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Olivier Moréteau

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Citations:

Bluebook 21st ed.

Olivier Moreteau, *The Words of Comparative Law*, 6 J. INT'L & COMP. L. 183 (2019).

ALWD 6th ed.

Moreteau, O. ., *The words of comparative law*, 6(2) J. Int'l & Comp. L. 183 (2019).

APA 7th ed.

Moreteau, O. (2019). *The words of comparative law*. *Journal of International and Comparative Law*, 6(2), 183-208.

Chicago 17th ed.

Olivier Moreteau, "The Words of Comparative Law," *Journal of International and Comparative Law* 6, no. 2 (December 2019): 183-208

McGill Guide 9th ed.

Olivier Moreteau, "The Words of Comparative Law" (2019) 6:2 J Int'l & Comp L 183.

AGLC 4th ed.

Olivier Moreteau, 'The Words of Comparative Law' (2019) 6(2) *Journal of International and Comparative Law* 183.

MLA 8th ed.

Moreteau, Olivier. "The Words of Comparative Law." *Journal of International and Comparative Law*, vol. 6, no. 2, December 2019, p. 183-208. HeinOnline.

OSCOLA 4th ed.

Olivier Moreteau, 'The Words of Comparative Law' (2019) 6 J Int'l & Comp L 183

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# THE WORDS OF COMPARATIVE LAW

Olivier Moréteau\*

**Abstract:** While the word “comparative” refers to a cognitive and intellectual activity supposing that there are several elements to compare, the word “law” is used in the singular, as if law was to be compared to itself. The whole phrase indicates that comparison takes place within the study of the law, but the use of the singular does not point to a pluralistic approach: what do we mean by law? Should we not talk about “comparing the laws” or “legal comparison”?

With a reflection on the words of the law as a starting point, this paper visits the corpus of comparative law in a pluralistic perspective and the process as a basic element of cognition. Words of the comparatists are then visited in successive steps describing what they do: first the discovery of the foreign legal system with immersion in its language and culture yet keeping some outsider awareness to read the silence in language. Then comes the need to communicate on this other legal system, which is in essence an experience in translation. Based on what they learn, comparatists also build systems, using or developing common words in the various realms of international law, often for practical purposes. Last but not least, some aspire to develop neutral terms for the sake of knowledge in order to develop a specialty language of legal science. This latter activity tends to be neglected as a utopian aspiration. It encompasses the creation of precise terms and meta-categories. In any case, words are the tool of comparatists and therefore constantly evolve.

**Keywords:** *words; comparative law; pluralism; cultural immersion; translation, specialty language*

## I. Introduction: Words of the Law

Jurists trained in the Western legal traditions can hardly conceive of any form of legal activity without the instrumentality of words. Their ancestors honoured Themis — goddess of divine law, order and customs — represented as blindfolded and holding a sword, which would later change into words (“sword” became

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\* Professor of Law; Russell B. Long Eminent Scholars Academic Chair; Director of the Center of Civil Law Studies, Louisiana State University; Director Emeritus of the Édouard Lambert Institute of Comparative Law, Université Jean Moulin Lyon 3. [moreteau@lsu.edu](mailto:moreteau@lsu.edu).

This paper is based on an address given on the 50th anniversary of the Notre Dame University London Law Program at Fischer Hall, London, 22 October 2018. I thank Professor Michael Addo, Director of the Notre Dame London Law Program, and Dr. Stathis Banakas, University of East Anglia, for their generous invitations. Thanks also go to Seth Brostoff and Lisa Scalone for research assistance and Sue Farran and Mariano Vitetta for careful editing. This paper would not exist without Jacques Vanderlinden and, with all remaining imperfection, is dedicated to him.

“words” with “s” moving to the end). Except when considering taboos, which is the business of the anthropologist, the Western jurist is of the opinion that: “it is on the loom of language that all law is spun”.<sup>1</sup> Whether the law is crafted by legislative or court language or doctrinal writing, or based on people’s behaviour, it is rarely administered without the agency of human language and cannot be thought or described, comparatively or otherwise, without the instrumentality of words:<sup>2</sup> the Westerner is of the opinion that “law is power dressed in words”<sup>3</sup> and “when words fail, no law remains”.<sup>4</sup> Section II of this paper will prove that this is not true: law can exist without words.<sup>5</sup> The central point however will be to discuss the words that we use in comparing legal systems, whether or not we use words, gestures or combinations thereof.

In this regard, scholars mostly use terminology created by those who administer the law, though the history of Roman law and the civil law tradition shows that the language of scholarship can also shape legal practice.<sup>6</sup> The language of the law is a mix of everyday words and technical terms. Whether they create, administer or study the law, lawyers like to use ordinary words with a technical meaning like “fruit” and “cause” in the civil law, “breach” and “frustration” in the common law and “damages” and “constitution” in both, and occasionally invent complex words unlikely to be used outside some legal context, such as “antichresis”, “emphyteusis” or “writ of certiorari”.<sup>7</sup>

When writing his famous *Bramble Bush* in 1930, Karl Llewellyn pointed out our sins in using technical words:

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- 1 CG Weeramantry, *Law in Crisis, Bridges of Understanding* (London: Capemoss, 1975) p.133.
  - 2 Peter Grossfeld, *The Strength and Weakness of Comparative Law*, trans. Tony Weir (Oxford: Clarendon, 1990) pp.92–94 describes law as a creature of language. Annabelle Mooney, *Language and Law* (New York: Palgrave Macmillan, 2014) points to the unusual character of legal language, often called legalese: 23. See also Harold J Berman, *Law and Language, Effective Symbols of Community* (Cambridge: Cambridge University Press, 2013).
  - 3 Jaakko Husa, *A New Introduction to Comparative Law* (Oxford: Hart, 2015) p.47.
  - 4 Grossfeld, *The Strength and Weakness of Comparative Law* (n.2) p.93 insisting that without “I swear”, there is no oath. “We speak of ‘canonical forms of words’, of ‘constitutive’ or ‘effective’ speech acts”, citing JL Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 2nd ed., 1975) and John R. Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press, 1979). See more recently Antonio Gambaro, “Law, Language and Meaning: The Performatives in a Multilingual Context” in Rodolfo Sacco (ed.), *The New Ambitions of Legal Science: Legal Anthropology and Legal Traductology* (Rome: Accademia nazionale dei Lincei, 2009) p.55 and Andrei Marmor, *The Language of Law* (Oxford: Oxford University Press, 2014) pp.12–22.
  - 5 Rodolfo Sacco, *Il diritto muto: Neuroscienze, conoscenza tacita, valori condivisi* (Bologna: Il Mulino, 2015).
  - 6 See Helmut Coing, “The Roman Law as ius commune on the Continent” (1973) 89 *LQR* 505.
  - 7 I will not add “estoppel” to these latter category of terms because it comes from the French “estouper”, meaning to plug, to close, and by extension prevent, and was also used in the context of sexual intercourse: Frédéric Godefroy, *Dictionnaire de l’ancienne langue française, et de tous ses dialectes, du IXème au XVème siècle* (Paris, 1884), v° estouper. See Olivier Moréteau, *L’estoppel et la protection de la confiance légitime, Éléments d’un renouveau du droit de la responsabilité (Droit anglais et droit français)* (Thèse, Lyon, 1990) p.13.

Legal usage of technical words has sinned, and does still, in two respects; it is involved in ambiguity of two kinds: multiple senses of the same term, and terms too broad to be precise in application to the details of single disputes. First, it does not use terms in single senses, but uses the same term in several senses; and in several senses, indiscriminately, without awareness. This invites confusion, it makes bad logic almost inevitable, it makes clear statement of clear thought difficult, it makes clear thought itself improbable. No logician worth his salt would stand for it; no scientist would stand for it.<sup>8</sup>

This paper addresses the words used by legal scholars when engaging in comparative legal studies, assuming that they do not necessarily coincide with the terminology of the legal systems explored by the comparatist.

The legal vocabulary is particularly rich, as for English alone, we count over 25,000 entries in the Black's Law Dictionary.<sup>9</sup> If we compare with the 171,476 words in current use in the 1989, 20-volume edition of the Oxford English Dictionary,<sup>10</sup> this would mean that approximately one word out of seven conveys a legal meaning. Though numerous, legal terms may not be sufficient in numbers or precision of meaning because lawyering and legal scholarship keep wrestling with polysemy.

Llewellyn points his angry finger at polysemy, characterising it as a sin. Legal scholars may be sinning when they use technical terms such as “cause”, meaning for the French *causa* or the reason why one enters into a contract, causation in the context of civil liability, case in the context of civil procedure. One also sins using “condition”, meaning in the English common law context, a condition precedent or subsequent but also an essential term in a contract. We sin with the most general words like *droit*, which in civil law parlance means “law” in the general sense (*droit objectif*) or “right” in a more precise sense (*droit subjectif*), while “law” in a common law context may designate law in general, embracing statute law, common law, equity or combinations of these terms. English and French speakers are no doubt great sinners, but they are not the only ones.

The Germans by contrast might qualify as saints, at least in the eyes of Llewellyn, who spent some of his young years in Germany<sup>11</sup> and brought some

8 Karl Llewellyn, *The Bramble Bush, on Our Law and Its Study* (New York: Oceana, 1978) p.83. George Orwell, “Politics and the English Language” *George Orwell: Essays* (New York: Alfred A. Knopf, 2003) p.954 rather criticised the “inflated style”: Judith D Fischer, “Why George Orwell’s Ideas About Language Skill Matter for Lawyers” (2007) 68 *Montana Law Review* 129.

9 In its 10th edition (St Paul: Thomson Reuters, 2014) at the time of writing. The Preface to the 7th edition (1999) reveals the addition of 4,500 entries to the 20,000 in previous editions. The Association Henri Capitant *Vocabulaire juridique*, by Gérard Cornu, counted over 10,000 entries in the 10th edition (Presses universitaires de France, 2014) p.vii, note 1.

10 To which one may add 47,156 obsolete words, available at <https://en.oxforddictionaries.com/explore/how-many-words-are-there-in-the-english-language/> (visited 26 March 2019).

11 Arthur L Corbin, “A Tribute to Karl Llewellyn” (1962) 71 *Yale LJ* 805.

civilian German concepts to the United States.<sup>12</sup> Germans in general and German lawyers since the time of the Pandects<sup>13</sup> do not like polysemy, and avoid it at all costs in law making. They create compound words so that one word means only one thing. Where in English we talk of “hardship” and in French of *imprévision*, words that would fail a Llewellyn test, they say *Wegfall des Geschäftsgrundlage*, meaning that the very foundation of the agreement goes away, this because due to unforeseen events, one party would be bound to tender a performance excessively onerous or excessively cheap compared to what the parties reasonably expected at the time of contracting. When borrowing this German doctrine, the Italians coined the term *eccessiva onerosità*, which does not include the word contract but is precise enough and may pass Llewellyn’s test.<sup>14</sup> This incursion into German proves that in fabricating and using technical legal terms, we can do better. This favours more accurate communication among experts, at the cost of confusing lay people to whom laws are meant to apply:<sup>15</sup> while the French favoured plain language at least in the Civil Code,<sup>16</sup> Germans made the choice of computer-like precision and mathematical complexity.<sup>17</sup>

Things are radically different in East-Asian cultures. In China, Confucius brought in a deep distrust of laws. “The true cohesion of a society is secured not through legal rules but through ritual observances”.<sup>18</sup> According to Confucius, a king leads by his moral power<sup>19</sup> and words are of central importance. As Confucius explained:

If the names are not correct, if they do not match realities, language has no object. If language is without an object, action becomes impossible — and therefore, all human affairs disintegrate and their management becomes pointless and impossible. Hence, the very first task of a true statesman is to rectify the names.<sup>20</sup>

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12 James Whitman, “Commercial Law and the American *Volk*: A Note on Llewellyn’s German Sources for the Uniform Commercial Code” (1987) 97 *Yale LJ* 156.

13 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, Trans. Tony Weir (Oxford: Oxford University Press, 3rd ed., 1998) pp.143–148.

14 See art.1467 of the Italian Civil Code.

15 In the United States, the movement towards plain language legal writing started with David Mellinkoff, *The Language of the Law* (Boston: Little, Brown & Co., 1963). It influenced federal legislation such as the Paperwork Reduction Act of 1980 and the Plain Writing Act of 2010. See also, in a broader perspective, Karen A. Schriver, “Plain Language in the U.S. Gains Momentum: 1940-2015”, (2017) 60:4 *IEEE Transactions on Professional Communication* 343.

16 Jean Leclair, “Le Code civil des Français de 1804: une transaction entre révolution et réaction” (2002) 77 *Revue juridique Thémis* 1, 21 and Olivier Moréteau, “Codes as Strait-Jackets, Safeguards and Alibis: The Experience of the French Civil Code” (1995) 20 *North Carolina Journal of International Law and Commercial Regulation* 273, 279.

17 Zweigert and Kötz, *An Introduction to Comparative Law* (n.13) pp.144–145.

18 Simon Leys, *The Hall of Uselessness, Collected Essays* (New York: New York Review of Books, 2013) p.322. See also *The Analects of Confucius*, Trans. and notes by Simon Leys (alias Pierre Ryckmans) (New York and London: Norton, 1997).

19 Simon Leys, *The Hall of Uselessness, Collected Essays* (n.18) p.323.

20 *Ibid.*

What is it that we compare? Section II reflects on the words of the title of this article, showing how problematic they are. Section III addresses the language of the comparatists: what words do we use when describing and comparing legal systems? The whole article will show that words of comparative law, much like comparative law itself, are on the move.

## II. Comparing What? Words of the Title

The words “comparative law” and their equivalent in other languages (*droit comparé*, *diritto comparato*, *Rechtsvergleichung*) have been there for well over hundred years, and attracted international attention in 1900 with the Paris *Congrès international de droit comparé*,<sup>21</sup> later to flourish after World War II<sup>22</sup> with a focus on convergence, universalism and a trend towards harmonisation.<sup>23</sup>

Forefathers like Édouard Lambert, who was inspired by his master Raymond Saleilles, drew a distinction between “comparative history” (*histoire comparative*) and “comparative legislation” (*législation comparée*), and interestingly, the French terms distinguish between “comparative” and “compared”. They use “comparative” with history, a process, and “compared” with legislation, pointing to a body of legal rules, soon to be addressed as law (*droit comparé*). Both perspectives tend to merge nowadays in comparative legal history.<sup>24</sup>

What is it that we compare and what does it mean to be comparative? This is asking the question of the corpus on the one hand and the process on the other. It is an invitation to reflect on the words “law” and “comparative”, starting with the substantive and then discussing the adjective.

### A. The Corpus

The reports presented in Paris in 1900 show that Lambert, Saleilles and other participants were aware of the need to extend the scope of comparative studies beyond legislation,<sup>25</sup> and to target doctrinal literature and court decisions, all elements later redefined as legal formants<sup>26</sup>. They also characterised the comparative approach as a science, while acknowledging concrete applications when it came to

21 *Congrès international de droit comparé 1900, Procès-verbaux des séances et documents* (Paris: LGDJ, 1905).

22 See, eg, HC Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: Cambridge University Press, 1946).

23 Vivian Grosswald Curran, *Comparative Law, An Introduction* (Durham: Carolina Academic Press, 2002) pp.7–29.

24 Olivier Moréteau, Aniceto Masferrer and Kjell Å Modéer (eds.), *Comparative Legal History* (London: Elgar, 2019).

25 A *Société de législation comparée* had been founded in Paris in 1869, operating under that name.

26 Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law” (1991) 39:1 *American Journal of Comparative Law* 1-34 continued in (1991) 39:2 *American Journal of Comparative Law* 343-401.

improving the law or facilitating transnational activities, a chief motivation in the foundation of the Institut de droit comparé Édouard Lambert in Lyon.<sup>27</sup> It was also made clear that the corpus was to include unwritten law such as custom and usages: Lambert pushed his disciples to study usages and custom in the workplace and in international trade.<sup>28</sup>

Addressing custom, however, the focus tends to be on those usages that are recognised and enforced by state authorities. Such usages tend to be regarded as customary law by both the civil law and the common law. In the 1980s, attempts were made to disconnect custom from state law, in the context of international trade. René David demonstrated that many transnational norms applied in the context of international business transactions find no support in state law and can be described as *droit non-étatique*.<sup>29</sup> This is an area of the law where professional organisations such as the International Chamber of Commerce and many other non-governmental trade organisations keep track of evolving usages and put them in written form, in publications that are regularly updated.<sup>30</sup> The concept of “stateless law” (the idea that law can exist without the state as the primary source of creation, enforcement and legitimacy of law or that social norms without the sanction of state law may coexist with state law) has gained currency in recent literature,<sup>31</sup> though “stateless law” may not be the best term to translate *droit non-étatique*. The concept is fuzzy and unclear, defined as “a form of law in which the social context is as important as the text”.<sup>32</sup> Thus defined, it may include soft law and many other fuzzy things. These developments show that comparatists go beyond the written and unwritten norms to address social context, which is central to the development of custom.

Legal pluralists such as Roderick Macdonald and Jacques Vanderlinden enlarge the scope of investigation and invite us to rethink the corpus of comparative studies. Vanderlinden identifies no less than four different uses of the word custom in legal discourse:<sup>33</sup>

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27 Édouard Lambert, *L'Institut de Droit Comparé, son programme, ses méthodes d'enseignement* (Lyon, Rey, 1921).

28 Olivier Moréteau, “Édouard Lambert et l'enseignement du droit comme science sociale et comparative” in David Deroussin (ed.), *Le renouveau des sciences sociales et juridiques sous la III<sup>e</sup> République: La Faculté de droit de Lyon* (Paris: La mémoire du droit, 2007) pp.193, 196–197; *Le juriste français entre ethnocentrisme et mondialisation* (Paris: Dalloz, 2014) pp.212–214.

29 René David, *Le droit du commerce international. Réflexions d'un comparatiste sur le droit international privé* (Paris: Economica, 1987).

30 See for instance the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce, known in their present version as UCP 600, globally referred to in letters of credits, a largely unregulated area of banking activity.

31 See, for example, Helge Dedek and Shauna Van Praagh (eds.), *Stateless Law: Evolving Boundaries of a Discipline* (Oxford: Routledge, 2015). For a useful review of this book, see (2017) 21 *Edinburgh Law Review* 315–317.

32 *Ibid.*, 3.

33 Jacques Vanderlinden, “Here, There and Everywhere ... or Nowhere? Some Comparative and Historical Afterthoughts About Custom as a Source of Law” in Moréteau *et al.*, *Comparative Legal History* (n.24) 140ff.



- (1) The supposed original policies prevailing in Western European communities prior to the revival of Roman law or in overseas communities before colonialism. The word also enables [the observer] to escape a systematic anachronistic or analocalistic<sup>34</sup> reference to “law”.
- (2) A specific formal source of law (along with legislation, case law, legal science or legal acts) inherited from Rome by the self-styled “jurists” of Western Europe and developed within particular legal systems from the thirteenth century onwards, also called “customary law” by legal historians.
- (3) So much of indigenous law of a colony as the colonial administration recognised, which are commonly referred to as “customary law”.
- (4) The remnants of original pre-colonial policies [or practices] still existing in “colonial” communities, which continue to function under colonial rule and the post-independence “new” policies, all functioning as autonomous, possibly clandestine (and often considered by the state as illegal tension-solving mechanisms in various social contexts).<sup>35</sup>

Vanderlinden first discusses custom (2) and (3), showing how custom, allegedly a form of spontaneous law that develops from the doings of the people, happened in a number of significant jurisdictions to be confiscated by emerging royal powers. In France, this was the drafting of customs, starting under an order by King Charles VII in 1454.<sup>36</sup> The moment judges got hold of a *coutumier*, the name given to a record of customs existing in a given region, they typically refused to consider any argument that the usage may have changed, and treated the *coutumier* as a written law.<sup>37</sup> As Vanderlinden notes, “Originally and essentially connected to spontaneous life action and experience, custom is transformed in either a doctrinal or a statutory source of law, as it takes the written form”.<sup>38</sup> He shows that the same happened in England when the royal courts deprived the people of Kent of the custom of gavelkind, a system of tenure promoting equal division of land among the heirs of the landholder. As it conflicted with primogeniture, judges insisted that all customs of Kent be reduced into writing, then refusing to hear of any custom that was not

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34 The adjective comes from the noun analocalism, used by Vanderlinden in order to designate the unjustified transfer of a notion applicable in one place to another where it is not applicable, Jacques Vanderlinden, *Les pluralismes juridiques* (Brussels, Bruylant, 2013) p.363.

35 Vanderlinden, “Here, There and Everywhere ... or Nowhere? Some Comparative and Historical Afterthoughts About Custom as a Source of Law” (n.33) p.143.

36 Ordinance of Montil-Lès-Tours, 15 April 1454, art.125.

37 Jacques Vanderlinden, “La coutume dans le droit français des pays de coutumes aux XVI<sup>e</sup>, XVII<sup>e</sup> et XVIII<sup>e</sup> siècles” *La coutume, Recueils de la Société Jean Bodin*, t. LII (Brussels: De Boeck Université, 1990) p.283.

38 Vanderlinden, “Here, There and Everywhere ... or Nowhere? Some Comparative and Historical Afterthoughts About Custom as a Source of Law” (n.33) p.146, also insisting on the fact that the drafting of custom was not made by representatives of the people but by “a King’s official or a judge or a group of persons made up of members of the nobility, the clergy, and the middle class” (*ibid.*). On the drafting of customs, see John Gilissen (ed.), *La rédaction des coutumes dans le passé et le présent* (Brussels: Éditions de l’Institut de Sociologie, 1962).

recorded.<sup>39</sup> Vanderlinden tries to make sense of what happened in France and in England, pointing to a trend towards the elaboration of a unitary system, issues that pertain to knowledge and also a sense of social and intellectual superiority of those administering the law, stigmatising “an impossible couple” between lawyers and custom.<sup>40</sup> “Customary law” was to become a construct that, even in the opinion of the historians, had to be documented, though it is essentially oral and gestural.

Whether one looks at custom (2) (post-Roman law) or (3) (colonial), we witness this Western assumption that customary law or custom must be mandatory to qualify as legal.<sup>41</sup> We Westerners have locked the definition of the law: we are not willing to regard as law rules and processes that are not mandatory and not enforced by state authorities.<sup>42</sup>

This is where we turn to Vanderlinden’s custom (1) and (4). To understand this, we must move outside the model of the state’s monopoly to define and implement the laws, which brings us to the realm of legal pluralism. The individual must be placed at the centre and considered as subjected to several networks of rules, some state-based (and properly legal as we define it) and others stateless, such as religion, professional groups, social or sport associations, criminal organisations and groups of all kinds. Not all these norms would qualify as law as we define it, but the life of the individual is conditioned by these networks of norms and often-conflicting policies.<sup>43</sup>

We know very little of pre-Revival of Roman law customs of Western Europe (custom (1) above), but Vanderlinden, whilst warning against the “doubly mortal sin” of anachronism and analocalism, shares his intuition that there may be similarities with custom (4), existing in Africa pre-colonisation and re-emerging after independence.<sup>44</sup> Law in these societies can be defined, in Gabon as “ivanga”, meaning “what man does”<sup>45</sup> or “Diola” in Senegal, where the village chief says that what he enforces is “the ways of doing of the Diola”.<sup>46</sup> Where chiefs appear to have

39 *Ibid.*, noting that with few exceptions such as CK Allen, *Law in the Making* (Oxford: Oxford University Press, 7th ed., 1966), most authors do not discuss custom in the context of English law.

40 *Ibid.*, p.147. See also Jacques Vanderlinden, “Le juriste et la coutume, un couple impossible ? (bis) ou, À propos de Méthode d’interprétation et sources, contrepoint au départ d’une image française de la loi et du juge” in Philippe Jestaz (ed.), *François Gény, mythe et réalités* (Paris: Dalloz, 2000) p.55 and Jacques Vanderlinden, “Réseaux, pyramide et pluralisme ou regards sur la rencontre de deux aspirants-paradigmes de la science juridique” (2002) 49 *Revue interdisciplinaire d’études juridiques* 11.

41 Vanderlinden, “Here, There and Everywhere ... or Nowhere? Some Comparative and Historical Afterthoughts About Custom as a Source of Law” (n.33) p.150 notes the effort to make the custom more accessible by writing “if a man wishes to take a wife, he will ask the parents of the woman” rather than “the consent of the parents of the woman is required as an essential condition of the celebration of the marriage”.

42 This perspective is challenged in contemporary literature. See the essays gathered in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds.), *The Concepts of Law, Comparative, Jurisprudential, and Social Sciences Perspectives* (Burlington: Ashgate, 2014).

43 See Vanderlinden, *Les pluralismes juridiques* (n.34).

44 Vanderlinden, “Here, There and Everywhere ... or Nowhere? Some Comparative and Historical Afterthoughts About Custom as a Source of Law” (n.33) pp.160–161.

45 Etienne Le Roy, “Justice africaine et oralité juridique” (1974) 36 *Bulletin de l’Institut français d’Afrique noire* 559.

46 Etienne Le Roy, *L’esprit de la coutume et l’idéologie de la loi, La connaissance du droit en Afrique* (Brussels: Académie royale des sciences d’outre-mer, 1985) p.210.

absolute power, one discovers that there is no chief without subjects and that the making of a chief is the result of a mysterious alchemy with countless variables. All of what would be regulated by institutions and rules in the West appears to be conditioned by “ways of doing” in other cultures.<sup>47</sup>

Now, does it mean we have to regard all this as the law? Vanderlinden eventually resisted and now says that “law” should be used only where there is a state, if we want to avoid polysemy.<sup>48</sup> However, that does not mean that custom (1) and (4) are to be left out of our comparative efforts. For the sake of language consistency, Vanderlinden suggests renaming custom (1) and (4) “do” because it reflects what is being done in a group, regardless of whether mandatory or not. Very often these are mechanisms aiming at re-establishing social harmony in the group, which may fully ignore Western ideas of guilt or culpa, as is the case with the Inuit.<sup>49</sup>

We must be able, when we look at these legal systems, to go beyond what we call law, whether in the form of legislation or custom. Not that we must describe “non-legal” mechanisms as “law” for very often they are not. But because these mechanisms are used where in the Western world we resort to the law, they must be taken into account as elements of the corpus and therefore be included in the comparative process. They are more than context to be aware of when looking at the corpus of what constitutes law: they are processes filling the tasks that we typically assign to the law, and therefore belong to the corpus.

For example, can we look at the law of China, ignoring the multitude of “non-legal” mechanisms that are cultural and political, and focus only on what resembles what we are doing in the West?<sup>50</sup> Doing this may lead to a misconception in our understanding of how China works, with the centrality of the Party controlling judicial decisions just as much as it does politics and every aspect of social and economic life. Obviously, the Chinese culture, as well as the influence of the Party, must be taken into account as elements of the corpus.<sup>51</sup>

The reader will not find here a new definition of the word “law” but may come to realise that this word, used in the singular in the term “comparative law”, may be too narrow to cover the larger scope of what we need to investigate in our comparative activity, particularly when we consider non-Western societies.

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47 Vanderlinden, “Here, There and Everywhere ... or Nowhere? Some Comparative and Historical Afterthoughts About Custom as a Source of Law” (n.33) p.163.

48 *Ibid.*, p.164.

This is where the distinction between law and norm and the restriction of the former to state-controlled norm seems to me essential for the sake of clarity. Hence, considering legal and normative pluralisms and assuming the state allows another law than its own to operate within its jurisdiction, the first one (legal pluralism) is possibly a limited and narrowly defined variant of the very wide — if not limitless — second one (normative pluralism), which in turn, can manifest itself in single shared facts.

49 *Ibid.*, 159.

50 For a pluralistic approach of Chinese law, see Werner Menski, *Comparative Law in a Global Context, The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2nd ed., 2006) pp.493–593.

51 *Ibid.*, pp.584–593.

We need to take into account “non-legal” mechanisms and policies that play the role of law when considering these societies, and this with a pluralistic attitude. The major breakthrough of Macdonald’s critical pluralism and Vanderlinden’s radical pluralism is a shift of paradigm, just like turning the pyramid of norms on its head,<sup>52</sup> looking at things from the perspective of the individual rather than the state: pluralists do not simply look into what the abstract rule or norm is but may question the way it is perceived and experienced by a variety of individuals or social groups. It is like accepting to look into the fact that, as would be the case in the United States, laws banning certain substances (e.g. marijuana), though colour blind on paper, are strictly or harshly applied to people with a dark skin while being largely overlooked in the case of others. All social mechanisms resorted to in order to solve disputes and re-establish social harmony may not qualify as “law” in the traditional sense but belong to the corpus of comparative legal studies.

This extends the scope of legal formants identified by Rodolfo Sacco,<sup>53</sup> useful as those may be, in revising our approach to legal sources. Of course, traditional legal formants, be they legislation, judicial decisions, doctrine or practice, must be taken into account, but we must consider the “do’s” when considering non-Western cultures. We must also consider the “do’s” when studying Western legal systems because of the constantly evolving social mix and the importance of immigration, which has an undeniable impact on the way laws are administered in the postcolonial West.<sup>54</sup>

We then end up comparing what at first sight does not look comparable, not only oranges with oranges but apples with oranges.

Regarding the corpus, the words “comparative law” may be a misnomer for at least two sets of reasons. First, the word “law” appears in the singular in a sort of absolute way, as if law was to be compared to itself. At the very least, we should use a plural (comparative laws), like in *Comparer les droits*<sup>55</sup> or *Premiers pas dans la comparaison des droits*.<sup>56</sup> Second, the word “law” does not include the whole corpus of what is meant to be compared, at least if it is understood *stricto sensu*. Either we accept to refer to “laws” *lato sensu*, in which case we will have “comparative laws”, or we must substitute a broader term to law, to make it clear that the corpus includes non-legal (and sometimes illegal) social norms and mechanisms. We may want to talk about comparative norms, but this is too restrictive as “do’s” go beyond the scope of normativity.

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52 Jacques Vanderlinden, “Réseaux, pyramide et pluralisme ou regards sur la rencontre de deux aspirants-paradigmes de la science juridique” (n.40).

53 Sacco, “Legal Formants: A Dynamic Approach to Comparative Law” (n.26).

54 Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994).

55 Jacques Vanderlinden, *Comparer les droits* (Brussels: Story Scientia, 1995).

56 Olivier Moréteau, “Premiers pas dans la comparaison des droits” in Jean-Claude Gémard and Nicholas Kasirer (eds.), *Jurilinguistique : entre langues et droits; Jurilinguistics: Between Law and Language* (Montreal: Bruylant and Thémis, 2005) p.407.

From the point of view of the corpus, one may advocate for “comparative laws” with an invitation to embrace the polysemy of the word: would it make us sinners like our biblical ancestors biting into the fruit of the tree of knowledge? It does not make us enemies of science, because we go beyond that one tree and embrace reality with pluralistic eyes. Regarding knowledge, the sin may be to feast off one unique source or observe from one unique perspective.<sup>57</sup>

The change of adding one letter, the mark of the plural, is minimal, and yet potentially huge. Traditionalists may be somehow reassured, and critical or radical pluralists may agree, as they after all stick to the term “legal” pluralism though inviting to embrace a much broader scope of investigation. We may also accept “legal comparatism” as a synonym to “comparative laws”.

Before making a final proposal, we need to embrace the word “comparative”, which is before all a process.

### B. *The Process*

Much has been written on the comparative method as applied to the study of the law,<sup>58</sup> recently to acknowledge the centrality of comparative legal history to legal science.<sup>59</sup> In the humanities and social sciences, and also in life sciences, any phenomenon we approach needs to be observed in the perspective of its origins and evolution, and the human mind is quick to draw comparisons with other phenomena of a similar kind. Comparison is part of the cognitive process.<sup>60</sup>

Writing about the first steps in comparative law, in an attempt to educate and not discourage the beginner, I wrote:

One is prompt at saying that comparison is a complex and sophisticated activity best to be left to the trained specialist. Yet, from early childhood, at the age of the first steps, it appears to be the first human intellectual activity. It is part of the cognitive process and it develops with the acquisition of

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57 Olivier Moréteau, “Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo whilst Understanding Contamination” (2011) 4 *Journal of Civil Law Studies* 516, 536–538.

58 See for instance Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (Cheltenham and Northampton: Edward Elgar, 2012) and Esin Öricü, “Methodology of Comparative Law” in Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Elgar, 2006) p.442.

59 Aniceto Masferrer, Kjell Å Modéer and Olivier Moréteau, “The Emergence of Comparative Legal History” in Moréteau *et al.*, *Comparative Legal History* (n.24) pp.1, 6–13. The volume contains essays by Adolfo Giuliani, Seán Patrick Donlan, Dag Michalsen and Matthew Dyson discussing theory and methods.

60 As Vivian Curran writes, “[t]he cognitive sciences suggest that each individual’s cognition depends on comparison, because human understanding is a function of relating one entity or domain to another”: Vivian Grosswald Curran, “Cultural Immersion, Difference and Categories in U.S. Comparative Law” (1998) 46 *American Journal of Comparative Law* 43, 47, citing George Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal about the Mind* (Chicago: University of Chicago Press, 1987).

language. With games of shapes and colors, the child is trained to typology. When noticing that the everyday rules of conduct are more lenient at the grand-parents' home than at home and later on at school, the child engages in some form of legal comparatism.<sup>61</sup>

Law students use comparison from their first day in law school, when they distinguish public law from private law, compare civil and criminal procedure and limitation periods in tort and contract, etc.<sup>62</sup> In most jurisdictions, they focus on just one legal system, but spontaneously, during a study abroad experience or when hearing of a foreign legal system, they engage in some more or less elaborate comparative process.

Adults tired of children comparing all the time say that one does not compare apples with oranges, as if only two things that are alike can be compared. Yet, why not comparing a pencil with a typewriter and a computer? The moment we look at them in the light of a function, like producing a text, the comparison of very different things becomes possible.<sup>63</sup>

The comparative process is intimately connected to legal science, addressing law in its broadest sense as an object of study and knowledge. In this sense, it is fair to use the word law in the singular, like one does when discussing comparative anatomy, comparative literature and comparative religion. As Vivian Curran wrote: "In its essence, comparative legal analysis is just legal analysis, since comparison is not unique to the field of comparative legal analysis, since, rather, all analysis, legal and other, is comparative at heart".<sup>64</sup>

The current trend of comparative legal studies is to embrace diversity,<sup>65</sup> though rarely erring towards the extreme and unacceptable view that cultural diversity is an obstacle to comparison.<sup>66</sup> Yet, one should not lose sight of the universal dimension of human experience, reflected in philosophy and sometimes in anthropology: though it must not be neglected, cultural diversity may not be of central importance in making sense of the human experience. René Girard has demonstrated that all desire is mimetic (meaning that our desires are borrowed from other people).<sup>67</sup>

61 Moréteau, "Premiers pas dans la comparaison des droits" (n.56) p.410.

62 See Xavier Thunis, "L'empire de la comparaison" in François van der Mensbrugge (ed.), *L'utilisation de la méthode comparative en droit européen* (Namur: Presses universitaires de Namur, 2003) p.5.

63 This defeats the idea of the *presumptio similitudinis*, which causes the functional method to be criticised in recent literature. See Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) pp.339, 369–372.

64 Vivian Grosswald Curran, "Comparative Law and Language" in Reimann and Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (n.63) pp.675, 699.

65 See for instance volumes published in the Juris Diversitas Book Series, Ashgate and Routledge.

66 Pierre Legrand, *Negative Comparative Law* (London: Taylor & Francis, 2018).

67 René Girard, *Mensonge romantique et vérité Romanesque* (Paris: Grasset, 1961); *Deceit, Desire and the Novel* (Baltimore: John Hopkins Press, 1965); *La violence et le sacré* (Paris: Grasset, 1972); *Violence and the Sacred* (Baltimore: Johns Hopkins University Press, 1977); *Des choses cachées depuis la fondation*

Mimetic desire is the source of mimetic rivalry, the source of all human conflicts leading to spurges of violence. Identifying a scapegoat and murdering it is the way to bring about desirable peace. A René Girard-inspired or mimetic-driven comparative analysis of the diverse legal systems remains to be written, analysing laws and policies as tools for channelling violence and restoring social harmony. At least from an anthropological and philosophical viewpoint, it is likely to reveal much unity amongst cultural diversity, as also does the concept of natural law.

With these multiple layers, it makes it all the more challenging to discuss the language of the comparatists.

### III. In What Language? Words of the Comparatists

We comparatists not only face the need of understanding foreign languages and cultures but also constantly struggle with the choice of words, whether we write or speak in our native language or in a foreign language. We face the lexicon of at least two distinct systems depending on how many systems we embrace in our work. While some scholars do not hesitate to say that the comparative process is translation,<sup>68</sup> others insist on the need to resort to a neutral language.<sup>69</sup>

The conversation is confusing if we discuss the language of comparison in general. We need to identify what we are doing step by step, remembering that comparative law is a broad term encompassing a variety of tasks. For the sake of simplicity, I will break them down in accordance with a commonplace trilogy: comparative law aims at understanding the law of the other (task 1), comparative law aims at bridging differences between legal systems and helps identify or develop a uniform or harmonised law where needed (task 2) and comparative law favours a better understanding of one's own legal system, sometimes trying to improve it by importing foreign elements or making sense of those foreign elements that influence it (task 3). This third task is largely reflexive and derives from the other two. Though it generates its own words, it will be left out of the scope of this paper.

Task 1 is diversity driven, while task 2 is unity driven. Either or both can be conducted with a practical purpose in mind or for the mere sake of knowledge. I need to know the law of the other party when doing business with or operating in the other's foreign environment, but I may want to know the law of another country out of curiosity, for the sake of knowledge. Likewise, regarding task 2, the drive to unification and harmonisation may be for a practical purpose. But the comparatist may also wish to have a broader understanding of existing models, say, regarding land control, market transactions, family or business organisations and

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*du monde* (Paris: Grasset, 1978) and *Things Hidden Since the Foundation of the World* (London: Athlone Press, 1987).

68 Curran, *Comparative Law, An Introduction* (n.23) pp.31–45 and Curran, "Comparative Law and Language" (n.64).

69 Moréteau, "Premiers pas dans la comparaison des droits" (n.56) pp.426–428.

control of governmental authorities, dealing with violent crime, simply for the sake of knowledge. Whether our motivations are practice or knowledge driven is not always clear, and it does not really matter. Both tend to mingle both in our teaching and academic writing. Sacco rightly complains that comparatists are put to the test of proving the usefulness of their activity, as if the pursuit of knowledge itself was not a legitimate purpose.<sup>70</sup>

The point is that the language we need, the words we use, is not the same whether we analyse, describe or teach a foreign legal system (task 1) or engage in system building (task 2, which must be preceded by task 1).<sup>71</sup> While the first activity has much to do with translation, the second one is hard to achieve without some kind of metalanguage.

### A. *Analysing the Law of the Other: Comparative Law as Translation*

The first step in a comparative study is the description of the law of the other. It is easy when the systems we compare share the same origins and are expressed in one language, like the civil codes of Belgium and France, though the similarity of interpretation is never guaranteed.<sup>72</sup> However, the law of the other is usually expressed in a foreign language. Vivian Curran opens her study of comparative law and language with the following words:

At the simplest level of observation, language issues arise in connection with comparative law because people in different countries speak in different languages, producing legal texts in foreign languages that become the target of comparative legal studies.<sup>73</sup>

Comparatists must be multilingual,<sup>74</sup> and “the range of legal cultures they can study by the foreign languages they know” is necessarily limited.<sup>75</sup> These limits also apply to the audience of comparative work. As Vivian Curran says:

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<sup>70</sup> Rodolfo Sacco, *La comparaison juridique au service de la connaissance du droit* (Paris: Economica, 1991) pp.5–8. In Zweigert and Kötz, *An Introduction to Comparative Law* (n.13) p.15, the authors do not shy at asserting that “the primary aim of comparative law is knowledge”.

<sup>71</sup> In Moréteau, “Premiers pas dans la comparaison des droits” (n.56) pp.425–428, I first discuss the language of the foreign system, and then the need of a neutral language of reference for the sake of comparison.

<sup>72</sup> Contrast for instance the interpretation of art.1384, para.1 in France and in Belgium. See Olivier Moréteau, “Basic Questions of Tort Law from a French Perspective” in Helmut Koziol (ed.), *Basic Questions of Tort Law from a Comparative Perspective* (Vienna: Jan Sramek Verlag, 2015) pp.3, 67–69.

<sup>73</sup> Curran, “Comparative Law and Language” (n.64) p.676.

<sup>74</sup> On hyperpolyglots or language superlearners, see Michael Erard, *Babel No More: The Search for the World’s Most Extraordinary Language Learners* (New York: Free Press, 2012).

<sup>75</sup> Curran, “Comparative Law and Language” (n.64) p.678.



if foreign language knowledge is crucial, then even a polyglot comparative law scholar may not be able to communicate successfully to students who are unable to read foreign texts except in translation, thus reducing comparative law's educational potential.<sup>76</sup>

The best approach is for the comparatist to discover the foreign system by immersion and then expose it by translation, a process also familiar to comparative-literature and comparative-religion scholars.

### (i) Discovering Otherness by Immersion

The best way to study a foreign legal system is not only to read its source documents in the original language but also to visit the foreign jurisdiction and experience its culture, legal and at large, by way of immersion, which may also include field experience and practice. “The immersion approach in comparative legal analysis suggests the importance of trying to understand foreign legal cultures in an untranslated form; i.e., through the prisms that shape perceptions in the target legal culture”.<sup>77</sup> Vivian Curran explains that “[t]his implies both an expansion and alteration of the comparatist’s prisms”,<sup>78</sup> an experience that is rarely described in legal literature<sup>79</sup> but is sometimes shared by comparatists in the form of anecdotes in the classroom, during public lectures or at the dinner table.

As Grossfeld writes: “Different languages represent different world-views. When we learn another language we unconsciously adopt its speakers’ world of thought: ‘Language thinks in us’”.<sup>80</sup> For this reason, working from translated texts is less useful because translation is already the result of comparative legal analysis; perceptions will be “contaminated” by the work of the translator.<sup>81</sup> The problem is not circular but linear, and it is only a risk, not a necessity: “Whereas translation *precedes* comparative legal analysis, legal translation ‘merely’ risks being inadequate without prior comparative legal analysis”.<sup>82</sup>

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<sup>76</sup> *Ibid.*

<sup>77</sup> Curran, “Cultural Immersion, Difference and Categories in U.S. Comparative Law” (n.60) 57.

<sup>78</sup> *Ibid.*

<sup>79</sup> See Vanderlinden, “Here, There and Everywhere ... or Nowhere? Some Comparative and Historical Afterthoughts About Custom as a Source of Law” (n.33) p.157 (discussing the problem of succession in the chiefdom with the Zande chief Ukwatutu); see also René David, *Les avatars d’un comparatiste* (Paris: Economica, 1982).

<sup>80</sup> Grossfeld, *Strength and Weakness of Comparative Law* (n.2) p.96, citing Emil Wezel, *Sprache und Geist* (Leipzig: Felix Meiner, 1935) p.iv and referring to the philosophy of language of Gottfried von Herder and Wilhelm von Humboldt: “For Humboldt language is the formative organ of thought. It is not just a device for representing the truth, but ‘much more, of discovering truth hitherto unrecognised’” (*ibid.*).

<sup>81</sup> CJW Baaij, “Translation and the ‘Contamination’ of Comparative Legal Research” in Simone Glanert (ed.), *Comparative Law — Engaging Translation* (Oxford and New York: Routledge, 2014) p.104.

<sup>82</sup> *Ibid.*, p.106, emphasis in the original. Hence, the need for the linguist to be trained in comparative law before engaging into legal translation: see Guadalupe Soriano-Barabino, *Comparative Law for Legal Translators* (Oxford: Peter Lang, 2016).

However, as much as it is important to absorb the original culture by its own prisms and channels:

comparatists need to retain their stance as outsiders even as they acquire insight into the insiders' view. Otherwise they will fail to perceive with sufficient acuity those fundamental, powerful aspects of target legal cultures which are so entrenched as to be unarticulated and even unconscious.<sup>83</sup>

The comparatist should be what French philosopher Michel Serres calls a *Tiers-Instruit*, an educated outsider, a *Troubadour of Knowledge* as translators have it.<sup>84</sup>

As much as it is necessary to master the language of the other, we need to assess the difference between what is spoken and what is not.<sup>85</sup> The general tendency in Western cultures is to speak out and address matters explicitly. Yet there are variations. In the traditional close-knit English society, understatements are commonplace, and the phrase "I would not do it that way" expresses strong reprobation. By comparison, Americans are fond of superlative expression and exaggeration, and use explicit language, probably because the population is not homogenous and does not share a centuries-old common code, like the English or the French. In Japan, the proportion of the spoken to the unspoken is allegedly of 1 to 9: "The general view is that the less verbal one's position is, the more polite and rich it is in implications".<sup>86</sup>

Rodolfo Sacco has characterised the implicit models and notions that can be invisible or hidden formants as "cryptotypes",<sup>87</sup> and shows their importance in the understanding of laws, legal language and legal cultures, as markers of the mentality of a legal system. He explains that they become visible through the comparison with another system where the same notions are explicit. The synecdoche or *pars pro toto* is another example.<sup>88</sup> Bernhard Grossfeld has these insightful words:

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83 Curran, "Cultural Immersion, Difference and Categories in U.S. Comparative Law" (n.60) 57–58, citing George Steiner, *On Difficulty and Other Essays* (Oxford: Oxford University Press, 1978) p.26, who wrote that "learning [is] the suspension of reflex".

84 Michel Serres, *Le Tiers-Instruit*, Gallimard 1992, transl. Sheila Faria Glaser with William Paulson as *The Troubadour of Knowledge* (Ann Arbor: University of Michigan Press, 1997).

85 Grossfeld, *Strength and Weakness of Comparative Law* (n.2) p.97.

86 Sayo Yotsukura, "Ethnolinguistic Introduction to Japanese Literature" in William C McCormack and Stephen A Wurm (eds.), *Language and Thought, Anthropological Issues* (The Hague: Mouton, 1977) pp.261, 263. Yosiyuki Noda, *Introduction to Japanese Law* (Tokyo: University of Tokyo Press, 1976) pp.9–13, with a description of the Japanese language, summarised by Grossfeld, *Strength and Weakness of Comparative Law* (n.2) p.100, in the following terms: "Japanese is better adapted to the expression of feeling than to logical argument; as a language of poetry rather than scholarship, it is not good at expressing logical relations".

87 The word points to what is hidden. Sacco, *La comparaison juridique au service de la connaissance du droit* (n.70) pp.105–108.

88 Pier Giuseppe Monateri, "Règles et technique de la définition dans le droit des obligations et des contrats en France et en Allemagne : la synecdoche française" (1984) *Revue internationale de droit comparé* 7.

rules of conduct generally are only in part made known through language; what is most important often remains “between the lines”, “between one word and another”. The silent space between words is of different breadth in different cultures. Words “swim” on an “ocean” of silence; they relate to a common, silent background.<sup>89</sup>

Even in legal systems that favour explicit language, such as the United States, there appear some untranslatable words which, while ubiquitous, express the American legal mind. It takes prolonged immersion in the United States to get a fair perception of concepts such as “law”, “policy”, “due process”, “fairness”, “reasonableness”, “deference”, and “discretion”.<sup>90</sup> Conversely, some civil law concepts challenge common law-trained scholars.<sup>91</sup> Think for instance of the distinction between “juridical acts” and “juridical facts”.

As much as immersion matters,<sup>92</sup> the comparatist must not neglect external literature on the target legal system (ie, books or articles written by third-country scholars), especially when written by reputable comparatists. Doing so implies a judgment call as to whether the author has experienced immersion and regarding the time and context of the publication.

Jaakko Husa insists that “the question concerning the comprehension of substance of law is more fundamental than purely technical linguistic orientation”.<sup>93</sup> This by no means undermines the importance of language, legal and general. The comparatist is a *passeur*, a go-between vested with the duty of communicating the words of otherness to the home audience, which in essence is an exercise in translation.

## (ii) Communicating Otherness by Translation

After or during the immersion in the foreign legal system, the comparatist is called upon to share the knowledge of the foreign legal system with students, scholars and the “real” world as one sometimes describes practice in academic circles. Whether

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89 Bernhard Grossfeld, *Kernfragen der Rechtsvergleichung*, Mohr 1996, translated by Vivian Curran, *Comparative Law, An Introduction* (n.23) p.34.

90 George P Fletcher and Steve Sheppard, *American Law in a Global Context, The Basics* (New York: Oxford University Press, 2005) pp.54–74 (“The Language of Law”) and George P Fletcher, “Fair and Reasonable. A Linguistic Glimpse into the American Legal Mind” in Rodolfo Sacco and Luca Castellani (eds.), *Les Multiples langues du droit européen uniforme* (Turin: L’Harmattan Italia, 1999) p.57.

91 Shawn Marie Boyne, “Translating Civil Law ‘Objectivity’ with an Adversarial Brain: An Ethnographic Perspective” in Glanert (ed.), *Comparative Law — Engaging Translation* (n.81) p.123.

92 This part of the effort is rarely rewarded in terms of academic recognition (see Olivier Moréteau, “Ne tirez pas sur le comparatiste” (2005) *Rec Dalloz* 452), but the return on investment is usually immense regarding personal and scholarly enrichment.

93 Jaakko Husa, “Understanding Legal Languages: Linguistic Concerns of the Comparative Lawyer” in CJW. Baaij (ed.), *The Role of Legal Translation in Legal Harmonization* (Alphen aan den Rijn: Kluwer, 2012) pp.161, 178. In Husa, *A New Introduction to Comparative Law* (n.3) p.195, he writes: “Must the comparatist be a linguistic genius?” The answer is: “no”, which will sound as good news for many a reader.

or not actual translation is needed, this is an exercise in communication that implies translation or is very similar to translation. Familiarity with the experience of teaching English and American law to a French audience in English or in French, and teaching French law or civil law systems to an Anglo-American audience in English or at times in French, helps understand that these are exercises in cross-border communication, passing both systemic legal borders and linguistic borders.<sup>94</sup> Legal translation is indeed different from other types of specialised translations.<sup>95</sup>

Vivian Curran understands that “the decoding process, whether of foreign language or law, is a process of translation. Understanding translation’s mechanisms thus illuminates the process of comparative law. Translation is both de-coding and re-coding, identifying and constructing meaning”.<sup>96</sup>

The facts that based on some neuroscience breakthrough, some linguists and philosophers of languages can now demonstrate that the human brain is wired for the acquisition of language and that all the languages of the world are governed by a limited set of structures, at the first sight, seem to contradict the above analysis.<sup>97</sup> Yet, they do not dissipate the mysteries of communication, which always lies beyond language.<sup>98</sup> As Curran has it:

The polyglot knows that much alterity is not apparent. The polyglot legal comparatist knows that legal orders reside as much beneath and aside from words as they do in the words that purport to embody them.<sup>99</sup>

Translation is an exercise in communication and construction of meaning. The word translation literally means the process of moving something from one place

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94 Olivier Moréteau, “Les frontières de la langue et du droit” in Rodolfo Sacco (ed.), *The New Ambitions of Legal Science: Legal Anthropology and Legal Translology* (n.4) p.63 and “Les frontières de la langue et du droit: vers une méthodologie de la traduction juridique” (2009) *Revue internationale de droit comparé* 695.

95 Simone Glanert, “Translation Matters” in Glanert *Comparative Law — Engaging Translation* (n.81) p.1. See also Jan Engberg, “Comparative Law for Translation: The Key to Successful Mediation between Legal Systems” in Anabel Borja Albi and Fernando Prieto Ramos (eds.), *Legal Translation in Context, Professional Issues and Prospects* (Bern: Peter Lang, 2013) p.9, citing Michael Harvey, “What’s so Special about Legal Translation?” (2002) *Meta* 47, 179–182, who points to four aspects: “(1) legal discourse gives rise to legal effects, (2) law is a system-bound discipline, (3) requirements on fidelity are higher than in other areas, and (4) legal texts are characterized by ambiguity and interpretation”. See more generally, Le Cheng, King Kui Sin and Anne Wagner, *The Ashgate Handbook of Legal Translation* (Farnham and Burlington: Ashgate, 2014).

96 Curran, “Comparative Law and Language” (n.64) p.679.

97 Noam Chomsky, *On Nature and Language* (Cambridge: Cambridge University Press, 2002); *Language and Mind* (Cambridge: Cambridge University Press, 3rd ed., 2006) and Steven Pinker, *The Language Instinct, How the Mind Creates Language* (New York: William Morrow, 1994).

98 George Steiner, *Language and Silence: Essays on Language, Literature, and the Inhuman* (New Haven: Yale University Press, 1998) p.x. On the significance of implications, see Marmor, *The Language of Law* (n.4) pp.35–43, 85–105; he discusses the varieties of vagueness in the law.

99 Curran, “Comparative Law and Language” (n.64) p.680.

to another, acknowledging the existence of some space between these two places, a space in-between that must be visited by the translator.<sup>100</sup>

Walter Benjamin says that the task of the translator is not that of a communicator but of a craftsman contributing towards the achievement of the text by some sort of alchemy.<sup>101</sup> The translator's task aims at expressing the most intimate connection between languages, to identify a core that resists translation. Benjamin used the metaphor of a broken vessel, the original language providing incomplete fragments, some missing ones to be brought by the other language. The vessel will only near perfection once it is translated.<sup>102</sup> Benjamin's metaphor shows the proximity of translation and interpretation,<sup>103</sup> both in a linguistic and an artistic sense. The cellist interpreting a Bach score must decipher silences between the signs.<sup>104</sup> The comparatist-translator is also an interpreter and may be, occasionally, an artist. Jean-Claude G mar demonstrates how one can catch the "spirit" of the law when co-drafting the text in several languages rather than translating. He proves Benjamin's point in showing how co-drafting produces a three-dimensional, unbroken vessel.<sup>105</sup>

When teaching English law in English to French students, I nonetheless have to translate, to equip them with the common law English terminology and the ability to express it in French.<sup>106</sup> Meeting the untranslatables, I tell them to keep the word in English and provide neologisms or periphrases as tools of communication. I recommend against translating terms such as "trusts", "Court of Appeal", "Master of the Rolls" and "frustration" of contract, but tell them that there is no problem with using *Chambre des lords* when talking about the House of Lords, replaced by a Supreme Court in 2009. Why? Because this is a literal translation, a decal, devoid of risk of confusion with a French institution, a danger that existed when translating "Court of Appeal". Overall, when teaching a foreign law, it may be a good idea to use source-based translation, a translation

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100 Anne Wagner, "A Space in-Between — Legal Translation As a 'Third Space'" (2016) 9 *Journal of Civil Law Studies* 167.

101 Walter Benjamin, "The Task of the Translator" *Selected Writings* (Cambridge: Harvard University Press, Vol.1 (1913–1926), 1996) p.253.

102 *Ibid.*, p.260.

103 Jean-Jacques Sueur (ed.), *Interpr ter et traduire* (Brussels: Bruylant, 2007) with an essay by Fran ois Ost, "Les d tours de Babel" 13; see also Fran ois Ost, *Traduire. D fense et illustration du multilinguisme* (Paris: Fayard, 2009).

104 Alain Levasseur uses the verb decipher in the context of code interpretation: Alain A Levasseur, *Deciphering a Civil Code, Sources of Law and Methods of Interpretation* (Durham: Carolina Academic Press, 2015).

105 Jean-Claude G mar, "Catching the Spirit of the Law: From Translation to Co-drafting" in Glanert (ed.), *Comparative Law — Engaging Translation* (n.81) p.67.

106 Husa, *A New Introduction to Comparative Law* (n.3) p.195 insists on:

the need to resort to material in the original language or at least in key issues to examine the contents of the foreign law (also) directly in the original language. When the aim is to reach the legal-cultural level in comparative law a basic ability of some sort to read and perceive foreign legal language is necessary.

as close as possible to the original. One may do the same in writing, as I did in *Droit anglais des affaires*.<sup>107</sup>

A source-based approach is recommended when translating legislation,<sup>108</sup> whereas a target-based approach is acceptable when translating doctrinal texts.<sup>109</sup> Nicholas Kasirer invites us to use Gény's method of interpretation (*libre recherche scientifique*) as a translation method,<sup>110</sup> a suitable approach when translating doctrine.<sup>111</sup>

Our central point here is to convey what we learn about the foreign system to our home audience, and this is a place where we have to transcend the untranslatable, make it clear and complete, making Benjamin's broken vessel fully visible in three dimensions.<sup>112</sup> This act of translation—communication—interpretation pushes the comparatist to get an even better understanding of the foreign system than during the immersion experience.<sup>113</sup> Questions by students and comments on our papers force us to go beyond and fill silences with words and sounds, bringing additional depth and dimension. Teaching a foreign system or exposing it in books and articles is not meant to be literal translation of the foreign literature and language, as useful as this may be in some contexts,<sup>114</sup> but a creative activity transcending what we observe, making it more complete than its description in the original literature and yet re-presenting it in a fully authentic way. The “spirit” of the law breathes in this in-between language or third space identified by Anne Wagner and Walter Benjamin.<sup>115</sup>

The comparatist like the translator or the interpreter must be selfless, offering a “creation of the second degree” as explains Simon Leys with a musical comparison:

Glenn Gould and Sviatoslav Richter are no less artists for not having themselves composed *The Well-Tempered Clavier*. Great interpreters efface themselves the better to serve their models; but the more successful they are at this task, the more deeply their individual temperament and sensitivities are being revealed in their interpretations. Every touch from a

107 Olivier Moréteau, *Droit anglais des affaires* (Paris: Dalloz, 2000).

108 See the translation of the Louisiana Civil Code from English to French: Olivier Moréteau, *Le Code civil de Louisiane, édition bilingue* (Paris: Société de législation comparée, 2017) and “The Louisiana Civil Code in French: Translation and Retranslation” (2016) 9 *Journal of Civil Law Studies* 223.

109 On the distinction of source-based and target-based translation, see Jean-René Ladmiral, *Sourcier ou ciblisme, Les profondeurs de la traduction* (Paris: Les belles lettres, 2014).

110 Nicholas Kasirer, “François Gény's libre recherche scientifique As a Guide for Legal Translation” (2001) 61 *Louisiana Law Review* 61, 331.

111 Olivier Moréteau, “La traduction de l'œuvre de François Gény: méthode de traduction et sources doctrinales” in Olivier Cachard, François-Xavier Licari and François Lormant (eds.), *La pensée de François Gény* (Paris: Dalloz, 2013) p.69.

112 Benjamin, “The Task of the Translator” (n.101) p.260.

113 See the description of the immersion experience in the sub-paragraph above.

114 In Moréteau, “La traduction de l'œuvre de François Gény: méthode de traduction et sources doctrinales” (n.111) pp.80–81, I contrast the respective merits of free and literal translation of doctrinal texts.

115 See n.100 and n.101, respectively.

great pianist, every stroke from a great calligrapher, becomes a mirror of the interpreter's mind.<sup>116</sup>

When building systems however, the comparatist has a chance to move from the role of translator–interpreter to that of architect or composer.

### ***B. Building Systems: the Need for a Neutral Language***

Before addressing neutral words, a caveat is needed. Are the words we use ever neutral? The comparatist is a “rooted cosmopolitan”<sup>117</sup> with large sometimes worldwide views, but a national or local system of reference, all too often located in the West. We are conditioned by the language and culture we evolve in,<sup>118</sup> a leitmotiv in this paper. Even when gifted with a broad mind, we have a natural tendency to favour words reflecting our time, culture and tradition.

When comparing different legal systems from an identified and external point of view (*tertium comparationis*), we should use a neutral language or a metalanguage. In comparative anatomy, who would compare “cat legs” with “human legs” or “dog paws” with “human paws”? If looking at things with a scientific eye, you do not choose between human perspective and animal perspective but use a neutral language of “upper” and “lower limbs”, understanding that upper means closer to the head.<sup>119</sup> But here again, this arrangement reflects Western structuralist perceptions. Asian and African cultures may propose more fluid perceptions or representations of the human and animal body.

Much has been done in the realm of private and public international law to develop a common language to facilitate the response to identified needs, sometimes with the help of comparatists, though this language is not necessarily neutral. Much is to be done in the speculative realm of theoretical knowledge to develop a neutral language. We will briefly explore the common language in the empire of usefulness before speculating on a neutral language in a kingdom of uselessness.

#### **(i) Common Words of Usefulness: International Law and Practice**

Public international law was not built out of thin air but using building blocks of the civil law and common law traditions. The fact that this area of the law is developed in a limited number of languages favours the emergence of a common language of international law that more easily translates into other languages than will ever be the case in the realm of private law. The common language of public

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116 Simon Leys, *The Hall of Uselessness, Collected Essays* (n.18) pp.310–311.

117 Bruce Ackerman, “Rooted Cosmopolitanism” (1994) 104 *Ethics* 516.

118 William Twining, *Globalisation and Legal Theory* (Cambridge: Cambridge University Press, 2000) p.50.

119 Moréteau, “Premiers pas dans la comparaison des droits” (n.56) p.426.

international law directly derives from the law of Western nations.<sup>120</sup> It reflects the experience of the colonising powers rather than the colonised people and cannot be described as neutral terminology. The words of international human rights also reflect Western values like fair trial<sup>121</sup> or respect for private life.<sup>122</sup> Likewise, the World Trade Organization is also developing a language of international trade law, predominantly expressed in English but translatable in other languages, based on the experience of developed countries of the West.

Private international law develops in a more decentralised manner, as is particularly the case with the law of international business transactions. One notes the leadership of the United Nations Commission on International Trade Law. The Convention on Contracts for the International Sale of Goods (CISG) has largely contributed to the promotion of a common language of contract law expressed in the six official languages of the Convention.<sup>123</sup> A strong common law influence is noted with notions such as “fundamental breach” (art.25), “anticipatory breach” (arts.71–73) or “fitness” (art.35). “Remedies” (arts.45–52 and 61–65) is clearly a common law word, which has been promoted so as to become a neutral term usable in comparative law.<sup>124</sup> Others are more neutral such as “conformity of the goods” (arts.35–44), “avoidance” (arts.49 and 64) or “exemption” (art.79), though the French *force majeure* is elsewhere a standard. The development of widely available soft-law instruments such as the UNIDROIT Principles of International Commercial Contracts, published in 1994 and updated in 2016, or the Principles of European Contract Law, also known as PECL or Lando Principles, contribute to the fine-tuning of the language of international business transactions. For instance, in the UNIDROIT Principles, “avoidance” is used in the context of contract validity where there would be nullity (civil law) or a void or voidable contract (common law), the word “termination” being used in the context of non-performance (rather than breach in the CISG).

The plurality of sources favours the improvement of this terminology while bringing some diversity. One notes that many distinguished comparatists contribute to the drafting and updating of these instruments, thereby manufacturing convenient terms in contract-related matters. These always derive from the civil law and common law traditions and therefore from Western experience. Largely for practical reasons, which happen to coincide with the hegemony of some nations, English has

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120 See Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co., 1927) p.104.

121 European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), art.6.

122 *Ibid.*, art.8.

123 Lisa M Ryan, “The Convention on Contracts for the International Sale of Goods: Divergent Interpretations” (1995) 54 *Tulane Journal of International and Comparative Law* 99.

124 Olivier Moréteau, “Les remèdes à l’inexécution du contrat : Approche théorique et pratique de l’exécution forcée en droit du commerce international/Remedies for Breach of Contract: A Theoretical and Practical Approach to Specific Performance in International Commercial Law” (2017) *Revue de droit des affaires internationales — International Business Law Journal* 639.



become a lingua franca in world affairs and in the context of the European Union, a reality likely to survive Brexit.<sup>125</sup>

When it comes to the rules of conflict of laws, the Hague Conference is taking a leading role not only in standardising the terminology but also in establishing uniform rules.<sup>126</sup> Regarding terminology, one notes that scholars resort to Latin when describing, for instance, the law applicable in the jurisdiction where the court sits (*lex fori*), the law applicable to the contract (*lex contractus*), the law of the place where the damage occurred (*lex loci delicti*) or the law of the place where the property is located (*lex rei sitae*). Latin has the advantage of being a dead language: the meaning of words no longer changes, which is much needed in a specialty language.<sup>127</sup> Latin offers a wonderfully stable common and neutral language to zoologists and botanists, allowing them to communicate with their brethren speaking different languages. Latin terms are broadly used in comparative law conferences, which brings us to the kingdom of uselessness.

## (ii) Neutral Words of Uselessness? System Building in Comparative Law

Legal science does not have a specialty language.<sup>128</sup> Legal terms are given a normative meaning inside each legal order. They are therefore not suitable for comparative work, because there is constant doubt as to whether a term is used in a neutral way or with its normative meaning inside a legal system. Developing a metalanguage requires imagination and may be done at the risk of being rejected by national jurists, who may no longer understand what we are talking about, except in the fields of international trade and international law where a common language has already developed.

When doing comparative law in English, we tend to prefer the common law lexicon, speaking of the comparative law of torts rather than referring to civilian delictual or extra-contractual liability. Why not discuss a law of wrongs, thereby

125 Barbara Pozzo, “English as a Legal Lingua Franca in the EU Multilingual Context” in Baaij (ed.), *The Role of Legal Translation in Legal Harmonization* (n.93) p.183 and Olivier Moréteau, “Can English Become the Common Legal Language in Europe?” in Rainer Schulze and Gianmaria Ajani (eds.), *Common Principles of European Private Law* (Baden-Baden: Nomos, 2003) p.405.

126 Hans van Loon, “The Hague Conference on Private International Law: Asser’s Vision and an Evolving Mission” [2011] 24 *Hague Yearbook of International Law* 3 and “Globalisation and the Hague Conference on Private International Law” (2000) 2 *International Law Forum* 230.

127 Moréteau (n.125) p.415. Heikki ES Mattila, *Comparative Legal Linguistics: Language of Law, Latin and Modern Lingua Francas* (Burlington: Ashgate, 2nd ed., 2013) also prefers Latin.

128 Jacques Vanderlinden, “Les nouvelles ambitions de la science du juriste. Une langue générale de spécialisation est-elle une utopie?” in Rodolfo Sacco (ed.), *The New Ambitions of Legal Science: Legal Anthropology and Legal Transductology* (n.4) pp.13, 14 (my translation):

Legal science ought necessarily to be expressed in a specialty language, in which all elements that may be found in legal notions as the result of in depth and rigorous analytical work may be formulated in as neutral a way as possible. There are many examples, from high-profile scholars, of complaints regarding the lack of precision and polysemy of the legal language. However, little has been done to address the matter.

using a neutral term and avoiding common law and civil law connotations?<sup>129</sup> When exploring the law of contract, we use the word “contract” in a neutral or generic way, whether we refer to common law contracts (agreement plus consideration) or *contrat*, *contratto* or *Vertrag*, agreements that may include gratuitous promises.

A neutral language may consist of broad meta-terms or meta-categories that must be defined for the purpose of the comparison or in breaking down common concepts into smaller units, at times resorting to mathematical language and inviting for complex equations. It may be a combination of both. Its use would no doubt make comparative studies more precise or accurate but also complicated to read when consisting of complex equations. Fortunately, we have the option of using metaphors when teaching or addressing a general audience, just as scientists sometimes do with success.<sup>130</sup>

Vanderlinden has done a remarkable experiment in the context of expectations human beings may have regarding landholding.<sup>131</sup> He reflects on the use of symbols and formulae reminiscent of chemistry.<sup>132</sup> When I discussed the matter with him, he regretted that he could not use three-dimensional representations. Language-wise, he uses Indo-European roots, and the terms he coins are precise and apt for detailed analysis, as are his diagrams here and in other comparative law exercises.<sup>133</sup> His efforts are worthy of discussion, and an international conference should be convened on the matter.

My own efforts are nowhere as detailed, as I have tried to define broad meta-categories to put the basic concepts of civil obligations in perspective rather than identifying every molecule as Vanderlinden does. In my work on estoppel and the protection of reliance,<sup>134</sup> I attempt to map the law of obligations moving from a three-corner approach (contract–tort–restitution) to a four-corner scheme (contract–tort–restitution–reliance), in an attempt to offer a model that could help compare many different legal systems. On my PowerPoint presentations, each corner is identified by an initial: E (estoppel) stands for reliance, to avoid confusion with restitution, but the key point is that C [contract], T [tort], R [restitution] and E [estoppel/reliance] are preliminarily redefined as meta-concepts or neutral terms, not to be confused with the corresponding notion in national legal systems. My project was to show

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129 Eric Descheemaeker, *The Division of Wrongs* (Oxford: Oxford University Press, 2009). However, whether the European Group on Tort Law will want to be renamed “European Group on Wrong Law” is to be doubted.

130 See Christophe Galfard, *The Universe in Your Hand: A Journey Through Space, Time, and Beyond* (London: Macmillan, 2015).

131 Vanderlinden, “Les nouvelles ambitions de la science du juriste. Une langue générale de spécialisation est-elle une utopie?” (n.128).

132 *Ibid.*, pp.48–50.

133 Vanderlinden, *Comparer les droits* (n.55).

134 Moréteau, *L'estoppel et la protection de la confiance légitime, Éléments d'un renouveau du droit de la responsabilité (Droit anglais et droit français)* (n.7); “Revisiting the Grey Zone between Contract and Tort: The Role of Estoppel and Reliance in Mapping out the Law of Obligations” in Helmut Koziol and Barbara Steininger (eds.), *European Tort Law 2004* (Vienna and New York: Springer, 2005) p.60.

that Western legal systems wrestle with issues that occur at the intersection of contracts, torts and restitution, a grey zone difficult to map as legal systems do not agree on the definition and scope of contract. Liability for medical malpractice can be in tort or in contract, as can liability for breach of a pre-contractual arrangement. Working from a broad and neutral definition of tort, contract and restitution, and adding a broad and neutral category of reliance, it becomes possible to map the law of obligations and it gets easier to compare various legal systems, getting a better understanding of their solutions, particularly in obscure or grey areas.

The harmonisation efforts mentioned in the previous sub-paragraph help only to some extent but they lack an overall view or comprehensive perspective: some groups work on contracts, others on torts, and all neglect defining major categories, because legal systems do not agree, while some remain invisible as is the case with reliance.

The challenge is to craft words that can be accepted by other comparatists and pass the translation test. Using Latin avoids the need of translating meta-categories in various national languages. In the context of my study, one may want to use *contractus*, *delictus*, *restitutio* and *factum proprium*.<sup>135</sup>

Whether the suggested meta-categories can be used outside the Western world remains to be seen, and the work will have to be done by others. I have a sense that applied to Chinese law, a focus on praxis, more than on black-letter law, would show that the contract corner is much weaker in practice than on paper, business relationships being culturally perceived as a continuum rather than the succession of a negotiation and a performance stage, separated like two movements in a symphony or sonata. Much probably happens in the vicinity of the reliance corner, which matches the necessary fluidity of business relations.

These meta-categories dwell in the mind of the comparatist as a *tertium comparationis*. They are not meant to be substitutes for existing concepts and institutions prevailing in legal systems. They are scientific in nature, tools of knowledge and understanding. They may be metalinguistic and shape the third space identified when discussing translation.

Whether we discuss a precise neutral language or meta-categories, this is aspirational utopia. Many a reader will conclude that it is not worth the effort because if jurists have not done it yet, it must be useless. As useless as science can be, who guessed that modern medicine would emerge from the Renaissance theatres of anatomy and that the efforts of astronomers would one day give us the GPS? The problem is that jurists do not like to act as scientists;<sup>136</sup> they fear that

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135 *Factum proprium* describes actions or omissions that generate reliance. *Venire contra factum proprium* (going against one's own previous conduct) is the Roman law version of estoppel: Thiago Luís Sombra, "The Duty of Good Faith Taken to a New Level: An Analysis of Disloyal Behavior" (2016) 9 *Journal of Civil Law Studies*, 27, 29, 44. See also Alejandro Borda, *La teoría de los actos propios* (Buenos Aires: Abeledo-Perrot, 1993).

136 Andreas Rahmatian, "Alchemistic Metaphors in Comparative Law: Mixed Legal Systems, Reception of Laws and Legal Transplants" (2018) 11 *Journal of Civil Law Studies* 231, 257–258.

they will not be taken seriously or be considered to be out of touch with reality. Reliance on unification and harmonisation efforts does not suffice, as they broaden but also narrow the horizons of the comparatist. Legal science needs the help of anthropologists, sociologists, linguists, etc. who can accompany the efforts of the comparatists by lending their language.

#### IV. Words of Conclusion?

The world of comparative law is in constant motion and so are its words. This paper tried to define the corpus of the activity, to show that it goes beyond the law as we traditionally understand it, to include “do’s”, practices or policies. The comparative process was approached as intimately connected to our cognitive abilities. Then followed a step-by-step analysis of what we comparatists do when analysing the law of the other: it is to be discovered by immersion and communicated by translation. Comparatists, however, often go beyond the study and description of foreign systems. They build systems, fabricating or using a common language. The challenge for generations to come is to develop a specialty language for legal science, with neutral words fit for the study of very different systems and meta-categories that help towards a better understanding of the legal universe.

Let us turn to a master of comparative law and language for the final word to this paper. Vivian Curran helps us understand that words are our tools, which constantly need to be reinvented or perfected:

As translator of legal meaning, comparative law always has to invent and reinvent tools with which to translate. The paradox is that this undertaking, however descriptive in nature its ultimate objective may be, requires the ability to destroy its own past rigidities and manners of perceiving, its own methods of decoding and transmitting, in order to construct a new modality of analysis, a new vocabulary better adapted to changed contemporaneous meanings in the perpetually chameleon-like world of new presences, claims, standards, and influences, in which the legal and extra-legal increasingly criss-cross to the point of becoming indistinguishable, and whose juncture are the more difficult to perceive to the extent that they are unexpected.<sup>137</sup>

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137 Curran, “Comparative Law and Language” (n.64) p.706.