Concluding Remarks: A Methodological Road Map?

A QUESTION WAS posed in the Introduction to this book: can comparative law method be presented in a systematic and (or) schematic way? The question was described as daunting, and it has to be admitted that the preceding chapters do not immediately reveal any coherent and schematic model of comparative law methodology. Yet what can perhaps be gleaned from the chapters is the outline of a framework consisting of a number of what might be termed schematic dichotomies which, when taken as a whole, might provide a methodological guide for the research student, especially at the vital research question and literature review stage (Chapter 2). What remains, therefore, by way of conclusion is, first, to set out a résumé of these dichotomies and, secondly, to try to group them all within a framework.

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1. *Comparison and law*. The first and quite general dichotomy that the comparative law researcher might make is one that is admittedly somewhat artificial, but nevertheless helpful. Comparative law as a subject can be reduced to two fundamental questions: what is meant by 'comparison', and what is meant by 'law'? The distinction is artificial, in as much as the methodological questions contained in the 'comparison' aspect only make sense when linked to the object of comparison, namely 'law'. Yet what is valuable about the separation is that it permits one to reflect separately upon the comparison as a methodological process in itself and law as a category containing a range of possible comparables. The schematic dichotomies that follow largely flow from this fundamental distinction.

2. *Macro and micro comparison*. At the next level, so to speak, the old and well-established dichotomy between macro and micro comparison is still, arguably, worth making, since the two aspects have given rise to rather different orientations in comparative law studies. At the macro level the idea that national legal systems can be grouped into categories has resulted in an important body of literature about legal families, legal traditions, legal styles and so on, and while these have equally attracted criticism, it remains important that relations between various national systems be the object

of reflection.[1] For example there is undoubtedly a genealogical relation (see below) between the national systems that make up the civil law family or tradition and some would certainly argue that it is the absence of such a genealogical connection that helps give the common law tradition its distinctiveness.

3. *Similarity and difference*. Having considered the macro-micro question, the next dichotomy facing the comparatist is the debate concerning the presumption to be adopted. Should the comparatist assume similarity or difference? As we have seen (Chapter 3), work from disciplines outside law has highlighted the dangers of adopting what has been described as a universalist approach, and this point has been developed within the discipline of law by Pierre Legrand. He argues that comparison is by its nature founded on difference. Others have argued that the position is more complex and that similarity and difference depend, at least to an extent, on the level at which the comparatist is operating.[2] The presumption is important not just because of the dangers that have been associated with universalist approaches but also because the dichotomy can inform actual reasoning methods. Inductive approaches associated with transnational harmonisation projects, and indeed with the idea of law as a transnational science, tend to be motivated by the idea of ironing out difference. Consequently the more general debates concerning harmonisation and legal transplants will have their roots in this dichotomy.

4. *Genealogical and analogical comparison*. Associated with the similarity or difference dichotomy, and with debates about legal families or traditions,[3] is the distinction between comparison based upon two objects that have a common ancestor and objects that do not. This may at first sight seem a more relevant distinction with respect to macro comparative projects, but it is in fact important for micro projects as well. To what extent, for example, does the English law of contract, or aspects of it, share a genealogical relationship with the civilian law of contract?[4] Does the remedy of discovery of documents, said to be one of the distinctive elements of common law procedure, share a genealogical relationship with what appears to be a similar remedy in Roman law?[5] Clearly many of the remedies offered by Roman law do not share much of a genealogical relationship with the personal actions of the old common law. Yet several comparatists have noted an analogical relationship between the remedial approach of Roman law and

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[1] See Glenn (2006); and see eg some of the contributions in Riles (2001).
[2] See also Cotterrell (2007).
[3] Glenn (2006).
[4] See eg Simpson (1975).
[5] *Cf* D.2.13.

that of the common law.[6] And such a relationship can in turn impact upon the 'comparables' question.

5. *Internal and external perspectives*. Remaining at a relatively general level, another comparison dichotomy upon which the comparatist should reflect is whether she should adopt the inner perspective of a jurist belonging to the foreign legal system, or whether she should remain an outsider. In fairness, for many researchers, there may not be much choice in that the mentality of a foreign jurist may take many years—a lifetime almost?—to absorb. Consequently many comparatists will remain, even if unconsciously, outsiders. However the dichotomy remains an important one at the methodological and theory levels because if the comparatist is at least conscious of being an outsider, she will be in a better position to appreciate not just the importance of understanding the other from the other's mentality (even if she cannot absorb the whole mentality itself).[7] She will, equally, appreciate the dangers of imposing on the other system her own epistemological mentality. In other words if one is conscious of being an outsider, one may be more attuned in respect both of understanding the other in a non-imperialist manner and of seeing in the other aspects of its law that the internal mentality of the other will obscure.

6. *Functional method and its alternatives*. Moving to an even lower level of operation one is then faced with, perhaps, one of the most contentious questions. What scheme of intelligibility should be adopted by the comparatist? During the later twentieth century the scheme that came to dominate was the functional method, and this method clearly has many strengths and many defenders (see Chapter 4). However with the close of the century, the method has come under much criticism and other methodological schemes have been asserted (see Chapter 5). Now one major difficulty in presenting this debate under the guise of a dichotomy between functionalism and its alternatives is that it appears to endow a reduced status to, say, a deep hermeneutical approach. This latter approach is 'merely' one of the 'alternatives'. In fact this is not an implication that is intended, and the reduction of this scheme of intelligibility debate to one of a dichotomy between functionalism and the alternatives simply reflects the dominant position that the functional method has in comparative law. The functional method is relatively easy to apply, and challenges few traditional formalist notions of law as a set of rules and (or) norms.[8] Indeed superficial functionalism is easily reconcilable with a conceptual structuralist approach to law, since the comparatist can be tempted to use the functional method as a means

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[6] See Zweigert and Kötz (1998: 186–87).
[7] See Cotterrell (2007).
[8] Nevertheless this is not to suggest that there are not major difficulties in defining the functional method: see Michaels (2006).

of orientating himself towards a set of rules or norms in the other system that can then be subject to standard positivistic legal reasoning techniques (induction, deduction and so on) and even the imperialistic 'better solution' assertion.

7. *Rule-model and its alternatives*. When one moves from the 'comparison' to the 'law' question, the first and perhaps dominant dichotomy facing the comparatist is epistemological in its foundation. Is knowledge of 'law' a matter, and only a matter, of having knowledge of rules and (or) norms? We have seen that some have asserted this to be the case, but the comparatist must treat this with considerable scepticism for several reasons. First, there is the obvious danger of epistemological imperialism: the civilian lawyer who asserts that English law can be reduced to a set of norms, or the English lawyer who insists on seeing Continental law as nothing but a series of leading cases, risks reducing the other to an image that conforms to the comparatist's own mentality. Secondly, it could severely limit the choice and field of possible comparables. Is comparative law just about comparing rules, or is it not also about the possibility of comparing institutions, concepts, factual situations, methods, attitudes, mentalities, values and so on and so forth? Thirdly, there is the danger of excluding important elements from the other's notion of 'law' with the result that one does not even begin to appreciate the mentality basis. What a German lawyer may regard as an informal or non-law practice may, in the other tradition, be regarded as a fully legal practice.

8. *Nature (or science) and culture (including order and chaos, rationalism and relativism)*. Another epistemological issue that arises within the law question is the internal coherence, if any, that a comparatist brings to bear both on her own system and on the other. Indeed the whole notion of 'system' suggests that this is a defining characteristic of law. What can lie behind this issue is what might be described as a paradigm or programme orientation: is there order in nature (*res*), or just chaos, order being located only in the mind of the observer (*intellectus*)? If one subscribes to the view that within the object itself of comparison (the comparable) there is an inherent order, it is possible to conclude that this order is something that can be identified and used as a comparable in itself. Thus we have seen how the institutional system of Roman law can seemingly be transplanted from one legal system to another. This is perfectly respectable, but—and this is what is so important—it is open to challenge (see Chapter 7).

It is open to question not just because of the issue of order itself as being inherent in the *res,* but often because such order is associated with the idea of science in turn embedded in what has been termed the 'nature' paradigm. Law, it might be said, like any natural phenomenon, is capable of being the object of a science, and such a scientific framework is by definition universal and amenable, like mathematics, of transfer from one culture

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to another. Those who challenge such views often work within a cultural paradigm which sees all knowledge—or at least all legal knowledge—as being rooted and defined only by the culture in which it operates. There is nothing that rises above culture. Some go further, and attack the tradition of European rationalism itself; all knowledge is only relative.[9] Such oppositions often manifest themselves, at the level of schemes of intelligibility, in the methodological confrontation between the causal (explanation, demonstration)—or sometimes the structural scheme (models, systematised axioms)[10]—and hermeneutical (textual) schemes.

9. *Holism and individualism.* Another fundamental paradigm dichotomy that can be important in the understanding of legal mentalities—and in the analysis of facts—is the one between a holistic and individualistic analysis. The first is based on an ontological idea that collectivities of persons and (or) things can have an existence in themselves (forests exist as entities) while the second asserts that it is just the individual parts which have a 'real' existence (only trees exist; or 'there is no such thing as society, there are only individual men and women'). This paradigm orientation has emerged as important in the discussions concerning methodology and facts. At what level are facts to be viewed? It is, then, a dichotomy that is of importance to the researcher who is, for example, investigating the way facts are envisaged in different legal traditions and the techniques of legal reasoning.[11] Equally the dichotomy has a role at the level of culture and mentality. When, say, comparing the law of obligations, or some aspect of it, in France and in England is one mentality—or 'philosophy'—more focused on the individual act, or is it focused on activities?

10. *Actual and virtual facts.* In particular the holism versus individualism paradigm informs the debate between 'actual' and 'virtual' facts (see Chapter 9). This last dichotomy continues to be located more in the law question than the comparison one, in as much as one is looking at the way law incorporates fact into its domain. However because the mind (*intellectus*) is connecting with fact (*res*), the epistemological schemes through which this connection is taking place are equally important. C is injured on an escalator in D's department store: does the legal system envisage this event as an abstract person injured by an abstract thing under the control of another person? Or does one examine the actual person (age, sex, intentions and the like) injured on this particular escalator operating in this particular way and at this particular speed on premises under the possession of this particular corporate person whose business is such and such and who

[9] But *cf* Berthelot (2008).
[10] Gardin (2001: 408–12).
[11] For a more detailed look at this paradigm dichotomy see Valade (2001, 2006); Berthelot (2001b: 246–48).

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employs such and such number of employees skilled in such and such skills whose intentions at the time of the accident were this and that? In other words the way facts are envisaged is both an issue of method and law: do civil law jurists, when faced with problems arising out of actual facts, create sets of 'virtual facts' that are different from the 'virtual facts' created by common lawyers if they were handling the same actual facts? Comparison and law become intimately intertwined.

Ten dichotomies seem, then, to have emerged from this examination of comparative law methodology. The figure itself is of little importance, save that it has erred for convenience (of the researcher undertaking comparative law studies) on the side of economy, and so there is no claim being made that the number is not to be expanded or perhaps even retracted. The question of course is how these ten dichotomies are, if at all, to be further schematised.

Now the point should be stressed at once that in presenting these methodological issues as dichotomies, one is already schematising them under a dialectical scheme of intelligibility. Yet can—or, more pertinently, should—they be re-ordered into some kind of hierarchy? Clearly there is some ranking in terms of levels of operation, and thus the researcher should start with dichotomy number 1 and could usefully progress from here to number 7, although there is no strict reason why one might not consider number 4 before number 3. After number 7 the dichotomies do seem to become more abstract in respect to their methodological level, in that they are paradigm or programme orientations rather than actual methods such as functionalism. But the point here is that these orientations lend themselves more to the 'law' rather than the 'comparison' aspect and as a result should perhaps be reflected upon by the researcher at this later stage.

However even if there is some loose hierarchical organisation which can be used further to schematise these ten methodological dichotomies, this organisation is not where the answer to the research question posed at the beginning of this book lies. The suggested answer lies in the use of the dialectical scheme itself. Method is being presented as a list of oppositions and it is in the very notion of opposition that perhaps the key to social science method is to be found. In the social sciences in general the 'explanation of social phenomena arises, in effect, from a methodological pluralism which finds its source in the various ways in which the phenomena are interrogated'.[12] Indeed there is, as Berthelot has put it, '*la logique même de l'affrontement*'.[13] There is no unique paradigm which governs in the social sciences; one can jump from one approach to another, each approach revealing a different kind of knowledge.[14] *Une voie naturaliste*

[12] Valade (2001: 400).
[13] Berthelot (2001b: 260).
[14] Ibid: 262.

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et évolutionnaire will reveal one type of knowledge, while *une voie herméneutique* another.[15] One is not talking here of methodological or epistemological relativism, but of pluralism, which is not the same thing; for each *voie* has its own premises but these premises remain in themselves legitimate.[16] There is no single theory, no single paradigm or programme, no single scheme of intelligibility and no single reasoning method in the social sciences. As this book has attempted to show, the same is equally true of comparative law studies. And that is why a pluralistic dialectical scheme of methodological (and paradigm) 'confrontations' is probably the most satisfactory answer to the question of whether or not methodology in comparative law can be schematised.

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[15] Berthelot (2006a: 382).
[16] Ibid: 381.