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THE USE OF THE COMPARATIVE METHOD IN INTERNATIONAL ARBITRATION SCHOLARSHIP

Morad El Kadmiri

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THE USE OF COMPARATIVE LAW METHODOLOGY IN INTERNATIONAL ARBITRATION

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THE USE OF THE COMPARATIVE METHOD IN INTERNATIONAL ARBITRATION SCHOLARSHIP

Morad El Kadmiri

Résumé

La méthode comparative est au cœur des développements de l'arbitrage international. Les controverses épistémologiques récurrentes sur la nature du droit comparé et ses relations avec la méthode ont constitué un obstacle au développement du sujet ainsi redéfini. Partant du principe que la méthode est particulière à l'individu qui se propose d'étudier un objet comparativement, la question initiale détermine également la méthode à déployer. Conséquemment, une appréhension du regard de la comparaison ainsi que de la méthodologie sont nécessaires. Puisque la méthode comparative n'est pas universelle, la question de la méthodologie est spécifiquement abordée. Le second développement important de cet article concerne la contribution que le droit comparé peut apporter à l'enseignement de l'arbitrage international. Les usages légitimes et les détournements de la méthode comparative sont mis en évidence. Identifiant la fonction éducative du droit comparé comme une de ses facettes principales et l'arbitrage comme appartenant au domaine de la pratique, la réconciliation de ces deux composantes semble difficile. Un examen critique du traitement du droit comparé dans la littérature est entrepris avant d'aborder les lacunes et besoins du sujet dans une conclusion sur l'orientation devant être prise pour traiter des questions de comparaison en matière d'arbitrage international.

Mots clés : Arbitrage, Arbitrage international, Comparaison, Droit comparé, Éducation, Enseignement, Épistémologie, Fonctionnalisme, Grille de lecture, Méthode, Méthodologie, Perspective, Pluridisciplinarité, Savoir

Abstract

The comparative method is central to the developments of international arbitration. The recurrent epistemological debates on the nature of comparative law and its relationship with method have constituted a hindrance to the developments of the subject thus redefined. Starting from the premise that method is particular to the individual who sets to study an object comparatively, the initial question also determines the method to deploy. Therefore, an awareness of both the gaze of the comparison and methodology is necessary.

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This article is dedicated to my beloved mother Fadila.

Since the comparative method is not pan-disciplinary, the question of methodology is specifically addressed. The second salient development of this paper is concerned with the contribution comparative law can make to the teaching of international arbitration. Uses and misuses of the comparative method are underlined. Identifying the educational function of comparative law as one of its principal facets and arbitration as belonging to the realm of practice, the reconciliation of these two components seems difficult. A critical investigation on the treatment of comparative law in the literature is conducted before discussing shortcomings and needs in a conclusion on the direction scholarship should take to challenge comparative issues in international arbitration.

Keywords: Arbitration, Comparative Law, Comparison, Education, Epistemology, Functionalism, Interdisciplinarity, International Arbitration, Method, Methodology, Perspective, Scholarship, Teaching, Framework

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I. EXORDIUM

> *On ne peut se passer d'une méthode pour se mettre en quête de la vérité des choses. […] Toute la méthode réside dans la mise en ordre et la disposition des objets vers lesquels il faut tourner le regard de l'esprit, pour découvrir quelque vérité…*
>
> René Descartes[1]

A. Summary Definition: Identification of the Object

Ius Comparatum – It is customary to introduce a subject by defining its key terms. When the opportunity arose to publish under the aegis of the venerable International Academy of Comparative Law which is on the verge of celebrating its centenary anniversary, the topic to be discussed in the field of 'international arbitration' was the use made therein of 'comparative law methodology'.[2] Two and three words to be defined then – making up for a mere total of five. A simple task in appearance. The reality is far more convoluted but shall be kept within reasonable limits. The birth of *Ius Comparatum* augurs the scientific orientation of the Academy and, hopefully, the publication shall be a continuous testament of its progress in the fulfilment of the mission entrenched in article 2 of its Statutes providing that "[t]he purpose of the Academy is the comparative study of legal systems." Prominent comparative law scholars agree on the fact that a publication based on international cooperation and focusing on specific methodological issues is the most

[1] René Descartes, *Règles pour la direction de l'esprit* (Librairie Générale Française 2002) Rules IV & V, 88, 98. Rule V is akin to the third precept of the *Discourse* in René Descartes, *Discours de la méthode* (LGF 2000) 90. See René Descartes, *A Discourse on the Method* (Ian Maclean tr, OUP 2006) 17 for an English translation. French citations are reproduced in original language in accordance with the publication's bilingualism. See Xavier Blanc-Jouvan, 'Le cinquantenaire de la Revue' (1999) 51 Revue internationale de droit comparé 751.

[2] The International Academy of Comparative Law was founded at The Hague, Netherlands on 13 September 1924 and is now headquartered 28 rue Saint-Guillaume in Paris, France with the co-tenant *Institut de Droit Comparé* of the University of Paris founded in 1931.

appropriate format for the refinement of the subject.[3] Thus, papers of this inaugural volume should correlate with and complement each other.

Definitions – The term 'use' is understood in its general acceptation and will not require an in-depth examination. In this regard, however, Immanuel Kant seemed to consider in *De mundi sensibilis atque intelligibilis forma et principiis* (simplified by *Dissertation of 1770*) that the use of method was the premise of science. In his words,

> *[i]n all the sciences of which the principles are given intuitively, […] use gives method. After a science has attained a certain fullness and orderliness, trial and error show what path and what procedure must be pursued if it is to be brought to completion, and made to shine more purely, once the blemishes both of mistakes and of confused thoughts have been eliminated.*[4]

The author introduced the term 'scholarship' to the discussion. This is perfectly in line with the Academy's ethos. In fact, 'comparative law methodology' and 'teaching comparative law' along with the 'future of the International Academy of Comparative Law' were the three core topics under discussion during the Ceremony of 15 May 2017 in Honour of Five Great Comparatists. The first two mentioned here are the concern of this paper. These topics,

> *…represent the avenues by means of which we intend to develop the reflections about the role of the Academy in order to cope with the current challenges of comparative law. […] If the Academy itself and the comparative law methodology are important to us and require clear definitions for any future project, the aspects related to teaching are not less significant. In fact, the growing internationalisation of legal education*

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[3] André Tunc, 'France, Notion et objectifs d'une revue de droit comparé' (1975) 27 (1) RIDC 52; Xavier Blanc-Jouvan, 'Le rôle international d'une revue de droit comparé' (1975) 27 (1) RIDC 58; Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 Am J Comp L 673, 699.

[4] Immanuel Kant, *Theoretical Philosophy, 1755–1770* (David Walford and Ralf Meerbote eds, CUP 1992) Section 5, 406 (original emphasis). Kant's metaphysical dimension of method is beyond the scope of this paper; our focus is on the logical use of the understanding in the intuitive sphere. For an antagonistic view, see Paul Feyerabend, *Against Method* (4th edn, Verso 2010). Its 1975 original subtitle: *Outline of an Anarchistic Theory of Knowledge*.

> *plays today a key role in advancing the comparative legal method. Knowledge of other legal systems can be acquired through studying abroad and following courses which address international and regional legal questions. What about the comparative approach in legal education? What does it entail, and how should it be implemented? The Academy should not be absent in this crucial debate. […] In reality, the main contribution other legal researchers are expecting from us is the answer to the question 'how to compare?' […] We think that the Academy could offer the instruments to deal with comparative law more systematically. In doing so, we would encourage young scholars to deal seriously with comparative law, which ultimately could have a positive impact on the improvement of legal scholarship in general.*[5]

Regarding 'international arbitration', there is no generic acceptation for this process. Jurisdictions across the globe differ in their conceptions of its nature and sources. Suffice to provide here a summary definition. Thus, according to the authors of a leading treatise, "arbitration should be defined by reference to two constituent elements which commentators and the courts almost unanimously recognize. First, the arbitrators' task is to resolve a dispute. Second, the source of this judicial role is a contract."[6] Therefore, arbitration is the extrajudicial[7] binding process whereby one, or many, independent and impartial individual(s) is, or are, entrusted by the equally binding private will of litigants to settle their dispute. The international dimension of arbitration can be resulting from – among other criteria – many connecting factors such as, for instance, the place of business, subject matter or place of arbitration.[8]

Object – It might be considered that the title of the current contribution is in its essence subversive.[9] Indeed, the alert reader will note that the term

[5] Katharina Boele-Woelki and Diego P Fernández Arroyo (eds), *The Past, Present and Future of Comparative Law* (vol 29, Springer 2018) Preface, v–xiv.

[6] Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 11.

[7] Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 2. Although this is partially incorrect in general and especially in the enforcement stage.

[8] Article 1 (3) of the UNCITRAL Model Law on International Commercial Arbitration (amended on 7 July 2006).

[9] George Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 Am J Comp L 684. It is suggested the whole discipline carries a subversive nature.

'law' has been omitted from the 'comparative law methodology' triad. The *res* (object to be known)[10] is both the comparative method and international arbitration scholarship. Hence, 'law' appears totally superfluous since "method and methodology are to be distinguished from the substance of a discipline."[11] Five terms to examine then with scholarship carrying the meaning elicited by the Academy, that is, the teaching of the comparative method.

B. Method as a Particular Yardstick: Lessons from Modern Rationalism

Definition of method – Method also replaced methodology in the title of this paper. The reason is that the accepted definition of methodology entails a systematic approach while method alone accounts for particularity. Etymologically, "method connotes the search for a certain form of truth. The word originates from the Greek 'methodos' ('μέθοδος'), which consists of the prefix 'meta-' ('after') and of the suffix hodos ('way'). The compound suggests 'pursuit of knowledge' and 'mode of investigation'."[12] Simply put, a "method is a means of obtaining data" according to Professor Esin Örücü.[13] Similarly, Professor Geoffrey Samuel explained,

> *[m]ethodology […] has been described as a route to follow in order to achieve a result; and the expression 'methodology' is a scientific study of these methods, of these 'routes to follow'. More precisely method has been seen as a 'manner of conducting thought' […] different approaches entail different methods.*[14]

Rationalism and method – Without a doubt, the vocable is also inherited from the founding father of modern rationalism, whose influence on the world's ideas is still pregnant in our age.[15] René Descartes released in 1637 a

[10] Geoffrey Samuel, 'Taking Methods Seriously (Part Two)' (2007) 2 J Comp L 211.

[11] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 2.

[12] Simone Glanert, 'Method?' in Pier G Monateri (ed), *Methods of Comparative Law* (Edward Elgar 2012) 65.

[13] Esin Örücü, 'Methodological Aspects of Comparative Law' (2006) 8 Eur J L Reform 29.

[14] Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 2.

[15] René Guénon, *Orient et occident* (Véga 2006) 43–4; René Guénon, *La crise du monde moderne* (Gallimard 1973) 108. See also Feyerabend (n 4) 223 for a dismissal of the universal relevance of science and rationality,

seminal and biographical *magnum opus* entitled *A Discourse on the Method of Correctly Conducting One's Reason and Seeking Truth in the Sciences.*[16] A decade prior to this classical masterpiece, *Regulae ad directionem ingenii* (*Rules for the Direction of the Understanding*) was written but not completed. The *Rules* were designed in a more systematic manner than the later *Discourse* and formed part of the *Opuscula posthuma, physica et mathematica* only published in 1701 (in Latin) together with, among other writings, *The Search for Truth by the Natural Light*.[17] Originally published in French at a time when Latin was the learned language of intellectual elites, the *Discourse on 'the' Method* aimed at a larger – albeit not vulgar – audience, but particularity was the essence of its exposition.[18] Descartes provided a definition of his personal conception of method in his earlier *Rules*.[19] The following discussion is openly subsumed under Cartesian philosophy.

State of experimenting? – It seems crucial to emphasise here that our rejection of methodology as an epistemological framework is also a result of the fact that systematism and comparativism in law may prove to be an irreconcilable oxymoron.[20] "Methodology is riddled with problems" admitted Professor Örücü.[21] Former Director of the Max Planck Institute for Comparative and International Private Law based in Hamburg, Professor Konrad Zweigert,

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and 241 for the admission of the relative validity of rationality and the contingent improvements it may be subject to.

[16] Descartes, *A Discourse on the Method* (n 1) vii; Descartes, *Discours de la méthode* (n 1) 12, 65: "*Discours de la méthode pour bien conduire sa raison et chercher la vérité dans les sciences, plus la dioptrique, les météores et la géométrie qui sont des essais de cette méthode*."

[17] René Descartes, *La recherche de la vérité par la lumière naturelle* (LGF 2010).

[18] Descartes, *Discours de la méthode* (n 1) 70: "*Ainsi mon dessein n'est pas d'enseigner ici la méthode que chacun doit suivre pour bien conduire sa raison ; mais seulement de faire voir en quelle sorte j'ai tâché de conduire* la mienne" (emphasis added). See Descartes, *A Discourse on the Method* (n 1) 6 for an English translation.

[19] Descartes, *Règles pour la direction de l'esprit* (n 1) Rule IV, 89: "*Ce que j'entends maintenant par méthode, ce sont des règles certaines et faciles, par l'observation exacte desquelles on sera sûr de ne jamais prendre une erreur pour une vérité, et, sans y dépenser inutilement les forces de son esprit, mais en accroissant son savoir par un progrès continu, de parvenir à la connaissance vraie de tout ce dont on sera capable*."

[20] Konrad Zweigert, 'Methodological Problems in Comparative Law' (1972) 7 Isr L Rev 465; Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 6, 173.

[21] Örücü (n 13) 30.

even suggested unreliability was the fate of methodology in comparative law. In his terms,

> *[t]his is too young a discipline to expect of it a definite set of methods. Even today, the proper method for tackling a problem of comparative law must usually be found by trial and error. It is part of the comparatist's experience that his method is not predetermined in detail; if at all, it may be proposed as an hypothesis to be verified or falsified by its results. A basic error of earlier theoretical concepts of comparative law was that its premises, its aims and methods, were definable by philosophical or systematic deduction. It still remains doubtful whether any logical and complete methodology of comparative law which can claim absolute reliability is at all possible.*[22]

Professor Patrick Glenn also acknowledged that "the history of comparative law is not one of adherence to a methodological norm but rather one of deviation and variety" and "reveals a preoccupation with principles of method, though no consistency in their application."[23] In the same vein, Paul Feyerabend explained,

> *[t]he idea of a method that contains firm, unchanging, and absolutely binding principles for conducting the business of science meets considerable difficulty when confronted with the results of historical research. We find, then, that there is not a single rule, however plausible, and however firmly grounded in epistemology, that is not violated at some time or other.*[24]

This does not mean, however, that attempts to formalise a framework for a viable approach to comparative legal studies are in vain.[25] Far from it. Almost half a century has passed since Professor Zweigert's observation and one has to acknowledge that various efforts have been attempted to extract the discipline outside of its 'state of experimenting'.[26]

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[22] Zweigert (n 20).

[23] Patrick Glenn, 'Against Method?' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law* (Hart Publishing 2014) 177.

[24] Feyerabend (n 4) 7; Glenn, 'Against Method?' (n 23) 186, 188.

[25] Stephen Smith, 'Comparative Legal Scholarship as Ordinary Legal Scholarship' (2010) 5 J Comp L 355.

[26] Zweigert (n 20); Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 3, 6.

C. Formulation of a Reliable Framework: Amateurism, Specialism and Exclusivity

Theoretical framework – Repeated calls for the establishment of such framework have been made in the past decades and the Academy's initiative appears to be the perfect occasion to insist on its modalities. In this regard, Professor Walter Kamba declared,

> *…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 – a framework which would also be valuable to the legal practitioner for the recognising and handling of legal problems involving foreign law. […] A theoretical framework is a necessary guide to action and impinges upon, and constitutes the foundation of, all specific comparative legal studies and research. It is this framework which gives unity to what appear to be discreet particular projects of comparative law. It is this theoretical aspect around which a common tradition can derive – around which a stock of knowledge capable of transmission and refinement can accumulate.*[27]

Professor Arthur von Mehren gave the same account three years before Professor Kamba.[28] Some three decades following the observation of von Mehren and the efforts of Kamba, the situation remained identical in Professor Mathias Reimann's words and this leads to revisiting the validity of the methodological dimension of comparative law. According to Reimann,

> *…the lack of theoretical foundations is the main (or at least a major) reason for the failure of comparative law to make overall progress […] the field as a whole lacks a sound theoretical framework. […] Comparative law will probably not make serious progress until it bids farewell to its current laissez faire approach to theoretical and methodological basics. The discipline would be better off if comparatists gathered the courage to define a common canon of knowledge, to agree on a limited set of ultimate goals, and to commit to long-term and interdisciplinary cooperation. By*

[27] Walter Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 Intl Comp L Q 485, 518.

[28] Arthur von Mehren, 'An Academic Tradition for Comparative Law?' (1971) 19 Am J Comp L 624.

> *taking these steps, comparative law can perhaps learn to walk in a chosen direction rather than continue to stumble along without aim.*[29]

Amateurism – Anarchy and amateurism are the resultant of the lack of systematism in the discipline. These are detrimental to legal science and constitute an impediment to the fruits that may otherwise be validly yielded by a methodological approach. Thus, Professor Annelise Riles felt able to declare that "amateurism is perhaps comparative law's defining methodological trait" and its persistence "in late twentieth century comparative law, long after the infusion of modern social scientific paradigms and methods into other fields of legal scholarship, then, is treated as something of an embarrassment."[30] For Professor Samuel,

> *…law is governed not by an epistemological approach of inquiry, but by one of authority, and that while such an approach is adequate, indeed necessary, for national lawyers, it is inadequate for comparative lawyers.*[31]

> *…[M]oving from 'black-letter' law to comparative legal studies is fraught with danger […] because one is forced to make methodological, paradigm and orientation shifts if a lawyer is to do serious comparative work. […] Only by operating outside the authority approach will the comparison aspect of comparative law escape from being amateurish.*[32]

> *Amateurism can be fatal to a serious research project and can result in work that is pretentious and ridiculous and (or) full of errors.*[33]

Discussing its effects on education, Professor Reimann seemed less concerned than Samuel when he acknowledged "[i]t is true that the danger of amateurism looms large – even among comparatists and certainly among others. […] Specialists are always tempted to believe that nonspecialists just cannot [use comparative or other perspectives], but at least on a basic level, they often can."[34]

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[29] Reimann, 'The Progress and Failure of Comparative Law' (n 3) 695, 699–700.

[30] Annelise Riles, 'Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism' in *Rethinking the Masters of Comparative Law* (Annelise Riles ed, Hart Publishing 2001) 94.

[31] Geoffrey Samuel, 'Taking Methods Seriously (Part One)' (2007) 2 J Comp L 94–5.

[32] Samuel, 'Taking Methods Seriously (Part Two)' (n 10) 235–6.

[33] Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 35.

[34] Mathias Reimann, 'The End of Comparative Law as an Autonomous Subject' (1996) 11 Tul Eur & Civ LF 67.

Specialism and exclusivity – The obverse pitfall to amateurism would be specialism confining the method to a small group of highly trained individuals. These specialists would in turn provide their expertise to lawyers and judges who admittedly face severe time constraints and a general incompetence impinging upon their ascertainment of foreign law – let alone comparison thereof.[35] This process has been amusingly designated as 'packaging' by a foremost scholar in the person of Professor Sir Basil Markesinis. Such 'package' is devised to meet the needs of practitioners by making foreign law 'easily digestible'.[36] Regardless of the various difficulties encountered by practitioners and jurists, relying on a *delivery* (albeit express) from a third party seems unsatisfactory. Awareness of the comparative method should contribute to the development of an *autonomously conducted* and *time effective* discipline. This is one of the guiding hopes of this humble contribution. Could packaging apply to the comparative method instead of the interstitial dissemination by experts of partial and casuistic foreign law findings? This is an essential question as former President of the Academy, Professor Konstantinos Kerameus revealed the dangers of specialism leading to exclusivity which he attributed to the potential neglect of other branches of domestic or international law.

> *Exclusivity would result in making comparative law an esoteric, and for most lawyers inaccessible, intellectual activity. The comparative method, which had to work hard in order to gain general acceptance, would again be eroded to a seclusive business, reserved for the luxurious curiosity of a few strange human beings. Comparative law runs the serious risk of being marginalized unless it tries to be established as a central, frequent, and almost indispensable method of legal research. […] [C]omparative law, because it is a descriptive rather than a normative or interpretative discipline, is accustomed to well-rounded presentations of legal issues but not necessarily to clear-cut answers. By engaging in comparative law exclusively, a lawyer may go astray and lose sight of the main structure of*

[35] Basil Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years* (Hart publishing 2003) Foreword by former UK Supreme Court President Lord Phillips of Worth Matravers, vii.

[36] ibid 36, 158; Basil Markesinis, 'Scholarship, Reputation of Scholarship and Legacy: Provocative Reflections from a Comparatist's Point of View' (2003) 38 Irish Jurist 20, 23. See also Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 20.

> *legal problems and their expected solutions. Therefore, a conjunction of comparative law and any branch of substantive or procedural law will probably have the benefit of keeping lawyers in the mainstream of legal reasoning while enriching it with the comparative dimension.*[37]

Furthermore, Professor Glenn regarded comparative legal practice as a "rapidly expanding field of legal practice" and "a new addition to the discipline of comparative law and implies its generalization and democratization." In his view, the comparative methods "should become more mainstream in legal thought. This has important consequences, among other things, for legal education."[38]

This contribution will be the perfect opportunity to introduce an uninitiated audience to the characteristics and uses of the comparative method in the area of international arbitration with a particular focus on the academic literature; breaking with the exclusivity of theorists who tend to study the subject in isolation – at the exclusion of few notable exceptions.[39] Beginning with definitions, the first question addressed is: what is it to compare (II.A)? Then, who compares (II.B)? Finally, how to compare (II.C)?

II. THE COMPARATIVE METHODS

> *Pour parfaire la science, il faut passer en revue dans leur totalité et une par une, d'un mouvement continu et absolument ininterrompu de la pensée, toutes les choses qui concernent notre propos, et les embrasser en une énumération suffisante et ordonnée.*
>
> René Descartes[40]

[37] Konstantinos Kerameus, 'Comparative Law and Comparative Lawyers: Opening Remarks' (2001) 75 Tul L Rev 868–9. See also Smith (n 25).

[38] Patrick Glenn, 'Comparative Law and Legal Practice: On Removing the Borders' (2001) 75 Tul L Rev 1002.

[39] Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012).

[40] Descartes, *Règles pour la direction de l'esprit* (n 1) Rule VII, 106. This rule is akin to the fourth precept of the *Discourse* (n 1) 90 in French and 17 for the English translation.

A. Comparative Law and Method: Persistence of Terminological Uncertainties

1. *Epistemological Disambiguation: The Methods of Comparison*

Epistemological debates – The assumptions underpinning the recurrent semantic controversies that lie in the definition of comparative law are not to be confused with a worn academic quarrel; they hinder the progress of the subject.[41] According to Professor Reimann, the beginning of the 21st century was "a time of rising complaints about the discipline's malaise" since "comparative law has been a serious failure because it has not developed into a coherent and intellectually convincing discipline. […] The most embarrassing theoretical weakness is the continuing lack of an understanding of what it really means to compare."[42] Professor Xavier Blanc-Jouvan also noted "[t]he more progress a science makes, the more crucial it becomes to reach a bare consensus on its goals and methods."[43] Although these controversies stem from a philological debate, jurists have been bold enough to venture outside their territory with more or less success.[44] Some suggest settling the misunderstanding would be a futile endeavour.[45] This terminological ascertainment, however, responds to an epistemic duty to characterise the nature of the subject – it is a matter of truth and authenticity. In this regard, Professor Samuel noted that "methodology rightly forms a central part of epistemology. To take methods seriously is to take knowledge (epistemology) seriously" and "[b]efore one can examine the methods of comparative law, the subject itself needs to be defined, since definition and method are quite closely linked."[46] Likewise, Professor Valentina Vadi declared that "[d]iscourse on

[41] Blanc-Jouvan, 'Le cinquantenaire de la Revue' (n 1) 748.

[42] Reimann, 'The Progress and Failure of Comparative Law' (n 3) 672–3, 686.

[43] Xavier Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Opening Remarks' (2001) 75 Tul L Rev 862–3.

[44] Maximilian Schmitthoff, 'The Science of Comparative Law' (1939) 7 (1) Cambridge L J 95.

[45] id; Zweigert (n 20); Xavier Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Closing Remarks' (2001) 75 Tul L Rev 1235.

[46] Samuel, 'Taking Methods Seriously (Part One)' (n 31) 118; Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 8.

method is essential because it clarifies the tools of the discipline and its objectives."[47]

Methods rather than method – It appears appropriate to begin here with an exegetic assessment of the meaning of the topic by reviewing conceptions expressed in a fairly abundant literature. Perhaps to extinguish any established illusion at the outset, will be quoted first the late Professor Sir Otto Kahn-Freund whose views were characterised with audacity.

> *The trouble is that [comparative law] […] has by common consent the somewhat unusual characteristic that it does not exist. Comparative law – this has almost become a common place – is not a topic, but a method. Or better: it is the common name for a variety of methods of looking at law, and especially of looking at one's own law.*[48]

This far from marginal nihilistic appreciation of the subject is shared by a legion of scholars.[49] This enlightening negation does not appear abusive – although denied by later scholars as will be seen – but may fail to help characterise the subject of this paper. Defining a concept negatively is only partially revealing its nature. Fortunately, Kahn-Freund's inaugural lecture upon taking the Chair of Comparative Law at the University of Oxford did not end there. Indeed, there would be little motives of pride in the promotion. His following statement is, however, highly interesting. For it acknowledges the existence of a 'variety of methods' and the verb to 'look' appears twice. Would there be many *methods* of comparison as many scholars noted? What do these methods entail? Professors Maurice Adams and John Griffiths identified the cause of the variety of methods in comparative law in these terms.

> *All scientific work begins with a question about the world we live in. Questions go before methods, and until one has specified what the question is, no sensible discussion of methodology is possible. […] Actually, it is a whole collection of methods that may be helpful in seeking answers*

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[47] Valentina Vadi, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration' (2010) 39 Denv J Intl L & Poly 77.

[48] Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 LQR 41. See also Markesinis, 'Scholarship, Reputation of Scholarship and Legacy' (n 36) 9.

[49] 'Bibliographie, J. Hall, Comparative Law and Social Theory' (1996) 18 RIDC 307.

> *to a variety of sorts of questions about law. What legal comparison entails in a concrete situation depends on the sort of question one wants to try to answer. […] [T]here is no such thing as a single method which, applied as a sort of recipe, will lead to the right results.*[50]

This view is widely accepted among the scholarly community.[51] Dr Simone Glanert affirmed "*method is not absolute*. Within the diversity of methods obtaining in each discipline, it will be claimed by the proponents of one particular method that their model ought to prevail, that it must be regarded as the best method."[52] For Professor Örücü,

> *[s]ince there is no single method or single perspective exclusive to comparative law, we cannot talk of one 'comparative law method' or 'comparative law methodology' or even one 'methodology of comparative law', but of 'methods employed in comparative law research'. […] When one accepts that there is no one methodological paradigm, then a plurality of methods can be practised. I believe that the availability of a multiplicity of approaches can only enrich research possibilities. As the comparative law research is open-ended, the methodology is determined by the strategy of the comparative lawyer.*[53]

Are these various methods then also the corollary of the *subjectivity* of the *intellectus* (knowing subject)?[54] (see Sect. II. B) Also, to which extent does this outlook interfere with, or merely influence, his assessment? Are these questions, by any means, relevant for international arbitration? If so, to which extent? (see Sect. III. C) Some answers will be provided to these questions with no pretention to be exhaustive considering the vastness of the subject.

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[50] Maurice Adams and John Griffiths, 'Against 'Comparative Method': Explaining Similarities and Differences' in Adams and Bomhoff (n 39) 279–281, 301.

[51] Kamba (n 27) 511; Örücü (n 13) 41; Catherine Valcke, 'Reflections on Comparative Law Methodology: Getting Inside Contract Law' in Adams and Bomhoff (n 39) 23; Glenn, 'Against Method?' (n 23); Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 45.

[52] Glanert (n 12) 66 (original emphasis).

[53] Örücü (n 13) 41, 31.

[54] Samuel, 'Taking Methods Seriously (Part One)' (n 46).

2. *Within and Beyond Method: Controversial Dichotomy*

Comparative 'law' – Examining the subject further, increasing the characterisation difficulty, it is essential to dissipate the recurrent misconceptions about 'comparative law' and the 'method(s)' pertaining to it. Misunderstandings that are in part due to their definition but also to the ambit and aims of the subject. Professor Glenn revealed "the origin of the word 'compare', as a combination of the Latin words 'with', or cum (com), and 'pare', or peer or equal."[55] According to Kamba,

> *Convenience and historical accident seem to account for the choice and continued use of the somewhat misleading name 'comparative law.' Other names which would more accurately designate the subject have been suggested – names such as 'the comparison of laws,' 'the comparative study of law or laws,' 'comparative legal study and research'.*[56]

Professor Kerameus noted in this regard that "because law is not only a reference but is the very field of our study, the traditional term of comparative law is fully justified and suitably reflects the field of our scholarly endeavors."[57] It is somehow amusing and quite disturbing at the same time to note that Professor Blanc-Jouvan, then treasurer of the Academy, declared "we all admit that the expression is inadequate" adopting a general opinion omitting the view expressed in the same congress by President Kerameus and published in the same review![58]

Beyond method? – Few early exponents of comparative law as a science seemed to have attributed an independent realm to the discipline.[59] This was the prevailing conception on comparative law during the early 20th century as expressed in the seminal Congress of 1900 with some notable dissenting opinions such as Frederick Pollock who declared "*le droit comparé n'est pas une science propre, mais […] n'est que l'introduction de la méthode comparée dans*

[55] Glenn, 'Against Method?' (n 23) 186.

[56] Kamba (n 27) 487.

[57] Kerameus (n 37) 866.

[58] Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Closing Remarks' (n 45) 1235.

[59] Harold Gutteridge, 'The Value of Comparative Law' (1931) J Soc Pub T L 27.

le droit."[60] A quite debated view would be to consider comparative law as a branch of law, that is a subject akin to the substantive areas of the law such as contract or property law. According to some comparatists, it is not.[61] However, Professor Reimann recently assumed at the dawn of the 21st century that this view belonged to the past, since the accumulated knowledge resulting from the various comparative endeavours have amounted to the establishment of an independent field of law. In his view, the claims confining the discipline to method may have been valid more than half a century ago since "the discipline consisted mainly of a particular way of looking at law and of a research agenda […] [but] the actual *knowledge* accumulated in the meantime makes [this] position indefensible."[62] For Professor Kerameus, among these "two schools of thought, which qualify comparative law either as an auxiliary method of engaging in serious legal research or as a quasi-autonomous branch of law aspiring to equal treatment with other, more traditional and down-to-earth, parts of a legal system […] the first scholarly direction […] is the prevailing one."[63] Professor Vadi simply considered this as a false dichotomy.[64] In the same vein, Professor Smith indicated that "[c]omparative legal scholarship is simply scholarship that compares legal phenomena."[65]

It remains to be seen if in the area of international arbitration, the use of the comparative method has contributed to the development of an autonomous and coherent body of knowledge which constitutes 'comparative international arbitration' or does the controversial dichotomy still make sense in that arbitration still requires the support of method.

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[60] Frederick Pollock in *Congrès international de droit comparé, Procès-verbaux des séances et documents* (vol 1, LGDJ 1905) 60.

[61] Kamba (n 27) 486–7; Ugo Mattei, 'Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction' (2002) 50 Am J Comp L Supp 87.

[62] Reimann, 'The Progress and Failure of Comparative Law' (n 3) 683–4 (original emphasis).

[63] Kerameus (n 57).

[64] Vadi (n 47) 77.

[65] Smith (n 25) 336.

3. *Plurality of Views and Unity of Approach: Systematism as Guidance*

Comparison and systematism – Yet, there seems to be an inexcusable misunderstanding which would be to treat foreign or international law as comparative for the mere reason that one is looking outside his own. According to Professors Zweigert and Kötz, "the mere study of foreign law falls short of being comparative law."[66] This aberration is not only the fact of busy practitioners. The academic curricula and works are not remote from this deceptive fallacy. Perhaps is it the result of an "absence of any serious interest in method (and epistemology) by academic lawyers."[67] Those who fall in this shortcoming seem to reduce comparative law to its 'extra dimension of internationalism' using the formula of our learned German Professors discarding by the same fact its determining facet.[68] Taking a step further in the elicitation of the formulation, Professor Kamba is of the opinion that "comparative law is the *systematic application* of comparison to law."[69] It is not without significance that Professor Harold Gutteridge attempted to settle the question of the meaning of comparative law in an article discussing its *value* indicating that, "the comparative method lends itself to the study of any branch of legal learning, and that its division into separate categories serves no useful purpose, and may cause confusion."[70] Pondering on the uses of methodology in comparative law, the Academy – in agreement with Gutteridge – disclosed its agenda noting that "notwithstanding the particular elements which remain specific to each legal field, it is nevertheless possible to establish a general methodological framework for all areas of the law. The Academy should provide the tools to elaborate such framework."[71] This methodological framework is not incompatible with the plurality of methods used. Thus, Professor Samuel

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[66] Zweigert and Kötz (n 36) 6. See also Roscoe Pound, 'The Place of Comparative Law in the American Law School Curriculum' (1934) 8 Tul L Rev 168; Kamba (n 27) 505–6; Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Closing Remarks' (n 45) 1236.

[67] Samuel, 'Taking Methods Seriously (Part One)' (n 31) 94.

[68] Zweigert and Kötz (n 36) 2.

[69] Kamba (n 27) 486, 489, 506 (original emphasis). See also René David, *Traité élémentaire de droit civil comparé* (LGDJ 1950) 4.

[70] Gutteridge (n 59) 28.

[71] Boele-Woelki and Fernández Arroyo (n 5) Preface, x.

observed "[j]ust as one uses different maps in different situations, so the comparatist should employ different methodologies to reveal different kinds of knowledge […] and not seek to impose a single knowledge 'map'. Difference is what matters."[72] Instead, a general approach is to be favoured regardless of the applicative substantive subject.

Comparison of (and in) law – It is regrettable, however, that comparative law cannot derive its methodology from a universal science of comparison as it is contained in law which is characterised with a plurality of approaches. Professor Kerameus astutely noted,

> *[a] general science of comparison is, at least up to now, nonexistent. […] Therefore, as things stand now, comparative law is neither supported by an established discipline of general comparison nor fertilized by any comparative glimpses produced in other areas of social or human sciences. It stands alone, embodied in law and law only and put in the service of law and law only. […] [C]omparative law cannot rely on any developed general theory of comparison, it is more law than comparison. For our discipline, law is not a point of reference, it is our very subject matter.*[73]

Similarly, Dr Glanert simply remarked, "*method is not pan-disciplinary.*"[74] The opposite opinion of Professor Gutteridge noting that "[i]n effect, this method of study applies to law similar processes to those which have already been adopted in other sciences" appears too ambitious and impractical.[75] If it is doubtful these processes would apply equally to law; Professor Samuel believes that, at least, social science methodology is relevant to law and that its neglect is the principal source of amateurism in comparative law.[76] Professor Blanc-Jouvan also considered that "different approaches to law, to legal science, and to legal education" are "reflected in comparative law" noting that this diversity was "desirable and healthy, as in any science, insofar as divergences nourish

[72] Samuel, 'Taking Methods Seriously (Part Two)' (n 10) 236.

[73] Kerameus (n 37) 867.

[74] Glanert (n 12) 65 (original emphasis).

[75] Gutteridge (n 59).

[76] Samuel, 'Taking Methods Seriously (Part One)' (n 67).

the debate and further deepen our understanding of the problems."[77] Indeed, as Professor Stephen Smith indicated,

> *[n]o amount of goodwill and effort will ever produce a shared vision of comparative law. The obstacle is structural: there is nothing in the methodology, subject-matter, challenges or aims of comparative scholarship that does or should distinguish it from domestic scholarship. Comparative legal scholarship is just legal scholarship. Comparative scholars are thus no more likely to agree to a set of common aims and assumptions than are legal scholars generally.*[78]

Professor Zweigert favoured an idiosyncratic, purposive and contextual approach to comparative law which can be manifold depending on the applications, making all the foregoing claims valid.[79] For the purposes of this article, comparative law will be considered in its methodological dimension. These considerations call into the questioning of subjectivity.

B. The Gaze of the Comparison: The Subject at the Source of the Understanding

1. *Preponderance of Perspective: Parable of the Comparatist's Foot*

Preponderance of perspective – Kahn Freund's definition of comparative law relying on the comparatist's outlook is reminiscent of Descartes' notion of 'regard de l'esprit'[80] which the subject directs at the objects of comparison following an orderly and particular method. One has to consider that "*method is speculative.* Scholarly work […] dwells in the realm of representation. Because any representation is generated by a situated observer […] it is inevitably other than mere description."[81] As Professor Samuel noted, comparative law would be a 'perspective' and "if one sees method as an epistemological issue and

[77] Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Closing Remarks' (n 45) 1235.

[78] Smith (n 25).

[79] Zweigert (n 20) 465.

[80] Descartes, *Règles pour la direction de l'esprit* (n 1) Rule V, 98.

[81] Glanert (n 12) 69 (original emphasis).

embedded in theory, the dichotomy between 'method' and 'perspective' becomes very much less pronounced."[82] According to Professor Mitchel Lasser,

> *[t]his problem of perspective spills into that of methodology and theory. The comparatist must come to terms with the fact that the object of analysis does not simply 'exist' and 'speak for itself'. The comparatist must recognize that she selects what to describe, decides what to focus on and edits the description and analysis accordingly. The adoption of a methodological approach and thus of a theoretical framework, therefore, constructs the object even as it describes it.*[83]

Günter Frankenberg declared that "perspective [is] a central and determinative element in the discourse of comparative law."[84] Professor Vadi affirmed that "depending on the perspective adopted, comparisons may have completely different outcomes. In other words, where one stands on any particular issue is nearly always dependent upon where one sits."[85] In the same vein, Professor Blanc-Jouvan believed that "a professor's approach is not necessarily the same as a practitioner's; a lawmaker's approach is not necessarily the same as a judge's. As important as each approach is, none should be regarded as exclusive. All of them are valid and even complementary."[86] To this statement the author would add that the professor's view assesses and is influenced by the views of the lawmaker and judge (the latter himself should be strongly influenced by the lawmaker in any serious democracy committed to the rule of law, and by the professor for the sake of critical argumentation). Hence the emphasis on *complementarity*.

Comparatist's foot – In comparative law, this outlook seems to be a determining factor since it is embodied in method. As Glanert noted, "*method is not objective*. Although the promotion of a given method often discloses universalizing aspirations, the fact remains that any method is necessarily

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[82] Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 2.

[83] Mitchel Lasser, 'The Question of Understanding' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 217.

[84] Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harv Intl L J 411.

[85] Vadi (n 47) 78.

[86] Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Closing Remarks' (n 45) 1236.

produced by a particular individual situated in time and space. In other words, any method is someone's method."[87] The famous parable of John Selden concerning Equity would equally apply to comparative law and epitomises its contingent nature.

> *[Comparative Law] is a Roguish thing: for Law we have a measure, know what to trust to; [Comparative Law] is according to the Conscience of him that is [Comparatist], and as that is larger or narrower, so is [Comparative Law]. [It is] all one as if they should make the Standard for the measure, we call a Foot, a [Comparatist]'s Foot; what an uncertain Measure would this be? One [Comparatist] has a long Foot, another a short Foot, a Third an indifferent Foot: [It is] the same thing in the [Comparatist]'s Conscience.*[88]

Igor Stramignoni identified this issue as the '*question de la comparaison*' which he deemed a "*question vitale pour la connaissance comparatiste du droit*" and is related to the issue of representation.[89] This question has been formulated in plain terms by a giant comparative theorist by the name of Professor Pierre Legrand.[90] The late Professor Rudolf Schlesinger employing a less philosophical verbosity noted in his leading casebook *Comparative Law: Cases–Text–Materials*[91] that "[a]n individual's jurisprudential outlook […] is bound to have a strong influence on the direction and intensity of his interest in Comparative law."[92] Such 'jurisprudential outlook' has been laconically summed up by Professor Kamba as corresponding to "the comparatist's general attitude to law."[93] In the same vein, Professor Roscoe Pound also affirmed "[w]hat we may expect from comparative law depends upon the comparative lawyer and the kind of thing he sets before us as comparative law."[94]

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[87] Glanert (n 12) 67 (original emphasis).

[88] John Selden, *The Table-Talk* (2nd edn, John Russell Smith 1856) 49. In this metaphor, *Equity* has been replaced by *Comparative Law*; and *Chancellor* by *Comparatist*.

[89] Igor Stramignoni, 'Le regard de la comparaison : Nietzsche, Heidegger, Derrida' in Pierre Legrand (ed), *Comparer les droits, résolument* (PUF 2009) 161–2.

[90] Pierre Legrand, 'John Henry Merryman and Comparative Legal Studies: A Dialogue' (1999) 47 Am J Comp L 3.

[91] Bertram Willcox, 'Rudolf B. Schlesinger – World Lawyer' (1975) 60 (6) Cornell L Rev 921.

[92] Rudolf Schlesinger, *Comparative Law: Cases–Text–Materials* (5th edn, Foundation Press 1988) 40.

[93] Kamba (n 27) 512–3.

[94] Roscoe Pound, 'What May We Expect from Comparative Law?' (1936) 22 ABA J 56.

2. *Difficulties in the Characterisation of the Comparatist's Outlook*

Inquiry on perspective – If perspective plays a central role in the developments of the comparative method, an investigation on its presumptions should be carried out. Only by meaningfully discerning the extent of prejudice in representation will one have a clearer view of the object represented by a comparative study. In this regard, it appears necessary to recall here the astute observation of Professor Legrand concerning the gaze of the comparison.

> *Since the instrument of the comparison is the comparatist himself, it seems important that information about the comparatist should be accessible to those interested in evaluating his results. In fact, I argue that a meaningful apprehension of any significant comparative discourse must involve an assessment of the gaze of the comparatist on the law and the law-world which he purports to re-present and, therefore, an appreciation of the referential framework which sustains that gaze. It follows that there is a merit in making explicit the basic assumptions that underlie a comparatist's choice in formulating his questions and identifying the evidence he regards as relevant to answer them.*[95]

The issue lies here in the difficulty to characterize that gaze, assuming comparison itself is already challenging for practitioners and academics considering contingencies of time. This is however a process which is not stranger to the field of international arbitration since, for instance, the selection and appointment of arbitrators relies mostly on a preliminary assessment of their jurisprudential outlook and their ideological tendencies. This is a comparative process by nature. Studies revealed that "[a]rbitrators, like judges, are influenced by anchoring, framing, representativeness, and egocentric bias" and are "diverse, independent, and hold resolutely different opinions…"[96]

Awareness of perspective – Failure to expose the comparative method is thus also accompanied by an absence of self-appraisal among international arbitration actors. According to Professor Vadi, "a more conscious use of the comparative method needs to be promoted. […] Once aware of perspective,

[95] Legrand, 'John Henry Merryman and Comparative Legal Studies' (n 89).

[96] Susan Franck, Anne van Aaken and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory LJ 1173; James Crawford, 'The Ideal Arbitrator: Does One Size Fit All' (2017) 32 Am U Intl L Rev 1003.

arbitral tribunals and interpreters can make conscious use of the instruments of law. […] [S]uch awareness [would] limit eventual abuses of the comparative method…"[97] Similarly, Professor Kahn-Freund indicated "the choice of subject and the choice of method are inevitably conditioned by the past experience of him who makes them. I should like to submit that this subjective element in teaching and in research need not have any disadvantageous effect – if, but the 'if' is essential, it is raised to the level of consciousness."[98] Readers can venture a guess on the ideological substrate of authors by reviewing their other writings. Implicit comparison being offered as a package by most authors, this would add a difficulty to the existing ascertainment and explanation of the comparison which remains mostly merely at the description stage.

Hence the necessity to focus on methods by making explicit the stages through which a viable comparison may be valid and produce certain and accurate results.

C. Focus on Methods: A Systematic Comparison Process Beyond Amateurism

1. *The Comparison Process: Relevance of the Syllogistic Reasoning Method*

Systematic comparison – The mission of the Academy to provide useful answers to the question 'how to compare?' (see Sect. I. A) by formulating a framework that should be applicable to any subject – including international arbitration – (see Sect. I. C) can benefit from the insight and support of scholars who have experimented comparison beyond theory. Professor Örücü believed this question had "no fixed answer."[99] Professor Vadi considered, however, that "[o]nly by knowing the merits and limits of the comparative method can interpreters and adjudicators make an appropriate use of it."[100] Professor

[97] Vadi (n 47) 100.

[98] Kahn-Freund (n 48) 41.

[99] Örücü (n 13).

[100] Vadi (n 47) 69.

Kamba indicated that the comparison process was the most difficult aspect of comparative law.

> *Having decided on the purpose or purposes for undertaking a specific comparative project, and having selected the legal systems and topics, the next problem is that of methodology – how should one, carry out the comparison in a systematic manner? The application of a proper method is generally a pre-requisite for success in any area of study. In comparative law it is of paramount importance because on it will depend: first, whether the specific comparative inquiry effectively serves the function or functions which the comparatist has decided to emphasise; and secondly, the accuracy and value of the results secured and the validity of conclusions drawn.*[101]

In this regard, more generally, Professor Smith asserted that "arguments about the 'right way' to do comparative law, *qua* comparative law, are not helpful. Such arguments should be understood, or reframed, as arguments about how to do legal scholarship generally."[102] Mark Van Hoecke also remarked that "[i]n order to develop a suitable methodology of comparative law, one needs a better view on the methodology of legal scholarship within domestic legal systems."[103] If arguably the only difference with domestic scholarship would be the resort to foreign law, it remains to be seen what methods are favoured when comparing.

Deductive/syllogistic reasoning method – What does the comparison process consist of?

> *There are, thus, three main operations or stages involved in comparative law. The first may be called the descriptive phase. This may take the form of a description of the norms, concepts and institutions of the systems concerned or it may consist in the examination of the socio-economic problems and the legal solutions provided by the systems in question. The second stage may, for convenience, be described as the identification phase and is concerned with the identification or discernment of*

[101] Kamba (n 27) 510–1.

[102] Smith (n 25) (original emphasis).

[103] Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) Preface, v.

> *differences and similarities between the systems under comparative consideration. The third stage is the explanatory phase under which the divergencies and resemblances are accounted for.*[104]

These three phases are further found in the writings of other scholars.[105] Kamba also emphasised "[t]hese phases are not always distinctly separated from each other nor are they always dealt with in a particular order. They may all be intermingled in the same discussion. But all three are essential for any legal study which claims to be comparative law."[106] Systematism appears opposed to implicit or inexistent comparison. The emphasis on the explanatory phase and the systematic requirement for a discussion of the observed divergencies and similarities correspond to the basic requirements of the subject.[107] Failure to comply with this traditional syllogism has been, among other issues, at the source of labels of amateurism the discipline has suffered from.[108] Thus, Professor Zweigert noted "[a] critical evaluation of the results gleaned from comparative law is a necessary part of every comparative study."[109] Dean Pound insisted that "a fruitful comparative law, even looking only at the precept element in legal systems of different lands, has to do much more than set side by side sections of codes or of general legislation."[110] Similarly, Professor Blanc-Jouvan explained that "[i]f [study of foreign law] is purely informative or descriptive, of course, or if it consists of a mere juxtaposition of solutions, it leaves no place for comparison."[111] Contrary to Kamba, Blanc-Jouvan admitted the validity of 'implicit' and various 'degrees' of comparison (see Sect. III. C. 2).

Perspective and systematism – It is evident that subjectivity plays a great role in the comparison process and in accordance with Professors Blanc-Jouvan,

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[104] Kamba (n 27) 511–2 (original emphasis).

[105] Gutteridge (n 59). Ambiguously referred to as 'objects'.

[106] Kamba (n 27) 512.

[107] id.

[108] For an exposition of deductive reasoning in comparative law see Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 35, 46–7; Samuel, 'Taking Methods Seriously (Part One)' (n 31) 101–2, 104.

[109] Zweigert (n 20) 473.

[110] Roscoe Pound, 'Comparative Law in Space and Time' (1955) 4 Am J Comp L 75.

[111] Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Closing Remarks' (n 45) 1235.

Frankenberg, Kahn-Freund, Lasser, Legrand, Pound, Schlesinger, and others, the comparatist's outlook prevails despite the systematisation efforts. Professor Zweigert thus considered that "any legal critique by way of comparative law will of necessity retain certain subjective aspects."[112] In relation to the foregoing syllogism and more generally, Kamba finally confessed that,

> *[t]he proper execution of the three phases of comparison is greatly influenced by three main factors: the first may, for convenience, be called the comparatist's Jurisprudential Outlook; the second is the Social Context of the legal systems under comparison; and the third is the Legal Context of the legal topics under study in the case of micro-comparison. […] [S]ystematic comparison consists of a combination of a number of techniques or approaches which leave considerable room for individual judgment.*[113]

Professor Samuel indicated in this regard that "[i]n the social sciences […] the distinction between observer [*intellectus*] and object [*res*] is not so clear-cut, since the latter includes the former…" This is also true for law. Imperialism can thus affect both the jurisprudential outlook and the observation of the socio-legal context corrupting the results of the comparison (see Sect. III. A. 1).[114] What are the alternative ways to compare? Are there any?

2. *Functionalism: Old Fashioned Tool?*

Exposition – A very 'popular' method of investigation in comparative law would be that of functionalism.[115] According to Professor Samuel, functionalism operates at both the levels of 'legal reasoning' and in 'legal theory' as a scheme.[116] In his view,

> *[t]he reason why functionalism is so attractive to comparative legal studies lies in its ability to take researchers, to some extent at least, beyond the*

[112] Zweigert (n 20) 474.

[113] Kamba (n 27) 512, 517 (original emphasis).

[114] Samuel, 'Taking Methods Seriously (Part One)' (n 31) 99.

[115] Michele Graziadei, 'The Functionalist Heritage' in Legrand and Munday (n 83) 100.

[116] Samuel, 'Taking Methods Seriously (Part Two)' (n 10) 219.

> *formal conceptual authority of the textual or unwritten rule and to locate them in the facts within which the formal rule is alleged to be operating.*[117]

Functionalism denotes the latent perception among lawyers and academics that an authoritative approach to comparison is insufficient and flawed.[118] According to Professor Graziadei, "[f]unctionalism also promised to cast light on the relationship between law and society. […] The results of sophisticated functional investigations have widened our comparative knowledge and have become part of mainstream legal thinking."[119] Professor Zweigert, one of the most fervent exponent of functionalism, declared that "the basic methodological principle of all comparative law is that of *functionality*."[120] He witnessed the early transition from dogma to functionalism highlighting the fundamental "methodological dichotomy surrounding the *source* of knowledge […] between inquiry and authority" identified by Samuel (see Sect. I. C).[121] Knowledge drawn exclusively from an authoritative standpoint would be amateurish. Insisting on this point could resolve most of the problems in international arbitration. According to Professor Zweigert,

> *[t]he basic principle of comparative law methods is that of functional equivalence; and all other methodical rules – for the selection of legal systems for analyzing a given problem, the scope of investigation, the setting up of a system, etc. – derive from this principle. You cannot compare the incomparable, and in law, the comparable is only that which fulfils the same task, the same function. […] The one fundamental experience which goes to the very roots of comparative law is that every society poses the same problems to be solved by its law but the different legal orders solve these problems by very different means, although in the end and for practical purposes the solutions are about equal.*[122]

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[117] ibid 220.

[118] Zweigert (n 20) 466.

[119] Graziadei (n 115) 125.

[120] Zweigert and Kötz (n 36) 34 (original emphasis).

[121] Samuel, 'Taking Methods Seriously (Part One)' (n 46).

[122] Zweigert (n 20) 466–7. See also Zweigert and Kötz (n 36) 33–40.

Critique and alternatives – The universality of functionalism appears dubious.[123] Almost half a century has passed since this comment and it is also no longer a novel approach. The views expressed by Professor Zweigert are impregnated with universalist ideals which seem unrealistic but are able to justify the relative validity of the method.[124] He also acknowledged that if legal systems at different stages of development might pose difficulties in the comparison process; 'system-neutral' areas of the law should not constitute a problem.[125] Is international arbitration a 'system-neutral' area where a functional approach would be valid? This calls into the notion of the *anational* nature of the subject. Other terms are 'internationalisation', 'denationalisation'.[126] If international arbitration is seen as 'floating' over nations as an independent means of resolving disputes, using nonstate norms and other forms of soft laws, then it seems appropriate to recognise the validity of functionalism in the field. Problems may arise in other circumstances as indicated – these are particularly affecting the uninitiated.[127] Either way, the deductive use of logic and functionalism are only some of the different levels at which comparison can be effective, bearing in mind that "*all methodologies, even the most obvious ones, have their limits*."[128] Various approaches have been thoroughly examined by Samuel, for instance, in his papers on 'taking methods seriously' and other works, therefore, it is not the place to exhaustively address them.

In the next section, three issues need to be addressed. Firstly, the relationship and tension between comparative law scholarship and international arbitration practice (III. A.). Secondly, the contribution comparative law as an educational tool can make to the field of international arbitration (III. B.). Thirdly, the treatment of comparative law in the literature (III. C.). Finally, it seems important to discuss the direction scholarship should take in responding to the needs of practice.

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[123] Örücü (n 13) 33–37 on 'functional comparability'.

[124] ibid 467.

[125] ibid 474.

[126] Julian Lew (ed), *Contemporary Problems in International Arbitration* (Springer-Science 1987) 1.

[127] Zweigert (n 20) 467.

[128] Feyerabend (n 4) 16 (original emphasis).

III. COMPARATIVE LAW AND INTERNATIONAL ARBITRATION SCHOLARSHIP

> *For when method in all its intellectual richness is taken seriously by comparatists […] such a comparatist is no longer an amateur.*
>
> Geoffrey Samuel[129]

> *The nature of the forces that shape individuals and their societies are such that […] the comparative task is eternal.*
>
> Arthur von Mehren[130]

A. Comparative Law and the Arbitral Practice: Uses and Misuses

1. *Uses of Comparative Law in International Arbitration: Legitimate Benefits*

Different applications – Comparison can be used between arbitration and the various national forms of litigation, that is, for the selection of the most viable process and for the arbitral process itself.[131] Supporting this claim, Judd Epstein considered each arbitral procedural decision as "a comparative law creation or application in practice."[132] To the same effect was Andreas Lowenfeld who saw international arbitration "as an exercise in comparative procedure."[133] It is also used in advocacy. In this regard, Professor Frédéric Sourgens observed that comparative law would be used by counsel as a 'rhetorical' tool for three main reasons. Firstly, "to explain law foreign to the tribunal in a manner helpful to his case"; secondly, "as a means to close legal gaps in the law applicable to the dispute"; and thirdly, "to extract general

[129] Samuel, 'Taking Methods Seriously (Part Two)' (n 10) 237.

[130] Arthur von Mehren, 'The Rise of Transnational Legal Practice and the Task of Comparative Law' (2001) 75 Tul L Rev 1224.

[131] Glenn, 'Comparative Law and Legal Practice' (n 38) 998.

[132] Judd Epstein, 'The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation' (2001) 75 Tul L Rev 917.

[133] Andreas Lowenfeld, 'The Two-Way Mirror: International Arbitration as Comparative Procedure' (1985) 7 Mich YBI Legal Stud 163.

principles of international law or trade usages."[134] Stepping back from the arbitral process, comparative law is also used in international arbitration regarding the earlier choice of the substantive law and the dispute resolution clause.[135] It is also used in legal doctrine, which will be discussed especially in the last subsection (see Sect. III. C).[136] Professor Vadi insisted on the centrality of comparative law in the field in these terms,

> *[n]ot many fields of law use comparative law as extensively as international arbitration. International arbitration is a method for settling transnational disputes, involving parties and adjudicators of different nationalities, and requiring the application of different sets of procedural and substantive norms. For its intrinsic characteristics, international arbitration constitutes the Walhalla for comparative law experts…*[137]

Benefits of comparing – The intensity of the uses of foreign law in every stage of the arbitral process and in the scholarly considerations on the topic more generally makes it difficult to disregard the comparative method. More than a simple tool for the solving of practical issues with a desired outcome in view, its use leads to the broadening of horizons and to a more developed consciousness of the alternatives and opportunities available. All of this leads to a betterment of the subject and, ultimately, to the realisation of justice. Judd Epstein, assessing the situation from the broader perspective of alternative dispute resolution processes, believed,

> *[c]omparative law studies and comparative cultural studies have provided sensitivity to different ways of negotiation and different methods of thinking about the use of law. Through the study of comparative law and allied disciplines of comparative sociology and anthropology, legal practitioners serving as mediators or representing parties within a mediation can make use of comparative law in a way not traditionally thought common. […] [Practitioners] sensitive to the lessons of*

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[134] Frédéric Sourgens, 'Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Arbitration' (2007) 8 Pepp Disp Resol LJ 1.

[135] E J Cohn, 'Commercial Arbitration and the Rules of Law a Comparative Study' (1941) 4 U Toronto LJ 1; Glenn, 'Comparative Law and Legal Practice' (n 38) 998–9; Epstein (n 132) 915–7.

[136] Vadi (n 47) 81.

[137] ibid 68 (original emphasis).

> *comparative law and its classifications may reduce the effects of ethnocentrism…*[138]

Two topics are highlighted by Epstein; interdisciplinarity and ethnocentrism. The latter is a notion akin to imperialism and constitutes an epistemological pitfall in comparative law.[139] Imperialism consists in the "imposition, via a universal theory, of a definition fashioned in one legal culture on the law of another culture [which] may simply obscure rather than highlight this other culture."[140] In this regard, Professor Zweigert explained that "successful work in comparative law requires a radical yielding of every prejudice of a dogmatic or habitual or other nature resulting from one's own law."[141] Interdisciplinarity is yet another key feature distinguishing law as authority from comparative law as inquiry which warrants a broader approach.[142]

In these circumstances, the developments and support of comparative law theory appear crucial and can remedy the deficiencies of transnational practice. Practice which can also lead to serious diversions of the legitimate uses of comparative law.

2. *Misuses of Comparative Law in International Arbitration: Diverted Science*

Comparison and practice – The call for harmonisation of the Academy (see Sect. II. A. 3) also lies in the misuses of comparative law that may be attributed to developments of transnational practice for instance. Professor Sourgens indicated that "[t]hrough the crucible of empirical testing, international arbitration, hand-in-hand with other aspects of the legal profession, will help shape the contours of comparative law. It will certainly push the outer boundaries of comparative law further than many scholars'

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[138] Epstein (n 132) 920–1.

[139] Samuel, 'Taking Methods Seriously (Part Two)' (n 10) 230–1; Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 6, 9.

[140] Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 9.

[141] Zweigert (n 20) 467.

[142] Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 5, 23–4, 28, 119; Samuel, 'Taking Methods Seriously (Part Two)' (n 10) 229 on the 'cultural paradigm'.

comfort zones. […] As such, the practice of advocacy in international arbitration will be one of the agents of progress."[143] This is equally true for all the areas in which the method can be deployed (see Sect. III. A. 1). While this development is certainly beneficial, it does result in some diversions. Professor Blanc-Jouvan addressed the broader relationship between comparative law and *legal practice*.

> *This is, naturally, another function of comparative law: to help judges, arbiters, lawyers, and contracting parties conduct their affairs, because it has become more and more common to be in a situation where foreign law must be applied, especially in business life. Comparative law is no longer simply a learned law; it has increasingly become a practical law. […] I will just mention the risk of a superficial knowledge or an insufficient understanding of foreign laws, due precisely to the absence of a scientific approach, which may be worse than complete ignorance and lead to serious setbacks. There is also the threat of a sort of confiscation of comparative law by those who are just interested in 'doing business abroad' […]. In fact, comparative law should not be the monopoly of any particular group or profession. It can only benefit from the conjunction of academic impulse and professional support.*[144]

Challenging diversions – Comparative law is seen in international arbitration as a 'transactional tool' responding to some 'commercial objectives'.[145] There surely are ways to tackle risks of illegitimate use of the subject for interested ends and their corollary which is amateurism – recalling to the mind the old adage *fraus omnia corrumpit* and its consequences. It would be interesting to take Professor Blanc-Jouvan's observation further on the need for a supportive scientific or academic approach. For Epstein, this would be "a new use of comparative law that allows academics to investigate and chronicle its developments and assist the legal profession in its practice."[146] In this regard, Professor Arthur von Mehren considered that,

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[143] Sourgens (n 134) 23.

[144] Blanc-Jouvan, 'Centennial World Congress on Comparative Law: Closing Remarks' (n 45) 1224; Blanc-Jouvan, 'Le cinquantenaire de la Revue' (n 1) 749–50.

[145] Sourgens (n 134) 5; Kamba (n 27) 501.

[146] Epstein (n 132) 921.

> *…comparative practice will have alerted jurists to the problems that legal diversity creates; […] the broader and deeper perspectives and learning associated with comparative law can contribute in ways that comparative legal practice alone can not. […] [T]ransnational practice makes comparison more frequently necessary but not intellectually easier […] misunderstandings and misappreciations may pose serious dangers for comparative legal practice. […] [T]ransnational legal practice will continue to need comparative law in the deep sense […]. The rise of comparative legal practice clearly has significance for the role and contribution of comparative law as it will be studied and practiced in the next century; it should not, however, be seen as a substitute for comparative law.*[147]

Before turning to an examination of the literature exerting a widespread educative function within and beyond academia, it appears pertinent to introduce the reader to the educational function of comparative and to examine its relationship with international arbitration.

B. Comparative Law for Educational Purposes: Reconciliation of Practice and Theory

1. *A Focus on the Educational Function of Comparative Law*

Educational purpose – Apart from the debatable terminological inappropriateness disentangled in the foregoing developments (see Sect. II. A), it seems that the functions of comparative law provide for a clearer meaning of its essence.

> *One of the main factors that impeded progress in comparative legal studies was the absence of a systematic and comprehensive treatment and appreciation of the functions of comparative law. […] The clarification of its functions is, therefore, necessary for an appreciation of its value and importance. Moreover, the main purpose for which a particular project of comparative study or research is undertaken will, to a large extent, dictate the choice of legal systems or topics to compare and the method of comparison.*[148]

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[147] von Mehren, 'The Rise of Transnational Legal Practice' (n 130) 1223.

[148] Kamba (n 27) 489. See also von Mehren, 'An Academic Tradition for Comparative Law?' (n 28).

Furthermore, Professor Maximilian Schmitthoff believed that "[n]o lawyer would embark on a comparative legal study without intending that his endeavours should be utilized either by him or by others."[149] What then are these functions? In other words, for the purposes of this article, why does one compare in the field of international arbitration? Dissociating the functions of comparison from their application appears pertinent, although the two can often be assimilated. Thus, comparative law can be employed purely for the "improvement of the general knowledge of the law" which is one of the two main functions identified by Schmitthoff and is interested with *jurisprudence* and *legal history*.[150] It is noteworthy to mention that the views expressed 80 years ago by Schmitthoff may appear outdated as the subject has developed beyond these areas since then. More recently, Professor Kamba in his attempt to provide a common framework for the validity of comparative legal studies identified six functions pursued by those who have an interest in the subject which he deemed where neither exhaustive nor clear-cut. Namely, *Academic Studies*; *Legislation and Law Reform*; *The Judicial Process*; *Unification and Harmonisation*; *International Law*; and *International Understanding*.[151] Where does international arbitration stand in all these functions? Everywhere it seems, *prima facie*. This paper is concerned with *Academic Studies* and *International Understanding*; however, scholars of international arbitration will be chiefly interested in the other four functions. The former two functions being respectively merely the scholarly vehicle of exposition and result of their primary concerns. *Academic Studies* involve two components, the '*teaching and study of law*' and '*legal research*'.[152] The latter serving as a basis to the former which is, more specifically, the object of this paper.

Curriculum – Considering the separate comparative law course is usually offered by an increasing number of universities primarily as a postgraduate

[149] Schmitthoff (n 44) 99.

[150] id.

[151] Kamba (n 27) 490 (emphasis added).

[152] id.

elective course,[153] the situation may not improve in the field of international arbitration unless the different actors are willing to challenge and instruct themselves, however imperfectly. The example of the founding of the School of International Arbitration at Queen Mary University in London some three decades ago – and the emphasis on the 'comparative approach' in its curriculum – is uncharacteristic of the state of the discipline but underlines the needs of the subject.[154] Roy Goode affirmed "[i]ts outlook will be international and its method comparative."[155] Peter Sanders indicated that "[a]n introduction to *comparative law* may well be included in the curriculum of the School."[156] He further contemplated the necessity of "a comparative approach as well in regard to questions of arbitral procedure as to questions of substance that may arise in arbitration. All this to achieve the goal of training truly international arbitrators."[157] The old dichotomy between the 'teaching of comparative law' (as a separate course) and the 'comparative teaching of law' (in mainstream subjects) highlighted by Schlesinger would still make sense if the international arbitration course offered neglected the introduction to the comparative method.[158] Professor Reimann seemed to strongly favour the approach according to which "the truly comparative study of law, should become part and parcel of other courses" instead of "an autonomous subject" noting that "the goal is not to turn every student into a comparative lawyer, but only to expose all of them to the comparative dimension of law."[159] This is not a novel idea.[160] Furthermore, Reimann also believed that, "[t]eaching comparative law in a decentralized fashion also has a greater educational impact because it

[153] Rudolf Schlesinger, 'Teaching Comparative Law: The Reaction of the Customer' (1954) 3 Am J Comp L 492; Rudolf Schlesinger, 'The Role of the 'Basic Course' in the Teaching of Foreign and Comparative Law' (1971) 19 Am J Comp L 618.

[154] The '*comparative and internationalist approaches*' seemed to have been determining criteria in the founding of the School of International Arbitration. See Lew (n 126) 5.

[155] Roy Goode, 'The School of International Arbitration: Aspirations and Objects' in Lew (n 126) 12–3.

[156] Peter Sanders, 'The Birth of the School of International Arbitration' in ibid 10 (original emphasis).

[157] ibid 11.

[158] Schlesinger, 'The Role of the 'Basic Course'' (n 153) 616.

[159] Reimann, 'The End of Comparative Law as an Autonomous Subject' (n 34) 50, 66; Max Rheinstein, 'Teaching Comparative Law' (1938) 5 U Chi L Rev 623.

[160] Pound, 'The Place of Comparative Law in the American Law School Curriculum' (n 66); Rheinstein, 'Teaching Comparative Law' (n 159).

leaves deeper impressions and reaches more students."[161] International arbitration is also usually offered as a postgraduate course.[162] If it systematically includes elements of comparison, therefore, it could be sufficient for students who would have not elected comparative law as a 'basic course'.

2. *Some Remarks on Reconciling Practice and Theory*

Teaching and practice – It must be stated unequivocally here that international arbitration is definitely belonging to the realm of practice. According to Patrick Glenn, transnational practice contributes to comparative legal thought by propagating legal ideas "outside their place of origin" thus "[c]omparative legal practice, *pace* the traditional teachings of comparative law."[163] For Judd Epstein, "[a]n area that was exclusively the province of specialist academics has been transformed and is now made and used by legal practitioners daily."[164] However, Professor von Mehren assumed some half a century ago that "academic study of comparative and foreign law will neither be substantially encouraged nor definitely shaped in our lifetimes by the requirements of the practicing profession."[165] What he had in view were, more specifically, other subjects with a local orientation. Teaching and study of international arbitration require an advanced understanding of foreign and international law, the conflict of laws or private international law and public international law, as well as the different areas of business law.[166] For instance, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards constitutes a landmark and is interpreted in light of the 1969 Vienna Convention on the Law of Treaties which is a foundational text of public international law. A prominent arbitrator by the name of Pierre Lalive noted that,

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[161] Reimann, 'The End of Comparative Law as an Autonomous Subject' (n 34) 64.

[162] Mihail Danov, 'Teaching International Commercial Arbitration at Postgraduate Level – Techniques for Enhancing Students' Learning' (2011) 45 Law Teacher 101.

[163] Glenn, 'Comparative Law and Legal Practice' (n 38) 984–5 (original emphasis).

[164] Epstein (n 132) 913.

[165] von Mehren, 'An Academic Tradition for Comparative Law?' (n 28) 626.

[166] Roy Goode, 'The School of International Arbitration: Aspirations and Objects' and Pierre Lalive, 'International Arbitration: Teaching and Research' in Lew (n 126) 14, 16.

> *…the 'ideal' [or] 'good' international arbitrator […] should have a certain amount of training in and experience of comparative law and the comparative method […] [and] must show proof of a comparative or comparatist mind, open to legal pluralism, to various cultures and various political and social systems.*[167]

Teaching tools – Mastery of the comparative method in the field is of utter importance because of the various extraneous factors affecting the arbitral process, namely, the places of business, substantive laws, *lex arbitri*, the law of the seat. Its neglect however appears to be recurrent among busy arbitration practitioners who face time constraints and a general incompetence. Academics addressing these audiences and their students alike are clearly neglecting theory. In an ideal world, scholars practicing in the field should be both conversant with the comparative method and willing to transmit it. Unfortunately, this is not the case.[168] Unsystematic comparison remains the norm. Certainly, the teaching of law is not exclusively performed through textbooks, however, this format – referred to as proper 'teaching tools in comparative law' by Professor Max Rheinstein – provides meaningful and tangible information on the use of the comparative method and will serve as the basis of our assessment (see Sect. III. C).[169] According to Professor von Mehren,

> *[u]nlike most other fields of legal study, comparative law is not self-defining nor is it taught in response to rather specific professional needs. […] Professional imperatives are not a likely source of an academic tradition for the comparative study of law. […] [T]he subject matters most consistently involved in legal practice with significant foreign elements, and hence the topics that would presumably be emphasized in comparative-law courses with a professional orientation, do not provide a particularly apt vehicle for*

[167] Lalive (n 166) 16 (original emphasis).

[168] Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003). This book, referring first to the term 'comparative' in its title, contains 28 Chapters, none of which introduce the reader to the comparative method. Another leading textbook in the field by Gaillard and Savage (n 6), although not devising a specific chapter to comparative law methodology, makes at least explicit reference to comparative law in its subsections (see Sect. III. C. 1).

[169] Max Rheinstein, 'Teaching Tools in Comparative Law: A Book Survey' (1952) 1 Am J Comp L 95.

> *introducing students to the problems of approaching and understanding in a profound sense the rules and workings of another legal order.*[170]

Since international arbitration is shaped by practice, the academic literature available on the subject is mostly based on practical considerations for the simple reason that authors themselves are largely established practitioners, be they scholars in conjunction with their stake in the business. In the following subsection, an assessment of the state of international arbitration scholarship will be succinctly and critically conducted in respect of its use of comparative law.

C. The Treatment of Comparative Law in the Literature: Critical Examination

1. *Explicit Treatment of Comparative Law: Perspectivism and Imperialism*

Analytical framework – As suggested in the foregoing developments (see Sect. III. B. 2), the treatment of comparative law in the academic literature is very summary and unsophisticated. Setting aside theory, it hardly articulates comparative law within the methodological sphere in which it truly belongs. The below example extracted from a leading treatise is only a partial sample of the literature and is representative of this poor treatment. It has been selected for its systematic presentation of the subject impregnated with rationalism. Same degree subsections and their immediate arborescence are fully reproduced.

Table 1 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999): see the appendix.

Critical examination – Explicit reference to comparative law is found in three instances in the subsections of the book. Comparative law appears thus on the same line as 'Treaty' and opposed to 'French Law'. It is also opposed to 'International Conventions'; 'International Arbitral Case Law'; 'Resolution of the Institute of International Law' and even to 'Policy Considerations'. This

[170] von Mehren, 'An Academic Tradition for Comparative Law?' (n 28) 624, 626.

observation alone is not sufficient to form an estimate of the use of comparative law by the authors.

Looking closer at the first example, the subsection on 'Treaty and Comparative Law' in Part I, Chapter I, sets out the meaning of 'international' arbitration as defined in various instruments such as international conventions (New York 1958; European Convention of 1961) and national legislations as well as soft laws (UNCITRAL Model Law). The specificities of each national legislation described independently are highlighted and opposed to that of other countries in the continuous flow of five paragraphs.[171] A further paragraph attempts a summary conclusion revealing a 'distinct tendency' in light of the French position.[172] Thus, the authors' jurisprudential outlook seems here to affect greatly the conclusion. This paragraph even starts from the premise that international arbitration should be classified as such on the basis of its international economic nature before acknowledging that the nations mentioned prefer to define it in light of a connecting factor. Finally, to comfort their bias, some countries adopting the French model are explicitly mentioned before turning to French Law in the next subsection. It seems obvious that this is a somewhat meagre treatment of 'comparative law' and the imperialistic outlook is here patent. The subsection should have been entitled 'Treaty and *French and Foreign Law*'.

The second example is perfectly illustrative of this prejudice. In Part II, Seciton III on Arbitrability, and under a subsection on the 'General Principles of International Arbitration', the subsection on 'Comparative Law' starts with the following sentence. "The position of French law, as illustrated by the *Galakis, Gatoil* and *Bee Frères* decisions, has been followed in many other jurisdictions."[173] The following statements are simply discussing the position of other national legislations in light of posited French law and the UNCITRAL Model Law.

The third example is similar but presents a clear advantage. In Part II, Chapter III, the subsection on 'The Position Adopted in Comparative Law' concerning the 'Review by the Courts of the Existence and Validity of the

[171] Gaillard and Savage (n 6) 51–5 [101–5].

[172] ibid 55 [106].

[173] ibid 323 [549].

Arbitration Agreement' starts with the following sentence. "French law was quick to recognize the negative effect of the competence-competence principle."[174] The next paragraph states, "[h]owever, the major international conventions on arbitration and arbitration legislation in other legal systems do not always endorse this approach very clearly."[175] There is thus a discernable systematic reference to French Law as a starting point concerning any matter under consideration. The advantage of this development lies in the subsection entitled 'Policy Considerations'.[176] It follows immediately the subsection on 'Comparative Law' which should be entitled instead 'The Position Adopted in *Foreign and International Law*'. The discussion here is normative. "From a legislative standpoint, each of the two approaches to the question of when the courts should be entitled to rule on the existence and validity of the arbitration agreement has its own *advantages and disadvantages*" states the first paragraph of this subsection.[177] The following paragraphs discuss the merits and demerits of the two approaches in light of various national developments and approaches.[178] This is clearly better than just reviewing each national legislation seperately and leaving it to the reader to form a value judgement and estimate of the various positions under consideration.

2. *Implicit Treatment of quasi-Comparative Law: Unsystematic Coverage*

Analytical framework – It should be mentioned that the foregoing examples are prominent for their explicit reference to 'comparative law'. However, a similar reasoning has been adopted in various other subsections of the treatise with the same goal in mind. The below table is illustrative of that use of foreign law and its unsystematic coverage.

Table 2 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999): see the appendix.

[174] ibid 407 [672].

[175] ibid 408 [673].

[176] ibid 410 [677].

[177] id (emphasis added).

[178] ibid 410–413 [677–82].

Critical examination – In these instances, 'French Law' constitutes the starting point of the analysis and is opposed to 'Other Legal Systems' and 'International Conventions'. One can again assume that the gaze of our authors is strongly influenced by a civilian outlook. Further, this is an archetypal example of the juxtaposition of various legal orders with no effort to relate them to each other with a constructive discussion, except for Part I on 'Definition and Sources'.[179] The subsection entitled 'Trends' corresponds to the *identification* (Diversity of Legislative Technique) and *explanatory* (Convergence of Legislative Objectives) phases mentioned in the foregoing developments; while the subsection on 'Analysis' would correspond to the *descriptive* phase where the various legal systems of the world are described. It is regrettable that this effort of systematic coverage of one issue, namely, the 'Public Sources' of International Arbitration is not found in other sections of the book – at least not systematically. Professor Lasser explained that "[t]his basic level of explanation represents, of course, but the tip of the comparative iceberg. The comparatist can go into infinitely greater depth in an attempt to offer evermore incisive analysis."[180] He further insisted that, at least, "serious study should generate increasingly rich description."[181] Similarly, Mark Van Hoecke observed that "[c]omparative law usually remains at the level of description, combined with some comparison (but mostly at the 'tourist' level)."[182] Emeritus Professor John Bell noted,

> *[f]or many comparative lawyers […] the focus of comparative law is to present an analysis of internal dynamics and principles of the existing laws of the countries studied. This may seem predominantly descriptive, particularly when studying a foreign system. How can a foreigner do more than describe what foreign lawyers think their legal rules are?*[183]

Considering the vastness of the subject, the authors have chosen to expose various problems in light of foreign and international developments

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[179] ibid 71–103. See also Pound, 'Comparative Law in Space and Time' (n 110).

[180] Lasser (n 83) 238.

[181] id.

[182] Van Hoecke (ed), *Methodologies of Legal Research* (n 103) Preface, vi.

[183] John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in ibid 158.

which is commendable. These are enlightening the reader who wishes to grasp a phenomenon beyond his land, in this case, the French legal system. However, once faced with the task of meaningfully comparing various substantive laws or institutions or concepts and forming an estimate on their merits, one must admit that the tools are simply missing.

IV. THE FUTURE OF COMPARATIVE INTERNATIONAL ARBITRATION SCHOLARSHIP

This section will be in the form of a succinct conclusion. This paper has attempted to underline misconceptions on comparative law. The genuine efforts of improvement that occurred since its initial 'experimental stage' have not been translated in the field of international arbitration. By no means this article is to be conceived as containing the last word of the comparative method – or rather, with deeper insight, methods. International arbitration relies eminently on the developments of the comparative method. As in any science, the developments of method are closely linked with the flourishing of law. These developments are to a large extent guided by experimentation and the systematic use of method exceeding the limits of doctrinal and academic knowledge.[184] Thus, it appeared pertinent to clarify some of its characteristics and also to reveal potential misuses. The refinement of the comparative method should be shaped by practice, under the scientific guidance of comparative law as an academic discipline. Diverted uses of the comparative method resulting from the transactional nature of arbitration can be prevented by establishing a scientific cooperation. The formulation of a general framework challenging methodological issues should be the crux of such scientific endeavour. The current state of scholarship tends to confirm the thesis of a pure neglect of theory. A better articulation of comparative methodology must be the subject of a serious and rigorous implementation. A more systematic use of, at least, the deductive reasoning method should lead to much richer developments than those confined to a purely descriptive approach. Focusing perhaps on what Professor Mark Van Hoecke described as 'deep level'

[184] Sourgens (n 143).

comparative law – that is beyond a methodology concerned with rules and cases.[185] Despite the density of arbitration-specific content in textbooks and specialised works, an introductory chapter must familiarise the reader with the comparative method. International arbitration courses should include significant developments concerning comparative law theory. Perhaps the problems arising with method may paradoxically find their solution in a pure emancipation from it.[186] This is yet another consideration and it seems that method is still a favoured tool in the solving of the problems of comparative law.[187] Therefore, unless arbitration practitioners, academics or their students alike are willing to go off the beaten track, amateurism will continue to characterise the state of scholarship in comparative international arbitration.

[185] Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 165.

[186] Glanert (n 12) 81. See also Feyerabend (n 4) 11–12 on the anarchistic 'principle' of *anything goes*, and 17 on his arguments against the 'consistency condition'.

[187] Glanert (n 12) 63.

V. APPENDIX

Table 1 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999)

Part I – Definition and Sources	Part II – The Arbitration Agreement	
Chapter I – Definition of International Commercial Arbitration Section III. – The Meaning of 'International' §2. – The International Nature of Arbitration and the Application of Specific Substantive Rules A. – Treaty and Comparative Law B. – French Law	Chapter II – Formation of the arbitration agreement Section III. – Arbitrability §1. – Subjective Arbitrability B. – Substantive Rules 2° *General Principles of International Arbitration* a) International Conventions b) Comparative Law c) International Arbitral Case Law d) Resolution of the Institute of International Law	Chapter III – Effects of the arbitration agreement Section II. – Negative Effects of the Arbitration Agreement §2. – Implementation of the Principle that the Courts Have No Jurisdiction B. – When Can the Courts Review the Existence and Validity of the Arbitration Agreement? 1° *The Position Adopted in Comparative Law* 2° *Policy Considerations*

Table 2 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (KLI 1999)

Part I – Definition and Sources		Part III – The Arbitral Tribunal		
Chapter II – Sources of International Commercial Arbitration Section I. – Public Sources §1. – National Sources A. – French Law B. – Other Legal Systems		Chapter I – The Constitution of the Arbitral Tribunal Section I. – National and International Rules		Chapter II – The Status of the Arbitrators Section I. – Arbitrators as Judges §2. – Protection of the Arbitrators A. – The Principle of Immunity 1° *French Law* 2° *Other Legal Systems*
1° *Analysis* a) Europe i) UK ii) [etc…] b) Other Continents i) USA ii) [etc…]	2° *Trends* a) Diversity of Legislative Techniques b) Convergence of Legislative Objectives	§1. – The Appointment of the Arbitrators B. – The Subsidiary Role of National Laws 1° *French Law* 2° *Other Legal Systems and International Conventions*	§2. – Difficulties in the Constitution of the Arbitral Tribunal A. – French Law B. – Other Legal Systems C. – International Conventions	