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Controlled Comparison and Language of Description

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Every now and then, I enjoy watching nature documentaries, and in particular those by Jacques Cousteau, the famous French oceanologist. There is an episode where —if I remember correctly— part of the coast of Somalia is explored. Cousteau's divers are at the beach, fully equipped and ready to explore the waters. This to the great amusement of the local population; to the locals, the creatures on the beach must be an unfamiliar species of dolphins: they have the same smooth skin and general appearance, despite the fact that they have limbs and are able to walk. Nonetheless, dolphins they must be!

We all experience the desire to characterize unfamiliar phenomena in terms or categories we think we understand or recognize; this makes the unexpected manageable. As the example above shows, this desire can be so seductive that it can lead to deception. As far as comparative law is concerned, this can be quite a problem. Is there a way to overcome this seduction? This is a question I want to deal with in this chapter, and I will build on a debate that took place in the 1960s in order to do so. But to be able to do this, I will first need to start with a discussion on the specific characteristics of comparative law.

I

What is it that justifies comparative law as an independent discipline?[2] This question is relevant, since comparison is inseparably connected with doing research in the humanities and social sciences—of either which the legal domain is a part.[3] Nearly any claim we make as lawyers, as well as every distinction we draw, will implicitly or explicitly be set against something else. A legal arrangement can only be qualified as satisfactory or good because there is another arrangement by which it can be measured; such an arrangement is never good just in and of itself. When judges are looking for principles to help decide on an unprecedented or unregulated situation, they tend to rely on analogical reasoning, ie they apply a rule for a comparable situation, be it a real or hypothetical one, to the situation at hand. Also, ordering and classifying cases in a specific field or domain —call it the pursuit for consistency— is very much a comparative activity; it is an exercise which can only be done because there are a number of cases that can be situated against each other. Comparing, in other words, is a fundamental principle of legal research.[4] It even provides the inevitable and

[1] A previous version of this chapter was published in Dutch, as: 'Eenvoud en verleidelijkheid: Rechtsvergelijkende analyse en taal van descriptie' (2011) 60 *Ars Aequi Maandblad* 796-801.

[2] See also M Adams. 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in M Van Hoecke (ed), *Methodologies of Legal Research*, (Oxford, Hart Publishing, 2011) 229-240.

[3] On this, see for example B Bix, 'Law as an Autonomous Discipline' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 975–87 and Ch McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 623–50.

[4] Also in this vein, VV Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53 *American Journal of Comparative Law* 262.

inescapable frame of reference for scientific activity in the humanities and social sciences.[5] More generally and even stronger: '[t]hinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research.'[6] Therefore, it could be argued that there really is nothing very special about doing comparative law. To be sure, *legal* research has some distinctive features, but comparativeness is not one of them; that quality is part and parcel of all (legal) research. '[I]n major respects, comparative law is an instance of the more general form of legal research [which is hermeneutic, interpretative and institutional]. The way in which it attempts to reconstruct both the foreign and the researcher's own legal systems is similar to general legal research on either of those systems."[7]

If all this is true, what then could possibly justify, or be the point of, distinguishing comparative law from other kinds of legal research? Why not simply refer to what doing legal research amounts to, and then add a few words of warning on the choice of countries and so on? There must be more to be said on this, for why else would the phrase 'comparative law' proudly carry the term 'comparative' in its banner? If indeed it does not want to be dismissed as a pleonasm —'Thinking about the law is by definition comparative, Silly!'— comparative law should at the very least pose some specific challenges other than the problems lawyers and legal researchers routinely face.[8]

One of the main reasons there is something special or distinctive about doing comparative legal research, something that calls for a specific approach and specific methods, is that legal comparatists must, among other things, immerse themselves in a foreign and therefore strange legal culture. Such an 'involved' activity does not come naturally because legal comparatists have to deal with one or more legal cultures whose 'language' (metaphorically understood) they do not speak, ie cultures with different institutions and unexpressed codes; their own histories, ideologies and self-images; systems they have not normally been trained, educated or disciplined in, and with which they are therefore not naturally or intimately connected to. This process of trying to understand foreign or strange legal cultures (or some of their elements) with an eye for subsequent comparison, manifests particular problems because it goes far beyond mere fact-finding and the regular (ie national) way of legal interpretation, where one almost self-evidently engages the social context when determining the meaning of the law. The problems that the law addresses and the solutions

[5] Knowing what I don't know, I do not wish to make any statement in this chapter about what are called the positive or natural sciences.

[6] GE Swanson, 'Frameworks for Comparative Research' in I Vallier (ed), *Comparative Methods in Sociology* (Berkeley, University of California Press, 1971) 141. Also quoted by VV Palmer 'From Lerotholi to Lando' (2005) 261. The anthropologist Clifford Geertz formulated the same view somewhat more subtly: 'Santayana's famous dictum that one compares only when one is unable to get to the heart of the matter seems to me … the precise reverse of the truth; it is through comparison, and of incomparables, that whatever heart we can actually get to is to be reached.' C Geertz, *Local Knowledge* (New York, Basic Books, 1983) 233. More direct is J Hall, *Comparative Law and Social Theory* (Baton Rouge, Louisiana State University Press, 1963) 9: '[T]o be sapiens is to be a comparatist.'

[7] J Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Van Hoecke (ed), *Methodologies of Legal Research*, 175 (Bell qualifies this statement, to the extent that he clearly recognizes that there are peculiar challenges to comparative law, especially in terms of having to make explicit, to a foreign audience, the broader social and cultural context and assumptions of a foreign legal systems or legal concepts).

[8] VV Palmer, 'From Lerotholi to Lando' 262–63, *cf* HP Glenn, 'Aims of Comparative Law' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham, Edward Elgar, 2006) 59.

that it intends to provide are very much connected to the socio-cultural environment from which these problems and solutions arise, and the comparatist should engage with this environment. This specific problem justifies the existence of the research discipline known as comparative law. Furthermore, the repeated assertion that comparative law is not an area of law seems to support this point.[9] In any case, thorough understanding and comprehensive description of a foreign legal cultures —in the manner described above— indeed raises mainly methodological questions.

II

In the 1960s, a debate took place that was related to the issue described in the previous section: which conceptual framework ought to be used to describe a foreign legal culture (or legal system[10])? How are the characteristics of the foreign system represented most efficiently? The initiation for the debate was a study by Max Gluckman, a South-African legal anthropologist, about the process of dispute resolution in the Barotse-tribe in former Northern-Rhodesia (today known as Zambia).[11] Gluckman opted for a conceptual framework, based first and foremost on English law, and secondly on Roman-Dutch law. 'I consider that very many of [the Barotse legal] concepts can, without distortion after careful and perhaps lengthy description and discussion, be given English equivalents (…).'[12]

As was to be expected, Gluckman's methods received criticism, most notably from fellow anthropologist Paul Bohannan: the terminology of English law and Roman-Dutch law might well be suited to the description of the English and South African legal systems, but certainly not for the description of the 'folk law' of an African tribe.[13] According to Bohannan, these legal systems were to be described in the native terms and categories that evoked their individuality. In other words, they should not be forced onto the Procrustean bed

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[9] VV Palmer, 'From Lerotholi to Lando' 262-63. See also WJ Kamba, 'Comparative Law: a Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly*, 486-489. All this led Kahn-Freud to quip that there is no such thing as comparative law: 'The trouble is that the subject (...) has by common consent the somewhat unusual characteristic that it does not exist.' O. Kahn-Freud, 'Comparative Law as an Academic Subject' (1966), 81 *Law Quarterly Review*, 41. Part of Kahn-Freud's observation is due to the somewhat established and misleading English terminology – 'comparative *law*'. This suggests that there is in fact a separate *legal* domain. This problem does not exist in Dutch (rechts*vergelijking*), nor in German (Rechts*vergleichung*). In both languages, the term refers to an activity: *comparing* law. French has the same 'problem' as English: '*droit* comparé'.

[10] In this text, I will treat terms such as legal culture, system, etc., as synonymous, referring to these norm constellations that are foreign to that of a comparatist. This applies to systems that are physically or culturally close to ours (within Europe, for example) or far away. For the problems concerning the term legal culture, see D. Nelken, 'Defining and Using the Concept of Legal Culture', in E Örücü and D Nelken (eds.), *Comparative Law. A Handbook* (Oxford, Hart Publishing, 2007) 109-132.

[11] M Gluckman, *The Ideas in Barotse Jurisprudence* (Manchester, Manchester University Press, 1967) (second edition, originally published in 1965 as 'Storrs Lectures on Jurisprudence at Yale Law School'); M Gluckman, 'Reappraisal' in *The Judicial Process among the Barotse of Northern Rhodesia (Zambia)* (Manchester, Manchester University Press, 1967) (first edition 1955) en M. Gluckman, 'Concepts in the Comparative Study of Tribal Law' in L Nader (ed.), *Law in Culture and Society* (Berkeley, University of California Press, 1997) 349-373. See also SF Moore, 'Comparative Studies', in L Nader (ed.), *Law in Culture and Society* 341-346.

[12] M Gluckman, *The Judicial Process* 380-381.

[13] P Bohannan, 'Review of *The Ideas in Barotse Jurisprudence*' (1967) 36 *Kroeber Anthropological Society Papers* 94-101 and 'Etnography and Comparison in Legal Anthropology', in L Nader (ed.), *Law in Culture and Society* 401-418.

of the principles and concepts of a different legal culture. This would only lead to tunnel vision and confusion because the foreign legal culture would then be viewed and understood as a function of this different legal culture. '[I]t simulates understanding through the use of a familiar word. Such simulation leads —almost inevitably, I think— to an assumption of comparability of everything called by the same word – and this is a difficulty that is almost impossible to correct.'[14]

Gluckman appeared to only agree in part with this criticism.[15] Indeed, he too believed that a legal anthropologist should strive to describe the legal system at issue in a way that would reflect its individual character. And where there would be no reasonable equivalent of the original (ie African) terminology available, then the original terminology would prevail. However, in cases where there was an equivalent, he did not consider it a problem to use – in his case – English or Roman law terminology; if necessary however with a comprehensive description of the original Barotse concept. In fact, he preferred such an approach. '[I]t seems to me that the refinements of English, and in general European, jurisprudence provide us with a more suitable vocabulary than do the languages of tribal law.'[16] As a result, and with regard to the concept of 'ownership', he was prepared to state that

> I consider that when writing in English, the use of the English equivalent term, general and multiferential in its common-sense meaning, brings out implications in the English meaning of "owner" as well as perhaps a significant core of similarity in the Barotse meaning of *mung'a*. The alternative in the extreme is to make communication impossible.'[17]

Gluckman argued that it would not only be possible to communicate more effectively about a foreign system using this familiar —ie English and Roman-Dutch— terminology, but that this would be even more effective in revealing the similarities and differences between the legal systems researched.

In this respect, the difference in opinion between Gluckman and Bohannan seemed to be a matter of nuance and taste. It is even possible to argue that they were both partially right, but that Gluckman was the more pragmatic of the two: in practice it is impossible to objectively describe a foreign system, and a language of communication is indispensable. Gluckman therefore believed that one should be able to use a language that is recognisable for the stranger, especially a language that allowed the making of subtle distinctions. Bohannan argued that such a research strategy would inevitably lead to confusion and tunnel vision (bias) and that this should be avoided at all costs. It seemed as though both Gluckman and Bohannan only focused on the negative aspects of the other's approach.

[14] P Bohannan, 'Etnography and Comparison in Legal Anthropology' 403.
[15] M Gluckman, 'Concepts in the Comparative Study of Tribal Law' 349-373.
[16] ibid 367.
[17] ibid 357.

III

There is however, I think, more to the story, and this is set against a background of differing views concerning the goals of legal anthropology and comparative law respectively. Gluckman was mainly interested in reaching a higher level of abstraction; he wanted to investigate whether some of the fundamentals of a specific legal system, in his case of the Barotse-tribe, also had a further-reaching and broader meaning. For Gluckman these fundamentals were potentially more than just incidental legal concepts, he viewed them as part of a larger question: what is the relation between the local legal concepts and the socio-economic context of these concepts? He also wanted to be able to explore and explain that relation: 'I am interested, like most social anthropologists, in specifying the folk conceptions of particular people as clearly as I can and then trying to explain why they are as they are, and how they differ from folk conceptions of others, in terms of social and economic background.'[18] He was concerned with description as well as comparative analysis, no doubt taking to heart the statement that 'he who knows one society, knows no society.'[19] Bohannan, on the other hand, was primarily interested in describing and understanding the foreign legal system in and on its own terms, rather than comparing it. As Clifford Geertz had it: '"law," here, there, or anywhere, is part of a distinctive manner of imagining the real."[20] [21] Therefore, since each legal construct must and can be seen as a discrete epistemological construct, the differences between legal cultures is irreducible.[22] As a result, it is, eg, 'not possible for a civilian to think like a common-law lawyer.'[23] Bohannan indeed believed that in the micro-world of the legal conceptual framework of the Tiv, a Nigerian tribe he had investigated himself[24], the whole organisation of the legal system could be found. Gluckman on the other hand looked at the concepts and principles of Barotse law as *part* of a larger (comparative) objective, whereas Bohannan was mostly interested in studying the (Tiv) concepts *themselves*

[18] ibid 354.

[19] Attributed to Fahrenfort. Cited by A Köbben, 'De vergelijkend-functionele methode in de volkenkunde' [The comparative-functional method in anthropology], in A Köbben, *Van primitieven tot medeburgers* [From primitives to fellow citizens] (Van Gorcum, 1964) 24.

[20] C. Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology* (New York: Basic Books, 1983) 184 (I will not go into Geertz' nuanced argumentation).

[21] Bohannan's approach is in tune (not identical!) with what later got prominence as 'difference theory.' Specifically in comparative law it gained prominence after Frankenberg published his critique of functionalism *à la* Zweigert and Kotz. G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411–55. For important nuances of functionalism, see J Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 419–47.

[22] On all this, see R Caterina, 'Comparative Law and the Cognitive Revolution' (2003-2004) 78 *Tulane Law Review* 1506 (and surrounding pages). Caterina calls for a more empirical approach towards questions of difference and similarity between legal systems (in his case because cognitive sciences might cast doubt on a presumption of difference in comparative law: 'Of course cultural diversity cannot be denied, and one merit of comparison is that it challenges old certidus. But must comparative lawyers (or anthropologists) delberately seek "astonishment"? Must they "purposefully privilege the identification of differences?" ' (1546, quoting Clifford Geertz and Pierre Legrand respectively). Also G Dannemann, 'Comparative Law: Study of Similarities or Differences?, in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 416.

[23] P Legrand, *Fragments on Law-as-Culture* (Zwolle, Tjeenk Willink, 1999) 64.

[24] See P Bohannan, *Justice and Judgment Among the Tiv* (Prospect Heights, Waveland Press, 1957).

because he considered them a reflection of the whole organization of the legal system.[25] Speaking about a foreign legal culture in terminology taken from a legal language unknown to that culture, 'gives the *illusion* of getting somewhere.'[26] The discussion between Gluckman and Bohannan appeared to be at cross-purposes because they both had a different research focus and research objective.

In any case, and as far as I am concerned, comparative law should not only focus on understanding and describing the foreign legal system, but should also strive to obtain more general ideas that follow from the identified differences and similarities between the legal systems. As just mentioned, this was Gluckman's objective, more than it was Bohannan's. However, it is striking that many times comparative law limits itself to only describing a foreign legal system (and often does so in a rather sophisticated manner). If however we want to give the term 'compare' an independent meaning, by explicitly bringing information from the different legal systems together, by comparing them to each other and by discussing the relation between the systems at hand, more should be done. The question then becomes: What can we learn about the legal systems vis-à-vis each other, and do the reported similarities and differences fit in comparative and explanatory frameworks?

For the purpose of description, Bohannan argued in favour of a completely neutral language, an 'independent language without national home' [27], because he felt that Gluckman's conceptual framework was too closely connected to an existing system. A computer language like Fortan was an example of such an independent language. Bohannan realised that such an approach would be biased as well, but the bias would be more noticeable. 'Obviously we cannot become biasless — rather, we must investigate our biases and institute controls for them. Obviously human beings cannot compare (or do anything else) without culture; rather we must control the logic of the culture of comparison.'[28] Such a controlled comparison was to start from the inside and work towards the outside (not the other way around), according to Bohannan. The systems should be allowed to speak for themselves and they should be researched separately, based on their own terms and categories, and ultimately there should be an analytical framework – the aforementioned 'independent language without national home' – as the basis for the actual comparison. 'This new language (…) is a logical structure of interrelated propositions about the working of society and culture.'[29] For Bohannan, comparability and comparison were first and foremost a result of research, a conclusion, something that could only be found or postulated *after* the systems or cultures at issue had been fully explored, based on their individual characteristics. Comparability could certainly not be advanced by using a language of description that was intimately linked to a specific legal system. 'Comparison must be done in a *controlled way*, with great awareness and sensitivity to the original meaning, and with a set of methods that allow us to utilize what we are doing toward some specific ends beyond merely buttressing a position.'[30]

[25] SF Moore, 'Comparative Studies' 343.
[26] P Bohannan, 'Etnography and Comparison in Legal Anthropology' 402 (my italics).
[27] P Bohannan, 'Ethnography and Comparison in Legal Anthropology' 416.
[28] ibid 416.
[29] ibid 416-417.
[30] ibid 410 (italics mine).

Nevertheless, Bohannan would not dare to claim that Gluckman's conclusions about the system of dispute settlement with the Barotse were wrong, he just believed that Gluckman's method did not allow us to verify it. 'Please note that I did *not* say that the [Barotse] and the English do not have fundamentally similar ideas, but only that by [Gluckmans] method of exposition there is no possible way for a reader to discover whether they have or not.'[31]

Avoiding research bias is of course an important objective of any type of research, but Gluckman stated that we nevertheless should also consider the practical dimensions of comparative legal research: 'It must be a very blinkered mind that, when an anthropologist speaks of contract in an African tribe, immediately thinks of the English or French or Roman-Dutch or Roman contract. "Contract" has a general meaning of enforceable agreement; and one can use it – and must use it – to discuss the different conditions, forms, incidents, and remedies for breach of contract in various social conditions.'[32] This is why he argued that

> [i]n a study of government one may use the word "legislature" to cover British Parliament, American Congress, German Bundestag and Reichstag, French Chambre des Députés, Japanese Diet, all for purposes of general discussion in order to draw attention to similarity while insisting on difference. Some word is necessary for purposes of general discussion. In discussing several systems of law, therefore, one may speak of ownership, contract, property, succession, marriage, betrothal, judge, decision, all to draw attention to a core of similitude while defining differences.[33]

Open communication about new insights should indeed realistically be possible. Bohannan also appeared to acknowledge this when he wrote that the dispute with Gluckman 'boils down to this question: is it more difficult for a reader to keep in mind a set of narrative terms or a set of glosses on English words (…)?'[34] He nevertheless maintained that the second approach was too misleading. The fact of the matter, according to him, was that 'good ethnography is hard to read (…). [E]very ethnographer owes it to himself, the people the studies, and his colleagues not to blunt the edge of his material.'[35]

IV

It seems clear to me that the anthropologist-ethnographer, as well as the legal comparatist, need to interpret foreign legal data as much as possible in their unique social context. The description of foreign legal systems or cultures should in other words do justice to its unique characteristics. Bohannan seemed very much aware of this and accepted its consequences without compromise. But since common sense is a virtue for the legal comparatist —as is

[31] ibid 411.
[32] M Gluckman, 'Concepts in the Comparative Study of Tribal Law' 364.
[33] ibid.
[34] P Bohannan, 'Etnography and Comparison in Legal Anthropology' 402.
[35] ibid 403.

sympathy for the reader![36]— the real question is according to me whether using an existing language is indeed as disruptive as Bohannan took it to be. Is there indeed bias if familiar terminology —terminology stemming from one specific system— is used in comparative law? And does it really prohibit controlled comparison?

As far as the last question is concerned, I do not think it does, in any case not necessarily so. This appreciation is confirmed by the fact that Bohannan, as an anthropologist and ethnographer, does not seem to fully realise that, in order to compare something, there needs to be similarity —to a certain degree— between the different jurisdictions regarding the matter at hand; a similarity that is represented in the research question and in the comparative conceptual framework which initiates the research. In any case, comparison is useless if there is no similarity between the systems or cultures. In this regard, the legal comparatist needs more specifically to *postulate* comparability and similarity at the start of the research. Comparability and similarity are not only a possible result of the research, as Bohannan seems to suggest, but are especially the necessary and presupposed starting points. Such a presumption of comparability is not completely unfounded but based on prior knowledge and/or preliminary investigation. At the very least, it is an educated guess, and this guess shows itself in the terminology on which the research question is framed and on which the research project builds. But of course, one has to realize that the true nature of the comparability/similarity of legal systems, including its conceptual framework and accompanying vocabulary, is only revealed by the research itself. It is important to note here that this implies that the focus of a research project needs to be adjusted repeatedly — stepping back and making a landscape picture (distance and similarity) and coming close and making close ups (difference). There is however no other way than to start with a broad conceptual framework and research question, based on a general view of the situation at issue and a presumption or appearance of similarity.[37] In due course, more and more details will emerge as a result of an accurate description of the uniqueness of a system, including a willingness to re-characterize the original framework and vocabulary, the research question and the general situation.

In my opinion, controlled comparison is a function of this permanent change in perspective; a continuous process and also part of the research procedure. Controlled comparison refines the research process permanently, even if you start with using a familiar conceptual framework.[38] Since Bohannan was so focused on describing a foreign legal system from an almost exclusively micro or internal perspective, he did not seem to realize that it is in fact this permanent change in perspective which was essential to doing comparative law. This might well cater for solving the troubles he identifies on Gluckman's approach.

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[36] See also, for a more extensive discussion, K Lemmens, 'Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship', in M Adams and JA Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge, Cambridge University Press, 2012).

[37] Even Pierre Legrand, the difference thinker *par excellence*, admits this. See P Legrand, 'The Same and the Different', in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003) 283. "(…) I accept that no comparison can be initiated without a comparatist taking the view that there is an apparent sameness between the objects of comparison, that they seem alike in at least one respect."

[38] However, attention to case selection is a prerequisite, but this is something few lawyers pay attention to. See R Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *The American Journal of Constitutional Law*, 125-155.

Bohannan's view may ultimately result in the description of a legal system being reduced to merely background information and deep context. By following his methodology you will run the risk of losing the notion that the principles of a legal system might transcend their local origin and have a further-reaching meaning than just their specific embeddedness.[39] Bohannan's view may thus give rise to a solipsism that will in the end make comparison very difficult.[40] The building of a conceptual framework, and theory building based on comparison, will as a result become almost impossible. Bohannan did not seem to be fully aware of the 'comparative' consequences of his research strategy. In the end this is the result of the fact that in his capacity as a legal anthropologist and ethnographer, he might never have been really focused on comparison as such.

V

In one of his articles Mark Van Hoecke writes that

> the ambition of comparative law has always been to develop some neutral framework, some common language with which several legal systems could be described in a way accessible to and completely understandable by lawyers belonging to any one of those legal systems. *We are not discussing here the problems it entails*. We wish merely to emphasise that some (relatively) neutral, objective, accessible description is a key ambition of comparative law.[41]

In this article I did discus part of the challenge Mark Van Hoecke did not wish to touch upon in his 1998 article, by discussing the implications of the debate between Gluckman and Bohannan. Regardless of whether we embrace Gluckman's or Bohannan's view, the comparative lawyer has to realize —and this is a fundamental restriction of every form of comparative research— that there are no descriptive terms that are entirely neutral or unbiased. So let us now return to the question I posed at the beginning of this chapter: is it possible for the legal comparatist to escape the temptation of describing a foreign system in terms or categories he thinks he knows or recognizes? The answer is —without a doubt— no. However, by now the issue (and the accompanying question) has gained a different identity, and is more about whether using legal terminology that is linked to a specific legal system is too detrimental to effective or useful legal comparison. I do not think this is necessarily so. But doing this necessitates that the researcher should permanently work in a 'spirit of conceptual tentativeness': the researcher needs to avoid normative preconditions and be willing to replace the original conceptual and terminological framework with a better-suited

[39] *cf* JM Donovan, *Legal Anthropology* (Lanham, AltaMira Press, 2008) 166.
[40] He does appear to be aware of this (although not taking consequences): 'It seems to me that I did not say anything so absurd.' P Bohannan, 'Etnography and Comparison in Legal Anthropology' 405.
[41] M. Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 530 (italics added).

one[42], realizing that whatever terms one uses will inevitably carry traces of the normative preoccupations of those who use the natural language from which the terms used derive. As with all other classifications, a comparative framework was (and is) always subject to correction in the light of better insight. A continuous process of 'perspective change' —ie 'controlled' comparison— can ensure that this will actually take place. Neutrality in comparative law can than at least be a worthwhile *aspiration*, even if existing and familiar terms are chosen as a means of description.

[42] M Adams and J Griffiths, 'Against "Comparative Method": Explaining Similarities and Differences'', in M Adams and J Bomhoff (eds.), *Practice and Theory in Comparative Law* 2012.