

Special Issue - Comparative Law

Introduction

*Irene Broekhuijse and Sofia Ranchordás**

Comparative legal research methods have received considerably more attention over the past decade. Numerous influential textbooks and articles on the relevance of the methodology of comparative law have been published. The books by Hirschl and Siems, in particular, have been a source of profound insights to both young and experienced scholars interested in the art—or science—of comparing legal systems (Hirschl, 2014; Siems, 2014). This special issue on Comparative Law was organized with the aim of reflecting on the importance of methodology in comparative law, showing different approaches (e.g., numerical approaches vs. more doctrinal comparisons of jurisdictions), and challenges (e.g., unitary vs. federal systems).

A thorough reflection on comparative legal methods is more timely than ever. Both undergraduate and graduate students and young scholars attempt to navigate the dangerous waters of comparative law, often without knowing where this journey will take them. They lack awareness of the need to have a clear methodology and strategy, and not rarely do they think that mere references to other jurisdictions will already qualify as ‘comparative law.’ In the last decade, more mature perceptions on comparative legal methodology have indeed evolved from punctual references to other jurisdictions based on the researcher’s interest to compare within or between legal families to more structured, contextual, and interdisciplinary approaches. Through this shift, insofar as one can refer to it as a shift, scholars have intended to engage with the contextual aspects in which the law operates and apply a clear methodology that allows researchers to draw valid conclusions. One of the challenges that scholars still grapple with, and which has been difficult to tackle, is the pitfall of bias. Or perhaps the latter should be referred to as two challenges, as ‘bias’ has two meanings here: 1. The selection bias, which has been caused, for example, by language restraints and a subsequent undue pre-selection of cases; and 2. personal bias, which affects one’s perception of a foreign legal culture. Both issues deserve further attention, since besides the intellectual responsibility for valid research, bestowed on academics to uphold their credibility, there is also the ethical responsibility to argue correctly, given that persua-

* Dr. I.L.A. Broekhuijse is Assistant Professor Legal Theory at the Vrije Universiteit Amsterdam and Research Fellow at the University of Johannesburg. Prof. Dr. Sofia Ranchordás is Professor of Law, Chair of European and Comparative Public Law and Rosalind Franklin Fellow at the University of Groningen.

sive fallacies, such as hasty generalization or false comparisons (and subsequent false conclusions) can have negative consequences if accepted. For one, flaws might be ultimately difficult to correct. The legal enterprise is argumentative, and the acceptance of arguments is generally sufficient to accept the proposition as warranted. Once a conclusion has been accepted, it might serve as a premise for the next argument, etc., until the flaw has been corrected. By then the fallacy could have traveled far, rendering itself more difficult to repair and leaving deep imprints. Secondly, the comparative account may not be appreciated by those who feel misrepresented. It is for this last reason that it is important to observe that when applying comparative legal research methods, a scholar is making statements about 'someone else's' legal order. These statements can be even used by some scholars in a normative way to judge how that or another jurisdiction 'ought to be.' In the past, these judgments have been qualified *inter alia* as forms of paternalism, which has been particularly sensitive in postcolonial times; interpretations from Western views projected on jurisdictions of former colonies that did not match the factual situation or were simply construed as strange domination ('what do you know about our way of life' and 'so who are you to say what works for us'). Needless to say, misrepresentations are equally unfortunate in other situations, and fallacies are not necessarily fashioned on purpose.

It could be argued, in line with Gadamer's well-known proposition on perspectives, that a scholar is prejudiced by his own perceptions that are formed by his physical environment and the time he lives in (Gadamer, 2011). A fallacy, such as an overhasty conclusion, is therefore easily made. A famous example to illustrate this point, perhaps, is the representation of the concept of Parliamentary sovereignty in the United Kingdom, a concept that is easily explained in a too narrow understanding. Scholars have, for instance, remarked that the Brexit, or the 'threat' to cease to accept the judgments of the ECtHR as binding, relates to Parliamentary sovereignty (Zoethout, 2017). Although this notion can be validly brought forward, it remains on the surface of the actual debate as it does not address the internal discussion in the United Kingdom on the absoluteness of Parliamentary sovereignty, especially whether it prevails over the Rule of Law (for the sake of the protection of human rights) (Elliott, 2003). In this case the framing of the connection between Parliamentary sovereignty and the Brexit or the 'threat' to cease to accept the judgments of the ECtHR as binding is arguably insufficient to do justice to the full debate on its consequences.

This special issue contains contributions that address the issue of bias and the challenges of comparing legal systems from different perspectives. In her article, *Comparative Rights Jurisprudence: An Essay on Methodologies*, Ioanna **Tourkochoriti** proposes tools to gain a fuller grasp of legal arguments in foreign jurisdictions. She proposes 'some methodologies for research in comparative jurisprudence understood as an effort to understand legal ideas, 'the philosophical principles, concepts, beliefs and reasoning that underlie legal rules' as applied by various jurisdictions around the world and methodologies for the study of the intellectual foundations of rules protecting rights in various legal systems.' Likewise, albeit from a different angle, Dave **Van Toor** directs the reader's attention to the understanding of contextual matters. In his article *Case Selection in Com-*

parative Law Based on Hofstede's Cultural Psychology Theory, Van Toor explores his assertion that 'differences in cultural-psychological dimensions of countries can help explain legal differences, and gives insight on the relationship between law and culture.' In line with this theme, Stefanus **Hendrianto** provides in his article *Comparative Law and Religion: Three-Dimensional Approach*, an overview of (main) groups of scholars and their approaches to comparative law and religion. Subsequently, he proposes to move away from these approaches and toward legal-theological studies. He argues that 'the essence of comparative law is not only the act of comparing the legal system of one country to that of another, but also has a broader mission to compare the relationship between religion and law in the respective countries.' Antonia **Baraggia's** article, *Challenges in Comparative Constitutional Law Studies: Between Globalization and Constitutional Tradition*, examines the effects of globalization and migration of constitutional ideas on the meaning of comparative constitutional law. She emphasizes that '[...] even if globalization is an inevitable process, this does not mean that it will condemn comparative law to a sort of marginalization. On the contrary, this forces the comparative scholar to be aware of the importance of the cultural and historical roots of a given order to see how globalization affects the original values on which a system was based.' Lastly, the articles of Giacomo Delledone and Catalina Goanta illustrate how comparative legal methods operate in their respective fields and focus on particular complexities. Giacomo **Delledonne** provides in his article *Comparative Law and Federalizing Processes: Methodological Insights* a highly precise insight into credential case selections, in which he highlights the necessity of having a full grasp of 'diachronic, historicizing insights and the distinctive features' of a constitutional framework. In her article, *Big Law, Big Data*, Catalina **Goanta** uses Consumer Law as an example to illustrate why law should be treated as big data. Her innovative numerical approach to comparative law follows Siems' approach to comparative legal scholarship and shows that comparing legal systems goes beyond the mere comparison of pieces of legislation.

References

- Allan, T.R.S. (2003). *Constitutional justice, A liberal theory of the rule of law*. Oxford, OUP.
- Elliott, M. (2001). *The constitutional foundations of judicial review*. Oxford, Hart Publishing.
- Gadamer, H.G. (2011). *Truth and method* (translation) (chapter 4 Elements of a theory of hermeneutic experience). New York/London.
- Hirschl, R. (2014). *Comparative matters, the renaissance of comparative constitutional law*. Oxford, OUP.
- Siems, M.M. (2014). *Comparative law*. Cambridge, CUP.
- Zoethout, C.M. (2017). Should we be worrying about a Brexit from the European Convention of Human Rights now, too? *Ancilla Iuris*, 1, 1-10.