Cooperation in Non-Unitary States

A methodological approach to comparative constitutional law

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1. INTRODUCTION

1.1. COOPERATION IN NON-UNITARY STATES

Politics and governance in multi-layered constitutional systems feed into the necessity of information sharing, coordination and even joint-action plans between the different layers of the constitutional order.[1] Cooperation may not be an essential condition for the existence of non-unitary states, but it may well be a condition for an effective one.[2] Some even contend that it is imperative to their very existence.[3] Therefore, cooperation is merely a matter of *realpolitik* in non-unitary regimes. It is of a nature to be reckoned with. In most cases, the autonomous entities constituting the non-unitary system cooperate through the formalised process of signing agreements amongst each other, *i.e.* agreements of cooperation. These are said to be one of the most formal mechanisms of infra-state cooperation.[4] However, with respect to such agreements discussion arises as to their legal status, how they are should be classified: are they to be governed through the lens of private law (*i.e.* contract law) or public international law (*i.e.* law of treaties)?

[1] J. POIRIER, *Keeping Promises in Federal States. The Legal Status of Intergovernmental Agreements with Special Reference to Belgium and Canada*, PhD Dissertation, University of Cambridge, 2003, p. 1.
[2] I. BERNIER, *International Legal Aspects of Federalism*, London, Longman, 1973, p. 5.
[3] C.J. FRIEDRICH, *Tendances du fédéralisme en théorie et en pratique* (translation by A. and L. PHILIPPART), Brussels, Institut belge de science politique, 1971, p. 19; F. DELPÉRÉE and S. DEPRÉ, *Le système constiutionnel de la Belgique*, Brussels, Larcier, 1998, p. 281-283.
[4] J. POIRIER, *Keeping Promises in Federal States. The Legal Status of Intergovernmental Agreements with Special Reference to Belgium and Canada*, PhD Dissertation, University of Cambridge, 2003, p. 1-2.

1.2. AIM AND RELEVANCE OF THE RESEARCH

The aim of the research is to reconstruct and therefore to explain the national narrative with respect to cooperation in non-unitary states, so not solely agreements of cooperation. This reconstruction will allow us to understand how such states classify their instruments of cooperation and why they classify it in a particular manner. Hence, agreements of cooperation will be embedded into the larger context of cooperation in order to fully grasp the mechanisms at play.

Research on this topic has already been done. However, no research has been done in a methodologically sound manner. In not doing so, most scholars are either completely unaware of comparative law scholarship requirements[5] or only tentatively touch upon them, practically engaging in comparative law without ever explicating its theoretical foundations.[6] This research may therefore add to the body of comparative literature, in which there is, and should be, attention for comparative methodology. Here lies its theoretical relevance.

The research has practical relevance as well. By reconstructing national narratives and, thus, understanding systems on their own terms, it might reveal or clarify choices made at home and, by consequence, help in reconstructing the Belgian narrative with possible implications on the classification of its instruments of cooperation.

1.3. PURPOSE OF THE RESEARCH PROPOSAL

This research proposal strives to build a methodological lighthouse by setting out signals of awareness regarding the choices to be made, and hence supervising the research to come. It is true that not all can be seen and done in advance, and compromises will possibly have to be made along the way. Therefore, the direction *may* be adjusted when certain thresholds are reached during the actual research. Nevertheless, a plan is needed to at least initiate the research. By succeeding to prepare the research, one is more likely to succeed in the research itself, but by failing to prepare, one is preparing to fail.[7]

1.4. OVERVIEW

The research proposal starts by laying down a brief state of the art and

[5] See *e.g.* Y. PEETERS, *De plaats van samenwerkingsakkoorden in het constitutioneel kader*, Bruges, die Keure, 2016, p. 1-426.
[6] See *e.g.* J. POIRIER, *Keeping Promises in Federal States. The Legal Status of Intergovernmental Agreements with Special Reference to Belgium and Canada*, PhD Dissertation, University of Cambridge, 2003, p. 1-302.
[7] The second half of the sentence was coined by Benjamin Franklin.

subsequently focuses on establishing a research question. The third chapter constructs the methodology for the research to come on the basis of three steps. Then, the fourth chapter elaborates on the choice of legal systems. Finally, some conclusionary remarks are formulated regarding comparison and understanding, epistemological pessimism and, last but not least, methodology.

2. A MERCATOR PROJECTION – RESEARCH QUESTION

2.1. WE, THE TRAVELLERS

In his article on critical comparisons, FRANKENBERG most aptly compared comparative law to the joy of travelling.[8] We, comparatists, are travellers. If not physically, then at least intellectually. However, it is with regard to the latter, the intellectual travelling, most find themselves stranded somewhere on one of the isolated methodological islands constituting contemporary comparative law, with no clear sight on where to head to. Therefore, and to avoid being dragged into a Swiftian satire, a tool is needed to guide our journey. In the 16th century, the Mercator projection became the standard map for nautical navigation because of its ability to represent lines of constant course for seafarers. It became an essential tool for anyone defying the high seas. Since comparative law methodology can be very rough at times, we might need some help navigating it. A sound and well-established research question can be our guide past the methodological Sirens, keeping us constantly on course to our objective. Only if such a research question is established, can a methodology be tailored to fit the bill.

2.2. STATE OF THE ART

Every research question requires a preliminary exploration of the literature on the topic under scrutiny, *i.e.* a state of the art. However, since an extensive, comparative state of the art is not feasible within the constraints of this research proposal, the state of the art presented in this section focuses on Belgium, and more specifically on agreements of cooperation. The choice for Belgium is justified in light of the difficulties regarding the classification of agreements of cooperation in this federal state, which sparked the interest for a comparative research in the first place. Hence, it is only fair to present these difficulties in a succinct state of the art.

In the Belgian legal landscape, legal uncertainty with regard to agreements of cooperation between federated entities is the norm rather than the exception.

[8] G. FRANKENBERG, "Critical Comparisons: Re-Thinking Comparative Law", *Harvard International Law Journal* 1985, p. 411-412.

First and foremost, the uncertainty is caused by the failure of the Belgian Constitution and high-ranking legislation[9] to regulate in a detailed manner the conclusion, implementation, amendment, termination, and the parliamentary approval of agreements of cooperation.[10] The only articles to be found on the very topic are articles 92, 92*bis*, and 92*ter* of the *Special Law on Institutional Reform*[11] (*i.e.* high-ranking legislation), which determine when such agreements can and, in certain instances, must be concluded. Second, the uncertainty is further increased by the inability of the Belgian Supreme Court, in the absence of any legislative action, to decide on the nature of such agreements.[12] As indicated in the introduction, the main issue revolves around the question whether they are to be governed through the lens of private law (*i.e.* contract law) or public international law (*i.e.* law of treaties).

In Belgian doctrine, only one major work has been written on the topic of agreements of cooperation in which all these aspects, omitted by the Constitution and high-ranking legislation, are systematically analysed.[13] In his analysis, PEETERS argues that agreements of cooperation are most similar to treaties, and that the principles of the law of treaties can be applied *per analogiam*. In doing so, he drew inspiration form the German and Swiss legal systems. However, the author reminds us that such agreements are *similar, but not equal to* treaties and, thus, that these principles have no direct application since agreements of cooperation are entirely situated in, and therefore dominated by, one constitutional order.[14] In this respect, PEETERS is in line with previous authors who already juxtaposed agreements of cooperation and treaties.[15] The main argument for their position is the fact that such agreements have a public law character and that they are concluded by autonomous regions (or the central authority itself) in legislative and executive matters falling within their substantive competences.

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[9] In Dutch: *"bijzondere wetgeving"*. A literal translation would be *"special legislation"*.

[10] Y. PEETERS, *De plaats van samenwerkingsakkoorden in het constitutioneel kader,* Bruges, die Keure, 2016, p. 177-184.

[11] In Dutch: *"Bijzondere wet tot hervorming der instellingen*".

[12] Recent case law has shown the difficulties in this respect. The Belgian Supreme Court had to remit the same case to the lower courts for a second time. It is now pending before the Ghent Court of Appeal. Both the first and the second time, the Supreme Court did not take a clear position on this matter (first judgment: 3 April 2015, C.14.0090.N; second judgment: 14 September 2018, C.17.0620.N.). Note that the agreements of cooperation were concluded *before* there was a statutory requirement of parliamentary approval. See also Y. PEETERS, *De plaats van samenwerkingsakkoorden in het constitutioneel kader,* Bruges, die Keure, 2016, p. 177-184.

[13] See Y. PEETERS, *De plaats van samenwerkingsakkoorden in het constitutioneel kader*, Bruges, die Keure, 2016, p. 1-426.

[14] Y. PEETERS, *De plaats van samenwerkingsakkoorden in het constitutioneel kader,* Bruges, die Keure, 2016, p. 177-184.

[15] See R. MOERENHOUT en J. SMETS, *De samenwerking tussen de federale Staat, de Gemeenschappen en de Gewesten*, Deurne, Kluwer, 1994, 143-144; P. KLEIN, *Un aspect du fédéralisme coopératif horizontal: les accords de coopération entre entités fédérées*, Brussels, Centre d'Etudes du Fédéralisme, 1990, 8-9; R. ERGEC, "Le droit international et les conflits au sein de l'Etat federal", *Revue de droit international et de droit comparé* 1987, p. 354-365.

Nonetheless, not everyone agrees with the public law viewpoint. In certain French-speaking doctrine, there is notably a more favourable stance towards a private law analysis of such agreements. For example, COENRAETS subjects the implementation and termination of agreements of cooperation to principles of private law.[16] POIRIER, as well, stresses the connection between agreements of cooperation and contract law and, despite the equality of the contracting parties, even draws an analogy to administrative law contracts.[17]
However, some contend that the private law reasoning by certain authors is merely driven by political motives insofar the autonomy of the regions is thereby mitigated to diminish centrifugal forces.[18]

2.3. ESTABLISHING A RESEARCH QUESTION

Since questions go before methods,[19] one can only start to contemplate a methodology when a clear and concise research question is in place. A research thesis should be a detailed answer to such a question.[20] But how should we proceed in establishing a research question? It is oftentimes argued that a research question should be neutral and, thus, system-invariant. This is what ZWEIGERT and KÖTZ called the negative aspect of the principle of functionality,[21] or what FRANKENBERG coined to be a process of distancing, a requirement for all critical comparatists.[22] Both the negative aspect and the process of distancing are intrinsically linked to the formulation of a *tertium comparationis*, which renders comparison between two or more legal systems possible. According to VALCKE, the *tertium is "no other than the issue, particular topic or more general area of law that the comparatist proposes to*

[16] P. COENRAETS, "Les accords de cooperation dans la Belgique fédérale", *APT* 1993, p. 168.
[17] With regard to the administrative law contract analogy: J. POIRIER, *Keeping promises federal systems. The legal status of intergovernmental agreements with special reference to Belgium and Canada*, PhD Dissertation, University of Cambridge, 2003, 114-115. With regard to the connection with contract law *and* the administrative law contract analogy: J. POIRIER, "Le droit public survivra-t-il à se contractualisation? Le cas des accords de cooperation dans la système fédérale belge", *Revue de droit de l'ULB* 2006, 289 and 309-311.
[18] P. KLEIN, *Un aspect du fédéralisme coopératif horizontal: les accords de coopération entre entités fédérées*, Brussels, Centre d'Etudes du Fédéralisme, 1990, 22; R. ERGEC, "Le droit international et les conflits au sein de l'Etat federal", *Revue de droit international et de droit comparé* 1987, p. 366. See also Y. PEETERS, *De plaats van samenwerkingsakkoorden in het constitutioneel kader*, Bruges, die Keure, 2016, p. 178-179.
[19] M. ADAMS and J. GRIFFITHS, "Against 'Comparative Method': Explaining Similarities and Differences" in M. ADAMS and J. BOMHOFF (eds.), Cambridge, Cambridge University Press, 2012, p. 279.
[20] G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, London, Hart Publishing, 2014, p. 25.
[21] K. ZWEIGERT and H. KÖTZ, *Introduction to Comparative Law*, Oxford, Clarendon Press, 1998, p. 35.
[22] G. FRANKENBERG, "Critical Comparisons: Re-Thinking Comparative Law", *Harvard International Law Journal* 1985, p. 414.

explore in her target legal systems."[23] At first hand, this might seem straightforward and uncomplicated, were it not for the *formulation* of such a *tertium*. Sincee labels are unreliable identifiers and system-dependent (*e.g.* "freedom of assembly", "contract", "property", "murder", etc.),[24] and will therefore result in a skewed analysis of the legal system(s) under scrutiny, such labels will not and, indeed cannot, do here. *Ergo*, VALCKE proposes a problem-based formulation relating to a social function, because functions do tend to cut across jurisdictions, unlike legal norms or labels.[25]

The arguments presented in the introduction risk being superficial. The effectiveness rationale may be only one of several possible explanations of the emergence of agreements of cooperation. Understanding the full picture behind these agreements is of vital importance. Agreements of cooperation are not self-standing phenomena of which the meaning can be grasped in a political and legal vacuum. They might be the result of a specific view on or ideology of cooperation within that state. They might be affected by other instruments of cooperation. Such agreements might serve different purposes in different states. Or, their classification might even be determined merely by the fact that a legal system is generally more favourable towards private law solutions (or to public law solutions). All of these factors, amongst others, should be taken into account if one aims to undertake an in-depth analysis of the classification of such agreements. A research question cannot therefore be limited to the scope of classification, but it should be put into a wider context. So, here the "problem" is not the simple fact that there is a *need* for cooperation in non-unitary states, but that the causes of this necessity may vary according to the legal system, which in turn may potentially affect how they perceive their instruments of cooperation. The research should therefore try to unravel the *institution of cooperation*, of which *agreements of cooperation* (as an instrument) are a part, their classification merely being the tip of the iceberg. Accordingly, the research question has a rather broad but not unfeasible scope. It reads as follows: *"How do the constituent entities of non-unitary states cooperate and why?"*

This research question is as neutral as can possibly be and tries to avoid labels and predetermined concepts to a maximal extent. Some clarification as to the chosen wording:

"Constituent entities" – This refers to the autonomous regions of both federal and confederal states, including the central authority itself;
"Non-unitary states" – These can be both federal and confederal states. Note that this excludes devolved states (*e.g.* United Kingdom of Great Britain and

[23] C. VALCKE, *Comparing Law – Comparative Law as Reconstruction of Collective Commitments*, Cambridge, Cambridge University Press, 2018, p. 190-191.
[24] *Ibid.,* p. 193.
[25] *Ibid.,* p. 194-195.

Northern Ireland), since they are *de iure* unitary, for the sake of feasibility; "Cooperation" – *Any form* by which the constituent entities collaborate to exercise their exclusive or shared competences is meant.

Now, we have our map, unto which a route can be sketched.

3. THE HIGH SEAS – COMPARATIVE METHODOLOGY

A comparative journey into constitutional law has its own specific difficulties. It is easy to get lost between the methodological islands of comparative law in general, but more so in the field of comparative constitutional law, which can be extremely opaque. Some argue that comparison in this field is but a hollow intellectual exercise, since constitutional identity is so dominant that little can be learned.[26] In their view, any solution emerging in a constitutional order is so context-specific that it cannot operate outside that context.

The answer to such an epistemological pessimism[27] is as simple as the inherent flaws of their critical premise: an entirely functional reading of a constitution would indeed be incomplete, but so would an exclusively identitarian account, because no meaningful basis for comparison would be at hand.[28] Thus, it may be optimal to combine a functional and identity-based approach, as JACKSON suggests. More specifically, she suggests a form of *contextualised functionalism*.[29] All too often doctrines, theories, institutions and legal norms with similar names and seemingly similar functions mean quite different things in practice in more particular contexts.[30] In order not to be blindsided by a lack of context, the method of contextual functionalism will be applied for the purposes of this research.

However, one may wonder whether or not 'contextual functionalism' is a

[26] For a general discussion of the methodological difficulties regarding comparative constitutional law, see M. ROSENFELD and A. SAJÓ, "Introduction" in M. ROSENFELD and A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 12-18.

[27] M. VAN HOECKE, "Deep-Level Comparative Law" in M. VAN HOECKE (ed.), *Epistemology and Methodology of Comparative Law,* Oxford, Hart Publishing, p. 172-174. VAN HOECKE considers LEGRAND to be an epistemological pessimist, and rightly does so. LEGRAND's argument that nothing can be learned from comparison is not convincing, not least because his own conclusion presupposes comparative knowledge.

[28] M. ROSENFELD and A. SAJÓ, "Introduction" in M. ROSENFELD and A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 18.

[29] V.C. JACKSON, "Comparative Constitutional Law: Methodologies" in M. ROSENFELD and A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 72.

[30] *Ibid.,* p. 66.

pleonasm. As HUSA has shown, functionalism *an sich* contains a paradox: in its theory it recognises the importance and guidance of context of law, though in practice it fails to value its theory.[31] So contextual functionalism may signify many things, the meaning of which will be delineated for this paper, but a pleonasm it is not.

JACKSON does not explain in detail what is meant by contextual functionalism. Nevertheless, one may tentatively see her point and, hence, a possible practical method. What contextual functionalism concretely means for this paper, is made clear by the following three steps.

3.1. FIRST STEP: THE FUNCTIONALIST HOW

As MICHAELS explained, functionalism is a generic term for many forms of functionalist comparison.[32] This can lead to unnecessary criticism when a comparatist does not succeed in sufficiently explaining his to-be-used form. Functionalism, as understood here, signifies *equivalence functionalism*. This form of functionalism explains an institution as a possible but not necessary response to a problem; *"[...] the specificity of a system in the presence of (certain) universal problems lies in its decision for one against all other (functionally equivalent) solutions. Legal developments are thus no longer necessary but only possible, not predetermined but contingent."*[33] By consequence, this form does justice to difference within similarity, rather than difference and similarity.

So, according to *equivalence functionalism*, the research will look at *how* the constituent entities of non-unitary states tend to cooperate. This allows simultaneously for the identification of functionally equivalent institutions, aimed at cooperation, and the blossoming of the peculiarity of each system.

Though, this is not to say that this paper understands law *merely* as an answer to a specific societal problem or need, as substantive functionalism does. What it does contend is that the call to resolve those problems or needs is *only one* of many characteristics of law. As VALCKE posits, all theorists agree that law is connected to social problems *to some extent* and disagreement only exists as to the intensity of that connection. Nonetheless, the fact that law is systematically connected to social problems or needs (however intense that connection may be) does not entail that social facts are, in turn, connected to

[31] J. HUSA, "Methodology of Comparative Law Today: From Paradoxes to Flexibility?", *Revue Internationale de Droit Comparé* 2006, p. 1104.
[32] R. MICHAELS, "The Functional Method of Comparative Law" in M. REINMANN and R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, p. 339-382.
[33] R. MICHAELS, "The Functional Method of Comparative Law" in M. REINMANN and R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, p. 358-359 (referring to LUHMANN).

nothing but law.[34] Thus, the functional freedom a problem-based formulation of a research question provides allows us to identify many possible answers to a specific problem or need, of which legal solutions are only a part.

So, at least at this stage, equivalence functionalism does not discriminate between legal and non-legal sources and solutions. Nevertheless, the broadness of the materials identified deliver us the context needed not to be blindsided by a lack thereof. The entirety of these materials, which constitute the context, need to be sorted at a later stage.[35] Therefore, an analysis of that context is required in order to be able to assess a system on its own terms. This what we turn to next.

3.2. SECOND STEP: THE EXPRESSIVIST WHY

Expressivism considers constitutions of legal systems to be the expression of a distinctive national character. Its application will prove useful insofar the comparatist recognises that the precise content of that character is subject to revision.[36] Expressivism, by consequence, facilitates the understanding of a system on its own terms: its choices, its justifications, its ramifications and, not least, its coherence. The benefit of such an expressivist analysis is that each system can be assessed on its merits according to the standards it has set for itself. Since this is the case, not all legal formants[37] *actually* affecting the emergence of a certain solution will be taken into account, but only those elements which the system itself considers *should ideally* affect the solution.[38] Thus, a search for "formants of identity" or "internal legal formants", rather than all legal formants, as SACCO suggests.[39] This accounts for the identity-based approach (see *supra*) and allows us to assess *why* a legal system has made certain choices. Hence, this approach is more than suitable when engaging in comparative constitutional law.

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[34] C. VALCKE, *Comparing Law – Comparative Law as Reconstruction of Collective Commitments*, Cambridge, Cambridge University Press, 2018, p. 198-199.
[35] *Ibid.*, p. 199.
[36] M. TUSHNET, "The Possibilities of Comparative Constitutional Law", *The Yale Law Journal* 1999, p. 1307-1308.
[37] The term 'legal formants' refers to a concept developed by SACCO, see R. SACCO, "Legal Formants: A Dynamic Approach to Comparative Law" (Instalment I of II), *The American Journal of Comparative Law* 1991, p. 1-34. According to him, comparative law scholars are to take into account all relevant sources of law in a given legal system. For instance, even though an expressive and declamatory statement may contradict the actual, operative rule, both are legal rules.
[38] VALCKE is the first to posit this perspective. See C. VALCKE, *Comparing Law – Comparative Law as Reconstruction of Collective Commitments*, Cambridge, Cambridge University Press, 2018, p. 200.
[39] R. SACCO, "Legal Formants: A Dynamic Approach to Comparative Law" (Instalment I of II), *The American Journal of Comparative Law* 1991, p. 1-34.

3.3. THIRD STEP: THE RECONSTRUCTIONIST CLASSIFICATION

First, we have identified the context and, then, sorted the context. Now the time has come to *scrutinise* the context and, hopefully, to reconstruct a coherent narrative regarding the legal system under scrutiny. Therefore, a third step is required: Reconstructionism, as a substantive version of EWALD's jurisprudentialism. The reconstructive analysis of *jurisprudence and case law* will focus on the *ideas* of the jurists of the particular legal system.[40] It takes into account economics, sociology, and history, but only to the extent that those elements (i) have not been filtered out by the expressivist interlude and (ii) play a role in the thoughts of those jurists. One may wonder why such a third step is necessary, since expressivism already tells us a great deal about the ideas and values of a constitutional order. Well, put simply: Expressivism, indeed, explains what elements *should ideally* affect a certain solution, but does not tell us which of those are also *actually* affecting the solution. This is important when one aims to peruse the *"the very essence of the rule of law"*[41], *i.e.* theory-practice congruence.[42] The theory would then be the entirety of ideals and values that should ideally affect a solution, and the practice would be those ideals and values manifesting themselves in reality, *i.e.* case law and, to a lesser extent, jurisprudence. Subsequently, this will enable us to reconstruct the path-dependency of all the instruments of cooperation identified, from their classification to their, perhaps even Platonic, ideal.

These three steps account for the overall method of *contextual functionalism* as proposed by JACKSON, but very much influenced by VALCKE.

4. SHORES AND NEW FOUND LAND – LEGAL SYSTEMS

4.1. THE SELECTION

When following the methodology as explicated in the previous chapter, one truly has the ability of discovering new knowledge. But methodology alone will not do; it has to be unleashed upon an object. Finding legal systems is an inherent part of every comparative journey. Therefore, it is crucial that one not only establishes criteria on the basis on which legal systems are selected, but also is transparent in the way one does so.

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[40] W. EWALD, "The Jurisprudential Approach to Comparative Law: A Field Guide to 'Rats'", *The American Journal of Comparative Law* 1998, p. 701-707.
[41] L.L. FULLER, *The Morality of Law (Revised Edition)*, New Haven, Yale University Press, 1969, p. 209-210.
[42] See also C. VALCKE, *Comparing Law – Comparative Law as Reconstruction of Collective Commitments*, Cambridge, Cambridge University Press, 2018, p. 205-211.

First, we should establish the number of legal systems to be examined. According to HUSA and many others, this depends on the purpose and depth of the research.[43] Since the research question itself is fairly broad, we should not seek to examine more than three legal systems. Selecting more than three systems creates the risk of being superficial and could hence undermine the purpose of the proposed research: an in-depth understanding.[44]

With regard to the actual selection of legal systems, one could notice that HIRSCHL could provide an attractive guide to selecting legal systems, since we are engaging in comparative constitutional law, which is the subject of his selection method.[45] However, we do not seek to establish causality in one way or another, while HIRSCHL's method is aimed at precisely that, so HIRSCHL will be neglected in this respect. The context-related method developed by ODERKERK, on the other hand, could prove to be very helpful. This method of selection fits seamlessly with our research method of *contextual functionalism*. ODERKERK proposes to select systems, first, on the basis of objective criteria and, second, when the objective criteria are insufficient, on the basis of subjective criteria.[46] The objective criteria are elements relating to the topic and objective of the research itself, *i.e.* the context. The subjective criteria are elements relating to the researcher or the conditions under which the research is to be conducted.

Since the topic is cooperation in non-unitary states and the aim is reconstructing the story of a particular legal system, it is only proper to make a comparison between Belgium on the one hand and more mature legal systems on the other hand. Preliminary research singles out Canada, Switzerland, Austria, Germany and the USA as possible objects of comparison. These are all societies which are simultaneously fairly similar and sufficiently different to the Belgian one, a fact which potentially increases the dialectic knowledge to be gained (see *infra*).[47]

At this stage, Austria and Germany can already be excluded due to linguistic barriers. This is, however, not the case for Switzerland because sources about Swiss federalism and cooperation are sufficiently available in French, English and even in Dutch. Preparatory investigation, thus, indicates that language is

[43] J. HUSA, *A New Introduction to Comparative Law*, Oxford, Hart Publishing, 2015, 108-110.
[44] *Ibid.*
[45] R. HIRSCHL, "The Question of Case Selection in Comparative Constitutional Law", *The American Journal of Comparative Law* 2005, p. 125-155.
[46] M. ODERKERK, "The Importance of Context: Selecting Legal Systems in Comparative Legal Research", *Netherlands International Law Review* 2001, p. 310-312.
[47] 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, p. 413-415.

not an obstacle in exploring the Swiss legal system.[48] This leaves us, next to Belgium, with three possible further objects of comparison: Canada, Switzerland and the USA. Because of our limitation to three legal systems, one still has to be excluded. This will be done in a negative fashion: in the following section, there is a brief explanation as to why those three systems have been chosen, which *ipso facto* excludes one of them. After all, every research has its limitations to remain feasible.

4.2. THE SELECTED

Belgium. The choice for Belgium is rather self-evident since this is the legal system the researcher is most familiar with and embedded into. As mentioned earlier, the difficulties with regard to agreements of cooperation in Belgium triggered the comparative intuition in the first place. The transparency with regard to the choice for Belgium is not only a matter of intellectual honesty, but making this explicit also reduces the risk of implicit biases and native-bound assumptions.[49]

Switzerland. The Swiss Confederation[50] is one of the oldest confederacies in the world and its cooperation model has reached a level of maturity some would envy. It is due to that maturity that so many (non-German) sources are available on the Swiss system, enabling us to study it. Therefore, it is only appropriate to learn from the Swiss experience.

Canada. Canada is a federal state with one hundred years more acquaintance with continuous federal cooperation than Belgium and is said to be, next to Switzerland, one of the most decentralised states in the world. Also, with regard to the instrument of agreements of cooperation Canada seems to be a good sparring partner. Proof thereof: there are nearly 1500 federal-provincial agreements currently in force in Canada.[51] This means that Canada is not only an interesting case for cooperation *an sich*, but more specifically with regard to agreements of cooperation as well. This makes Canada the perfect fit, next to the (relative) novelty that characterises Belgium and the long-established nature of Switzerland.

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[48] See also L. KESTEMONT, *Handbook on Legal Methodology*, Antwerp, Intersentia, 2018, p. 39-41. KESTEMONT argues that if a legal scholar does not master the foreign language, he can make use of secondary sources. With regard to Switzerland primary sources are available in French and secondary sources in English and Dutch.

[49] L. KESTEMONT, *Handbook on Legal Methodology*, Antwerp, Intersentia, 2018, p. 39-41; J. REITZ, "How to do comparative law?", *American Journal of Comparative Law* 1998, 618-620.

[50] Switzerland denotes itself as a 'confederation' for historical reasons, but it is in essence a federal state.

[51] J. POIRIER, *Keeping Promises in Federal States. The Legal Status of Intergovernmental Agreements with Special Reference to Belgium and Canada*, PhD Dissertation, University of Cambridge, 2003, p. 2.

Due to the confusion with regard to the denotation of some states (see footnote 50) and to minimise the risk of misunderstanding, the terminology of 'non-unitary states' was explicitly chosen (instead of 'federal states'). This wording proves to be even more useful when one considers that all three selected states have, at least to a minimal extent, certain characteristics of a confederacy.

5. CONCLUSIONARY REMARKS

Three final remarks are left to be made.

First, for those who wonder in what respect understanding systems on their own terms is really 'comparative', the next few words will clarify the unconsciousness of the assumptions of those wondering, which are so latent that the question should be answered. As STORME puts it quite aptly: "*You have to know things to be able to look at things*".[52] Likewise, VALCKE claims that the *"reconstruction of anything foreign is inherently 'comparative' in the sense that it necessarily proceeds, if only epistemologically, from a dialectic movement with the local referent whereby the distinct peculiarity of each is revealed and emphasized through contrast with the other."* Reconstructing the narrative of a certain system thus presupposes prior or 'native' knowledge, for it is only by virtue of that knowledge that one can see (read: *understand*) another legal system as distinct, on its own terms. Hence, this knowledge enables us to view the world through a perceptive lens, without *ipso facto* imposing that lens unto that world. The reconstruction of those national narratives will be presented system-by-system. This enhances the understandability of each narrative and underlines its coherence.

Second, those who, like LEGRAND, argue that nothing can be learned from comparison, or even doubt its possibility in specific fields of comparative law, as for example comparative constitutional law, have too narrow an understanding of knowledge. They conceive knowledge to be *practical* knowledge, such as the ability to transplant solutions from one system into the other.[53] The epistemological pessimists have lost track of what comparative law is all about: understanding systems on their own terms. Doing so might even reveal or clarify choices made at home. And that is all a comparatist can wish for.

Third, as stated before: Not everything can be foreseen and dealt with in a preliminary fashion. Compromises may have to be made along the way. Adjustments are probably inevitable. Nonetheless, one should not be afraid of

[52] This is a statement by professor M.E. STORME in the context of a lesson series on comparative law taught at the KU Leuven (April 2019). "Look" is to be interpreted as study according to the methods of comparative law.
[53] Indeed, this is rather ironic in LEGRAND's case.

the daunting task of setting out methodological thresholds. It helps navigating the risks of comparative research and consequently steers a steady course towards its objective. After all, as history has proven, the greatest discoveries were made by the most dauntless, but *prepared*, seafarers.