Emma Patrignani

Otherness, Pluralism and Context

Underground issues in comparative legal studies

ACTA UNIVERSITATIS
LAPPONIENSIS 361

Acta Universitatis Lapponiensis 361

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Academic dissertation
to be publicly defended with the permission
of the Faculty of Law at the University of Lapland
in lecture room 3 on 17 November 2017 at 12 noon

LAPIN YLIOPISTO
UNIVERSITY OF LAPLAND

Rovaniemi 2017

Acta Universitatis Lapponiensis 361

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University of Lapland
Faculty of Law

Layout: Taittotalo PrintOne

Sales:
Lapland University Press
PL 8123
FI-96101 Rovaniemi, Finland
tel. +358 40 821 4242
publications@ulapland.fi
www.ulapland.fi/LUP

University of Lapland Printing Centre, Rovaniemi 2017

Printed:
Acta Universitatis Lapponiensis 361
ISBN 978-952-337-030-2
ISSN 0788-7604

PDF:
Acta electronica Universitatis Lapponiensis 228
ISBN 978-952-337-031-9
ISSN 1796-6310

Abstract (in the form of FAQ)

What is this book?

This is an article-based dissertation. It explores issues which are foundational for the theory of comparative law. Ideas drawn from neighbouring disciplines (philosophy, social sciences epistemology, anthropology) are made to interact with law: the conception of otherness, the understanding of pluralism and the meaning of context are basic – in this sense *underground* – theoretical issues that determine the subsequent methodological choices of the comparatist.

What is theory of comparative law?

The comparative study of laws brings forth various compelling theoretical issues. For example, these concern questions about what is the conception of law in foreign cultures: through comparison domestic notions are put into question, as the comparatist faces the fact that in other places things are organized differently. Moreover, comparison brings about issues on the very possibility to understand the other, in addition to questions about the comparatist's own ideas and tacit prejudices. Can the other be understood on its own terms? How does the comparatist relate new knowledge to what she already knows? Her pre-understanding is something she cannot completely get rid of, so she needs to acknowledge its influence on the process of acquisition of knowledge. Furthermore, the comparatist exits the normative legal sphere she was trained in and faces other normative spheres. She has to reconsider what normativity means; being "out" of the normative domestic legal system does not mean to be entirely freed from normativity.

Are other scholars concerned about those issues?

Indeed. Recently, comparative law has been described as the Cinderella that became the Queen. This has happened for various reasons. Classical comparative law drew much on legal material produced by nation states, while nowadays the law is created at multiple levels; its general structure appears more like a net rather than a pyramid. To face the challenges of globalisation, the study of comparative law (and of law in general) has to transform itself by assuming the transnational dimension of the legal and including in the analysis normative phenomena existing on a smaller scale too. Legal theorists and comparatists are needed in order to develop analytic tools which can make sense of the new normative structures studied.

Furthermore, the last 30 years have also witnessed a deeply unravelling internal debate concerning the very fundaments of the discipline, its directions and purposes. Sharp disagreements have been manifested concerning the nature of the legal compara-

tive scholarly endeavour and its aims and reasons: is it a method or a discipline? Does it further knowledge or use in practice? Other debated issues are: micro- and macrocomparison (which one to favour in different circumstances); functionality (whether it is a meaningful starting point); structuralism (whether to adopt it as a background theory); differences *vs.* similarities (what to focus on); *tertium comparationis* (what it is and is it necessary to have one for comparing); and translation (practical and ethical issues). Moreover, debates have considered the possibility and desirability of legal transplants and of legal convergence. The unrest is due to influences coming from among others the following: post-modern philosophy; critical schools of thought such as critical legal studies, post-colonial studies, discourse theory and orientalism; economic analysis of law, behavioural economics and neo-institutional economics; and the debate on objectivity carried out in philosophy of science.

What to learn from this internal debate?

According to the author, this debate resulted in a double complexification. On the one side, the understanding of the compared laws is complexified. This entails perceiving the laws as radically other and therefore not fully comprehensible. Laws have to be analysed without assuming their internal coherence but rather giving voice to the silenced disagreements and placing them within their context, without thereby crystallising it in an unmovable monolith. On the other side, the position of the comparatist has been complexified as well. This leads to the acknowledgment of her responsibility in choosing the appropriate analytical tools for her cognitive interests and stresses the ethical dimension connected to comparative legal research. These two complexifications when combined create the methodological basis against which the articles included in this dissertation have to be read.

Are these two complexifications accepted in the literature?

Overall, while the complexification of the concept of law has now reached a relatively higher level of acceptance (at least most comparatists would agree that good comparison has to look further then black-letter, legislated rules), the same cannot be said for the complexification of the position of the comparatist. Indeed the more easily spottable political implications of legal comparison have been unveiled, as have the parochialism and ethnocentrism of certain scholarship. Still, not many are willing to stop pondering on the epistemological position of the comparatist as a knower. The methodological debate within comparison seems to have really digested only the first complexification. This is the historical conjuncture where this dissertation can be located. It contributes to this debate by claiming that the two complexfications actually travel together. A broadened understanding of law requires a rethinking of the role of the comparatist as well: the field of study gets so broadened that the comparatist herself is included in it.

What is the overall aim of this dissertation?

Although each article stands on its own, the overall aim of this dissertation is to advance a certain attitude toward comparativism as an academic endeavour. It aims at raising

awareness of the risks connected to reductionism and simplification and argues for a conception of legal comparative knowledge that embraces complexity theory and that reflects on its own epistemological status. Both the understanding of the compared laws and the ethical position of the comparatist need to be reflected upon, which is what these contributions purport to do.

Contents

Acknowledgments

This book is the result of a long research journey. As the word "research" suggests, this intellectual journey consisted of innumerable searches. Searches for the right argument, searches for the own words, searches for books, articles, cases. Searches for conferences, for publishers, for funding. For homes, places to stay overnight, flight tickets. For oneself, maybe even. Along the way, many encounters have helped me, commenting on my work and offering collegial support and inspiration.

This journey would never even have started if Professors Juha Karhu and Jaakko Husa had not created the Legal Cultures in Transnational World (LeCTra) doctoral programme at the Faculty of Law of the University of Lapland. Their "Call for Applications" referred to an approach to comparative law that was in a way exactly what I was looking for (the first search!), and could not resist applying. Not only they believed in the potential of my chaotic proposal, but also their trust in my work has been constant, even in moments when I didn't have any myself. The many seminars, symposia, conferences that were organized at the Faculty brought to Lapland illustrious authors and thinkers who stimulated enlightening discussions. Also the informal meetings among doctoral students have always been fruitful and inspiring. I express my gratefulness to all the participants and organizers of such events. In all of these years my supervisor Jaakko Husa has managed to strike a balance between supporting the writing process and at the same time allowing a maximum degree of academic freedom. I am thankful for his feedbacks, insights and expertise, which he has always been ready to share. I would also like to thank him for agreeing to act as the Custos at my defence.

Sincere gratitude goes to the pre-examiners, Professors Geoffrey Samuel from the Kent Law School and Jørn Øyrehagen Sunde from the University of Bergen. It was a privilege for me that they took the time to comment on my work and to share their expertise with me. I am also thankful to Geoffrey Samuel for agreeing to act as the Opponent at my defence.

Without the excellent proofreading work of Nick Kirkwood my chances of publishing in international peer-reviewed journals would have been much slimmer, I am really indebted to him for his work. Thanks are also due to the staff of the Library of the University of Lapland, and of the all the other libraries I have visited, such as the one of the Max-Planck Institute for Comparative and International Private Law in Hamburg, the Cujas Library and the French National Library in Paris, as well as the University Library in Berlin. For the financial support received I need to thank the LeCTra doctoral programme, the *Suomalainen Lakimiesyhdistys*, and the Rector of the University of Lapland.

This work would also not have been possible without non-institutional support, that is the closeness of friends and relatives. Unsurprisingly, as this is also included in the meaning of the word "research" itself: it is namely composed by the intensive prefix "re-", and "search", which means "to seek for". Its etymology is to be drawn back to the Latin word *circare*, whose meaning is to "go about, wander, traverse", and in Late Latin "to wander hither and thither", from *circus*, which means "circle". Therefore research work also necessarily involves wandering around, taking hikes, traversing rivers, spinning in circles, overcoming mental loops, going to circus. All things that one usually does with chosen and unchosen family members. My warmest thank you goes to you all.

Hamburg, 26 September 2017
Emma Patrignani

1. General introduction – (un)definition of comparative law

"*Theatrum legale*"[1];

"Vergleichung der Gesetze und Rechtsgewohnheiten der verwandesten [sic], wie der fremdartigsten Nationen aller Zeiten und Länder"[2];

"Leges legum" or "*biologia delle leggi*"[3];

"*Constatation des diversités législatives [..][et] conséquences [..][:] quel profit doit en résulter pour le progrès de la science et celui de la civilisation générale*"[4];

"*Le droit comparé [..] c'est la méthode comparative appliquée dans le domaine des sciences juridiques*"[5];

"*Es handelt sich um einen geistigen Vorgang, der einerseits mit dem Recht zu tun hat und andererseits eine Vergleichung zum Inhalt hat. [..] die Rechtsvergleichung [stellt sich] dar als das Miteinandervergleichen von verschiedenen Rechtsordnungen der Welt*"[6];

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[1] Gothofredi Guillelmi Leibnitii, "Nova methodus discendae docendaeque jurisprudentiae", in *Opera Omnia, Tomus Quartus* (Genoa: Fratres de Tournes, 1667/1748), p. 192. ["Legal theatre" (if not otherwise specified, translations are mine)].

[2] Anselm Von Feuerbach, "Blick auf die deutsche Rechtswissenschaft", in *Kleine Schriften vermischten Inhalts* (Nuremberg: Theodor Otto, 1833), 152-177, p. 163. ["Comparison of legislations and legal customs of the most related, as well as the most alien, nations of all times and countries"].

[3] Emerico Amari, *Critica di una scienza delle legislazioni comparate* (Palermo: Edizioni della Regione Siciliana, 1969 [1857]), p. 216. ["Laws of the laws" or "biology of laws"].

[4] Raymond Saleilles, "Rapport présenté à la commission d'organisation sur l'utilité, le but et le programme du congrès", in *Procès-verbaux des séances et documents du Congrès International de Droit Comparé tenu à Paris du 31 juillet au 4 août 1900* (Paris: L.G.D.J. Pichon et Durand-Auzias, 1905), 9-17, p. 9. ["Ascertainment of the legislative differences and consequences: what kind of advantage does this produce for the progress of the science and of civilization in general"].

[5] René David, *Traité élémentaire de droit civil comparé: introduction à l'étude des droits étrangers et à la méthode comparative* (Paris: L.G.D.J. Pichon et Durand-Auzias, 1950), p. 4. ["Comparative law is the comparative method applied in the domain of legal sciences"].

[6] Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Tübingen: J.C.B. Mohr, 1984), pp. 1-2. ["The words suggest an intellectual activity with law as its object and comparison as its process. [...] comparative law is the comparison of the different legal systems of the world", as translated in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, trans. Tony Weir, 3rd ed. (Oxford: Oxford University Press, 1998), p. 2].

"*Comparative Law is a body of potentially 'universal' knowledge about the law, acquired by observing the legal phenomenon as it appears in a variety of social and geographic contexts. It is an approach to legal institutions or to entire legal systems that study them in comparison with other institutions or legal systems as they exist elsewhere*"[7];

"*La comparaison, ça nous tombe dessus: c'est une expérience*"[8].

The only thing for sure that these disparate definitions of comparative law make clear is that there is no consensus of what comparative law means[9], and this pertains not only to its definition, but to its subject-matters and methods as well. Many of the most recent mono-authored textbooks on comparative law avoid giving a clear cut definition of comparative law[10]. Concerning the name of the discipline, René David was unsatisfied with *droit comparé*[11] and envied the German *Rechtsvergleichung*, with which Konrad Zweigert and Hein Kötz were not completely happy either[12]. Rudolf Schlesinger's textbooks start by calling "Comparative Law" a misnomer, which is accepted only because it became custom, while "*Comparison of Laws and Legal Systems*" would have been preferable[13]. In this text no substantive differentiation of meaning will be attached to the expressions "comparative law" and "comparative legal studies", even though the latter might be understood as implicitly advancing a broader definition of law in contrast to the former, more strictly positivist, term. As it will hopefully emerge, this dissertation advances certain theoretical stances concerning both the nature of law and the nature of comparativism as an academic endeavour. Still, the two denominations are used interchangeably.

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[7] Ugo Mattei, Teemu Ruskola and Antonio Gidi, *Schlesinger's Comparative law : cases, text, materials*, 7th ed. (New York: Foundation Press, 2009), p. 7.

[8] Pierre Legrand, *Comparer les droits, résolument* (Paris: Presses Universitaires de France, 2009), p. 35. ["comparison falls on us: it's an experience"].

[9] The agreement on the existence of disagreements is so wide that it goes from Edouard Lambert, "Séance du 1er aout ", in *Procès-verbaux des séances et documents du Congrès International de Droit Comparé tenu à Paris du 31 juillet au 4 août 1900* (Paris: L.G.D.J. Pichon et Durand-Auzias, 1905), 26-60, p. 29, to Esin Örücü, "Developing Comparative Law", in *Comparative Law - A Handbook*, eds. Esin Örücü and David Nelken (Oxford and Portland, Oregon: Hart Publishing, 2007), 43-65.

[10] For example Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford and Portland, Oregon: Hart Publishing, 2014); Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014); and Günter Frankenberg, *Comparative Law as Critique* (Cheltenham: Edward Elgar Publishing, 2016), all dedicate some pages to a general introduction about the discipline but do not define it precisely. Jaakko Husa takes the risk: "Comparative Law is a part of social sciences and more extensively part of the study of humankind. To be more exact, comparative law is part of the entity that consists of legal disciplines: a part of the organised attempt to understand human law, a special normative phenomenon that is not limited to a certain state or cultural sphere". Jaakko Husa, *A New Introduction to Comparative Law* (Oxford and Portland, Oregon: Hart Publishing, 2015), p. 18.

[11] See David, *Traité élémentaire de droit civil comparé: Introduction à l'étude des droits étrangers et à la méthode comparative*, p. 2.

[12] Zweigert and Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, p. 2.

[13] Rudolf Schlesinger et al., *Comparative Law: Cases-Text-Materials*, 6th ed. (New York: Foundation Press, 1998), p. 2.

1.1. What is theory of comparative law?

The comparative study of legal cultures brings forth various compelling theoretical issues. These concern questions about what is the conception of law in foreign cultures, and as such one's general theory of law is complexified: through comparison domestic notions are put into question, because one necessarily has to face the fact that things could be otherwise[14]. Moreover, comparison brings about issues on the very possibility to understand the other, in addition to questions about one's own ideas and tacit prejudices. Can the other be understood on its own terms? How do we relate new knowledge to what we already know? Our pre-understanding is something we cannot completely get rid of, so we need to acknowledge its influence on the process of acquisition of knowledge. Furthermore, the comparatist exits the normative legal sphere she was trained in and faces other normative spheres. She has to reconsider what normativity means; being "out" of the normative domestic legal system does not mean to be entirely freed from normativity.

Recently, comparative law has been described as the Cinderella that became the Queen[15]. This has happened for *external* reasons: classical comparative law drew much on legal material produced by nation states, while nowadays the law is created at multiple levels; its general structure appears more like a net rather than a pyramid[16]. To face the challenges of globalisation, the study of comparative law (and of law in general) has to transform itself by assuming the transnational dimension of the legal and including in the analysis normative phenomena existing on a smaller scale too. Legal theorists and comparatists are needed in order to develop analytic tools which can make sense of the new normative structures studied.

Furthermore, the last 30 years have also witnessed a deeply unravelling *internal* debate concerning the very fundaments of the discipline, its directions and purposes. Sharp disagreements have been manifested concerning the nature of the legal comparative scholarly endeavour and its aims and reasons: is it a method or a discipline? Does it further knowledge or use in practice? Other debated issues are: micro- and macrocomparison (which one to favour in different circumstances); functionality (whether it is a meaningful starting point); structuralism (whether to adopt it as a background theory); differences vs. similarities (what to focus on); *tertium comparationis* (what it is and is it necessary to have one for comparing); and translation (practical and ethical issues). Moreover, debates have considered the possibility and desirability of legal transplants and of legal convergence. The unrest is due to influences coming from among others the following: post-modern philosophy[17]; critical schools of thought such as critical

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[14] *Q.v.* George P. Fletcher, "Comparative Law as a Subversive Discipline", *The American Journal of Comparative Law* 46, no. 4 (1998), 638-700; Horatia Muir-Watt, "La fonction subversive du droit comparé", *Revue Internationale De Droit Comparé* 52, no. 3 (2000), 503-527.

[15] Frankenberg, *Comparative Law as Critique*, pp. 3–7.

[16] François Ost and Michel Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Bruxelles: Publications des Facultés universitaires Saint-Louis, 2002).

[17] See for example Pierre Legrand, "Paradoxically, Derrida", *Cardozo Law Review* 27 (2005), 631 and Pierre Legrand, "Siting Foreign Law: How Derrida Can Help", *Duke Journal for Comparative and International Law* 21 (2011), 595-629.

legal studies[18], post-colonial studies[19], discourse theory and orientalism[20]; economic analysis of law[21], behavioural economics[22] and neo-institutional economics[23]; and the debate on objectivity carried out in philosophy of science[24].

The theoretical issues to be discussed are already manifold even before actually starting the activity of comparison and before choosing which comparative method to deploy. Even though indeed the separation line between preliminary or definitional issues and methodological issues is very thin, if existent at all, it has to be acknowledged that the accent of this dissertation is set on foundational matters. Basic definitional contentions and reflections on the role of analytical tools are focused on. The word "underground" in the second half of the title refers exactly to the basicness or preliminarity on which the main focus of this research is set. Underground in this context should not be understood in the sense of marginal, as indeed for example issues connected with legal pluralism are nowadays emerging to the fore in many branches of legal scholarship. Rather, the term refers to issues which are primordial. Their lying underground implies that they pertain not only to legal comparison when narrowly defined, but that they can also be of use to the study of law in general and certainly aim at having some kind of relevance also in law as conceived by anthropologists and philosophers[25]. Nevertheless, they concern also legal comparison, in the sense that they determine what kind of legal comparison can be carried out. In this sense, those issues belong to the methodology of comparison. Although the theory of comparative legal studies as a field is the underlying research basis of each paper, there are three main sub-themes represented in the dissertation: otherness, pluralism and context. Overall, a fundamental approach to legal comparativism is suggested, one that attempts to bypass the risks connected with simplification.

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[18] David Kennedy, "New Approaches to Comparative Law: Comparativism and International Governance", *Utah Law Review* 2 (1997), 545-638.

[19] Upendra Baxi, "The colonialist heritage", in *Comparative Legal Studies: Traditions and Transitions*, eds. Pierre Legrand and Roderick Munday (Cambridge: Cambridge University Press, 2003), 46-75.

[20] Teemu Ruskola, "Legal Orientalism", *Michigan Law Review* 101, no. 1 (2002), 179-234; Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, Mass. and London: Harvard University Press, 2013).

[21] Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997).

[22] Julia De Coninck, "*Overcoming the Mere Heuristic Aspiration of (Functional) Comparative Legal Research? An exploration into the Possibilities and Limits of Behavioral Economics*", *Global Jurist Topics* 9, no. 11 (2009).

[23] Irene Biglino, "Formants and Institutions: Intellectual Meeting Points between Rodolfo Sacco and Douglass North", *Global Jurist* 11, no. 2 (2011).

[24] Günter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law", *Harvard International Law Journal* 26 (1985), 411-455.

[25] In this way issues such as "countering ethnocentricity, responding to the challenges of multiculturalism, and recognizing legal pluralism" have brought comparative legal studies into areas of debate that are familiar in contemporary legal theory. Roger Cotterrell, "Comparative Law and Legal Culture", in *Oxford Handbook of Comparative Law*, eds. Mathias Reimann and Reinhard Zimmermann, 2nd ed. (Oxford: Oxford University Press, 2008), 710-737, p. 728; and also Richard Hyland, "Comparative Law", in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson, I ed. (Malden: Blackwell Publishing, 1996), 184-199, p. 197.

1.2. Structure of the thesis

This is an article-based dissertation in which each article stands on its own and aims to make a different point, although certain basic concerns are common. The purpose of this synthesis is to highlight these common themes. The articles are reproduced with the permission of the journals in the second part of this thesis as they have been published. This opening section aims to provide a common space where the general project underlying the scattered articles is discussed in detail.

One very relevant underlying thread is a sensibility for issues surrounding the cognoscibility of the laws to be compared and the historicity of comparative legal knowledge. This epistemological concern is presented in the articles as referring to the subject matter of each of them, but due to word-count restrictions it was not possible to dedicate space to my own lengthy reflexive disclosures. This is done, once and for all, in "2.1. Method as path" section, and the posture is then further contextualised in "2.2. Method ¬ objectivity". The following section "2.3. Method as methods" sketches a possible critique of method without going too much into details; as this thesis focuses on methodology I wanted to spare the reader from the dazzling feeling of standing in-between two mirrors facing one another. Following this, the articles are then shortly presented: in section "2.4. The articles" the focus is not so much on their main subject-matter, but rather the aim there is to highlight what is the cognitive exercise performed in each article and to make explicit how the epistemological concern mentioned above is manifested. At that point of the synthesis, the reader will probably have a clear enough vision of what my project is about, and the fatidic "research question" issue can be approached. This is done mainly by presenting doubts concerning the possibility and opportunity of formulating a research *question* for the kind of theoretical work undertaken in this dissertation.

Chapter 3 presents a brief history of the discipline of comparative law, with the aim of bringing out the variations in method that have taken place and to situate within this history the recent methodological discussion to which my writings also belong. The purpose of this chapter is to show how much theory of comparative law has changed over time. At times, legal comparison has drifted along with the currents of its own *Zeitgeist*; for example, displaying encyclopaedic and ethnocentric tendencies when it was practiced under the name of *Rechtsethnologie* in the eighteenth century or when it adopted the enthusiastic tones of belief in progress during the Paris Congress in 1900. Its development has sometimes been the result of the accidents of personal stories, such as those of the scholars who fled the Nazi-regime and were confronted with a new legal environment. At times it also has been in clear opposition to the dominant approaches to law, fighting to overcome the narrow national focus or the even the narrower black-letter focus. That this relatively recent academic practice has undergone such radical methodological vicissitudes speaks for its substance. There is something there, some theoretical matter that deserves to be studied.

Chapter 4 tackles the three underground issues in comparative legal studies mentioned in the title. Otherness, pluralism and context are given independent standing,

regardless of the way they had to be squeezed, bent and manipulated in order to fit the article-format. The synthesis allows for a broader scope and a more didactic style of writing, which hopefully will help to overcome certain shortcuts that were necessary in the drafting of the articles.

2. Method

2.1. Method as path

My personal interest in research was originally ignited when encountering the theoretical debate on methodology that has taken place within the comparative law field. This discussion provided a point of access to many philosophical matters that had remained until that moment impossible to grasp. The Legal Cultures in Transnational World (LeCTra) Doctoral Programme offered a very well-tailored environment for such research interests as its fourth paradigmatic area is devoted to the theories and methods of multicultural legal studies. This refers to questions related to "culturally transmitted information about what is law (ontology), where do we acquire knowledge of it (epistemology), and what kind of approaches we should use while seeking information about law and different understandings of law (methodology)". LeCTra "draws heavily on these discussions when developing and testing its specific theories and methods and approaches looking under the surfaces of formal law"[26]. My publications are based on the writings of the many authors who have visited LeCTra seminars and events in Lapland over the years. An important part of the research process is the realisation that the material we work on is written by living humans with whom one can discuss and exchange ideas.

A 10-month research visit in Paris in 2012-2013 allowed me to become acquainted with the comparative approach propounded by Pierre Legrand, which is an approach partly in opposition with the Trento thesis[27], the Manifesto[28] of Italian legal comparison drafted at the very university were I studied. It is in that time that my readings delved deeper into Emmanuel Levinas' philosophy, and I tried to combine it with the theory of legal comparison. The subsequent intellectual inquiry led naturally towards legal theory and in particular towards questions concerning the understanding, conceptualising and rendering of very different notions of the legal. The encounter with radically different normativities brings about questions about the researcher's own assumptions and preconceptions. This jurisprudential debate is truly total in nature: it includes not only the confrontation of different general theories of law but also different methodologies of legal research, and ultimately it includes epistemological questions concerning our very capability to know or what is the nature of our knowledge about law. It has been

[26] LeCTra Action Plan, p. 2.

[27] Pierre Legrand, "Questions à Rodolfo Sacco", *Révue Internationale De Droit Comparé* 47, no. 4 (1995), 943-971.

[28] It will be presented below.

interesting to discover that analogous challenges and debates had been also troubling legal anthropologists. And based on my readings and reflections of the intersection between empirical approaches to law and analytical (dogmatic) legal theory, I produced two papers on legal pluralism. Eventually, I actually carried out a comparison, with the main focus being the issue of diversity. However, instead of dealing with diversity among different laws, the comparison concerned the diversity among different people as seen through legal lenses. I chose to focus on France and Germany as they provide suitable historical examples of opposite approaches to issues of belonging to the national community and legal reactions to inhomogeneity of society due to immigration. I deemed myself to have sufficient understanding of the two systems to tackle them as I had studied law and lived in both countries. Further, research visits to both countries while drafting the article have allowed deeper insights into the respective literature.

What follows is the intellectual and physical path that led me to this point: I was trained as a comparative lawyer in Italy by Rodolfo Sacco's disciples, became interested in theory and the critical approach and then in legal anthropology and legal theory, which led me to travel and visit both France and Germany. Finally, I tried to use the substantive knowledge and sensibility gained about those continental European legal systems to compare them. This brief narration should serve as a sort of disclaimer of what my standing point is. Everything that is written in this dissertation is very much the product of the rarely coherent, never efficient path just depicted. To paraphrase Legrand, every single word of this compilation is the result of

> My Very Best Interpretation of the [issues at hand, presented below] as I s[a]t in [the] [Rovaniemi,] Paris [and Berlin] Libraries at this Stage in my Early Career and at this Juncture in My Life; in the Light of my overall Education Including my Institutionalization into 'Law' and into 'Comparative Law', My Linguistic Competence in French [, English, German and Italian] and my Cultural Familiarity With France [and Germany]; on the Basis of My Experience as a Comparatist-at-Law and of My Acquaintance with [Italian,] French [and German] Law in Particular; Given What I Wanted to Establish; and by Reference to the Materials I Came Across in [Rovaniemi,] Paris [and Berlin], the Texts I Decided to Use, the Arguments I Chose to Mobilize, the Evidence I Elected to Retain, the Quotations I Opted to Feature and the Words I Preferred to Deploy in Order to Account for What Inevitably Remains Less Than the Whole[29].

In other words, this method as path signifies that this chapter is not the result of a misprint of what should have been included in the Acknowledgements[30]. Those (apparently) external details of the circumstances under which the texts have been written

[29] Pierre Legrand, "Negative Comparative Law", *Journal of Comparative Law* 10, no. 2 (2015), 405-454, p. 426.

[30] Finnish doctoral dissertations feature the "Acknowledgements" at the very beginning, and this part of the manuscript is usually devoted to giving thanks to the various people and institutions that have followed and supported the researcher.

are actually already part of the content[31]. A (short) story about the writer is methodologically relevant, as it is a statement on the conditions that limit the knowledge produced in this dissertation. This work opts for an understanding of knowledge (more precisely, academic scholarship on the topics of the meta-theory of laws and of legal comparison) that highlights its situatedness. This is not necessarily always the case in comparative law[32], but the stance taken here is that the meaning of objectivity in legal and comparative legal studies cannot be taken for granted and deserves to be reflected upon.

2.2. Method ¬ objectivity

At least since Günter Frankenberg's seminal article appeared in 1985 in the Harvard International Law Journal, objectivity has become a central issue in the methodological debate. His article explicitly states at the outset that

> because of comparative legal scholarship's faith in an objectivity that allows culturally biased perspectives to be represented as 'neutral' the practice of comparative law is inconsistent with the discipline's high principles and goals. In response, this essay will suggest a critical approach that recognizes the problem of perspective as a central and determinative element[33].

Along similar lines the present work asserts its own situatedness within the legal culture(s) I was exposed to and my own experience as a researcher. Moreover, this dissertation distances itself from the idea that the comparative perspective would allow the comparatist to attain a "bird's eye view". The reasons and the implications of this approach are discussed more in detail in the first three essays (presented below), which all address from different angles the epistemological position of the comparatist. The title of this section thus means that method is not a way to achieve objectivity, which is therefore negated by the logical "not" sign ¬. In a way, objectivity is taken away from the idea of method[34].

In contrast to this stance, various schools of thought of juridical comparison have tried to urge the comparatist to abandon her prejudices in order to produce neutral and

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[31] Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 411-455, p. 434.

[32] For an example of an approach that completely refuses to take into consideration its own situatedness, see Otto Pfersmann, "Le droit comparé comme interprétation et comme théorie du droit ", *Revue Internationale De Droit Comparé* 53, no. 2 (2001), 257-288.

[33] Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 411-455, p. 441.

[34] The use of the logical sign is mainly meant to be ironical. However, it also signifies that often, even when trying to go beyond a certain way of looking at things, we still need to use the language of the paradigm to be overcome. Thirdly, the use of the logical sign is also a way to re-evoke the significance of objectivity as a key theme, as an indirect way to maintain the importance of the avoided theme (I am indebted to Juha Karhu for making me notice this third point).

objective knowledge[35]. In this way for example the conception of knowledge advanced by Zweigert and Kötz has been shown to rely on the one of René Descartes[36], as in their classic textbook comparison is presented as a "school of truth"[37]. According to Legrand, the German authors share the Cartesian ambition to elaborate a pure thought, freed from distortions caused by subjectivity. Their epistemological sophistication foresees that the knowing subject gets rid of all preconceptions, of all emotional attachments and of all distractions of bodily origin in order to reach, following a clear method, incontestable knowledge[38].

Another example is provided by the Trento theses, the cultural manifesto of Italian comparison developed by Sacco in 1987[39]. The second thesis, for example, is formulated as follows:

> Comparison focuses its attention on the different legal phenomena as they have been concretely realized in the past or in the present, following a criterion according to which it is considered real what has concretely happened. In this sense, comparison has the same validation criterion of historical sciences[40].

Such an approach does not take into account the broad scope of the epistemological debate in the historical sciences[41] but refers to a very precise validation criterion, the *verum ipsum factum* by Giovanni Battista Vico[42]. This stance was motivated by the will to overcome strict positivism and to extend the scope of legal comparison beyond unverifiable dogmatic statements and to make space for sociology of law and law-in-action[43]. This is assuredly a laudable intent, but unfortunately it causes a setting aside

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[35] Zweigert and Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, p. 36.

[36] Legrand, *Paradoxically, Derrida*, 631, pp. 645–54.

[37] Zweigert and Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, p. 14 ["école de verité"].

[38] Legrand, *Paradoxically, Derrida*, 631, pp. 645–46.

[39] http://www.jus.unitn.it/dsg/convegni/tesi_tn/le_tesi.htm [14/1/2017]. For an authentic interpretation of the theses see Antonio Gambaro, Pier Giuseppe Monateri and Rodolfo Sacco, "Comparazione Giuridica", in *Digesto delle discipline privatistiche - sezione civile*, Vol. III (Turin: UTET, 1990), 51-56.

[40] "La comparazione rivolge la sua attenzione ai varii fenomeni giuridici concretamente realizzati nel passato o nel presente, secondo un criterio per cui si considera reale ciò che è concretamente accaduto. In questo senso, la comparazione ha lo stesso criterio di validazione delle scienze storiche".

[41] See for example Jacques Revel, "Les sciences historiques", in Épistémologie des sciences sociales, ed. Jean-Michel Berthelot (Paris: P.U.F., 2012), 21-76. It is interesting to note that the expression which describes history as the attempt to present things "the way [they] really happened" ["wie [sie] eigentlich gewesen [sind]"], attributed to Leopold von Ranke, was not intended as an "epistemological programme" or as the rallying cry it has become. *Id.*, p. 45.

[42] Rodolfo Sacco, "Comparazione e conoscenza del dato giuridico positivo", in *L'apporto della comparazione alla scienza giuridica*, ed. Rodolfo Sacco (Milan: Giuffré, 1980), p. 246. See also Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)", *The American Journal of Comparative Law* 39, no. 1 (1991), 1-34, p. 26.

[43] Antonio Gambaro, "The Trento Theses ", *Global Jurist Frontiers* 4, no. 1 (2004). Still, every time the author tackles the question of the epistemological foundations of the second thesis, he sets the problem aside as if it would concern only the preconceptions and the mentality underlying the studied laws and not those of the comparatist herself.

of the necessarily biased perspective of the comparatist. Furthermore, the fifth thesis foresees that:

> Knowledge of a juridical system is not the monopoly of the jurist belonging to the system; if, on the one hand, he is advantaged by the abundance of information, on the other hand he will be hindered by the bias that the theoretical statements of the system are completely coherent with the operational rules of the considered system[44].

The insider and the comparative jurists do not work in the same way: the latter is supposed to look at the law neutrally, while the former is a biased participant in the normative system[45]. To summarise: the second thesis refers to the *comparandum* as that what has "concretely happened", and the fifth to the comparatist as an external observer. As a result, the epistemological status of knowledge acquired through comparison is considered to be objective and scientific[46].

In opposition to the two approaches presented here which strive to develop an objective and descriptive comparative methodology, the articles develop a different perspective which problematises the comparatist's position. That is, the nature of the knowledge produced depends also on the perspective and on the theoretical framework of the researcher. This "epistemological awareness" is developed throughout the articles, but while there it is applied to the topics treated respectively, here the aim is to state it also for the whole work undertaken in this dissertation. As the possibility of objectivity as absolute knowledge is negated, the whole idea of method has to be re-thought.

2.3. Method as methods

Once the unavoidability of methodological issues connected with the perspective of the researcher is acknowledged, comparison can start – or continue, since it has always already started – following various further paths. While in the previous sub-chapter the emphasis was set on the importance of the departing point, now the *modi operandi* (in plural) will be put in the spotlight. As the title already suggests, the first contention is that there is not one preferred method, but many. This may sound like a very naïve and commonsensical contention, but it is not that long ago when comparative lawyers were arguing normatively in favour of the one right method[47]. Still, in the comparative

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[44] "La conoscenza di un sistema giuridico non è monopolio del giurista appartenente al sistema dato; se da una parte è favorito dall'abbondanza delle informazioni, sarà però impacciato più di ogni altro dal presupposto che gli enunciati teoretici presenti nel sistema siano pienamente coerenti con le regole operazionali del sistema considerate".

[45] See also Antonio Gambaro, Rodolfo Sacco and Louis Vogel, *Le droit de l'Occident et d'ailleurs* (Paris: L.G.D.J., 2011), p. 3.

[46] Gambaro, Monateri and Sacco, *Comparazione Giuridica*, 51-56.

[47] For one recent example see Oliver Brand, "Conceptual Comparison: Towards a Coherent Methodology of Comparative Legal Studies", *Brooklyn Journal of International Law* 32, no. 2 (2007), 405-466.

literature many methods are used. This is shown also by the presence of scholarly publications that present and discuss a variety of available methods[48]. The purpose here is not to repeat what has already been done by others, so in the following I will not provide a list of possible methods. Instead, the question that will be discussed here is: where does the pluralisation of methods stem from?

To begin with, the pluralisation of methods has come about in connection to the pluralisation of contemporary laws and normative phenomena in Europe[49] and beyond. National legal systems are not the only type of normative orders that can possibly be included in the sphere of interest of the comparatist. There are also "large scale organised normativit[ies]"[50], such as international organisations. But it has to be stressed how the differentiation between national and international is fading as many norms implemented at national level are of international origin (and vice versa), and overall global relations of interdependence between different levels have given rise to transnational legal phenomena. The same can be said about small-scale organised normativities, which exist within or across state boundaries. They might be of a more or less official nature, and the kind of recognition they might enjoy at state level also varies[51]. Overall, these transformations in the legal world "out there" challenge the Westphalian conception of the world and of law not only ontologically but also epistemologically: because the legal and normative phenomena are so different, the way to study and compare them has to always be re-adjusted. There is no method that would be valid for every legal domain. As it is not possible to separate the method from the context, there is a plurality of methods depending on the laws studied.

Moreover, the pluralisation of methods is partly a consequence of the pluralisation of the cognitive aims of comparison itself. Depending on the specific purposes of the research there is a "sliding scale of methods"[52] among which to choose. The depth of the study is determined by the knowledge-interest: no approach is right or wrong as such, but each provides only partial access to reality and therefore permits a concrete phenomenon to be understood only partially[53]. The choice of method is one of the first that needs to be met by each scholar for herself. For example, if a scholar compares for a practical purpose or in connection with the drafting of legislation or in view of harmonisation, she will need a different method than someone who compares with the

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[48] For a quick attempt to present a list of possible methods see for example Mark Van Hoecke, "Methodology of comparative legal research", *Law and Method* (2015). For an encompassing overview of the different methods that have concretely been deployed in comparative legal studies see Siems, *Comparative Law*. For older overviews of methods see Anne Peters and Heiner Schwenke, "Comparative Law beyond Post-Modernism", *The International and Comparative Law Quarterly* 49, no. 4 (2000), 800-834 or Vernon Valentin Palmer, "From Lerotholi to Lando: Some Examples of Comparative Law Methodology", *The American Journal of Comparative Law* 53, no. 1 (2005), 261-290.

[49] Jaakko Husa, "The Method is Dead, Long Live the Methods - European Polynomia and Pluralist Methodology", *Legisprudence* 5 (2011), 249-271.

[50] Husa, *A New Introduction to Comparative Law*, p. 110.

[51] On the pluralisation of the concept of law, see the dedicated subchapter below (4.2.).

[52] Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 261-290, p. 290.

[53] Samuel, *An Introduction to Comparative Law Theory and Method*, pp. 92 – 95. Geoffrey Samuel, "Taking Methods Seriously (Part Two)", *Journal of Comparative Law* 2, no. 2 (2007), 210-237, pp. 232-233.

aim of understanding the cause of similarities and differences or of classifying legal cultures or of developing further the theory and method of comparative law itself[54]. Husa draws the conclusion that there are as many different fields in comparison as there are legitimate ways to compare. Instead of a "ready-made choose-and-use or one-size fits all methodology"[55] the scholar has the final responsibility to choose what analytical tools to deploy, based on the subject matter and her cognitive interests.

Simone Glanert calls for a total resignification of method as methods depend on the studied domain and on the purposes of the research as mentioned above, added to the fact that method does not guarantee objectivity and scholarly work is never a mere description and is instead a re-presentation (a presentation anew) and a fictional discourse[56]. According to the author, "method" is in need of a re-signification that goes against its own etymology[57]: sure enough the word originates from the Greek "methodos", which is a compound of the prefix "meta-" (means after, behind and also beyond and expresses also development) and the suffix "hodos" (means the way or manner). It thus signifies a pursuit, a following after and later also a way of inquiry[58]. In opposition to such an understanding of method as being "the road to knowledge", Glanert problematises its very utility. Drawing further on the importance of pre-understanding and prejudices in the theory of modern hermeneutics as developed by Hans-Georg Gadamer and on the instability of meaning as theorised by Jacques Derrida, she concludes that method proves to be rather an "epistemological obstacle"[59]. Alternatively she envisages a "post-methodological configuration which [...] would allow comparatists to reclaim an agential space as they assume responsibility for their own strategic decision"[60]. Unless one wants to disregard completely the debates in philosophy of science, hermeneutics and the contribution of the schools of thought such as legal realism and critical legal studies, the "innocence" of method is to be considered as "unveiled" and comparison recognised as ethical performance and a political act[61]. This seems to be in line also with Husa's assertion that "the most important and possibly the only actual tool for study is an open and inquisitive mind"[62] together with sound research ethics.

To sum up, from method being the one right way we have gone to the pluralisation of methods and now arrive at the conclusion that the theory and methodology of com-

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[54] Husa, *A New Introduction to Comparative Law*, pp. 140 – 143. See also Maurice Adams, "Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law", in *Methodologies of Legal Research - Which Kind of Method for What Kind of Discipline?*, ed. Mark Van Hoecke (Oxford and Portland, Oregon: Hart Publishing, 2011), 229-240, p. 236.

[55] Husa, *A New Introduction to Comparative Law*, p. 142.

[56] Simone Glanert, "Method?", in *Methods of Comparative Law*, ed. Pier Giuseppe Monateri (Cheltenham: Edward Elgar, 2012), 61-81.

[57] *Id.*, p. 65.

[58] See entry "method" in Ernest Klein, *A Comprehensive Etymological Dictionary of the English Language* , Vol. II (Amsterdam: Elsevier Publishing Company, 1967), p. 973.

[59] Glanert, *Method?*, 61-81, p. 81.

[60] *Ibid.*

[61] Günter Frankenberg, "The Innocence of Method - Unveiled: Comparison as an Ethical and Political Act", *The Journal of Comparative Law* 9, no. 2 (2014), 222-258, p. 231.

[62] Husa, *A New Introduction to Comparative Law*, pp. 142-143.

parative legal studies is of a heuristic nature[63], which calls for a strong research ethics. This theme is recurring in the articles and has been at the very centre of my research interests for many years. Following the debate on the role and nature of methods in comparative law, I have tried to figure out what research ethics entails. The first three essays are small contributions to the reflexion on the difficult position of the researcher once the pluralisation and fragmentation of method has left her alone with a multiplicity of (possibly conflicting) analytical tools. The fourth article is different as it tries to carry out a comparison taking these almost-paralysing methodological caveats into account. I have not followed any specific method as it would have been in contradiction with everything written above, and I had to heuristically make my political and ethical choices.

Overall, my aim has never been to provide solutions or ways out but rather to critically analyse the constraints under which the comparatist has to take her methodological choices and strategic decisions. The articles could be read as reminders to comparative lawyers about what it is that they have to acknowledge, or take into account, when embarking on comparison. Hence, in a way they are contributions on methodology or on what is left of it after the resignification of method described above: a bunch of analytical tools and research ethics. This much is what can be said about all of them on the whole: more specific methodological reflection has to be carried out separately for each of them.

2.4. The articles

The dissertation contains three articles and a book chapter; each looking at one particular topic. Given the nature of the issues dealt with and the arguments made this approach was favoured over a monograph. In this subchapter, the content of these essays is presented, and particular attention is devoted to the way in which each of them incorporates the sensibility for epistemological reflection as presented in the three preceding sub-chapters.

2.4.1. Levinasian alterity

The contribution "Alterity according to Emmanuel Levinas and Comparison of Laws"[64] was first written in French, then shortened and translated into English. The starting point is the idea that a conception of otherness is necessary for any comparison. The main theoretical assertion is that the relationship to the Other suggested by Levinas can help the comparatist position herself in regard to the foreign laws under consideration. Three aspects of Levinas' thinking are developed in the text, the first of which is the radical heterogeneity of the Other. According to the kind of idea of otherness adopted, the

[63] *Id.*, pp. 145–146.

[64] Emma Patrignani, "Alterity according to Emmanuel Levinas and Comparison of Laws", in *Le droit comparé et.../ Comparative Law and..*, eds. Alexis Albarian and Olivier Moréteau (Aix-en-Provence: Presses Universitaires d'Aix-Marseille, 2016), 437-446.

jurist will opt for a different definition of comparison and will conceptualise the laws differently. A conception that recognises the radical heterogeneity of the Other avoids imposing domestic legal conceptions on the foreign laws studied. Secondly, the critical assessment of knowledge conceived as appropriation is thematised, as it influences the epistemological situation of the comparatist, her ideas about what she can understand of the different and the kind of knowledge she focuses on. Lastly, the conceptualisation of otherness brings about consequences concerning the responsibility of the knowing subject or, in Levinasian terms, the establishment of an ethical relation to the Other.

This paper carries out a sort of interdisciplinary work in the sense that a certain specific idea taken from a neighbouring discipline, namely philosophy, is made to interact with theory of legal comparison. Primary and secondary literature by and about Levinas on Otherness is analysed keeping in mind the role of the comparatist towards the laws compared. While reading, I had to select what I thought could be issues relevant to this kind of relation, as indeed neither Levinas himself nor the secondary literature mention legal comparison. And, as he sketches an understanding based on dialogue, I deemed his philosophy to contain persuasive arguments toward a certain kind of comparison. In particular for the purposes of this introductory synthesis it is relevant to underline how the Levinasian critique of knowledge as appropriation, if applied to legal comparison, leaves us with an understanding of legal scholarship that is not accumulative. That is, not an exhaustible kind of knowledge where there is a finite heap of stacked notions about the foreign law. Rather, law is suitable for endless interpretations and explanations, and each comparatist will choose her argumentative path, what information to select and what literature to resort to. According to this view, comparative legal studies do not produce universally valid knowledge, and the comparatist cannot hide behind an alleged neutrality. On the contrary, she is responsible for the images of the other law she produces and for her own methodological choices. This introduces the issue of the ethics of research in general and more particularly of comparison.

It has to be emphasized that Levinas did not write his philosophy as a basis for a certain kind of research method. His thoughts on the conception of otherness and of the relation of the self to the other are made to interact with the theory of legal comparison in a way that entails a double "reading": firstly, towards law in general and comparative law in particular, and secondly towards methodologically relevant themes. Overall, the chapter does not provide a straightforward application of his philosophy, but rather Levinasian Alterity (the way I read it) is used to give philosophical standing to the epistemological shift from "method as a road to knowledge" to "research responsibility and ethics" as introduced above.

2.4.2. Theoretical programmes

The article "Legal Pluralism as Theoretical Programme"[65] chronicles the trajectory of the theory of legal pluralism. Originally introduced by anthropologists as a descriptive

[65] Emma Patrignani, "Legal Pluralism as Theoretical Programme", *Oñati Socio-Legal Series* 6, no. 3 (2016), 707-725.

label in order to account for normative phenomena observed during fieldwork, nowadays a less naïve understanding of the term is needed. The article presents how legal pluralism, if conceived as a theoretical programme, becomes a normative analytical tool. Epistemic reflexivity is applied to the concept by illustrating how this normativity works, or in other words, how the theoretical programme chosen affects the results. This happens as the theoretical programme adopted guides the researcher in the selection of the relevant data and in the legitimate forms of explanation. Indeed the whole debate between legal monists and pluralists has been turning around on what kind of normative phenomena should be considered relevant for the purpose of legal scholarship, with the pluralists striving to enlarge the definition of law from the strict "stately-enacted rules" idea. Moreover three contemporary theories of legal pluralism are studied with the aim of identifying the legitimate forms of explanation underlying them, that is, the connections between the facts that are looked for. The whole argument is developed without mentioning its applicability to comparative legal studies, but obviously the comparatists also face the other law with a certain theory of law in mind, and therefore the argument developed in the article is pertinent to legal comparison as well[66].

In the article the notion of theoretical programme as adapted by Jean-Michel Berthelot to the social sciences is applied to legal pluralism. This paper develops a reflection on the epistemological status of legal pluralism as a theory of law; in other words, the article purports to investigate the nature of empirical knowledge produced by approaching legal phenomena with pluralist lenses. All the attention is therefore devoted to the space between the knower and the known, avoiding any simplifying claims of objectivism. The conclusion is that the concept of legal pluralism, as any other theory adopted, enables research and at the same time limits the space for manoeuvre: this awareness shall not discourage the production of knowledge but make it more realistic. Taken as a whole, this article examines very closely in what way knowledge of legal phenomena (be they foreign or domestic) can never be absolute and therefore contributes to the discussion presented in the previous chapter on the inaptitude of method to guarantee (a certain kind of) objectivity.

2.4.3. Complexity theory

The other article about legal pluralism is entitled "Complex Legal Pluralism"[67], which analyses the challenges that arise at the crossroads between abstraction-oriented jurisprudence and empirically oriented approaches to law. It considers that legal pluralism allows for an understanding of law as a complex phenomenon, and this conception

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[66] In fact the whole idea of the article stems from Geoffrey Samuel's schemes of intelligibility theory, which he has been developing in connection to the theory of comparative law in various publications. Q.v. Geoffrey Samuel, "Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences", in *Epistemology and Methodology of Comparative Law*, ed. Mark Van Hoecke (Oxford: Hart Publishing, 2004), 35-77, pp. 57-74; Geoffrey Samuel, "Taking Methods Seriously (Part One)", *Journal of Comparative Law* 2, no. 1 (2007), 94-119, pp. 105-110; and more recently Samuel, *An Introduction to Comparative Law Theory and Method*, pp. 81 – 95.

[67] Emma Patrignani, "Complex Legal Pluralism", *Retfærd Årgang* 38, no. 4/151 (2015), 19-33.

brings along consequences concerning the theory of knowledge about law. Complexity theory as developed by Edgar Morin is combined with theory of law; the result being a pluralist understanding of legal pluralism. This article aims to make a similar point to the previous article in that it discusses the nature of our understanding of legal pluralism and argues that our discernment of it is not abstract or general.

No abstract and general laws can be formulated about complex systems, and rather knowledge about them is characterised by singularity, locality and temporality. This means that each rendering of complex systems cannot ignore contingent aspects of them, including the contingent perspective of every specific observer. As stated already in the previous article, the outlook of the researcher studying legal pluralism matters. Here this point is used to argue further the reason for why legal pluralism (if one is ready to follow the understanding of it advanced in this article) is better protected than other theories of law from the risk of wrongly assuming its own generality or universal applicability. Once again, the discussion is about the nature of legal theory and about the influence of the outlook of the observer on the knowledge she can have of the law. It should be underlined that the focus is neither on the factual legal pluralist situation nor on its desirability. The article does not discuss the ontology of legal pluralism but its epistemology[68]. In this sense, it is a reflection that is relevant to the comparatist as well, as she will also have to face the complexity of foreign law. Given the particularity of her own comparative endeavour, she has to be aware of the possibilities to avoid the pitfalls of general theories of law through the tools provided by complexity theory.

Such a complexification of the concept of law does not make the position of the researcher necessarily easier, but complexity theory does provide some conceptual tools to handle it. The article closes with a reference to the ethics of research. This renewed understanding of legal pluralism as a complex system (and as such being a theory that states its own contingency and perpetual need for re-definition) also states the unavoidable responsibility involved in making methodological choices.

2.4.4. Diversity in society

After taking all of this epistemological awareness into consideration, still the impossible will be done: laws will be compared. This is the spirit of the fourth article "Overcoming Essentialisation – A comparative study of 'Living Together'-conceptions"[69], which compares two Constitutional Courts' decisions that judge the constitutionality of Statues forbidding Islamic veils. The first judgement is the French Decision n. 2010 – 613 DC, rendered on 7 October 2010 by the Constitutional Council. The second is the German order in the cases 1 BvR 471/10 and 1 BvR 1181/10, rendered on the 27 January 2015 by the First Senate of the Federal Constitutional Court.

The two decisions are placed within their respective context. They are not taken to represent "the" French and "the" German legal answer to the veil or to contain the

[68] See the differentiation by Morin between restricted complexity and general complexity. Edgar Morin, "Restricted complexity, general complexity", (2005).

[69] Emma Patrignani, "Overcoming essentialisation: A comparative study of 'living-together' conceptions", *International Journal of Law in Context* (2017), 1-22. doi:10.1017/S1744552317000210.

ultimate definitions of the courts of "what it means to live together" in each society. The two decisions are considered as documents in which the deciding organs at least implicitly state something about the French and German ways of living together: they are steps in the processes in which meanings are negotiated within the French and German legal evolution. Being cultural products of their respective society, they constitute possible starting points for analysis. The essentialisation to be overcome (to which the title refers) is not the essentialisation of the "other" veil-wearing woman but in this case of the French and German attitudes towards diversity in society. This article purports to show how both cultural contexts are complex, multi-stranded and shifting over time, and thus the study of the context is used as a means to overcome simplifying and stereotyping explanations. Therefore, already at the outset the article states that legal cultures are understood as mixed, non-pure compounds and that the aim in re-presenting the French and German conceptions of living together is to defend a law-in-context approach that overcomes essentialisation.

While reading and looking for the appropriate way to formulate the argument I had to realise how, in practice, the choice of scheme of intelligibility determines what is conceived of as relevant[70]. The methodological tool constitutes the "object" of comparison and vice versa: the process and the object of comparison mutually construct one another. So, while the article is an interpretation of French and German law, it does not focus on the substantive law or on the legal reasoning carried out by the courts. Rather, given the "object" of comparison – the conceptions of living together- the focus is on the vision of society entailed in the judgements. While the beginning of the research defined the main claim of this article, the line of argument (for example the choice to divide the analysis of the living together into three parts) and then the single steps within it (for example the choice to rely mainly on Rogers Brubacker's reconstruction of the history of German nationality law, or on Jean Baubérot's version of the history of laicity in France) were progressively shaped.

Overall, the "method" followed in the comparison carried out in this last article has very much been one of trial and error; in other words heuristic research of what could be an appropriate way of developing the argument and supporting it. By reading commentaries of the decisions and literature about both countries on the topic, the yardsticks of the conception of individual, of belonging to the national community and of secularism were identified as elements about which something relevant could emerge from both decisions. In this way, the procedure that led to the comparison

[70] As the texts are dissected with the aim of understanding the social and cultural ideas underlying them, the methodological tool chosen is probably fairly close to what Samuel defines as the hermeneutical intelligibility scheme, see Samuel, *An Introduction to Comparative Law Theory and Method*, pp. 86–87, and pp. 108–120. It has to be underlined though that the hermeneutical method as presented by Samuel (who relies heavily on Legrand's approach) does not stress the complexity and variability within each context as vehemently as this article does. In this sense, the approach taken in the article is also similar to what Van Hoecke names "deep level comparative law", in Mark Van Hoecke, "Deep Level Comparative Law", in *Epistemology and Methodology of Comparative Law*, ed. Mark Van Hoecke (Oxford: Hart Publishing, 2004), 165-195, in particular with reference to the conclusion he reaches concerning the existence of competing theories in each legal culture, pp. 189-191.

carried out in this article cannot be said to have been one of setting the principles at the beginning (object of comparison, research question, method) and then just executing the programme. Rather, mutual co-shaping took place.

I chose a middle line in regard to translation related issues[71]. The article is written as much as possible by pretending to ignore the fact that the sources are in different languages (so for example the names of the institutions, i.e. "Constitutional Council", "Senate of the Federal Constitutional Court" and "Council of State" are used only in the English version), but the most salient passages of the compared decisions are reproduced in their original version in the text and have a translation in the footnotes. This approach was chosen for various reasons. To begin with, concerns over readability and word count restrictions meant that the text had to be concise. Moreover, the overall focus of the article did not lay on the aspects of the legal cultures that could be read from the literal linguistic expressions contained in the texts, but rather it lay on what could be read between the lines in regard to the ideas underlying the texts. For example the translated words "individual", "citizen", "national community", "secularism" as well as the untranslated ones "*laïcité*" or "*bekenntnisoffen*" are contextualised and their meaning (with its variations over time) is discussed. That is to say, the sensitivity for the foreign language is manifested through the awareness for the foreign culture. Nevertheless, since the contextualisation is carried out in English and addressing an international audience, a certain level of semantic infidelity is unavoidable[72].

To conclude, the first three publications (the book chapter and the two articles on legal pluralism) are more theoretical in nature and affirm similar points to the ones made in the previous sections on method. In contrast, the last article tries to implement the recommendations developed in the first three publications. As stated, the comparative work carried out there is not the result of a linear process but of continuous moves between methodological texts and substantial law and its history, as well as moves between French and German literature. This non-linearity has to be attested concerning the setting of the research question, as will be put forth next.

2.5. Research questions

Many of the questions tackled in the articles, such as the instability of the line to be drawn between what counts as legal culture and what as non-legally-relevant culture (culture-not-pertaining-to-the-legal), the significance of the concept of otherness for

[71] Comparative law methodology and legal translation are intrinsically connected, as argued for example by Jennifer Hendry, "Legal comparison and the (im)possibility of legal translation", in *Comparative Law - Engaging Translation*, ed. Simone Glanert (Oxon and New York: Routledge, 2014), 87-103. The issue is not addressed directly in this dissertation as it consists mainly of theoretical essays on other topics, but since this last article carries out a comparison and therefore multiple translations from French and German to English, the issue has to be at least mentioned.

[72] Simone Glanert, "Comparaison et traduction des droits: à l'impossible tous sont tenus", in *Comparer les droits, résolument*, ed. Pierre Legrand (Paris: PUF, 2009), 279-311, pp. 305-309.

legal comparison or the non-universality of the theory of legal pluralism have gone unanswered. In other words, it would be incoherent with the nature of the academic work undertaken here to formulate a research question in the form of a hypothesis that is then proven to be right or wrong in the course of the analysis or in the form of a question expressing a desire to know something previously unknown. Rather, these texts merge together in a discussion that is never ending. Nevertheless, it is worth continuing this discussion, and with these texts I have added my own contribution.

More precisely, the overarching aim of this dissertation is to argue in favour of a conception of legal comparative knowledge that is aware of the risks connected to reductionism and simplification[73]. Knowledge, and also juridical knowledge, is constructed as structured representations which necessarily are simpler and contain less information than the world they refer to[74]. This simplification can be very useful for pedagogic purposes. Think for example the taxonomies of the legal systems of the world, or the civil law – common law distinction: they help the novice to orientate in the jungle of theorical legal constructs. Indeed reducing the amount of information to be dealt with in structured representations is useful and human knowledge is based on cognitive structures. The schematization of the world, so as to render it in an ordered (almost geometrical) way is how the scientific spirit works[75]. Still, the overarching concern of this dissertation is to argue that this also has limits, and that at least we should be aware of how these representations structure (and therefore also restrict) the way we think. In other words, what is being asserted and defended is the importance of the local, the particular, the troubling exception that forces us to re-think the structure, or maybe even the paradigm we are in. The general, the universal, the reduction to (stereo) type are criticised – in particular in connection to the nature of legal knowledge. That is, instead of a search for an ever perfectible simple structure, the unknowability of the other and complexity should be embraced as starting point for an epistemological appreciation of legal knowledge.

The inquiry of the epistemological status of legal knowledge is indeed very broad to be dealt with in a journal article. Therefore for the individual papers a more precise way to approach the issue had to be found. Most significantly, I had to find a way of grasping such issues and to hack from the inchoate mass of possible conceptions something to hold on to. This then had to be carved into one thin handle, a line of thought, that would manage to stay afloat on its own. Therefore, the single questions tackled in the papers can be formulated as follows: "How can Levinasian Alterity help comparatists to overcome the conception of knowledge as apprehension?"; "How do the analytical tools influence the knowledge produced?"; and "How is legal pluralism, as a theory of law, better equipped against universalising tendencies?". One cannot help noticing how questions formulated in this way have been formulated after the essays have been

[73] I am grateful to both the pre-examiners for making me realize how this point had to be stated explicitly in order to give a clearer sense of direction to the whole thesis and also to make it more intelligible.

[74] Marie-Laure Mathieu, *Les représentations dans la pensée des juristes* (Paris: IRJS Éditions, 2014), pp. 237 – 265.

[75] *Id.*, pp. 306 – 307.

written. They are not research questions that were formulated before the research was undertaken but deliberately drafted afterwards.

The fourth article focuses on practice and performs comparison. It does this by having a methodological concern and tries to answer the following question: "How can legal comparison be carried out in a way that is context-sensitive and at the same time not stereotyping or essentialising the compared laws?". The answer is looked for by performing the comparison itself. Notwithstanding the fact that the object of comparison is the content of two constitutional courts' decisions, the article's most compelling concern is *how* comparison is performed. This is in line with the overall methodological focus of the dissertation.

As stated above, because of the theoretical nature of the research undertaken, no unequivocal research *question* can be formulated. This is because we are led to assume that for every question there must be an answer, which may be right or wrong, or somehow contain a certain degree of truth. But this does not apply in the realm of interpretation, where the aim is rather to persuade the reader of the solidity of a certain way of looking at something.

3. History of the discipline and state of the art

As mentioned at the outset, the history of legal comparison is particularly interesting as different methodologies have been following one another; at times in consonance with certain philosophical currents and at times in open disagreement with ideas developed both outside and inside legal doctrine. It is therefore interesting to observe how different thought structures underlie the different approaches to comparative legal studies that have succeeded each other in history, such as encyclopaedic aspirations, evolutionist theories, scientific positivism and universalism. Similarly, also post-modern philosophy has influenced the methodology of comparative law. Broadly speaking, the history of methodology can be described as a history of the evolution of paradigms[76]. They are windows through which one can watch the world; windows that define the borders of the visible.

The aim here is not to provide a detailed historical reconstruction but rather to stress the high variability of actual research practices that have been striving to become accepted methodological attitudes within the academic field. That is to say, it will be highlighted how comparative legal studies have been very diverse, disparate even. Furthermore, this chapter is built in a way that should highlight the historicity of the articles presented in the second part of the dissertation or clarify their historical context.

3.1. Illustrious precursors

According to some historians of the discipline, legal comparison boasts illustrious precursors such as Aristotle's *Politics*[77], Plato's *Law*s and Theophrastus' *On Laws*[78]. According to others, those references to foreign rules and institutions are carried out in such an unsystematic and unreflected way that they cannot be considered to be properly

[76] Alessandro Somma, *Temi e problemi di diritto comparato - vol II Techniche e valori nella ricerca comparatistica* (Torino: Giappichelli Editore, 2005); Léontin-Jean Constantinesco, *Traité de Droit Comparé - Tome I Introduction au Droit Comparé* (Paris: L.G.D.J., R. Pichon et R. Durand-Auzias, 1972), pp. 8-9; This has also been claimed by Balázs Fekete in his doctoral dissertation: Paradigms of modern comparative law – toward a new interpretation of the history of comparative law, supervised by professor Zoltán Péteri (Pázmány Péter Catholic University, Budapest) in 2009.

[77] Amari, *Critica di una scienza delle legislazioni comparate*, p. 164; Charles Donahue, "Comparative Law before the Code Napoléon", in *Oxford Handbook of Comparative Law*, eds. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 3-33, p. 20.

[78] Zweigert and Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, p. 48.

comparative[79]. Discordance can be traced also concerning the interest of roman legal scholars for alien legal rules. Some describe them as self-centred and convinced of the superiority of their own law[80]; they downplay the Greek influence on the redaction of the XII Tables[81] and depicting the role of the *praetor peregrinus* in the formation of the *jus gentium* as not having comparative nature but rather being a prudent crystallisation of customs based on the necessities of Mediterranean merchants[82]. Others have tried to show the vastness of the actual influence of Egyptian and Middle Eastern ideas on Roman law[83]. Be that as it may, interest in foreign law alone is necessary but not sufficient for comparison.

A more systematic analysis of foreign law has been carried out by Charles de Secondat, Baron de Montesquieu who, in his *De l'Esprit des Lois*, studies the variability and the relation between social and natural conditions and the law[84]. Because he had an overall coherent approach, and declared that rules of law cannot be treated as abstractions but must be regarded against their background and in the environment in which they are called upon to function, he is considered to be one of the founders of comparative law as a discipline[85]. Nevertheless, in the nineteenth century he received criticism by comparatists for lacking the necessary historical sensitivity that would have allowed him to recognise the right stage of development of the laws he studied[86]. More recently his work has been assessed in comparative legal literature as partisan; defending the *status quo* of the French monarchy as opposed to despotic others far away in time or space[87].

As noble precursors, Heidelberg jurists Paul Johann Anselm von Feuerbach and Eduard Gans still have to be mentioned: in opposition to the historical school, they looked beyond the German experience by displaying rather universalistic aspirations.

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[79] Frédéric Pollock, "Le Droit comparé: Prolégomènes de son histoire", in *Procès-verbaux des séances et documents du Congrès International de Droit Comparé tenu à Paris du 31 juillet au 4 août 1900* (Paris: L.G.D.J. Pichon et Durand-Auzias, 1905), 248-261, p. 249; Walther Hug, "The History of Comparative Law", *Harvard Law Review* 45, no. 6 (1932), 1027-1070, p. 1029.

[80] Mario Rotondi, "diritto comparato", in *Novissimo Digesto Italiano*, eds. Mariano D'Amelio and Ernesto Eula, Vol. V (Turin: UTET, 1957), 823-826, p. 823; Pollock, *Le Droit comparé: Prolégomènes de son histoire*, 248-261, p. 250.

[81] but see Henri Sumner Maine, *Ancient Law* (London and New York: Everyman's Library, 1965 [1861]), p. 15.

[82] Pollock, *Le Droit comparé: Prolégomènes de son histoire*, 248-261, p. 253; Hug, *The History of Comparative Law*, 1027-1070, p. 1030; Donahue, *Comparative Law before the Code Napoléon*, 3-33, p. 22.

[83] Pier Giuseppe Monateri, "Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"", *Hastings Law Journal* 51, no. 3 (2000), 481-555.

[84] Charles Montesquieu, *Esprit des lois* (Paris: Typographie de Firmin Didot Frères, 1849), p. 8.

[85] Harold C. Gutteridge, *Comparative Law, An introduction to the comparative method of legal study and research*, 2nd ed. (Cambridge: Cambridge University Press, 1949), p. 12.

[86] Amari, *Critica di una scienza delle legislazioni comparate*, pp. 226–227; Pollock, *Le Droit comparé: Prolégomènes de son histoire*, 248-261; Eugen Ehrlich, "Montesquieu and Sociological Jurisprudence", *Harvard Law Review* 29 (1916), 582-600, p. 582. As it is often the case, this criticism actually reveals quite a lot about those who formulated it, maybe even more than about the target of the criticism.

[87] Robert Launay, "Montesquieu: the Specter of Despotism and the Origins of Comparative Law", in *Rethinking the Masters of Comparative Law*, ed. Annelise Riles (Oxford and Portland, Oregon: Hart Publishing, 2001), 22-39.

Famously, Feuerbach called for a *Universal-Jurisprudenz* and studied both the similarities and differences of laws and customs in near as well as faraway countries. He thus showed an interest in all kinds of manifestations of law without bias in favour of legislated rules. In addition, he aimed to improve knowledge (with a certain encyclopaedic vocation) rather than improve national law[88]. And so the way for the subsequent comparative legal research opened up. In the meantime, France had promulgated its *Code Civil*, and this indeed aroused the interest of private legal scholars abroad[89]. Overall, by the first half of the nineteenth century law had come to be considered a human construct and one that displays notable local variabilities. As these variabilities became more apparent because the territories of applicability were clearly defined, also legal comparison started to be conceivable. As a result, comparative law started to affirm itself as an independent academic discipline in modern sense during the second half of the nineteenth century, as is proved by the flourishing of scholarly societies and academic publications[90].

3.2. Legal ethnology

As legal ethnology is here meant the legal comparative school of thought which developed mostly in Germany (where it was called *Rechtsethnologie*), but saw representatives also elsewhere, for example in England and Italy. It manifested interest for normative apparitions of all sorts, particularly in very different and often colonised societies, and it was strongly influenced by recent discoveries in biology and in natural sciences as it considered Darwin's evolution theory to be applicable to the evolution of regulatory regimes[91]. This was explained as being the result of some universal natural features of

[88] Von Feuerbach, *Blick auf die deutsche Rechtswissenschaft*, 152-177.

[89] Already in 1808 the first German version was published of the *Handbuch des französischen Zivilrechts* by Karl Salomo Zacharie. Interestingly, the book was then translated into French by Charles Aubry and Frédéric Charles Rau and became extremely successful in France. French jurists read this study of their private law not in the form of an exegesis of positive law but as a systematised exposition that looks for the historical and philosophical foundation of the institutions. In a way, they could experience a de-placement of perspective, seeing the familiar as foreign, which is also a typical experience in comparativism. Constantinesco, *Traité de Droit Comparé - Tome I Introduction au Droit Comparé*, pp. 83 -85.

[90] The first journal, the Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes, appeared in Germany in 1823, which was followed in 1834 by the French journal Revue étrangère de législation. The first scholarly society was founded in Paris in 1869. It was named Société française de législation comparée and published the Annuaire de législation étrangère (a mere French translation of foreign statutes from the previous year) and the Annuaire de législation française. The Revue de droit international et de législation comparée was printed in Belgium in the same year. The Zeitschrift für vergleichende Rechtswissenschaft was founded in 1878 in Stuttgart. In Spain the Revista de derecho internacional, legislación y jurisprudencia comparadas appeared in 1884. In Germany various associations were constituted: the Gesellschaft für vergleichende Rechts- und Staatswissenschaft in 1896, the Internationale Vereinugung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre in 1894, each publishing their own periodicals. In London in 1869 the Society of comparative legislation was founded and in 1895 followed the Society of Comparative Law, which issues the Journal of the Society of Comparative Law. In Italy the Rivista di diritto internazionale e di legislazione comparata and the Rassegna di diritto commerciale e straniero were printed for the first time.

[91] Constantinesco*, Traité de Droit Comparé - Tome I Introduction au Droit Comparé*, pp. 114–120.

human beings, as similar forms of life would produce similar institutions according to the same cause-effect relation. The whole of humanity would be thus guided by the same civilising impulses, and there would be "laws on the development of laws"[92] to be discovered through the comparative study of legal systems "at different stages of development".

Hence, according to Sir Henry Sumner Maine, for example: "As societies do not advance concurrently, but at different rates of progress, there have been epochs at which men trained to habits of methodical observation have really been in a position to watch and describe the infancy of mankind."[93] He believed the evolution of humankind to be uniform and developed his well-known theory according to which in more primitive societies the position of the individual is determined by his social status (mainly given by the family), while in more advanced ones by freely stipulated contracts[94]. On the basis of this understanding of the evolution of laws he establishes his research agenda as follows:

> We shall examine a number of parallel phenomena with the view of establishing, if possible, that some of them are related to one another in the order of historical succession.[..] We take a number of contemporary facts, ideas, and customs and we infer the past form of those facts, ideas, and customs not only from historical records of that past form, but from examples of it which have not yet died out of the world, and are still to be found in it[95].

Unilineal theories of evolution are spread through the *Zeitschrift für vergleichende Rechtswissenschaft*, founded in Stuttgart in 1878 by Franz Bernhöft and Georg Cohn, whose opening article states the following: "so comparative legal studies will teach us [...] how in the end, even without actual connection, the legal systems of different nations evolve according to the same laws of development"[96]. Similar ideas are propagated also through the *Jahrbuch der internationalen Vereinigung für vergleichende Rechtswissenschaft*, first published in 1895. This approach is defended even when it leads to forcing the material into a Procustean bed in order to attain a positive result in proving the original hypothesis. For example Albert Hermann Post wrote:

> the comparative-ethnological research will reach [...] a knowledge of the causes of the circumstances of the life of populations through the assemblage of similar

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[92] For example the Italian comparatist Emerico Amari would write explicitly about the construction of a "biology of laws". Amari, *Critica di una scienza delle legislazioni comparate*, p. 216.

[93] Maine, *Ancient Law*, p. 71.

[94] *Id.*, pp. 99–100.

[95] Henri Sumner Maine, *Village-Communities in the East and West* (New York: Henry Holt and Company, 1880), pp. 6-7.

[96] "So will also die vergleichende Rechtswissenschaft lehren, [...] wie endlich auch ohne jede thatsächliche [sic] Verbindung die Rechtssysteme verschiedener Nationen sich nach gemeinsamen Entwicklungsgesetzen fortbilden". Franz Bernhöft, "Über Zweck und Mittel der vergleichenden Rechtswissenschaft", *Zeitschrift Für Vergleichende Rechtswissenschaft* 1, no. 1 (1878), pp. 36–37.

> or kindred ethnic manifestations, wherever and whenever in the world they may have appeared, and through the drawing of inferences about their causes, which will also be similar and kindred. In this sense it is an a-historical [kind of research][97].

These ideas were still represented at the Paris Congress in 1900 where Joseph Kohler expressly advocates the study of the "identical civilizing forces" pushing humanity[98].

Even though intrinsically flawed due to being founded on such ideas, which moreover implied that the western systems were at the very top of the evolution line, this current manifested interest in very different conceptions of the legal and necessarily had to have a broader understanding of the definition of law. This puts it in opposition to the paradigm established later, which focused only on legislated private law, thus drastically reducing the scope of the discipline. It has to be acknowledged though that the broadness of the interests of legal ethnologists, expanding in space and time, was actually due to their encyclopaedic aspirations and universalist tendencies rather than to a sensibility for the cultural context and respect for diversity.

3.3. Paris Congress

At the 1900 Paris Congress there had been discussions about the ethnological approach, and in particular Edouard Lambert, one of the organisers, who advanced strong criticisms in regard to its circularity between premises and conclusions and denounced as simply erroneous its fundamental presupposition, namely the unilineal theory of evolution. He states that there is no singular "natural" evolutionary path, but that rather the social life of populations may follow very different trajectories[99]. With a certain dose of "intellectual dirigisme"[100] Raymond Saleilles, another prominent organiser, posed the scientific and positivist framework for the new paradigm of comparative law to be pursued starting from then on. "*[T]out est à faire*"[101] he proclaimed in his report to the organisers. He continued establishing the goals of the congress as follows: 1) the definitions of the methods to realise the three functions of comparative

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[97] "die vergleichend-ethnologische Forschung will [...] zu einer Erkenntnis der Ursachen der Thatsachen des Völkerlebens gelangen, indem sie gleichartige oder ähnliche ethnische Erscheinungen, sie mögen wo und wann immer auf der Erde auftreten, zusammenstellt und aus ihnen auf gleichartige oder ähnliche Ursachen Rückschlüsse macht. Sie ist also durchaus unhistorisch". Albert Hermann Post, *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis* (Oldenburg: Schulze, 1880), p. 13.

[98] Josef Kohler, "De la methode du droit comparé ", in *Procès-verbaux des séances et documents du Congrès International de Droit Comparé tenu à Paris du 31 juillet au 4 août 1900* (Paris: L.G.D.J. Pichon et Durand-Auzias, 1905), 227-237, p. 228.

[99] Lambert, *Séance Du 1er Aout* , 26-60, pp. 33–35.

[100] Attitude defined as such by Roderick Munday, "Accounting for an encounter", in *Comparative Legal Studies: Traditions and Transitions*, eds. Pierre Legrand and Roderick Munday (Cambridge: Cambridge University Press, 2003), 3-30, p. 3.

[101] Saleilles, *Rapport présenté* à *la commission d'organisation sur l'utilité, le but et le programme du congrès*, 9-17, p. 14.

law; namely the documentation of foreign laws, the comparison and the adaptation in view of transplant; 2) the identification of the role of comparative law as a method of teaching; 3) the research of the right way of using in practice the knowledge produced through legal comparison, respectively by legislators, judiciaries and in the drafting of international treaties; and 4) the organisations of the means to obtain information about foreign law[102]. Also Lambert had been convinced of the fact that one of the main aims of comparison is legal unification through the identification of what in modern terms would be called common core[103]. Moreover, he asserted the necessity of focusing mainly on the legislation of Latin and Germanic countries, considering even common law not to be comparable with civil law and thus taking into consideration only private law[104].

The focus on positivised private law in the view of unification indeed became the standard for the new century and one that required a lot of ink to be spilled in order to be overcome. This cannot be understood without connecting it to the conditions in Europe at the opening of the twentieth century, which were characterised by optimism and belief in progress. Legislated private law designated a manageable amount of information so that also the comparative discipline could consider itself as partaking the science-ness that guaranteed credibility for the kind of knowledge considered valuable and reliable at the time.

3.4. Complexification of the idea of law for the purposes of comparison

The theoretical discourse between comparatists became more articulated after the Second World War. Among the scholars who fled the Nazi-regime to the United States and were confronted with a new legal environment[105] the figure of Ernst Rabel deserves to be mentioned. He decided to study conflict of laws and therefore his attention focused on the *fact* to which private international law applies. There is a *factual situation* to which substantial dispositions of at least two legal orders are applicable, and comparative law can be useful to explain how different systems may give different legal qualifications of the same fact[106]. His way of doing comparison moved away from abstract legal categories as positivised by legislators and focused rather on concrete legal solutions to particular problems[107]. The 1960-61 Cornell Seminars, directed by

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[102] *Ibid.*

[103] Lambert, *Séance du 1er aout* , 26-60, pp. 49–50.

[104] *Id.*, pp. 36 – 39.

[105] Vivian Grosswald Curran, "Cultural Immersion, Difference and Categories in U.S. Comparative Law", *American Journal of Comparative Law* 46, no. 1 (1998), 43-92, pp. 66–78.

[106] David J. Gerber, "Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language", in *Rethinking the Masters of Comparative Law*, ed. Annelise Riles (Oxford and Portland, Oregon: Hart Publishing, 2001), 190-211, p. 202.

[107] Michele Graziadei, "The Functionalist Heritage", in *Comparative Legal Studies: Traditions and Transitions*, eds. Pierre Legrand and Roderick Munday (Cambridge: Cambridge University Press, 2003), 100-130, p. 105.

Rudolf Schlesinger, also used a factual approach: various cases (factual situations) were to be solved by jurists according to their respective legal systems in order to identify if the operational rules were actually similar regardless of their systematic qualification. This constituted the first encompassing study of the common core on the formation of contracts[108].

Some of these ideas are then to be found also in the much discussed functionalist method. As there are as many definitions of functionalism as there are functionalists (if not more)[109], here I will limit myself to reproducing the definition of functionality formulated in the prominent textbook by Zweigert and Kötz:

> The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function. [...] The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results[110].

This last fundamental assumption has been also called *praesumptio similitudinis*[111]. Brutally leaving aside the –however compelling- debate or cacophony of criticism and defences of (various versions of) functionalism, only one aspect of this definition will be spotlighted here. The approach proposed can be understood as a further step in the complexification of the concept of law because, firstly, it focuses on remedies and on the effects of rules rather than on the rules themselves. Secondly, it rests on a conception of law as related to society even though still separated from it and as an instrument to reach certain social objectives. In this way at least the word "society" and the idea that the kind of interaction that law has with it is relevant for the com-

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[108] Rudolf Schlesinger, ed., *Formation of Contracts, a Study of the Common Core of Legal Systems* (Dobbs Ferry, New York; London: Oceana Publications; Stevens & Sons, 1968).

[109] For an attempt of systematisation see Ralf Michaels, "The Functional Method of Comparative Law", in *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 339-382.

[110] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 34 ["Das methodische 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. Unvergleichbares kann man nicht sinnvoll vergleichen, und vergleichbar ist im Recht nur, was dieselbe Aufgabe, dieselbe Funktion erfüllt. [...] Rechtsvergleichende Grunderfahrung [ist], dass zwar jede Gesellschaft ihrem Recht im wesentlichen die gleichen Probleme aufgibt, dass aber die verschiedenen Rechtsordnungen diese Probleme, selbst wenn am Ende die Ergebnisse gleich sind, auf sehr unterschiedliche Weise lösen". Zweigert and Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, p. 33]

[111] Konrad Zweigert, "Die "Praesumptio Similitudinis" als Grundsatzvermutung rechtsvergleichender Methode", in *Inchieste di diritto comparato 2 -- Scopi e metodi del diritto comparato*, ed. Mario Rotondi (Padua: Cedam, 1973), 734-760, p. 737.

paratist are re-introduced in comparison after the strict positivist paradigm imposed at the Paris Congress.

More and more the focus is broadened; not only is legislation taken into account but also empirical aspects of law are considered in their social contingencies[112]. This shift cannot be said to make things easier. On the contrary, in the introduction to the second volume of the International Encyclopaedia of Comparative Law (a titanic collection that aims to compare the private law of the systems of the world), René David admits the difficulties in finding a common definition of law that would allow comparison[113]. He recognises that comparing the rules which are in fact enforced might lead to considering elements which in very different experiences are not considered to be law. The functions of law are so diverse that "the task of comparison is likely to be made difficult, or even falsified to some degree"[114].

In order to make sense of the variability of the very concept of law some comparatists, relying on developments in linguistics and anthropology, try to set as their object of interest the structure underlying the legal system by considering all of its various components beyond the official pyramid of sources of law[115]. For example, in 1979 Sacco elaborated on his theory of formants: those are various types of rules and propositions coexisting in the same legal order. They are legal and normative elements stemming from different sources that are susceptible to having different influence on the resulting system in action. It is exactly this comparatively different role played by the various formants that differentiate legal systems from one another. So for example, legislation, judicial decisions, scholarship, customs and cryptotypes[116] are all formants. Those can be further dissected into principle declarations and operational rules, *rationes decidendi* and *obiter dicta* and so on. Each of these has a different impact on the living law, and the comparatist has to take them all into account. In this way, she will be able to qualify the system as being more or less compact; that is to say to assess how much inconsistency exists among different formants[117].

Further complexifications of the object of comparison, that is to say of all the elements that the comparatist has to take into account, are brought about by various authors who argue in favour of a deepening of the focus on jurisprudential concepts. This comparative jurisprudence turns towards the intellectual and philosophical

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[112] René David, *Les avatars d'un comparatiste* (Paris: Economica, 1982), p. 47. See also Jorge L. Esquirol, "René David: At the Head of the Legal Family", in *Rethinking the Masters of Comparative Law* (Oxford and Portland, Oregon: Hart Publishing, 2001), 212-237.

[113] René David, "The different conceptions of the law", in *International Encyclopedia of Comparative Law - The legal systems of the world - their comparison and unification*, Vol. II (Tübingen and The Hague: Mohr Siebeck Verlag and Mouton, 1975), p. 3.

[114] *Id.*, p. 10.

[115] Constantinesco, *Traité de Droit Comparé - Tome I Introduction au Droit Comparé*, pp. 213–221.

[116] Defined as rules that exist and that are relevant but which the participant in the legal system does not formulate explicitly; and even if attempted cannot be put easily into words. Rodolfo Sacco, "Crittotipo", in *Digesto delle discipline privatistiche - sezione civile* (Turin: Utet, 1990), p. 39.

[117] Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 1-34, pp. 23–25.

foundations and cognitive structures which underpin rules and institutions[118]. Others have argued for the importance of the cultural context[119]. Overall, the elements to be taken into account have broadened to such an extent that the amount of information is unmanageable for one single researcher, and many have recognised the necessity of interdisciplinary team work[120].

3.5. Complexification of the position of the comparatist

It was not until 1985 that also the position of the comparatist herself was put under scrutiny. Frankenberg's "Critical Comparison" article led the path[121], allowing for an encounter between theory of comparison and politicized jurisprudential theories such as those advanced by the Critical Legal Studies[122]. The 1996 Utah Symposium "New Approaches to Comparative Law" thematised the political dimension and the non-neutrality of the comparative act: comparatists themselves were described as "people with projects, not texts written by methods"[123] and comparative law as "invasive political enterprise with considerable practical impact"[124]. The symposium openly criticised, for example, the contribution to hegemonic practices such as (more or less) forced transplants in exchange for financial support or other forms of economic partnerships. The role of the comparatist legal scholar is condemned in the reproduction of structures of domination. Alongside with the systematic inclusion of the dimensions of power within comparativism, CLS has also denounced its traditionally (at least since the Paris Congress) West-centred perspective.

Since then various voices have been raised against the ethnocentrism intrinsic in mainstream comparative approaches that invariably prove the superiority of the domestic system and its values in comparison to foreign ones. This might also be the result of the unacknowledged influence of the cultural background and more specifically of the legal pre-understanding of western scholars. This has been thematised extensively

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[118] William Ewald, "Comparative Jurisprudence (I): What was it like to try a rat?", *University of Pennsylvania Law Review* 143, no. 6 (1995), 1889-2149; William Ewald, "The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"", *The American Journal of Comparative Law* 46, no. 4 (1998), 701-707; Catherine Valcke, "Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems", *The American Journal of Comparative Law* 52, no. 3 (2004), 713-740; Jaakko Husa, "Nicht nur Juristische Auslandsforschung: Rechtsvergleichung als Rechtsphilosophie ", *Rechtstheorie* 40 (2009), 1-20.

[119] Discussed below in apposite sub chapter 4.3.

[120] Jaakko Husa, "Interdisciplinary Comparative Law - Between Scylla and Charybdis?", *Journal of Comparative Law* 9, no. 2 (2014), 12-26.

[121] Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 411-455.

[122] For a sympathetic criticism of the encounter see Ugo Mattei, "Comparative Law and Critical Legal Studies", in *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 815-836.

[123] Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 545-638, p. 548.

[124] Günter Frankenberg, "Stranger than Paradise: Identity & Politics in Comparative Law", *Utah Law Review* (1997), 269-274.

also by Teemu Ruskola in his publications on legal orientalism[125]. By applying Edwards Saïd's literary and postcolonial theory to legal scholarship, he illustrates that western discourses about the orient have contributed to the creation of the identity of the West as opposed to an invented East through the "projection onto the Oriental Other of various sorts of things that 'we' are not"[126]. The other is thus described as static, irrational and exotic in order to qualify the self as a dynamic, rational, master of one's destiny.

Once such discursive domination has been unmasked, what different approach can be adopted? Some, optimistically, have declared comparative law to be the cure of its own ethnocentric disease[127]. The mission of the comparatist is reset, and her inquiries "should pursue the ultimate goal of overcoming prejudice and stereotyped notions of other cultures and legal systems"[128]. Ruskola, realistically, recognises that preconceptions, understood in the Gadamerian sense, have to be managed but cannot be eliminated. The idea that one can free oneself from them is a prejudice of the Enlightenment's, and on the contrary preconceptions are necessary for understanding: "there is no innocent knowledge to be had, and we have little choice *but* to Orientalize"[129]. He advances the idea of an ethics of orientalism, which is an awareness of the fact that the categories we employ always impose limits of what we can discover in the world.

Along similar lines, also Legrand has repeatedly stressed how the comparatist cannot claim objectivity, which is itself a culturally constituted concept. To be dismissed are also all aspirations of truth, as all one can do is defend an ever perfectible and contestable interpretation and assume responsibility for such invention[130] of the foreign law compared. Finally, also the idea of understanding has to be reshaped, as the comparatist will never be able to fully dismiss her preconception or fully grasp the other in its otherness[131].

Overall, while the complexification of the concept of law has now reached a very high level of acceptance, the same cannot be said for the complexification of the position of the comparatist. Indeed the more easily spottable political implications of legal comparison have been unveiled, as have the parochialism and ethnocentrism of certain scholarship. Still, not many are willing to stop pondering on the epistemological position of the comparatist as a knower[132]. In Morin's words, while the "restricted complexity" of legal comparison is nowadays an accepted standard, its "general complexity"

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[125] Teemu Ruskola, "Legal Orientalism", *Michigan Law Review* 101 (2002), 179. Ruskola's theorisations are based on the way Chinese law has been studied- and misrepresented- in American legal scholarship.

[126] *Id.*, p. 209.

[127] For example Nora Demleitner, "Combating Legal Ethnocentrism: Comparative Law Sets Boundaries ", *Arizona State Law Journal* 31 (1999), 737-762.

[128] *Id.,* p. 739.

[129] Ruskola, *Legal Orientalism,* 179, p. 222.

[130] Invention is intended both as creation and as finding.

[131] Lastly in Legrand, *Negative Comparative Law*, 405-454, pp. 432-437.

[132] Indeed exceptions exist; see for example the attention devoted by Samuel to the relationship between *intellectus* and *res* Geoffrey Samuel, "Taking Methods Seriously (Part Two)", *Journal of Comparative Law* 2, no. 2 (2007), 210-237, p. 211.

is a bit less thematised. Hence, while the former refers "to [legal] systems which can be considered complex because empirically they are presented in a multiplicity of interrelated processes, interdependent and retroactively associated"[133], the latter actually requires "an epistemological rethinking, that is to say, bearing on the organization of knowledge itself"[134]. And the methodological debate within comparison seems to have digested only the first one. But the two actually travel together: and this is the point that I have tried to make with the articles "Legal Pluralism as a Theoretical Programme" and "Complex Legal Pluralism". Legal pluralism is taken to represent a complexified understanding of law beyond black letter, monist pyramids. Both articles argue that such a broadened understanding of law necessarily requires a rethinking of the role of the comparatist: the field of study gets so broadened that the comparatist herself is included in it. This is the historical conjuncture where my writings take place.

[133] Morin, *Restricted Complexity, General Complexity*, p. 6.
[134] *Ibid*.

4. Cohesive side themes

This chapter introduces the three underground issues in comparative legal studies that traverse the articles. Assuredly, only the first book chapter relies extensively on comparative legal literature, while the three articles build mostly on other kinds of sources. Still, their arguments are very much topical for the theory of comparative law as well, and the aim of this chapter is to highlight the connection. Otherness, pluralism and context are here presented in order to clarify the meaning they are given in this dissertation, as each of them is so abstract that they could be understood and used in different ways. This chapter discusses those terms and advances one possible connotation for each of them. Altogether, the way they are used and understood here brings them very close to each other: the conception of otherness that is put forth is a prerequisite for the idea of pluralism, which in turn displays certain key features which are important for the study of law in context. Given the meaning they acquire, these three terms could almost be considered to be three faces of the same phenomenon or more specifically the aspects of the same sensitivity towards legal comparative research. As already stated above, this dissertation is a reflection on theoretical and methodological issues in comparative legal studies, with the focus set on fundamental matters of concern. No particular technique of comparison is here proposed as being better that others, but undeniably there is a certain normativity instilled at the underground level of the three issues presented. That is to say, while each article aims at making one little disparate contribution, the dissertation as a whole can be understood as advancing a certain primal attitude. This attitude, almost an ethic of research, is grounded on a special awareness of the other law and of one's own scholarly work; an awareness which builds on a certain understanding of the three core themes.

4.1. Otherness

"Do we really want to wade into the swamp of the philosophy of 'otherness'?"[135] ironically asks James Whitman. I am afraid so. Otherness is the first underground issue which influences legal comparison. Vivian Curran states it clearly: "Comparison involves understanding one entity or domain in terms of another entity or domain. The comparative enterprise is thus permeated by the other, the inevitably different"[136].

[135] James Q. Whitman, "The neo-Romantic turn", in *Comparative Legal Studies: Traditions and Transitions*, eds. Pierre Legrand and Roderick Munday (Cambridge: Cambridge University Press, 2003), 312-344, p. 314.
[136] Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 43-92, p. 45.

Further, otherness lies at the very core of the comparative enterprise, as it is something which differentiates it intrinsically from the rest of legal scholarship, and in a way it is the *proprium* of comparative law. It is not by chance that the first journal of comparative law was published in Heidelberg, Germany, 25 years after the introduction of the French civil code[137]. For the first time, the otherness of the other law became remarkable. Despite the fact that during the period of *ius commune* there have been local customs which were developed, rooted and most of all different, the frontiers were not so clear; the borders of the territory affected by the application were not so pronounced as they would later become with the promulgation by Napoleon of a unified private law for France. The recognition of otherness became unavoidable, and comparison became possible. Some conception of otherness is necessarily mobilised when undertaking a comparison, and according to the kind of idea of otherness adopted – in a more or less conscious manner-, the jurist will conceptualise the other laws differently. A subtle consciousness of otherness could consider comparing two customary laws of eighteenth century Europe, but at that time all the symbolic force of the French civil code was necessary in order to let the other law be perceived as other and therefore comparable.

4.1.1. Otherness as inferiority

The issue of the Other, Otherness or Alterity is one of the central themes of post-modern philosophy due to the particular attention it devotes to the experience of plurality and of differences[138]. For a long time, European thought has been trapped in an understanding of the concept that can be explained in a simplified way by starting with the etymology of the word. This etymology limits alterity to a semantic field and to an imaginary realm which are purely negative, where the other is thought only in opposition to the one[139]. The word "other" namely stems from the Old English adjective *oþer* "the second", which is also used as a noun and pronoun meaning "one of the two, other"[140]. The original Latin word *alter* is composed of the root **al-* meaning "beyond" and by the Indo-European suffix **-(t)ero-*, which is an adjectival comparative suffix carrying a meaning of contrast and of specification[141]. Otherness conveys thus the idea of an opposition between two elements thought of as alternatives. Moreover, "other" refers to the second component, the less evident and common one, which can be understood as a copy of the first, its shadow, its replacement, whose primary function is to contribute to the definition of the first[142].

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[137] Heinrich Albert Zachariä, "Über den Zweck dieser Zeitschrift: Statt einer Vorrede", *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* 1 (1829), 1-43.

[138] Jeffrey Koski, "Alterity", in *Encyclopedia of Postmodernism*, eds. Victor Taylor and Charles Winquist (London: Routledge, 2001), 8-9.

[139] Francesco Paolo Ciglia, "Alterità", in *Enciclopedia Filosofica*, ed. Virgilio Melchiorre, Vol. I (Milan: Bompiani, 2006), p. 306.

[140] See entry "other" in Klein, *A Comprehensive Etymological Dictionary of the English Language*, p. 1102.

[141] Andrew L. Sihler, *New Comparative Grammar of Greek and Latin* (Oxford: Oxford University Press, 1995), p. 364.

[142] Ciglia, *Alterità*, p. 306.

In such a manner for example the conceptual categories available to Europeans at the moment of their confrontation with the "radical foreignness"[143] of the Amerindians were thus limited: the recognition of otherness implied the necessity of the establishment of a hierarchy, the differentiation between a one-first and an other-second, while only Christian universalism opened the way to equality and avoided discrimination[144]. In European minds, only similarity seemed to imply recognition. A relationship could be established by only starting with common elements. Conversely, alterity and difference were indissolubly bound to a ranking as if they manifested themselves in a situation where there is already a classificatory rationality at work. The conceptual categories for thinking otherness were organised around the parallelism between universalism/respect *versus* otherness/discrimination. Interestingly, Curran advances the hypothesis that also the generation of comparative lawyers that fled Nazi persecution held the view that perceived difference, otherness, would be *inextricably* linked to exclusion, discrimination and even annihilation[145]. In contrast, common cores between (legal) cultures would facilitate communication, further justice and prevent future holocausts[146]. Traumatised by their personal experience, they conceived this parallelism as universal, and while focused on furthering the indeed laudable goal of peaceful coexistence, they considered a structure of thought that actually needs rethinking as immutable.

The parallelism universalism/respect *versus* otherness/discrimination, based on an understanding of otherness that includes in the concept a sort of depreciation and belittlement, is familiar to jurists as in its shortcomings it is analogous to the principle of formal equality. General and abstract rules do not let the singularity of each case emerge and can on an individual basis cause injustice if not set aside, adjusted or at least creatively interpreted. As Adorno wrote: "In law the formal principle of equivalence becomes the norm; everyone is treated alike. An equality in which differences perish secretly serves to promote inequality"[147]. Hence the need for the correctives of substantial equality. Come to think of it, the otherness of each single case (or for that matter each single cat) cannot be held within the concept (of "Cat") as reality is made of individual exceptions and not of universal concepts. Those are but a framework situated in the thinking mind. This can be extended also to the concept of law in general. The article "Complex Legal Pluralism" shows the limitations of general theories of law, that is, those theories about law that claim to be ultimate: they simplify socially variable phenomena and forget their own situatedness[148]. As argued also in "Legal Pluralism as a Theoretical Programme", the impossibility of a universally valid definition of law is due both to the extreme variability

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[143] Tzvetan Todorov, *La conquête de L'Amérique - La question de l'autre* (Paris: Éditions du Seuil, 1982), pp. 193-204.

[144] for more examples of the monist model see Pierre Legrand, "The same and the different", in *Comparative Legal Studies: Traditions and Transitions*, eds. Pierre Legrand and Roderick Munday (Cambridge: Cambridge University Press, 2003), pp. 257–58.

[145] Vivian Grosswald Curran, "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives", *American Journal of Comparative Law* 46, no. 4 (1998), 657-668, p. 666.

[146] *Id*., p. 667.

[147] Theodor Adorno, *Negative Dialectics*, trans. E. B. Ashton (London: Routledge & Kegan Paul, 1973), p. 309.

[148] Patrignani, *Complex Legal Pluralism*, 19-33, pp. 22–24.

of the legal phenomena worldwide and to the limitation of labelling concepts[149]. Empirical phenomena do not fit into analytical categories in a one-to-one manner, and the multiplicity of the real cannot be forced into one forever imperfect definition. Concepts are necessarily imprecise and incomplete: and this applies also to any definition of law. As a consequence, the criticism to the shortcomings of formal equality and to the universality-leads-to-respect-while-otherness-to-discrimination thought construction can be extended to conceptual thought overall, which instead attributes identity and overlooks (when not repressing) otherness, differences and particularities[150]. A rethinking of Otherness seems to require a reconsideration of the whole way of thinking.

4.1.2. Otherness as primordial

And yet a rethinking of Otherness is needed, possible and has happened already within the possibilities allowed by conceptual thought and human language. A chiasm within the parallelism mentioned above can be drawn. Alterity can be thought of as preliminary to all hierarchical ordering and universalism criticized for its monopolistic tendencies. For the sake of clarity, in the following I will be using the word "alterity" to refer to this renewed understanding of otherness, which has been introduced by the philosophy of Emmanuel Levinas. He proposes the grounding of respect in the recognition of alterity (and not in the commonalities) and denounces the uniformity imposed by universalism. In order to understand how he came to such ideas, those have to be put into historical and intellectual context.

Levinas developed the extension of the possible ways of thinking about the Other as a critique of Edmund Husserl and Martin Heidegger[151]. For Husserl, the meeting of the other is firstly a perception of his corporeality and secondly an acknowledgment of his being analogous to the self. Husserlian intersubjectivity does not trigger a privileged relation to the other, and the self remains basically isolated[152]. Phenomenology, being a philosophy which raises the question concerning the other uniquely in relation with the issue of the constitution of the world, remains necessarily stuck in a conception of the other as *Fremdich*, analogous of the self and as a foreign me[153]. This impasse is not overcome by Heidegger either, even though the Dasein is not considered as separate, and on the contrary he is never fully separated from the others. Because he is thrown into the world as the others, the Self belongs to the Others[154]. But in this way the Oth-

[149] Patrignani, *Legal Pluralism as Theoretical Programme*, 707-725, p. 713.

[150] Vincenzo Costa, *Alteritá* (Bologna: Il Mulino, 2011), p. 40.

[151] Rudolf Bernet, "Levinas' s critique of Husserl", in *The Cambridge Companion to Levinas*, eds. Simon Critchley and Robert Bernasconi (Cambridge: Cambridge University Press, 2002), p. 87.

[152] Emmanuel Levinas, *Trancendance et Intelligibilité - suivi d'un entretien* (Geneva: Éditions Labor et Fides, 1984), p. 40. See also Emmanuel Levinas, *Totalité et Infini - Essai sur l'Éxteriorité* (The Hague: Nijhoff, 1961), p. 185.

[153] Michael Theunissen, *Der Andere - Studien zur Sozialontologie der Gegenwart* (Berlin: de Gruyter, 1965), p. 257.

[154] "„Die Anderen" besagt nicht soviel wie der ganze Rest der Übringen außer mir, aus dem sich das Ich heraushebt, die Anderen sind vielmehr die, von denen man selbst sich zumeist nicht unterscheidet, unter denen man auch ist". Martin Heidegger, *Sein und Zeit*, 3rd ed. (Halle: Max Niemer Verlag, 1931), p. 118.

ers only end up serving in the development of the argument leading to *das Man*[155]. This is the criticism advanced by Levinas to the German philosopher: "the relation to others is posed by Heidegger as the ontological structure of the Dasein: it plays virtually no role in either the drama of being or in the existential analytic. All the analyses in *Sein und Zeit* proceed either towards the impersonality of everyday life, or for the isolated Dasein"[156]. The Dasein repeats the autarky of a self-constituting ego.

If on the one hand Levinas' conception of alterity can be understood as a correction of the solipsism that phenomenology had not been able to exceed, then on the other hand also the influence of the philosophy of dialogue by Martin Buber should not be forgotten[157]. The philosophy of dialogue considers the question of the relation to the other as *the* primary problem whose reach is the broadest[158]. It is the dialogical life that gives a foundation to ontology[159]. Actually, in a series of lectures presented in 1946 and 1947 at the Collège Philosophique, Levinas contrasts his conception of the I-Thou relation to the one of Buber[160]. He underlines the fact that, according to Buber, it consists of a reciprocal relationship, which implies that it could become a spiritual friendship without ethical connotations. For Levinas, inasmuch as Buber suggests that we can know the other and form a community with him, he expresses a concept that is too similar to the enclosure of the Other into the Same. While Buber holds that the I-Thou relation is reciprocal, Levinas underlines its asymmetry. The former theorizes a relation which leads to knowledge and therefore gets closer to the relation I-that (from a subject to a thing). The latter, on the contrary, considers the relationship to the other as pre-original, which means before any knowledge, before the *cogito*[161]. Later on, however, Levinas recognized Buber's influence on him because of the importance accorded to the dialogical relation, its phenomenological irreducibility and its ability to form an autonomous order[162].

This is thus the tradition to which Levinas belongs to, the background against which he developed his conception of alterity, which is presented in the book chapter "Alterity according to Emmanuel Levinas and Comparison of Laws". As illustrated there, it is

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155 *Id.*, p. 126.

156 "La relation avec autrui est certes posée par Heidegger comme structure ontologique du Dasein: pratiquement, elle ne joue aucun rôle ni dans le drame de l'être, ni dans l'analytique existentiale. Toutes les analyses de Sein und Zeit se poursuivent soit pour l'impersonnalité de la vie quotidienne, soit pour le Dasein esseulé". Emmanuel Levinas, *Le temps et l'autre* (Paris: P.U.F., 1983), p. 18. See also Theunissen, *Der Andere - Studien zur Sozialontologie der Gegenwart*, p. 172; and also Jean-Luc Marion, "The final appeal of the subject", in *Deconstructing Subjectivities*, eds. Simon Critchley and Peter Dews (Albany: State University of New York Press, 1996), p. 90.

157 Agata Zielinski, *Levinas - La responsabilité est sans pourquoi* (Paris: P.U.F., 2004), p. 11.

158 Emmanuel Levinas, "Martin Buber und die Erkenntnistheorie", in *Martin Buber*, eds. Paul Arthur Schlipp and Maurice Friedman (Stuttgart: Kohlhammer, 1963), pp. 122–23.

159 Theunissen, *Der Andere - Studien zur Sozialontologie der Gegenwart*, p. 258.

160 Levinas, *Le temps et L'autre*, p. 89.

161 Stephan Strasser, "Buber and Levinas: Philosophical Reflections", in *Levinas & Buber, Dialogue & Difference*, eds. Peter Atterton, Matthew Valarco and Maurice Friedman (Pittsburgh: Duquesne University Press, 2004), p. 45.

162 Emmanuel Levinas, *Hors Sujet* (Paris: Fata Morgana, 1987).

an understanding of alterity that accords pre-eminence and pre-existence to the other, which is free and whose independence cannot be reduced by the comprehension of the knowing subject. Levinasian alterity is *external*, that is it does not belong to any shared metaphysical ordering and therefore is completely foreign. This is understood as a richness, as it is what is foreign, what comes from the exterior, that can teach and bring about something new, unexpected or unheard of[163]. Moreover, another fundamental characteristic of alterity is its infinity, its unsuitability to become a content of conscience: the infinite remains exterior to the thought which thinks it. Otherness conceived in this way remains ultimately incomprehensible and undefinable[164]. In Levinasian philosophy, the encounter with the other counts as primordial experience, anterior to any rational grasping. In contrast, it is the encounter with the other that shapes all further experiences and ways of thinking.

4.1.3. Otherness in S.A.S. v France

It is interesting to note that the Levinasian conception of alterity has been mobilized in the French Government Submission to the European Courts of Human Rights in the case *S.A.S. v. France* of 1 July 2014. In this well-known case, the Court declared the French provision prohibiting full face veils to be compliant with the ECHR, and the argument that made the point is the French "living together"-conception, which is considered to be a legitimate ground to restrict the rights to respect for private life and to manifest one's beliefs[165]. Levinas' discourse about the face of the other as the

[163] Patrignani, *Alterity according to Emmanuel Levinas and Comparison of Laws*, 437-446, p. 440.

[164] *Ibid.*

[165] What then is the exact content of the French "living together" that is recognised by the Court? In the explanatory memorandum accompanying Bill no. 2520 (eventually Act no. 2010–1192) as it was discussed in the French Parliament, the wearing of a full face veil is defined as a "sectarian manifestation of a rejection of the values of the Republic" that brings with it "a symbolic and dehumanizing violence, at odds with the social fabric" that is "incompatible with the fundamental requirements of 'living together' in French society". The Muslim practice is seen as undermining the "dignity of others who share the same public space and who are thus treated as individuals from whom one must be protected". In a nutshell, the conception of living together entails, as an indispensable element, the possibility of open interpersonal relationships, which are considered to be fundamentally jeopardised by the concealment of one's face. Thus, the self-confinement of any individual who cuts herself off from others would be prohibited. Moreover, the "living together" is used here to protect the majority of the population, which is assumed to share this conception and to not be familiar with the practice of wearing full face veils. In effect, by stating that the refusal of visual exchange undermines the dignity of others who share the same public space, the statute is not only stating that in France people do not wear veils but is also preventing people in France from being confronted with such an unusual sight. The statute is protecting a certain image of the social landscape, which should be preserved somehow as "French" – and of a kind of Frenchness that is certainly not Muslim. This understanding of the "French conception of living together" and its use as a means to protect the majority is the one shared in the ECtHR judgement. The Court dismissed all other adduced justifications for the ban: public safety (§139), gender equality (§119) and protection of human dignity of the veil wearers (§120). It only retained the "French conception of living together" as it considered it legitimate and having the necessary value for providing sufficient grounds for the limitation of the right to respect for private life and of the right to freedom of thought, conscience and religion as protected by artt. 8 and 9 ECHR respectively. Furthermore, the Court accepted it as a measure to protect the others, that is, the non-wearers. The banned practice is considered to be "breaching the right of others to live in a space of socialization which makes the living together easier" (§122). Maintaining a given appearance in the population or creating a certain superficial image of how the people in the street look is considered to be "a choice of society" compatible with human rights law.

fundamental element of the encounter has been interpreted literally as referring to the actual visage of the other person, which would be necessary for social interaction (which in turn, as the government's argument goes, is necessary for community life within society)[166]. In her Final Observations however, the applicant replied that "the government is treading on dangerous ground when it attempts to justify a legal measure by postmodern philosophy, which by its very nature is highly complex and not capable of clear-cut interpretations, let alone one 'correct'" interpretation. Arguably, the law prohibiting covering the face in public is not at all in line with the spirit of Levinas' philosophy, and his idea of face-to-face is centred on inherent respect for the other – the opposite of what the law in question achieves"[167]. Similarly, the reading of Levinas' philosophy proposed in my contribution below underlines the recognition of alterity as a step towards the guarantee of freedom and equality, which is completely at odds with the Government's submission. This same attitude is manifested also in the Constitutional Council decision compared in the fourth article "Overcoming Essentialization - A comparative study of 'Living Together'-conceptions'": there also an uncovered face encounter is preferred to a deeper respect for disturbing difference. As argued in the article, the decision introduces an objective reading of freedom and equality according to which the meaning of these fundamental principles is determined by central authorities for society as a whole.

Furthermore the applicant in S.A.S. v France disputed the enforceability of Levinasian ethics through law, which were backed by penal sanctions[168]. Even though it is not the only possible reading of Levinasian ethics, some authors have indeed argued that his teachings are not transposable into political ethics. Their imposition through a programmatic social theory "would necessarily perpetrate, *en masse*, the very subsumptive violence they denounce"[169]. This seems to be the present situation, as described also in the last article. Not only is a homogenizing majoritarian conception of living together politically sustained, it is also enforced by a ban, while other milder measures were actually recommended also by the Council of State[170]. Levinas' alterity has been denied twice: in the rejection of the radical heterogeneity of the other, and in the means i.e. the criminalization of alterity or the imposition through criminal law of a certain understanding of freedom and equality. Levinas wrote in 1961 that,

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[166] French Government Submission in Response to the Third Party Interventions, S.A.S. v. France, App. No. 43835/11 (Eur. Ct. H. R. filed Sept. 17, 2012), at ¶104, as quoted in Eva Brems, "Face veil bans in the European Court of Human Rights: the importance of empirical findings", *Journal of Law and Policy* 22, no. 2 (2014), 517-551, p. 536.

[167] Final Observations, S.A.S. v. France, App. No. 43835/11 (Eur. Ct. H. R. July 4, 2013), at ¶90, as quoted in Brems, *Face veil bans in the European Court of Human Rights: the importance of empirical findings,* 517-551, p. 536.

[168] *Ibid.*

[169] Nick Smith, "Questions for a Reluctant Jurisprudence of Alterity", in *Essays on Levinas and Law - a Mosaic*, ed. Desmond Manderson (Basingstoke: Palgrave Macmillan, 2009), 55-75, p. 57.

[170] Conseil d'État - Section du rapport et des études, Étude relative aux Possibilités Juridiques d'Interdiction du Port du Voile Intégral, 30 March 2010, available at : http://www.conseil-etat.fr/content/download/1731/5221/version/1/file/etude_vi_30032010.pdf [17/2/2017].

"Freedom consists of knowing that freedom is in peril"[171]. This is quite a different understanding of the word.

To conclude, the conception of otherness lies at the very core of many highly topical matters for the comparative lawyer. On the one hand, she is confronted with the alterity of the other laws and needs to find a way to enter into dialogue with it in order to develop at least a partial intelligibility of the foreign, which will indeed remain unknown, mostly unexplored, and towards which the comparatist will anyway be indebted and held responsible for her rendering: "À *l'impossible tous sont tenus*"[172]. But can she fix it? Yes she can[173], and an awareness of her own understanding of otherness will help her at least to "fail better". On the other hand, otherness is a very important notion for the comparatist and for the legal scholar in general given the challenges that social, cultural and religious inhomogeneity pose to law. A reflection on otherness helps the understanding of difference and inequality as historically and empirically related but conceptually separated notions[174]. Moreover, otherness-awareness is crucial in order to fathom the inherent plurality of every law.

4.2. Pluralism

By definition legal comparison requires a broadening of the horizon beyond the territory of applicability of one's legal system at least to the neighbouring one. Therefore, the comparatist has to be aware of the plurality of laws. Yet, the plurality goes deeper and reaches down inside within the one. One of the methodological arguments of this thesis consists of a complexification of the concept of law also (but not only) for the purposes of comparison. Luckily enough, the comparatist is not alone in this challenge, and she can fruitfully draw inspiration from the legal anthropology literature. Anthropological studies had to overcome the understanding of law developed around dogmatic categories and grounded uniquely on the western state legal experience and had to develop complexified analytical tools. The theories of legal pluralism developed there are indeed useful for the comparatist; not in order to understand the law in very distant colonized societies but most importantly to unthink all laws. In other words this thesis argues that pluralism is relevant for comparison in a more foundational sense than the simple recognition of the existence of a plurality of legal systems in the world and a manifestation of interest for what happens there. Pluralism is relevant in the sense that it entails a recognition of the plurality that is inherent in every legal culture.

4.2.1. Outward looking pluralism

On account of this there are (at least) two senses in which law can be regarded as plural. The first one is the traditional outward looking pluralism, which describes a

[171] Levinas, *Totalité Et Infini - Essai Sur L'Éxteriorité*, p. 5.
[172] Glanert, *Comparaison et traduction des droits: à l'impossible tous sont tenus*, 279-311.
[173] Husa, *A New Introduction to Comparative Law*, p. 24.
[174] Rogers Brubaker, *Grounds for Difference* (Cambridge, US: Harvard University Press, 2015), p. 11.

multiplicity of legal and normative phenomena coexisting and overlapping in the same territory (which could be delimited as encompassing the whole world). This type of pluralism is usually based on empirical observations of the existence of normative and legal spheres that are not reducible to the state-produced law. Such an observing and describing pluralism[175] carries with it strong political bearings and consequences for legal philosophy. As criticised by Boaventura de Sousa Santos 20 years ago, the symmetry between society and state was a basic tenet of the social as well as the legal sciences in the nineteenth century, but "this conception of social transformation misrepresented the dynamics of capitalist development in fundamental ways"[176]. Generally speaking, he states that "the absorption of modern law in the modern state was a contingent historical process which, like any other historical process, had a beginning and will have an end"[177]. More and more legal scholars are struggling to find new vocabularies that go beyond the classical equation of perfect congruence between legal unit, political unit and national unit[178]. Interestingly, we see legal anthropologists and legal comparatists converge on this ground. Just as an example, the two 2013 published books *Laws and Societies in Global Contexts: Contemporary Approaches* by the legal anthropologist Eve Darian-Smith and *The Cosmopolitan State* by the late comparatist H. Patrick Glenn can be read together. Darian-Smith dismisses the idea that the state represents one legal system and contains within it a single cultural interpretation of law as a "myth"[179]:

> In re-examining the production of domestic national legalities in a heightened era of globalization, it is essential to acknowledge that monocultural societies no longer exist (if in fact they ever did). [...] Today we are witnessing a rising presence of multicultural communities around the world, particularly in Europe and North America. These culturally rich subnational and transnational communities with distinctly different norms and values – and often with considerable social networks and economic links to peoples and places in Latin America, Africa, Asia, and the Middle East – present possibilities of new legal knowledge emerging within Western national boundaries[180].

> My point is that whether the accommodation of alternative, perhaps non-Western, legal norms and cultural values is embraced or resisted, the taken-for-granted

[175] On the descriptiveness of this approach and for bibliographical references see my article "Legal Pluralism as a Theoretical Programme".

[176] Boaventura De Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995), p. 94.

[177] *Id.*, pp. 94–95.

[178] That is, the basic tenet of nationalism according to Ernest Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983), pp. 1–7.

[179] Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge: Cambridge University Press, 2013), p. 9.

[180] *Ibid.*

> assumption in much sociolegal research that a national legal system maps onto a homogenous 'society' is no longer acceptable[181].

Along similar lines, the purpose of Glenn's book is to relinquish the nation-state as empirically impossible and to set forth the notion of a cosmopolitan state that corresponds better with social reality. The coincidence of a population, homogeneous in terms of language, religion and ethnicity, with a closed legal and political state-like structure has never occurred: all states are, and since the Greek *poleis* in antiquity have been, cosmopolitan. He purports to demonstrate this assertion and at the same time sketches a pioneering general theory of the cosmopolitan state, thus being descriptive and normative at the same time:

> while the idea of a cosmopolitan state correspond with social reality, its assertion is not a descriptive exercise. [...] there are normative consequences, notably as to whether populations should continue to be inculcated with ideas of social uniformity as underlying norm, and whether measures of social 'uniformization' have some institutional justification[182].

To sum up, they both argue for the basic idea that law, nation (referring to a homogeneous population) and state (as political entity) do not coincide. Moreover, they share the postulate (more or less assertively formulated) that law, nation and state may only have ever been congruent in official state rhetoric and mainstream academic discourse. In any case, both authors recommend that we leave behind such a paradigm of thinking of contemporary law. Lastly, both manifest a strong commitment towards the political desirability of pluralism. This first version of outward looking pluralism is thus both politically and jurisprudentially engaged and has prompted very lively and passionate debates[183]. When the diversity of the social (beginning with gendered and racialized difference) enters the field of law and forces into its very core the recognition of irreconcilably conflicting interests due to radically divergent social understandings, the resulting philosophy of law is obviously affected. The conceptual inquiries of normative legal theory are shown to be coloured by their assumptions about the social, and state law can no longer be viewed as objective or neutral[184]. Nevertheless, at a conceptual level, the recognition of such pluralism "does not necessarily displace the conception

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[181] *Id*., p. 10.

[182] Patrick Glenn, *The Cosmopolitan State* (Oxford: Oxford University Press, 2013), pp. vii – viii.

[183] Whether post-national thought has become an established dominant political theory or not is not a matter of discussion here, where the focus is rather on systematising legal doctrines on pluralism. For a partial but interesting insight, see https://www.theguardian.com/world/2017/jan/04/the-canada-experiment-is-this-the-worlds-first-postnational-country, where it is declared that the nation-state model has been overcome in Canada but that it is still "sacrosanct" in Europe. See also the book by Constantin Languille, *La possibilité du cosmopolitisme* (Paris: Gallimard, 2015), which discusses about the topic from a political perspective in connection with the burqa ban.

[184] Roger Cotterrell, *The Politics of Jurisprudence - A Critical Introduction to Legal Philosophy*, 2nd ed. (London: LexisNexis UK, 2003), pp. 209–236.

of state law as a unified and coherent system. It may merely situate state law as one form of law within a context of normative multiplicity"[185]. The analytical purposes of traditional normative legal theory are scaled down, their narrowness emphasised, but their project is not yet inherently shattered[186]. It is at this point that a second more deep rooted understanding of pluralism is worthwhile considering.

4.2.2. Pluralism within

The second version of pluralism presented here involves a pluralisation of *all* laws and aims at highlighting the incoherencies and variations within *any* legal culture, even the state-produced-law one. Any and every law, including mainstream state-based law is plural "in that it is derived from plural sources, relies upon plural modes of reasoning and interacts in complex and contradictory ways with a plurality of social, ideological and political systems of significance"[187]. This pluralism as "incoherence within" brings legal philosophy a step further than the first version of outward looking pluralism in that it requires to "re-conceptualize the Western concept of positive law as essentially complex and heterogeneous"[188].

This version of pluralism can be understood in connection with the philosophical reflection that extends Otherness beyond the other, as it resides not only *among* different unities, but also *within* each unity. There is no pure and simple "one"[189], writes Jean-Luc Nancy, and "there has never been, nor will there ever be, any [real] philosophical solipsism. In a certain way, there never has been, and never will be, a philosophy 'of the subject' in the sense of the final [*infinie*] closure in itself of a for-itself"[190]. Following this way of thinking, there is no essence that is not co-essence, singular plural and plurally singular, and "there is no 'self' except by virtue of a 'with', which, in fact structures it"[191]. "From the very start, the structure of the 'Self', even considered as a kind of unique and solitary 'self', is the structure of the 'with'. Solipsism, if one wants to use this category, is singular plural"[192]. No matter where we, for our research purposes, draw the borders of the unit, there will always be differences and possible fragmentations within. There is no uniform identity as such, be it at the level of an individual human being, of a local community or of a "national" community.

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[185] Margaret Davies, "The Ethos of Pluralism", *Sydney Law Review* 27 (2005), 86-112 p. 96. See also Annelise Riles, "Comparative Law and Socio-Legal Studies", in *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 775-813, pp. 794–795.

[186] Cotterrell, *The Politics of Jurisprudence - A Critical Introduction to Legal Philosophy*, p. 229.

[187] Davies, *The Ethos of Pluralism*, 86-112, p. 108.

[188] *Id.*, p. 108.

[189] Jean-Luc Nancy, *Being Singular Plural* (Stanford: Stanford University Press, 2000), pp. 7-8: "The typical traits (ethnic, cultural, social, generational, and so forth), whose particular patterns constitute another level of singularity, do not abolish singular differences; instead, they bring them into relief. As for singular differences, they are not only 'individual' but infraindividual. It is never the case that I have met Pierre or Marie per se, but I have met him or her in such and such a 'form', in such and such a 'state', in such and such a 'mood', and so on."

[190] *Id.*, p. 29.

[191] *Id.*, p. 94.

[192] *Id.*, p. 96.

In her study on the status of foreigners in different European civilizations, written in the context of the wider debate on the reform of the French Nationality Code, Julia Kristeva concludes also with the need for recognising the otherness, biological and symbolical, that is present in each self: "Unsettling, the stranger is part of us: we are our own strangers - we are divided"[193]. She argues that the acknowledgment of this internal fracture could lead to a better coexistence in a inhomogeneous society[194]. It is not necessary to follow her in an optimistic view of the future to appreciate the central move, which parallels Nancy: the recasting of plurality at the core[195]. It has to be underlined how this plurality has actually been there for a long time but not acknowledged. The shift is thus a shift in the way we perceive things: not as separate boxes, which are uniform inside and diversified outside, but as transversally diversified.

From this perspective, any legal philosophy that has its foundations on the idea of singularity, claiming that there is "One law in a particular geo-political space and that the One law is itself One system, defined by clear limits, governed by certain principles and unified by a distinct foundation"[196], clearly loses ground. In contrast to this, an understanding of law as plural in this second sense of "pluralism within" sees law as diverse and fragmented and not as systematic and cohesive[197]. This is different from the liberal model of cosmopolitan state law, which provides a minimum common basis and *from then on* promotes social diversity: such a perspective would still not abandon the idea of autonomy and separateness of law or its nature of neutral system of norms. Something similar to the "pluralism within" approach has been advanced with vigour by the Critical Legal Studies, which is a school of thought that focuses on the power structures embedded in any legal and political system. According to this view, each contingent plural legal culture contains within itself opposed forces in a continuous struggle – and the task of any engaged scholar is to reveal them.

As a consequence, any black letter legal text - which could be seen as posing a black-on-white stable norm, be it written by a legislator or a judge (to take two example familiar to the western legal scholar) - is situated as follows:

> not on a single developmental path, but on multiple trajectories of possibility, the path actually chosen being chosen not because it had to be, but (where relevant) because the people pushing for alternatives were weaker and lost out in their struggle, and also (in part) because both winners and losers shared a

[193] Julia Kristeva, *Étrangers à nous-mêmes* (Paris: Gallimard, 1991), p. 268. See also the understanding of identity as "never unified and, in late modern times, increasingly fragmented and fractured; never singular but multiple, constructed across different, often intersecting and antagonistic, discourses, practices and positions", by Stuart Hall, "Introduction: Who Needs Identity?", in *Questions of Cultural Identity*, eds. Stuart Hall and Paul Du Gay (London: SAGE Publications, 1996), 1-36, p. 4,

[194] Kristeva, *Étrangers à nous-mêmes*, p. 290.

[195] Julia Kristeva, "The Meaning of Equality", in *Crisis of the European Subject*, trans. Susan Fairfield (New York: Other Press, 2000), 95-110.

[196] Davies, *The Ethos of Pluralism*, 86-112, p. 92.

[197] *Id.,* 86-112, p. 93.

> common consciousness that set the agenda for all of them, highlighting some possibilities and suppressing others completely[198].

In a similar fashion the judge has been described as the one who has to suppress the plurality of law by choosing one interpretation and kill all the others[199]. The good news (not for the losing party of the one particular trial, but for the comparatist indeed) is that, as argued in the "Complex Legal Pluralism" article, there is an ongoing unresolvable debate about what law is[200]. So the judgment that defines what is the correct view of the law today and kills or suppresses the other options may be overruled tomorrow, and in any case it remains contestable by other judges (who would have decided differently), lawyers, legislators, academics and so on.

The formants theory presented by Sacco can be understood as a first step towards the recognition of this plurality within, as it already acknowledged that, given the multiplicity of legal formants, "there is no guarantee that they will be in harmony rather than in conflict"[201]. And while every interpreter obviously claims all other previous interpretations to be wrong, the comparatists shall not "get mixed up in these generational polemics"[202] and focus her attention exactly on this internal inconsistency among formants by going beyond the idea that there is one single right rule. As has been argued above (in the chapter on method), the problem with the approach proposed by Sacco is that by opening the sphere of interest of the comparatist to all the possible formants she considers her position as detached and neutral. Correctives have been brought about by the *crits*, who saw the comparatist's role as a militant one, not only unmasking the inconsistency among formants but also showing how the various options of the plurality within also implicate different value choices. The task of the comparatist is, above all, to "refuse the homogenizing and essentializing gestures of the tradition" and show instead "how all cultural formations are split, hybrid, and embedded in contexts of power"[203].

To summarize, this chapter presented two versions of pluralism, one outward looking and the other existing within each unit. The two are not incompatible with one another, as the second version can be seen as a further pluralization of the first one. Both versions are endorsed in the articles. The first one is settled as a preliminary issue on the two articles on legal pluralism, as they both develop a reflection based on the assumption that the meaning of the word "law" is much broader than the singular instantiation of it that is the law produced by the modern nation state. The "complex legal pluralism" article goes further and adopts an understanding of pluralism that resonates with the second version by stating that a cultural understanding of law implies the recognition

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198 Robert W. Gordon, "Critical Legal Histories", *Stanford Law Review* 36 (1984), 57-125, p. 109.

199 Robert M. Cover, "Nomos and Narrative", *Harvard Law Review* 97 (1983), 4-68, p. 54.

200 Patrignani, *Complex Legal Pluralism*, 19-33, p. 29.

201 Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 1-34, p. 23.

202 *Id*., p. 25.

203 Nathaniel Berman, "Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion", *Utah Law Review* (1997), 281-286, p. 281.

of the internal inconsistencies of law, which is constituted of countless fragments not necessarily related in a formal rational manner[204]. This characteristic is important as it is one of the features that make law a complex system in the sense described in the article. Lastly, pluralism in the form of "inconsistencies within" is fundamental for the methodological argument developed in the last article, as the purpose of the comparison carried out there is to underline how both French and German legal cultures are compounds of mixed elements. Even in regard to foundational and characterizing elements such as the conception of the individual, the conditions of belonging to the national community and the meaning of state neutrality, the legal cultures are not monolithic but split and dispersed. As argued there, the aim of studying law in context is to disassemble it in the various contradicting elements and to analyse the winning or majoritarian ones as well as to give voice to the loosing and silenced options.

4.3. Context

Admittedly, one could compare some black letter rule from the Italian *Codice Civile* with some black letter rule from the French *Code Civile* and not expand one's research to any extra-textual element by pretending that the codes' texts exist in a vacuum and adjust to the legal systems' rhetoric of unity and coherence. That would still be a comparison, even if an uninteresting and possibly misleading one. On the contrary, throughout the articles the importance of studying and comparing the law *in its context* has been stressed. This indeed lies on a certain understanding of the nature of law; so in a way this is a point that brings comparative law close to legal philosophy. Devoting attention to context has been considered for example as a means to overcome the lack of foundation once all grand narratives about the nature of law have been set aside[205]. The idea of law as a theoretical unit that is neutral and uniformly valid for everyone within its territorial boundaries of application has been attacked on the one hand by various jurisprudences of difference (that is, approaches to the legal from the perspective of the excluded and suppressed). On the other hand it has been attacked by the growth of transnational regulatory regimes that have an uncertain legal status but which have undeniable coercive force. As such, in order to make sense of it, Roger Cotterrell suggests that law needs to be studied in context and that "normative legal theory and empirical legal theory need to become a single enterprise"[206].

[204] Patrignani, *Complex Legal Pluralism*, 19-33, p. 25.

[205] Cotterrell, *The Politics of Jurisprudence - A Critical Introduction to Legal Philosophy*, pp. 254–263.

[206] *Id.,* 263. Interestingly Cotterrell seems to be extending the need to consider the context also of legal scholarship itself, and this is presented as a corrective for the circularity, aridity and scholasticism of normative legal theory: "conceptual analysis of law always presupposes social conditions that must be examined empirically", thus carrying out a sort of "sociological reconstruction of legal theory", pp. 246-247.

4.3.1. Relevance of context for comparison

As for the comparatist's endeavour, contextualization is crucial in order to avoid misunderstanding due to the high level of variability of law across different societies. René David noted that "[l]aw is but one of the possible methods of organizing a society. Its position in this context must be clarified, and its relations with other factors of social organization must be stated, if it is desired to have an accurate idea of the real scope of rules of law"[207]. So the comparatist might find herself studying phenomena which are considered to be "law" by legal scholars in some parts of the western world, while for example Islamic jurists and Hindu thinkers would not consider them "legal". More recently Werner Menski considered the "central challenge for the comparative law teacher and legal theorist in the field of globalised legal education" to be the fact that there is no "worldwide agreement, in theory as well as in practice, about the central object of globalised legal studies, namely 'the law' itself"[208]. He continues by saying that, "As in religious studies, it seems that, unless we agree to disagree about the basic ingredients of law itself and allow others the space to explain (and live) their culturally conditioned understandings of life and law, no real progress will be made in global legal debate".

Beside the centrality of having an understanding of the general role of law in society, in the comparative legal literature the importance of context has been stressed also in relation to more specific research aims. It has been asserted as useful in avoiding ethnocentric bias[209], in recognizing the integrity of the other and accepting the legitimacy of diversity[210]. Some consider the study of law in context to be the *proprium* of comparative legal research: "the juxtaposition and interpretation of foreign material calls for making explicit and trying to understand the institutional and socio-cultural context of the law"[211]. Indeed, there are elements of the legal environment, such as the so-called cryptotypes entailed in the legal mentality of jurists working within a system, which remain unformulated and that therefore are discernible only through comparison.

Still, what is meant by studying law in context? As already the case for otherness and pluralism, there are many competing definitions for the word "context"[212]. Moreover, this section has so far deliberately avoided the term "culture", as it is probably one of the trickiest ever introduced into the vocabulary of the comparative legal scholar, but indeed contextualization as intended in this dissertation and the study of legal cultures lie very near to each other in the sense that contextualization entails a certain understanding of law as a product of culture. In the following, I will try to clarify the choice of the term and the connotation attached to it.

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[207] David, *The Different Conceptions of the Law*, p. 3.

[208] Werner Menski, *Comparative Law in a Global Context: the Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: Cambridge University Press, 2006), p. 32.

[209] Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 737-762.

[210] Cotterrell, *Comparative Law and Legal Culture*, 710-737, p. 736.

[211] Adams, *Doing what doesn't come naturally. On the distinctiveness of comparative law*, 229-240, p. 234.

[212] Crf. for example the various contribution to the issue Antoine Bailleux and François Ost, "Dossier Le Droit en Contexte", *Revue Interdisciplinaire D'Études Juridiques* 70 (2013).

4.3.2. Culture(?)

Among the founders of cultural studies, Raymond Williams attests the wide meaning of the word "culture": beginning from cultivation (as in agriculture) of crops and by extension meaning cultivation of the mind, the term's significance articulates in two possible directions, i.e. as signifying a system of a whole way of life involved in all forms of social activities (practices) or alternatively as a product of artistic and intellectual activities (ideas)[213]. There is an indissoluble inter-relationship between ideas and practices: the resultant culture is threaded through all social practices, which may manifest unexpected correspondences but also discontinuities. Indeed, such a complex object of study puzzles the square-minded legal scholars, and if "legal culture" is considered as a subset of the broader "culture" it ends up being puzzling in the same way[214]. As for legal culture, Lawrence Friedman who coined the term differentiates between internal and external legal culture, where the first refers to convictions and practices of the legal professionals and the second to the perceptions of law shared by the lay members of the society[215]. The sum of the two perspectives leads to a definition approximately encompassing patterns of social behaviour and attitudes concerning law and judicature[216]. But the ideas of context and culture used in this thesis are not used in this sense. Rather, my approach (in particular in the last article) is more interested in uncovering basic ideas about who we are and how we want to live together that are hidden under the surface of black-letter law. In order to better clarify such an approach its relation to the existing comparative literature should be spelled out.

In the comparative legal literature, explicit concern with law's relation to culture has become prominent since the 1990s[217]. The issue has been raised in particular in connection with debates on the feasibility and desirability of legal transplants: famously, Alan Watson argued that legal evolution has happened mostly though the moving of rules or systems of law from one people to another[218]; and in opposition to this view Legrand fiercely claimed that legal transplants are impossible[219]. The disagreement

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[213] Raymond Williams, *The Sociology of Culture* (Chicago: The University of Chicago Press, 1995 [1981]), pp. 10–14. Where he observes the non-incompatibly, but rather the convergence, of these two senses.

[214] Roger Cotterrell, "The Concept of Legal Culture", in *Comparing Legal Cultures* (Aldershot: Dartmouth Publishing Company, 1997), 13-31, p. 13.

[215] Lawrence Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975), p. 223.

[216] *Id.*, p. 193.

[217] Cotterrell, *Comparative Law and Legal Culture*, 710-737, p. 710.

[218] Alan Watson, *Legal Transplants: An approach to comparative law*, 2nd ed. (Athens, Georgia: University of Georgia Press, 1993 [1974]), p. 21. He then declares the moving as successful when the moved rule "grow[s] in its new body, and become[s] part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection", *id.*, p. 27.

[219] Pierre Legrand, "The Impossibility of "Legal Transplants"", *Maastricht Journal of European and Comparative Law* 4 (1997), 111-124 re-defines rule as incorporating much more than a sequence of words: "[t]he meaning of the rule is an essential component of the rule; it partakes in the ruleness of the rule", p. 114. Further on, he expands the definition of rule as "necessarily an incorporative cultural form. As an accretion of cultural elements, it is supported by impressive historical and ideological formations. A rule does not have any empirical existence that can be significantly detached from the world of meanings that characterizes a legal culture; the part is an expression and a synthesis of the whole: it resonates", *id.*, p. 116.

lies in the way law is conceived as relating to society, as the degree of transplantability is inversely proportional to the embeddedness of law in culture[220]. If law is rules, i.e. propositional statements, then they can be transplanted, but this is not so if law is seen as closely intelocked with society. Furthermore, the relevance of law's cultural context has emerged in relation to the so-called "gap" between law and society, which has constituted one of the core issues in legal sociology[221], which in turn is thus connected to legal comparison[222]. Both sub-fields have been dealing with the gap question, but arguably nowadays consesus has been reached (and such understanding is also shared here) that law and society are not to be considered as two separate subsystems but instead as being inextricably intertwined. Law is not conceived as independent or as a by-product of social forces but as being actively involved in the constitution of social, political and economic phenomena and vice versa[223].

4.3.3. Risk of stereotyping – and how to avoid it

For the purposes of this synthesis the most relevant aspect to be considered concerning the contextualization of law is the objection of producing an essentialised and stereotyped image of the studied legal culture by simplifying complex entities by emphasising one particular aspect of the whole[224]. Glenn notoriously disfavoured "legal culture" as he saw it as a conceptualising instrument that would be a means of differentiation, separating cultures from one another and assuming homogeneity within. Moreover, as a descriptive concept culture would reify the present as a given necessity and would fail to understand historical influences and circumstances[225]. Therefore, culture as an epistemological instrument is dismissed as it would contribute to an "epistemology

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[220] William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplant", *The American Journal of Comparative Law* 43, no. 4 (1995), 489-510 presents a scale of mirror theories of law, arranged according to their degree of acceptance of transplantability. On the connection between transplants and understanding of legal culture, see also Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions", in *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 441-476, pp. 465–474.

[221] Reza Banakar, *Normativity in Legal Sociology - Methodological Reflections on Law and Regulation in Late Modernity* (Cham: Springer, 2015), pp. 52–56.

[222] *Id.*, p. 145. The core issue is the same as with the legal transplants debate.

[223] Riles, *Comparative Law and Socio-Legal Studies*, 775-813, p. 796. This is in line with the understanding of culture advanced already long ago by cultural theorist Stuart Hall, who also underlined how cultural identities are always transversal. He conceptualises culture as "interwoven with all social activities" not as something separable in distinct poles ("culture" *vs.* "non-culture"). The core problem of Cultural Studies would thus be the thinking together of both the specificity of different contradicting practices and the forms of articulated unity they constitute. See Stuart Hall, "Cultural studies: two paradigms", *Media, Culture and Society* 2 (1980), 57-72, p. 63.

[224] Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, p. 32. For the same concern related to "contextually oriented" comparative constitutional law see Vicki C. Jackson, "Comparative Constitutional Law: Methodologies", in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 54-74, p. 67. She states the need to avoid "national stereotypes and group characterizations" and advances as a possible alternative the focus on the similarity of singularly taken rules. See also Hyland, *Comparative Law*, 184-199.

[225] Patrick Glenn, "Legal Cultures and Legal Traditions", in *Epistemology and Methodology of Comparative Law*, ed. Mark Van Hoecke (Oxford: Hart Publishing, 2004), 7-20.

of conflict, as opposed to an epistemology of conciliation"[226]. Furthermore, devoting attention to legal culture or somehow adopting a holistic approach to law has been set within the romantic tradition. Whitman states that, "When comparatists today talk about the problem of 'understanding' the 'other' or of law as 'culture', they are drawing on a tradition that can be traced to late eighteenth- and early nineteenth-century Germany"[227]. He historicizes the "cultural turn" as a rediscovery of the Herderian idea of *Volksgeist*, a peculiar national character informing law, but also social manners, art, language and whatever else contributes to "make French individuals *french*, or German individuals *german*"[228]. Also the Gadamerian concept of *Vorverständnis*[229] is mobilized; that is the pre-understanding that influences (allows but also restricts) the possibility of further understanding – with reference to the jurists internal to a system (rather than to comparatists approaching it, from their own perspective, as the *other*)[230]. He highlights the limitedness of the internal perspective, as participants are usually poor informants[231] and warns against a number of "excessive Romantic tendencies"[232] that are mainly related to the risk of crystallising the other into its *Vorverständnis* and more broadly into its culture by depicting it as an unchangeable block.

Indeed the idea that there would be a sort of organic connection among different manifestations of culture defined in general and totalizing terms is problematic. Such a view fails to account for the agency of the individuals and the role they play in generating meanings[233], which may lead to a orientalisation of the other by "emphasizing the irreducible of the experience of that culture and the inevitable strangeness and 'otherness' of what lies outside it"[234]. Most of all it fails to account for conflicting understandings and views within every culture, which implies both similarity within and difference between cultures[235]. A naïve comparison of French law with German law, for example, would have been inadequate according to my understanding of context, which actually considers both laws as composed by "many coexisting, fragmented, sometimes integrated, sometimes conflicting normative orders with different degrees of access to coercive authority and with different kinds of articulations with other cultures and with the global legal arena"[236]. Thus, the main argument of this last subchapter is as follows: a contextualizing approach according to which the interpretation of black letter law needs to refer to the cultural whole the law belongs to does not necessarily

[226] *Id.*, p. 17.
[227] Whitman, *The Neo-Romantic Turn*, 312-344, p. 315.
[228] *Ibid.*
[229] This time not in relation to the position of the comparatist – as was the case above within the legal orientalism theory, but instead it refers to the jurist internal to the system.
[230] Whitman, *The Neo-Romantic Turn*, 312-344, pp. 325–329.
[231] As is argued also by the fifth Trento thesis, see the above section "method as path".
[232] Whitman, *The Neo-Romantic Turn*, 312-344, p. 336.
[233] Riles, *Comparative Law and Socio-Legal Studies*, 775-813, pp. 796-802.
[234] Cotterrell, *Comparative Law and Legal Culture*, 710-737, p. 716.
[235] *Id.*, p. 718.
[236] Riles, *Comparative Law and Socio-Legal Studies*, 775-813, p. 794.

go hand in hand with the myth of the integrity of legal culture[237]. The soundness of a law-in-context approach is not reduced by the heterogeneity of the cultural context. On the contrary, the law-in-context approach is used to highlight the heterogeneity of the cultural context.

To recap, the understanding of law in context adopted here considers law to be part of a worldview which is not necessarily coherent or fully instantiated and is shaped by dynamic processes among individual and communities. The last article aims at showing the incoherence of the worldviews (more specifically, the views of the individual, of the national community bond and of state neutrality towards religions) manifested in the compared legal texts. Admittedly, various problems are posed when studying the relation of legal texts with their cultural context, emphasizing law's relation to beliefs and ultimate values. To begin with, the exact meaning of these values cannot be set, but only its oscillations can be studied. Moreover, their interpretation varies significantly among participants in a *culture* and also among participants of the *legal culture* depending on their structural position within the system[238]. In addition, one needs to be aware that those values and beliefs are also partly rhetorical claims, which are manipulated by certain members of the culture in order to project uniformity, coherence or stability on a given cultural unit[239]. As a consequence, these underlying values and beliefs are rarely defined in a straightforward way in legal texts: "Often they will not be directly expressed at all, merely taken for granted as part of the 'self-understood', the unstated

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[237] Cfr. Michele Graziadei, "Comparative Law, Legal History, and the Holistic Approach to Legal Cultures", *Zeitschrift Für Europäisches Privatrecht* 7 (1999), 531-543. Still, as the author states the importance of historical research in contrast to mythology, i.e. the study of the past in all its complexity, including facts that are disturbing or unsettling because they do not fit into the mythological image of the self, I understand his statement to be concurring with the argument made in this chapter.

[238] David Nelken, "Thinking About Legal Culture", *Asian Journal of Law and Society* 1, no. 2 (2014), 255-274 p. 269.

[239] *Id.*, p. 269. Even Legrand's account of the French statute on religious dress at school, which is otherwise very focused on highlighting the "frenchness" of the statute, admits the persistence of anthropological diversity under the fictional and utopic unitary myth – which is, after all, at least partly a product of official state rhetoric. Pierre Legrand, "Tracing the French Statute on Religious Dress at School", p. 8, http://www.pierre-legrand.com/tracing-detail-2.pdf [28/2/2017]. To be sure, Legrand's understanding of culture has been variating over time. In 1997 he drastically stated that "in enacting a particular rule (and not others), the French, for example, are not just doing *that*: they are also doing something typically French and are thus alluding to a modality of legal experience that is intrinsically theirs. In this sense, because it communicates the French sensibility to law, the rule can serve as a focus of inquiry into legal Frenchness and into Frenchness *tout court*", in Legrand, *The Impossibility of "Legal Transplants"*, 111-124, p. 115. This somehow reifies and essentialises "frenchness". More recently he has also argued for the non-uniformity of culture, being contested by individuals as a function of the way in which power manifests itself. The experience of cultural difference would thus be *internal* to any culture. Furthermore, he has stressed how meanings are neither fixed nor static and presented a much complexified view on diffusion and mutation of culture by concluding as follows: "[r]eferring to 'culture' in this way does not automatically privilege coherence, does not imply stultification, does not entail essentialism, does not exaggerate distinctness, does not preclude temporal variation, does not efface individual variations or contestations that can take the form of participation in a range of sub-cultures, does not fetishise identity such that it would lay beyond critique, and certainly does not cast its advocates as some reactionary minority". Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity", *Journal of Comparative Law* 1, no. 2 (2006), 365-460, p. 390.

intellectual context in which legal rules are given meaning and purpose"[240]. For this reason, any interpretation such as the one proposed in the last article is necessarily personal, not-final and not right.

Interpretive comparison that aims at discovering unexpressed assumptions and at studying society through law is indeed fraught with risks of misunderstanding, misreading and misrepresenting. Those cannot be set aside by the understanding of context presented here. What can be set aside is the risk of simplifying, stereotyping and essentialising foreign legal cultures by reducing them to a coherent block to be accepted as a whole. This understanding of cultural difference requires a recognition of the existence of the many within the one and a rejection of clear cut binary oppositions. Similarly, legal anthropologist Sally Engle Merry states culture to be "the product of historical influences rather than evolutionary change. It is marked by hybridity and creolization rather than uniformity and consistency"[241]. To conclude, the notion of context when paired with the one of plurality within presented in the previous sub-chapter is able to bypass the risk of essentialisation.

4.3.4. Corollary

One closing remark has to be added. The shift in focus towards the understanding of state-based and non-state-based normative orders in their context entails an interesting corollary where there is a fading away also of the distinction between the perspectives of insiders and those of outsiders[242]. The comparative legal scholar who has adopted an otherness-awareness, sharing concern for plurality within and is prepared to contextualize is at the same time an insider and outsider, participant and critic and normative and descriptive[243]. She is not fully an insider in the sense that she is not uniquely playing by the rules of the system as a lawyer by pleading in front of a national court. She is not completely an outsider either, as she is never simply observing. Instead, by creating images of the studied law she is necessarily engaging with it and taking a stance. The contextualized law studied is not a definite object with clear conceptual boundaries which scholars can be inside or outside of, and therefore the dichotomy internal=normative *vs.* external=descriptive is complexified[244]. This bears consequences also on the question related to the cognoscibility of the radical otherness, as the difference-approach points to the incommensurability and finally incomprehensibility of the foreign law. Agreeing with this admission, I would even extend it further: there is no outsider for whom the foreign law would be absolutely incomprehensible, and there is no insider

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[240] Cotterrell, *Comparative Law and Legal Culture*, 710-737, p. 735.

[241] Sally E. Merry, "What is Legal Culture? An Anthropological Perspective", in *Using Legal Culture*, ed. David Nelken (London: Wildly, Simmonds and Hill, 2012), 52-76, p. 55. A similar formulation can already be found in Sally E. Merry, "Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)", *Political and Legal Anthropology Review* 26, no. 1 (2003), 55-77.

[242] Margaret Davies, "Legal Pluralism", in *Oxford Handbook of Empirical Legal Research*, eds. Peter Cane and Herbert Kritzer (Oxford: Oxford University Press, 2010), 805-827, p. 825.

[243] Riles, *Comparative Law and Socio-Legal Studies*, 775-813, pp. 800–802.

[244] I also arrive at this conclusion in the article Patrignani, *Legal Pluralism as Theoretical Programme*, 707-725, p. 720.

for whom the domestic law would be simple and well known. Vice versa, there is no blinded insider and all-perceiving outsider. Rather, complete understanding is always unachievable[245]. Michele Graziadei puts it amiably: "the question whether cross-border communication can ever be 'complete' assumes that there can be 'complete' communication within any single linguistic system. But this assumption is questionable to begin with because it sets an impossible ideal standard. Our everyday life is a monument to misunderstanding, no matter what language we speak"[246]. Without downplaying the difficulties of studying in foreign languages and rendering the law studied in some other, again foreign, languages, the corollary brought up here stresses how foreign and domestic are relative concepts. There is no total foreignness or complete domesticity. Once more the position of the comparatist needs to be complexified.

The complexified understanding of the compared laws entails perceiving them as radically *other* (and therefore not fully comprehensible), analysed without assuming their internal coherence but rather giving voice to the silenced disagreements and placing them within their context (without thereby crystallising it in an unmovable monolith). Furthermore, the complexified position of the comparatist that has been advanced in the second chapter on method acknowledges her responsibility in choosing the appropriate analytical tools for her cognitive interests and stresses the ethical dimension connected to comparative legal research. These two complexifications when combined create the methodological basis against which the following articles have to be read. Or in other words, they can be read and listened to as variations on the theme set by this synthesis.

[245] Glanert, *Comparaison et traduction des droits: à l'impossible tous sont tenus*, 279-311, at p. 290, acknowledges how, even within one same language, it is impossible to fix the meaning of words.

[246] Graziadei, *Comparative Law as the Study of Transplants and Receptions*, 441-476, p. 468. There the move is to precisely show how the allegedly "external" approach of the legal pluralist is actually also normative, while here the blurring of the distinction is a bit more general, as it originates from the broader approach to comparativism which takes into account the three issues presented in this chapter.

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ALTERITY ACCORDING TO EMMANUEL LEVINAS AND COMPARISON OF LAWS

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I. Opening: the *quid pluris* of comparison

> Characters: an array of comparative law scholars with statuses ranging from "distinguished professor" to "inexperienced PhD student".
> Act 1, Scene 1: A classroom in summertime. A discussion following a panel on the emphasis that should be placed on the cultural context so as to understand both foreign and one's own law.
> Professor in the audience: "What you say is certainly relevant and interesting, but we don't need to be comparatists in order to do that. Comparison does not add anything to a context-sensitive approach, it is not special in any way".

To be sure, the professor in the audience is right. Disparate conceptions of law may merrily coexist with comparative research. It is often the case that, at the level of personal experience, the encounter with different conceptions of the legal provokes and stimulates the researcher, and the resultant understanding of law and legal research is strongly influenced thereafter. Still, it is not necessary to be a comparatist in order to be aware of the embeddedness of law in culture. Therefore, it can be said that many of the theoretical issues that arise due to comparison are actually shared concerns of domestic legal theory.[1] Comparison may help those issues emerge, or may make them blatant, but they are there anyway. In this sense, the professor's remark is not a peregrine one.

Nevertheless, there is a theoretical *quid pluris* involved in comparison: the concept of otherness. As trivial as it may seem, "comparison involves understanding one entity or domain in terms of *an other* entity or domain. The comparative enterprise is in thus permeated by the other, the inevitably different".[2] In order for comparison to be even conceivable, there has to be some kind of "otherness" mobilised – be it explicitly stated or implicitly at work in the mind of the comparatist.[3] The definition of law adopted is surely a methodologically relevant choice; yet we have comparison also among the wording of legislations (clearly, the

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[1] Cf. M. Siems, *Comparative Law*, Cambridge: CUP, 2014, p.106. Cf. also S. A. Smith, "Comparative Legal Scholarship as Ordinary Legal Scholarship", 5 *Journal of Comparative Law* 331 (2011).

[2] V. Curran, "Cultural Immersion, Difference and Categories in U.S. Comparative Law", 46 *American Journal of Comparative Law* 43 (1998), p.45.

[3] Cf. G. Samuel, *An Introduction to Comparative Law Theory and Method*, Oxford: Hart Publishing, 2014, p.11.

interest and the relevance of such research will have to be proved, but indeed it will be a comparison). Things being so, what intrinsically differentiates comparative legal research from the rest of legal scholarship is the deployment of the idea of otherness.

Exploring and making use of the possible link between comparative law and philosophy, this paper in particular examines the conception of otherness developed by Emmanuel Levinas (for which the term "alterity" will be used) and attempts to draw forth some recommendations for the comparison of laws.

Otherness, its definition and our relation to it, is among the central themes of contemporary philosophy, given the particular attention it devotes to the experience of plurality and of differences.[4] Here the focus is on Levinas because he conceives alterity in a way that overturns a conceptual structure that is firmly rooted in European thought. The idea of the "other" has often been conceptually related to "one" to which the other is somehow second.[5] The Latin word *alter* contains the Indo-European suffix *– *(t)ero* –, which carries a meaning of contrast and of precise identification.[6] *Alter* conveys the idea of an opposition between two elements, thought of as alternatives, and refers to the second, the less evident and common component.[7] It implies a sort of pre-existing hierarchy, and the recognition of the other intervenes in a moment when there is already an ordering rationality in place.

The conceptual categories used to think about otherness have usually been organised around the parallelism between universalism, the idea that there is something in common among all human beings, that goes hand in hand with the recognition of equality, *versus* otherness, that is manifested through differences and that leads to submission and discrimination.[8] Sameness is synonymous with inclusion and difference with exclusion.[9] Levinas' conception of alterity, on the contrary, subverts the parallelism and draws a chiasm by decoupling it: universalistic claims are seen as totalising and imposing uniformity, while the appraisal of differences is seen as the key to proper ethical living. Alterity is conceived outside negativity, in a truly positive sense.

Before entering into a more detailed analysis of the concept of alterity and its influence on the theory of comparative law, one more preliminary issue has to be dealt with that concerns the interest of legal scholars in Levinas' ethics. The philosophy of Levinas has already attracted the attention of jurists, who elaborated

[4] Cf. J. Koski, "Alterity", in V. E. Taylor and C. E. Winquist (eds.), *Encyclopedia of Postmodernism*, London: Routledge, 2001, pp.8-9.
[5] Cf. B. Waldenfels, "Andere/Andersheit/Anderssein", in H. J. Sandkühler (ed.), *Enzyklopädie Philosophie*, vol. I, Hamburg: Felix Meiner Verlag, 2010, p.88. Cf. also P.-J. Labarrière, "L'alterité de l'autre", in A. Jacob, *L'Univers Philosophique*, vol. I, *Encyclopédie Philosophique Universelle*, Paris: PUF, 1990, p.80.
[6] Cf. A. L. Sihler, *New Comparative Grammar of Greek and Latin*, Oxford: OUP, 1995, p.364.
[7] Cf. F. P. Ciglia, "Alterità", in: V. Melchiorre (ed.), *Enciclopedia Filosofica*, vol. I, Milan: Bompiani, 2006, pp.305-6.
[8] Cf. for example the account of the 1550 Valladolid debate concerning the treatment of the American natives by the Spanish colonisers given by T. Todorov, *La conquête de l'Amérique – La question de l'autre*, Paris: Le Seuil, 1982, pp.193-212. On the connections between universalism and Christian thought and their influences on legal anthropology see É. Leroy, "Pluralisme et Universalisme juridiques. Propos d'étape d'un anthropologue du droit", in *L'étranger en France face au droit de la famille*, Paris: La documentation française, 2000, p.6. A quick overview of the various manifestations of the "monist model" (understood as the preference accorded to oneness and similarity) in Western thought can be found in P. Legrand, "The same and the different", in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: CUP, 2003, pp.256-58.
[9] According to Vivian Curran, this was also the mind-set of the generation of eminent comparative lawyers that fled from Nazi Germany to the United States, cf. V. Curran, *op. cit*., note 2, pp.66-78.

on it in order to apply his ethics to interpersonal relationships, which are susceptible to be disciplined by law. According to some authors, his teachings are not transposable into a political ethics.[10] According to others, on the other hand, some important arguments are to be derived from his reflections that can justify the existence of the State and institutions, and which may progressively orient them towards the horizon of Justice.[11] This paper differs from other legal approaches to Levinas because it aims to apply the author's thinking on alterity to the epistemological position of the comparatist facing other laws.

The main theoretical assertion of this paper is that the conception of alterity and relationship to the other developed by Levinas can help the comparatist to position herself in regard to the foreign laws under consideration. The aspects of the author's thinking that are particularly meaningful and that will be developed in the text are the radical heterogeneity of the other, the critical assessment of knowledge conceived as appropriation and the establishment of an ethical relation to the other. Each of these aspects and their possible contribution to the theory of comparison will be focussed on in different sections of the paper.

II. Radical Heterogeneity

> "The metaphysical other is other with an alterity that is not formal, is not the simple reverse of identity, and is not formed out of resistance to the same, but is prior to every initiative, to all imperialism of the same.
> It is other with an alterity constitutive of the very content of the other.
> Other with an alterity that does not limit the same, for in limiting the same the other would not be rigorously other: by virtue of the common frontier the other, within the system, would yet be the same"[12].

The first aspect where the implications of Levinas' thinking are interesting for the comparison of laws is the very definition of alterity and its characteristics. Levinas writes about "something else entirely";[13] something that is characterised by a deeply different nature that is denominated "radical heterogeneity".[14] The other is not produced through a negation that is instrumental to define the same i.e. it is not

[10] The imposition of levinasian thoughts on ethics through a programmatic social theory "would necessarily perpetrate, en masse, the very subsumptive violence they denounce". N. Smith, "Questions for a Reluctant Jurisprudence of Alterity", in D. Manderson (ed.), *Essays on Levinas and Law: A Mosaic*, Basingstoke and New York: Palgrave Macmillan, 2009, p.57.

[11] This interpretation would be viable thanks to the arrival on the scene of the third party, who limits the (otherwise infinite) responsibility towards the Other and opens up to institutions and even to the universe of logic. The third allows the relation of proximity and of affection towards the other to attain an ethical status, enables reciprocity and leads to the emergence of the necessity of State and of statutes. Cf. V. Marzocco, "L'ostaggio o il lupo. Un'ipotesi su soggettività e origine delle istituzioni in Emmanuel Levinas", in M. Durante (ed.), *Responsabilità di fronte alla storia. La filosofia di Emmanuel Levinas tra alterità e terzietà*, Genoa: il melangolo, 2008, p.201; cf. also M. Ruol, "Entre politique et sainteté: l'exigence de justice", in M. Dupuis (ed.), *Levinas en contrastes*, Bruxelles: De Boeck Université, 1994, p.143.

[12] E. Levinas, *Totality and Infinity: An Essay on Exteriority*, transl. by A. Lingis, Pittsburgh: Duquesne University Press, 2012, pp.38-39 (1969, first French edition 1961).

[13] *Id*., p.33.

[14] *Id*., p.36.

other in relation to the same. The concept of *exteriority* is introduced in order to describe the condition of not belonging to any shared general metaphysical ordering. Exteriority is not a simple spatial distance, it expresses another "*way of existing*".[15] Moreover, it allows the other to be able to increase knowledge, since it is that which is foreign that can teach. The teaching that the other generates is not reducible to maieutic: coming from the exterior it brings to the same more than what is already latent within it.[16]

The second main fundamental concept is the idea of *infinity*.[17] In contrast to totality, which does not leave anything outside and ties together all the differences of the real under one single concept, the infinite remains exterior to the thought which thinks it. It is an idea whose *ideatum* overflows the capacity of thought. Infinity brings about the insufficiency of our "knowledge" of the other, which remains ultimately incomprehensible and undefinable. Alterity cannot be conceived of as content of conscience; on the contrary it forces us to acknowledge the limits of penetration of our intellect. There is always something of the other which necessarily slips through unperceived. To sum up, alterity connotes an other that is wholly different (exteriority) and that therefore cannot be comprehended and included in an overarching contemplation (infinity).

Clearly, there are examples of comparative legal approaches that do not conceive the otherness of the other law as Levinasian alterity; the most patent example being the "*praesumptio similitudinis*",[18] which refers to an other that is assumed to be similar, fully comprehensible and that can be led back to unity with the same.[19] Another example is the conception of the legal other as "that which is not the same", entailing a sort of *praesumptio diversitatis*. As Cliffort Geertz denounces, the other law is described as "law without lawyers, law without sanctions, law without courts, or law without precedent",[20] and the list could well be concluded by a "law without law":[21] clearly the idea of such scheme is to remark that, in our own law, we do have lawyers, sanctions, courts and precedents.[22] There is no real encounter with the alterity of the other that can introduce elements hitherto unheard of. Both approaches – presupposing the similarity of the other law, and defining it by contrast – do not bring anything new to the comparatist.

[15] *Id*., p.35.
[16] *Id*., p.51.
[17] For an historical reconstruction and an extensive explanation of the world, see also the chapter "Infini" in E. Levinas, *Altérité et transcendance*, Saint-Clément-la-Rivière: Fata Morgana, 1995, pp.69-89.
[18] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed., transl. by T. Weir, Oxford: OUP, 1998, p.40.
[19] To be precise, it is not a question as to whether and to what extent actual differences or similarities exist between various laws, as some conceptions of the legal are indeed more similar to each other than others. The aim here is to detect what kind of concept of otherness is at work in different methodological approaches.
[20] C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, New York: Basic Books, 1983, p.168.
[21] *Ibid*., cf. also T. Ruskola, "Law without Law, or is 'Chinese Law' an Oxymoron?", 11 *William & Mary Bill of Rights Journal* 665 (2003), pp.666-69.
[22] Cf. T. Ruskola, "Legal Orientalism", *Michigan Law Review* 101, 1 (2002), pp.179-234 and by the same author *Legal Orientalism: China, the Unites States and Modern Law*, Cambridge, Mass. and London: Harvard University Press, 2013.

To conceive of the other law in a way that entails a conception of otherness compatible with the features of Levinasian alterity implies thinking of the law "object" of comparison as something completely different from the domestic law; that is, something that is constructed on presuppositions that do not have anything to do with the foundations of the already-known worldview.[23] To be sure, no universal definition of law is possible.[24] Any attempt to draw a "general" jurisprudence or a "grand" theory of law is doomed to reveal its situatedness – which does not make it less valid in quality, clarity of insight or less effective in letting certain aspects of a given conception of law emerge; rather, situatedness makes a general theory less valid in quantity, or better said it restricts the geographical area and the time span in which the theory is applicable or valid.[25] Therefore, if the *exteriority* of the other law is to be preserved, it shall not be included in a community (like a certain general theory of law) that anticipates similarities. Nowadays, no serious comparatist would dare to deny the importance of going deeper than black letter law; the difference lying rather in what kind of further data are deemed to be pertinent and what relevance is accorded to them.[26] Different perceptions of normativity can be understood as part of wider intangible intelligibility frames, or paradigms.[27] This open conceptualisation allows the emergence of fundamental differences such as, for example, the place granted to reason,[28] the juridical qualification of reality[29] or the differentiation between fact and norm.[30] Within comparative law literature, law has been for example conceived of as the following: a cognitive phenomenon,[31] the expression of singular mentalities[32] and a framework.[33] And various other

[23] Cf. R. David, "The different conceptions of the law", in: *International Encyclopedia of Comparative Law, vol. II, The Legal Systems of the World: Their Comparison and Unification*, Tübingen: J. C. B. Mohr, 1975, p.10. If René David was admitting with vexation that law does not have the same reach and role in different world societies, Werner Menski some 30 years later states the same with more ease, cf. W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa,* 2nd ed., Cambridge: CUP, 2006, p.32.

[24] Cf. B. Z. Tamanaha, "Law", in: S. N. Katz, (ed.), *Oxford International Encyclopaedia of Legal History,* Oxford: OUP, 2009, pp.18-22 and by the same author "What is 'General' Jurisprudence? A Critique of Universalistic Claims by Philosophical Concepts of Law", *Washington University in St. Louis Legal Studies Research Paper,* No. 12-03-02, 2012.

[25] Cf. J. D. Galligan, "Legal Theory and Empirical Research", in P. Cane and H. Krytzer (eds.), *Oxford Handbook of Empirical Legal Studies,* Oxford: OUP, 2010, pp.976-995.

[26] The problem of defining the external boundaries of what constitutes relevant material for a legal scholar is a poorly formulated one: it is simply not possible to define those boundaries once and for all, not only because of their variability in time and space but also because of their entrenchment with the surroundings. Law is not a separate subset of the culture to which it belongs, but it is interconnected with it. Cf. P. Legrand, "On the singularity of law", 47, *Harvard International Law Journal*, 2006, p.527. Cf. also C. Geertz, *op. cit*., note 20, pp.173-74. Along similar lines C. Eberhard, "L'anthropologie du droit: Un itinéraire entre altérité, complexité et interculturalité", Conférence donnée à l'Université Jules Verne de Picardie, Amiens, 24 mai 2002, p.4.

[27] Cf. D. De Béchillon, *Qu'est-ce qu'une règle de Droit?*, Paris: Éditions Odile Jacob, 1997, pp.108-113.

[28] Cf. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed., Oxford: OUP, 2010, p.4. Cf. also N. Rouland, *Anthropologie Juridique*, Paris: PUF, 1988, p.396.

[29] Cf. G. Samuel, "Epistemology and Comparative Law: Contributions from the Sciences and the Social Sciences", in M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Oxford: Hart Publishing, 2004, pp.50-53.

[30] Cf. C. Geertz, *op. cit*., note 20, p.173-74.

[31] Cf. W. Ewald, "Comparative Jurisprudence (I): What Was It like to Try a Rat?", 143 *University of Pennsylvania Law Review* 1889 (1995), p.1951.

[32] Cf. G. Samuel, *op. cit*., note 29, pp.35-77.

sophisticated terms have been mobilised. What is relevant here, is to note that the definitions that shift the focus of the comparatist to the most basic worldviews of a society are those which enable the alterity of the other law to manifest itself. This is because they leave the comparatist the most freedom in collecting traces[34] and constructing her understanding of the legal other; respecting its alterity.

Lastly, the ideas of *infinity* and of *incomprehensibility* find their place in an open conceptualisation of law inasmuch as it admits that the comparatist who does not share a particular vision of the world will not be able to understand everything of the foreign law she studies. Actually, the knowledge that the foreign jurist can hope to reach is not an exhaustible kind of knowledge; a finite heap of stacked notions. On the contrary, law is suitable to endless interpretations and explanations. The research, she knows from the outset, will remain uncompleted and imperfect because of the infinity and incomprehensibility acknowledged to the other law.

III. Critique of Knowledge

> "Knowledge is a relation of the Same with the Other in which the Other is reduced to the Same and divested of its strangeness, in which thinking relates itself to the other but the other is no longer other as such; the other is already appropriated (le propre), already mine".[35]

The second aspect of Levins' thinking which is meaningful for comparison is the critique of a kind of knowledge he qualifies as "seizure, appropriation".[36] Described as a manifestation of an encompassing and organising conscience, such a knowledge reduces the other to an object of study.[37] By applying the thinker's own categories to the thought, the object is absorbed into the subject, thus annulling its otherness.[38] Furthermore, the seizure happens in the thematisation of the known object, in its inclusion within a panoramic picture.[39] The idea that to know something means having it all systematised in front of oneself, as a whole representation ordered according to categories established by reason, is dismissed as reduction of the other to the same.

The critique assuredly targets modern epistemology, with the pretence of being neutral, objective and capable of drawing a universal picture: in a way, a pretence of having everything "under control". But such a way of exercising intellectual capacities has been at work already "before the technical ascendancy over things which the knowledge of the industrial era has made possible",[40] it has been lurking in Western thought since its inception. The possibility of possessing,

[33] Cf. M. Van Hoecke and M. Warrington, "Legal Cultures, Legal Paradigms, and Legal Doctrine: Towards a New Model for Comparative Law", 47 *The International and Comparative Law Quarterly* 495 (1998), p.524.
[34] Cf. J. Husa, "Research Designs of Comparative Law: Methodology or Heuristics?", in M. Adams and D. Heirbaut (eds.), *The Method and Culture of Comparative Law*, Oxford: Hart Publishing, 2014, p.67.
[35] E. Levinas, "Transcendence and Intelligibility", in A. T. Peperzak, S.Critchley and R. Bernasconi (eds.), *Emmanuel Levinas: Basic Philosophical Writings*, Bloomington: Indiana University Press, 1996, p.151.
[36] *Id*., p.152.
[37] *Id*., p.153.
[38] E. Levinas, *Le temps et l'autre*, Paris: PUF, 1983, p.19.
[39] E. Levinas, *op. cit*., note 12, p.294.
[40] E. Levinas, *op. cit*., note 35, p.152.

that is, of suspending the alterity of what is only at first other, is not only a temptation but is the very "*way* of the same".[41] This attitude has manifested itself in philosophy inasmuch as it has considered the other as being accessible by thought and susceptible to becoming an object of knowledge.

In opposition to that, Levinas advances the notion of intelligibility, which accentuates the relational aspect of the interaction between the same and the other (the "knower" and the "known"). Since the other is free, "[o]ver him I have no power. He escapes my grasp by an essential dimension, even if I have him at my disposal. He is not wholly in my site".[42] So through intelligibility no power is exercised, and the other is not dominated as is the case in knowledge. Moreover, intelligibility takes place in a relation where elements stay separated and are not marked by it: this "unrelating-relation"[43] cannot itself be encompassed or thematised. Intelligibility is thus a way to get to "know" the other through interaction without framing it within the point of view of the one.

The criticism of knowledge as seizure can be directed at the way comparatists have been conceiving their wisdom. Legal comparative studies have been aiming at the production of universally valid learning,[44] which is, in Levinasian terms, a way of exerting a domination of the same, an expression of the will to seize the other and subsume it into an overarching order.

Since its dawn, legal comparison has been driven by the desire to create "the ultimate science of laws"[45] inductively, through empirical observation of various juridical phenomena. Following the auspices of Leibniz, who proposed the redaction of a "*theatrum legale*"[46] including laws from all over the world, the project has been unable to fully recognise alterity exactly because of those encyclopaedic aspirations: by framing the laws into a "theatre", they are analysed through a classificatory rationality that is already in place. Later on, comparatists based their studies on the unilinear theory of evolution[47] and resolved to study the law of "less evolved" societies in order to discover the most ancient phases of the "evolved" laws.[48] In this way, comparative law became a "biology of laws".[49] The adherents to this school of thought not only targeted the elaboration of a universal knowledge but also

[41] E. Levinas, *op. cit*., note 12, p.38.
[42] *Id*., p.39.
[43] *Id*., p.295.
[44] Cf. A. Peters and H. Schwenke, "Comparative Law Beyond Post-Modernism", (2000) *49 The International and Comparative Law Quarterly* 800, pp.803-10. The authors do not differentiate between universalist tendencies concerning the laws studied (to be unified) and the universalist tendencies concerning the epistemological status of the knowledge produced by comparison. This may lead to misunderstandings.
[45] A. Von Feuerbach, "Blick auf die deutsche Rechtswissenschaft", in *Kleine Schriften vermischten Inhalts*, Nuremberg: Verlag von Theodor Otto, 1833, p.163 (translation is mine).
[46] G. W. Leibniz, "Nova methodus discendae docendaeque jurisprudentiae", in *Opera Omnia*, Tomus Quartus, Genoa: Fratres de Tournes, 1768, p.192 (1667/1748).
[47] Cf. A. H. Post, *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend- ethnologischer Basis*, Oldenburg: Schulze, 1880, p.13. F. Bernhöft, "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft", 1 *Zeitschrift für vergleichende Rechtswissenchaft*, 1878, p.37.
[48] Cf. H. S. Maine, *Ancient Law*, London: Everyman's Library, 1965, p.61 (1861) and by the same author *Village Communities in the East and West*, New York: Henry Holt and Company, 1880, pp.6-7. This approach was presented at the Paris Congress by J. Kohler, "De la méthode du droit comparé", in *Procès-verbaux des séances et documents du Congrès International de Droit Comparé tenu à Paris du 31 juillet au 4 août 1900*, Paris: LGDJ Pichon et Durand-Auzias, 1905, p.228.
[49] E. Amari, *Critica di una scienza delle legislazioni comparate*, vol. I, Palermo: Edizioni della Regione siciliana, 1969, p.216 (1857) (translation is mine).

introduced a presumption of similarity of evolutionary lines of juridical systems. While this second erroneous thesis was rejected at the Congress of Paris in 1900,[50] the universalistic tendencies still enjoy vigorous support. The organisers conceived comparative law as a science aiming at the standardisation of laws.[51] Consequently, the paradigm of the Congress annuls the other's alterity not only because of its political goal (the unification of legislations) but also because of its scientific attitude that aims at methodological exactitude; thus claiming an epistemological status for the comparative knowledge produced that is similar to the ones of the approaches of the previous century. This constant is maintained in the post-world war mainstream.[52] More recently, Konrad Zweigert and Hein Kötz's seminal textbook describes comparative law as a "school of truth",[53] and also according to the Trento theses[54] the status of knowledge acquired through comparison is considered to be objective and scientific, and the juridical systems studied are viewed as a multiplicity of exemplars displayed in front of the comparatist.

Contrarily to such conceptions, Levinas writes: "[t]he pluralism of being is not produced as a multiplicity of a constellation spread out before a possible gaze, for thus it would be already totalized, joined into an entity".[55] There is no view from above, no all-encompassing perspective to be gained. Knowledge of other laws necessarily unfolds in the relation established between comparatist and *comparata,* and this relation is only meaningful from the inside; it is not susceptible to be observed "laterally".[56] The hegemonic project concealed behind the alleged neutrality of "scientific" comparison has been openly denounced within the comparative literature:[57] such a supposedly universal knowledge probably reveals more about the holder of the knowledge than about its own content.[58] Rather, Étienne Le Roy has written about a *dialogie*, which can be described as "a dialogue where the discovery of the other and the taking into account of his alterity come before any concern for the exchange of information".[59] The relation to the radical other is the point from which all meaningful intelligence about the other stems. It is

[50] Cf. E. Lambert, "Séance du 1er août", in *Procès-verbaux*, cit., note 48, p.33.
[51] Cf. R. Saleilles, "Conception et objet de la science juridique du droit comparé", in *Procès-verbaux*, cit., note 48, p.173.
[52] Cf. H. E. Yntema, "The American Journal of Comparative Law", 1 *American Journal of Comparative Law* 1/2 (1952), pp.12-13.
[53] K. Zweigert and H. Kötz, *op. cit*., note 18, p.14 (translation is mine). Pierre Legrand has shown how their conception of knowledge relies heavily on the one by Descartes. P. Legrand, "Paradoxically, Derrida", 27 *Cardozo Law Review* 631 (2005), pp.645-54.
[54] The Trento theses, developed by Rodolfo Sacco in 1987, have been the cultural manifesto of Italian comparison. An explanation thereof can be found in A. Gambaro, P. G. Monateri and R. Sacco, "Comparazione giuridica", in *Digesto delle discipline privatistiche – sez. civile*, vol. III, Turin: Utet, 1990, pp.51-56. For a recent endorsement of this approach cf. A. Gambaro, "The Trento Theses", 4 *Global Jurist Frontiers* 1 (2004).
[55] E. Levinas, *op. cit*., note 12, pp.305-306.
[56] *Ibid*.
[57] Cf. G. Frankenberg, "Critical Comparisons: Re-thinking Comparative Law", 26 *Harvard International Law Journal* 411 (1985) p.429. For a reflection on the epistemological basis of comparison in cultural studies that arrives at a similar conclusion, namely the unifying tendency of the operation and its missing out on the alterity of the *comparata*, cf. J. Matthes, "The Operation Called 'Vergleichen'", in J. Matthes (ed.), *Zwischen den Kulturen? Die Sozialwissenschaften vor dem Problem des Kulturvergleichs*, Soziale Welt, Sonderband 8, Göttingen: Verlag Otto Schwarz & Co., 1992, pp.88-89.
[58] Cf. W. P. Alford, "On the Limits of "Grand Theory" in Comparative Law", 61 *Washington Law Review* 945 (1986), p.946.
[59] É. Leroy, *op. cit*., note 8, p.6 (translation is mine).

not reducible to comprehension, but rather it is a primordial ethical relation that structures our experience as subjects and that is precursory to the construction of every system and elaboration of every procedure.[60] In this sense: "[t]he first philosophy is an ethics".[61]

IV. Epilogue: Comparison as Ethics

Considering the encounter with the radical other as the "pre-original" birthplace of all theoretical relations leads to the chiasm mentioned in the introduction. The recognition of alterity and the ethical relation to it are now substituted to any aspirations of universalist knowledge. For the comparison of laws, the emergence of a new way of understanding alterity allows the superseding of the connection between difference and exclusion; this is done by following the example of other critical approaches to law, such as critical race theory and feminist theory.[62] Levinasian alterity neither lends itself to discriminatory manipulation, nor to lies such as the "separate but equal" one. Comparison which assumes alterity enables legal pluralism to express itself, through its remarkable and its imperceptible differences. It yields new understanding by discovering these differences: it does not fear complexity and does not need to resort to the reductionism of an all-encompassing unity. At the same time, it also recognises the political dimension of the comparative enterprise[63] and the responsibility of the comparatist for the knowledge she (re)produces. Thus, the position of the legal scholar facing the other law is an ethical one. A comparison aware of alterity "provides a model for ethical thinking and practice".[64]

The aim of this chapter is to state that a reflection on alterity is a necessary prerequisite for all comparison since it influences the entire comparative experience. On this point, the jurist cannot but take advantage of the work that has already been done on alterity by other disciplines, such as philosophy. Furthermore, this chapter endeavours to show the theoretical pertinence and the conceptual fruitfulness of Levinas' thinking for legal comparison. The acceptance of the infinity of alterity, of the limits of knowledge of the other and the abandoning of the illusion of a panoptical vision complicates the comparatist's task, but will help her abstain from deforming methodological shortcuts; traps that comparison has not always been able to avoid.

In many ways, this chapter is nothing but a beginning. Indeed, there is still much to investigate in Levinas' thinking concerning the notion of alterity, and this work surely has not explored all the possible implications for comparative law. Furthermore, the elaboration of the author is being continued by other philosophers, and the conceptualisation of alterity in philosophy continues to attract interest. Thematics such as the complexity of the linguistic relation to the other, or the alterity internal to the Self have been developed as a continuation of Levinas's

[60] E. Levinas, *op. cit*., note 35, p.108. See also S. Critchley, *The Ethics of Deconstruction: Derrida and Levinas*, 2nd ed., Edinburgh: Edinburgh University Press, 1999, p.3.
[61] E. Levinas, *Éthique et Infini. Dialogues avec Philippe Nemo*, Paris: Fayard, 1982, p.81 (translation is mine).
[62] Cf. V. Curran, *op. cit*., note 2, pp.44-46.
[63] Cf. D. Kennedy, "The methods and the politics", in P. Legrand and R. Munday, *op. cit*., note 8, p.433. Cf. also G. Frankenberg, "Stranger than Paradise: Identity & Politics in Comparative Law", *Utah Law Review* 259 (1997), p.274.
[64] A. Nouss, "Translation as ethics", in S. Glanert (ed.), *Comparative Law: Engaging Translation*, New York: Routledge, 2014, p.23.

oeuvre. This text is but a beginning also because it only contains theoretical reflections which are preliminary to the actual comparison. It has not yet been started, but with alterity as a conceptual framework the comparatist can now set to work.

Act 2…

Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-legal Series, v. 6, n. 3 (2016) – Past, Present and Future of Sociology of Law
ISSN: 2079-5971

Legal Pluralism as a Theoretical Programme

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Patrignani, E., 2016. Legal Pluralism as a Theoretical Programme. *Oñati Socio-legal Series* [online], 6 (3), 707-725. Available from: http://ssrn.com/abstract=2833822

Abstract

This paper reconstructs the development of the status of the *theory* of legal pluralism: while originally the term has been used as descriptive label referring to a situation observed in the world, nowadays a more sophisticated understanding of the role of the concept is needed. The epistemology of social sciences can help us make sense of the multifarious literature on legal pluralism, and of the different conceptions of the term that have been proposed. More specifically, legal pluralism is here devised as a theoretical programme and its influence on the production of social-scientific knowledge is analysed. The investigation concentrates on the role of the concept in the selection of relevant data and on the intelligibility structure imposed on them.

Key words

Legal pluralism; empirical legal studies' epistemology; law; sociology; anthropology

Resumen

Este artículo reconstruye el desarrollo de la situación de la *teoría* de pluralismo jurídico: aunque en un principio el término se utilizó como una etiqueta descriptiva referida a una situación que se observaba en el mundo, hoy en día se necesita una comprensión más sofisticada del rol del concepto. La epistemología de las ciencias sociales puede ayudar a dar sentido a la literatura heterogénea sobre pluralismo jurídico, así como a las diferentes concepciones del término que se han propuesto. Más específicamente, aquí se concibe el pluralismo jurídico como un programa teórico y se analiza su influencia en la producción de conocimiento científico social. La investigación se concentra en el papel del concepto en la selección de datos relevantes y en la estructura de inteligibilidad impuesta sobre ellos.

Palabras clave

Pluralismo jurídico; epistemología de los estudios jurídicos empíricos; derecho; sociología; antropología

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ISSN: 2079-5971

1. Introduction

There is an ancient Indian tale about a group of blind men who have never seen an elephant and want to discover what they look like; so they touch one. Each man grasps a different part of the animal and consequently imagines it differently: The one who touches the leg is persuaded that elephants are like trees, and the one who feels the ear convinces himself that elephants are like fans. They all end up with very different opinions about the appearance of elephants. The American poet John Godfrey Saxe popularised this tale in the Western world with a poem that concludes:

> [E]ach was partly in the right,/ And all were in the wrong!/ Moral:/ So oft in theologic wars,/ The disputants, I ween,/ Rail on in utter ignorance/ Of what each other mean,/ *And prate about an Elephant/ Not one of them has seen!* (Saxe 1873, p. 78)

Some versions of the tale specify that the blind men are not aware of their blindness, and this is a relevant detail, because if they were informed about it they would also take into account the fact that their own perception of the animal is limited, as is that of their fellows. The whole point of the tale is to prompt speculations on the conditions and relativity of human perception. In a similar way, this paper wants to reflect on the influence of analytical tools on the results of empirical legal research. In other words, the elephant of this paper is legal pluralism, and the tactile sense of the blind men, the only means at their disposal to get to know what an elephant looks like, is the *concept* of legal pluralism.

This paper aims to redraw the theoretical trajectory of the concept of legal pluralism from being considered a descriptive label to having a more complex epistemological status. The starting point is a research question concerning the kind of knowledge that is produced by legal scholars who approach the world with the legal pluralist mindset and the influence of the concept on the empirical knowledge produced. An initial short excursion into the history of the term puts forth the *theoretical takeover* (Berthelot 2012a, p. 229) that was induced by the introduction of a descriptive term in the vocabulary of the legal scholar. That is to say, the shift towards an empirical approach to law entailed the recognition of an existing pluralism and unsettled established theories of law. Yet, it will be argued that an unsophisticated understanding of analytical tools as merely descriptive is problematic. Any agreement on the exact content of the concept's definition has proven impossible: As a matter of fact, the meanings of words are variable, and are even more so if they refer to an evolving societal phenomena such as law. Consequently, it is necessary to recognise a different epistemological status of analytical tools, and the purpose of this essay is to reflect on the relation between the *concept* legal pluralism, the social reality it refers to and the legal pluralistic knowledge produced. Here, Bourdieu's notion of *epistemic reflexivity* can be invoked:

> The analysis of mental structures is an instrument of liberation: thanks to the instruments of sociology, we can realize one of the eternal ambitions of philosophy-discovering cognitive structures […] and at the same time uncovering some of the best-concealed limits of thought. I could give hundreds of examples of social dichotomies relayed by the education system which, becoming categories of perception, hinder or imprison thought. The sociology of knowledge, in the case of the professionals of knowledge, is the instrument of knowledge *par excellence*, the instrument of knowledge of the instruments of knowledge. I can't see how we can do without it. (Bourdieu 1990, p. 16)

This way of proceeding entails the systematic applicability of the instruments of sociology to the subject who practices sociology and the exploration of the "unthought categories of thought which limit the thinkable and predetermine what is actually thought" (Bourdieu 1990, p. 178). Thinking about limits does not enable one to think without limits (Bourdieu 1990, p. 184) but allows a more realistic

account of the epistemological status of the knowledge produced, thus buttressing the fundaments of the discipline to which epistemic reflexivity is applied (Wacquant 1992, p. 46). Following the teachings of Bourdieu, in order to support the epistemological security of empirical approaches to law[1], a theory of the intellectual practice itself has to be included as an integral component and necessary condition of a critical theory of legal pluralism. Reflexivity is here thus referred to the activity of research itself. The ambition is to unearth the "epistemological unconscious of [the] discipline" (Wacquant 1992, p. 41), which is not going to happen by magically abolishing the distance between knower and known, but by taking into account this objectivising distance and analysing it (Bourdieu 1990). The reflexive turn "lead[s] to constructing scientific objects differently. It helps produce objects in which the relation of the analyst to the object is not unwittingly projected" (Wacquant 1992, p. 42). What makes this reflexive exercise particularly interesting is the fact that the objectivising distance and the relation of the legal pluralist to legal pluralism has changed over time. The present paper purports to show the variations of this relationship, or in other words, the evolution of the epistemological status of the concept "legal pluralism".

Clearly, facts and concepts are different. They influence one another, and any knowledge-producing activity based on an empirical approach entails a progressive co-shaping of concepts and facts in an ongoing process of understanding and revising the explanatory tools. Through a reciprocal interaction the facts mould the concepts and vice-versa. Such "prudent" (Santos 1995, p. 22) knowledge requires a rethinking of the relation between the subject (with its concepts) and the object (with its facts) in a way that entails the possibility of a connection between the two. Confusion between observed realities and conceptual instruments used to observe them is sometimes being prompted by the fact that we perceive realities *through the filter* of concepts, representations, theories, values and paradigms (Ost and Van de Kerchove 2002, p. 21). Consequently, careful consideration of the chosen theoretical framework and verification of its effect on the empirical research conducted are not only legitimate but also necessary.

Both anthropology and sociology, which deal with the exceptionally variable and receptive "objects of study" that humans inevitably are, had to face epistemological issues of this sort, such as the risks of "nostrification" of the Other into the categories of the observer's mindset as an outcome of the "*Aufmerksamkeitsfixierung*" (Matthes 1992, p. 84). From the time it emerged as a distinct subdiscipline, legal anthropology has been enlivened by analogous debates: Max Gluckman and Paul Bohannan pursued ethnographic studies of law and social control that led to opposite theoretical positions. The former maintained that the legal categories developed by Western legal scholarship could be used in order to represent indigenous legal practices and concepts (Gluckman 1955), while the latter considered the indigenous legal categories to be irreducible to Western vocabulary, and argued for the use of untranslated terms (Bohannan 1957). The Gluckman-Bohannan controversy on the appropriateness of the use of concepts stemming from the culture of the observer in order to account for a different observed culture was, in a way, a discordance of cognitive interests (Moore 1969, p. 339): not only a disagreement on the emic or etic way of rendering the results of ethnographic fieldwork, but also on the posture of the ethnographer herself. Of the two, Bohannan showed more concern for the impossibility of ever arriving at a "fact" that is uncoloured by the ethnographic instrument that is represented by the perceiver of the fact, and therefore affirmed the importance of learning "more about our sensory means of perception, and mechanical and other extrinsic extensions of them, and our own cultural prison" (Bohannan 1969, p. 407).

[1] Taken in a broad sense. I am not referring here to any specific American school of thought such as the Empirical Legal Studies of New Legal Realism. For an overview, see Macaulay and Mertz (2013).

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ISSN: 2079-5971

Animated by similar concerns, this essay tries to apply epistemic reflexivity to legal pluralism by conceptualising and making explicit the way in which an apparently descriptive concept is actually also normative, to wit directing the research. This will be done by relying on the notion of *theoretical programme* (Berthelot 2012b, p. 457). The second section seeks to capture the cognitive operations that have been set out by the concept legal pluralism since its inception, focusing on the fundamental strategic moves of the empirical turn and of the problematisation of classical legal theory. In the third section a way of conceiving legal pluralism that is abreast with contemporary reflection on the epistemology of social sciences will be advanced.

2. "Legal pluralism" as a label to account for a fact

The link between the empirical study of law and the realisation of its plurality predates the coinage of the term, thus proving its descriptive origin. It is worth mentioning how more than a century ago Eugen Ehrlich (1913), observing the "living law" in the Bukowina region, acknowledged the coexistence of nine completely different legal bodies of rules applied on a personal basis. Another founding father of the sociology of law, Georges Gurvitch, noted that the accuracy of the immediate empirical data of the juridical experience, and their particularly intense variability, necessarily leads to a pluralist conception of law (Gurvitch 1935, p. 66, 1960, p. 185). Moreover, Gurvitch argued that the study of law as a social fact should avoid adopting any particular philosophy of law (Gurvitch 1960, p. 188). Nevertheless, the introduction of a pluralist understanding of law has since its inception been the expression of a certain legal politics in the sense that it implied the recognition of the existence of power structures that are maintained by the monist tendency of the dominant social group (Rouland 1988, p. 304). This double dimension is acknowledged by Jean Carbonnier, who used the term *pluralisme juridique* as an explicative hypothesis for the widest possible number of juridical phenomena (Carbonnier 1969, p. 5) mentioning at the same time the connection between the choice of a theory of law (monist *vs.* pluralist) and the preference for a given political structure (Carbonnier 1969, pp. 13-16).

Then the term appeared as the title of a collection of papers published by John Gilissen, where the monist theory of law is vehemently shown to be inadequate, in particular in its variant developed by Carré de Malberg, who considered the State to be the starting point of all legal order, the only creating power of proper law (Gilissen 1972, p. 7). In the same book, the well-known definition of legal pluralism proposed by Jacques Vanderlinden (1972, p. 19) refers to the existence, within one defined society, of various juridical mechanisms that apply to identical situations. This statement is interesting for the purposes of this paper because it defines the concept as *existence*. Along these lines, according to other contributors, the aim of legal pluralism is the definition of a complex *reality* in its present state (Van den Bergh 1972, p. 93) or the *rendering* of the historical evolution of law (Ingber 1972, p. 82). Here, it is essential to acknowledge that the term is considered to be a descriptive one. This employment continues in Barry Hooker's book from 1975 called "Legal Pluralism". He also gives an account and analysis of a particular phenomenon and likewise uses the term as a descriptive category by referring to "the *situation* in which two or more laws interact" (Hooker 1975, p. 6, emphasis added). The same can be said about the seminal article by John Griffith, where he imperatively states: "[l]egal pluralism is *the fact*. Legal centralism is a myth, an ideal, a claim, an illusion" (Griffith 1986, p. 4, emphasis added). So legal pluralism is perceived to be the best label to describe a fact that is out there. There are certain facts in the world which deserve the label of "legal pluralism", while some other facts only deserve the label of "weak legal pluralism". Clearly, in so doing, the author was also defining what he wanted this label to mean, dismissing different meanings proposed by other anthropologists. The debate concerning the appropriate meaning continued, and the focus shifted from the societal group to the

individual (Vanderlinden 1989). The definitional dispute notwithstanding, the lowest common denominator is that "legal pluralism" remains part of a conceptual apparatus that is suggested directly by observed realities and is treated as a label proposed to *describe* a situation *existing* in the world, empirically verifiable, for which there was no label before (Merry 1988, Von Benda-Beckmann 1988).

The adoption of an empirical point of view led legal anthropologists to take into account normative phenomena which are not defined as law by the state legal system. In other words, the boundaries between law and notlaw posed by the rule of recognition of the state system itself are not considered to be the only valid way to define the relevant data. Legal pluralists, by going to look for law in previously unexpected places and recognising more sources of law than the ones usually accepted in classical legal theory, questioned the very meaning to be given to the word "law" (Le Roy 2003, p. 10). Apart from being one major cause of disarray and disparagement, this has also given rise to fruitful discussions and reflections. What is at stake is clear: the very possibility of "detect[ing]" and "see[ing]" (Davies 2010, p. 810) *legal* pluralism in a society depends upon the concept of law utilised. Far from being a sterile debate on nomenclature, this raises important issues for the legal scholar. To be sure, it is at this very point that legal pluralism, carrying its baggage of knowledge about the interconnected patterns of normativities at work in the complex world we happen to live in, enters and upsets the field of jurisprudence.

The dispute unfolds on at least two levels: the first is the level of legal theory, where a pluralist conception of law clearly contributes to the denouncement and progressive erosion of the ideological rhetoric of state legal monism (Woodman 1998, p. 48). Alternative conceptions of law challenge more conventional understandings of the term; legal theory is summoned inasmuch as it is ultimately built on the common sense and intuition about law drawn from the scholar's own domestic experience. Furthermore, at times legal theory might even fail to fit the facts of the legal system of the theoretician, if empirically tested. Thus, abstract and coherent logical constructs are criticised not only because theoretically they are ethnocentric, but also because they do not even correspond with domestic social reality (Galligan 2010). At the level of jurisprudence, legal pluralism, which is the product of an empirical approach to normative phenomena, challenges the validity of the pure theories of law. Where they are proven to be ill-founded, their universal soundness is reduced to a point of view that is necessarily relative and bearer of local interests. Still, it is indisputable that in the Western world there is (or there has been, due to reinforcement of local affinities and transnational regulations) a state monopoly on law. This fact is surely based on the process of centralisation of power that occurred in most European nation states during the nineteenth century, but is also a consequence of the elaboration of general theories that defined law in such a way that by the twentieth century it was understood to be necessarily centred on a State (Davies 2010, p. 808). Through a process of co-shaping, state monopoly on law and monist legal theories have been upholding and reinforcing each other. The jurisprudential debate triggered by legal pluralist conceptions of law is in this way charged with meaning and values: the expression "politics of definition" (Santos 1995, p. 115) makes it clear and leads us to the second level of the quarrel set off by legal pluralism, the one of politics *tout court.*

As Michel Leiris (1992, p. 37) argued, in most of the cases the anthropologist becomes the "natural advocate" of the people she studies: in the same way the legal pluralist is likely to claim that marginalised normativities deserve to be acknowledged by the central legal system, and to contend for more biodiversity in law. Clearly, it is important to be aware of what becomes visible through the lenses of a concept. Becoming visible means also acquiring a certain credibility, and in the best case scenario this might lead to recognition by neighbouring (dominating) normative systems. Research on legal pluralism gives voice to submerged social processes and fields, and this produces an effect of empowerment. Doing empirical

research utilising a legal pluralist framework certainly produces (at least indirectly, or in the long run) different political consequences than repeating and developing further abstract theories of law. Nevertheless, the elaboration of a theoretical framework is analytically not coincident with its desirability. Thus, the *concept* of legal pluralism cannot be blamed or prized for empirical constellations that are abhorred or found attractive for political or moral reasons (Von Benda-Beckmann 2002, pp. 45-46).

Both at the jurisprudential and the political level, compelling debates arise when the descriptive conception of legal pluralism meets classical academic legal science, but they will not be followed further here. Rather, the accent is set on another aspect of the theoretical matter of contention, namely the impossibility of a universally valid definition. The main shortcoming of the extended conception of law advocated by anthropological and sociological approaches is the one pointed at by the so-called pan-legalist objection: the problem of the distinctiveness of law from other social normative orderings has been haunting the theorists of legal pluralism until today (see for example the advanced distinction proposed by Croce 2012). The various attempts to locate an appropriate threshold of legal relevance notwithstanding, a conclusive line could not be drawn (Tamanaha 2008, p. 391). Theories and definitions are necessarily situated and cannot be considered universal (Tamanaha 2009, pp. 18-22, 2012, pp. 22-23). More recently the attempt to identify the essence of law through the use of a general concept that is universally valid has been acknowledged as an "illusion", and any such search defined as vain, "for the simple reason that this fundamental existence of the genuine properties of law does not exist" (Treiber 2012, p. 37). The very definition of law adopted, the very general theory one espouses, is dependent upon the cognitive interests of the research (Treiber 2012, p. 1).

Evidently, the impossibility of a universal definition of "law" for "legal pluralism" conceived of as a descriptive label is a quite predictable shortcoming for any term that claims to account for reality: empirical phenomena do not fit into analytical categories in a neat one-to-one manner, and the multiplicity of the real cannot be forced into one forever imperfect definition. In other words, the problem is not the law (with its variability in different human societies in time and space), but the epistemological status of our concepts. If we consider them to be descriptive labels we will necessarily end up having to admit their incompleteness and imprecision, and it could not be otherwise. A more complex understanding of the role of concepts in the production of knowledge is needed, and this applies to legal pluralism too.

3. Legal Pluralism as a theoretical programme

Many contemporary theorists explicitly distance themselves from the naïve objectivism of the social-scientific, empiricist-positivistic take on legal pluralism that is spread among the first proponents of the concept. Fortunately, the speculation on the influence of analytical tools on the production of knowledge in the social sciences has come to a more sophisticated understanding of the social scientific enterprise. These theoretical investigations may help us make sense of the various literature on legal pluralism and of the different conceptions of the term that have been proposed. Various approaches are indeed possible in order to account for the present state of the literature on the topic. For example, one could concentrate specifically on the scientific community itself, on its internal ordering and its influence on the knowledge produced (Husa 2014). Admittedly, Bourdieu's notion of epistemic reflexivity requires a recognition of the gravitational forces of the academic field on the intellectual work. Even so, it also provides the means to overcome the relativism this might lead to, namely highlighting the significance of the relation between knower and known. Not all aspects of the content of a notion can be explained through reference to the academic social field of its production. Epistemic reflexivity makes the objectifying relation between knower and known

itself the object of analysis; and the resultant objectification of objectification is the epistemological basis for social scientific knowledge (Maton 2003, p. 57). The impact and validity of a theory are not entirely expounded only by referring to the usages made of it by the scholarly community, but can also be evaluated on the basis of its internal consistency and its ability to structure empirical data. In this paper, the objectifying relation of the legal pluralist to the legal phenomena is scrutinised with the help of the notion of *theoretical programme* as developed by Jean-Michel Berthelot (2012b, pp. 469-70).

In his exploration of the epistemology of social sciences, Berthelot distinguishes, in between the broad disciplinary borders and low-rise methodological procedures, the middle level of the plurality of possible approaches, theories and schools of thought. As had already been noted by Robert K. Merton, this plurality is to be found within any discipline, and at the same time the "middle-range theories" share common issues, commitments and debates that create bridges among disciplines; and within sociology, they can be consonant with a variety of comprehensive sociological theories which are themselves discrepant in certain respects (Merton 1968, pp. 41-69). Those different approaches concern in fact the intellectual framework of the researcher. In order to solve a problem, to represent or explain a social normative phenomenon, the researcher brings into play schemes of analysis and more generally schemes of thought which inscribe the problem into a space of plausible solutions and designate certain acceptable operations (Merton 1968, pp. 39-40). Berthelot (2012b, p. 459) ventures to reconstruct those schemes and their workings, by relying mainly on the notion of a programme as developed by Imre Lakatos[2] and adapting it to the social sciences.

A programme can consist of an implicit guide of thought or of an explicit struggle manifesto and can be transposed into different particular theories. For each theory there is a tension between the dominant programme brought into play and the complexity of the real world that it aspires to reconstitute and at the same time describe (Berthelot 2012b, p. 485). Being a sort of a bet on the fruitfulness of an orientation of research, it is evaluated on the basis of its capacity to put aside "anomalies" which would falsify it and of its power of rational clarification of new occurrences (Berthelot 2012b, pp. 469-70). In other words, a programme is appraised according to its capacity to reduce the tension and the incongruencies between the "map" and the "territory". Also the clarity of the coding language is a determinant feature. The same phenomenon, within one same discipline, can be cut out from the context, studied, thematised and represented in different ways according to the indications given by the different programmes (Berthelot 2012b, p. 461), which therefore can be in competition with each other. As a matter of fact, there are conflicts between schools of thought: to conceive the epistemological space of social sciences through programmes does not mean to forget their situatedness within a certain scientific community. Instead, it involves focusing on some aspects inherent to the programmes' structure and their internal coherence rather than on the human background in which they are developed. Such an approach thus concentrates on the fundamental propositions which define a certain

[2] Lakatos's programmes are formed by a sequence of theories and experimental techniques grounded on a central core of assumptions, around which a belt of auxiliary hypotheses is developed. His view of science tries to reconcile Popper's falsification and Kuhn's paradigm revolution: conflicts with observation cause adjustments in the auxiliary hypothesis before they lead to a shift to a new research programme, and the whole process is rational and progressing and avoids the theoretical astray of incommensurability. The programme as conceived by Lakatos manages at the same time to convey its role as a vector of scientific activity, but it does not imply absoluteness and thus justifies the coexistence of different scientific explications of the same phenomenon and accounts for the social and historical context of the activity. Programmes have been poetically described as emerging as "excrescences of imagination fighting for existence by trying to outgrow each other", and defined as "flowers of phantasy" that display heuristic power (Motterlini 1999, pp. 9-10). Berthelot adjusts this notion for the purposes of social science epistemology and focuses on the role played by programmes in the creation of knowledge (programmes as heuristic devices) rather than on their ability to account for and explicate the history of science.

Oñati Socio-legal Series, v. 6, n. 3 (2016), 707-725
ISSN: 2079-5971

point of view in research in a given domain at a given time. The core of a programme is composed of axioms that define the *ontological* orientations concerning the entities and their relevant properties to be retained in the analysis; and of axioms that determine the *epistemological* orientations, outlining the legitimate forms of explication (Berthelot 2012b, pp. 474-475). In this sense, the programme steers the research through a set of axioms that are considered to be applicable to certain domains of reality.

The basic idea that the concepts steer the analysis is not completely absent from the legal anthropological literature. Leopold Pospisil already assigned to the very concept of law the role of a heuristic device:

> "Law as a theoretical and analytical device is a concept which embraces a category of phenomena (ethnographic facts) *selected according to the criteria the concept specifies*. Although it is composed of a set of individual phenomena, the category itself is not a phenomenon - it does not exist in the outer world. The term "law" consequently is applied to a construct of the human mind for the sake of convenience. The justification of a concept does not reside in its existence outside the human mind, but in its value as an *analytical, heuristic device*" (Pospisil 1971, p. 39)[3].

His position might have been partially due to the quixotic aim of developing a cross-cultural understanding of legal knowledge, and the authority he recognises in the social researcher might be considered excessive and outdated since it maintains the observer/observed dichotomy instead of depicting the research endeavour as an interactive one (Goodale 1998, p. 138). Nevertheless, he has the merit of introducing the researcher as one of the elements that, together with the inequality of power, determine the relativity of the concept of law. The reflection concerning the use of culturally relative concepts and their influence on the constitution of legal anthropological knowledge (Arnaud 1998, p. 6) has led to the recognition that the role of the concept is not one of a final description or explanation of what has been previously observed, but instead it is one that has shifted to the very beginning of the analysis. The concept becomes the "starting point for looking at the complexities of cognitive and normative orders" (Von Benda-Beckmann 2002, p. 40), and as such is particularly relevant for the subsequent research, since sociological theoretical frameworks are not value-free or non-normative (Westerman 2011, p. 109, 2013, pp. 50-63).

The following sub-paragraphs focus on the structuring force of the ontological and epistemological axioms entailed in the programme of legal pluralism, making explicit the theoretical programme's guiding power in the data selection process and in determining the legitimate forms of explanation.

3.1. Data selection

Applying the notion of a social scientific programme to legal pluralism requires a rethinking of the conception of relevant data. Berthelot differentiates between the *background* of reality, the *events* as perceived and organised by the people living them, their *traces,* and the stabilised *facts* as forged by the researcher. The infinite succession of events composing the background of reality is always already structured in the mind of the people living them. The difference between "ordinary" and "social-scientific" structuring of events is uniquely a difference between "*de jure"* and not "*de facto"* (Berthelot 2012b, pp. 489-493). The legal pluralist proposes one possible reconstruction among others, which will be evaluated according to the accurateness of its rendering and its pertinence, even if the participants would not have reconstructed the facts that way[4]. The materials are

[3] Emphasis added.

[4] A completely adverse position is held by scholars belonging to the ethnomethodology school, for whom the role of the researcher is uniquely the description of the mechanisms and the processes through which people organise and orient themselves, without proposing any "scientific" structuring of data

gathered by the researcher partly through the traces they leave, which are but fragmentary expressions of the events, and partly they are produced by the researcher herself by means of questionnaires, interviews, observations and similar means. The social scientist then engages in a pertinent structuring of the traces, transforming them into facts, steady objects of analysis and explication. Those facts are the results of a constructing operation that applies structuring axioms that consist of schemata of selecting elements from a continuum of reality and regrouping them in pertinent entities and sequences (Berthelot 2012b, pp. 494-95).

Each programme, or more specifically their ontological axioms, determine the application of this sophisticated mechanism of data selection and structuring. This point is openly accepted by some theorists of legal pluralism in the form of statements such as: "pursuing legal pluralism raises questions of scale and projection concerning the range and scope of the investigation, that are in turn dependent upon the standpoint from which legal pluralism is being addressed. For what you look for defines what you see" (Griffith 2011, p. 176). Yet others are more cautious. In his theoretical assessment of legal pluralism for instance, Melissaris mentions the issue concerning the selection of facts and discourses that are to be taken into consideration, rendering it as a sort of *fumus boni juris* evaluation of the "lawness" of a certain discursive practice. Nevertheless, he rapidly moves on to the decision concerning the merits, since it is only at that stage that a fully accomplished evaluation of the legal pluralist phenomenon can take place (Melissaris 2004, p. 75). What is argued here is that it is necessary to reflect about the very primordial moment of the acquisition of knowledge: the interstice between the mind of the researcher and her *prima facie* impression of the discourses she listens to and identifies as legally relevant.

Accepting this renovated theory of data is vital for any contemporary legal anthropologist. Clearly, the whole history of legal pluralism can be considered to be a debate about the selection of the pertinent data. Since the very beginning, legal pluralists have struggled to obtain the acceptance of a more extended definition of law, raising to the level of the "legally relevant" information bases that are not taken into consideration by traditional legal theory. Here the purpose is a more complicated one: the renovated data theory developed by the contemporary epistemology of social sciences involves the recognition that traces of events are reconstructed into facts by the researcher. In this manner state-enforced rules are constructed as "legality" and set within the wider matrix of normative phenomena existing beyond the State. Such a way of re-imagining normative and legal "hybridity" (Donlan 2012, p. 4) evidently puts into question the validity of a different data-organisation, for instance the hierarchical theory of sources of law or the classical taxonomical disposition into discrete and closed families or systems. Each programme entails certain rules of data selection and organisation, and legal pluralism as a programme also has the same guidance power.

3.2. Legitimate forms of explanation

The second half of the core of legal pluralism when conceived of as a research programme is constituted by its epistemological axioms. In order to account for the explanatory structures considered to be acceptable, Berthelot introduces the notion of *scheme of intelligibility.* A scheme of intelligibility is a set of operations and prescriptions that determine what kind of correlations between events are deemed to be pertinent. A non-exhaustive list of six possible schemes is proposed: (1) the *causal* scheme (if *x*, then y or *y=f(x)*) understands social facts as being cause and

alternative to the "ordinary" one. Such an approach has been applied to legal pluralism by Badouin Dupret, with the conclusion that there is no legal pluralism unless the participants consider themselves to be in such a situation (Dupret 2007, pp. 18-19). Those efforts to downplay the role of the researcher notwithstanding, it cannot be denied that there would be no social sciences without social scientists, and the purpose of this paper is exactly to explore the often overlooked role of the analytical tools in the mind of the researcher.

consequence of one another, and presents them as connected in an aetiological chain; (2) according to the *functional* scheme (S→X→S), phenomenon X is analysed in relation to its role or purpose in a given system, and consequently the teleological connections will be stressed; (3) in the *structural* scheme, elements gain their meaning from their respective position within a coherent structure (X results from a system founded on disjunctive rules, A or not A); (4) the *hermeneutical* scheme comprehends each fact as a symptom or expression of an underlying signification to be discovered through interpretation; (5) in the *actional* scheme the focus is set on the intentional actions of the agents, and events are mainly conceived of as the result of those intentions; and finally, (6) the *dialectical* scheme is presented, where a certain fact is explained as being the outcome of the development of internal contradictions within a system (Berthelot 2012b, p. 484). Those are but examples of different possible ways of selecting certain nexuses between elements. The schemes designate the connections that are considered to be more relevant or at least specifically worthy of attention in order to gain knowledge that deserves academic recognition. They present an array of possible relevant interactions to be singled out and studied by the researcher, operating at an intermediary level between reasoning techniques (such as induction or analogy) and paradigm orientations. These matrices of possible associations between facts are at work in different programmes and, silently but effectively, operate in contemporary theories of legal pluralism as well. Each different conception of legal pluralism applies a different scheme of intelligibility so as to meaningfully reconstruct the plurality of laws. In order to discover the scheme of intelligibility at work it is necessary to read between the lines about what kind of connections between facts are deemed to be telling. For instance, the conceptions of legal pluralism proposed by Roderick Macdonald, Emmanuel Melissaris and Margaret Davies can be usefully considered from this point of view as differentiating from each other exactly on the basis of the scheme of intelligibility they incorporate. Similarly, those schemes of intelligibility have also been used as a key to understand the methodological disputes between comparative lawyers (Samuel 2014, p. 14, pp. 81-95).

Macdonald sets forth a conception of *critical* legal pluralism that focuses on the individuals who are not passive subjects exposed to the control of law, but who are agents continuously negotiating their agency with one another (Macdonald and Kleinhans 1997, pp. 38-40): "[l]egal subjects are not just law-obeying or law-abiding. They are law-creating, generating their own legal subjectivity and establishing legal order as a knowledge process for symbolizing inter-subjective conduct as governed by rules. In such an aretaic conception, every human being in interaction with others is both law-maker and law-applier" (Macdonald 2011, p. 310). Compliance occurs through personal commitments arrived at without coercion or inducement, and people define acceptable behaviour in ways that engage their fluid, competing and multiple identities and notions of the self (Macdonald 2011, pp. 323-24). His position resembles the conception of law as an individual claim proposed by the liberal Bruno Leoni, who considers to be legal those demands that, following the rule of thumb *id quod plerumque accidit*, enjoy a good probability of being satisfied in a given society at a given time. Legal and illegal demands are located at the opposite ends of a spectrum of all possible demands that people may make, and each single individual, with his intentional actions (of claiming and of satisfying a claim), determines the position of the demand along this spectrum (Leoni 1991, pp. 195-205). In this sense, a multiplicity of laws is the outcome of the agents' intentional doings: this way of concatenating facts follows the epistemological orientation of the *actional* scheme of intelligibility as presented above. Therefore, it can be said that, with his theory of legal pluralism, Macdonad is proposing to recognise as most telling the interaction between facts that focuses on agents' intentions and actions.

The epistemological axioms that underlie Melissaris' theory are less clearly identifiable. He proposes to shift the focus away from the strictly defined and hermetically closed legal systems and the empirico-positivist approach typical of the last century and advances a theory that is a refinement of the contributions of Gunther Teuber, Robert Cover and Boaventura de Sousa Santos (Melissaris 2004, pp. 73-75). He proposes a conception of legal pluralism that focuses on discourses reducible to the basic schema legal/illegal. He adopts Teubner's definition of "communicative processes that observe social action under the binary code legal/illegal" (Teubner 1998, p. 128). Those discourses, in order to be considered relevant, need to fulfil the further condition to be institutionalised, which is to create generalised expectations and to be the object of the commitment of their participants. The notion of commitment is borrowed from Cover, who has a very strong understanding of the term, which includes an intellectual sense of belonging as well as bodily participation (Cover 1986, p. 1605). Melissaris thus mixes the work of two authors to elaborate his definition of the legal, and to further detail his conception he prescribes also the posture that the research should take. He requires that voice is given to the participants themselves, to their understanding of "what is it that they do when entering the legal discourse and why": this is what Santos calls for, when he argues for letting the South (symbolising the socio-economically dominated subjectivity) emerge and express itself without the distorting interference of a distant observer (Santos 1995, pp. 506-518). Melissaris' sophisticated theory of legal pluralism finds a balance between the philosophies of three different scholars, and for this reason it mixes elements from different schemes of intelligibility. It applies partly the *structural* scheme of intelligibility to legal discourses, since different elements acquire their meaning in relation to the position they occupy in the complex interrelation of closed systems. Interdiscursive relations are conceptualised by Teubner who mobilises a vocabulary and a theoretical apparatus such as "structural coupling" and "linkage institutions" that define specific roles for each element in the total economy of the systems relations (Teubner 1998, pp. 126-129). Melissaris then calls for a move from structures to discourses, which are institutionalised but not in the sense that they become whole coherent systems, rather the institutionalisation is due to the participants' commitment (Melissaris 2004, p. 74). It is at this point that the *hermeneutical* scheme of intelligibility enters into play, with the reference to the participation and with the emergence of the subjugated subjectivities in their own terms. It is they, who, connecting a certain meaning to a certain discourse, make it legal, and it is their understanding of the practice that should be given voice to. Therefore, the researcher should figure out, by interpretation, the signification underlying the (facts of) participation. By so doing, she clarifies the scope of the research and produces legal pluralistic knowledge in line with Melissaris' conception. To sum up, the relevant connections are those that convey a certain meaning to certain facts (hermeneutical scheme), thus setting them within the non-contradictory matrix of legal/illegal discourses (structural scheme).

Finally, Davies aims at developing a new understanding of law, one which is appropriate to contemporary conditions of diversity. Her idea of pluralism is twofold. On the one hand, there is the outward looking pluralism which sees a multiplicity of normative spheres coexisting in the same one space, with state law being one among many normative instances. Davies is aware of the fact that this approach risks remaining trapped in a theoretically singular view of plural laws, focusing on developing a systematic and totalistic understanding of legal plurality. To be sure, she contends (Davies 2005, p. 96), this is what happened to much of the empirical research on legal pluralism. Instead she pleads for a deeper understanding of the conceptual pluralities concerning law. She calls for a re-evaluation of the relation of law to the social, political and moral spheres of life, and for the recognition that all law is a form of cultural practice (Davies 2005, p. 107). As a consequence, legal pluralism comes to signify the multiplicity of the legal

phenomena, which is expressed in a variety of different forms that are incommensurable and cannot be reduced to unity. On the other hand, the second understanding of pluralism she advances points to the inherent pluralism of state law itself, which, far from being a coherent and complete block, is actually full of lacunas, contradictions, unresolved histories and counter-narratives (Davies 2005, p. 96). She suggests re-conceptualising the Western concept of positive law as complex and heterogeneous and presents Cover's insights on *nomos* as effectively expounding the contradictory and fictional foundations of any singular structure of law. This second pluralist attitude also rests on the conviction that law is essentially a cultural expression of a radically plural society (Davies 2005, p. 110). These two attitudes of pluralism, which convene under the expression "ethos of pluralism" both entail a "descriptive" part in which she determines what should be focused on, and what she calls a "normative" part, which includes the political and social reasons that make pluralism preferable to monism (Davies 2005, pp. 100-105). Nevertheless, her approach to pluralism can also be understood as a programme with its heuristic guidance power. Because of her aspiration of making sense of the dominant legal order through its implications in systems of social power and of explicating the alternative concepts of the legal as elaborations on cultural, sexual and other forms of difference, the *hermeneutical* intelligibility scheme can be seen at work in her theory. In other words, the concept of law she expounds is envisaged as an expression of underlying cultural meanings, which are to be assessed through interpretation, and the characterisation of this kind of nexus between meanings and practices is considered to be the *proprium* of the legal pluralistic research.

The divergences in the scholarly production of legal pluralists are in this way grasped as being an expression of variance in the epistemological core of the programmes. The authors briefly considered here all propose a programme of legal pluralism that differs from the other proposals not in the ontological part of the core but in its epistemological axioms. They all apply a different intelligibility scheme to their data, and thus they isolate as relevant different kinds of interactions between their constructed facts. The very same world phenomena would be conceptualised and made sense of in partially different ways by each of these theories. Very much like the blind men touching the elephant, legal scholars conducting their research empirically are being guided by the theoretical programme they adopt, which leads them to construct as legally relevant certain facts and to perceive as academically worthy of attention certain kinds of interrelations between facts.

4. General considerations

The concluding remarks will consider what is the interest in setting the concept of legal pluralism within the theoretical programme theory. Before that, it is appropriate to acknowledge explicitly the nature of the stance of this essay. Clearly, it entails the implicit assumption that the recognition of (not only) normative pluralism in society is necessary. It is under the eyes of everyone that different *Weltanschauungen* happen to coexist very closely and intersect with each other, and this established social reality does not even need to be upheld. Needless to say, the "central" legal system is in need of finding ways to deal with this factual situation, and legal pluralism is certainly a very useful analytical tool. Furthermore, developing theoretical frameworks that enable getting to grip with the complexity of, and to make sense of, the network of interrelated normativities existing in the contemporary world is clearly a way of challenging whether generations of law students should still be inculcated with the general theories of state law that do not take into account other kinds of norms. On the whole, reflecting on the theoretical foundations of the anthropology of law is a way of supporting the overall project of the discipline. This is the underlying agenda of this paper, which has hopefully been visible throughout, the abstractedness of the approach taken notwithstanding. Yet, the main focus of this essay is not to prompt any particular policy of legal pluralism,

but instead it is to apply epistemic reflexivity to the concept by illustrating the way in which the epistemic practice of research, and in particular the theoretical programme chosen, affects the results.

A first corollary of this operation is the reduction of distance between the so-called internal and the external approaches to law. As has been discussed above, the legal anthropological and sociological enterprise involves a change in the nature of the legal research. It introduces, alongside the classical legal doctrine that uses a nomologico-deductive way of reasoning, an inductive way of looking at law, one where the researcher proceeds in order to establish the facts by empirical investigation. This opposition can be presented as the methodological dichotomy between paradigms of inquiry and of authority (Samuel 2007a, 2007b). Often, legal scholars are trapped into a world of consenting insiders and therefore are unable to produce any relevant social scientific knowledge (Samuel 2009). Their intellectual work consists of analysing and systematising rules in the pyramid of precepts so as to determine their exact prescriptive content within the authority paradigm. Conversely, the empirical legal researcher concentrates on the actual behaviour of the people in the world; instead of developing alleged universal theories of law she reveals features of lived normative phenomena (be they of state origin or not). By and large, legal theory and empirical research on law have tended to ignore one another, each going in its own direction and following different research agendas. Still, since they both aim at comprehending the same phenomenon, cooperation could be advisable (Galligan 2010, p. 991). To this end, legal pluralism happens to be rather well placed: it is a fruitful area for constructive engagement between empirical research on law and legal philosophy, whose concepts are directly put into question (Cotterrell 2002, p. 638, Davies 2010, p. 825).

A second corollary of the complexification of the epistemological status accorded to the concept of legal pluralism consists in a further challenging of the dichotomy between the internal *vs.* external approach. The very validity and utility of such a sharp opposition are questioned. A search for the archetypal instance of the dichotomy leads us back to the beginning of the twentieth century, to the conflict between the internal, conceptual and pure theory of law developed by Hans Kelsen and the external approach to law, seen as part of a social complex, adopted by Eugen Ehrlich (Davies 2010, pp. 809-810). The prominence of the two first proponents notwithstanding, this disciplinary division is conventional, unnecessary and furthermore contestable since it is based on the assumption that law has clear conceptual boundaries which scholars can be inside or outside of (Davies 2010, p. 825). In order to question this dichotomy, Bourdieu (1991, p. 95) argues that the internal approach can be conceived of as a product of the legal scholars' social field and of their legitimation strategies. Far from being the general and abstract output of a universal reason, law is actually a space of belief within which the agents are players socialised to think that they are playing a game that deserves to be played (Bourdieu 1991, p. 99). The "internal" point of view is attacked by showing its historicity, its situatedness and contingency. The legal social field yields a normative order that reflects its own values, which are therefore not neutral nor universal. In this paper the direction of the attack to the dichotomy is specular, and the internal/external opposition is challenged by reflections on the inherent normativity of frameworks adopted by the "external" approach to law. The outcome is influenced by decisions concerning the scale and the projection of the inquiry, the purposes of the research, the actors involved in the investigation, the selected sources and the methodological approaches used. Those terms of reference determine what the scholar sees (Griffith 2013, p. 272). How this happens is the question that has been dealt with in this paper, which contributes to the further articulation of the dichotomy beyond the simplistic understanding of internal = normative *vs.* external = descriptive approach.

The overall aim of this paper has been to investigate the nature of empirical knowledge produced through legal pluralistic lenses, its presuppositions and

foundations, its extent and validity. By showing the heuristic guidance exercised by the concept of legal pluralism, it has been highlighted how it enables research and at the same time limits the space of manoeuvre. Such an assessment should not be understood as undermining the validity of the concept. As Bourdieu puts it: "Reflexivity is a tool to produce more science, not less. It is not designed to discourage scientific ambition but to help make it more realistic" (Bourdieu and Wacquant 1992, p. 194). That is to say, the programme approach offers a realistic assessment of the capacity of the term to convey information about the studied domain, one that takes into account the normativity inherent to the use of concepts. Moreover, this approach provides a way to analyse the coherence and the internal structure of the various conceptions of legal pluralism proposed in scholarly literature. It has been claimed that the different usages of the concept by various contemporary theories of legal pluralism can be explained as being a consequence of their derivation from programmes incorporating different intelligibility schemes.

The basic point of this paper is that the definition of legal pluralism adopted steers the research: awareness of this allows for a choice of framework corresponding to one's cognitive interest. In this way, the shape of the "obstacle" constituted by the empirical method is made clear, and the relation between observed realities and the conceptual instruments used to observe them is acknowledged, in that the influence of the latter on the former is undisguised.

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Complex Legal Pluralism

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Abstract: Legal pluralism as a theory of law lays at the crossroads between theoretically oriented jurisprudence and empirically oriented anthropological and sociological research on law and as such holds great relevance in contemporary reflection on the nature of law. The term is understood here as the recognition of the plurality inherent in every legal culture, which is a quality that allows the applicability of insights from complexity theory. Complexity as developed by Edgar Morin is here referred to legal pluralism and is used to argue that legal pluralism is not simply another general theory of law. Rather, as a theory of law, it is characterised by its focusing on the variability of legal phenomena. It is a theory of law that states its own contingency and the perpetual need for re-definition. While any alleged all-encompassing theory destroys the autonomy of the legal scholar, complexity provides her with the appropriate tools to grapple with the intricacies of the contemporary legal world.

Keywords: Legal pluralism, complexity, law as culture, general theories of law, legal philosophy.

1 Introduction

The main claim of this article is that legal pluralism is not just another general theory of law. To be precise, the trespasser here is 'general'. Understanding the plurality of law entails accepting its complexity and dismissing all ambitions to create a universal, all-encompassing, ever-valid, general theory of law. Legal pluralism is a theory of law and one which is characterised by its focusing on the variability of legal phenomena and the importance of empirical findings. It is a theory of law that states its own contingency and perpetual need for re-definition. This is not because we have all become skeptical post-modern relativists but because of the nature of the complex thing we are talking about: contemporary law.

The line of argument will go as follows: law as legal pluralism is a complex system, and complexity theory can fruitfully be applied to it as a theoretical framework. Complexity theory does not involve the formulation of general theories, therefore legal pluralism is not another general theory of law.

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2 Two preliminary issues

The first preliminary issue that needs to be made explicit concerns the factual and theoretical disconnection between law, nation and state. For a long time in the western world there has been coexistence, within the same community, between diverse legal systems. It started with the differentiation between ecclesiastical and secular powers and then continued with the formation of secular legal systems: feudal laws were sided by manorial laws, mercantile laws, urban laws and royal laws; their respective jurisdictions were determined on a case-to-case basis following territorial, personal or substantial criteria. This plurality has been a source of legal (as well as economic and political) transformations and also of freedom for individuals: a serf might address the town court for protection against his master, a vassal might address the king's court for protection against his lord and a cleric might address the ecclesiastical court for protection against the king.[2] The relation among these different laws was not only that of alternative exclusive jurisdiction but also of coexistence in the sense of a relation between common (*ius commune*) to particular law (*ius proprium*). This relation implies the dependence of one level on the other as a definitional counterpart and as guidance for legal reasoning in concrete cases.[3] The study of the history of European law reveals its plurality and complexity.[4] The process of absorption of modern law into the modern state is thus a historically contingent one which 'like any other historical process, had a beginning and will have an end.'[5] Moreover it is disputed to what extent this process of centralisation and differentiation of law along national territorial borders has been effective; it has been argued that a perfect coincidence of a homogenous group of people with the legal and political structure of a state has never occurred, anywhere.[6] Law (as a normative system), nation (referring to a homogeneous population) and state (as a political entity) do not coincide, and they may have corresponded to each other only in official state rhetoric and mainstream academic discourse, becoming a sort of 'self-fulfilling prophecy'.[7] The 'myth' or 'taken-for-granted assumption'[8] concerning the overlapping of a national legal system with a homogeneous society is here going to be left behind. The disconnection between law, nation and state is one of the theoretical bases for this article.

2 Berman 1983, p. 10.
3 On common laws defining themselves in relation to particular laws and to other common laws, in tolerance and interdependence see Glenn 2005, pp. 95-96.
4 Donlan 2011, 2/1.
5 De Sousa Santos 1995 p. 95.
6 Glenn 2013p. vii f..
7 Davies 2010, p. 810.
8 Darian-Smith 2013, p. 9.

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The second preliminary issue consists of the placement of this article within the broader jurisprudential discussion. We are at the sometimes uncomfortable but highly thought provoking crossroads between legal theory and legal sociology, an intersection that Gunther Teubner, in the pages of this very journal, has described as a 'paradoxical hybrid' and a locus of 'mutual irritation'.[9] It has been lamented that for a long time legal theory and empirical legal research[10] have tended to ignore one another, each going in its own direction and following different research agendas.[11] Analytical jurisprudence has been more focused on developing and refining theories; that is, abstractions from the law in books.[12] Sociological and anthropological studies of legal phenomena have challenged this way of proceeding and the way of doing philosophy of law is recast. In this discussion, legal pluralism as a theory of law is quite central: it is a fruitful area for constructive engagement between empirical research on law and legal philosophy, whose concepts are directly put into question.[13] The reflections presented in this article are to be understood in the setting of the upsetting of legal philosophy to which legal pluralism has contributed.[14] The focus is not on the shift it caused from monistic to pluralistic understandings of law but on the width of applicability of any legal theory. In other words, the legal-cultural epistemological limits involved in doing legal theory that are highlighted by theories such as legal pluralism. As Jaakko Husa puts it: 'grand legal theories are not very well equipped for confronting the new legal pluralistic world.'[15] He advances, instead, the heuristic tool of the kaleidoscopic view of law, which takes into account the variability (in space and in time) of legal theories and also the perspective of the theoretician who points the kaleidoscope towards what interests her. Most importantly, 'the kaleidoscopic view of legal theory is not itself a legal theory. Yet, this view underlines the importance of not locking any theory within its primary epistemology:[16] it is only by understanding dif-

9 Zamboni M. (2012) Interview with Gunther Teubner – Frankfurt (Germany), December 2010. *Retfærd Årgang* 35 nr. 4/139: 3-21, p. 5.

10 The term refers here to sociological and anthropological studies of law, and not to contemporary strands of empirical legal scholarship that are gaining momentum in North-American academia. For those, see Suchman and Mertz 2010, 555-579. See also Macaulay and Mertz 2013, 195-210.

11 Galligan 2010, p. 991.

12 But, for an extensive and learned presentation of the major Anglo-American normative legal theories interpreted contextually ie reflecting and expressing the political and social environment of their production see Cotterrell 2003.

13 Cotterrell 2002, p. 825.

14 That the discussions on the nature of legal pluralism are in fact discussions on the nature of law has since been acknowledged. See Le Roy 2003, pp. 7-20.

15 Husa 2013, p. 209.

16 By 'primary epistemology of law' is meant the 'inbuilt and subconscious epistemic foundation of law and everything that is deemed legal. [...] The effects of this kind [of] primary epistemology concern the manner one regards as a proper theorising about law.' *Id*., p. 199.

ferent viewpoints of law that we can also obtain a better understanding of legal theory itself.'[17] The kaleidoscope metaphor goes against the meta-ideas of objectivity and of universality on which legal theory has been built.[18] Here the project is a parallel one; namely the proposal of an understanding of law that, by being pluralistic, also changes the theory of knowledge about law.

3 *General* Theories of Law

By 'general theory of law' is meant an intellectual contribution that aims to clarify theoretically the nature of law or legal institutions in general.[19] That is, that aims to offer a clarification with universal value, or, to put it in an exaggerated way, to advance timeless truths about law. Aspirations of this kind were well spread among legal theorists in the nineteenth century.

Austin's concentration on the abstraction and exposition of principles derived from positive systems is an example of such an attitude. Even while admitting the existence of individual peculiarities in different systems, the focus of what he calls General or Universal Jurisprudence is on the 'principles, notions, and distinctions which are common to systems of law'.[20] And the reader does not have to search far to localise the alleged 'generality' and 'universality' he is referring to, as the text continues as follows:

> 'And these resemblances [...] are necessarily confined to the resemblances between the systems of a few nations; since it is only a few systems with which it is possible to become acquainted, even imperfectly. *From these, however, the rest may be presumed*. And it is only the system of two or three nations which deserve attention: – the writing of the Roman Jurists; the decision of English Judges in modern times; the provisions of French and Prussian Codes as to arrangement'.[21]

As such, it could not be more explicit where the author and his theory are situated. Still, the theory is called general and universal.

An interesting parallel can here be drawn with the theory of comparative law, as more or less at the same time similar goals were set. The aspiration was to create universal knowledge inductively through empirical observation of various juridical phenomena. In this context it is worth recalling the words of the German criminalist Anselm von Feuerbach, who wrote:

17 *Id*., p. 212.
18 *Id*., pp. 197-98.
19 Cotterrell 2002, p. 3.
20 Austin 1954, p. 367.
21 *Id*., p. 373 (emphasis added).

'Comparison and combination are the two richest sources of all discoveries in the empirical sciences. It is only through the process of contrasting that the opposed elements become clear; and in the same way it is only through reflection on similarities and differences, and the reasons thereof, that the essence of all things can be exhaustively explored. From comparison of languages emerges the philosophy of languages, the true science of languages; in the same way, it is from comparison of laws and customs of nearby and distant nations, of all times and countries, that a universal jurisprudence can emerge, the ultimate science of laws, which gives meaning to all particular laws.'[22]

The main shortcoming highlighted above seems to have been overcome, as Feuerbach does not claim that from the study of a few legal systems the principles of all the rest can be presumed, and instead he refers to the laws and customs throughout history. Clearly, the question of feasibility could arise, but what has to be stressed for the line of argument to be followed here is rather the use of words such as 'universal' and 'ultimate' to describe the kind of knowledge that is to be produced.

More recently, the philosopher Joseph Raz has also stated that the central task of general jurisprudence is to produce a universally applicable theory of the nature of law:

'The general theory of law is universal for it consists of claim about the nature of all law, of all legal systems, and about the nature of adjudication, legislation, and legal reasoning, wherever they might be and whatever they might be. Moreover, its claims, if true, are necessarily true [...], not contingent on existing political, social, economic, or cultural conditions, institutions, or practices.'[23]

Such assertions are highly problematic, as universalistic truth claims lead to paradoxes when derived (and then applied) to time and culture bound phenomena like law.[24]

Assertions of generality are paradoxical not only because they refer to socially constructed, variable phenomena, but also because they are multiple. When multiple theories claim to be ultimate, either only one of them is rightly claiming this universality, or none of them are. Legal philosophers do not live in a vacuum and are aware of the existence of multiple theories: just to provide one example, the popular textbook 'Lloyd´s Introduction to Jurisprudence' opens with the adage *quot homines, tot*

22 Von Feuerbach 1833, p. 163 (emphasis added, translation is mine. Orig.: '*Die reichste Quelle aller Entdeckungen in jeder Erfahrungswissenschaft ist Vergleichung und Kombination. Nur durch mannigfaltige Gegensätze wird das Entgegengesetzte vollständig klar; nur durch Betrachtung der Ähnlichkeiten und Verschiedenheiten und der Gründe von beiden wird die Eigenthümlichkeit und innere Wesenheit jeden Dinges erschöpfend ergründet. So wie aus der Vergleichung der Sprachen die Philosophie der Sprache, die eigentliche Sprachwissenschaft hervorgeht; so auch aus der Vergleichung der Gesetze und Rechtsgewohnheiten der verwandtesten, wie der fremdartigsten Nationen aller Zeiten und Länder, die Universal-Jurisprudenz, die Gesetzwissenschaft ohne Beinamen, welche aber jeder besonders benannten Gesetzwissenschaft erst ihr wahres kräftiges Leben verleiht*.')

23 Raz 2009, pp. 91-92.

24 Tamanaha 2012, p. 32.

sententiae.[25] Indeed, any textbook presenting various conceptions of law must recognise their plurality, as each chapter cannot pretend to be the whole book; on the contrary the various theories (or rather the theorists) discuss with each other. In this manner, the definition of law advanced by natural lawyers, as an expression of some higher non-human instances (God, Nature, Universal Reason), is presented in its historical appearances and is also criticised for confusing law with morals by positivists. Those, in turn, bring law down to earth as a set of rules posited by humans. However, being empirically oriented, they are in turn accused of confusing law with facts by normativists. As supporters of the pure theory of law, they argue that law is what has been validly enacted according to a higher norm. The list continues with the historical school and law as the expression of the *Volksgeist*, followed by the more recent analytical jurisprudence, various theories of justice and interpretivism. And then come the contemporary approaches: legal realism, critical legal studies, post-colonial and feminist legal theory and socio-legal studies. They all have their own take on law, their specific vantage point or perspective on the subject-matter and obviously they all rely on some assumptions or basic theorising.[26] What is more important, none can claim exclusivity.

The aspect of general theories of law that is criticised here is not the content of each theory, but its attitude towards other alternative theories. An array of restriction and exclusion strategies may accompany a given theory so as to provide it with a false sense of exclusivity.[27] This occurs, for instance, whenever a certain theory is put forward as defining the whole law rather than expressing one possible selection of the subject-matter.[28] Other strategies consist of passing certain aspects of the theory advanced as displaying philosophically *necessary* or scientifically *objective empirical characteristics* of law.[29] The epistemological attitude of closure towards further theoretical inquiry is the problem: the positing of a certain concept of law as the *exclusive* concept of law.[30] Such an approach is essentialist or reductionist as it posits a particular model of law as a governing paradigm.[31] To sum up, a general theory of law is here defined as being a theory concerning law that claims to be ultimate. The point of this paper is not only to assert that legal theorists (be they legal pluralists or belonging to any other school) should avoid this epistemological attitude, but also the point is to show that legal pluralists are better protected from assuming such an attitude.

25 Freeman 2008, p. 1.
26 See also Berman 1983, p. 12.
27 Halpin 2014, p. 185.
28 *Id*., p. 184.
29 *Ibid*.
30 *Id*., p. 187.
31 Griffiths A. 2002, p. 293.

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4 Legal Pluralism

What is meant by legal pluralism in this paper? Indeed, the definitional disputes over the term have been both passionate and compelling. Pluralism has been studied in colonial and postcolonial contexts;[32] the existence of various normative orders has been acknowledged around state or official law and mainstream society in 'western' countries;[33] and finally pluralism has been discussed also in relation to processes of globalisation and transnationalisation of law.[34] Different definitions have been advanced depending on the context. Nonetheless, it lays beyond the scope of this text to reconstruct them. And besides, definitions set borders of meaning that are inevitably unsatisfactory and imprecise: drawing a definitional line between legal pluralism, legal culture and the rest of social life is an ever-perfectible enterprise. Bearing this general *caveat* in mind, it remains indispensable that an established convention on the (rough) meaning of certain keywords is set.

Legal pluralism is understood here as a feature of law-as-culture, which means that law is a manifestation of a specific cultural worldview. The concept of law-as-culture cannot be used to justify causally a certain legal institution by referring to a cultural explanation (and assigning causal priority to competing hypothetical variables[35]). The term entails a more interpretive approach that is concerned with understanding how different aspects of legal culture resonate and fit together.[36] This is anything but an easy exercise, as different aspects of any legal culture rarely resonate and fit together: more often than not they are disparaged and incoherent. This brings us back to legal pluralism: law, understood as a manifestation of culture, is inherently plural. Pluralism is an element that is present in every law-as-culture, and vice versa a cultural understanding of law implies the recognition of the internal inconsistencies of law, which is constituted of countless fragments not necessarily related in a formal rational manner.[37] This amounts to nothing more than a modification of the maxim *ubi societas ibi jus* into becoming *ubi societas ibi jura*. In this sense, in a context of normative plurality, legal pluralism is here understood as the idea that state law is just one form of law. It is worth underlying that legal pluralism is not taken to be a synonym for cultural difference as if there were a relation of congruence between legal order and cultural iden-

32 See for example Hooker 1975
33 See for example the literature referred to in Merry 1988.
34 See for example Twining 2010, 243-262.
35 Nelken 2004, p. 9.
36 *Ibid.*
37 See the intriguing reference to Steppenwolf, the novel by Herman Hesse, made by Banakar 2008, p. 57-59.

tity.[38] As stated in the first preliminary issue above, law and cultural identity are seen as disjoined and both transversally differentiated.

In addition to that legal pluralism, as defined in this paper, disassociates itself from the allegedly strictly descriptive, social-scientific, empiric positivistic conception of the earlier legal pluralists.[39] In particular, what is challenged is the objectivist epistemology of such an approach that produces images of pluralism that are a reification of 'the legal'. Rather, individuals are recognised as agents creating, and at the same time moving in between, a complex environment of normative patterns that is variously interconnected and variously meaningful. Given the high level of complexity and dynamicity of these normative patterns, any account of pluralism that crystallizes them conceptually as separated parallel normative orders will be inadequate.[40] Anne Griffiths has written of the 'highly mobile and contingent nature of law' and of the 'multifaceted dimensions of legal pluralism that are constantly in the making'.[41] As such, she is referring to a conception of pluralism that is multidimensional, polycentric and made of a network or web of relations as opposed to more traditional views of legal pluralism that are linear and mono-causal. In order to better understand the epistemological posture of the conception that is defended here, insights from complexity theory can profitably be referred to.

5 Applying complexity theory to legal pluralism

Complexity theory originated in the 40s and 50s in North America among mathematicians and engineers in transversal fields of interest such as Information Theory, Cybernetics and General Systems Theory. It then spread in the 1980s with the founding of the Santa Fe Institute,[42] which focus on the study of dynamical systems with a large number of variables, interactions and feedbacks so that internal processes cannot be easily predicted: in complex systems the paradigms of classical science do not apply.[43]

38 Greenhouse 1998
39 Together with others such as Kleinhans and Macdonald 1997 and Davies 2005.
40 Davies 2010, p. 822.
41 Griffiths, 2011, p. 174.
42 http://www.santafe.edu/
43 What needs be overcome is the reductionism and scientific determinism as represented by Pierre Simon Laplace, who in 1814 famously described scientific knowledge as follows: 'We may regard the present state of the universe as the effect of its past and the cause of its future. An intellect which at a certain moment would know all forces that set nature in motion, and all positions of all items of which nature is composed, if this intellect were also vast enough to submit these data to analysis, it would embrace in a single formula the movements of the greatest bodies of the universe and those of the tiniest atom; for such an intellect nothing

On this side of the ocean Edgar Morin has also written on complex thought in relation to reflections on knowledge (how we know, how we organise our knowledge[44]) and interdisciplinarity.

Even though it is not a much trafficked theoretical path, this article is not the first attempt to use complexity theory to render the intricacies of law. A well-developed vision of law and complexity has been offered by Ruhl.[45] In contrast to the approach that will be taken here, he relies directly on chaos theory and complex adaptive system theory as developed in the natural sciences and orients his overall academic project as a refined guide to practical decisions about legal design. Another general[46] proposal is advanced by Murray,[47] who also relies on natural sciences' literature and on one contemporary philosopher.[48] More recently, another exploration of the concepts of complexity and their relevance to law has been published with the aim of raising awareness and encouraging engagement.[49] The present contribution follows similar lines of argumentation, with the difference that it relies on Morin's notion of complexity. Being grounded in the humanities and social sciences, it appears more suited to an understanding of the inherently plural law-as-culture. This fifth chapter thus presents some characteristics of complexity that are referable to plural legal cultures: by presenting certain key concepts of complexity theory, the definition of legal pluralism contained in the fourth chapter is here continued and refined.

Complexus in Latin means 'that which is woven together'. In Morin's words, it is the 'fabric [...] of heterogeneous constituents that are inseparably associated, [...] the fabrics of events, actions, interactions, retroactions, determinations, and chance that constitute our phenomenal world'.[50] Already the etymology of the word hints at a first feature of complexity: the *interactions* among the elements are more significant than the definition of every single element taken in isolation. Knowing the content of the

would be uncertain and the future just like the past would be present before its eyes.' Laplace 1951.

44 Morin distinguishes between 'restricted complexity' and 'generalized complexity'. The former refers to a system that can be considered complex because it empirically exists as a multiplicity of interrelated processes, which are interdependent and retroactively associated. The latter requires an epistemological rethinking, as any system can be looked at through complexity glasses. See Morin 2006, p. 6.

45 Ruhl 1996a; Ruhl 1996b; and Ruhl 2008.

46 General in the sense that it proposes the utilisation of complexity theory as a framework for understanding the 'whole law', which is in contrast to other authors that have used the theory as a framework to understand specific fields of law.

47 Murray 2008.

48 Namely Deleuze. On the convergence between complex system theory and postmodern philosophy, see Heylighen Cilliers, Gershenson 2007.

49 Webb 2014.

50 Morin 2008, p. 5.

various formants[51] of law does not by far correspond to a knowledge of law. It is their respective weight and their interrelations that determine the resultant legal culture. In addition, in a complex system the interactions among constituents, and between the system and its environment, are of such a nature that the system as a whole cannot be fully understood simply by analysing its components: there are qualities and properties that only emerge from the compound.

But a complex system is more than quantities of units and interactions that defy calculability. It also entails a certain degree of randomness and *indetermination*. This uncertainty partly arises from the limits of our ability to comprehend and partly from the uncertainty inscribed in phenomena.[52] Phenomena are uncertain as any particular development of the system cannot be predicted by examining the constituent parts at their starting point.[53] As Brian Tamanaha has noted, unpredictability is an inherent characteristic of legal pluralism, where, in addition to the usual uncertainty as to the outcome of hard cases, there is the added element of jeopardy of not knowing which one of the competing legal regimes will find application.[54]

Morin deploys, together with the systemic idea of *emergence* (new qualities and properties that are emergent from the compound in relation to the constitutive qualities and properties of the elements taken in isolation), the cybernetic idea of retroaction or feedback: the return of an effect on the conditions that produced it.[55] So, for example, society is the result of the interactions among individuals, and at a societal level the societal features of culture and language emerge. Those societal features in turn retroact on the individuals, who are shaped by the culture and language they happen to live in.[56] This involves a modification in the understanding of causality. Along with linear causality, the feedback loop and *recursive causality* (effects and results are necessary for their own causation) are present at all levels of complex organisations.[57] As has already been noted, a kind of endo-exo causality is assumed to be at work in the conception of law-as-culture as defined in the previous chapter: culture is not considered to produce certain effects on law nor vice versa, but different elements mutually interrelate. Law is both a reflection and a determinant of economic and political conditions,[58] and they need to be studied together. While the paradigm of simplicity isolates objects of knowledge from their *environment,* in the complexity paradigm this disjunction is seen as a carrier of falsifications that are deceptive and mis-

51 Sacco 1991.
52 Morin 2008, p. 20.
53 Morin 2008, p. 56.
54 Tamanaha 2008
55 Morin *2008* pp. 112-113.
56 Morin 2006, p. 10. A similar cycle has been applied to norm creation as well: see for example, Kleinhans and Macdonald, 1997, and also Vanderlinden 1989.
57 Morin 2008, p. 61.
58 Berman 1983, pp. 44- 45, and 553-556.

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leading. A contextual approach in law involves, rather than a bare exposition of legal rules, treating legal subjects broadly. Insights from other disciplines allow a better (more realistic and more stimulating) understanding of legal phenomena.[59]

Additionally, complexity urges to rethink the strict opposition between order and disorder. Complex systems can be analysed at different levels; what make sense in one, may provoke disorder in another, and 'local truths can become global errors'.[60] This is a very well-known situation for the legal practitioner: each individual belongs at the same time to micro-(local communities), meso-(state) and macro-(global) legal realities, and the rules established at one level may be incoherent with those established at another level. Over-lapping normative orders often make competing opposite claims.[61] Those can be seen in terms of competition or even menace, or in terms of conciliation and equilibrium.[62] What is more, as the principles of *order from noise* and *order from disorder* suggest, from agitation and random encounters, organisations may emerge.[63] The respective meanings of the three words *order/disorder/organization* are reset. Correspondingly, at the logical core of complexity the principle of the excluded middle reveals its limits.[64] In complex systems, incoherent elements may coexist, and concepts may not be closed and clearly distinguishable. In defiance of the Pandectists' efforts towards a refined legal conceptual construction, a pluralist understanding of law requires the adoption of a complex form of reasoning including multivalent or many-valued logic, and modal logic.[65] Inconsistencies are unavoidable for transnational, globalised law, as they are in the traditional *loci* of legal pluralism (such as postcolonial contexts). But they are also unavoidable within 'classical' state-law.[66] A judgment that defines the correct view of the law today may be overruled tomorrow, and in any case it remains contestable by other judges (who would have decided differently), advocates, clients, academics, legislators, official, journalists etc as there is an ongoing and unresolvable debate about what law is.[67]

Finally, while classical science aims at the formulation of abstract and general laws, the paradigm of complexity recognises the historicity of knowledge; that is to say its

59 This is the very basic understanding of the law-in-context approach, which nowadays has its own Journal at Cambridge University Press [http://journals.cambridge.org/action/displayJournal?jid=IJC]. Cfr. also the various understanding of the approach in the 2013 dossier Le droit en contexte. *Revue interdisciplinaire d'études juridiques*, 70.

60 Morin, *supra* note 43, p. 11.

61 Glenn 2013, p. vii.

62 *Id*., pp. 142-143.

63 Morin 2006, p. 40-42.

64 Morin 2008, p. 16.

65 See the chapter on Cosmopolitan Thought in Glenn 2013, pp. 259-190.

66 Davies 2005, p. 108.

67 Webb 2014, pp. 487-89.

singularity, locality, temporality.[68] Similarly, while it is true that the civil lawyer (stereo)typically considers legislative rules in their general and abstract formulation, the inherently plural legal culture lives in the local and in the particular. A pluralistically sensitive understanding of law is necessarily aware of the locality and particularity of the intersecting lived normativities.[69] To this corresponds the reintroduction of the observer in the observation,[70] which is the last feature of the epistemology of complexity that will be introduced in this article. The impossibility of an overarching theory of complexity that would allow to ignore the contingent aspects of complex systems (if something is really complex, it cannot be adequately described by means of one theory), necessarily entails engaging with the contingent aspects of every specific complex system and with the contingent perspective of every specific observer.

To recapitulate, the features of unpredictability, emergence and endo-exo causality together with the relativity of the concepts of order and disorder, the relevance of context and the applicability of paraconsistent logics as well as the ideas related to the historicity of knowledge and the observer's perspective are all ascribable to legal pluralism as understood here. But complexity, it has been argued, is not an all-encompassing theory that can be applied mechanically to the legal world. Instead, complexity equips the legal pluralist with a certain number of principles which help the autonomous researcher in her pursuit of legal understanding. Whereas a general theory of law destroys the autonomy of the legal scholar, the problematic of complexity stimulates an autonomous strategy. Complexity theory shows that absolute predictions of law's impact on society (or vice versa) are no longer scientifically rational goals. Applying complexity theory to legal pluralism allows a greater appreciation of the forces at play in the interaction of law and society and dooms any reductionist, prediction-oriented, general theory of law.[71] The theoretical and conceptual tools of complexity exclude the possibility of one single theory to be adopted ubiquitously. They entail the negation of the possibility to have a general theory of law.

6 Conclusions

Legal pluralism, understood as legal culture that is inherently plural, entails a change in the theory of knowledge that the pluralist adopts. Adopting an understanding of legal pluralism as the one suggested in this article means to participate in what Roger Cotterrel called 'an exploratory enterprise aimed at serving an ongoing, ever-changing

68 Morin 1984, p. 51.
69 Davies 2010, p. 823.
70 Morin 1984, p. 68. For an application of this idea to the domain of law, and more specifically to the definition of law, see Treiber 2012.
71 Ruhl 1996a, p. 853.

juristic practice.'[72] As a legal theory, complex legal pluralism is not focused on finding ultimate truth about law's nature or timeless, essential or necessary characteristics of the legal. In this sense, it is not 'general'. Similarly to general theories, complex legal pluralism as a legal theory aims to grasp the legal reality. But contrarily to general theories, the relationship between theory and practice is not one of map and territory, because the map is moving. Complexity theory provides a set of theoretical and conceptual means, not an overall explanation.

This opens up supplementary issues for the researcher. Among the set of theoretical and conceptual tools provided by complexity theory, the researcher should be explicit about 'which elements are being adopted, how they are received, and what informs that choice.'[73] Complexity theory does not allow escaping the moment of choice, hence the ethical implications of research.[74] This is of the highest significance if we acknowledge that the complexification of the concept of law (due both to changes in the world and to modifications in our instruments to understand it) undermines accountability and the possibility of justice. As has been rightly noted, '[c]omplexity, fragmentation, pluralism of laws and globalization can perpetuate injustice.'[75] These conclusions reveal themselves for what they are: a new starting point. As such, 'recognition of the complexity of the contemporary landscape, and unwillingness to categorize and simplify, is only the starting point for the project of present day legal theory.'[76]

Legal pluralism as a non-general theory of law, while stating its own contingency and perpetual need for re-definition, also states the unavoidable responsibility involved with methodological choices. And it is exactly with the tools provided by complexity theory that a 'pluralist pluralism' may make those choices.

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72 Cotterrell 2014, p. 42.
73 Webb, 2014, p. 485.
74 Heylighen, Cilliers and Gershenson 2007; Morin 1984, p. 37.
75 Douglas-Scott 2014.
76 *Ibid.*

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International Journal of Law in Context, page 1 of 22 (2017) © Cambridge University Press 2017
doi:10.1017/S1744552317000210

Overcoming essentialisation: a comparative study of 'living-together' conceptions

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Abstract

This paper compares two judgments of constitutional courts (French and German) assessing the constitutionality of statutes concerning veil-wearing and focuses on the underlying conceptions of 'living together'. This means that what is actually compared is the self-understanding of the respective majority in the two societies as stated in the decisions. This is done by disassembling the concept of 'living together' into three elements: the notion of the individual, the meaning of belonging to the national community and the space accorded to religion in public. Each section of this paper examines one of these elements as they are entailed in the judgments and positions them critically within the respective legal cultural and historical contexts. The main aim of this paper is methodological in nature and is namely to show how comparative legal cultural studies can avoid essentialisation and rather highlight the complexity of every cultural context.

I. Introduction

The challenges of multiculturalism are becoming more pressing every day: this can be seen both in the daily news and in the ways law handles the cultural and religious dishomogeneity of society. This paper compares the judgments of two constitutional courts assessing the constitutionality of statutes concerning the presence of a fairly new practice in European society, namely veil-wearing, and focuses on the underlying conceptions of 'living together'. One of these judgments is the French Decision n. 2010–613 DC rendered on 7 October 2010 by the Constitutional Council, and the other is the German order in the cases 1 BvR 471/10 and 1 BvR 1181/10 that was rendered on 27 January 2015 by the First Senate of the Federal Constitutional Court.

Living together is indeed a timely issue. Definable as a modus vivendi (Dupont, 2011, p. 81), the concept refers to human interactions in a given territory and to basic shared values. In nineteenth-century Western European nation-states, those basic shared values were determined by a relatively homogeneous majority in a dominant situation and enforced on everyone else. Conversely, twenty-first-century states are characterised by diversity. Nowadays, living together needs to be renegotiated in a situation of plurality of cultural lifestyles. Taken-for-granted social norms, cultural forms of expression and of social conversance are confronted with alternatives whose alterity can fascinate, but also perturb. This creates challenges also for law: as it is such a topical matter, the comparative study of living together is important for understanding the influence of cultural heritage and for appreciating the novelty of the circumstances.

The study of European living-together conceptions in connection with reactions to Islamic veiling appears to be full of prejudices. The idea to write about this was sparked by the European Court of Human Rights' decision in the case of *S.A.S. v. France* of 1 July 2014. As a matter of fact, the Court declared that the French Act no. 2010–1192 prohibiting full-face veils in all public places is compliant with the European Convention on Human Rights. The only argument that made this point is the French living-together conception, which is considered to be a legitimate

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ground to restrict the rights to respect for private life and to manifest one's beliefs, as foreseen by the second paragraphs of the Articles 8 and 9 ECHR respectively (§142 decision *S.A.S. v. France*).[1] In a nutshell, the living together recognised by the Court entails, as an indispensable element, the possibility of open interpersonal relationships, which in turn are considered to be fundamentally jeopardised by the concealment of one's face. Moreover, living together is used to protect the majority of the population (§122). In effect, by stating that the full-face veil undermines the dignity of others who share the same public space, it is implied that in France people do not wear veils and also that they have to be protected from being confronted with such an unusual sight. The Act no. 2010–1192 defends a certain image of the social landscape, which should be preserved somehow as 'French': a kind of Frenchness that is certainly not Muslim.[2] This much disputed judgment aroused my interest in the French legislative procedure, which led to the promulgation of Act no. 2010–1192; one step of this was the decision of the Constitutional Council assessing the conformity of the Bill to the Constitution. This decision thus became the *comparandum*. Only a few months earlier, the First Senate of the German Federal Constitutional Court had decided that, due to possible bias, the two constitutional complaints regarding the ban on headscarves in North Rhine-Westphalian schools had to be decided without the involvement of Vice-President Ferdinand Kirchhof, as he could be regarded as the author of the legal concept to be considered.[3] I decided to wait for the decision on the merits of the constitutional complaints and that this would become the *comparatum*.

Both courts' decisions will be analysed here against their background, and it will be highlighted how they fit their context. Nevertheless, this does not need to lead to deterministic understandings of history nor to simplistic and reductive 'cultural' justifications. David Nelken warns that '[c]ulture as a term easily lends itself to misuse both by social actors and scholars. It can be interpreted in a way that is "essentialist", over-determined, over-bounded and xenophobic' (Nelken, 2010, p. 6). Vicki Jackson has a similar concern in relation to 'contextually oriented scholarship' within comparative constitutional law, which might 'assume a fixed national identity' (Jackson, 2012, p. 67). In the context of this paper, an example of this would be a causal explanation of the content of the judgments that rhetorically construct the French and the German conceptions of living together as uniform, immovable and stereotypical. In contrast, understanding law in context can rather be an occasion to highlight how every cultural context is 'complex and multi-stranded, and may shift over time' (p. 67). This is what this paper purports to do. The presupposition is that law exists in a social matrix that is actually constituted of a vast diversity of overlapping and potentially competing elements (Nelken, 2010, p. 17).

The essentialisation to be overcome (to which the title of this paper refers) is not the essentialisation of the 'other' veil-wearing woman,[4] but in this case the French and German

1 The Court dismissed all other adduced justifications for the ban: public safety (§139), gender equality (§119) and protection of the human dignity of the veil wearers (§120). It only retained the protection of the 'French conception of living together' as a *legitimate aim* (§121), as well as the measure *proportionate* (§157), so that the ban would fall within the acceptable limitations of the right to respect for private life and of the right to freedom of thought, conscience and religion.

2 Ilias Trispiotis (2016) has argued that the conception of living together as recognised in this judgment is problematic and that an alternative understanding would be advisable.

3 German Federal Constitutional Court's Press Release No. 22/2014 of 13 March 2014, available at: ‹http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-022.html› (accessed 14 March 2017).

4 A discursive practice that indeed exists and is deeply problematic. The fact that this paper does not focus on it does not mean that it is irrelevant and not worth studying; this has masterfully been done by others (Frankenberg, 2014, pp. 246–258). Rather, the focus here is on the European 'self' in order to unveil that its identity is also rhetorically constructed (Dietze, 2009, p. 48), and to possibly contribute to a non-essentialising portrayal of it.

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attitudes towards diversity in society. As will be presented next, the two constitutional controversies concern different types of religious garments and different places where they are forbidden. In France the – upheld – statute forbids the wearing of the full-face veil (*burqa* and *niqab*) in public places, while in Germany the – censured through restrictive interpretation – statute targets the headscarf (*hijab*) worn by public school teachers. Since the comparison carried out in this paper focuses on the non-wearers and on the general vision of society entailed in the judgments, this difference is not a hindrance. In both cases, there is a constitutional court reacting to increasing religious heterogeneity.[5] As with any reaction to otherness, it actually tells much about the self (Amir-Moazami, 2007, p. 17). The headscarf is taken here as a 'mirror of identity' that forces Western societies 'to see who they are and to rethink the kind of societies and public institutions they want to have' (Joppke, 2009, p. X). Therefore, the two decisions offer a wonderful opportunity to understand how courts from different historical, political and legal contexts address challenges posed by diversity in society.

The text will be structured as follows: after a general presentation in Section II of the two decisions, Sections III–V focus on the conception of living together. The concept is broken down into three elements: the notion of the individual (Section III), the meaning of belonging to the national community (Section IV) and the space accorded to religion in public (Section V). Each section will minutely examine one of these elements as they are entailed in the judgments and will position them critically within the respective histories. Finally, the conclusion resets the findings in a more general matrix.

II. Presentation of the two compared decisions

The two compared decisions, if considered as *texts*, are very different: one is two pages long, the other thirty-nine. One was deliberated on by the whole Council as a single organ composed of ten members; the other was decided by the First Senate of the Court as a result of the work of six members, two of which expressed a dissenting opinion.[6] This section will focus on the legal reasoning of the courts, which are also rather different.

The French Decision n. 2010–613 DC rendered on 7 October 2010 by the Constitutional Council declares the Bill prohibiting the concealment of one's face in public places to be compliant with the Constitution. It was taken before it was enacted, according to the second paragraph of Article 61 of the Constitution, so it is an instance of an a priori abstract constitutionality challenge. The Bill was voted on in parliament after various preparatory works. The National Assembly created a commission that had the task of gathering information about Islamic full-face veiling practices (recording 1,900 cases

5 Moreover, in both cases, the constitutional courts are evaluating the constitutionality of statutes dealing with the presence of veils in *public* (all public places and public schools), and therefore they are particularly significant for studying the ideas of the respective societies. It is for this reason they were selected, as opposed to decisions taken by Supreme Courts in France and Germany that concern Islamic veiling in *non-public* sites; for example, the *Arrêt* n° 612 of 25 June 2014 (13–28.369) rendered by the French Court of Cassation in its Plenary Assembly, which confirmed the dismissal of a headscarf-wearing worker from the *Baby-Loup* childcare centre, or the *Urteil* of the German Federal Labour Court rendered on 24 September 2014, n. 5 AZR 611/12, which confirmed the possibility to prohibit headscarves for nurses in evangelical hospitals. As this paper was undergoing review, also the Court of Justice of the European Union has pronounced for the first time the possibility for firms to prohibit workers from wearing religious symbols through the judgments in cases C-157/15 *Achbita, Centrum voor Gelijkheid van kanses en voor racismebestrijding v. G4S Secure Solutions*, and C-188/15 *Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole Univers*.

6 A deeper text-structure, stylistic and linguistic comparison of the judgments will not be carried out, but indeed they do display interesting features of the respective legal culture they stem from. Notwithstanding the relevance of those aspects for a judicial style comparison, they cannot be explored further, as the focus of this paper is on the substantive and implicit content of the texts.

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on French national territory). It submitted its report in January 2010.[7] The Council of State produced a study on the legal feasibility of a ban, presented in March 2010, that actually advised against it.[8] In addition, the National Assembly unanimously voted for a resolution in May 2010 upholding republican values and condemning integral veiling as being in contrast to them.[9] As for the Bill, it was originally deliberated by the government, then adopted by the National Assembly and the Senate, and subsequently deferred to the Constitutional Council by the Presidents of both Houses.

In the decision, the Council respectively refers to Articles 4, 5 and 10 of the 1789 Declaration of the rights of man and of citizen (DDHC) in defining freedom as the possibility to do anything not explicitly forbidden, limiting the law's possibility to restrict action only to activities that are harmful for society and protecting the freedom of opinion. Further, it refers to the third paragraph of the Preamble of the 1946 Constitution, which guarantees equality of women and men, and it mentions the protection public order – an objective with constitutional value. It then moves on to consider the legislator's intentions and performs a minimum control of not manifest disproportionality of the conciliation operated by the legislator between the protection of public order and the guarantee of constitutionally protected rights. It formulates a reserve of interpretation: the public places where the wearing of the full-face veil is prohibited should not encompass the places of worship open to the public – which otherwise would have been included in the 'public spaces' as referred to in Article 2, para. 2 of the considered Bill. Besides this interpretative restriction, the Council declares the Bill to be compliant with the Constitution. The Act no. 2010–1192 was thus promulgated on 11 October 2010 and entered into force on 12 April 2011.

More generally, it has to be added that, in France, the wearing of religious garbs is prohibited at school. In regard to teachers, the rules concerning public agents apply. The duty of strict neutrality was first enunciated by the Council of State[10] in general and then explicitly applied to the wearing of religious symbols.[11] The legal basis for the same prohibition but in regard to pupils is to be found in the Act no. 2004–228 of 15 March 2004 on laicity at school. After various '*affaires du voile*', starting with the 1989 Opinion of the Council of State, which actually considered the wearing of headscarves by pupils not to be incompatible with the principle of laicity at school,[12] the legislators concluded the heated debate with a strong positioning (Joppke, 2009, pp. 44–45). Thus, the decision analysed here can be seen as belonging to an ongoing French discussion on the presence of (mainly Muslim) religious clothing in public places (Dieu, 2010; Champeil-Desplats, 2012).

The German order in the cases 1 BvR 471/10 and 1 BvR 1181/10, rendered on 27 January 2015 by the First Senate of the Federal Constitutional Court, is the response to two constitutional complaints (Article 93, para. 1, sentence 4a, Basic Law, in the following referred to as GG) that were advanced by

7 Assemblée nationale, XIIIe législature, rapport n. 2262. From here on, this report will be referred to as 'Rapport d'Information Raoult' from the name of the reporting deputy, Éric Raoult, available at: ‹http://www.assemblee-nationale.fr/13/rap-info/i2262.asp› (accessed 12 March 2017).

8 *Study of Possible Legal Grounds for Banning the Full Veil*, Conseil d'Etat – Reports and Studies Section, available in English at: ‹http://www.conseil-etat.fr/content/download/1910/5758/version/1/file/etude_voile_integral_anglais.pdf› (accessed 12 March 2017).

9 Assemblée nationale, XIIIe législature, TA n. 459, 11 mai 2010, available at: ‹http://www.assemblee-nationale.fr/13/ta/ta0459.asp› (accessed 12 March 2017).

10 CE, 8 December 1948, *Demoiselle Pasteau*, no. 91.406; and CE, 3 May 1950, *Demoiselle Jamet*, no. 98.284.

11 CE avis, 3 May 2000, *Demoiselle J. X.*, no. 217017. More recently, the duty of strict neutrality has been restated also in the government document Charter of Secularity in Public Services, which was distributed with the *Circulaire* n° 5209/SG on 13 April 2007, available at: ‹https://www.dgdr.cnrs.fr/bo/2007/07-07/521-bo0707-cir5209.htm› (accessed 19 March 2017) and in the Charter of Secularity at School, which was distributed with the *Circulaire* n° 2013–144 on 6 September 2013, available at: ‹http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=73659› (accessed 19 March 2017).

12 CE avis, 27 November 1898, no. 346.893.

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two Muslim women of German nationality. Both had been teaching in public schools and had been requested to remove their headscarves. One substituted the garment with a woollen hat and a polo-neck pullover to cover her hair and neck, but she still received a warning from school authorities. Her lawsuits were unsuccessful at all levels of jurisdiction of the labour courts. The second claimant refused to remove the headscarf and was dismissed. Similarly, her lawsuits in the labour courts were unsuccessful. The claimants alleged that their constitutional rights had been violated by the school authorities' sanctions, as confirmed by the labour courts, and indirectly they also challenged the constitutionality of §57, s. 4, and §58, sentence 2 of the Education Act of North Rhine-Westphalia (NRW SchulG) in the version of 13 June 2006 on which those decisions were based.

The reasoning of the Senate consists in a balancing of constitutionally guaranteed fundamental rights. On the one side, there is the freedom of faith and conscience (Article 4 GG) of the complainants, which is considered in connection with the free development of personality (Article 2, para. 1 GG) and human dignity (Article 1, para. 1 GG), in addition to the right to freely choose one's profession (Article 12, para. 1 GG). Moreover, the Senate refers to Article 3, para. 2 GG on the equality between men and women.[13] On the other side, weighted against those rights, the Senate takes into consideration the negative religious freedom of the pupils (Article 4, para. 1 GG), the educational mandate of the state (Article 7, para. 1 GG) that has to be carried out guaranteeing neutrality of worldview and the parental right to children's upbringing (Article 6, para. 2 GG). The result of this reasoning is a relative prevalence of the rights of the complainants, as opposed to the negative rights of third parties.

The Senate decided that sentences 1 and 2 of §57 s. 4 NRW SchulG have to be interpreted restrictively: the prohibition of the expression of religious beliefs by outer appearance or conduct cannot be justified by mere abstract danger. A sufficiently specific danger of disrupting the peace at school or the state's duty of neutrality has to exist in order for a ban to be constitutionally acceptable. This applies both to teachers and to other educational staff, including socio-educational staff employed by the Land. Moreover, §57 s. 4 sentence 3 of the same statute, which gave privilege to representing Christian and occidental educational and cultural values or traditions, has been declared to be discriminatory on grounds of faith and religious beliefs and hence is unconstitutional and void.

In contrast to France, no full-face veil ban exists in Germany.[14] The legal confrontations on headscarves ('*Kopftuch-Streite*') are mostly in reference to public school teachers. In particular, the Second Senate of the Federal Constitutional Court had decided the *Ludin* case[15] in 2003. At that time, there was no state legislation concerning teachers and headscarves, and therefore the decision of the board of education of the Land Baden Württemberg that prohibited Fereshta Ludin from taking a post as an English and German teacher because of her insistence on wearing a headscarf was annulled. The Second Senate declared that the statutory basis at that time was not

13 Interestingly, both courts refer to the principle of equality between men and women, but the French court does it in order to state that the full-face *veil* places women in a situation of exclusion and inferiority that is incompatible with the principle, while the German one in order to verify that the headscarf *ban* affects disproportionally (only) women.

14 Even though full-face veil-wearing women do encounter difficulties in everyday life, available at: ‹http://www.spiegel.de/international/germany/germany-debates-a-ban-on-burqas-and-other-muslim-veils-a-1108562.html› (accessed 23 August 2016). Federal Chancellor Angela Merkel, in a speech on 14 September 2016, declared full veiling to be 'a big obstacle to integration. . . . When the face remains covered, the possibilities to get to know and to appreciate one's personality are heavily reduced. It hinders communication, which does not consist only in words'. Concerning the possibility of a ban, she envisages it as consisting of 'precise provisions for those sectors where full-face veiling is not appropriate – for example in the public sector or in front of a Court'. Full text available at: ‹https://www.bundeskanzlerin.de/Content/DE/Rede/2016/09/2016-09-14-merkel-parlamentarierkonferenz.html› (accessed 15 March 2017).

15 BVerfG, 24.09.2003–2 BvR 1436/02.

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sufficiently definite for a prohibition on teachers wearing a headscarf, and it expressly advised the Land legislatures to redefine the admissible degree of religious references permitted at school. In doing so, it did not give precise guidance as to the content of the legislation. As a result, the Länder governed by the Christian-Democratic Party (CDU/CSU) passed anti-headscarf legislation that more or less explicitly exempted 'Christian-occidentals' symbols from its reach.[16] But the most evident example of the dependence of the passing of anti-headscarf laws on the colour of the governing party is provided by the Land North Rhine-Westphalia. As long as it was ruled by the Social Democratic Party (SPD), no such legislation was passed (Robbers, 2001, p. 648) but, as soon as a CDU government came into power in 2006, a selectively exclusive headscarf law was enacted (Joppke, 2009, p. 72). Perhaps it is not a coincidence that exactly this statute ended up being contested in front of the Constitutional Court. The First Senate decided as expounded above, which has led to discussion among constitutional law scholars as to whether the case should have been deferred to the Plenary according to §16 of the Federal Constitutional Court Act, as some interpreted this decision to deviate from the previous one (Rusteberg, 2015, pp. 638–639; Sacksofsky, 2015, pp. 806–807; Klein, 2015, pp. 464–466).[17]

The 2010 French Constitutional Council decision and the 2015 judgment by the First Senate of the German Federal Constitutional Court illustrate two very different approaches to veiling in public, to the point that they reach opposite conclusions in their balancing of fundamental rights. However, the following sections of this paper do not spotlight the legal reasoning, but rather the roots of these different judicial approaches and specifically the ideas about French and German societies as depicted in the texts. Indeed, the image of a society inferable from its black-letter law is not necessarily the same as the one that would emerge from empirical research. In addition, these two texts are not taken to represent 'the' French and 'the' German legal answer to the veil, and neither do they contain the ultimate definitions of the courts of 'what it means to live together' in each society. They are steps in the 'iterations' (Benhabib, 2010, p. 466), the processes in which meanings are negotiated, within the French and German legal evolution. These two texts are cultural products of their respective society: as such, they are the result of the 'massaging' (Glenn, 2010, p. 16) of the particular legal tradition they belong to and therefore constitute possible starting points for analysis. The two decisions are here considered as documents in which the deciding organs at least implicitly state something about the French and German ways of living together.

The next sections will discuss the political and philosophical contexts that inform the decisions and more specifically the origins of the conception of living together as entailed in the judgments, which is a result of (at least) three elements. The first of these is the representation of the singular human being, which will be looked at next. The indented paragraphs contain excerpts of the decisions in their original version (English translation is provided in the footnotes).

III. Images of the individual

In both decisions, the courts are dealing with a statute that is forbidding something. They have to verify whether the restriction of the possibilities of action of the individual is legitimate: this implies that some conception of individual has to be mobilised. Aristotle notably considered the individual to be a *zoon politikón*, her existence given by the community, and her nature and telos to be a member of it (Aristotle, 2009, p. 26). This conception was widespread in Europe in the twelfth and thirteenth centuries and has influenced the philosophy of both law and the state (Böckenförde, 2001, p. 12). In

16 Only Berlin and Bremen, governed by left-leaning parties, passed laws prohibiting all religious symbols, Christian and Jewish included.

17 Cf. also the debate among Hans Michael Heinig, Christoph Möllers and Mathias Hong, available at: ‹www.verfassungsblog.de› (accessed 21 April 2016).

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opposition to this view, the social contract theorists of the seventeenth and eighteenth centuries developed a representation of the human as singular and free. Relations and connections are not given in advance; they can only be created by the free expression of the will of the individual when she wants to do so in order to satisfy her needs or to develop herself.[18] The image of the individual contained in the French decision, clearly ascribable to this more recent conception, will be analysed first.

3.1 Individual as an autonomous being, forced to be free

The French Constitutional Council in its decision bears on the DDHC of 1789, which considers the human to be a carrier of rights inherent to her person, anterior and superior to the state:

> '3. Considérant qu'aux termes de l'article 4 de la Déclaration des droits de l'homme et du citoyen de 1789: "la liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi".'[19]

Thus the Council refers to an individual who is primarily free to exercise her natural rights. This 'French republican theory' individual exists prior to her choice of lifestyle, values and politics; these are but external expressions of an inner self (Scott, 2007, p. 127). The Declaration considers the individual abstractly, not in the particular circumstances of real life. The disregarding of particularistic cultural determinations corresponds to the disregarding of any substate community affiliation, or rejection of 'communalism'. *Communautarisme* refers to 'the closing of ethnically defined communities on themselves, ... and a refusal of integration. Communalism threatens the process of direct communication between the state and citizens that underlies French political philosophy' (Bowen, 2010, p. 156). The condemnation of communalism can be traced back to debates held after the 1789 Revolution and, at the time, it was not directed at religious communities. Intermediate corporate bodies were abolished, as they were accused of separating citizens, giving them illusions of superiority, constraining them and claiming authority independently from the state (Bowen, 2010, p. 161). On the contrary, blindness towards intermediate (between state and citizen) forms of affiliation was melded to the concern to assure equality of treatment between individuals who are naturally diverse and to create a common space among very different men and women (Rosanvallon, 2004, pp. 121–124).

The difficulty with this legal fiction is due to the dissension between its apparent descriptive posture ('this is how the individual is for the law') and its strong normativity ('this is how the individual has to be by law'). So for example, in point 4 of the decision, the Council considers the objectives pursued by the legislator as follows:

> '[le législateur] a également estimé que les femmes dissimulant leur visage, volontairement ou non, se trouvent placées dans une situation d'exclusion et d'infériorité manifestement incompatible avec les principes constitutionnels de liberté et d'égalité.'[20]

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18 Such is for example the image of the human as described by Jean-Jacques Rousseau in the 'Discourse on the Origin and Foundations of Inequality Among Mankind' (Rousseau, 2002).

19 'Considering that, according to art.4 of the Declaration of the rights of man and citizen of 1789: "Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights. These borders can be determined only by the law"' (all translations are mine).

20 'The legislator considers that the women covering their face, voluntarily or not, find themselves placed in a situation of exclusion and inferiority which is manifestly incompatible with the constitutional principles of freedom and equality.'

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One cannot avoid recalling Rousseau's statement: '... whoever refuses to obey the general will shall be constrained to do so by the whole body; which means nothing else than that he shall be forced to be free' (Rousseau, 2002, p. 166). So an individual who chooses to cover her face is making a choice against her own liberty and equality and can be forced not to make that choice. Liberty and equality are given here an *objective* meaning. The tension between subjective and objective understanding has been conceptualised with reference to human dignity: according to the subjective understanding, dignity is coextensive with freedom of choice and cannot logically be violated by the individual herself, who instead defines what dignity means to her; the objective version, in contrast, introduces external standards. Both in France[21] and at the European level,[22] the subjective understanding of dignity prevails; therefore it is not applicable to this case (Rapport d'Information Raoult, p. 177; Mathieu, 2010; Dieu, 2010). Nevertheless, with this decision, the Council introduces an objective conception of other fundamental rights, namely liberty and equality. Some commentators discuss the 'rupture' and maybe even 'evolution' (Dieu, 2010) of the French conception of the principle of equality, as this 'paternalistic' (Hunter-Henin, 2012, pp. 624–628) version leads to a negation of personal autonomy and free will.

To summarise, the free and autonomous individual of the 'republican theory' to which the Council refers is, paradoxically, limited in her freedom of choice. Finally, she finds herself to be under the influence of the (state) society. The point of departure was the individual conceived as freed by community fetters but, at the end of the line, we see her actually being restricted by this very image. As will be shown next, defining the conception of the individual is fraught with risks for any legal text, and therefore it is understandable that the German decision attempts to leave such a definition as open as possible.

3.2 Individual as community-determined, whichever community

In the decision under scrutiny here, the First Senate of the Federal Constitutional Court focuses strongly on the individual. For example the judgment recognises, at §96 and §110, that an imperative religious precept of covering in the public space is an issue of personal identity as protected by the right of free development of one's personality (Article 2, para. 1 GG) in connection with human dignity (Article 1, para. 1 GG).[23] Moreover, the centrality of the individual can be inferred from the clear distinction that is made between civil servants and public administration (§104, §107, §112)[24] (Theilen, 2015; Schwabe, 2015). In addition to this, when discussing the freedom of religion (§86), the Court refers explicitly also to the singular person entitled with fundamental rights instead of only to the religious community as it used to do[25] (Rusteberg, 2015, p. 640; Ladeur, 2015, p. 634; Sacksofsky, 2015, p. 803). As a result, in this judgment, the individual is important not only as a fundamental rights bearer (as the obvious

21 Cf. for example the Constitutional Council's decisions in preliminary rulings on constitutionality no. 2010–25 of 16 September 2010, no. 2010–71 of 26 November 2010 and no. 2010–30 of 17 December 2010, which all interpret dignity as opposable by the individual to the institutions. In contrast, in the (isolated) decision of the Council of State CE Ass 27 October 1995, *Commune de Morsang-sur-Orge*, n. 136727, dignity had been used to strike down consensual arrangements.

22 Cf. for example the ECtHR decision *Pretty v. UK*, 2346/02 of 29 April 2002.

23 That religious freedom is related to human dignity as protected in Article1 GG had already been acknowledged in the decision on school prayers BVerfG, 16.10.1979–1 BvR 647/70; 1 BvR 7/74 (§63).

24 This distinction is necessary for argumentative purposes, as the Senate has to distinguish this case from the one on crucifix on classrooms' walls, BVerfG, 16.05.1995–1 BvR 1087/9(Klein, 2015, p. 468).

25 For example, in the *(Aktion) Rumpelkammer* decision BVerfG, 16.10.1968–1 BvR 241/66 at §25 and the previous headscarf decision BVerfG, 24.9.2003–2 BvR 1436/02 at §40.

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focus for a decision on a constitutional complaint), but also as she is explicitly singled out from her work and religious community.

The judgment ventures to define the conception of a human being of the liberal constitutional state and explicitly opts for an open characterisation of the individual: that is to say, one that leaves its content as undefined as possible:

> 'Der freiheitliche Staat des Grundgesetzes ist gekennzeichnet von Offenheit gegenüber der Vielfalt weltanschaulich-religiöser Überzeugungen und gründet dies auf ein Menschenbild, das von der Würde des Menschen und der freien Entfaltung der Persönlichkeit in Selbstbestimmung und Eigenverantwortung geprägt ist (§109).'[26]

So the question about the subjective or objective understanding of human dignity, which in the German context has been formulated by Böckenförde (1987, p. 14), is answered in the subjective sense – that is, the individual is bestowed with the responsibility of choosing for herself how to develop her personality (Klein, 2015, p. 467). If one decides to avoid social contacts and become isolated, this choice is protected by the negative freedom of opinion and the general rights of the personality (Beaucamp & Beaucamp, 2015, p. 182). Such is the conception of the individual as entailed in the text. But where does it originate from?

Historically, in the German territories, the collectivist representation of the individual has been more influential (Böckenförde, 2001, p. 8). Later on, in the Basic Law, the image of the individual developed as a sort of hybrid: in its first draft, Article 1, para. 1 declared the state to be 'there for human will, not the human for the State's will'. Hence, it apparently leaned towards a Rousseauian conception of individual – but which could also be understood as a reaction to the just defeated Nazi regime. The final version of Article 1 GG actually refers to human dignity. A definition of the image of the individual has been formulated by the Federal Constitutional Court in a 1954 decision[27]: 'The image of the human contained in the Basic Law does not refer to an isolated individual; rather the Basic Law has solved the tension between individual and society in the sense of the community-relatedness and boundedness of the person, without thereby encroaching his own intrinsic value' (§29).

According to the classic comment by renowned constitutionalist Günther Dürig (2003, p. 24), the Court found a balance between the human being as an autonomous individual and the Aristotelian conception of collective, political humanity.

Overall, in German law, the legal understanding of the human is very heterogeneous, depending on the branch of law considered (Häberle, 2008). Space is given for various developments and concretisations, and this openness is not a fortuity, but a political statement, as the liberal democratic order of the constitutional state entails the normative negation of any prescribed integral human image (p. 63). This openness is found in the decision considered here as well. The Senate puts emphasis on the individual taken singularly, separated from the societal context, and recognises that, through the exercise of her rights and freedoms, the person inevitably manifests her choices connected to societal and religious belonging. In this way, the judgment recognises that the individual is under the ascendancy of the community but does not impose a certain predominant societal conception.

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26 'The liberal state of the Constitution is characterised by openness towards the multiplicity of convictions concerning worldview and religion, and such an attitude is based on an image of the human being that is shaped by human dignity and the free development of personality in self-determination and -responsibility.' This formulation is to be found already in §42 of the 2003 decision of the *Ludin* case.

27 BVerfG, 20.07.1954–1 BvR 459/52; 1 BvR 484/52; 1 BvR 555/52; 1 BvR 623/52; 1 BvR 651/52; 1 BvR 748/52; 1 BvR 783/52; 1 BvR 801/52; 1 BvR 5/53; 1 BvR 9/53; 1 BvR 96/54; 1 BvR 114/54.

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To sum up, the 'typically French' autonomous individual ends up being constrained by the Constitutional Council more than the '(partially) community determined German' by the Federal Constitutional Court. Such a statement on the extent of the autonomy of the individual recognised in the two texts would remain incomplete if the kind of national bond implied was not put under scrutiny. This leads us to the next chapter: after having pondered on the conception of the individual in the two texts, the following addresses the meaning of societal belonging.

IV. Societal belonging

The two countries offer good material for comparison, as they have been 'constructing, elaborating, and furnishing to other states distinctive, even antagonistic models of nationhood and national self-understanding' (Brubaker, 1992, p. 1). The commonplace representation of the French national community is that of a political community, while the German national community is first and foremost a cultural and ethnical one. So belonging in France would be the result of a rational act of will, while in Germany it would be a pre-political fact (Dumont, 1991, p. 249). These two 'types' of different national cohesion ideals are mirrored also in the degree and form of inclusiveness/exclusiveness in relation to ethnic difference and in the distinction between the French civic territorial (*jus soli*) and German ethnocultural (*jus sanguinis*) basis of criteria for attributing citizenship. The next section will attempt to problematise this conventional narrative.

4.1 Civic nationalism, moralised

The two decisions compared here do not approach the issue directly, but both make reference to life in society and to the presence of foreign practices in public spaces. In this sense, they both reveal something about the conception of 'belonging' in the respective societies, and their assertions are diametrically opposed. Concerning French society, the Constitutional Council acknowledges the legislator's concern that:

> '[P]ratiques ... consistant à dissimuler son visage dans l'espace public ... méconnaissent les exigences minimales de la vie en société.'[28]

In this manner, it states that the full-face veil is not only against liberty and equality, but also against fraternity, as it casts off the others and contests head on 'our conception of living together' (Rapport d'Information Raoult, p. 87). Also in the explanatory memorandum accompanying the Bill as it was discussed in the French parliament, the wearing of a full-face veil is defined as a 'sectarian manifestation of a rejection of the values of the Republic'[29] that brings with it 'a symbolic and dehumanizing violence, at odds with the social fabric'.[30] In other words, there is a certain social fabric whose texture is defined negatively by placing it in opposition to the Islamic practice.

It has to be added that this decision has introduced an innovative notion of public order (Levade, 2010; Verpeaux, 2010). In the third *considérant*, the Council refers to Articles 5 and 10 DDHC, which enable the legislator to intervene to protect public order. The 'tryptic' of safety, tranquillity and salubrity constitutes the 'material public order' that, according to constitutional jurisprudence,[31]

28 'Practices ... consisting in covering one's face in public spaces ... are oblivious to the minimal exigencies of life in society.'

29 Projet de loi interdisant la dissimulation du visage dans l'espace public, N° 2520, Assemblée Nationale, p. 3, available at: ‹http://www.assemblee-nationale.fr/13/projets/pl2520.asp› (15 March 2017).

30 *Ibid.*

31 Cf. for example the decisions no. 94–352 of 18 January 1995, no. 2003–467 of 13 March 2003, no. 2010–605 of 12 May 2010.

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has to be reconciled with the constitutionally guaranteed freedoms. But, by referring, in the fourth *considérant*, to the 'exigencies of life in society', the Council is actually extending the meaning of the notion. The simple protection of public order would not be enough to justify a general and absolute ban. Public order acquires a more substantial and positive content consisting of a certain number of social values.[32] What is problematic with this 'social' public order is that it may change over time, it could be filled with even more precise and restrictive social rules, and more generally it is an instance of moralisation of the public space (Dieu, 2010; Fatin-Rouge Stéfanini and Philippe, 2011). Actually, Article 5 DDHC, with its negative phraseology (the legislator is entitled to edict prohibitions only against acts which are harmful to society), was designed to restrict the possibilities of state interference. 'Ironically', it now becomes 'a source of justification for one of the most intrusive pieces of legislation passed in France' (Hunter-Henin, 2012, p. 631). The social public order is very close to the objective understanding of fundamental rights mentioned in the previous section, as in both cases a social norm is identified and imposed on the individuals, and personal autonomy yields to social heteronomy (Dieu, 2010). In this way, the political community that constitutes France is not neutral or value-free. On the contrary, it is becoming filled with normative content in an explicit way.

It has to be acknowledged though that, to a certain extent, this is not a complete novelty in French history. It is true that Ernest Renan, in his famous speech at the Sorbonne in 1882, spoke of a 'daily referendum' (Renan, 1882, p. 27) to characterise the belonging to the French state. He argued that it is not race, language, interests, religion or geography that constitute a nation, but the existence of a common will. However, he also referred to the existence of a common past, of having common ancestors: so, even in Renan's speech, which is usually depicted as foundational for civic nationalism, there are actually elements of ethnicity concealed beneath the surface (Noiriel, 2007, pp. 19–20). Accordingly, the simplistic 'Jacobin' image of France represents only one side of the coin (Birnbaum, 1998; Daly, 2013, p. 373). In the later part of the nineteenth century, a strong conservative current emerged that stressed the cultural and historic unity of France both against internal minorities and Enlightenment ideas and also external pressures (notably the Prussian annexation of Alsace-Lorraine). This conservative current, a sort of Catholic militant vision of Herderian culturalism (Birnbaum, 2004, pp. 262–280), has been described as a 'counter-revolutionary clerical monarchism and militarism' and as a 'populist, anti-semitic and vernacular ethnic movement, seeking to redefine "France" as an ethnic nation' (Smith, 1986, p. 149). As a consequence, French republicanism developed strongly as a reaction to such political opponents (Birnbaum, 2004, pp. 277–280). Historians of racism today argue that the discourse on the nation during the III Republic (1870–1940) actually turned on two axes: the civic and the identitarian one (Reynaud-Paligot, 2015), and indeed the stereotypical representation of France as an instance of pure civic nationalism is a superficial simplification.

It is against this historical background that the recent refurbishment of 'national identity' has to be read. Starting from the electoral campaign in 2007, Nicolas Sarkozy resorted to arguments about the majority's identity as opposed to the presence of Muslims on the national territory (Noiriel, 2007, p. 112; Daly, 2013, p. 378). Moreover, he established the connection between immigration and national identity, as 'immigration politics' would 'determine the identity of France in 30 years' (Noiriel, 2007, pp. 92–99). Such a polarisation of the discourse (French society as opposed to Muslim alien) is to be read also in the logic underlying the decision considered in this paper (Ouald Chaib & Brems, 2013, pp. 16–17).

32 Even if very implicitly, this 'immaterial' public order had already been useful in the reasoning of the Constitutional Council decisions no. 94–343/344 of 27 July 1994, no. 99–419 of 9 November 1999 and no. 93-325 of 13 August 1993 that forbid certain biomedical practices, incest and polygamy, respectively.

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Overall, the kind of 'life in society' envisaged in the Council's decision and the moralised version of public order it advances seem to be rather at odds with the civic conception of belonging. Rather, they are inscribable into a rhetoric of national identity, which, as argued, is not totally absent in the French legal tradition.

4.2 Ethnocultural belonging and openness to difference

In the meantime, on the other side of the Rhine, the German society depicted in the judgment text studied here appears to be much less homogeneous. In particular, the Federal Constitutional Court reiterates:

> 'Die Einzelnen haben in einer Gesellschaft, die unterschiedlichen Glaubensüberzeugungen Raum gibt, allerdings kein Recht darauf, von der Konfrontation mit ihnen fremden Glaubensbekundungen, kultischen Handlungen und religiösen Symbolen verschont zu bleiben (§104).'[33]

So, in the German society as it is represented in this text, there is no right to be sheltered from the confrontation with foreign manifestations of faith, ritual deeds and religious symbols (§116). More broadly, the decision records the high diffusion of the Islamic veil in German society (§100, §116), which is described as religiously pluralistic (§105). This is reaffirmed also by the dissenting judges (§11, §17), even though they differentiate between societal everyday encounters and repeated influential confrontation at school.

Besides these general statements, in the decision, the Senate searches for practical concordance (balancing among constitutionally protected rights) among freedom of religion and the fundamental rights of third parties and societal values with a constitutional status (Sachs, 2015, p. 572). Without going into the details, the outcome of the court's reasoning is that the rights of the third parties yield to the rights of the one. Hence, fundamentally, the evaluation leads to antithetical results as in the French decision, which considers the rights of third parties to be successfully opposable to the religious freedom of the individual. In other words, the German state–societal bond seems to be less constraining.

This could be justified by referring to the historical disconnection between ethnocultural nation-membership and formal state-membership (Brubaker, 1992, p. 51). The various pre-unitary German principalities were religiously and culturally heterogeneous, and the overarching Empire provided a mythical rather than realistic conception of the German nation (Benz, 2008, p. 32). Also, the Constitution of 1871 was not the achievement of popular sovereignty, but of 'state' sovereignty, where the state – functioning as a negotiation system among executives under the hegemony of Prussia – was conceptually separated from the citizens (p. 48). It is only during the Wilhelmine era (1890–1918) that a more ethnonational politics emerged, and the 1913 German Imperial and State Citizenship Law nationalised and ethnicised citizenship regulation (Brubaker, 1992, p. 114). This was then distorted and radicalised with the ethnoracial restructuring of citizenship undertaken by the Nazis (p. 166).

The catastrophes of World War II mark an important discontinuity in the history of the German national self-understanding (Gerdes & Faist, 2006, p. 319). Still, the citizenship law maintained a certain ethnonational inflection, which was characterised by expansiveness towards ethnic Germans expulsed from Eastern Europe and the Soviet Union and restrictiveness towards

33 'In a society that gives space to different religious beliefs the individuals don't dispose of the right to be spared from confrontation with foreign expressions of faith, cultual practices and religious symbols'. The statement is to be found also in the *Ludin* decision (BVerfG, 24.09.2003–2 BvR 1436/02) at §46, in the crucifix decision (BverfG, 16.5.1995–1 BvR 1087/91) at §34, and more recently it has been reaffirmed by the Federal Administrative Court (BVerwG, 30.11.2011–6 C 20.10) at §30.

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non-German immigrants (Brubaker, 1992, p. 170). This is manifested particularly clearly with the *Gastarbeiter* politic[34]: cultural diversity was necessary, their integration by definition excluded and naturalisation an exception. Germany has for a long time refused to consider itself as a country of immigration, which has led to the lack of a viable assimilationist tradition (p. 176). Rather, it has followed a policy of 'benign differentialism' (p. 178): even though access to citizenship is restricted, everyday encounters with differences are not excluded. This is restated by the Senate in the decision considered here as well.

Albeit, it has to be remembered that the Senate declares unconstitutional the provision that establishes a preference for Christian-occidental values: with the exception of the Berlin and the Bremen Laws, all other Länder statutes favoured the Christian-occidental majority (Baer & Wrase, 2005). Party political discourses in the legislative processes made use of the notion of German national identity in opposition to an invented Islamic threat. Through the headscarf debates, both poles have been constructed around a confrontational dichotomy in order to avoid difficulties in actually defining German national identity and to address inherent inconsistencies and contradictions within approaches to immigration and citizenship law (Sinclair, 2012, p. 29).

To conclude, the founding idea(l)s concerning the population of the state rooted in nineteenth-century history display big differences between France and Germany. Those have to be contrasted with the more recent political developments and the contemporary stress-factor that is immigration: populistic instrumentalisation of immigration is, somewhat ironically, a transnational phenomenon (Gerdes & Faist, 2006, p. 327). This section aims to highlight how, in both countries, belonging to national communities contains both civic and ethnic components. Indeed, these components are present in varying proportions at particular moments in history, which mark the specificity of each national experience (Smith, 1986, p. 149). The cultural and historical contextualisations attempted here expose how the two decisions fit respectively in their tradition, or more precisely, how they fit respectively in a *certain crease* of their tradition. Both traditions contain contradicting elements, and the same principle has received different concretisations at different times, as it is particularly manifest in the case of secularism as well.

V. Religion in the public sphere

After having taken into consideration the conceptions of the individual and of societal belonging, this section focuses on the place accorded to religion in the public space insofar as this is relevant for the living together. Different settings are possible, and each presupposes a certain accommodation of the public and private spheres. The settlement between these two conceptual spaces bounds the living together, as the significance of different religious garments allowed in the public sphere is indeed a determinant of the conditions of coexistence.

5.1 Many laicities

During the legislative procedure in France the principle of *laïcité* had been left aside: prohibiting the burqa could not be justified in the name of *laïcité*, as it was for the 2004 Statute on religious symbols at school (Rapport d'Information Raoult, p. 90). First, this is because the setting in that the integral veil was to be prohibited does not only involve state institutions, but also the entirety of the public places of the French territory. Second, it is because the burqa was declared not to be a religious symbol, but rather a political one and prohibiting it would be based on concerns of public order. Third, the

34 Migrant workers who were recruited mainly from southern Europe from the 1950s onwards were considered to be temporary sojourners, and their presence in Germany was seasonal according to business cycles. But, by the early 1970s, the sex ratio, employment rate and surge in births started to signal settlement (Brubaker, 1992, p. 172).

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principle was dismissed as ineffective, as it would weigh only on the state and not on private persons (pp. 90–94).

Nonetheless, the Constitutional Council referred to Article 10 DDHC, which protects religious freedom, thus confirming the religious significance of the banned practice (Dieu, 2010). Moreover, the Council introduced a reserve of interpretation:

> '[L]'interdiction de dissimuler son visage dans l'espace public ne saurait, sans porter une atteinte excessive à l'article 10 de la Déclaration de 1789, restreindre l'exercice de la liberté religieuse dans les lieux de culte ouverts au public; ... sous cette réserve, les articles 1er à 3 de la loi déférée ne sont pas contraires à la Constitution.'[35]

By including this restriction in the ban (it is not applicable in places of worship), the Council revealed the religious object of the law. If the prohibited attire was not religious, there would be no need for an exemption on religious grounds (Joppke & Torpey, 2013, p. 47). The Council's judgment resets the prohibition into the dichotomy mentioned at the outset of this section – to what degree are observant practices accepted in the public sphere. In any case, the official rhetoric had not hindered legal scholars from considering the ban as a (however questionable) application of the principle of laicity (Champeil-Desplats, 2012).

But what does laicity mean? At least two versions of the principle can be differentiated on the basis of the meaning associated to the public/private dichotomy. One requires public and private spheres to be clearly demarcated. Belief (private) and knowledge (public) are rigorously autonomous to one another: religion is limited to a constructed private space and cannot be expressed in the public sphere. Another version of the principle postulates it as personal (in this sense private) belief and religious freedom. This includes the respect of religious practices in private as well as in public life, but it negates the pre-eminence of one specific religion: in particular, the possibility of a state (public) religious institution (Baubérot, 2012, pp. 48–49; Bowen, 2010, pp. 29–31).

In the seventeenth and eighteenth centuries, the dominant conception in France was Gallicanism, an arrangement of close cooperation between the state and the French Catholic Church, which in turn had autonomy from the Vatican. Thus Catholicism enjoyed a sort of monopolistic position (Baubérot, 2012, p. 179). According to Ferdinand Buisson, the philosopher and first theoriser of *laïcité*, the principle was introduced in France with the Revolution and the DDHC through the creation of a State that was independent from the Church, detached from any religion and the recognition of human rights not considered to be given by God (1882, p. 1469). Then Napoléon Bonaparte instituted a complex system of Concordats with the recognised religions, but still the whole of the nineteenth century has been characterised by strong hostilities between two Frances: one deeply Catholic and the other one referring to the values of free thinking (Baubérot, 2013, p. 37).

The oppositions continued also during the III Republic and, even if the 1882 Statute laicises primary education, thus reducing drastically the political and social influence of the Church (Buisson, 1882, pp. 1469–1470), the horizon of an integral laicity is never attained (Baubérot, 2013, p. 72). During the parliamentary debates that led to the 1905 Statute on the Separation of the Churches and the State, opinions have been expressed in favour of a public space freed from all religious symbols and clothing (Baubérot, 2012, pp. 185–188), but the resulting text is actually an

35 'The ban on covering one's face in public spaces shall not limit the exercise of religious freedom in the places of worship open to the public, otherwise it would cause an excessive infringement of the article 10 of the 1789 Declaration; ... given this limitation, the articles from 1 to 3 of the Bill referred to are not contrary to the Constitution.'

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attempt to negotiate the end of the conflicts between clericalists and anti-clericalists (Baubérot, 2013, p. 83). It establishes a clear institutional separation and privatises the religious institutions in the sense that those have to now be organised as associations and, as such, they can act in the public space. The state does not assume any responsibility for private 'religious needs', but it guarantees the freedom of conscience and of belief without distinguishing among creeds (p. 87).[36]

The Constitutions of 1946 (IV Republic) and 1958 (V Republic) declare France to be laic. *Laïcité* thus becomes a shared heritage, and the division among the 'two Frances' is overcome. The laic self-conception of the political representatives and the intellectuals notwithstanding, rituals and symbolic elements of Christian origin have not disappeared. Moreover, in society, the Catholic Church has a relevant role and is thus publicly visible (Amir-Moazami, 2007, p. 96). Starting from the late 1970s and early 1980s, the public space changes also due to the increasing visibility of migrants. The Muslim population arriving mainly from ex-colonies (Algeria became independent in 1962) begins to settle down (Baubérot, 2013, p. 113), and political fights that were previously thematised as workers' fights are now defined as 'identitarian' by the political discourse (Noiriel, 2007, pp. 60–65).

The contemporary revival of *laïcité* is oriented to questioning the compatibility of immigrants' religion with it. Actually, *laïcité* is today mainly invoked to ostracise ostensible Muslim practices from the landscape of public visibility (Daly, 2013, pp. 379–380). This new laicity is structurally different from the previous one: its historical roots are not the religious wars and the Revolution, but the French colonial past; its geopolitics is not connected with the conflict of the two Frances, but with globalisation and the rejection of a Anglo-American liberal societal model; it is not discussed primarily in parliamentary debates, but it has become extremely mediatised; and from historically being a progressive principle, it is becoming a conservative one (Baubérot, 2013, pp. 119–121).

Overall, even if the courts sometimes still interpret the principle in favour of the rights of the individual (Joppke, 2009, p. 38), the decision studied here is rather in line with the new laicity resulting from the recent shifts in the meaning of the concept (Hunter-Henin, 2012, pp. 617–623).

5.2 Disputed neutrality

Oscillations of meaning are to be recorded also concerning the presence of religion in the public sphere in Germany. The central principles for this aspect in the judgment are freedom of religion, state neutrality and equal treatment, which are all basic principles inscribed in the constitutional structure (Robbers, 2001). As mentioned above, in the balancing between constitutional rights and values carried out by the First Senate, the positive religious freedom of the teacher headscarf-wearer prevails over the negative religious freedom of the pupils (reasoning concludes at §122). This extensive conception of religious freedom is the result of an erstwhile if very slow (Sacksofsky, 2009, p. 22) historical process: the individual would get an initial *beneficium emigrationis* in the 1555 Augsburg peace treaty, and the 1648 Westphalia treaty merely recognised the right of toleration for the private exercise – in the sense of not publicly visible – of a religion different from the state one (Dreier, 2011, pp. 76–77). Positive and negative freedom of religion were established only in 1919 with the Weimar Constitution (WRV). Nowadays, it is recognised as being of primordial importance and extensively interpreted to the point that it may have led to a sort of unintentional (not being the result of firm measures on integration policies) multiculturalism (Gerdes & Faist, 2006, p. 322).

36 Nevertheless, cases exist that show disagreement about the exact content of the principle. For example, the Council of State intervened in 1909 by annulling the decision of the Sens city mayor to prohibit clerks from accompanying a funeral procession in their sacerdotal dress, as it was deemed to be a measure not strictly necessary to the protection of public order, CE, 19 February 1909, *Abbé Olivier*, n° 27355. This decision is interestingly analogous to the one taken last summer by the Council of State, which suspended the decision of the mayor of Villeneuve-Loubet, who wanted to ban clothes that demonstrate an obvious religious affiliation worn by swimmers on public beaches (burkini), CE, 26 August 2016 n. 402742, 402777.

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State neutrality also is the result of a long and conflict-ridden process. The concordat of Worm 1122 is the first document setting forth the division between spiritual and temporal authorities, whose posts and competences become explicitly separated. Nevertheless, in the German territories, *one* Land's religion would still exists until the eighteenth century (Catholic, Evangelical or Reformed). The state stopped identifying itself with any creed with the Prussian Allgemeines Landrecht in 1794 and, even then, only the three Christian cults recognised by the law of the Reich enjoyed the *exercitium religionis publicum* – that is, open public presence (Dreier, 2011, pp. 74–77). In the Frankfurt Constitution of 1848/1849, full religious freedom was recognised and all distinctions between *excercitium publicum* and *privatum* disappeared. These central elements were overtaken also in the Prussian Constitution 1850, which albeit at the same time also codified the Christian impregnation of the state and the ethical co-ordination of both the Church and the state (pp. 78–80). This asset was then overcome with the WRV, which established also the main lines of the contemporary setting.

Nowadays, Article 140 GG, with its reference to Article 137, para. 1 WRV, forbids the existence of a state Church. Besides, the principle of neutrality is not explicitly stated, but is derived from the combination of the individual freedom of religion and conscience (guaranteed in Article 4 GG and in Article 140 GG combined with Article 136, paras. 1 and 4, Article 137, para. 1 WRV) with the principle of equality (as expressed by Article 3, para. 3 and Article 33, para. 3 GG) (Ganz, 2008, p. 41). This leaves space for different concretisations (Heinig, 2009). Among the two possible models of a stricter division vs. a more encompassing cooperative stance, Germany has definitely tended towards the second (Kokott, 2005, p. 346), and a change of direction would require a new interpretation of the principle (Sacksofsky, 2009, p. 33). This was also the position of the Second Senate's majority in the 2003 *Ludin* decision, which, at §43, stated that overall state neutrality has to be understood as open neutrality, but that, in the particular case of schooling, the Land legislatures could find a different 'appropriate compromise' (§47). In so doing, it opened up the possibility for the Länder to opt for a more 'laicist' conception (Baer & Wrase, 2005, p. 244), provided that they would do so by guaranteeing equality of treatment among members of different religious communities (§71). As is known, most Länder passed statutes that forbade headscarves but not Christian symbols, or they introduced a preference for 'Christian-Western' values, which led to serious constitutionality doubts among scholars (Baer & Wrase, 2005, pp. 249–251) and to discordant interpretations.[37]

In regard to the decision considered here, the First Senate restricts the discretion previously accorded to the Länder and re-establishes a more pluralist understanding of neutrality (Traub, 2015, p. 1340). This is defined as follows:

> 'Die dem Staat gebotene weltanschaulich-religiöse Neutralität ist indessen nicht als eine distanzierende im Sinne einer strikten Trennung von Staat und Kirche zu verstehen, sondern als eine offene und übergreifende, die Glaubensfreiheit für alle Bekenntnisse gleichermaßen fördernde Haltung (§110).'[38]

37 On the one hand, the Federal Administrative Court attempted a constitutionally conformed interpretation, which considered 'Christian' values and symbols not to be of a religious nature (despite their religious origin), but a reference to broadly understood cultural values that would underlie the whole constitutional value system (BVerwG, 24.06.2004–2 C 45.03). This path was followed by the Federal Labour Court (BAG, 20.08.2009–2 AZR 499/08, at §24), the Constitutional Courts of Bavaria (VerfGH Bayern, 15.01.2007–11-VII-05) and Hesse (StGH Hessen, 10.12.2007–P.St. 2016). On the other hand, most of the local tribunals have refused to treat religions differently and disapplied the privileging rule by forbidding not only the headscarf, but all and sundry religious symbols (see the whole list of seventeen decisions at Henkes and Kneip, 2010, p. 608). This led to the unplanned result of limiting the space accorded to Christian symbols, thus shifting from a model of open neutrality to a stricter laicism (pp. 608–610).

38 'The ideological-religious neutrality required from the state is however not to be understood as a distancing one, in the sense of a categorical division of state and Church, but rather as an open and cross-cutting posture, fostering equally the freedom of belief for all confessions.' The formulation is identical to the already

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Moreover, the judgment reiterates that the state cannot identify with any particular religion or acquire any religious or conscience content (§110), and it has to avoid also taking part and intervening in creeds affairs and cannot judge nor determine the content of a religion (§86, §110). In addition to these general statements, the Court concretises them in reference to the school sector and qualifies as '*bekenntnisoffen*' exactly those interdenominational schools that can convey to pupils tolerance towards other religions and worldviews (§111, §115). So the daily confrontation with teachers wearing religious clothing would be balanced by the presence of other teachers wearing different attire: in this way, interdenominational schools mirror the religiously pluralist society (§105, §116).

In this regard, the First Senate clearly puts an end to the partly contradicting local tribunals' interpretations of various statutes forbidding headscarves and privileging Christianity. It rejects policies that would have had certain forms of religious exercise pushed into the private sphere and reasserts neutrality as not meaning state indifference towards religion, but rather that the state can permit religious activities in its sphere and offer them a forum. Clearly, this text entails a new strong (re-)statement of the significance of neutrality in the German context.

To summarise, the French decision seems to assume a stricter (even for French standards) conception of laicity, which tends to erase the religious from public spaces. This, thus, favours negative religious freedom, while the German one reasserts a cooperation model that is more indulgent towards positive freedom of exercise. Nevertheless, the contextualisation of the two texts allows some similarities to emerge: first, the degree of religiosity permitted in the public space has been variating over time. For both countries, it can be said that there is no fixed constitutional understanding of the neutrality principle to be derived from the provisions concerning the division between state and Church (Ganz, 2008, p. 44). Second, the very concepts of *laïcité* and state neutrality have been developed in historical contexts that were radically different from the present one, as the state was facing mainly well-established and already institutionalised Christian creeds (Sacksofsky, 2009, p. 12; Baubérot, 2012, p. 183). Therefore, old understandings of the terms are unfit to deal with contemporary challenges of religious pluralism, especially in a context where religious cases are actually intertwined with migration, integration and other socio-economic issues. This is related more broadly also with the question of national identity: for both countries, the degree of religiosity allowed in the public sphere is discussed in connection with (or against) the development of a religious and cultural pluralistic identity. The third commonality is that, even in a synchronic perspective, different meanings are given to the principle by different institutional actors (Joppke, 2007, p. 315; Henkes and Kneip, 2010, pp. 612–613).

VI. Conclusions

This paper attempts to locate the conceptions of living together entailed in two judgments concerning veiling within the respective context of different legal cultures. This has been done by analysing the conceptions of the individual, of the national societal bond and of religion in public that are inscribed in the texts of the decisions. The differences in context result in different approaches to balancing rights in both increasingly pluralistic societies and also result in different understandings of living together. The main finding concerning the two legal cultures to which the compared decisions belong is that they both are highly inhomogeneous and contain contradicting elements. In other words, the context has been studied highlighting its complexity.

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mentioned §43 of the 2003 judgment. All three main quotations used in this paper are reiterations of what had already been stated in 2003: I take this to mean that, even though the object of the two rulings is not the same, the conceptions of individual, of pluralistic society and of open neutrality are shared by the two Senates.

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Trying to recapitulate the three central sections (III, IV and V) of this paper might cause a certain amount of bewilderment. The enlightened autonomous individual can be forced to be free, while the community-determined one can be actually freer to express herself as she pleases. A civic conception of the state is not incompatible with strong 'national identity' claims, while an ethnic-cultural one can develop both into favouring Western-Christian values and into being more pluralistic. Finally, the legal setting concerning the role of religion in public needs to be renegotiated in the present pluralist situation. One might feel the temptation to surrender to this conceptual chaos. Indeed, if one conclusion can be drawn, it is that (legal) meanings are fluctuating and that (legal) traditions are hybrid in nature.

There are at least three levels of understanding the conceptions of 'living together' enshrined in the two decisions. The first one is by relating the court's position to the respective 'stereotypical' image of the legal culture. I hope to have shown how these images do not exist in a coherent form. Communities are imagined and traditions are invented, and one main concern of this paper has been to avoid reifying national stereotypes. If legal cultures, like all cultures, are a product of the contingencies of history and are always undergoing change (Nelken, 2004, p. 5), then a complex outcome should not be considered as a failure. Legal cultures rather manifest an attitude of 'tending towards' one or the other model. In this way, also the decisions considered here are cases, themselves crossed, belonging to inhomogeneous traditions. As a consequence, the living together they envisage is not a fully and coherently instantiated modus vivendi, but a patchwork of different elements.

A second possible reading stresses the political aspects of the different kinds of judicial review that are carried out in the two judgments. The French a priori and abstract constitutionality check was tightly integrated into the legislative procedure. The objective understanding of freedom and equality, as well as the extended conception of public order and the re-delineation of the meaning of public and private when referred to the space religion is allowed to take, can all be inscribed into a coherent political project. Therefore, it may be plausible to read this judgment as part of the political campaign traversing multiple state institutions that led to affirming a certain conception of living together in French law (Ould Chaib & Brems, 2013, pp. 12–13). This campaign did not focus on stressing the autonomy of the individual, but rather on the 'threat' of communitarianism and reclaimed the authority at the central level to determine the required level of the population's homogeneity. Critical voices indeed exist but are to be found in the literature and in other sources, such as the media, that were not taken into consideration here. In contrast, the German judgment holds a completely different structural position. Here, the control of the constitutionality of the statute was carried out as a response to two constitutional complaints, so the Court had to play a different role: it did so by prioritising the position of the individual and her freedom of religion, rather than pursuing any vision of 'how the German society should be'. German constitutional complaints are meant for defending the individual's rights, and this may explain the Senate's focus on the person, her rights and freedoms. In so doing, it stopped the legislators of the Länder, who were on the whole more focused on affirming the 'Christian and Western' values that had to be transmitted at school. The point here is that different types of judicial review and their timing (a priori or a posteriori) do affect the framing of the issue.

Third, the two texts can be made sense of by highlighting their exceptionality: the French decision has been described as 'a stretch, if not an impossibility, given the prevailing jurisprudence and legal opinion' (Joppke and Torpey, 2013, p. 45). The German decision had two dissenting justices and was going (partly) against a decision taken by the other Senate only twelve years earlier and the Länder legislatures. The two cases entail statements on a crucial topic, which is the conception of living together. They reveal the high level of divergence of views; both judges could have written a text putting forward an opposite vision of their respective society and would have found elements to sustain such a view within their own tradition.

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To conclude, understanding law as an expression of culture does not mean having a romantic or essentialising vision of law. The texts analysed here can be effectively made sense of as a result of the circulation of models and the (temporary) outcome of political debates on topics of immigration and religious symbols. This paper attempts to show how trying to understand legal terms by placing them in their cultural context does not necessarily entail essentialisation, uncritical acceptance or justification. Rather, it means looking for oppositions and contradictions that are inherent in every legal culture and understanding law as being the result of power struggles in their political contingency.

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