

Methods of Comparative Law

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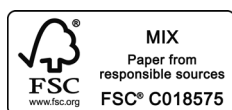
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3. Method?

Simone Glanert

Method is a digression.¹

It is hardly an exaggeration to think of method as a disciplinary hallmark. No discipline, it seems, can lay claim to intellectual respectability unless it features an accredited method. But comparative law seems unusual in as much as it is often *reduced* to a method – and this, by comparatists themselves for whom comparative law would be a strictly methodological endeavour. In a remark made on the occasion of a debate at the 1900 international conference on comparative law in Paris, Frederick Pollock thus defended the view that ‘comparative law ... is but the introduction of the comparative method into law’.² In effect, it is argued that ‘[t]he method called [c]omparative [l]aw can be used for a variety of practical or scholarly purposes’.³ Along converging lines, it is said that ‘the method of comparative law’ is ‘not only ... a method of *thinking* ... but also a method of *working*’.⁴ Some comparatists approach the matter in the broadest terms and conceive of comparative law as a ‘cognitive method’.⁵ In the words of a leading British academic, for example, “[c]omparative [l]aw” denotes a method of study and research’.⁶ Other authors draw a more specific connection between method and scientificity. They point to the fact that ‘[c]omparative law ... is the comparative method as applied to the domain of legal

¹ Benjamin, Walter, *The Origin of German Tragic Drama*. Trans. John Osborne. New York: Verso, 1998: 28 [‘*Methode ist Umweg*’] (1925).

² Pollock, Frederick, in Congrès international de droit comparé, *Procès-verbaux des séances*, vol. I. Paris: LGDJ, 1905: 60 [‘*le droit comparé ... n’est que l’introduction de la méthode comparée dans le droit*’]. See also De Francisci, Pietro, ‘La scienza del diritto comparato’. *Rivista internazionale di filosofia del diritto* 1921: 233 at 246, who refers to ‘a method of exposition’ [‘*un metodo di esposizione*’]; Kaden, Erich-Hans, ‘Rechtsvergleichung’. *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, vol. VI: *Rechtsmißbrauch und Schikane – Unsittliche Rechtsgeschäfte*. Berlin: F. Vahlen, 1938: 11, for whom ‘the concept of comparative law ... denotes nothing other than a method’ [‘*Der Begriff der Rechtsvergleichung ... bezeichnet nichts anderes als eine Methode*’].

³ Mattei, Ugo A., Teemu Ruskola and Antonio Gidi, *Schlesinger’s Comparative Law*, 7th ed. New York: Foundation Press, 2009: 1.

⁴ Zweigert, Konrad and Hein Kötz, *An Introduction to Comparative Law*, 3rd ed. Trans. Tony Weir. Oxford: Oxford University Press, 1998: 34 [‘*die Methode (der Rechtsvergleichung) (ist) nicht nur Denkmethode ... sondern auch Arbeitsmethode*’] (emphasis original) [1996].

⁵ Grossfeld, Bernhard, *Core Questions of Comparative Law*. Trans. Vivian G. Curran. Durham: Carolina Academic Press, 2005: 240 [‘*Erkenntnismethode*’].

⁶ Gutteridge, H.C., *Comparative Law*, 2nd ed. Cambridge: Cambridge University Press, 1949: 1.

science'.⁷ Accordingly, an influential German treatise asserts that '[c]omparative law ... is ... a method excellently suitable for putting legal science on a sure and realistic basis' as it 'can claim to show the way to a better mastery of the legal material, to deeper insights into it, and thus, in the end to better law'.⁸

Comparatists who emphasize method disagree on whether or not there ought to prevail a unique model. In their established treatise, two of the most prominent writers in the field defend the position that '[t]he basic methodological principle of all comparative law, from which stem all the other methodological principles – the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, etc. – is that of *functionality*'.⁹ Other influential comparatists, such as Patrick Glenn, refuse to promote any specific method. Rather, Glenn opines that '[t]here is no exclusive method and much to be said about the virtues, and defects, of different methods'.¹⁰

Not all comparatists, however, have fallen under the sway of method. In this regard, I find it interesting to observe that two writers holding antagonistic views on such a primordial matter as 'legal transplants' find themselves on the same side of the argument opposing a methodological appreciation of comparative law.¹¹ Pierre Legrand thus rejects an understanding of comparative law which he regards as being at once unduly formalistic and unacceptably unidimensional. For him, '[t]he discourse traditionally couched in terms of 'comparative law as method' has ... a negative and potentially stultifying impact on comparative law as an intellectual discipline'.¹² Arguing for comparative law as a 'perspective' allowing for a relativization of the posited law, not unlike economic analysis or feminist theory,¹³ Legrand argues that legal comparisons 'ha[ve] much more to offer than some relatively sterile methodological endeavours may have led us to believe'.¹⁴ In the same contrarian vein, Alan Watson defends an apprehension of comparative law as

⁷ David, René, *Traité élémentaire de droit civil comparé*. Paris: LGDJ, 1950: 4 [*'Le droit comparé ... c'est la méthode comparative appliquée dans le domaine des sciences juridiques'*].

⁸ Zweigert and Kötz, *An Introduction to Comparative Law*, op. cit., note 4: at 33 and 34 [*'Rechtsvergleichung ... ist ... eine vorzüglich geeignete Methode, die Rechtswissenschaft auf einen neuen, realistischen Boden zu stellen'*] darf den Anspruch erheben, selber den Rechtsstoff besser zu durchdringen, zu besseren Einsichten zu gelangen und damit am Ende zu einem besseren Recht'. I have modified the translation.

⁹ *Ibid.*, at 34 [*'Das methodologische Grundprinzip der gesamten Rechtsvergleichung, aus dem sich alle anderen Methodenlehrsätze – Auswahl der zu vergleichenden Rechte, Spannweite der Untersuchung, Systembildung, etc. – ergeben, ist das der Funktionalität'*] (emphasis original). I have modified the translation.

¹⁰ Glenn, H. Patrick, *Legal Traditions of the World*, 4th ed. Oxford: Oxford University Press, 2010: 7.

¹¹ See, respectively, Legrand, Pierre, 'The Impossibility of Legal Transplants'. *Maastricht Journal of European and Comparative Law* 4 (1997): 111; Watson, Alan, 'Legal Transplants and European Private Law'. *Electronic Journal of Comparative Law* 4 (2004) <<http://www.ejcl.org/44/art44-2.html>> (accessed 14 January 2011).

¹² Legrand, Pierre, 'Beyond Method: Comparative Law As Perspective'. *American Journal of Comparative Law* 36 (1988): 788, at 789.

¹³ *Ibid.*, *passim*.

¹⁴ *Ibid.*, 791. See, for a more recent expression of this view, Legrand, Pierre, 'Au lieu de soi'. *Comparer les droits, résolument*. Ed. Pierre Legrand. Paris: Presses Universitaires de France,

‘an academic discipline in its own right’, which addresses ‘a study of the relationship, above all, the historical relationship, between legal systems or between rules of more than one system’.¹⁵ Yet, voices questioning the fashioning of comparative law as method remain largely marginal.

The overwhelming majority of comparatists, then, continue to emphasize the significance of method. Some of them organize international conferences specifically addressing the use of method in comparative law.¹⁶ Others devote monographs or articles to an analysis of method with specific reference to comparative law,¹⁷ not to mention collections of essays such as the book featuring this contribution itself.¹⁸ Also, there are scholars who claim method for a circumscribed object of study within the field of comparative law.¹⁹ Even comparatists who deliberately depart from mainstream positivist comparisons showcase method. For example, in his critical work on comparative law in a globalizing world, Werner Menski, an expert in South Asian laws, propounds a new model of comparative research based on ‘a methodological approach that integrates the social and ethical elements of law in its various social contexts’.²⁰ In fact, only a small number of comparatists nowadays fail to discuss method in their scholarship,²¹ such that it seems reasonable to assume that for most academics method constitutes a *sine qua non* requirement for plausible comparative legal research. As Mitchel Lasser puts it, ‘[t]he comparatist *must* choose a methodology’.²²

Paradoxically, method remains woefully under-theorized and key issues still fail to be addressed. For example, can method effectively overcome situation (that of the law and that of the comparatist)? Is it in a position to offer epistemological guarantees of any kind?

2009: 35: ‘[Comparison] is ... something other than a method’ [*‘La comparaison, c’est ... autre chose qu’une méthode’*].

¹⁵ Watson, Alan, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. Athens: University of Georgia Press, 1993: 9.

¹⁶ See, e.g., Van Hoecke, Mark (Ed.), *Epistemology and Methodology of Comparative Law*. Oxford: Hart, 2004.

¹⁷ See, e.g., Constantinesco, Léontin-Jean, *Rechtsvergleichung*, vol. II. Cologne: Heymans, 1972; Samuel, Geoffrey, *Epistemology and Method in Law*. Aldershot: Ashgate, 2003; Örüücü, Esin, ‘Methodological Aspects of Comparative Law’. *European Journal of Law Reform* 8 (2006): 29; Brand, Oliver, ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies’. *Brooklyn Journal of International Law* 32 (2007): 405; Husa, Jaakko, ‘Farewell to Functionalism or Methodological Tolerance?’. *RabelsZ* (2003): 419.

¹⁸ See, for an earlier illustration, Rotondi, Mario (Ed.), *Inchieste di diritto comparato*, vol. II. Padova: Cedam, 1973.

¹⁹ See, e.g., Collins, Hugh, ‘Methods and Aims of Comparative Contract Law’. *Oxford Journal of Legal Studies* 11 (1911): 396.

²⁰ Menski, Werner, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. Cambridge: Cambridge University Press, 2006: 7.

²¹ See Merryman, John H., *The Civil Law Tradition*, 3rd ed. Ed. Rogelio Pérez-Perdomo. Stanford: Stanford University Press, 2007; Gordley, James and Arthur T. von Mehren, *An Introduction to the Comparative Study of Private Law*. Cambridge: Cambridge University Press, 2006.

²² Lasser, Mitchel, ‘The Question of Understanding’. *Comparative Legal Studies: Traditions and Transitions*. Eds. Pierre Legrand and Roderick Munday. Cambridge: Cambridge University Press, 2003: 234 (my emphasis).

Or does it simply betray ‘science envy’, unless, of course, it operates as an ‘anxiety reducing device’?²³ In sum, how, if at all, is method able to contribute to the credentialization of comparative law? I claim that no meaningful answer to such questions can be offered without the benefit of interdisciplinary thought. In this regard, Pierre Legendre does well to remind us that ‘the law does not shed any light on the law’.²⁴

I organize my argument as follows. The first part outlines key features pertaining to the idea of method. I show that method’s inherent characteristics cast serious doubt on its epistemological usefulness. In the second part of the paper, I introduce a more detailed assessment of method from the critical standpoint of Hans-Georg Gadamer (1900–2002), one of the most influential post-Heideggerian philosophers. I devote the third part of my contribution to an account of the way in which another intellectual, French philosopher Jacques Derrida (1930–2004), although holding more radical views than Gadamer in several respects, largely subscribes to his main thesis on method and therefore also challenges received opinion. In addition, I briefly suggest a connection with philosophy and sociology of science. Thus, I draw on the work of leading contemporary philosophers originating from specific cultural backgrounds and representing particular strands of philosophical thought in order to revisit method. While I mainly refer to comparative law, my text reaches beyond this field.

1.

Whether in the humanities or in the sciences, academics keen to follow a methodical path are faced with a wide range of options.²⁵ Predictably, many scholarly writings debate the choice of the ‘right’ method for a given field of study.²⁶ Occasionally, specialists wonder whether methods developed in one field can be transposed to another.²⁷ However, researchers seldom engage in a more general reflection on the epistemological implications arising from the very reference to method.²⁸ In the next paragraphs, I focus on what I regard as four important characteristics of method which, I claim, bridge the various

²³ Devereux, George, *From Anxiety to Method*. The Hague: Mouton, 1967: 97.

²⁴ Legendre, Pierre, *L’Autre Bible de l’Occident: le monument romano-canonique*. Paris: Fayard, 2009: 488 [‘le droit n’apporte sur le droit aucun éclairage’].

²⁵ See, for an introduction to different methods prevailing in the humanities and in the sciences, Balzer, Wolfgang, *Die Wissenschaft und ihre Methode*, 2nd ed. Freiburg: K. Alber, 2009.

²⁶ See, on the use of method in various fields of knowledge, e.g., Polkinghorne, Donald, *Methodology for the Human Sciences*. Albany: SUNY Press, 1983; Moscovici, Serge and Fabrice Buschini (Eds.), *Les Méthodes des sciences humaines*. Paris: Presses Universitaires de France, 2003; Bryman, Alan, *Social Research Methods*, 3rd ed. Oxford: Oxford University Press, 2008; Leopold, David and Marc Stears (Eds.), *Political Theory: Methods and Approaches*. Oxford: Oxford University Press, 2008; Baasner, Rainer and Maria Zens, *Methoden und Modelle der Literaturwissenschaft*, 3rd ed. Berlin: E. Schmidt, 2005.

²⁷ For instance, socio-legal scholars stress the need to employ a variety of methods derived from sociology in the study of law and legal phenomena. See, e.g., Banakar, Reza and Max Travers (Eds.), *Theory and Method in Socio-Legal Theory*. Oxford: Hart, 2009.

²⁸ But see Clément, Bruno, *Le Récit de la méthode*. Paris: Le Seuil, 2005.

disciplinary configurations. This analysis foregrounds a critical and interdisciplinary engagement, with the defence of method being somewhat reflexively advanced in comparative law.

In order to situate the contrarian character of my argument, I find it helpful, before I begin, to recall that etymologically, method connotes the search for a certain form of truth.²⁹ The word originates from the Greek *'methodos'* (*'méthodos'*), which consists of the prefix *'meta-*' ('after') and of the suffix *hodos* ('way'). The compound suggests 'pursuit of knowledge' and 'mode of investigation'. The term further derives its meaning both from the Latin *'methodos'*, signifying 'mode of proceeding', 'rational procedure' and 'system of classification', and from the Middle French *'méthode'*, referring to 'rational procedure'. In modern parlance, 'method' carries two principal meanings. First, it designates a procedure for attaining a certain objective. In particular, it describes a way of doing something according to a defined programme. For example, the term evokes a special procedure or a typical set of procedures employed in an intellectual discipline or field of study as a mode of investigation and inquiry. Second, the word 'method' suggests the quality of being well organized and systematic in thought or action. It signifies, for instance, the orderly arrangement of ideas and topics in thinking or writing. Interestingly, method would be so fundamental that it would not even be defeated by madness. In *Hamlet*, Polonius, convinced that Hamlet is mad, nonetheless recognizes some 'method' in his speech – that is, a kind of artfulness and order: 'Though this be madness, yet there is method in't'.³⁰ Now, the four specifications which I regard as crucial, and to which I turn, oppose both the idea of method as road to knowledge and the claim for method's epistemological primordially.

First, *method is not pan-disciplinary*. Giorgio Agamben observes that '[c]ontrary to common opinion, method shares with logic its inability to separate itself completely from its context. There is no method that would be valid for every domain, just as there is no logic that can set aside its objects'.³¹ Consider philosophy. It is well known that method has been one of philosophy's earliest focuses, whether one has in mind Plato's deductivism or Aristotle's inductivism. But it is perhaps Descartes who, in contemporary minds at least, most famously epitomizes the philosophical concern for method as he proceeds to fashion a *Discourse on the Method for Guiding One's Reason and Searching for Truth in the Sciences* (*Discours de la méthode pour bien conduire sa raison et chercher la vérité*

²⁹ See 'Method', in Simpson, John and Edmund Weiner. *The Oxford English Dictionary*, online ed. (accessed 14 January 2011).

³⁰ Shakespeare, William, *The Tragedy of Hamlet, Prince of Denmark*, in *The Oxford Shakespeare: The Complete Works*. Eds. John Jowett et al., 2nd ed. Oxford: Oxford University Press, 2005: II, ii; 207–208; 694 [c. 1600].

³¹ Agamben, Giorgio, *The Signature of All Things: On Method*. Trans. Luca D'Isanto and Kevin Attell. New York: Zone, 2009: 7 ['*Contrariamente all'opinione comune, il metodo condivide, infatti, con la logica l'impossibilità di essere del tutto separato dal contesto in cui opera. Non esiste un metodo valido in ogni ambito, così come non esiste una logica che possa prescindere dai suoi oggetti*'] (2008).

dans les sciences).³² To marshal but one other illustration, the development of method has similarly been of great importance in the field of translation studies. In 1813, in his seminal lecture, ‘On the Different Methods of Translation’ (*Ueber die verschiedenen Arten des Uebersetzens*), Friedrich Schleiermacher, a German theologian, philosopher and translator of Plato, distinguished between translation methods that seek to move the writer towards the reader, therefore emphasizing the readability and elegance of the target text, and those that purport to displace the reader towards the writer, thus claiming an abiding preoccupation with the foreignness of the source text.³³ Further, a seemingly infinite number of methods can be identified within each disciplinary formation. In this respect, comparative law constitutes a standard example of diversified allegiances to method. Indeed, panoramas of methods currently prevailing in the field attest to this pluralism,³⁴ which would need to embrace what one commentator dubs ‘no-method method’.³⁵ And one does not hesitate to present what one believes to be a new and better method susceptible of replacing previous models.³⁶ One comparatist even suggests a ‘rosy methodology’,³⁷ which would ‘offer no rule about how to arrive at ... responsible engagement [with the objects of analysis, the academic disciplines in play and the audiences at work]’.³⁸ But, even as the variety of methods both across and within disciplines confirms method’s significance (why would scholars seek to refine what does not matter?), there remains a clear sense in which this very diversity challenges the sense of direction which method claims to afford (where should one go if many roads can be followed?). In short, ‘plurality, which surrounds it, constitutes the eternal threat to method’.³⁹ This brings me to a closely related point.

Secondly, *method is not absolute*. Within the diversity of methods obtaining in each discipline, it will be claimed by the proponents of one particular method that their model ought to prevail, that it must be regarded as the best method. As regards comparative law, a typical argument in this respect is advanced by Konrad Zweigert and Hein Kötz, for whom, as we know, ‘[t]he basic methodological principle of all comparative law ... is that

³² Descartes, René, *Discourse on the Method for Guiding One’s Reason and Searching for Truth in the Sciences*, in *Discourse on Method and Related Writings*, 2nd ed. Trans. Desmond M. Clarke. London: Penguin, 2003 [1637]. The English translation of Descartes’ title fails to render the French adverb ‘*bien*’, which in this context means ‘well’, ‘correctly’ or ‘properly’.

³³ See Schleiermacher, Friedrich, ‘On the Different Methods of Translation’. Trans. Susan Bernofsky, Ed. Lawrence Venuti, *The Translation Studies Reader*, 2nd ed. London: Routledge, 2004: 49 [1813].

³⁴ See, e.g., Samuel, Geoffrey, ‘Taking Methods Seriously (Part Two)’. *Journal of Comparative Law* 2 (2007): 210; Palmer, Vernon V., ‘From Lerotholi to Lando: Some Examples of Comparative Law Methodology’. *American Journal of Comparative Law* 53 (2005): 261.

³⁵ Kennedy, David, ‘The Methods and the Politics’. *Comparative Legal Studies: Traditions and Transitions*. Eds. Pierre Legrand and Roderick Munday. Cambridge: Cambridge University Press, 2003: 352.

³⁶ See, e.g., Brand, ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies’, op. cit., note 17.

³⁷ Lasser, ‘The Question of Understanding’, op. cit., note 22: at 199–212 and 221–236.

³⁸ *Ibid.*, 236.

³⁹ Clément, *Le Récit de la méthode*, op. cit., note 28: at 9 [*Le pluriel, qui la cerne, est la menace éternelle de la méthode*].

of *functionality*’,⁴⁰ and who argue that comparative research must be framed in terms which are ‘purely functional’.⁴¹ Despite such a forceful assertion of primacy, the community of comparatists remains divided concerning the appropriateness of functionalism as comparative law’s method. Many scholars indeed adhere to a method featuring a variation on the theme of functionalism – such that functionalism very much continues to partake of the *doxa* within the field.⁴² But there are academics who, having castigated ‘the incoherencies of comparative law functionalism’,⁴³ show themselves to be far more sceptical, with one observer going so far as to reproach Zweigert and Kötz on account of their ‘disdain for concern with methodology’,⁴⁴ and another commentator going further still and branding their model as being ‘utterly insupportable both as method and as theory’.⁴⁵ Indeed, some comparatists are willing to chastise the functional method’s ‘theoretical imperialism’ and deploy a robust allegiance to polyphony.⁴⁶ Thus, it is claimed that ‘there is a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs’.⁴⁷ In particular, strong arguments are made for the adoption of an interdisciplinary apprehension of comparative law. Comparatists, it is stressed, ‘must make use of the full range of reasoning methods, schemes of intelligibility, paradigms and epistemological approaches ... employed across the sciences and social sciences (including humanities)’.⁴⁸

Thirdly, *method is not objective*. Although the promotion of a given method often discloses universalizing aspirations, the fact remains that any method is necessarily produced by a particular individual situated in time and space. In other words, any method is someone’s method. To be sure, some thinkers openly recognize the inevitably contingent character of the method they adopt. Even Descartes was willing to admit that his method was coloured by personal experience: ‘[M]y plan here is not to teach the method

⁴⁰ Zweigert and Kötz, *An Introduction to Comparative Law*, op. cit., note 4: at 34 [‘*Das methodologische Grundprinzip der gesamten Rechtsvergleichung ... ist das der Funktionalität*’] (emphasis original). I have modified the translation. I quote this passage at greater length *supra*, at text accompanying note 9.

⁴¹ *Ibid.*, at 40 [‘*rein funktional*’].

⁴² See, e.g., Michaels, Ralf, ‘The Functional Method of Comparative Law’. *The Oxford Handbook of Comparative Law*. Eds. Mathias Reimann and Reinhard Zimmermann. Oxford: Oxford University Press, 2006: 339–382.

⁴³ Hyland, Richard, *Gifts: A Comparative Study*. Oxford: Oxford University Press, 2010: 63.

⁴⁴ Twining, William, *Globalisation and Legal Theory*. London: Butterworths, 2000: 193.

⁴⁵ Rosen, Lawrence, ‘Beyond Compare’. *Comparative Legal Studies: Traditions and Transitions*. Eds. Pierre Legrand and Roderick Munday. Cambridge: Cambridge University Press, 2003: 505.

⁴⁶ Samuel, Geoffrey, ‘Dépasser le fonctionnalisme’. *Comparer les droits, résolument*. Ed. Pierre Legrand. Paris: Presses Universitaires de France, 2004: 409 [‘*impérialisme théorique*’]. See, for other criticism, Graziadei, Michele, ‘The Functionalist Heritage’. *Comparative Legal Studies: Traditions and Transitions*. Eds. Pierre Legrand and Roderick Munday. Cambridge: Cambridge University Press, 2003: 100–127; Hyland, *Gifts: A Comparative Study*, op. cit., note 43: at 63–125.

⁴⁷ Palmer, ‘From Lerotholi to Lando: Some Examples of Comparative Law Methodology’, op. cit., note 34: at 290.

⁴⁸ Samuel, ‘Taking Methods Seriously (Part Two)’, op. cit., note 34: at 236.

that everyone must follow to guide their reason, but merely to explain how I have tried to guide my own'.⁴⁹ As regards comparative law, however, the drive to locate method beyond specificity – and the conviction that this ambition can be achieved – continue to govern the framing of research. In particular, Zweigert and Kötz insist that the method they advocate applies to 'every investigation in comparative law', to 'all [comparative law]', to 'any comparative study'.⁵⁰ Such are 'the full requirements of the comparative method'.⁵¹ For the comparatist, the key issue therefore must remain 'whether the terms in which [s]he posed h[er] original question were indeed purely functional'.⁵² It is felt that the comparatist's situatedness need not detract from her 'pure and disinterested investigation'.⁵³ Indeed, Zweigert and Kötz, in their drive towards the One, away from what they regard as the waywardness of the many, hold that for all individual legal problems the researcher should produce an 'objective report' of the law in each jurisdiction.⁵⁴ For this to be possible, the comparatist is enjoined to 'eradicate the preconceptions of [her] native legal system',⁵⁵ the principal idea being that '[o]ne must never allow one's vision to be clouded by the concepts of one's own national system'.⁵⁶ Now, even if it were the case that comparative law ought to be performed objectively – a point which I am not prepared to concede as I cannot see how comparative research is enhanced by eliminating the comparatist's lived experience from the epistemological scene –, the fact is that Zweigert and Kötz's prescriptions can only strike one as being at once presumptuous and jejune. Indeed, not only are these authors falling for an epistemological mistake, but they also appear guilty of an evasion allowing comparatists to forget that method, any method, is marked at its very core by an irresistible historicity which is constitutive of it, that method does not therefore shape facticity as much as it is fashioned by it. Rather than be content with an unexamined belief in the human capacity for objective knowledge, it seems much more reasonable to accept that even if 'universality is the vocation of method, singularity [is] its fatal condition'.⁵⁷ There follows a crucial conclusion.

⁴⁹ Descartes, *A Discourse on the Method*, op. cit., note 32: at 7 [*'Ainsi mon dessein n'est pas d'enseigner ici la méthode que chacun doit suivre pour bien conduire sa raison, mais seulement de faire voir en quelle sorte j'ai tâché de conduire la mienne'*].

⁵⁰ Zweigert and Kötz, *An Introduction to Comparative Law*, op. cit., note 4, at 34 [*'jeder rechtsvergleichenden Untersuchung'l'der gesamten Rechtsvergleichung'l'jeder rechtsvergleichenden Arbeit'*].

⁵¹ Ibid., at 36. The English translation is a rewriting of the German original.

⁵² Ibid., at 40 [*'ob er die Frage nach der Funktion der Rechtsfiguren richtig und radikal genug gestellt... hat'*].

⁵³ Ibid., at 34 [*'das reine und... zweckfreie Forschen'*].

⁵⁴ Ibid., at 43. The English translation is a rewriting of the German original.

⁵⁵ Ibid., at 35 [*'von seinen eigenen juristisch-dogmatischen Vorurteilen radikal befreien'*].

⁵⁶ Ibid., at 35 [*'Keinesfalls darf man sich... den Blick durch Systembegriffe des eigenen nationalen Rechts verstellen lassen'*].

⁵⁷ Clément, *Le Récit de la méthode*, op. cit., note 28, at 23 [*'L'universel est la vocation de la méthode; le singulier, sa condition fatale'*]. See, for a specific application of this point to comparative law, Samuel, 'Dépasser le fonctionnalisme', op. cit., note 46, at 408: '[T]he universal and the comparative method cannot inhabit the same space' [*'l'universel et la méthode comparative ne sauraient habiter le même espace'*].

Fourthly, *method is speculative*. Scholarly work, despite any ambition to the contrary, dwells in the realm of representation. Because any representation is generated by a situated observer (it consists, more accurately, of a *re-presentation*, that is, of a presentation anew), it is inevitably other than mere description. In this sense at least, it seems reasonable to call the world which legal academics fashion through their use of language, fictional. The basic point is that ‘language and discourse cannot copy reality’,⁵⁸ that each language or discourse will necessarily filter reality through the prism of its own assumptions. Again, there is no reason why comparative research should find itself exempt from this fact, which is why one is not surprised, ultimately, to find that a recent critical and interdisciplinary study demonstrates how the texts generated by comparatists necessarily partake in fictional discourse,⁵⁹ how ‘each borrowing that [comparatists] [constantly] mak[e] from reality ... transforms itself into an element of fiction’.⁶⁰ Foreign law, which the comparatist makes into her object of study, is rendered through the comparatist’s language and discourse. For example, it is the French comparatist’s French words and French assumptions – say, concerning the fundamental character of binary distinctions in the organization of thought – which aim to convey English law. And it seems beyond dispute that any such re-presentation of English law is bound to differ from the German comparatist’s re-presentation, which, for its part, makes use of German words and depends on German assumptions, having to do, for example, with the scientific (or *wissenschaftlichen*) conception of law. Since the intelligibility of the law can only happen through schemes that interpreters impose upon it *a priori*, a French comparatist’s method, then, will differ from a German comparatist’s, such that each comparison will, in the end, generate a local version of English law which simply cannot reasonably pretend to being ‘English law’ (whatever that may mean) and which, to the extent that it will necessarily depart from ‘English law’, can properly be regarded as fashioning an ‘English law’ that is fictitious. Despite its provocative ring, Mallarmé’s insight to the effect that ‘[a]ll method is fiction’ thus strikes me as being felicitously perspicuous.⁶¹

Contrary to what is often assumed, method is therefore subject to important epistemological limits that simply cannot be ignored by comparatists. In particular, there is no single method which can claim to operate pan-disciplinarily. In fact, as it manifests itself in manifold ways both within and across disciplines, no method can be found to be absolute. Not only is it inevitably plural, but method, being developed by individuals who are situated in time and space, and who occupy ascertainable institutional or conventional

⁵⁸ See Pavel, Thomas G., *Fictional Worlds*. Cambridge: Harvard University Press, 1986: at 114.

⁵⁹ See Bercea, Raluca, ‘Toute comparaison des droits est une fiction’. *Comparer les droits résolument*. Ed. Pierre Legrand. Paris: Presses Universitaires de France, 2009: at 41–68.

⁶⁰ Genette, Gérard, *Fiction et diction*. Paris: Le Seuil, 2004: at 115 [‘chaque emprunt qu’il fait (constamment) à la réalité ... se transforme en élément de fiction’] (1979). I extend the author’s point to comparative law.

⁶¹ Mallarmé, Stéphane, ‘Notes sur le langage’. *Œuvres complètes*. Ed. Bertrand Marchal. vol. I. Paris: Gallimard, 1998: at 504 [‘Toute méthode est une fiction’] (1869–1870).

positions, is inscribed in finitude: it is never objective. To write like Heidegger, any method is method-in-the-world.⁶² In fact, since it is formulated in a given language and embedded in a singular discourse, method is inherently speculative. There is more, for the orientation a method embraces and the normative apprehension of the law and of the world it fosters operate not only at the conceptual level, but also intervene at the deeper layer of fundamentally-held convictions. In order to gain further appreciation of the issues arising from the use of method by comparatists, I want to turn to the writings of Gadamer. As I consider this philosopher's critique of method, at no time do I lose sight of comparative law.

2.

In 1960, Hans-Georg Gadamer released his *Truth and Method (Wahrheit und Methode)*, which purports to offer a fully-fledged theory of modern hermeneutics.⁶³ While Gadamer's text is widely regarded as the most important contribution to German philosophy since Martin Heidegger's *Being and Time (Sein und Zeit)*,⁶⁴ it seems fair to say that, with some noteworthy exceptions,⁶⁵ his work remains under-appreciated in the academic world outside of Europe, including in the US. Still, Gadamer's thoughts on hermeneutics have exercised a crucial influence on a wide range of academic fields, namely art theory, history, literary theory, philosophy, psychology, religious studies and sociology.⁶⁶ More recently, perhaps taking their cue from Gadamer himself who refers to

⁶² See *infra*, at text accompanying note 74.

⁶³ Gadamer, Hans-Georg, *Truth and Method*, 2nd rev'd ed. Trans. Joel Weinsheimer and Donald G. Marshall. New York: Continuum, 2004.

⁶⁴ See, e.g., Weinsheimer, Joel C., *Gadamer's Hermeneutics*. New Haven: Yale University Press, 1985; Warnke, Georgia, *Gadamer: Hermeneutics, Tradition and Reason*. Stanford: Stanford University Press, 1987; Grondin, Jean, *Einführung in die philosophische Hermeneutik*, 2nd ed. Darmstadt: Wissenschaftliche Buchgesellschaft, 2001; Malpas, Jeff, Ulrich Arnsward, and Jens Kertscher (Eds.), *Gadamer's Century*. Cambridge: MIT Press, 2002; Davey, Nicholas, *Unquiet Understanding: Gadamer's Philosophical Hermeneutics*. Albany: SUNY Press, 2006; Krajewski, Bruce (Ed.), *Gadamer's Repercussions*. Berkeley: University of California Press, 2004; Malpas, Jeff and Santiago Zabala (Eds.), *Consequences of Hermeneutics: Fifty Years After Gadamer's Truth and Method*. Evanston: Northwestern University Press, 2010; Di Cesare, Donatella, *Gadamer: Ein philosophisches Porträt*. Tübingen: J.C.B. Mohr, 2009.

⁶⁵ See, e.g., Rorty, Richard, *The Linguistic Turn*. Chicago: University of Chicago Press, 1992. Rorty's indebtedness to Gadamer is expressed in many of his books.

⁶⁶ Out of many applications, see, e.g., Davey, Nicholas, 'Hermeneutics and Art Theory'. *A Companion to Art Theory*. Eds. Paul Smith and Carolyn Wilde. Oxford: Blackwell, 2002: at 436–447; Warnke, Georgia, 'Sex, Gender, and Hermeneutics'. *Consequences of Hermeneutics: Fifty Years After Gadamer's Truth and Method*. Eds. Jeff Malpas and Santiago Zabala. Evanston: Northwestern University Press, 2010: 324–342; Saks, Elyn R., *Interpreting Interpretation: The Limits of Hermeneutic Psychoanalysis*. New Haven: Yale University Press, 1999.

‘[t]he exemplary significance of legal hermeneutics’,⁶⁷ scholars have underlined the role of philosophical hermeneutics for the study of law.⁶⁸

Truth and Method is adequately described as ‘a tract against the very idea of method’.⁶⁹ Gadamer’s philosophical hermeneutics arises principally in reaction to two major theoretical movements within the human sciences (*Geisteswissenschaften*). First, he disagrees with modern approaches to the humanities, advocating the use of scientific methods similar to those prevailing in the natural sciences. Secondly, he criticizes traditional hermeneutics, in particular as developed by Schleiermacher and Wilhelm Dilthey, which holds that appropriate methods of textual interpretation allow the interpreter to recover the original intention of an author.⁷⁰ To be sure, Gadamer does not reject the need for method under any conceivable set of circumstances. It would indeed be absurd not to recognize the usefulness of method in disciplines such as architecture or medicine. As one commentator observes, ‘it is not science which [Gadamer] contests, ever, but only the fascination which emanates from it and which threatens to reduce understanding to an instrumental process’.⁷¹ In other words, Gadamer’s philosophical hermeneutics challenges modern thought in as much as the latter resorts to a scientific or scientificized method with a view to apprehending the act of interpretation as a cognitive process that would be open to complete mastery by human beings.

What, then, are Gadamer’s main reservations regarding method? It must be noted at the outset that Gadamer’s philosophical hermeneutics is grounded on Heidegger’s hermeneutics of facticity, which purports to challenge received assumptions as regards human understanding.⁷² As early as 1923, Heidegger emphasized that he was using hermeneutics in line with its original meaning, that is, as it concerned ‘the investigation of facticity’, with a view to fostering ‘the *interpreting of facticity* in which facticity is being encountered, seen, grasped, and expressed in concepts’.⁷³ In the process, Heidegger showed that understanding is not so much an activity pertaining to consciousness as it is an essential

⁶⁷ Gadamer, *Truth and Method*, op. cit., note 63, at 321 [‘*Die exemplarische Bedeutung der juristischen Hermeneutik*’].

⁶⁸ See, e.g., Leyh, Gregory (Ed.), *Legal Hermeneutics*. Berkeley: University of California Press, 1991; Mootz, Francis J. III (Ed.), *Gadamer and Law*. Aldershot: Ashgate, 2007.

⁶⁹ Rorty, Richard, *Philosophy and the Mirror of Nature*, 2nd ed. Princeton: Princeton University Press, 1980: 358, n. 1.

⁷⁰ See, generally, Palmer, Richard E., *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer*. Evanston: Northwestern University Press, 1969.

⁷¹ Grondin, Jean, *The Philosophy of Gadamer*. Trans. Kathryn Plant. Montreal: McGill-Queen’s University Press, 2003: 20 [‘*Ce n’est pas la science qu’il conteste, jamais, mais la fascination qui en émane et qui risque de réduire la compréhension à un processus instrumental*’]. I have modified the translation.

⁷² See Grondin, Jean, *Von Heidegger zu Gadamer: Unterwegs zur Hermeneutik*. Darmstadt: Wissenschaftliche Buchgesellschaft, 2001: 81–92. For Heidegger’s work, see Heidegger, Martin, *Ontology – The Hermeneutics of Facticity*. Trans. John van Buren. Bloomington: Indiana University Press, 1999.

⁷³ Heidegger, *Ontology – The Hermeneutics of Facticity*, op. cit., note 72, at 11 [‘*Durchforschung der Faktizität / ‘des zu Begegnung, Sicht, Griff und Begriff bringenden Auslegens der Faktizität*’] (emphasis original).

condition of human existence or of ‘being-in-the-world’ (*‘In-der-Welt-sein’*).⁷⁴ The fact is that we understand ourselves and the world, and can only understand ourselves and the world, in terms of that into which we have been thrown (say, tradition, culture, language). What understanding we can claim starts from this fact of thrownness (*‘Geworfenheit’*). Now, thrownness is so profoundly constitutive of the human way of being that we are marked to our very core by its insurpassable historicity. Whatever understanding there can be, then, whether of ourselves or of the world, can only be derived from the facticity into which we have been thrown and will manifest itself ‘always within the limitations of [our] thrownness’.⁷⁵

Any understanding is therefore inscribed in finitude, and no method, no matter how sophisticated, can overcome this fact by lifting understanding out of its existential condition into a transcendental realm that would feature something like objectivity. In his path-breaking work, *Being and Time*, Heidegger indeed argues that understanding is framed by a threefold ‘fore-structure’ (*‘Vor-Struktur’*), such that before we even begin to understand the meaning of a particular object or situation, we have already located it within a context through ‘fore-having’ (*‘Vorhabe’*), placed it within a particular perspective through ‘fore-sight’ (*‘Vorsicht’*), and grasped it in a preliminary fashion through ‘fore-conception’ (*‘Vorgriff’*).⁷⁶ This Heideggerian fore-structure of understanding, which Gadamer, who shares Heidegger’s epistemological assumptions in this regard, aims to capture through the word ‘prejudices’ (*‘Vorurteile’*), constitutes the basis for all forms of understanding.⁷⁷

In Gadamer’s own words, ‘it follows that [hermeneutics] work is not to develop a procedure of understanding, but to clarify the conditions in which understanding takes place. But these conditions do not amount to a “procedure” or method which the interpreter must of himself bring to bear on the text; rather, they must be given. The prejudices and fore-meanings that occupy the interpreter’s consciousness are not at his free disposal’.⁷⁸ In sum, ‘[u]nderstanding is, essentially, a historically effected event’.⁷⁹

⁷⁴ Heidegger, Martin, *Being and Time*. Trans. John Macquarrie and Edward Robinson. Oxford: Blackwell, 1962, *passim*.

⁷⁵ *Ibid.*, at 417 [*‘immer in den Grenzen seiner Geworfenheit’*].

⁷⁶ *Ibid.*, at 191–192. A similar idea is developed by Rudolf Bultmann, a German theologian who was a contemporary and a one-time colleague of Heidegger’s. Bultmann notes that ‘[a] comprehension – an interpretation – is ... constantly oriented to a particular formulation of the question, a particular “objective”’. But included in this, therefore, is the fact that it is never without its own presuppositions: or, to put it more precisely, that it is governed always by a prior understanding of the subject’: Bultmann, Rudolf, ‘The Problem of Hermeneutics’. *Essays*. Trans. James C.G. Greig. New York: Macmillan, 1955: 239 [*‘Ein Verstehen, eine Interpretation ist ... stets an einer bestimmten Fragestellung, an einem bestimmten Woraufhin, orientiert. Das schließt aber ein, daß sie nie voraussetzungslos ist; genauer gesagt, daß sie immer von einem Vorverständnis der Sache geleitet ist’*] (emphasis original) [1950].

⁷⁷ See Gadamer, *Truth and Method*, op. cit., note 63, at 278–306.

⁷⁸ *Ibid.*, at 295 [*‘ihre Aufgabe (ist) überhaupt nicht... ein Verfahren des Verstehens zu entwickeln, sondern die Bedingungen aufzuklären, unter denen Verstehen geschieht. Diese Bedingungen sind aber durchaus nicht alle von der Art eines “Verfahrens” oder einer Methode, so daß man als der Verstehende sie von sich aus zur Anwendung zu bringen vermöchte – sie müssen vielmehr*

To make the point even more emphatically, Gadamer claims that '*[u]nderstanding is to be thought of less as a subjective act than as participating in an event of tradition*'.⁸⁰

Gadamer thus argues that every understanding is to be apprehended as an 'event', a happening of sense that can never be grasped by any method, and maintains the need to underscore 'not what we do or what we ought to do [which would be a methodical concern], but what happens to us over and above our wanting and doing'.⁸¹ In asserting that 'we should learn to understand ourselves better and recognize that in all understanding, whether we are expressly aware of it or not, the efficacy of history is at work',⁸² and in claiming in the most forceful terms that 'a naive faith in scientific method' can lead to 'an actual deformation of knowledge',⁸³ Gadamer's philosophical investigation revolutionizes the traditional view of hermeneutics aiming for the formulation of a method which would lead to understanding.

For Gadamer, then, the 'hermeneutical circle' ('*hermeneutischer Zirkel*'), habitually conceived as a method leading to the discovery of the true meaning of a text, is thoroughly ontological; the circle 'is neither subjective nor objective, but describes understanding as the interplay of the movement of tradition and the movement of the interpreter'.⁸⁴ The focus of interpretation, such as a text, makes affirmations or raises questions that invite the interpreter to respond. According to Gadamer, 'a person trying to understand a text is prepared for it to tell him something'.⁸⁵ Acts of interpretation are therefore dialogical in the sense that they entail a ceaseless conversation between the tradition and the interpreter. As the dialogue progresses, the interpreter revises his prejudices, rethinks his questions and expects new answers. The text, that is, the partner in dialogue, 'if it is to be understood properly – i.e., according to the claim it makes – must be understood at every moment, in every concrete situation, in a new and different way'.⁸⁶ Yet, Gadamer, using the concept of

gegeben sein. Die Vorurteile und Vormeinungen, die das Bewußtsein des Interpreten besetzt halten, sind ihm als solche nicht zu freier Verfügung'].

⁷⁹ Ibid., at 299 [*Verstehen ist seinem Wesen nach ein wirkungsgeschichtlicher Vorgang*'] (emphasis in the English translation).

⁸⁰ Ibid., at 291 [*Das Verstehen ist selber nicht so sehr als eine Handlung der Subjektivität zu denken, sondern als Einrücken in ein Überlieferungsgeschehen*'] (emphasis original).

⁸¹ Ibid., at xvi [*Nicht was wir tun, nicht, was wir tun sollten, sondern was über unser Wollen und Tun hinaus mit uns geschieht, steht in Frage*'].

⁸² Ibid., at 300 [*daß man sich selber richtiger verstehen lerne und anerkenne, daß in allem Verstehen, ob man sich dessen ausdrücklich bewußt ist oder nicht, die Wirkung dieser Wirkungsgeschichte am Werke ist*'].

⁸³ Ibid. [*d(ie) Naivität des Methodenglaubens*'] '*eine tatsächliche Deformation der Erkenntnis*'].

⁸⁴ Ibid., at 293 [*Er ist weder subjektiv noch objektiv, sondern beschreibt das Verstehen als ein Ineinanderspiel der Bewegung der Überlieferung und der Bewegung des Interpreten*'].

⁸⁵ Ibid., at 271 [*Wer einen Text verstehen will, ist vielmehr bereit, sich von ihm etwas sagen zu lassen. Daher muß ein hermeneutisch geschultes Bewußtsein für die Andersheit des Textes von vornherein empfänglich sein*'].

⁸⁶ Ibid., at 307–308 [*wenn er angemessen verstanden werden soll, d. h. dem Anspruch, den der Text erhebt, entsprechend, (dann muß er) in jedem Augenblick, d. h. in jeder konkreten Situation, neu und anders verstanden werden*'].

‘effective history’ (*‘Wirkungsgeschichte’*) to underscore the historicity of all understanding, shows that it is impossible for the interpreter to transport herself into a horizon different from her own. Gadamer refers to ‘historically-effected consciousness’ (*‘wirkungsgeschichtliches Bewußtsein’*) as a mode of being that is sensitive to its own historical situatedness. Historically-effected consciousness knows that ‘[t]o try to escape from one’s own concepts in interpretation is not only impossible but manifestly absurd’.⁸⁷ In other words, the historically-effected consciousness appreciates that, since history is incessantly at work in all her understanding, whether we are actually aware of it or not, such understanding is *itself* shaped by its historical tradition and that it is therefore impossible for an individual to find an Archimedean standpoint from which she could look at herself or at her culture. For Gadamer, ‘the illumination of [the hermeneutic] situation – reflection on effective history – can never be completely achieved; yet the fact that it cannot be completed is due not to a deficiency in reflection but to the essence of the historical being that we are. *To be historically means that knowledge of oneself can never be complete*’.⁸⁸ Because, as Gadamer asserts, ‘the horizon that one speaks of in the fusion of the horizons of interpretation is nothing that one ever reaches’,⁸⁹ it follows that ‘[t]he focus of subjectivity is a distorting mirror’.⁹⁰ And, understanding being grounded on tradition, no method can ensure that understanding of a text, or of a situation, be achieved. Ultimately, because ‘we are already finding ourselves in the middle of the game and can occupy no neutral standpoint – even if we strive very hard for objectivity and put our prejudices at risk’⁹¹ – the fact is that ‘we understand in a *different* way, *if we understand at all*’.⁹²

Despite Gadamer’s overall philosophical project often being branded as unduly conservative,⁹³ his views on method’s epistemological inadequacy are echoed in more radical circles.

⁸⁷ Ibid., at 398 [*‘Die eigenen Begriffe bei der Auslegung vermeiden zu wollen, ist nicht nur unmöglich, sondern offener Widersinn’*].

⁸⁸ Ibid., at 301 [*‘die Erhellung dieser (hermeneutischen) Situation, d. h. die wirkungsgeschichtliche Reflexion, ist nicht vollendbar, aber diese Unvollendbarkeit ist nicht ein Mangel an Reflexion, sondern liegt im Wesen des geschichtlichen Seins, das wir sind. Geschichtlichkeit heißt, nie im Sichwissen aufgehen’*] (emphasis original).

⁸⁹ Gadamer, Hans-Georg, *A Century of Philosophy: A Conversation with Riccardo Dittori*. Ed. Riccardo Dittori. London: Continuum, 2004: 61 [*‘der Horizont, wovon man in der Horizontenverschmelzung der Interpretation redet, (ist) nichts... was man je erreicht’*] (1999–2000).

⁹⁰ Gadamer, *Truth and Method*, op. cit., note 63, at 278 [*‘Der Fokus der Subjektivität ist ein Zerrspiegel’*].

⁹¹ Gadamer, Hans-Georg, *The Beginning of Philosophy*. Trans. Rod Coltman. London: Continuum, 2000: 30 [*‘wir (befinden) uns schon mitten im Spiel... und (nehmen) keinen neutralen Blickpunkt ei(n) – auch wenn wir uns noch so sehr um Objektivität bemühen und unsere Vorurteile aufs Spiel setzen’*] (1996).

⁹² Ibid., at 296 [*‘man anders versteht, wenn man überhaupt versteht’*] (emphasis original).

⁹³ This charge is indeed frequently expressed. While applauding Gadamer’s critique of positivism and of positivism’s scientific devaluation of understanding, Jürgen Habermas, for example, claims that philosophical hermeneutics gives short shrift to ideology and power and, specifically, fails to account for the way in which tradition can betray the effects of coercion on understanding. See Habermas, Jürgen, *On the Logic of the Social Sciences*. Trans. Shierry W. Nicholsen and Jerry

3.

Arguably the French philosopher having had the most impact on twentieth-century intellectual life (in 1998, the *New York Times* referred to him as ‘perhaps the world’s most famous philosopher – if not the only famous philosopher’),⁹⁴ Jacques Derrida addressed a wide range of subjects. In the course of a writing career spanning more than 40 years, he released twice as many books, most of them translated into any number of languages, engaging such varied themes as painting, friendship, religion and sovereignty, not to mention photography, psychoanalysis, archival work and the gift. Derrida’s abiding concerns, though, always had to do with texts and with the reading of texts. In this regard, Derrida’s name is closely associated with ‘deconstruction’ – an interpretative/political challenge to philosophical systems anchored to a close reading and dismantling of texts dedicated to showing that the purportedly foundational terms on which texts are claimed to rest are, in effect, the product of exclusive disjunctions, that is, of radical choices accompanied by a marginalization or a suppression of other discourses which are inherent to the text itself, to whose summons deconstruction responds and which deconstruction affirms (as opposed, say, to injecting them into the text) with a view to redeeming otherness in the furtherance of hospitality and justice. When pressed to explicate deconstruction, Derrida replied with a brief formula meant to capture this basic gesture of heteronomic commitment: ‘[P]lus d’une langue, that is, both more than a language and no more of a language’.⁹⁵ Deeply indebted to Husserl’s phenomenology and to Heidegger’s ‘correction’, Derrida insists on the historicity and on the linguisticity of human understanding. He thus argues that a philosophical system cannot rest on some ultimate justification or necessity. While it is made to seem natural, it inevitably depends on the dogmatist’s predilections. In sum, deconstruction diagnoses and exploits the difference between the illusion generated by theories projecting themselves as self-evident and the fact of their idealization by the thinking theorist.⁹⁶

A. Stark. Cambridge: MIT Press, 1988: at 143–170 [1977]; Habermas, Jürgen, ‘The Hermeneutic Claim to Universality’. Trans. Joseph Bleicher, Ed. Joseph Bleicher, *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique*. London: Routledge & Kegan Paul, 1980: 181–211 [1977].

⁹⁴ Smith, Dinitia, ‘Philosopher Gamely in Defense of his Ideas’. *The New York Times*, 30 May 1998, <<http://www.nytimes.com/1998/05/30/arts/philosopher-gamely-in-defense-of-his-ideas.html>> (accessed 14 January 2011).

⁹⁵ Derrida, Jacques, *Memoirs for Paul de Man*. Trans. Cecile Lindsay. New York: Columbia University Press, 1989: 15 (emphasis original). The words ‘plus d’une langue’ appear in French in the English text and the periphrasis is added to the English version.

⁹⁶ The number of books devoted to Derrida’s thought is beyond recension. See, for most helpful introductions in Derrida’s own words, with particularly useful accompanying commentaries, Derrida, Jacques and Maurizio Ferraris, *A Taste for the Secret*. Ed. Giacomo Donis and David Webb. Trans. Giacomo Donis. Cambridge: Polity, 2001; Caputo, John D. (Ed.), *Deconstruction in a Nutshell: A Conversation with Jacques Derrida*. New York: Fordham University Press, 1997. See also, for lengthier yet accessible readings, Miller, J. Hillis, *For Derrida*. New York: Fordham University Press, 2009; Wortham, Simon M., *The Derrida Dictionary*. New York: Continuum, 2010. See, generally, for appreciations of Derrida’s impact, Cohen, Tom (Ed.), *Jacques Derrida and the*

As regards his views on interpretation, Derrida's philosophical enterprise is very much at odds with Gadamer's, which their 1981 encounter (or rather, non-encounter) at the Goethe-Institut in Paris illustrated to somewhat striking effect.⁹⁷ Not only is Derrida not prepared to respect tradition (in the way in which Gadamer appears willing to do), but he expresses outright his intention to subvert what he regards as a 'hermeneutic veil'.⁹⁸ He wishes to 'perforate' it,⁹⁹ to undermine its 'colonial structure',¹⁰⁰ 'to withdraw [interpretation] from any hermeneutic question assured of its horizon',¹⁰¹ 'to rout all the Schleiermachers, all the veilmakers'.¹⁰² Over against Gadamer's philosophical hermeneutics, Derrida holds that a text is inherently and insurpassably indebted to grammatical ambiguity, to syntactic instability and to semantic indecidability. He emphasizes that 'equivocity is, in fact, always irreducible', because 'words and language in general are not and can never be absolute *objects*'.¹⁰³ Accordingly, there cannot be, properly speaking, anything like *the* meaning of a text. Indeed, the very fabric of a text opposes the idea of a meaning that would be its true meaning: 'A thousand possibilities will always remain open'.¹⁰⁴

Now, for Derrida, the inaccessibility of a text – the unreachability of something that would emerge, clearly, uncontroversially, as *the* meaning of a text – must be apprehended as beneficial. While, according to Gadamer, 'whatever is alienating in a text, whatever makes the text unintelligible, is to be overcome and thereby cancelled out by the interpreter',¹⁰⁵ such that its 'real meaning' becomes available,¹⁰⁶ Derrida takes the view that there is always something that the interpreter cannot access, something remaining, 'an

Humanities. Cambridge: Cambridge University Press, 2001; Goodrich, Peter et al. (Eds.), *Derrida and Legal Philosophy*. New York: Palgrave Macmillan, 2008.

⁹⁷ See Michelfelder, Diane P. and Richard E. Palmer (Eds.), *Dialogue and Deconstruction: The Gadamer–Derrida Encounter*. Albany: SUNY, 1989. A succinct account is in Davis, Colin, *Critical Excess*. Stanford: Stanford University Press, 2010: 26–55.

⁹⁸ Derrida, Jacques, *Spurs*. Trans. Barbara Harlow. Chicago: University of Chicago Press, 1979: 127 ['*voile herméneutique*'] (1978). I have modified the translation.

⁹⁹ *Ibid.* ['*perforer*'].

¹⁰⁰ Derrida, Jacques, *Monolingualism of the Other; or, the Prosthesis of Origin*. Trans. Patrick Mensah. Stanford: Stanford University Press, 1998: 39 ['*structure coloniale*'] (1996).

¹⁰¹ *Ibid.*, *Spurs*, op. cit., note 98, at 127 ['*le soustrait à toute question herméneutique assurée de son horizon*']. I have modified the translation.

¹⁰² *Ibid.* ['*éconduire tous les Schleiermacher, tous les faiseurs de voile*']. I have modified the translation. Derrida's pun will not be lost on readers who have German.

¹⁰³ Derrida, Jacques, *Edmund Husserl's Origin of Geometry: An Introduction*. Trans. John P. Leavey. Lincoln: University of Nebraska Press, 1989: at 104 ['*l'équivocité est en fait toujours irréductible*'] / '*les mots et le langage en général ne sont et ne peuvent jamais être des objets absolus*'] (emphasis original) [1962]. I have modified the translation.

¹⁰⁴ Derrida, Jacques, *Limited Inc.* Trans. Samuel Weber. Evanston: Northwestern University Press, 1988: 63 ['*Mille possibilités resteront toujours ouvertes*'] (1990).

¹⁰⁵ Gadamer, Hans-Georg, 'Text and Interpretation'. Trans. Dennis J. Schmidt and Richard Palmer. Eds. Diane P. Michelfelder and Richard E. Palmer, *Dialogue and Deconstruction: The Gadamer–Derrida Encounter*. Albany: SUNY, 1989: 41 ['*Das Befremdende, das einen Text unverstündlich macht, soll durch den Interpreten aufgehoben werden*'] (1983).

¹⁰⁶ Gadamer, *Truth and Method*, op. cit., note 63, at 296 ['*wirkliche Sinn*'].

irreducible remainder or excess'¹⁰⁷ – the text's secret, if you will. And it is good that there should be this distance between the interpreter and the text. Indeed, it is precisely this discontinuity which allows the conversation about the text to continue. For example, it is because interpreters have not yet managed to produce anything like *the* meaning of *Romeo and Juliet* that discussions, interventions and debates about the play continue to flourish, which Derrida regards as good. If, to return to Gadamer, whatever is unintelligible about the play had been overcome, the conversation would have stopped a long time ago. It is only because understanding is, in effect, interrupted, because instead of understanding there is non-understanding, because the text resists appropriation through interpretation, that there is ongoing interest in the text, that it survives as a focus of interpretative interest. Derrida thus calls for the '[e]radication of the hermeneutic principle' in as much as it constitutes an enterprise aiming for 'interpretive totalization'.¹⁰⁸

The divergences between Gadamerian philosophical hermeneutics and Derridean deconstruction are therefore profound.¹⁰⁹ It is no doubt on account of this significant contrast between these 'two interpretations of interpretation'¹¹⁰ – which, for Derrida, are nothing short of 'absolutely irreconcilable'¹¹¹ – that Gadamer and Derrida's congruity of views on the need to impugn method acquires so much significance. Indeed, just as Gadamer insists that 'hermeneutic theory ... is far too dominated by the idea of a procedure, a method',¹¹² Derrida is at pains to distinguish his deconstructive strategy from any methodological endeavour and, indeed, to dispute the interest of method altogether.

'Deconstruction is not a method and cannot be transformed into a method'.¹¹³ As if Derrida's resounding statement did not make matters plain enough, he adds that 'deconstruction cannot be reduced to some methodological instrumentality, to a set of transposable rules and procedures'.¹¹⁴ Over the years, Derrida would regularly return to this theme. He reiterated unceasingly that deconstruction is 'never a technical set of discursive

¹⁰⁷ See Derrida, Jacques, *Rams: Uninterrupted Dialogue – Between Two Infinities, the Poem*. Trans. Thomas Dutoit and Philippe Romanski. Eds. Thomas Dutoit and Outi Pasanen, *Sovereignities in Question*. New York: Fordham University Press, 2005: 149 ['*un reste ou un excédent irréductible*'] (2003).

¹⁰⁸ Derrida, Jacques, *Shibboleth: For Paul Célan*. Trans. Joshua Wilner and Thomas Dutoit. Eds. Thomas Dutoit and Outi Pasanen, *Sovereignities in Question*. New York: Fordham University Press, 2005: 26 ['*Eradication du principe herméneutique l'totalisation interprétative*'] (1986).

¹⁰⁹ See, for detailed exploration, Bertram, Georg W., *Hermeneutik und Dekonstruktion*. Munich: W. Fink, 2002; Angehrn, Emil, *Interpretation und Dekonstruktion*. Weilerswist: Velbrück, 2003.

¹¹⁰ Derrida, Jacques, *Writing and Difference*. Trans. Alan Bass. Chicago: University of Chicago Press, 1978: 292 ['*deux interprétations de l'interprétation*'] (1967).

¹¹¹ *Ibid.*, at 293 ['*absolument irréconcilables*'].

¹¹² Gadamer, *Truth and Method*, op. cit., note 63, at 291 ['*hermeneutisch(e) Theorie... (ist) viel zu sehr von der Idee eines Verfahrens, einer Methode, beherrscht*'].

¹¹³ Derrida, Jacques, 'Letter to a Japanese Friend'. Trans. David Wood and Andrew Benjamin. Eds. David Wood and Robert Bernasconi, *Derrida and Différance*. Evanston: Northwestern University Press, 1988: 3 ['*La déconstruction n'est pas une méthode et ne peut être transformée en méthode*'] (1983). I have modified the translation.

¹¹⁴ *Ibid.* ['*la déconstruction ne saurait se réduire à quelque instrumentalité méthodologique, à un ensemble de règles et de procédures transposables*']. I have modified the translation.

procedures, still less a new hermeneutic method',¹¹⁵ that 'in its very principle, deconstruction is not a method',¹¹⁶ that 'deconstruction is not a methodology, that is, the application of rules',¹¹⁷ that '[d]econstruction is not a method',¹¹⁸ that 'deconstruction is anything but ... a method'.¹¹⁹ Already in *Of Grammatology* (*De la grammatologie*), one of his earliest books, Derrida, although less adamantly than would subsequently be the case – he later exclaimed, tersely, '[n]o method'¹²⁰ –, proclaimed that deconstruction could not offer 'methodological ... assurances'.¹²¹ He defended 'a wandering thought on the possibility of itinerary and of method'.¹²² And he did not hesitate to connect anything like method with '[t]he exorbitant'.¹²³ Derrida's most insightful commentators have been willing to appreciate that '[d]econstruction ... does [not] yield to philosophy's classical definition of method', that 'it is not *stricto sensu* methodical'.¹²⁴ In fact, one reader aptly observes that 'deconstruction is also the deconstruction of the concept of method'.¹²⁵ A dispute involving Derrida and Claude Lévi-Strauss illustrates this point.

In 1962, when he released *The Savage Mind* (*La Pensée sauvage*), Lévi-Strauss, having been elected to the Collège de France three years earlier, had already established himself as a prominent anthropologist. In his book, he distinguishes between two modes of thought, which he associates with the 'bricoleur' and the 'engineer', or 'scientist', respectively.¹²⁶ Contrary to the 'bricoleur', who 'always ... make[s] do with "whatever is at hand"',¹²⁷ who 'may not ever complete his purpose but ... always puts something of

¹¹⁵ Derrida, Jacques, 'Mochlos, or the Conflict of the Faculties'. Trans. Richard Rand and Amy Wygant, *Eyes of the University*. Stanford: Stanford University Press, 2004: 102 [*'jamais un ensemble technique de procédures discursives, encore moins une nouvelle méthode herméneutique'*] (1990).

¹¹⁶ Derrida, Jacques, 'Qu'est-ce que la déconstruction?' *Le Monde*, 12 October 2004: iii [*'en son principe même, la déconstruction n'est pas une méthode'*]. This interview with Roger-Pol Droit first appeared posthumously, a few days after Derrida's death.

¹¹⁷ Ibid. [*'la déconstruction n'est pas une méthodologie, c'est-à-dire l'application de règles'*].

¹¹⁸ Derrida and Ferraris, *A Taste for the Secret*, op. cit., note 96, at 4 [*'La decostruzione non è un metodo'*] (1993).

¹¹⁹ Ibid., at 82 [*'la decostruzione è tutt'altro che ... un metodo'*] (1995).

¹²⁰ Derrida, Jacques, *Dissemination*. Trans. Barbara Johnson. Chicago: University of Chicago Press, 1981: 271 [*'Point de méthode'*] (1972). I have modified the translation.

¹²¹ Derrida, Jacques, *Of Grammatology*. Rev'd trans. Gayatri C. Spivak. Baltimore: Johns Hopkins University Press, 1997: 162 [*'assurances méthodologiques'*] (1967).

¹²² Ibid. [*'une pensée errante sur la possibilité de l'itinéraire et de la méthode'*].

¹²³ Ibid., at 157 [*'(l)'exorbitant'*].

¹²⁴ Gasché, Rodolphe, *The Tain of the Mirror*. Cambridge: Harvard University Press, 1986: 123. See also, for example, Caputo, *Deconstruction in a Nutshell*, op. cit., note 96, at 9; Norris, Christopher, *Deconstruction*, 3rd ed. London: Routledge, 2002: 1.

¹²⁵ Gasché, *The Tain of the Mirror*, op. cit., note 124, at 123.

¹²⁶ Lévi-Strauss, Claude, *The Savage Mind*. Trans. John Weightman and Doreen Weightman. Chicago: University of Chicago Press, 1966: 16–22 [*'bricoleur'/'ingénieur'/'savant'* or *'homme de science'*] (1962). The French word 'bricoleur' is retained in the English translation: Ibid., 17n. For his part, Lévi-Strauss uses 'scientist' (*'savant'* or *'homme de science'*) alternatively with 'engineer': Ibid., 19, 20 and 22.

¹²⁷ Ibid., at 17 [*'toujours s'arranger avec les "moyens du bord"'*].

himself into it',¹²⁸ the engineer 'works by means of concepts',¹²⁹ which 'aim to be wholly transparent with respect to reality'.¹³⁰ On the basis of 'the structures which [science] is constantly elaborating and which are its hypotheses and theories',¹³¹ against the background of 'a previously determined set consisting of theoretical and practical knowledge, of technical means, which restrict the possible solutions',¹³² the engineer addresses 'the universe' or 'nature' – as opposed to the 'bricoleur' who is concerned with 'culture'.¹³³ In his reaction to Lévi-Strauss's distinction, Derrida forcefully holds that Lévi-Strauss's scientist is 'a myth'.¹³⁴ He writes as follows: 'The notion of the engineer who supposedly breaks with all forms of *bricolage* is ... a theological idea'.¹³⁵ According to Derrida, it is imperative 'that we cease to believe in such an engineer [as Lévi-Strauss's]', that we accept that 'the engineer and the scientist are also species of *bricoleurs*' and therefore 'that we admit that every finite discourse is bound by a certain *bricolage*'.¹³⁶ Derrida is emphatic: 'It must be said that every discourse is *bricoleur*'.¹³⁷

Derrida's resistance to what he himself stigmatizes as 'scientificist objectivism' or 'naive objectivism' cannot be taken to exclude the existence of certain protocols for the reading of texts,¹³⁸ what he calls 'a certain marching order'.¹³⁹ (And Derrida agrees, of course, that there could be, if not a method, at least 'regularities in the ways of putting certain questions in a deconstructive style'.)¹⁴⁰ Indeed, 'it would be a great mistake to conclude that because deconstruction is critical of the ... concept of method, it would ... indulge in uncontrollable free play'.¹⁴¹ To be sure, '[a]lthough a deconstruction of method, deconstruction is not nonmethod, an invitation to wild and private lucubrations'.¹⁴²

¹²⁸ Ibid., at 21 [*'Sans jamais remplir son projet, le bricoleur y met toujours quelque chose de soi'*].

¹²⁹ Ibid., at 20 [*'opère au moyen de concepts'*].

¹³⁰ Ibid. [*'se veut intégralement transparent à la réalité'*].

¹³¹ Ibid., at 22 [*'(les) structures qu(e) (la science) fabrique sans trêve et qui sont ses hypothèses et ses théories'*].

¹³² Ibid., at 19 [*'un ensemble prédéterminé de connaissances théoriques et pratiques, de moyens techniques, qui restreignent les solutions possibles'*].

¹³³ Ibid. [*'l'univers/l'la nature/l'la culture'*].

¹³⁴ Derrida, *Writing and Difference*, op. cit., note 110, at 285 [*'un mythe'*].

¹³⁵ Ibid. [*'L'idée de l'ingénieur qui aurait rompu avec tout bricolage est ... une idée théologique'*].

¹³⁶ Ibid. [*'qu'on cesse de croire à un tel ingénieur/l'ingénieur ou le savant sont aussi des espèces de bricoleurs/l'qu'on admet que tout discours fini est astreint à un certain bricolage'*].

¹³⁷ Ibid. [*'on doit dire que tout discours est bricoleur'*].

¹³⁸ Derrida, *Of Grammatology*, op. cit., note 121, at 61 [*'objectivisme scientiste/l'objectivisme naïf'*].

¹³⁹ Derrida, *Dissemination*, op. cit., note 120, at 271 [*'une certaine marche à suivre'*].

¹⁴⁰ Derrida, 'Qu'est-ce que la déconstruction?', op. cit., note 116, at iii [*'des régularités dans les manières de poser un certain type de questions de style déconstructif'*].

¹⁴¹ Gasché, *The Tain of the Mirror*, op. cit., note 124, at 123.

¹⁴² Ibid.

In suggesting that even the so-called ‘scientific’ discourse identified by Lévi-Strauss cannot, in effect, legitimately fashion itself as a formalized programme of ideal procedures, that is, as a method, Derrida’s refutation is consonant with criticism voiced by prominent scientists themselves who have also expressed their concern regarding the epistemological constraints under which method must labour. For example, physicist, philosopher and sociologist Paul Feyerabend (1924–1994), in a book which US philosopher Richard Rorty said reminded him of Gadamer’s *Truth and Method*,¹⁴³ chastises the dogmatism he associates with the use of method.¹⁴⁴ He argues that, contrary to received assumptions, any rational attempt to frame a method is bound to have counter-productive effects on scientific research. For him, ‘[s]uccessful research does not obey general standards; it relies now on one trick; now on another; the moves that advance it and the standards that define what counts as an advance are not always known to the movers’.¹⁴⁵ Feyerabend stresses that the violation of established rules constitutes a necessary requirement for scientific progress. In his view, ‘given any rule, however “fundamental” or “rational”, there are always circumstances when it is advisable not only to ignore the rule, but to adopt its opposite. For example, there are circumstances when it is advisable to introduce, elaborate, and defend *ad hoc* hypotheses, or hypotheses which contradict well-established and generally accepted experimental results, or hypotheses whose content is smaller than the content of the existing and empirically adequate alternative, or self-inconsistent hypotheses, and so on’.¹⁴⁶ Indeed, ‘the invention of atomism in antiquity, the Copernican Revolution, the rise of modern atomism (kinetic theory; dispersion theory, stereochemistry; quantum theory), the gradual emergence of the wave theory of light, occurred only because some thinkers either *decided* not to be bound by certain “obvious” methodological rules, or because they *unwittingly broke* them’.¹⁴⁷ According to Feyerabend, then, ‘there is only one principle that can be defended under *all* circumstances and in all stages of human development. It is the principle: *anything goes*’.¹⁴⁸

Such an anarchical formulation notwithstanding, it must be clear that neither Feyerabend nor, in fact, any critical scholar working in the hugely influential field of science studies, which emerged in the 1960s with a view to questioning traditional scientific claims,¹⁴⁹ are arguing that method should yield to ‘the non-method of presentiment and inspiration, or [to] the arbitrariness of prophetic utterance’,¹⁵⁰ that comparatists, for example, should renounce coherence and consistency and turn themselves into dilettantes

¹⁴³ Rorty, *Philosophy and the Mirror of Nature*, op. cit., note 69, at 358 n. 1.

¹⁴⁴ Feyerabend, Paul, *Against Method*, 4th ed. London: Verso, 2010. Apart from a brief introduction by Ian Hacking, this text reproduces the third edition, which was the last to be released in Feyerabend’s lifetime.

¹⁴⁵ *Ibid.*, at xix.

¹⁴⁶ *Ibid.*, at 7 (emphasis original).

¹⁴⁷ *Ibid.* (emphasis original).

¹⁴⁸ *Ibid.*, at 12 (emphasis original).

¹⁴⁹ The precursor text is Kuhn, Thomas S., *The Structure of Scientific Revolutions*, 3rd ed. Chicago: University of Chicago Press, 1996 [1962].

¹⁵⁰ [G.W.F.] Hegel’s *Phenomenology of Spirit*. Ed. J.N. Findlay. Trans. A.V. Miller. Oxford: Oxford University Press, 1977: 29 [‘*die Unmethode des Ahndens und der Begeisterung und die Willkür des prophetischen Redens*’] (1807).

in search of aestheticization. It ought to be just as plain, though, that as Feyerabend, Derrida and Gadamer point to the limits of scientificization, instrumentalization and commodification, they most helpfully remind us that the differentiation of method from the lifeworld simply cannot be nearly as complete as methodologists assume and, in any event, proves not nearly as desirable as they would wish.

In the light of these philosophers' insights, I have wanted to challenge the ideology of method prevailing in the field of comparative law, which, epistemologically speaking, cannot be sustained as it proves to be more of a severe epistemological obstacle than a fertile source of epistemological opportunities. Given the focus of my argument, I have not sought to argue whether *this* method was more advisable than *that* method. Again, in terms of the construction of comparative knowledge, my goal has been to engage in a resignification of method, that is, to show that method cannot be approached strictly as a solution, but that it must also be envisaged as a problem. Specifically, I have wanted to tell comparatists that the most eminent representatives of some of the most influential currents of interpretative thought in recent memory, despite their significant disagreements on a number of key questions, concur that their work on texts does not, and must not, partake of method. As comparatists themselves trade in texts – they interpret texts on foreign law often written in a foreign language – it seems to me that these observations cannot but be worthy of their attention. As I purport to make comparative law's methodologists more anxious about their resort to method, I am also animated by an emancipatory impetus. Indeed, the post-methodical configuration which I envisage would allow comparatists to reclaim an agential space as they assume responsibility for their own strategic decisions, instead of reflexively implementing a given methodological agenda. Now, they would not mind, would they?