to oppose. If this is so, then, a great deal of new comparative law is as to its nature *anti*. But, non-orthodox comparative law does not seem to be able to offer new methods that would quite match the undeniable simplicity of Rabel's methodological core idea ('look at how a problem is solved in two or more legal systems and explore the differences and similarities in the respective treatments of the problem'). Instead of a systematic and orderly manner of research we have something quite different.

So, what we have instead of method-dogma is a plethora of attacks against orthodoxy. Because these new approaches, orientations, critical, alternative, post-modern, cultural, deconstructionist, non-orthodox comparative law/legal studies or whatever you choose to call them, are so plenty it is a difficult task to try to say in a general way what they are about. Nonetheless, I shall take the risk. We may, perhaps, claim that one important

[48] PETERS & SCHWENKE, above n 6 at 828.

[49] As a whole, one may claim that this sort of critique of functionalism in comparative law and orthodoxy of comparative law has been most evident in US comparative law circles. See, e.g., N. DEMLEITNER, « Challenge, Opportunity and Risk: An Era of Change in Comparative Law » (1998) 46 *American Journal of Comparative Law* 647-56.

main strand in non-mainstream comparative law has been the idea to stress differences in a very pronounced and profound manner[50]. This is because the orthodoxy is known for its international private law originated tendency to stress similarities. It will, therefore, be useful to consider this in a more concrete methodological perspective. Let us take one example.

Comparative legal studies proponent Pierre Legrand is most famous if not even infamous for his relentless and somewhat exaggerated die-hard critique against the European convergence of civil law with English common law[51]. Even though his position concerning convergence vs. non-convergence has been rightly criticized his ideas concerning comparative study of law in general are much easier to understand and they do not appear as extreme as his militant stand against European legal integration would suggest. Many of his theoretical ideas of comparative study of law present actually quite well the *general mentality* among the legions of those who oppose orthodoxy and who wish to move from comparative law to comparative legal studies or from rules to culture[52].

Now, in school-of-thought sense Legrand is a revealing example of someone who regards the role of context to be much more important than rules or institutions. But there is a hidden twist in here. Namely, he says that even rule is possible to understand in a certain way i.e. there must be certain sorts of epistemological assumptions behind the understanding of rule in a certain manner[53]. He says that :

"The meaning of a rule, however, is not entirely supplied by the rule itself ; a rule is never completely self-explanatory…The meaning of a rule is, accordingly, a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned"[54].

In this way Legrand ends up conceiving rule as a part of legal culture and not just a mere written law. This is, of course, understandable and does indeed make sense. However, Legrand's methodology does seem to be much more obscure than his idea of stressing the context of law instead of mere black-letter-rules.

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[50] See, e.g., V. CURRAN, « Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives » (1998) 46 *American Journal of Comparative Law* 657-68.

[51] See, e.g., P. LEGRAND, « European Legal Systems are not Converging » (1996) 45 *International and Comparative Law Quarterly* 52-81 and « Against a European Civil Code » (1997) 60 *Modern Law Review* 44-63.

[52] GRAZIAIDEI, above n 14, on page 126 says that « The catchword "culture" has been recently used to express dissatisfaction with functional comparisons ».

[53] Moderate functionalist BOGDAN, above n 11, on page 1237 says the same but in different words : « It is evident that legal rule must not be confused with a mere statutory provision or with a naked judicial statement ».

[54] P. LEGRAND, « The Impossibility of Legal Transplants » (1997) 4 *Maastricht Journal of European and Comparative Law* 114.

Frankly, I would venture to regard it as almost hilarious that legal rules (and concepts) are to Legrand merely the surface of the law as they were for the ark-functionalist i.e. Rabel. Accordingly, naked rules reveal very little about an actual legal system. Yes indeed, Legrand says that rules indicate nothing about the *deep structures* of legal systems[55]. The point against functionalism is I take it, as follows: comparative law should be interested not *only* in the rules and institutions. Nevertheless, Legrand and the theory of functional comparative law are, or so it seems, suggesting a different orientation, notwithstanding, they appear to have something basic in common. In other words, 'naked rules reveal very little…' Simply, there is an underlying willingness to see rules in a larger frame, not as mere points of restricted interest in legal-textual solitude, but as *a part of something larger*.

So, do we see here an unexpected theoretical alliance perhaps? But, would this make any sense – the dark empire of orthodoxy as a cosy bed-fellow of *la résistance* ? Now, of course, it would be too far fetched to try to really argue that Rabel's functionalism and Legrand's contextualism could be read as being the same method or approach. Obviously they do not, hence it would be misleading to make the suggestion that they are. However, in their epistemic willingness to expand their view from mere textual rule to contextual rule and the way they stress that rule is not just a rule, instead, it is embedded in deep structures of law and society or it has a role of larger system in which it has certain functions, they are quite similar.

The Rabel-based theory of functional comparative law stresses the comparison of rules and institutions and analyses especially similarities and perhaps even differences. Zweigert and Kötz go much further and stress firmly *praesumptio similitudinis* i.e. an assumption of similarity. Legrand's idea of comparative study of law is different; he suggests that one should study the deep structures of law and the main interest should be directed towards differences and particularly epistemological framework which he calls *mentalité*[56]. The problem with Legrand is that his intriguing hermeneutical discourse on the subject does not offer a method.

However, I would like to add, that the functional comparative law theory as such does not prevent stressing the differences (=different outcomes) because its concept of function is so loose; it must allow even great methodological freedom[57]. Attacking an assumption of similarity is, by

[55] LEGRAND, above n 51 at 56.

[56] LEGRAND, above n 54 at 121.

[57] Cf. R. MICHAELS, « The Functional Method of Comparative Law » in M. REIMANN & R. ZIMMERMANN (eds), *The Oxford Handbook of Comparative Law* (forthcoming, 2006; here quoted as PDF-file available on the internet) at 34. He argues : « Nothing is said about any further

all means, legitimate from a methodological point of view. But, similarity or difference is rather the end-result of the study than a certain method. And this critique is hardly new in comparative law circles[58]. Furthermore, much of what functionalist theory in comparative law says is not fundamentally contradictory to what post-modern theory seems to say: in our line of comparative detective work we may find *unexpected* things[59].

As I have indicated, Zweigert and Kötz's book makes their idea of method easy to ascertain; they just follow the lead initiated by Rabel in order to keep methodological instructions at the level of simple almost crude rule-of-thumb. Now, this does not apply to Legrand who is clearly interested in different kinds of comparisons than functionalism. To him truly important questions are found elsewhere than in the sector of rules and institutions. His ideas of approach and critique of functionalism has been correctly described as 'a hermeneutical exercise'[60]. We may, perhaps, describe this exercise generally relating very closely with the "context of law" in school-of-thought sense. The crucial issue is clear, then: what is comparative study of law according to his ideas?

"Comparative legal studies are best regarded as the hermeneutic explication and mediation of different forms of legal experience within a descriptive and critical metalanguage... Comparison must not have a unifying but a multiplying effect: it must aim to organize the diversity of discourses around different (cultural) forms and counter the tendency of the mind toward uniformization...comparison must involve the primary and fundamental investigation of difference"[61].

Legrand's view of comparative study of law is, besides surprisingly normative ('must involve', 'must not have'), such that he describes it as 'hermeneutic explication and mediation' of different legal cultures. He also says that comparison is 'critical meta-language' and 'fundamental investigation of difference'. These are grand semi-philosophical words I have to admit. Notwithstanding, I argue that when taking into account the undeniable defects of orthodoxy (*i.e. de facto* rule orientation) we may say that Legrand *does* have a point. However, his ideas offer very little for actual research-practice, in a technical sense that is, of average comparatists. Instead of offering a methodological rule of thumb he chooses to

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similarity or difference…Functionality leads to comparability of institutions that can thereby maintain their difference even in the comparison. It neither presumes nor leads to similarity ».

[58] See, e.g., G. FRANKENBERG « Critical Comparisons: Re-thinking Comparative Law » (1985) 26 *Harvard International Law Journal* 436-37.

[59] CURRAN, above n 12 at 17.

[60] SAMUEL, above n 23 at 60.

[61] LEGRAND, above n 54 at 123–24. See also LEGRAND, *Le droit comparé* (1999) at 36-38 (« une véritable expérience de la distance et la différence »).

concentrate on culture and deep structures that cannot (of course) be approached convincingly by using rule-oriented approach.

Legrand is advising comparative study of law to have a multiplying effect and by doing so he is not saying anything about the actual method – instead – he is debating over the legitimate area of use of the knowledge or information gained from comparative research[62]. In this sense Legrand's and methodological functionalism's versions of comparative study of law are incompatible or perhaps even incommensurable. But, none of this is really surprising: the language of functionalism (external framework, explanation, and harmonisation) and that of critical continental philosophy (e.g. Michel Foucault's or Jacques Derrida's ideas) have very little common ground. Indeed, if you start from realistically oriented international private law and mix it with ideas of functional macro-sociology, you end up somewhere else than with hermeneutics and critical continental philosophy of difference. Now, if we do not accept that Legrand's hermeneutical enterprise is a sufficient methodological model, we clearly have a problem at hand[63]. But, how much do these orientations differ from each other with regards to their most basic epistemic and methodological assumptions and how much of this difference is closer to rhetorical contradiction?

Here I venture to be a bit polemical. By this I mean to say that, altogether, Legrand's view of the comparative methods does *not* differ greatly from that of functionalist theory even while his hermeneutical and philosophical terminology does differ from the basic theory of orthodoxy: 'The comparatist must adopt a view of law as a polysemic signifier which connotes *inter alia* cultural, sociological, historical, anthropological, linguistic, psychological and economic referents'[64]. Put crudely, functional theory (not practice, however) says basically the same: one must look beyond law, and see also the context. Rabel, in turn, would remind us not to be lured by the façade of language. Even though, it seems to be clear that there are differences there are also crucial similarities in epistemic basic-ideas of studying law comparatively; one is supposed to see rules *and* contexts. Therefore, it is no surprise that one may find a non-orthodox

[62] LEGRAND, above n 54, speaks of the « ethic of comparative analysis of law ».

[63] From hermeneutical philosophy we are familiar with the sharp distinction that Hans-Georg Gadamer drew between the human sciences and natural sciences. Of course, if we were to follow his line of thinking the sort of methodological questioning entertained in this article would not be an advisable thing to do. However, the author does not follow Gadamer's philosophical hermeneutics on this question. See, for more details, H.-G. GADAMER, *Truth and Method* (2nd edn, 1994). (Gadamer's critique of Dilthey is based on the idea that Dilthey was too much influenced by the method-oriented model of natural sciences – for Gadamer there was no equivalent method in his concept of human sciences as e.g. law.)

[64] LEGRAND, above n 54 at 116.

comparative scholar ending up *de facto* using functionalist arguments[65]. This, in turn, may hint that functionalist approach does not really reduce law to a mere formal technique of conflict resolution as the critique has suggested[66]. However, rhetoric paints a much darker painting than does a close-reading of the methodological and epistemological core.

Again, we seem to reach a paradox: the priority of alterity over that of similarity, which is what Legrand is preaching for, is just turning the conviction of orthodoxy upside down[67]. And this means that it is its prisoner because this anti-strategy allows the orthodoxy to dictate in a negative way what its theoretical rival can be – its inverted mirror-image[68]. This is the paradox of contextual approach – it turns the black into white but it disregards the other colours on the palette of law. In this way its valuable message may shrink and become even a nihilistic story[69]. Now, is there no room for methodological middle-ground in today's comparative study of law?

## V. TOWARDS FLEXIBLE UNDERSTANDING OF METHODOLOGY

The above presents a somewhat confused picture: The complexity of comparative study of law seems to produce even puzzling results in academic field of comparative methodology; different schools of thought with strange love-hate relationship and peculiar innate paradoxes[70]. However, in this article the methodological analysis has struggled to get to the heart of the matter, as a critic would undoubtedly say: much of this has ignored what the analysed methodologies *themselves* say. Bearing that in mind, I still insist that functionalism is interested in context but it seems unable to take it genuinely into account, thus, falling into a practice of rule-oriented study of law not depending on what its basic theory says.

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[65] This point is made by MICHAELS, above n 57, on page 3-4 who sees Mitchell de S.-O.L.É Lasser as using a « typically functionalist argument from functional equivalents ».

[66] Of this critique see e.g., FRANKENBERG, above n 58 at 437.

[67] See also P. LEGRAND, « The Same and the Different » in P. LEGRAND & R. MUNDAY (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) at 240-311.

[68] SAMUEL, above n 23, on page 64 compares these two strands and says that they « will lead to quite the opposite methodological presumption ».

[69] Cf. CURRAN, above n 12 at 7. (Holding that relevant critique of US comparative law may appear nihilistic to those who do not understand the bias of American mainstream comparatists. According to her, the multicultural and multilingual emigrant comparative law generation is withering in the US.)

[70] This is of importance in general, as MUNDAY, above n 15, on page 22 says « comparison carries with it an intellectual baggage to which one has to be alert ».

In turn, contextual comparative study of law, *if* looked at through some of Legrand's main ideas, is painfully aware of the defects of the orthodoxy but seem at the same time to be obsessed by doing things in an opposite way. Doing so, contextual approach does not seem to be able to provide any *clear* methodological advice (method or approach by which to follow) concerning how to research law comparatively. It is too busy fighting with the windmills of orthodoxy[71]. This, on the other hand, does not mean to say that functionalism in comparative law would have 'coherently formulated functional method' because it does not have anything of that sort, however, the version of functionalism dealt with here offers a rule of thumb and some simple basic principles concerning the question of method[72]. Some road signs at least.

To simplify, for nationally oriented traditional lawyers all comparatists appear to be pretty much the same. If we comparatists would take our head out of the method-debate-bush we might realize that our discussions may look really strange to the uninitiated who may be interested in comparative study of law under different circumstances. It may as well be that the situation concerning comparative study of law's theoretical field today does not exactly invite all those interested in comparisons to take the final step into comparing. This is in part the making of comparatist-theorists themselves. But what can comparative study of law say to the extreme ends than to use the words from Shakespeare's Romeo and Juliet (III: 1) 'A plague o' both of your houses! They have made worms meat of me'.

However, I would like to argue that if one looks at contextually oriented studies and compares them with so-called mainstream studies there do not seem to be that many differences[73]. Different styles, yes. Different vocabulary, yes[74]. Different points of stress, yes. But incommensurability,

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[71] Even SAMUEL, above n 23, on page 77 points out that both of the extreme ends entail certain perils: functionalists may simplify legal knowledge whereas contextualists, as Legrand, may slip into ideology and myth.

[72] See MICHAELS, above n 57 at 25.

[73] This may sound, at first glance, extreme. However, if one looks at what sort of material is used and what sort of texts are being produced, then, in a comparative sense the differences seem actually to have to do mostly with vocabularies and points of interest. On the whole there seems to be no drastic differences – they are all comparative law or comparative legal studies, even though they may have differences concerning where to start in research and what to stress in the outcomes of studies. In this sense the notorious polemical position between similarities-are-everything and differences-are-everything seem to be strangely close to each other - two sides of the same coin. I mean to say that both of these traditions actually co-inside within professional culture and are genuinely interested in « the expert legal culture » quite independently from what they say they are interested in. Of the concept of legal culture from theoretical point of view see K. TUORI, *Critical Legal Positivism* (2002) at 161-83 (« memory of the narrow legal community, composed of professional lawyers »).

[74] See e.g., LEGRAND's short article, « Alterity: About Rules, for Example » in P. BIRKS and A. PRETTO (eds), *Themes in Comparative Law in Honour of Bernard Rudden* (2002) at 21-33.

no[75]. This appears to be the final paradox; if conceived carefully enough from epistemological and methodological point of view it might as well be that 'the contradiction will reveal itself as unreal' as *Geoffrey Samuel* suggests[76]. But, if these sharp contrasts (rules/black vs. context/white) do not lead to any clear methodology is there anything methodological than can be said about the subject at all. Are we destined to crude rule of thumbs or highly theoretical abstractions? Is it science vs. hermeneutics all over again with no hope of resolution or even reconciliation[77]?

Now, one interesting example of such a comparative law theorist that seems to struggle to get free from simple dichotomies, such as rules vs. context, is *Esin Örucu.* Especially her interesting book *Enigma of Comparative Law* (2004) should be mentioned in this context[78]. The very structure of her book offers theoretical contrapuncts and variations on the theme. She manages to show, to my mind, that there is no *one* true tradition of comparative law/comparative legal studies *but many*. It would seem that multiple traditions may give rise to many and partly incompatible but yet *legitimate* standards of comparative research in law[79]. This idea of pluralism is, nonetheless, receiving critique from those who are more robust in their efforts to try to develop method for comparative study of law, as for example, *Ralf Michaels*[80]. However, if something in the more extreme critique of functionalism in comparative law has had a point it may have been right here: does it really pay off to try to be so very serious in the search of rigorous scientific ideals[81]?

One of the key strengths of Örücü's construction is that she is not carried away by the overpowering affection of "difference" or "different" in the spirit of comparative law school of thought that has taken lately the

(One should look especially at how – in methodological sense – LEGRAND uses case law as a part of his argumentation).

[75] See e.g., J. HUSA, « Rechtsvergleichung auf neuen Wegen? » (2005) 46 *Zeitschrift für Rechtsvergleichung* 55-62. [Review essay of H. HENRŸ, *Kulturfremdes Recht erkennen* (2004). Essay questions, among other things, how different an approach that presents itself as alternative really is].

[76] SAMUEL, above n 23 at 64. See even HUSA, above n 29 at 443-45.

[77] As MICHAELS, above n 57 at 47 points out this question relates to the very nature of comparative study of law: should it be understood as interpretative or as scientific.

[78] See for more detailed discussion J. HUSA, « Melodies on Comparative Law : A Review Essay » (2005) 74 *Nordic Journal of International Law* 161-74.

[79] It seems, though, that the idea of reconciliation between the extreme ends and the idea of methodological plurality are gaining momentum. M.-C. PONTHOREAU says that « Si le droit comparé est compris comme un outil épistémologique, il ne correspond donc pas à une méthode. La comparaison des droits suppose au contraire plusieurs méthodes ». M.-C. PONTHOREAU « Le droit comparé en question(s) entre pragmatisme et outil épistémologique », *Revue internationale de droit comparé,* 1-2005, p. 23.

[80] See MICHAELS, above n 57, chapter IV.

[81] See FRANKENBERG, above n 58 at 439.

'Neo-Romantic turn'[82]. Nor is she interested merely in black-letter rules or institutions as the functional orthodoxy, in practice, seems to be. Her position seems not to be neither post-modern nor orthodox or mainstream; it is something in-between and even something different altogether[83]. However, from a methodological view Örücu's problem is that even she is not very practical in her methodological advice. And in this sense, methodological problems *i.e.* difficulty with method remind of Legrand's problems. In fact she presents no applicable methods (i.e. paths to follow in an orderly manner) at all, even though she manages to prove her point on the level of theory. But, is there anything in the field today that would make it possible to break free from these sorts of methodological black-white dichotomies. One plausible idea that I find of specific interest is the idea of deep-level comparative law presented by Mark Van Hoecke[84].

In one of his articles, Van Hoecke does not speak of rules vs. contexts schools of thought but, instead, of epistemological optimism and epistemological pessimism[85]. Now, we may describe functional comparative lawyers as optimists, the majority probably, and people like Legrand we may describe as pessimists. The actual point here, for theme at hand, is that both of these seem to be inadequate theoretical attitudes in working out a decent methodology for comparative study of law. Instead, the idea according to which both of these extreme positions may be wrong is intellectually appealing; Van Hoecke suspects that 'Maybe they both have biased view of reality[86]'. One of the ideas of deep level comparative law is an attempt to break free from unfruitful paradoxes by concentrating on what is really important: *the actual manner* in which comparative law studies are

[82] See J. Q. WHITMAN, « The Neo-Romantic Turn » in P. LEGRAND & R. MUNDAY (eds) *Comparative Legal Studies: Traditions and Transitions* (2003) at 314, [seeing much of the difference-oriented comparative legal studies to remind nineteenth-century Romanticism, also saying that this epistemic tendency (i.e. Neo-Romanticism) is strange because one may misunderstand even one's own law; not just foreign law].

[83] ÖRÜCÜ (2004) on page 107 says about comparatists that « She must be able to grasp the underlying assumptions, conceptions and values as well as the economic, social or cultural contexts surrounding the facts and the handling of law. She must grapple with the cultural matrix into which law is embedded. She must develop an awareness and understanding of the multiple layers of systems and the significance of what is observed. Having comprehended, she must then re-represent it for her audience with and explanation and provide and insightful comparison ».

[84] See M. Van HOECKE, « Deep Level Comparative Law » in M. Van HOECKE (ed) *Epistemology and Methodology of Comparative Law* (2004) at. 165-95.

[85] *Ibid.* at 172-74. Naïve epistemological optimism is 'pursuing comparisons as if comparing legal systems would not entail specific epistemological problems' whereas strong epistemological pessimism « has led to a simple denial of any possibility for comparing…legal systems », at 172.

[86] *Ibid.* at 173.

carried out[87]. This practicality is plausible, indeed, in order to avoid too sterile a nature of methodological debate[88].

In short, the general idea of deep level comparative law seems to combine many of the different elements that extreme positions are disregarding in their black and white view of the world. And what is more important is the fact that the idea of deep level comparative law is such that it can be applied in actual comparative studies i.e. not just theoretical discourse on subject but has some of the strengths of Rabel's core-ideology – simplicity[89]. Even so it combines rules, institutions and formal side of law with contextual elements of law and, thus, avoids unnecessary binary positions[90]. What it offers is a certain manner to follow a path, i.e. method, also in quite technical and practical sense of the word. However, deep level comparative law is certainly no miracle potion and it too, of course, has its defects. And yet, at least while studying western law it seems to provide some sort of general matrix for certain type of comparative law[91]. And, what is far more important is that it offers an example of *how* to discuss fruitfully about methodology[92]. In general, this approach to methodology itself in which theory and actual research are combined seems to be quite a recommendable way to proceed in methodology; not only theory, not only practical comparison, instead, theory *with* practical applications.

Summarily, comparative law research should not be too one-sidedly interested in rules, concepts or institutions only but it should really look

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[87] GROSSFELD, above n 34 on page 8 says: « Here controversy abounds; there is no generally accepted theoretical framework; the concept, its aims, its object, and its method are all in issue. If we waited for clarification, we would never get down to business ».

[88] Jaluzot refers to this tendency to treat methodology of comparative law as « une question stérile », instead, « la véritable question à se poser est celle la méthodologique concrétement appliquée en droit comparé ». B. JALUZOT « Méthodologique du droit comparé – Bilan et perspective », *Revue internationale du droit comparé*, 1-2005, p. 48.

[89] Sometimes too theoretical methodology may be counterproductive and it may scare people away from comparing law and lead to a situation in which even high quality methodological constructions have very limited practical value. Perhaps we may suspect that this explains partially why the refined methodological work of Léontin-Jean CONSTANTINESCO, as e.g. *Traité de droit comparé,* t. II, *La méthode comparative* (1974), did not have a great impact on comparative law practice.

[90] These are, such as, terminology, the structure of law and textbooks, important discussion points, underlying conceptions, theories of interpretation, competing theories within legal cultures. See Van HOECKE, above n 84.

[91] The present author has struggled to put some of the ideas of deep level comparative law into action in a co-article J. HUSA & J. TAPANI, « Germanic and Nordic Fraud – A Comparative Look under the Surface of Commonalities » (2005) 5 *Global Jurist Advances* No. 2., Article 2. (In this article the comparative matrix consists of nature of judicial thinking, judicial mentality, structure of law and of textbooks, underlying theoretical conceptions, the evaluation of the state of the mind of the victim and demonstration of *modus operandi* of each of the compared systems.)

[92] As REITZ, above n 17 at 635 says « that while the comparative method is simple to describe, it is difficult to apply ».

under the surface and see the deeper level of underlying theories and conceptions[93]. And in this way comparative study of law can have it all – rules, institutions *and* contexts. Instead of strange paradoxes and dichotomies there should be more flexibility – rules with history and sociology, institutions with social and historical backgrounds, cases with an anthropological environment and so on and so forth. In sum, we should have rules *and* contexts, we should have at least different shades or grey instead of mere black and white i.e. we should have a *sliding scale of methods* fitted to the purpose of present comparative study as Vernon Valentine Palmer suggests[94].

Even though this idea of having a flexible understanding of methodology concerns foremost methodology of comparative study of law it is quite likely that this sort of idea (between the extremes) would also fit much better for the solutions of many other non-national legal problems of a more practical nature as, for instance, the debate concerning European private law in which one extreme advocates naïve implementation of European Civil Code and the other extreme thinks that European private law will never fit the diverse European legal scene[95]. In accord, the idea according to which there really is comparative method (*i.e*. singular method) should be treated with more suspicion[96].

The above presented is not to say that 'anything goes' but it does imply that the idea of scale is of importance[97]. In accord, best approach is not always the same but it is adapted for the specific purposes of a researcher. And, even while we would find Feyerabend's methodological anarchism too wild we can, however, assume that he had a point when saying that 'all

[93] Cf. Van HOECKE, above n 84 at 191.

[94] V. V. PALMER, « From Lerotholi to Lando: Some Examples of Comparative Law Methodology » (2004) 4 *Global Jurist Frontiers* No. 2., Article 1. « It would be a serious blow if all matters had to be analysed from one angle or perspective, or treated with the same detail and depth, or prepared to the same degree or in the same way. Instead there should be a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs ».

[95] See J. SMITS, *The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System* (2002) at 271-74 (looking for « an optimal mix of uniformity and legal culture »).

[96] Concerning the idea of « comparative method » see e.g., REITZ, above n 17 at 617.

[97] So, the idea of the author (as formulated in HUSA, above n 29) is not really what MICHAELS, above n 57, on page 24 says suggesting that « comparatist pick (ad hoc?) which ever method seems most appropriate for a given purpose » but, instead, that because there are many types of comparisons with many types of interest of knowledge it follows that there must be multiple methods too. Instead of pure « ad hoc » or « anything goes » the idea of scale or methodological tool-box is relevant – there are a certain group of approaches in the tool-box, however, the tools used ought to be taken from that tool-box containing several tools depending on the purpose of the present study.

methodologies, even the most obvious ones, have their limits[98]'. Functionalism in comparative law seems to prove this, whereas Legrand refuses to construct an accessible methodology to begin with.

In practice, if I am right in my methodological analysis, this may also suggest a step away from soloist type of comparativism and move towards research-group based comparative study of law in which we would have people with different special skills; lawyers, historians, sociologists, political scientists, linguists, and anthropologists[99]. This would ensure the use of multiple methods and several methodologies. Right now, it would be quite healthy for a comparative lawyer or comparative legal researcher to think about what she is methodologically equipped to do and what she is not. This does not, though, mean that comparatists could not learn new methods and approaches from other disciplines or to risk moving further away from purely formal sphere or law whether it be functions of rules or deep structures of legal systems[100]. On the other hand, not all comparatists can be experts in all of the different disciplines studying law.

## VI. CONCLUSION

There is no need reminding that there are many more issues in comparative study of law than just those dealt with here[101]. Obviously this is the case. Yet, the very design and purpose of this article was to invoke the fundamental question concerning the very nature of methodological thinking in comparative study of law. As such, the point was not to say which methodology is "best". Instead, what is claimed here is what Modeér is also saying about the methodology of comparative study of law: 'It is not *either-or* but *both-and*[102]'. In a word, late modern comparative law needs a flexible understanding of comparative methodology. The idea of flexibility, methodological scale and teamwork would facilitate ruling out the need to

[98] FEYERABEND, above n 1 at 23.

[99] FRANKENBERG, above n 58, on page 439 seems to fall into this trap too in his, otherwise, critical approach; he also sees the comparatist as a solo-performer.

[100] This is, basically, the message of I. MARKOVITS which she suggested in her « Hedgehogs or Foxes?: A Review of Westen's and Schleider's *Zivilrecht im Systemvergleich* », (1986) 34 *American Journal of Comparative Law* 135 (saying that we can learn empirical methods and philosophy, so, we should abandon the pure world of formal law and « take the plunge ».).

[101] The list could be very long, however, it will suffice here to name such as e.g. A. WATSON [*Legal Transplants: An Approach to Comparative Law* (2nd edn, 1993)] and his legal-transplant-approach, H. P. GLENN with his legal-traditions-approach [*Legal Traditions of the World: A Sustainable Diversity in Law* (2nd edn, 2004)], and U. MATTEI with his comparative law & economics approach combining comparative law and law & economics [*Comparative Law and Economics* (1997)].

[102] MODEÉR, above n 10 at 201, ('Det är inte *antingen-eller* utan *både-och*.').

limit research-questions just because one would lack certain methodological skill. This would open-up a far better vision for comparative study of law than outdated soloism or getting constantly entangled with peculiar methodological paradoxes and all-or-nothing debates that must look peculiar to non-comparative lawyers and nationally oriented legal scholars[103]. Late modern comparative methodology should be able to offer multiple approaches for those non-comparatists who have heard the call of the Sirens, and we should not, instead, hinder their hearing-ability by "one-method-one-vision" discourse silencing the pluralist charm of the original song. Indeed, why should comparatists themselves do their best in spreading general disappointment to comparative study of law[104]?

Even though Feyerabend's critique against method should be treated with due suspicion, especially in the field of sciences, he clearly had a point when he warned against unanimity of methodological opinion that would 'be fitting for a rigid church, for the frightened or greedy victims of some (ancient, or modern) myth, or for the weak and willing followers of some tyrant'[105]. In accord, let comparative law and comparative legal studies disengage from these sorts of methodological rigidities even though we would not abandon critical discourse on methodology.

[103] PETERS & SCHWENKE, above n 6 at 832, point to the fact that real problems are not cultural blindness and ethnocentricity but « the lack of full knowledge and understanding of foreign rules and cultures ». They, too, stress the important role of interdisciplinary approach.

[104] About the idea of « general disappointment » see REITZ, above n 17 at 610-20.

[105] FEYERABEND, above n 1 at 32.