Legal Translation in the Realm of Comparative Law Research: Approaches and Challenges

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Sommaire

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Abstract. *Building on prior studies which suggest that the topic of translation lacks solid foundation in comparative law methodology, in this paper, we delve into the matter of translation in the realm of comparative legal research, exploring its nature and examining its treatment from the perspective of comparative law theory. To this end, we analyze a wide range of handbooks by Western legal scholars on the theory of comparative law, along with scholarly papers and book chapters in English, German, Spanish and French that address the topic of translation in the context of comparative law research. Our findings indicate that, in order to conduct comparative legal research, comparatists must be able to access a broad range of different legal texts genres from the foreign legal culture they are studying. Our research also shows that many comparatists are aware of the language problem. Regardless, there seems to be no consistent or organized method for addressing translation in comparative law methodology and many comparative law scholars appear to have doubts about the process of translation and feel that employing translated legal texts could compromise comparative legal research. By shedding light on the translation process involved in every comparative legal endeavour and the challenges and concerns legal comparatists have regarding the issue of translation for comparative law research, our findings pave the way for closer collaboration between comparative legal studies and translation studies. In particular, we conclude that the principal paradigm of the functional approach to legal translation studies, according to which there is no 'one-size-fits-all' translation technique but rather different translation techniques may be combined in the translation of a legal text, depending, above all, on the function of the translation, could give more transparency and consistency to the translation endeavours that take place in the realm of comparative legal studies. It could also ease the reluctance of comparative lawyers to accept translation as a natural component of comparative legal research.*

I. Introduction: comparative law and the language problem

In Western nations,[1] the dominating medium through which law comes into existence is words[2] (Brand, 2009:

1 We provide this clarification because, as Grossfeld (1996: 103) points out, the extent to which behavioural norms are fully conveyed through language is not the same in different societies. Depending on the culture, the most crucial aspects can be implied between the lines and between one word and another.

2 "The vast majority of legal notions in modern society exist within the realm of language" (Brand, 2009: 19).

19; Grossfeld, 1996: 58 ff.). Legal principles are embodied in words, and they are shaped and framed, as to their scope, purpose and effect, in words. Law itself is expressed by language, forming a conceptual system that can only be described effectively by its own terminology. It is through this terminology that legal actors engage in discursive practices, enabling and shaping social coexistence within a given culture at a specific time. Both the legal concepts constituting a legal system and the terms that have been coined to describe those concepts are practiced, and therefore inextricably bound up, in the language spoken within the boundaries of the legal culture in which they are expressed, explained, interpreted and refined over time. Therefore, understanding legal terminology is key to grasping the complexities of a legal system (Galli, 2021).

In the field of legal translation studies, extensive theoretical and applied research has focused on the translation of "culture-bound terms" (Weston, 1991: 11; Harvey, 2000: 357) or "system-bound terms" (Šarčević, 1997: 233; Weisflog, 1996: 47) and several proposals have been put forward to address terminological challenges resulting from the conceptual disparities that exist between different legal systems (for an overview, see Holl, 2012). Pommer (2006), for example, proposes to employ Constantinesco's (1972) 3-step-method "understand – compare – transfer" to acquire the contrastive legal subject knowledge necessary to reach satisfying translation solutions at the terminological level. Šarčević (1997: 235 ff.) uses legal comparison to determine whether a term in a legal system A has a "full equivalent", a "partial equivalent" or "no equivalent" in legal system B. Arntz (2001) and Sandrini (1996) employ the functional method of comparative law to conduct contrastive research on legal terminology in order to analyse and demonstrate similarities and differences in concepts and, therefore, terminology, among various legal systems. Soriano-Barabino (2016: 157 ff.), for her part, proposes a methodological framework for the application of comparative law to legal translation practice, including macro- and micro comparison strategies.

All these proposals have in common that they include detailed descriptions of the steps to follow and lead to a series of clearly defined translation techniques, including "functional equivalence" (using a legal concept of the target legal culture whose function is similar to the concept of the source legal culture), "formal" or "linguistic" equivalence (a literal or word-for-word translation), "borrowing" or "transcription" (reproduction of the original term, sometimes accompanied by a gloss or a translator's note) and "descriptive" or "self-explanatory" translation[3] (use of generic terms to convey the meaning). However, in legal translation studies, it is generally accepted that, depending on the communicative situation and the particular legal concept to be translated, a combination of various techniques can be the adequate choice (e.g. Mayoral-Asensio, 2002; Martín Ruano, 2005).

The question of which technique(s) should be used for the translation of a given legal term is answered by the paradigms of functionalism[4] (Reiss & Vermeer, 1984; Nord, 1991, 1997/2018), according to which the overall purpose of the translational action determines the choice of the translation method and techniques. Having its origin in general translation stu-

3 The designation of the different translation techniques varies slightly among the various authors. Here, we use the classification proposed by Harvey (2000).

4 For sake of clarity, we point out that "functionalism" has different meanings in comparative law and in translation studies, as will be explained in this study.

dies, functionalism was implemented in the domain of legal translation studies since the 1990s (Garzone, 1999; Mayoral-Asensio, 2002; Prieto Ramos, 2002, 2014; Martín Ruano, 2005; Soriano-Barabino, 2016: 159 ff.), gradually freeing legal translation from the dogma of excessive literalism and putting different possibilities for the translation of legal concepts on an equal standing. As stated by Prieto Ramos (2014: 124) in his approach to achieving communicative adequacy in legal translation:

> No translation technique is *a priori* more adequate than another. This can only be determined through a contextualized analysis of acceptability in which the consideration of functional equivalents on the basis of comparative law is part of the decision-making process and is not an end in itself.

From the examples of how the translation of legal concepts can be addressed, it appears that legal translation theory has fully embraced the use of comparative law methods for its (terminological) needs. However, we wonder whether the reverse is also true and comparative legal studies rely on legal translation theory when dealing with the translation of texts from foreign legal systems.

The relationship between comparative law and legal translation is not one-sided, since any study in comparative law that goes beyond analysing legal systems written in the same language encounters the challenge of translation from two perspectives.

To begin with, the comparative law expert must have linguistic access to the sources of the legal system they wish to analyse. The comparatist can gain this access by either having themselves a deep grasp of the (legal) language of the systems they are studying or by relying on translations from a third party. In addition, even if the comparatist is proficient in the language of the foreign legal system(s) they wish to examine and contrast, they encounter the dilemma of selecting a language for documenting and communicating the findings of their comparative research. As a result, during their comparative endeavour, they eventually have to convey information about one legal system using the language of the other legal system.

Given that both understanding a foreign language and translating it are essential elements of practicing comparative law, one would assume that they would be assigned a high priority in the methodology of comparative law. However, as Arntz (1999), Glanert (2014), and Engberg (2020) emphasize, the role of translation within the methodological framework of legal comparison is not given the attention it deserves, despite its pivotal importance in the field. Furthermore, as all three authors point out, the field of comparative law seems to be missing a structured method for addressing translation concerns.[5] In this study, we aim to look deeper into the matter of translation for the purpose of comparative legal research, exploring its nature and treatment from the perspective of comparative law theory.

II. Methodology

The methodology employed in this study involves analysing a wide range of handbooks on the theory of comparative law that are representative and reflective of the

5 In this context, Glanert (2014: 2) observes that "many academics writing in the field [of comparative law] do not show any interest in translation" and Engberg (2020) states that "[i]n general, translation as part of the methodology of legal comparison is not problematized to any deeper degree."

field's evolution, as well as scholarly papers and book chapters that specifically deal with the issue of translation for comparative law purposes. To identify the most relevant works in this ample field, we conducted a brief study on the evolution of modern comparative law.

In our research, we use sources in English (the linguistic medium of the common law), and in Spanish, German and French (besides Italian, the main languages of the civil law tradition). As trying to analyse all existing studies on comparative law would be an incommensurable endeavour, we are aware of the limitations and non-exhaustive nature of our study. We will focus on the tendencies in the attitude towards translation that prevail among comparative law scholars, especially in the works of what the discipline considers the main authors during the historical evolution of comparative law in Western culture.

To ensure precise data for our research objective, we employed the following questions to guide our examination of comparative law materials: What level of importance do experts in comparative law give to translation and what is their view on it? What challenges do they identify and what concerns do they voice? Who do they consider as appropriate for translating in comparative legal research? Are there recommended translation methods, strategies or techniques? Is there an evolving perspective on translation in comparative law throughout history? And, finally, based on the results of the questions mentioned above, would a closer collaboration between comparative law and translation studies be fruitful for comparative legal research? In the following section, we will present the findings of our analysis in relation to the history, purpose and object of study of comparative law.

III. Results

A. The search for sameness: functionalist approaches

It is generally agreed that comparative law, which can be described as "the scholarly search for interrelations between different legal systems" (Brand, 2009: 19), serves both academic and practical purposes. The theoretical aim of comparative legal research is to gain insight into foreign legal systems and their principles (Zweigert & Kötz, 1996: 14; Siems, 2022: 2). In practical terms, the knowledge obtained by comparative legal research is useful for both national legislation and global legal harmonization (Herrera Bravo, 2021). By examining legal systems from different jurisdictions, domestic lawmakers can learn from successful practices, avoid pitfalls, and enhance legal frameworks for the benefit of society. Ultimately, this could result in the development of more effective and equitable legal structures that align with international standards and principles–a very important aspect in an increasingly globalized world. In this regard, comparative law plays a fundamental role in advancing the harmonization and even partial unification of legal systems.

There is evidence that the interest in the comparison of domestic and foreign laws dates to ancient times (Schmitthoff, 1978: 495), with scholars such as Plato and Aristotle examining the forms of government of different societies (Siems, 2022: 9).[6] Nevertheless, legal scholars widely agree that comparative law as a branch of modern legal science emerged at the beginning of the 20th century amid a period characterized

6 For detailed information on the history of comparative law, see Walther, 1932; Schmitthoff, 1978; Donahue, 2006: 3 ff., and López-Medina, 2015: 125.

by intense cosmopolitanism that is referred to by historians as "the first globalization" (López-Medina, 2015: 127).

Legal practitioners started having increased international interactions and encounters with foreign legal systems, which led to a demand for comprehension and comparison of diverse legal frameworks, especially in the domain of private law, before later expanding to other branches of law like penal or constitutional law. In the academic world, this interest was corresponded by the concern to develop a methodical framework for legal comparison and thus, for the first time in history, establish the scientific foundations of comparative law.

In this context, Schmitthoff (1978: 496 f.) emphasizes the significance of Ernst Rabel, who is widely regarded as the pioneer of modern comparative law due to his influential paper *Aufgabe und Notwendigkeit der Rechtsvergleichung* published in 1924. Rabel laid down the academic groundwork for current comparative law, with one of his major impacts being the development of the "functionalist method" as the dominant approach for analysing legal systems across different countries.

Since, from a methodological point of view, each comparison requires a standard of comparison, known as "tertium comparationis", the central idea of the functionalist approach is that all societies face similar social and economic challenges, leading their legal systems to devise solutions to address those challenges.[7] Therefore, the primary goal of the functionalist method in legal analysis is to identify and evaluate legal rules or institutions that serve similar social or economic functions in different legal systems and thus can be regarded as "functional equivalents".

For many years, the functionalist approach has been the main method in comparative legal research and has also significantly influenced how comparatists approach the translation of legal texts. We find an example of this in David & Jauffret-Spinosi and their handbook *Les Grands systèmes de droit contemporains*, first published in French in 1964 (Schmitthof: *ibid*.). The authors introduce the idea of "f*amille de droits*", or "legal family", offering for the first time a structured analysis of legal systems globally. While translation for comparative law is not explicitly discussed in their work, it can be understood that, in their view, translating foreign law is mainly about identifying "functional equivalents". Based on the assumption that in nations with a Roman-Germanic legal background, the fundamental areas of law are comparable, David & Jauffret-Spinosi (2010: 59/1988)[8] conclude that legal concepts and structures across these systems are frequently interchangeable. Even in the absence of a "functional equivalent", the authors opt to translate a term from the source legal system by a term from the target legal system, along with a warning to handle the translation with caution (*ibid*.: 236).[9]

The significant impact of David's & Jauffret-Spinosi's work was further refined and deepened by Zweigert & Kötz in their influential 1971[10]

7 The assumption that the problems different societies want to solve through law are essentially the same is known in comparative law as *praesumptio similitudinis* (Siems, 2022: 11).

8 We consulted parts of the French original in an edition from 1988 and a Spanish edition that dates from 2010.

9 In the original French version of their handbook, the authors refer the English term "remedy" and state that, although it has no "satisfying" translation into French, the French term "*remède*" could be used with caution (David & Jauffret-Spinosi, 1988: 384).

10 For this study, we have analysed the German original in its edition from 1996.

handbook on the method of comparative law *Einführung in die Rechtsvergleichung*, where they increased the number of legal families from four to eight[11] and significantly contributed to the methodological evolution of comparative law by expanding the functionalist approach. Although the authors make no explicit reference to translation as such, it is noteworthy that they stress the importance of not basing comparative law studies on national legal concepts because they "obstruct the comparatist's vision" (Zweigert & Kötz, 1996: 33).[12]

Another comparatist who has reflected widely on legal translation and who can be classified as a strong advocate of the functionalist approach is De Groot. Starting from the premise that "legal information must not be translated from source language into target language but from the terminology of the source language legal system into the terminology of the target language legal system" (De Groot, 2006: 427), according to this academic, the ideal translation technique for legal terms is finding a functional equivalent. However, he clarifies that, due to the lack of exact equivalency between various legal systems, whether a term in legal system B can be used as an "acceptable equivalent" of a legal term stemming from system A depends on the context. If such an equivalent cannot be located in the target legal language, "subsidiary solutions" (*ibid*.: 425) must be considered.

The initial alternative is to maintain the original term without translation and to include any extra information in parentheses or footnotes, for example, a literal translation or a reference to a similar term (*ibid*.: 426). The second subsidiary solution consists in using a paraphrase to describe the source language term and, "[i]f the paraphrase in the target language is a virtually perfect definition of the source language concept, such a paraphrase approximates an equivalent consisting of several words" (*ibid*.: 427). The third alternative solution is using neologisms, e.g. terms in the target language that do not form part of its legal terminology, potentially accompanied by an explanatory footnote.

In his book *Introduzione al diritto comparato*, first published in Italian in 1992, Sacco (2001: 33-57) dedicates an entire chapter to examining the relationship between law and language. He recognizes the challenges of translating legal content that stems from the structured nature of legal systems, their terms, and concepts, but affirms that, despite these obstacles, legal translation can be accomplished (*ibid*.: 43).[13] However, for this scholar, legal translation seems to consist primarily in finding correspondences between the categories of the legal systems being compared, a process he refers to as "homologation" ("*Homologisierung*") (*ibid*.: 53 f.). According to Sacco, it is only appropriate to speak of "translation" when a functional equivalent

11 While classifying and grouping legal systems has long been unquestioned as an elemental part of macro-comparative law, with the turn of the millennium, criticism arose as to if, in the postmodern world, these classifications are still acceptable. Detractors argue that any attempt to draw a map of the world's legal systems are non-neutral, biased projects because all classifications, categories, taxonomies and groupings are fundamentally flawed (Husa, 2004).

12 "*Keinesfalls darf man sich also den Blick durch Systembegriffe des eigenen nationalen Rechts verstellen lassen* […]" (Zweigert & Kötz, 1996: 33).

13 Sacco's inspiration from Canadian jurilinguists such as Gémar (1995) and Snow & Vanderlinden (1995) is apparent in his argument that different "subtypes of translation" must be distinguished, including "traditional translation" (a text is translated in similar form into another language), bilingual drafting, codrafting, and linguistic transposition (Sacco, 2001: 35).

can be found. If there is no such equivalent in the target legal language, there can only be an "explanation"[14] instead.

Some time has passed since the initial release of David & Jauffret-Spinosi's, Zweigert & Kötz's, De Groot's and Sacco's works were published. Yet, the idea of functional equivalents as the only—or ideal—form of translation is still present in the field of comparative law, as we can see, for example, in Somma's 2015 comparative law manual. The topic of translation is only briefly discussed by the author, but it is evident that he views translation within the legal context as relying solely on functional equivalents. Similarly to Sacco (2001: 52), Somma (2015: 50) argues that unlike concepts in natural sciences, legal concepts cannot be rendered in another language in "absolutely equivalent terms", suggesting instead that jurists "homologate" foreign law concepts by finding the most suitable expression in their own legal system to convey the meaning of the foreign legal system's expression.

In general, one frequently perceives a sense of despair among comparative legal scholars when they are unable to find a functional equivalent in the foreign legal system. In a paper from 2009, Kischel (2009: 7) states that "(o)ne of the first […] insights a comparative lawyer will get, is that the translation of legal texts remains a myth, a sublime aim never to be truly achieved" and concludes that "the question in legal translation is not which translation is right, but, much more modestly, which one is less wrong." Despite of this insight, in his theoretical work on comparative law of 1,010 pages, the same author (Kischel, 2015: 9-11) dedicates only two pages to the topic of legal translation. He states that, due to the differences between legal cultures and the fact that their respective legal concepts are rarely congruent, translation normally means not only linguistic, but also legal transposition.[15] Kischel discusses translation techniques and states that when no conceptual equivalent exists, the translator can opt for a literal translation (despite its potentially confusing effect on legal scholars), an "explanation"—which the author negatively classifies as "exhausting" ("*langatmig*"), or an explanatory footnote. He points out that the more distant the legal cultures being compared are, the harder it is to articulate a foreign legal idea.

B. Embracing otherness: cultural and postmodern approaches

The functionalist approach has been the prevailing method in comparative law studies for a long time and remains an important and widely used approach. One of its primary benefits is that it seeks to prevent including in the comparison only those foreign legal concepts that comparative lawyers are familiar with from their own legal system and its ability to facilitate a deeper understanding of legal systems from the point of view of their responses to social conflicts. Nevertheless, criticism of the functional method and discussions of new methodological proposals have been ongoing in the field of comparative law.

Perhaps the most severe critique of the functionalist approach arises from postmodern perspectives on comparative law. Peters & Schwenke (2000: 803) argue that the main criticism of the postmodern perspective on comparative law is that the conventional functio-

14 "*In einem solchen Fall ist es besser zu erklären als zu übersetzen*" (Sacco, 2001: 52).

15 "*Nicht nur sprachliche, sondern auch juristische Übertragung*" (Kischel, 2015: 10).

nalist method fails to recognize significant differences between legal cultures, is subjective by nature, claims to be impartial and technical only on the surface, and demonstrates a limited perception of the law. Hence, legal comparison is becoming "trapped in cultural frameworks" (*ibid*.: 802) and there is doubt about the feasibility of comparative law, as the comparative lawyer's cultural and personal background could hinder their ability to understand a different legal system and remain unbiased in their research (Forster & Watson, 2018: 108).

In this context, it has been suggested that the formulation of the *tertium comparationis* already implies a cultural bias as it assumes that the same universal functions and legal problems exist across all jurisdictions and can be objectively discussed and problematized. In addition to these concerns, Hoecke (2015: 8) points out that the functionalist method, apart from never having been put to the test by its authors, in reality, does not imply a specific method, but a variety of "functional methods" that are used in diverging ways, serve different purposes and yield different results, depending on the research question(s) and research interest.

As a result of the criticism, several other approaches for comparative law research have been put forward, which are not necessarily always in contrast to the functionalist approach, but which describe independently and quite differently how comparative law should be addressed (Kischel, 2015: 108; Forster & Watson, 2018). For example, Constantinesco (1972) proposes to take as a starting point not a social problem, but a specific legal concept pertaining to a foreign legal system and study that concept thoroughly within its own system in order to gain a full understanding of it before going over to comparing it to the legal concepts that exist in the comparatist's own legal system in order to determine the differences and similarities and establish the relationship between the compared elements.

In this context, the author asserts that the process he calls "terminological translation" (*ibid*.: 167)– when a legal term from system A is replaced with one from system B with similar meaning and legal consequences—is rarely feasible due to the unique character of legal systems which makes that a specific legal language can express only the concepts rooted in its own specific legal framework. This scholar suggests that to enhance comparative law studies, it is necessary to move past simply translating legal terminology and instead offer a comprehensive description of foreign legal concepts within their original cultural, historical, and institutional settings, considering all sources that contribute to their construction (*ibid*.: 168).

This interesting shift from seeking a matching term in the source legal system's language to aiming for a detailed description of the foreign concept as seen in Constantinesco is also evident in Legrand's and Grossfeld's approaches and, as we will see, more generally in cultural and postmodern approaches to comparative law. As Brand (2007: 428 f.) explains, since the mid-1990s, conventional comparative law has been challenged by the culturalist movement, which defends that each legal culture is a unique, culturally contingent product, which is incommensurable and untranslatable except through a deep understanding of the surrounding social context.

Legrand (1996) is the prime proponent of this movement in comparative law. While functionalism is concentrated on finding similarities and convergences, Legrand's basic experience is that of plurality and difference. In this vein, he argues that comparative law is not a search for function, but a hermeneutic exercise ("*démarche herméneutique*") (*ibid*.: 292). Legrand

sees the specificity of legal traditions and cultures as contained in language, which, according to him, is not always translatable. The task of the comparatist is to delve beyond the surface appearance of law and to uncover what the rule signifies in terms of its political, social, economic, and ideological context.

Functionalism, according to his view, was only partially successful in penetrating the façade of language. Legrand (*ibid*.: 310 f.) argues that comparative analysts need a theory of translation in order to navigate the intricate relationship between law and language. This author suggests that having a theory of translation aids comparatists in recognizing they are translating ideas rather than just words, enabling them to accept their subjectivity while aiming for a hermeneutic interpretation of a text's meaning, prioritizing semiotics over semantics[16].

According to this scholar (*ibid*.: 312), there are three main approaches to translation in the realm of comparative law research. Firstly, the comparatist can borrow the term from the source language and insert it unchanged into the target language. Nevertheless, this option is qualified as a solution of last resort in cases of "genuine untranslatability" (*"véritable intraduisibilité"*), *i.e.* where the target language is unable to convey the idea conveyed by the term used in the source language. Secondly, the comparatist may choose to render the term in the source language by means of a loan word, e.g. a word in the target language which is stripped of its ordinary meaning and used with a stipulated meaning.[17] Thirdly, the comparatist can translate a word of the source language by a term in the target language that has similar pragmatic implications.[18] In any case, Legrand suggests that translation always seems to be associated both with a certain degree of entropy (*i.e.* "loss of information" in the transition from the source language to the target language) and with a phenomenon of incrementalization (*i.e.* an addition from the target language to the source language, in terms of either the signifier or the signified).

Another author who recommends employing a hermeneutic approach to analyse foreign legal systems is Grossfeld (1996). In his handbook on comparative law, the author (*ibid*.: 121 f.) explores the consequences of translating law from one language to another. According to Grossfeld, if our cognitive processes are influenced by the language we use, then legal systems cannot be disconnected from the language in which they are written. Therefore, when legal propositions are translated into a new language or context, they necessarily undergo a transformation in their meaning.[19]

16 *"Ainsi apparaît-il nécessaire au comparatiste d'entreprendre sa recherche armé d'une théorie de la traduction laquelle, seule, lui donnera l'occasion de résoudre, quoique bien imparfaitement, les pièges que lui tend l'imbrication du droit et de la langue. C'est une théorie de la traduction qui lui permettra de saisir qu'il ne traduit pas des mots mais des idées et qui, tout en l'autorisant à mesurer son investissement de subjectivité comme traducteur, le fondera à toujours viser à une compréhension herméneutique du signifié textuel en évitant, dès lors, de faire une place exagérée au significant, c'est-à-dire à la sémantique, par rapport au signifié, c'est-à-dire à la sémiotique*" (Legrand, 1996: 310 f.).

17 As an example, Legrand mentions rendering the common law concept "equity" as "*équité*" in French.

18 As an example, Legrand mentions translating "trespass" into French as "*transgression*".

19 "*Was geschieht mit dem Recht, das durch eine und in einer Sprache lebt, wenn es in eine andere Sprache übersetzt wird? Da Struktur und Wertung der Sprache das Denken lenken, bestimmt die Sprache Aufbau und Inhalt von Recht. Rechtssätze ändern daher ihren Inhalt, wenn sie in eine andere Sprache, in einen anderen Anspielungszusammenhang und damit in eine andere "Lebensform" (Wittgenstein), in ein anderes "Kraftfeld" (Quine) geraten. Je weiter die Sprachen und die zugrundeliegend Lebenserfahrung voneinander*

However, the author determines that the comparatist does not stand "helpless" (*"hilflos"*) in the face of legal language because they can sense the reality of law through linguistic interconnections and the interplay of legal institutions. Thus, he determines that, for the purpose of comparative law studies, it is more important to study life and actual legal practices than focusing solely on analysing legal texts (*ibid.*: 104 f.).

In this scenario, the author emphasizes the importance of legal comparatists delving into the intricacies and nuances of the foreign legal culture and asserts that they must translate the "legal culture" rather than the language (*ibid.*: 121). In this vein, he even suggests what we could classify as a "translation strategy" in the sense of Molina & Hurtado Albir (2002):[20] the comparatist must convert foreign law concepts into visual representations and then explain them in their own language. This approach is a clear shift away from the functionalist method which seeks similarities in the foreign legal system, towards acknowledging its differences and aiming to explain them.

Glanert, a comparative law scholar who has reflected widely and profoundly on the relationship between comparative law and legal translation (Glanert & Legrand, 2012; Glanert, 2014), goes beyond this in her approach to legal translation. She explicitly brings up the question of the most suitable translation method for comparative legal research and argues against using a "fluent translation strategy", which she defines as rewriting the original text in the target language respecting the style of the target language, as it overlooks the cultural and linguistic subtleties of the original text and is seen as a form of "appropriation of the cultural other" (Glanert, 2014: 6 f.).

Instead, she proposes to use an "alienating strategy of translation that values the specificity of the source text" (*ibid.*: 10), "the otherness of the foreign law" (*ibid.*: 3) and attests to its particularities. The result would be a translated text that "purposefully creates a feeling of strangeness" and that makes the reader aware that they are reading a foreign work. According to Glanert, this is the only strategy for comparative law studies that is "ethically acceptable". She even goes a step further and wonders whether legal translation should aim for "sameness, isomorphism, commensurability and adequation" or if it can instead be considered as an "original work in and on itself" without strict fidelity to the original text (*ibid.*: 1).

In the same vein, Moréteau (2019: 202) suggests that the comparatist needs to comprehend the foreign legal system in its complexity and then, in a creative act, reexpress it, offering "additional depth and dimension" so that the home audience can understand it. The author stresses that this cannot be achieved by "literal translation of the foreign literature and language" but by creating a "third space", an "in-between language" that allows the spirit of the foreign law to "breathe".

As Grosswald Curran (2019: 706 f.) points out, the practice of comparative law already is an act of translation. According to this legal comparatist, comparative law must constantly develop new methods

abweichen, desto grösser kann die Veränderung sein" (Grossfeld, 1996: 121 f.).

20 In line with Molina & Hurtado Albir (2002: 507 f.), we define "translation method" as the way in which a particular translation process is carried out in relation to the translation purpose, affecting the whole text. Strategies are the procedures, whether conscious or unconscious, verbal or nonverbal, used by the translator to solve problems that arise when carrying out the translation process, and to achieve translation adequacy more generally. Strategies provide a framework for finding a suitable solution for a translation unit, which, in turn, will be materialized by using a particular translation technique.

for translating legal concepts. This implies the necessity to let go of old ways of thinking, decoding, and communicating in order to create a new way of analysis and language that fits the ever-changing world of new ideas, norms, and influences, where legal and non-legal boundaries blur and are hard to identify. Effectiveness of comparative law in translating foreign concepts depends on adapting acquired skills and methods to new forms of foreignness. To improve as a disciplinary and research tool, comparative law needs to adopt a more integrated approach in its methodology. This implies that for comprehensive comparative legal works to be produced, research must be interdisciplinary and incorporate new niche methodologies and combined approaches like legal linguistics, legal translation, and socio-legal studies as research tools to address current gaps in comparative law methodologies (*ibid*.: 700).

C. Resorting to professional translators for comparative law research

An intriguing question in the context of translation for comparative law purposes, especially with regards to a potential collaboration between translation studies and comparative legal studies, is whether comparative legal scholars would be open to using translations completed by a third party, e.g. by a professional translator. In our research, we found that the answer to this question depends on how scholars compare foreign laws and what is considered the focus of study in comparative legal research.

Perhaps the initial thought is focused on the translation of statutory law. However, as Rabel (1924: 4) already noted, solely looking at statutory law ("*Gesetzesparagraphen*") is not enough. In fact, there is a consensus among scholars of modern comparative law that the object of the study of comparative law must not be limited to legislative texts but must consider the other factors that contribute to the interpretation and development of the law, such as case law, scholarly opinion or judicial reasoning. The interaction between law, jurisprudence, and academia is what shapes the "living law" (Rheinstein, 1987: 12) of a country and contributes to the functioning and evolution of the legal system (Oliva Blázquez, 2021: 1104; Ebert, 1978: 22, 40 ff.; Constantinesco, 1972: 172, 188 ff; see also Sacco's [1991] theory on legal formants).

According to Brand (2009: 20), to do meaningful legal comparison, the comparatist needs to describe "foreign law in its particular coordinate system, […] according to the original sources, with its own instruments, spirit and perspective". This broader approach in comparative law is necessary to ensure that the object of the study accurately reflects the nuances and intricacies of the legal reality of a given system. In that sense, legal culture with all its constituents has become the object of comparative law. In terms of text genres, this means that a variety of text genres with different pragmatic and linguistic characteristic could potentially be translated in the field of comparative law research. However, we find that many comparatists are hesitant to work with translators in their comparative legal projects or even refuse to collaborate altogether.

In line with the holistic approach to the study of comparative law we have just described, Constantinesco (1972: 165 f.) highlights the need for comparatists to have access not only to foreign statutory law but to all sources that contribute to the construction of the meaning of a legal concept, e.g. judicial decisions and scholarly opinions. However, he notes that "official"

translations of these sources are generally unavailable.[21] Considering this, he concludes that comparatists can only conduct comparative law research if they are proficient in the language and legal terminology of the foreign system they want to study.

Likewise, Husa (2015: 195) emphasizes the importance of foreign language proficiency for comparatists "unless there are reliable translations available". Without delving deeper into the definition of "reliable translations", the author suggests that comparatists should refer to original language sources or at least examine key aspects of foreign law directly in the original language. As stated by the author, the comparative analyst does not have to be exceptionally skilled in languages but should possess the necessary language abilities, so that "independent use of sources in that language becomes possible". We understand that "independent use" implies not requiring a translator.

A similar stance is taken by Hoecke (2015: 8), who does not even consider the possibility of involving a translator in comparative research when he states that "for a thorough comparative research a good reading knowledge of the local languages is an absolute requirement". Hence, as per the author, numerous researchers choose the legal systems they wish to compare based on their language skills, which explains why most comparative research in the Anglo-Saxon world is focusing on comparing common-law countries that still use English as their (main) official language (*ibid.*: 3).

For Moréteau (2019: 208), foreign law must be discovered by immersion[22] and communicated by translation. In practical terms, this requires the comparatist to comprehend the source documents in their original language, familiarize themselves with the foreign jurisdiction and its practices by being exposed to it in the foreign language, and ultimately convey this information through translation. Obviously, translation is necessary for sharing the findings of comparative law studies, but if the comparatist does the translation themselves after fully understanding the foreign legal culture, it is not "contaminated" (*ibid.*: 196). In contrast, relying on translated texts for comparative legal research is considered as "less useful" because "translation is already the result of comparative legal analysis" (*ibid.*: 197). Moréteau suggests that comparatists should be able to speak multiple languages since the range of legal cultures they can study is naturally limited by the number of languages they speak.

Brand (2009: 20) takes a different stance and warns against the prevalence of monolingualism in the field of comparative law caused by comparatists' limited ability to read languages other than English. The author suggests that confining comparative studies to English-speaking nations puts comparative law at risk of experiencing the drawbacks of monocultures, such as sterility. For Brand (*ibid.*: 18 f.), language is "one of the main obstacles" to comparative law and translation is "the fundamental operation of the comparatist". However, due to the uniqueness of legal cultures and the sys-

21 Interestingly, the author believes that "official" translations of statutory law are consistently high-quality ("zweifelsfreie Qualität") and easily accessible (Constantinesco, 1972: 164).

22 The concept of "immersion" is adopted from Grosswald Curran (1998), who highlights the importance for the comparative law scholar of understanding foreign legal cultures "in an untranslated form, *i.e.* through the prisms that shape perceptions in the target legal culture" (*ibid.*: 55).

tem-boundness of legal language, the comparatist has to deal with the problem that some terms are "barely translateable"[23] and others even "resist translation", constituting "untranslateables" (*ibid*.: 23 f.).

For the first scenario, Brand proposes that the comparatist can utilize "the methodological instruments of substitution and transposition"[24] (*ibid*.: 23 f.) as a resolution. For the second scenario, the case of "untranslateables", the best option, according to the author, is preserving the original term and circumscribing it to the audience, provided that the source language is based on the same alphabet.[25] Interestingly, unlike the previously mentioned authors, due to the shortcomings of the methods of comparative law, Brand does recommend consulting linguists for comparative legal research in order to overcome language barriers and make meaningful comparisons between legal systems.[26]

Kischel (2015: 11) also approves of using translations by professional translators for comparative law research, but he highlights the importance of the translator having legal expertise. The scholar believes that the comparatist, even if familiar with the language of the foreign legal system studied, should still defer to the translator who is an expert in the nuances of the foreign legal language. Simultaneously, the translator should possess expertise in the legal systems at hand and preferably be a lawyer, as, according to his reasoning, comparative law aids in increasing translators' awareness of challenges, enhancing their ability to identify specific obstacles, and framing issues more accurately. Interestingly, Kischel delegates the resolution of the translation issue to the translators, stating that "the solution, if at all possible, is left to the legal translation".[27]

Another legal scholar who believes in the involvement of a translator when conducting comparative legal research, particularly for translating "authoritative legal texts" like statutory law and court rulings, is Baaij (2014). While he suggests that translations done by non-comparatists are "less useful" for the comparatist because the translation is due to being influenced ("contaminated") by the translator's own comparative analysis, he proposes that this "methodological vicious circle" in which legal translation is caught up with comparative legal research can be avoided if the translator applies "literal translation methods", e.g. a "source-oriented approach", instead of "relatively free or otherwise adoptive translation methods" (*ibid*.: 105).

23 As an example, he cites the Spanish *salarios de tramitación*, which he translates as "workers' compensation for the time of unjustified dismissals".

24 Initially, it seems difficult to comprehend what the author means. However, upon mentioning De Groot (2006) in the same context, it becomes clear that he is referring to the techniques suggested by the latter as "subsidiary solutions", such as paraphrasing, when there is no "acceptable functional equivalent" (*ibid*.: 425) available.

25 As an example of "untranslatables", he mentions "common law" and "equity" and insists that these "key terms of understanding English law" cannot be translated with its full meaning into German and French.

26 "However, until conceptual comparisons or a more promising approach has cured the methodological malaise of comparative law, it is up to the individual comparatist to make sure that he pays due regard to the pitfalls that language puts between him and a meaningful comparison. He is well advised to overcome the lawyer's reluctance to work in an interdisciplinary fashion and seek a linguist's advice at times" (Brand, 2009: 32).

27 "*Die Rechtsvergleichung hilf bei Übersetzungen, Schwierigkeiten bewusster zu machen, konkrete Stolpersteine besser zu erkennen und Probleme genauer zu formulieren; die Lösung bleibt, soweit überhaupt möglich, der Rechtsübersetzung überlassen*" (Kischel, 2015: 11, our translation).

According to this legal scholar (*ibid*..: 106), there is a distinction between translating in the linguistic sense and translating in the legal sense. To avoid "contamination" of subsequent comparative legal research, translation for comparative law purposes should be as linguistic as possible, allowing the bulk of the comparative legal analysis to be conducted by professionals in that field.

D. Other proposals to overcome the linguistic barrier in comparative law research

In addition to these translation techniques, strategies or methods suggested by legal comparatists, there are other proposals from the side of comparative law to overcome the "linguistic barrier" (Constantinesco, 1972: 164). As we have already mentioned, Zweigert & Kötz (1996: 33) do not address the matter of translation, yet they emphasize the need to avoid using national legal concepts in comparative law studies as they can hinder the comparatist's perspective.[28] According to these authors, comparatists must free themselves from the system-bound concepts of their own legal background and create "generic terms" ("*Oberbegriffe*") instead to categorize a real-life, socio-economic problem and see how the problem is solved in different legal systems (*ibid*.: 44). However, the authors fail to provide specific guidelines on how to formulate these generic terms and do not delve further into language usage in comparative law research.[29]

Another proposal to address the language barrier in comparative legal studies is put forward by Brand (2007, 2009). The author proposes a new method of comparison which he names "conceptual comparison". Instead of directly comparing two different legal systems with each other, which the author believes will always involve "linguistic conflicts", it is suggested to create neutral *tertia comparationis* in the form of theoretical, abstract and unambiguous models ("comparative concepts") that reflect the distinctive features of legal rules, principles, or institutions from various legal systems. In a subsequent stage, existing legal institutions would be matched and assessed against these concepts. As the author explains, utilizing abstract models that "dwell 'in between' the existing legal systems" offers the comparatist the benefit of accessing meta-legal tools that can be defined and applied without being constrained by the language or traditions of specific legal systems, and without needing to consider their legal history (2009: 32).

Moréteau (2019: 203) makes a similar point proposing that the use of a "neutral language or metalanguage" when comparing different legal systems would make comparative studies more precise. In this vein, he suggests that the future task of comparatists is to develop a "specialty language for legal science", with neutral words suitable for analysing very different legal systems and with meta categories for a deeper comprehension of the legal universe (*ibid*.: 208). According to this scholar, such a neutral language could be obtained

28 "*Keinesfalls darf man sich also den Blick durch Systembegriffe des eigenen nationalen Rechts verstellen lassen* […]" (Zweigert & Kötz, 1996: 33).

29 According to Glanert & Legrand (2012: 2 f.), Zweigert & Kötz's silence on the matter of translation may be due to their conviction that all legal systems are, in essence, similar, and it is the comparatist's task to find these generic aspects and allow law to surpass its local character. They aim to identify commonalities in laws and establish a "universal legal science" ("*universale Rechtswissenschaft*"), "free from any misunderstandings that can arise from preconceptions, bias, different terminology of different legal systems" (Zweigert & Kötz, 1996: 46; our translation).

by defining broad "meta-terms or meta-categories" for comparison, by breaking down common concepts into smaller units, and by occasionally using mathematical language (*ibid*.: 206).

The author (*ibid*.: 207 f.) highlights that these meta categories are not meant to replace existing legal concepts and institutions, but that they would rather be used by the comparatist as analytical tools, as *tertium comparationis*. Nevertheless, he emphasizes that creating a metalanguage may face obstacles, such as readability issues if it heavily relies on mathematical language. Additionally, he questions whether jurists will embrace this metalanguage, as he believes they are reluctant to "act like scientists" for fear of not being taken seriously or being perceived as disconnected from reality. He concludes that developing a precise neutral language or meta-categories is "aspirational utopia" and, therefore, legal science and, especially, comparative law, needs anthropologists, sociologists and linguists to accompany the efforts of the comparatists by "lending their language" (*ibid*.: 208).

IV. Discussion and conclusion

Law is essentially and inseparably interwoven with language. However, for comparative law as a field of study, language differences constitute an eternal obstacle and a challenge. From our analysis, we conclude that comparatists are well aware of the fact that, due to the conceptual incongruencies between legal systems and legal languages, translation poses a problem. However, the level of awareness and the scope and depth of reflections on the topic as well as the solutions proposed vary among different authors.

We cannot identify a uniform or systematic approach to the matter of translation in comparative legal research as an academic discipline, with comparatists' approaches to translation ranging from an initial search for sameness by employing target-oriented translation methods and seeking functional equivalents, to finally embracing foreign law's otherness through source-oriented translation methods and descriptive translation techniques. However, we observe a parallelism between the methodological approaches to comparative law and the translation methods and techniques proposed by comparative law scholars. The search for sameness embodied in comparative law in the functionalist approach has also influenced the translation techniques suggested by comparative lawyers. In this vein, a target-oriented approach and the identification of functional equivalents are considered as the ideal translation method or techniques by several authors such as David & Jauffret-Spinosi (2010), Sacco (2001), De Groot (2006), or Somma (2015).

In this context, it is also important to note that the scholars supporting the functionalist approach argue that translation should occur exclusively from the legal language of one legal system into the legal language of another legal system, but not into the general language of the other system. We find that this approach is restrictive and paradoxical because the same scholars acknowledge that legal languages from different systems are profoundly incongruent, making it impossible to fully express legal system A in the language of legal system B. Considering this, it appears that their idea of translation is very narrow, acknowledging only functional terminological equivalents as legitimate translation while disregarding other methods as

distinct and not genuine translation.[30] As we have seen in Section I, this perception differs strongly from the functionalist approach employed in legal translation studies, where the purpose of the target text may justify the application of any method or technique to achieve communicative adequacy.

With the shift to a cultural perspective in comparative law research, the emphasis moves from seeking similarities to exploring the uniqueness of foreign legal systems, aiming for as objective a representation as possible. In terms of methodology, this aligns with a hermeneutic approach to the study of foreign law. The prevailing idea is that comparative law experts immerse themselves in the foreign legal system to fully understand it. This change in the approach to acquiring knowledge of a foreign legal system signifies a shift in the way translation is addressed by comparatists. Rather than seeking for functional equivalents, legal scholars are now proposing that foreign legal systems be fully depicted with all their intricacies and nuances. While no defined translation techniques are suggested, several scholars argue that a source-oriented approach (Glanert, 2014; Moréteau, 2019; Brand, 2009) should be applied in translation, with the potential consequence of alienating the audience in the receiving legal system being willingly embraced or even desired.

The primary goal of comparative law research, and hence, of the translation process within its scope, is to present the foreign legal system to the domestic audience in an unbiased manner. Since the comparatist must often add information or make it explicit, translation in the realm of comparative law research is considered a creative act (Glanert, 2014), leading to the creation of a "third space" (Moréteau, 2019: 202).

Language is "the comparative lawyer's most important instrument in choosing, describing and analysing the objects of his comparison" (Brand, 2009: 19). However, the problem is that law suffers the pitfalls of natural language. Law is a science but its instrument, human language, is not scientific. Suggestions have been made to create a legal metalanguage for impartially comparing various legal systems with the goal of achieving linguistic neutrality (Zweigert & Kötz, 1996; Brand, 2009; Moréteau, 2019). However, all attempts so far have been unsuccessful.

As we noted at the beginning of this section, there is no standard methodological approach to translation in comparative law studies; rather, there are various evolving tendencies. Considering Grosswald Curran's (2019) perspective on the matter, it appears that due to comparative law's position at the confluence of various social science disciplines such as anthropology, cultural studies, and language studies, the methods for studying comparative law are constantly evolving just like the approach to translation in this field.

Regarding a potential collaboration between legal translation studies and comparative law, the situation is still unclear. On the one hand, several comparatists underline that all translations needed for comparative law purposes must be carried out by the legal comparatists themselves (Constantinesco, 1972; Husa, 2015; Hoecke, 2015; Moréteau, 2019). The reason is that translation between legal systems inevitably implies an act of comparison and would therefore already be "contaminated" for later comparative research. On the other hand, several comparatists believe that comparative law should take on an interdisciplinary approach, involving cooperation with linguists, translators, and other specialists in the social sciences (Brand, 2009; Kischel, 2015; Baaij, 2014).

30 See Sacco (2001: 52), as explained in Section III.A.

From our perspective, it is evident that comparatists would gain advantages from working closely with professional translators for various reasons. Firstly, it would allow them to expand their comparative research to legal systems that employ a language they are not skilled in. In this manner, the focus of comparative legal research, which relies heavily on Western legal systems, could be expanded to include non-Western legal systems. Secondly, as language experts, translators can offer guidance to comparatists on various approaches to navigate the "linguistic barrier" and overcome the feeling of "untranslatability" that has plagued comparative legal research since ancient times. For example, before starting any translation endeavour in the realm of comparative legal studies, the systematic establishment of the overall translation method or strategy and the relevant translation techniques, according to a functionalist approach to legal translation, could give the comparatist a sense of control over the translation process and lessen their fear of contamination through translation. The acceptance that there is no 'one-size-fits-all' translation technique and that the translation of legal texts may involve the combination of several techniques on an equal standing according to the purpose of the translation (a descriptive translation is not *per se* less a translation than a functional equivalent), could give more transparency and consistency to the translation endeavours that take place in the realm of comparative legal studies. It could also ease the reluctance of comparative lawyers to accept translation as a natural component of comparative legal research.

We are hopeful that there is room for fostering collaboration between comparatists and translators because, as we have seen in our analysis, numerous comparatists such as Glanert (2014), Moréteau (2019), Husa (2015) or Baiij (2014) are no strangers to translation theory. They demonstrate a deep understanding of key translation concepts and reference translation theory researchers and specific methods or techniques. This demonstrates that comparatists are open to adopt methodological approaches from other social sciences.

To achieve successful collaboration, the comparatist and the linguistic expert need to discuss and evaluate different possible approaches to translation to determine the most appropriate approach for the goal of the comparative legal research project. We believe that, in many cases, the use of functional equivalents would be the less appropriate translation technique as they already imply an act of legal comparison, thus purporting a high level of prejudgment. In a complex, highly nuanced and constantly changing world, comparative legal research should not be about seeking sameness, but about embracing and describing otherness, e.g. foreign law systems. By resisting the temptation to use their home legal culture's legal classifications in analysing a foreign legal culture, the comparatist ensures that their research scope is not restricted by the boundaries of their own legal sphere. After taking everything into account, we believe that a source-oriented, descriptive approach to translation would be the most suitable approach in the realm of comparative law research.

As previously mentioned in the methodology section, undertaking a comprehensive review of all comparative law studies is not feasible, so we recognize the limitations of our research in this regard. Our focus is on the shared beliefs about translation among scholars in comparative law. Hence, while not exhaustive, we believe we have adequately addressed the key authors in the development of comparative law in Western culture.

Through our research, we aim to promote dialogue between comparative law and translation studies as academic disciplines that can learn from the insights of each other. In this sense, we are confident that our findings help to clear up any methodological misunderstandings between the two disciplines and set the stage for a successful collaboration.

While in this study we have concentrated on theoretical aspects of comparative law methodology, there is potential for future research to analyse the translation methods and techniques used in applied comparative legal studies and assess their consistency and appropriateness. We believe that our paper lays the foundation needed for carrying out such studies in the future.

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