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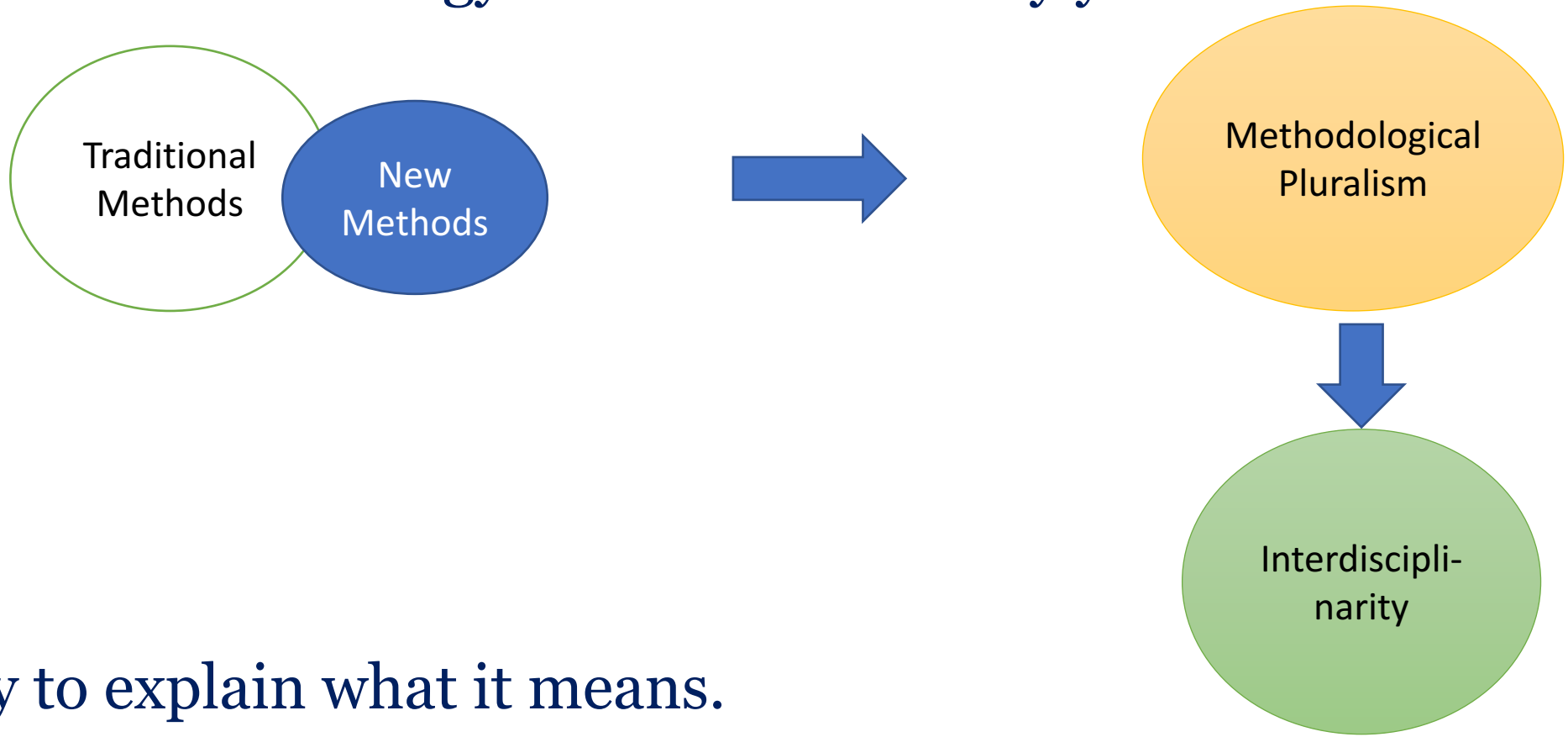
Methodological Pluralism and Post-Modern Theories in Comparative Law

Preliminary Remarks (only for didactic use)

The subject of this presentation relates to **developments** in comparative methodology over the last twenty years.



I will try to explain what it means.

Preliminary Remarks – 1 bis

Karl Popper,

"It may perhaps be asked what other methods a philosopher might use. My answer is that though there are any number of different methods, I am really not interesting in enumerating them. I do not care what methods a philosopher (or anybody else) may use so long as he has an interesting problem, and so long as he sincerely trying to solve it."

Preliminary Remarks - 2

The questions we will try to answer are also related to comparative methodology and its knowledge in **law teaching and research**.

The first question we can ask ourselves is the following: Is knowledge of methodology **necessary** for the study of comparative law?"

- Comparative law teaching should provide students with the necessary tools for carrying out **comparative law research**.

Preliminary Remarks - 3

It may be useful to ask **what role** methodology occupies in comparative law courses today

Its introduction into the university classroom is an **indispensable prerequisite**, which students of comparative law courses should not (or must) renounce.

All scholarly research implies comparisons

Scholarly legal research often requires comparing one's own legal system to another one (minimum: objects in two legal systems to make a comparison)

Preliminary Remarks - 4

It is not necessarily the case, however, that a lecturer teaching comparative subjects is familiar with or incorporates the methodology into his or her courses. Sometimes, the consequences are visible in their writings

However, a question arises whether comparatists, through their writings, have **contributed to the legal debate** concerning a foreign country,

or have they quietly remained in their own country and produced **irrelevant contributions** in this regard? Are the comparatist's descriptions and discursive reproductions more or less **recognizable** to those who operate within the foreign systems ? **(the comparatist in a comfort zone)** ……

Preliminary Remarks - 5

Comparative lawyers are like **travelers**

What is traveling?

Traveling must be about going to places, meeting new people, and discovering new things; thus, in a way, shortening the distance between the traveler and the people and places he/she visits.

So, too, comparative law must be about **shortening distances**.

When we return from a trip, we ask ourselves: what did we have left from that trip?

So we must ask ourselves what we are left with from a surface comparative analysis

Preliminary Remarks – 5 bis

Calvino, *Invisible Cities*

Kublai Khan asks Marco Polo about his travels,

> "**journeys to relive your past**?" was the Khan's question at this point, a question which could also have been formulated: "**journeys to recover your future**?"
>
> And Marco's answer was: "Elsewhere is a negative mirror. **The traveler recognizes the little that is his, discovering the much he has not had and will never have**."

Preliminary Remarks - 6

Thinking and analyzing objects of study **differently** from the traditional one, avoiding a simplified view of reality and characterized by linear logic (research area of mathematical logic), represents a **critical challenge** for comparatists.

The starting point for this reflection could be the **comparative process** and the application of a methodology at different stages of research, considering that several methods do not necessarily have to be applied in parallel.

The idea that the functional approach can be considered an acceptable method for legal research using a comparison is on the wane, as it is only **one of the possible approaches** for selecting research objects within the different legal systems.

Preliminary Remarks - 7

In comparative research, some necessary elements are fundamental:

a) the choice of national systems to be included in the research

b) the description of the object to be analyzed

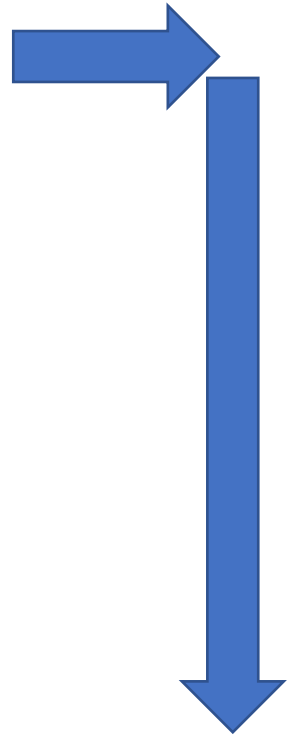
c) the definition of the project's aims and expected results,

d) the choice of methods to be used.

e) the formulation of one or more *research questions*

f) the sources of law to be analyzed

g) *Tertium comparationis*



Knowledge of languages

Preliminary Remarks - 8

What do we mean when we talk about a "**comparative process**"?

It consists of a series of concatenated and preparatory steps to compare models, solutions of legal problems, or institutions of different systems.

Are there **different stages** in this process?

The classifications are different, but basically the same.

The best known is that of Léontin-Jean Constantinesco. He divided the procedural path into the stages of 'knowledge'

'understanding'

'comparison'which may be followed by an eventual stage of applying the results.

First, the comparatist examines the differences and assesses whether **a comparison is possible**.

Preliminary Remarks - 9

This pattern has been followed almost uniformly by the doctrine, albeit with some uneventful variations that are present in the definitions of procedure in other legal disciplines, such as, for example, administrative law.

This scheme may coincide with the entire research project, or only with a part of it, and that, in any case, **the sequence of phases is purely indicative**, as the project **may be remodeled** at the conclusion of the individual phases.

Preliminary Remarks - 10

Regarding a definition of a «**research question**»

a legal scholar must necessarily consider

- his or her knowledge
- epistemological prejudices
- attitude toward the consequences of the theories he or she shares
- the methods or techniques he or she chooses to use for his or her analysis.

Preliminary Remarks - 11

At this stage, a researcher might prefer to reflect quasi in a **solitary dimension** before confronting other scholars on the same subject and move

at a later stage, to a **collaborative** or **interdisciplinary** perspective, also considering that a comparative research project often contains multiple questions about **socio-legal profiles**

Preliminary Remarks – 11-bis

The concept of **interdisciplinarity** linked to critical comparative law, does not, however, involve the substitution of the best-known methods for legal comparison until the 20th century, but rather their integration with new comparative approaches

Law is part of human culture

and that there is no sufficient reason to exclude the possibility that a field of study other than law may contribute to shedding light on similarities and differences between legal systems, as well as to solving a given problem at a definite historical moment

Preliminary Remarks - 12

The method employed in research,

can be identified by the ‘techniques’ with which comparisons are made.

Different **traditional** methods, e.g.:

- Historical
- Functional
- Evolutionary
- Structural
- Thematic
- Empirical

Preliminary Remarks - 13

All of these can be made from a **micro** or **macro** point of view (Vernon Palmer).

Choosing one or more methods is undoubtedly difficult

it is common to see the use of approaches that are not particularly brilliant,

Undoubtedly, this choice is also strongly influenced by **research questions**

Preliminary Remarks - 14

In connection with these choices, the researcher can always better define (initial) **aims** of the research, which may or may not be **normative**.

A comparatist must always try to fit the research aims to find a model helpful for **transforming** or **harmonizing legal systems** or identifying **the best solutions for a legal or social problem**

Preliminary Remarks - 15

Projects from a «non-regulatory» perspective:

• The "***Trento Common Core***" project, presented by Mauro Bussani and Ugo Mattei on July 6, 1995, and inspired by the *Cornell seminars* led by Rudolph Schlesinger

• The "***Common Core of European Administrative Laws***" project, led by Giacinto della Cananea and Mauro Bussani.

Preliminary Remarks - 16

What happens in the "knowledge stage?"

In this phase, the methodological approach is almost always **functional**, making it possible to identify the factors involved in the comparative research,

such as legal institutions, rules, legal or social solutions in certain legal systems.

In this case, legal functionalism will also **influence** other choices in the subsequent comparative process.

Preliminary Remarks - 17

What happens in the "comprehension stage?"

In this phase, the researcher must proceed to reintegrate the comparison term into his or her legal order, confronting the different factors involved in the comparative analysis.

It is not always possible to reinstate this term

Problem of **comparability**  **NEGATIVE**

Through an **interdisciplinary approach**, the researcher can use methods and techniques drawn from other disciplines such as political science, legal history, legal sociology, legal anthropology, statistics, and economics

Preliminary Remarks - 18

What happens in the "comparison stage?"

In this phase, it is necessary to ascertain the content of the relationship between the terms of comparison to highlight similarities and especially **differences**

Similarities and assonances between two or more jurisdictions can, in some cases, be considered **coincidences**, as opposed to dissonances that may reveal the features of cultural and social matrices of other jurisdictions.

However, both perspectives can be valuable for comparative analysis to **simplify the study of foreign law**.

Methodological Pluralism

What is methodological pluralism?

The concept of ‘methodological pluralism’, defined in many sciences, identifies **the tolerance of various methods**,

also used in **different phases** of a comparative process, even for the realization of research projects.

The starting point for a comparison is the idea that a ‘**toolbox**’ is necessary, **not a fixed methodological** road map and research outside rule and case-oriented comparative law offers varying approaches, which could usefully be applied in comparative research.

Methodological Pluralism - 2

We find this concept in some famous philosophical essays such as:

Nietzsche's ***Aurora***, passage 432:

"***In science there is no exclusive method of knowledge***",

Nietzsche emphasized the need to:

"*approach things with hesitation, treating them in turn with harshness or with justice, with passion or with coolness, since "one researcher deals with things like a policeman, another like a confessor, and a third still like a* ***curious traveler***""

We can take this passage for a reflection on the 'free spirit' and on those who choose **to be comparatist**s precisely because they feel they are **free mind**s

Methodological Pluralism - 3

Surface or deep comparison?

To answer this question, I borrow a sentence from Pierre Legrand.

"There cannot be a comparison that is not informed by the comparatist's predispositions and predilections, themselves having much to do with the cultural world that the comparatist embodies."

(Legrand, *Negative Comparative Law*)

Methodological Pluralism - 4

Paul Feyerabend, in ***Against Method***, used the term "**pluralistic methodology**". He writes,

"A *scientist who is interested in maximal empirical content, and who wants to understand as many aspects of his theory as possible, will adopt a pluralistic methodology, he will compare theories with other theories rather than with "experience," "data," or "facts and he will try to improve rather than discards the views that appear to lose in the competition.*

What are the implications of this assumption?

Methodological Pluralism - 5

a) All methodologies have limitations

b) The consistency condition, which requires that new hypotheses agree with accepted theories, is unreasonable

c) Uniformity of methods limits developments in science

a pluralistic methodology is necessary both for the advancement of knowledge and for the development of our individuality (J. Stuart Mill)

Methodological Pluralism - 6

In the 1960s, comparative legal doctrine reflects on this issue,

preferring the concept of '**variety of methods**' rather than 'methodological pluralism'.

In subsequent years there has been no establishment of a shared paradigm by the doctrine, given the presence of numerous variables, with varying degrees of intensity for the choice of methodological approaches for the effectiveness of comparative research.

The **aim of the research** and **the research question** will determine which methods could be useful.

Different methods **may be combined**, as they are **complementary** and not mutually exclusive.

Methodological Pluralism - 7

Other legal scholars:

Mathias Siems,

"There is no one *method* of *comparative law* but a large *variety of methods* to compare laws, fitting the different objects of a given comparative project"

Patrick Glenn, "There is no *comparative method*. This conclusion is in no way incompatible, however, with a *variety* of *comparative methods* over time and with deviation from each of them"

Günther Frankenberg, [*Comparative law* is] a *variety of methods* for looking at law.

Methodological Pluralism - 8

These considerations obviously also apply to **other fields of law** besides private law, such as public or international law.

Methods for comparative analysis in **constitutional law** are the same as those generally used in the various fields of comparative research. The same work may result from applying different methods, both in classification and functional analysis (Vicki Jackson)

In recent years, connections between comparative law and **international law** comes from the renewed interest in a `comparative' approach to international law. Indeed, since the end of the last century, more and more international law scholars have become engaged in shaping

'**Comparative International Law**' is a new field of study, focusing on the impact of national legal traditions on the construction of international law.

Methodological Pluralism - 9

Comparative international law utilizes insights and methods from comparative law

in order to identify, analyze, and explain similarities and differences in how international law is **understood, interpreted, applied, and approached** by different national and international actors

If, therefore, methodological pluralism, albeit with different linguistic meanings, seems to be shared by the most recent doctrine, it must be emphasised that

the use of a plurality of methods does not necessarily cover all phases of comparative research.

Methodological Pluralism and Comparative Process -2

The comparatist must include being faced with questions concerning methodology and its use.

He or she might ask whether it makes sense to exclusively approach comparative research using the methodological approaches in vogue in the last century.

Alternatively, it is necessary to confront the knowledge and application of multiple methods, which must also be known operationally.

What are the factors that can lead a comparatist to ask this question?

Methodological Pluralism and Comparative Process -3

Comparative science is increasingly moving towards general macro-comparative studies, also through **quantitative** methods, to identify factors and variables that influence the transformation of legal systems, also from a nomogenetic perspective.

Technological developments have enabled rapid progress to facilitate this approach, especially with **artificial intelligence**.

From another point of view, the **knowledge of a legal system's language and cultural and social factors might reveal** that experience without theory is just as incomprehensible as (one assumes) a theory without experience

None of these factors is separable from passion which gives rise to specific behaviors that create the circumstances and ideas necessary to analyze and explain the process, to make it rational

Post-Modern Theories of Law

If we consider the new methodological approaches required to study complex institutions and phenomena from a comparative point of view, we can refer to three specific perspectives (Siems)

- Post-modern
- Socio-legal
- Numerical

Let us try to define these three concepts

Post-Modern Theories of Law

Post-modern (or postmodern)

Term used from the 1960s onwards, initially in the United States and then in Europe, to define the various trends that emerged above all in architecture – later also in literature, cultural movements and the arts in general – which, characterized by the rejection of the ideal of progress and the denial of the **value of the new** and the unprecedented

Legal studies have become more sophisticated and more eclectic

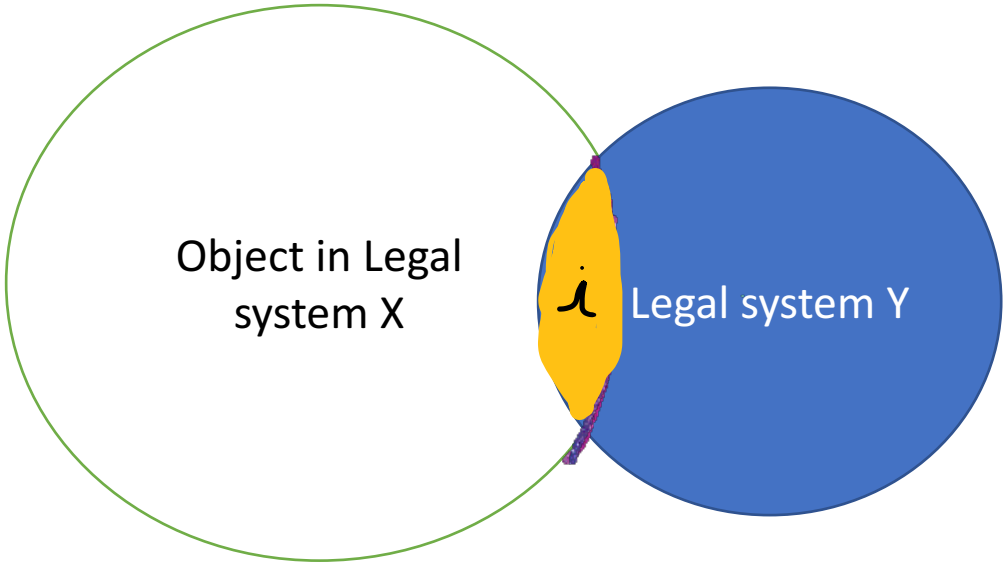
Post-Modern Theories of (Comparative) Law -2

In comparative law, there is a reluctance to abandon or reconsider traditional approaches (Siems)

- Post-modern comparative law focuses on **differences**
- Apparently similar concepts have different meanings in different legal systems
- Actually, the main purpose of comparative law is appreciate the complexity of legal systems and not to find common denominators

Post-Modern Theories of (Comparative) Law - 3

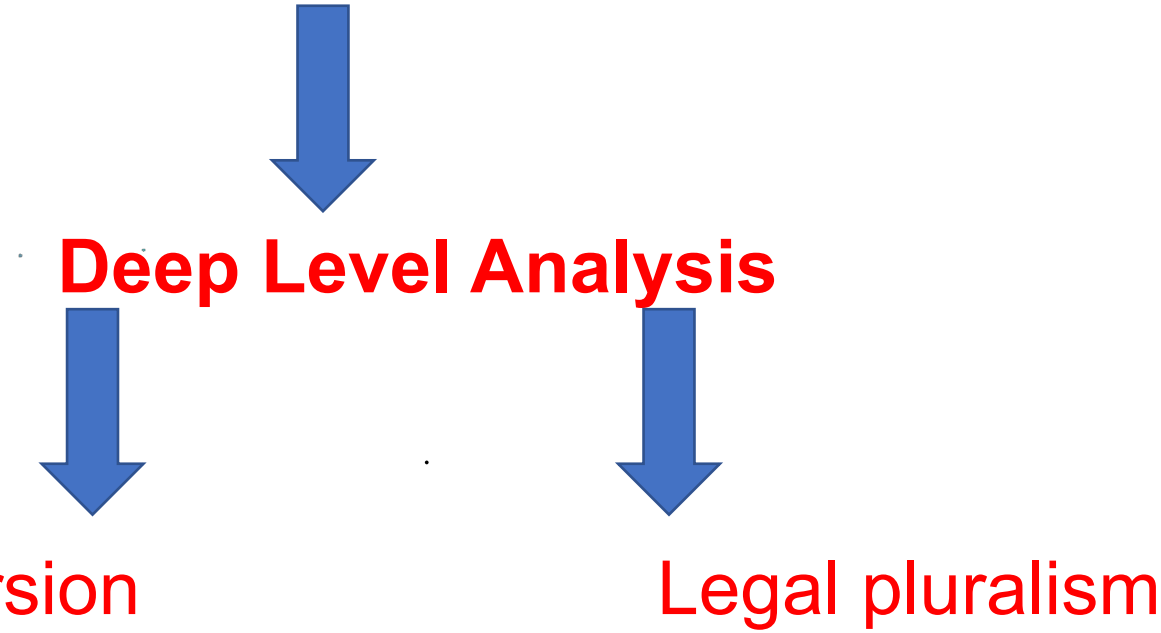
However, common elements can be found and form part of an **intersection set**



See, recently: Mauro Bussani et Giacinto della Cananea, *À la recherche du fonds commun des droits administratifs européens*, in *RIDC*, 2023/1, 7-36

Post-Modern Theories of (Comparative) Law - 4

One question we must ask ourselves is whether superficial analyses of different orders still have much meaning



Post-Modern Theories of (Comparative) Law - 5

Cultural immersion

Curiosity, Acts of Imagination, Methaphors, Difference, Poetry (comparatist as poets)

legal formants shows that **disharmony**, and not harmony, is what characterizes the different legal systems (Sacco)

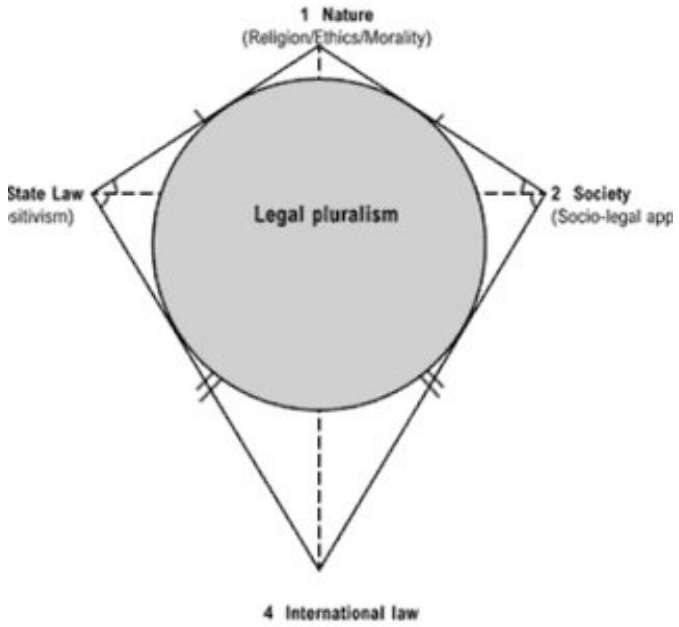
Legal pluralism

Legal orders or single rules may be rooted in different sources of legitimacy

Research in other acedemic fields dealing with topics such as cultural, social, structural, political and socio-economic pluralism (Siems, Moore)

Post-Modern Theories of (Comparative) Law - 6

Legal pluralism (Menski's Kite Model)



We have to consider these four perspectives: Nature, State Law, Society and International Law

Post-Modern Theories of (Comparative) Law – 6 bis

Two different forms of legal pluralism

A) where, within a state, **enclaves** with separate legal rules may operate

B) legal systems which sanction or enforce different systems of legal rules in state-wide but **separate and parallel court systems**'. From this perspective, methodological choices are also conditioned by the cultural background of the legal systems to be compared

Cultural approaches

Law as culture → Mutual influence and shaping of difference

Problem of language: If the comparatist studies countries with a different legal language, the relationship between linguistics and comparative law is closer. Siems distinguishes three approaches:

a) A functional approach to translation focuses on the **target languages**
b) A literal approach: translation needs to be faithful to the linguistic particularities of the **source text**
c) A cultural approaches aims to get the best of both worlds

We have to consider the **evolution of language**

Cultural approaches - 2

See, e.g., the history of the ***Oxford English Dictionary*** (*https://public.oed.com/history/*)

"The English language never stops evolving"

The Professor and the Madman (2019)

Cultural approaches - 3

Fluency in the language of the target legal order is a prerequisite for comparative studies

comparatists necessarily will be limited in the range of legal cultures they can study by the foreign languages they know

Problem of translation

«A translation is both de-coding and re-coding, identifying, and constructing meaning» (Vivian Curran)

From this point of view, understanding translation's mechanisms illuminates the processes of [deep]comparative law.

Law and Literature

The relationship between 'law and literature' characterises one of the postmodern theories of law

It was based, at its inception, on the need to give jurists a literary sensibility.

Significant contributions deepened this relationship, defining two different disciplinary perspectives – '**law in literature**' (in the classics of the Western literature) and '**law as literature**' (medium for analyzing legal texts)

All these different perspectives are subjects of university teaching

James Boyd White, *The Legal Imagination*, 1973, showed how the study of literature is similar to the type of interpretive activity involved in the law

Law and Literature - 2

Literature can therefore play an **auxiliary function** in this perspective for comparison

Literature, while presenting artificial universes, allows the comparatist and the judge to better grasp the essence of a social problem

Mainly a judge can use the literary argument, like the metaphor, e.g., in the elaboration of *obiter dicta* within a judicial decision, analogous to the mere facts used in cognitive matters

Narrative Jurisprudence uses storytelling to depict a common experience between social events and law (e.g., race discrimination, fornation of moral judgement)

Gender approaches

- In the late 1970s, 'a new and authoritative theory of law that provided a specifically feminist perspective on law and judicial interpretation' began to take hold.
- official visibility with Ann Scales' essay, *Towards a Feminist Jurisprudence* in 1981.
- In recent decades, the debate has developed to elaborate a theory of law based on **consciousness-raising**, **personal gender experience**, and **deconstructive** practice. This theory has invested in various areas of legal sciences, such as, for example, international law or global constitutionalism, but also methodology.

Gender approaches - 2

the personal experience of gender

the ‘knowledge gained from a different voice’ can characterize the steps of comparative analysis.

Projects in this direction have involved, for example, the rewriting of opinions relating to some Supreme Courts - the United States, Canada, Australia, and India - through a different evaluation of the context and inequalities relating to gender identity, social classes, disability, sexual orientation, immigration

Critical comparison

Derived from Critical Legal Studies (Cls) used in scientific literature without a precise linguistic stipulation, originated in the United States in the second half of the 1970s.

Duncan Kennedy defines this movement of legal studies as 'the emergence of a new left intelligentsia committed at once to theory and practice, and creating a radical left world view in an area where once there were only variations on the theme of legitimation of the status quo'

Critical approaches to the established positions of comparatists

Critical comparison - 2

Legal systems should be analyzed for their ability to give functional responses to social needs.

This point of view highlighted how the reasoning followed by the judges was limited by the presumably objective perception of applying pertinent rules, with the consequence that the definition of the conclusions could rather derive from arbitrary assumptions. The critical comparison is still today, more than thirty-five years later, the subject of further developments in the recent book by Gunter Frankenberg, *Comparative Law as Critique* (2019) to which we owe, among others, the merit of having initiated the debate on this theory among comparatists, with the publication in 1985 of the essay *Critical Comparison: Re-Thinking Comparative Law*.

Critical comparison -3

Critical Comparative Law

a) **Law as Politics**

b) **Law as Discourse**

c) **Negative Comparative Law (**Legrand**)**

Interdisciplinary Comparative Law

What is interdisciplinarity?

"Interdisciplinarity is an analytically reflective study of the, theoretical, and institutional implications of implementing interdisciplinary approaches to teaching and research" **(R.C. MILLER)**

Regarding the interdisciplinary approach, one needs to distinguish between **basic** and **advanced** research.

Interdisciplinary Comparative Law - 2

The knowledge of the mechanisms of relationships represents a dynamic perspective for the comparatist.

Deal with problems involving other disciplines, such as, for example, in the fields of

- Health
- the environment – with particular reference to climate change
- Energy, economics
- Transparency
- Health
- Market regulation,

to name but a few fields of basic interdisciplinary research.

AI and Comparative Law

Complexity – Artificial Intelligence – Comparative Law

Many definitions are attributed to the term '*artificial intelligence* (AI)' and its derivation from computer science.

These definitions have been modified over time.

However, we can consider AI as [the] 'theory and development of computer systems capable of performing tasks that usually require human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages'

AI and Comparative Law - 2

Three different forms of artificial intelligence can be distinguished:

- Weak
- Strong
- super,

depending on whether it is programmed to perform single tasks or any intellectual task that a human being can perform.

In a third case, AI could surpass human intelligence, the risks of which have already been highlighted in the **literature (McEwan, *Machines like Me: And People like You*, 2019),**

Artificial intelligence can help researchers in comparative analysis
I interviewed Chat GPT-4 two days after it was launched on the network.

Concluding Remarks -1

The transformations of law have revolutionized the way of studying sources, but especially of comparing them by interpreting the differentiating factors of different legal traditions that condition their existence, operation, hierarchy, as the solution of the same antinomies.

The comparison of different legal cultures, imposes, to some extent, the need to consider not only the mode of production of sources, but also, as mentioned above, that of interpreting them.

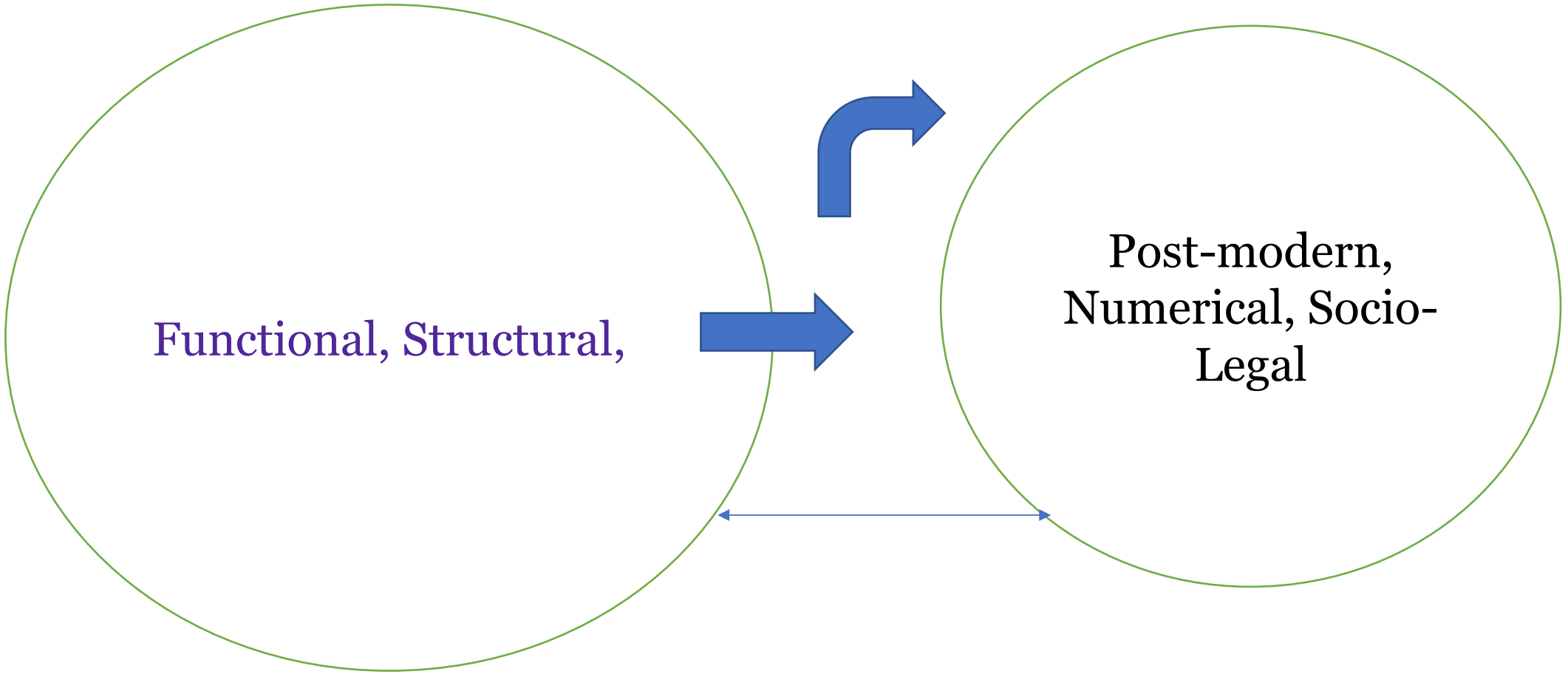
Traditional comparatists would **not be blind** to factors such as language, customs, moral and religious norms, etc.

and **not be blind** to a variety of methods for legal comparison

Concluding Remarks - 2

traditional approaches

new approaches



Towards a (new) comparative law?

Concluding Remarks -3

We agree with the idea that a methodological framework is needed

such as methodological knowledge to indicate at the moment some guidelines and principles useful for guiding comparatists in their comparative legal research in any field of the law

Methodological pluralism to give a chance to discover a suitable methods in a given analysis and in each steps of comparative process

Concluding Remarks - 3

To conclude, I would like to quote a passage from Italo Calvino, in *Six Memos for the Next Millenium*

“[w]henever humanity seems condemned to heaviness, I think I should fly like Perseus into a different space.

I don’t mean escaping into dreams or into the irrational. I mean that I have to change my approach, look at the world **from a different perspective**, with a **different logic** and with **fresh methods of cognition and verification**.”