



Abstracts

Welcome and Key Note Session

David Nelken

From pains-taking comparisons to pain-giving comparisons

In his plenary paper David Nelken will examine how the role of comparison is changing as places and contexts become increasingly intertwined. This requires comparative researchers, and comparative sociologists of law in particular, to increase their level of reflexivity so as to study comparison as a social process. For this purpose it may be helpful to distinguish between what will be described as 'disciplined comparisons', 'foil comparisons', and 'standardising comparisons', as well as to examine the feedback effects between them. Special attention will be given to the part played by comparison in the making and application of 'global' indicators designed to rank and thereby change the behaviour of the places being compared.

Fernanda Pirie

Comparison in the anthropology and history of law

From the point of view of comparative law, socio-legal studies opens up a vast field of subjects, approaches, and methods. Questions have been raised about how one might usefully compare law-in-action, legal culture, traditional or customary law, and transnational or globalized laws, and to what ends. This presentation describes the way in which an anthropologist or historian undertaking qualitative empirical research might use comparison to address questions about the nature, form, and purposes of different types of law. Rather than starting with theories, definitions, or specific problems, the researcher can let the terms of comparison emerge from the facts; and rather than struggling to identify an appropriate subject of comparison, the consideration of carefully-selected empirical cases can itself address definitional issues. This approach is illustrated with examples of transnational laws.

Theoretical and Analytical Perspectives on Comparison

Jennifer Hendry

A Broad Church? Comparative (Socio-) Legal Studies

This past semester I have been teaching a seminar on classical legal positivism, part of which engages with Jeremy Bentham's argument in favour of legal codification: we discuss the alleged benefits of this approach and then query why the legal systems of the United Kingdom were never codified. The most interesting contributions to this discussion invariably come from students who have been involved in the Erasmus exchange scheme, whether they have recently returned from the continent or are visiting Leeds; they outline how they had previously been unaware that legal systems had opted for or against legal codification, that the varying socio-political contexts had been so influential in terms of that selection and, moreover, that their own conception of law and its deeper structures had been challenged by the very existence of an alternative model. For many of these students this was the first instance where they had been presented with occasion to challenge (what until that point had been) taken for granted assumptions about their own legal system and legal culture and, importantly, the insight facilitating this opportunity was that things were *done differently elsewhere*. I tell this story to highlight two specific points: first, that it was the contextualisation of a specific legal process that provided the opportunity for a critical perspective and, second, that the importance of such a perspective was shown in particularly sharp relief by the very recognition of circumstances of alterity.

Both of them recognised and oft-utilised methods of legal research, the contextualisation and comparison of legal features can be said to combine in the approach known widely, although not exclusively, by the term *comparative legal studies*.¹ This approach purports to combine its insights into the real-life practices of law with recognition of the situatedness of those practices – a 'law in action'² perspective twinned with an awareness of law in its particular socio-cultural or socio-geographic context – and can thus be clearly distinguished from its more traditional, doctrinal and, dare I say, anti-theoretical³ forebear of comparative law. While the latter can be seen as having an overtly instrumental bent⁴ even to the extent of provoking some ire – for example, Rodolfo Sacco famously commented that 'the effort to justify comparative law by its practical uses sometimes verges on the ridiculous'⁵ – the former appears to require engagement with ideas and methods often associated with socio-legal approaches, most notably an openness to considerations of law-in-context but also those of law in action and interdisciplinarity.⁶ In this regard, comparative legal studies can arguably be considered as a 'second-order' type of investigation, scrutinising the means by and through which analyses concerning legal alterity are undertaken. If we also accept that 'legal

¹ Socio-legal studies, law and society studies, the sociology of law, and law in context approaches can be taken as different terms for an approach to legal research that, broadly stated, concerns itself with understanding the relationship between law and society, although the specific contours and methods falling within said approaches are often contested.

² Roscoe Pound, 'Law in Books and Law in Action', (1910) 44 *American Law Review* 12

³ Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (2014, Hart: Oxford), at 19

⁴ David Nelken, 'Comparative Law & Comparative Legal Studies' in Nelken & Özüdoğru (eds) *Comparative Law: A Handbook* (2007, Hart: Oxford) at 13

⁵ Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law', (1991) 39 *American Journal of Comparative Law*, at 2

⁶ Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory', (1995) 58 *Modern Law Review* 2. According to Legrand, a comparative legal researcher must display a commitment to both theory and interdisciplinarity.

ideas can only be properly understood if they are informed by a consideration of the 'social',⁷ then it would appear that any approach purporting to come under the rubric of comparative legal studies must also be socio-legal in character.

This presentation will investigate the extent to which disciplinary and methodological boundaries are blurred between and across these 'broad church' academic approaches, and briefly consider the benefits and drawbacks of such intertwining. For example, it could be argued that the employment of socio-legal insights within a comparative approach facilitates the avoidance of 'billiard ball' type juxtapositions of nation state legal rules intended to ascertain functional equivalence. From the other perspective, the self-awareness of the critical comparatist in terms of the subjectivity of their own knowledge and inherent bias⁸ could be a useful consideration for socio-legal scholars engaged in an attempt better to understand the 'mutually constitutive relationship between law and society'⁹ at a variety of levels and scales. As David Nelken has stated, 'by helping us to appreciate the fit (or lack of fit) between law and society in different social contexts [comparative research] brings into view those aspects of the relationship which are usually hidden from the scholar who is, after all, also part of his or her own society.'¹⁰

In undertaking this analysis I will also reflect on the following: whether comparative legal studies and socio-legal studies can be construed simply as separate social scientific perspectives with related but discrete aims; whether the utilisation of definitively socio-legal ideas at the core of comparative legal studies reduces it to an offshoot of socio-legal studies, itself ostensibly bi-disciplinary but in reality both multi-disciplinary and indeed often also multi-methodological; and whether the theoretical and interdisciplinary requirements increasingly placed upon the contemporary legal comparatist are so broad as to be genuinely *post*-disciplinary.

I will argue that the answers to these queries are to be found in scrutinising (the issue of) the socio-cultural or socio-geographic context of the relevant legal feature or practice. The aim in utilising the terms socio-cultural and socio-geographic here is to draw attention not only to the additional layer that a comparative legal studies approach adds to a socio-legal investigation but also to the specifics of what that layer concerns, namely the situatedness of this 'dynamic, reflexive, constitutive engagement' of the legal and the social. While both socio-legal studies and comparative legal studies can be said to place an emphasis on law in context, only comparative legal studies attempts to understand the connection of that context with its own locatedness or, rather, its own spatio-cultural context.

⁷ Roger Cotterrell, 'The Sociological Conception of Law' in (1983) *Journal of Law & Society* 241-255

⁸ Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' in (1985) 26 *Harvard International Law Journal* 411-55

⁹ Eve Darien-Smith, *Laws and Societies in Global Contexts* (2013, CUP: Cambridge) at 2

¹⁰ David Nelken, 'Comparative Sociology of Law', in Reza Banakar & Max Travers (eds) *Law & Social Theory* (2013, Hart: Oxford, 2nd ed.) at 343

Barbara J. Morazzani

In the Study of Comparatives in Socio-Legal Studies do Differences in Legal Interpretation Matter?

Introduction

The purpose of comparative law is to understand the legal rules and social order of any given state or system. Yet differences stemming between comparative law and international law and how international law is interpreted through a state's domestic legal framework are frequently overlooked (Noortmann 2012, Coleman 2007:22, Hurd 1999:388). Although interpretation is an essential feature of legal practice there is currently widespread disagreement over the nature of interpretation in both international and comparative law.¹

Awareness of the importance of interpretation in legal practice began in the time of Montesquieu. Montesquieu realized that the interpretation of legal text in different legal systems presented problems because each legal institution was required to follow its own sets of laws. Concerns arising from the interpretation of legal text continue to be problematic due to the development of, and changes to, issues which arise at both international and domestic levels of law. This is particularly evident when the same issue is under consideration, such as laws based on the protection of human rights. For instance, how can states agree that a particular legal rule exists, but then understand the rights or obligations of that rule in different ways?

The importance of interpretation therefore lies between the identification of those issues and the development and modification of law within different legal institutions. The interpretation of which may also justify legal change, particularly when there is a need to integrate different legal norms and policy within an existing legal framework. In this way decision-makers will focus their decisions on the appropriate form of interpretation based upon their beliefs in the role of law and the way law is created within that particular state. This presents a problem however, given that limitations inherent to any state's legal institution will cause the state's conduct to differ from the expectations not only of another state's legal institution but of the international level of law as well. Consequently, in the study of comparatives the legal conduct of states may be inconsistent with another in practice and will differ due to limitations inherent to any domestic legal institution.

Given the relationship between domestic and international law in areas such as human rights, this paper considers the degree to which legal interpretation and comparative law interact with international law in an attempt to inform mutual understanding which reflects on the increased importance of the role of legal interpretation in comparative law. The legal principle underlying the protection of human rights is particularly suited for comparative legal analysis given the contestation over the meaning of human rights, which international and state legal systems find difficult to reconcile relative to legal authority. This is because the issues regarding human rights do not centre completely on the nature of the rights involved as to when to enforce those rights.

To understand the value of interpretation, the paper begins with an analysis of legal interpretation to gain a better understanding of why interpretation matters and the limitations associated with positivist law. How legal behaviour shapes policy towards international law follows from this analysis which then segues to the legal systems of France and the United States given the difference in legal systems. The significance of this comparison plays an important role in the interpretation of legal norms pertaining to various legal systems, as well as in the adaptation of one legal system to another. This matters, since a state's legal structure and its perception of a human rights situation

¹ See for instance *Comparative Law in a Changing World* wherein DeCruz discusses the "causal relationship between different systems of law" (DeCruz (1999:10).

ultimately determines the course the state will take in decision-making, even when states face the same international pressures.

Agnieszka Kubal

Entry ban as surreptitious deportation? Investigating 'запрет на въезд' in Russian immigration law and practice from a comparative perspective.

Запрет на въезд is an entry ban that as a stand-alone sanction came to force in Russian migration law gradually since 2012. The amendment of the Federal Law N 321-ФЗ from 30 December 2012 specified that a 3 year entry ban was to be issued to anyone who has not left the territory of RF within the thirty day grace period after the expiry of their residence permit (Article 26, Law on the Rules of Entry and Exit from the Territory of RF, *О порядке выезда из Российской Федерации и въезда в РФ* with amendments, thereafter as 'Law on the Rules of Entry and Exit'). In summer 2013 new, stricter amendments followed –the 3 year entry ban was to be issued to foreign citizens who within a period of three years have committed two or more administrative offences (Paragraph 4 of Article 26, Law on the Rules of Entry and Exit). This new law, although introduced in 2013, was in practice extended in time to include also past administrative offences – it was applied retroactively ([Gannushkina 2014](#)). What could qualify as administrative offence was a speeding or a parking ticket, for example, or being caught crossing the street in the wrong place. Two of those forbade a person's entry into RF for three years, or – if issued from within the country – rendered a person effectively deportable.

The issuance of запрет на въезд with regard to administrative offences does not result from a judicial decision in the court of law, but lies within discretion of a Federal Migration Service staff member. In majority of the cases an FMS officer issues запрет на въезд whilst reviewing and amalgamating the police database regarding administrative offences (e.g. Central Database of the State Inspection of Road Safety: ЦБД ГИБДД - Центральный банк данных Государственной инспекции безопасности дорожного движения), with migration law database that holds information about foreign citizens' status in Russia (Central Database of the registration of foreign citizens: ЦБДУИГ -Центральный банк данных по учету иностранных граждан и лиц без гражданства, временно пребывающих и временно или постоянно проживающих в Российской Федерации).

In the everyday life language, among migration scholars and human rights lawyers in Russia, this is called: 'попасть в базу'; попасть meaning 'fall into the database, get caught into the database'. The widespread usage of this term inspires observation about the actual lack of agency on the side of the migrants against whom re-entry ban has been issued. The term попасть is more closely related to the metaphor of 'tripping and falling into' rather than bringing the certainty of objectives and consequences of that particular immigration law practice. This intuitively points to the haphazard law enforcement and a negative image of law that often result in turning for explanation to the all too familiar traits of Russian legal culture – the legal nihilism and cynicism about the law {Kurkchiyan, 2005 #740}: 263-4). After all 'tripping and falling into' does not inspire much confidence in how the law is administered among the citizens and non-citizens alike but brings to mind the rather well-known and well-rehearsed arguments about how the law 'does not really' work in Russia.

But is this the full story? Perhaps the clue to understand the entry ban legislation and enforcement practice lays elsewhere? This paper adopts a comparative perspective to demonstrate how the evolution and enforcement of entry ban legislation reflects the more global trends and directions of migration law. At the same time I argue that to fully understand the nuances and subtleties of the

entry ban legislation in Russia is to see how these global practices and tendencies are entwined or 'married' with the elements of local legal specificity (Shevel 2012):112).

Although the legal developments around *запрет на въезд* in Russia are relatively recent the legal features of the entry ban, its contentious nature and ambiguous role as a (double) punishment could be analysed drawing on analogies with the deportation law and practice in 'the Western' (primarily US and the UK) jurisdictions since the introduction of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Antiterrorism and Effective Death Penalty Act (AEDPA) –both of 1996, as well as UK's Secure Borders Act (2007) and most recent Immigration Act 2014. Comparative perspective on *запрет на въезд* clearly demonstrates how the evolution of the Russian immigration law follows a well-established logic of an increased reliance on deportation and *deportability* {De Genova, 2010 #721} as a form of post-entry social control of the migrant population rather than a regulatory border control tool (cf. Kanstroom 2000). Another astounding similarity refers to the retroactive application of the law: *запрет на въезд* in Russia and deportation in US in particular, are often issued for administrative offences or 'aggravated felonies' (a category that since 1996 in US expanded in scope), committed prior to the introduction of the law that has attached immigration consequences to these offences.

Russia's case comes of course with its specificities which affect the translation of these practices into the local context. These specificities or differences concern the rather broad, relatively to 'Western' migration jurisdictions, appeal structures. Unlike the United Kingdom, where with the introduction of the 2014 Immigration Act one could observe scything of appeal rights in immigration cases – the formal appeal structures in Russia remain rather broad: both administrative review and regular court routes are available for challenging the entry ban. The final distinction lies in the proportionality of the entry ban relative to the offence (administrative conviction). Russia – in contrast to the UK or the US – has not formally criminalized its migration law. The violations of migration law are of administrative nature and follow administrative process. And yet with the introduction of the entry ban for minor administrative offences, such as speeding or parking tickets, the migration law appears disproportionately harsh and severe leading toward increasingly *punitive* administrative process aimed at non-citizens. By contrast deportation in the US or the UK, however harsh, severe and inflexible, is nevertheless attached to a criminal conviction {Legomsky, 2007 #742} {Chacon, 2009 #743}. Whilst much of the discussion on deportation in the US and the UK takes place in the context of criminalization of migration {Aliverti, 2012 #745} {Kubal, 2014 #746}, overcriminalization {Chacon, 2012 #744} or – blatantly – crimmigration law {Stumpf, 2006 #747} {Moore, 2008 #749} {Romero, 2010 #748}, the analysis of the entry-ban in Russia invites a deeper reflection about the nature and the consequences of the civil/criminal labels in migration law. I conclude that although formally within the remit of the administrative law, *запрет на въезд* if analysed from the perspective of severity and impact on migrants' lives actually constitutes a quasi-criminal sanction, a form of punishment {Ortiz Maddali, 2011 #741}.

This paper proceeds as follows. The next section presents the research methods for the gathering of the empirical material and reviews the arguments for and against adopting a comparative perspective to understand the entry-ban legislation and immigration practice in Russia. Section 3 examines the evolution of entry-ban legislation, followed by a presentation of an empirical case study based on a story of Akmal (a composite character) of how the entry-ban operates in migrants' everyday lives in Moscow (Section 4). Section 5 analyses the similarities between entry-ban and deportation law and practice in Russia and in the UK and the US: a) the shift from employing these tools to control migration processes to control the social conduct of migrants and b) their increased

retroactive application. Section 6 points out the differences with respect to a) the appeal structures and b) proportionality (severity) of the entry-ban versus deportation as sanctions relative to the alleged transgressions of the law. The paper concludes with a discussion about the applicability of civil/criminal labels in migration law.

Limits to Comparison in Socio-Legal Studies?

Harry Willekens

Comparing contemporary western family law to Roman family law –can it be done and why would one go to the trouble of doing it?

One of the central questions of the sociology of law is (or surely ought to be) the causal explanation of why the law has changed (or has not changed over a long period of time). Usually, several on the face of it all plausible and internally coherent, but mutually incompatible stories can be told to try to explain the same processes of legal change or stasis. The question then arises how to distinguish empirically between a plausible, but false story of why the law changed (or not), and an alternative, equally plausible but possibly true story of why change occurred (or not).

The only test of hypotheses aiming at explaining legal change (or long-term legal stasis) I can see consists in a comparison with other cases in which either similar legal change occurred or the same purported social causes of change were present. If it results from the comparison that a peculiar type of legal change is always preceded by the hypothesised causes, this confirms the hypothesis – that is, confirms it weakly, for a serious comparison of complex processes of change will usually be restricted to a small number of cases, and it is thus always possible that the cases which would have falsified the hypothesis have simply been overlooked. If the comparison demonstrates that a specific legal change is not always preceded by the hypothesised causal factor, the implications are ambiguous: it may be that the original hypothesis was false, but it is also possible that the *same* feature of the law can be a result of *different* societal constellations, (only) one of which was identified by the original hypothesis. If the comparison shows that specific social changes are sometimes, but not always followed by specific legal changes, this may be an indication that there exists no causal relation between these changes, but it may just as well be that there is a causal relation, but that it is obscured in some cases by the presence of inhibiting factors.

Such comparative tests of hypotheses may be synchronic (comparing developments in different legal orders within a given period of time), but also diachronic (looking at developments in different historical periods which show structural similarities or in which similar hypothesised causes of legal change are at work).

Over the last fifty years family law in the West has undergone a true revolution (which had been foreshadowed by much more gradual change since the late nineteenth century). The equality of the spouses and the equality of all children, regardless of their birth within or out of wedlock, were introduced; divorce was liberalised; unmarried cohabitation came to be accepted by the law and (fragmentarily) institutionalised; paternal power developed into parental responsibility, parental rights were curtailed and children's rights extended; and recently same gender marriage and adoption have become possible. Looking for a social explanation of these momentous changes (and for historical cases with which to meaningfully compare them) I was struck by the surprising similarity between the contemporary family law revolution and the development of family law in Ancient Rome between the late third century BC and the late second century AD. Roman developments were less radical than those in the present day West: they stopped short of the full formal equality (of spouses and of children born within or out of wedlock) of modern law; no regime of state intervention into parental authority was developed, nor were same gender relations institutionalised. Nevertheless, it remains striking to see how in both cases the law went from the near total subjection of wives and children to assuring them a good deal of autonomy; how in both cases divorce, once nearly impossible, became easily accessible; and how the legal position of illegitimate children and concubines was improved in Roman law as it was (much more radically though) in contemporary law.

There are huge differences in social and legal structure between Ancient Rome and contemporary capitalist societies which might appear to constitute formidable obstacles to a meaningful comparison of the family laws of these societies. Ancient Rome was a predominantly agrarian society, and in the period we are looking at its agrarian workforce came to be constituted to a large extent by slaves. It was a status society, in which persons' rights and obligations depended on their legal status (but this is less of an obstacle than it might appear to be, for the status differences between Roman citizens were of restricted relevance to family law). Although it had sophisticated laws, the rule of law was quite weak and the state left the implementation of judicial decisions in conflicts between private parties to the parties themselves. The boundaries between "family" and "non-family" were different in Ancient Rome from what they are in our society. In taking decisions about marrying, divorcing, making a testament etc. the ancient Roman actors were partly pursuing different goals and strategies from modern actors.

These differences raise the question whether one should undertake the comparison at all; and if the differences were all there was to the two cases, there would be little sense in making the comparative attempt. But the existence of remarkable similarities in otherwise quite dissimilar cases makes the comparative exercise potentially more fruitful than the comparison between more similar cases. If two societies are quite similar, there is a high probability that most potential causes of legal change are similar too, hence the comparison might not be suitable for clearing up which potential causes are actually decisive; whereas a comparison between less similar societies unavoidably narrows down the number of potential explanations of what these societies have in common. The social differences should be kept in mind in interpreting any (apparent) analogies between ancient and modern legal developments, but if one does so and does not attribute anachronistic intentions to the social actors I can see no reason why the comparison would not be both doable and productive.

Ida Petretta

Comparative, beyond the pale?

(1). The legal world is saturated by comparison. Given that it runs throughout the law we ought to investigate comparison carefully.

(2). This study into comparison begins by reviewing the literature on comparison in-to-order discover the essence of comparison. The legal world does not overtly claim to use comparison though is implicit in all areas of law, within the system of precedent, justice, and throughout the law.

(3). Comparison is thusly examined through comparative law as it is the space that comparison and law are most obviously and openly present together. Comparative law can act as a micro-study of comparison which can provide an account of the workings of comparison in law and in judicial reasoning.

(4). This paper conducts a literature review of the current approaches in comparative law in-order-to investigate the notion of comparison. From the functionalist approaches which are guided by the *praesumptio similitudinis* principle in comparison, a principle largely based on the assumption that every society shares similar problems and that these problems are solved with similar results, to those who react against this and advocate difference in comparison on the basis that we necessarily understand differently to a native, and will never overcome our acculturation.

(5). The literature review makes evident certain worries and trends in comparison, such as; how to find sameness and difference in comparison, a craving for certainty in comparison and the concern about freezing the objects of comparison.

These worries point to traits of comparison and in turn a deeper questioning. The worry about the sameness and difference of selecting objects for comparison and the mapping of laws, arises because *comparison is aspectival*, that is highlighting certain family resemblances between the objects of comparison. This begs the question about the identity of the things under comparison, what is one? What are the things under comparison? The anxiety about certainty in comparison points to truth and the *goal-orientation of comparison* which means the 'what' of the comparison and methodology is decided on the comparatist's aim, raises further worries about comparison's relationship to truth and the value of comparison given that it is the outcome of the comparatist's aim. The worry regarding the freezing of objects in comparison arises because comparison is not 'there' but rather concerns representations.

(6). But to point to traits of comparison and so to speak of the properties of comparison, does that not fall back into the language of comparison? Is that still not within the parameters comparison? What is the framework of comparison? How is it framed?

(7). Moreover, does that ask about the essence of comparison? What is essence? The investigation then turns to how to best explore these questions about the essence of comparison. By re-tracing the etymology of comparison further than the current literature which stands on the Latin definition of comparison looking back into its etymology we can already see a glimpse into a more complex past which has been forgotten.

The paper is an attempt to discover the limits of comparison and to find out what is beyond the pale of comparison.

Pedro Fortes

Comparing Apples and Pears?

Three different models of collective action exist nowadays in legal orders across the world. The class action system operates predominantly through litigation, emphasis on private enforcement – lawyers as ‘entrepreneurs’ or ‘private attorney generals’ –, aggregation of multiple interests through opt-out schemes, and a regime of strong economic rewards and sanctions – based on contingency fees and punitive damages (Hensler et al, 2000). Originated in the U.S., class actions motivated legal reform in other jurisdictions – particularly in Commonwealth countries – and characteristics of this model were adopted in countries like Australia, Canada, and India, among others (Mulheron, 2004). Traits of the class action travelled mostly by way of diffusion rather than transplants of the entire discipline brought by U.S. Federal Rules of Civil Procedure (Hensler, Hodges, and Tulibacka, 2009). General resistance to class actions in Europe led to the establishment of a different model, predominantly based on regulation, emphasis on public enforcement, included together with courts of ADR, ODR, ombudsman in the civil justice analysis, and a regime of individual compensation (Hodges, Benöhr, and Creutzfeldt-Banda, 2012). The expression ‘collective redress’ was coined in an interesting case of legal Esperanto (Nelken, 2007) as reference to this model, which was constructed as a clear resistance to the influence of the U.S. – class actions were even labeled a ‘toxic cocktail’ by European authorities (Hodges, 2010). Endorsed by the E.U. and by European scholars, this model is emerging and its potential to influence legal reforms is still unclear – even inside Europe as advocates of difference fight against harmonization and convergence (Cotterrell, 2006; Cotterrell, 2006-A; Cotterrell, 2007; Legrand, 1996; Legrand 1997). Additionally, Brazil forged the Latin American model of Civic-Public Actions (Gidi, 2003; Grinover, 2009), characterized by a fierce institutional competition between litigation and regulation, private and public enforcement, aggregated and disaggregated mechanisms, and based on both compensation and regimes of economic incentives. This paper explores dynamics of institutional competition inside Brazil, by investigating how competing forces fight within this mixed model of collective action.

A cultural turn in socio-legal studies was followed by critiques of ‘legal culture’ as a fuzzy explanatory factor and academic discussion on how to define, disaggregate, and contextualize this concept (Friedman, 1975; Friedman, 1994; Blankenburg, 1994; Blankenburg, 1998; Cotterrell, 2006; Cotterrell, 2006-A; Cotterrell, 2007; Riles, 2006; Nelken, 2007). These debates originated very powerful analytical tools. For instance, Friedman suggested that structural factors were independent from cultural factors (Friedman, 1975) and Blankenburg correctly stated that these structural factors are constituted and constitute legal culture (Blankenburg, 1994). Adding economic insights to this reflection, Ogus proposed an analysis of ‘legal culture’ as infrastructure networks – which may reduce the costs of communication between those using the legal system and provide grounds for practicing lawyers to resist competition (Ogus, 2006). From an anthropological perspective, Riles highlights the role of networks in constituting law, focusing on focal points, linkages and multiplex relationships to analyze institutional politics, social movements, and emerging patterns (Riles, 2001). Additionally, grounded on Weber, Riles demands more comparative legal studies on rationalities and legal knowledge (Riles, 2006). These multiple concepts give much more texture to comparative legal studies.

Regarding methodology, the prevailing functional approach in comparative studies (Zweigert and Kötz, 1998; Vogenauer, 2006; Orücü and Nelken, 2007) is attenuated by the method of bricolage (Tushnet, 1999) and empirical investigation below the surface of blackletter law (Twining, 2009). I defend methodological eclecticism – or triangulation – and criticize the presumption of similarity. Comparative legal studies should be based on empirical evidence and collected data should reveal context. Analyzing legal transplant of collective action in Latin America, the Brazilian model was forged on diffusion (Twining, 2004; Twining, 2005; Twining, 2006; Twining, 2009) and adaptation

(Graziadei, 2006) – or as an ‘irritant’ (Teubner, 1998) – of foreign ideas from the U.S. and Europe. Interestingly, Brazilian scholars elaborated a Model Code of Collective Action for Latin America, which inspired legal reforms in the region. This model comprises a combination of different influences forming a hybrid or mixed system (Graziadei, 2006; Örucü, 2007), in which various legal actors compete for different sorts of rewards (reputational capital, social prestige, professional recognition). Ogus notes that ‘hybrid’ legal systems can benefit from this competition within the system.

I conducted 21 interviews to investigate dynamics between lawyers, prosecutors, public defenders, state assembly attorneys, NGO leaders, and other public officials, and map their interactions. In terms of functionalities, interviewees considered that regulation focuses on market coordination and that litigation focuses on dispute resolution. Nonetheless, many responded that efficient regulatory agencies could significantly reduce conflicts of a given regulated activity. Likewise, collective action interferes with market equilibrium, affecting competition, costs, tariffs, safety standards, adhesion contract clauses, corporate governance, organizational performance, etc. Therefore, relevant legal actors often use simultaneously judicial and regulatory channels as means of solving collective consumer wrongdoings. For instance, a public prosecutor may file a civic-public action suit against banks due to an abusive tariff and also send a petition to the Brazilian Central Bank in which he communicates that he took judicial action against this practice. In a particular real case, the Brazilian Central Bank edited a resolution prohibiting such a tariff even before a court had the opportunity to evaluate an injunction request. Regulating the market also involves solving collective problems and this case shows that regulators may preempt courts. On the other hand, litigation may also affect regulation directly. In another case, public prosecutors got injunctions against a few banks due to other illegal tariffs, imposing an unequal burden on these market players and affecting their competition. Subsequently, the Brazilian Central Bank prohibited this tariff for all listed financial institutions. These examples reveal that regulation and litigation may play equivalent roles, even if they are considered to exercise different functionalities – market coordination and dispute resolution.

This aspect is relevant for comparative analysis of different models of collective action: U.S. Class Actions are evidently based on litigation and the E.U. collective redress model is a system predominantly based on regulation. The Latin American model may be characterized as a hybrid model, in which institutional competition is a distinctive trait. There is strong competition between courts and regulatory agencies, but also between potential plaintiffs of collective actions. Initially, in practice, the Attorney General’s Office retained a monopolist position, since most civic-public actions were filed by public prosecutors. As successful cases became widely publicized in the media and increased the reputational capital of the Attorney General’s Office, other institutional actors decided to compete with the public prosecutors for political space. Public defenders developed strategies to guarantee their procedural standing for filing judicial collective actions – from building leading cases that could establish a positive precedent to institutional lobbying and political pressure for legal reforms recognizing standing for public defenders. After seventeen years, Federal Act n. 11,448/07 granted standing for public defenders to file consumer protection collective actions independently. Likewise, the Consumer Protection Committee from the State Assembly of Rio de Janeiro also adopted a strategic agenda for recognition of standing for judicial collective action suits – eventually recognized by the Brazilian Superior Tribunal of Justice. Furthermore, private associations established themselves as potential plaintiffs, selecting their judicial cases according to their institutional interests. In addition to these instances of institutional competition, there is also space for partnerships and dynamics of cooperative behavior among different actors. In some cases, prosecutors, public defenders, and state assembly attorney joined forces to negotiated settlement with companies. These institutional interactions suggest that predominance of regulation or

litigation does not come only from culture or politics, but also from moves made by different actors within socio-legal networks.

Attention to context and interactions is essential. A functional approach suffers from risks of reductionism – reducing regulation to a function of market coordination and litigation to dispute resolution. Additionally, legal bricolage implies borrowing legal materials at disposal not as an unlimited possibility of importing legal transplants, but rather as a practice that depends strongly on interactions of the *bricoleurs* and the context in which they decide to borrow foreign elements. Contingent forms of enforcement, incentives, rationality, and sanctions will calibrate a system. They depend not only on culture and politics, but also on institutional and contextual stakes of decision-makers. Therefore, the presumption of similarity adopted by mainstream comparative law should be substituted by methodological eclecticism – or triangulation. Comparative legal studies should be based on empirical evidence and collected data should reveal similarities and differences in each model. My research also revealed that institutional competition affects mobilization of resources and institutional moves to establish linkages with consumers and capture their social movements and aggregated demands. For instance, the Attorney General Office established itself as an Ombudsman – even if in the absence of formal law. Public defenders explore their large numbers of 320 individual cases per week to collect evidence of collective wrongdoings. State Assembly Attorneys are taken by bus to faraway suburbs to attend consumers and collect data on their consumer conflicts. NGOs have their own constituencies of affiliated supporters, who provide information of abusive practices as well. Institutions design their infrastructure to foster linkages with consumers and have competitive advantages in relation with their competitors. These institutions reduce risks of capture, are responsive to consumer demands, and advance a variety of adversarial legalism (Kagan, 2003; Kelemen, 2011). Even if this model suffers from imperfect enforcement and relies on the media for informal sanctions, law matters (McCallister, 2008).

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Regional Socio-Legal Comparison: Europe

Amaia Alvarez Berastegi

Social and Legal Definitions of Victim in Northern Ireland and the Basque Country

This study investigates the dynamics of law and society regarding the definition of victim in Northern Ireland and the Basque Country in order to explore the understudied concept of intra-democratic transition (transitions from conflict that take place within formal democratic states). The focus on the social and legal definitions of victim is significant due to the peculiarities these type of transitions face in terms of the interaction between law and society; in both case studies a democratic state and non-state actors became involved in a violent confrontation in which the use of legal and extra-legal methods undermined the rule of law.

The core existence of a political conflict is usually called into question in these contexts given the competing narratives on the past. One of the main features of intra-democratic transitions is, therefore, the tension between the narrative that argues that the violence had political roots and the one that is based on a terrorist origin. The mixture of narratives can also be noticed in the social and legal perspectives, where transitional and ordinary law, as well as a social meta-conflict (the conflict about what the conflict was about) coexist.

The definition of victim in Northern Ireland and the Basque Country is caught up in these conflicting narratives. International law, however, grants the same protection to victims regardless of the existence of an official conflict or not. The UN resolution regarding reparation for victims (2005) includes gross violations of international human rights law and serious violations of international humanitarian law. Yet, in both Northern Ireland and the Basque Country the definition of victim is a highly contested issue and, as a consequence of the absence of an agreement on how to deal with the past, both settings are implementing a piecemeal model of transitional justice.

Previous research on transitional justice has focused mainly on paradigmatic transitions (from dictatorial to democratic rule) and, indeed, comparative literature about Northern Ireland and the Basque Country has neglected the issue about victims. For this reason, this study focuses on two goals: (1) a better understanding of intra-democratic transitions, (2) exploring the specific features of the legal and social definition of victims in Northern Ireland and the Basque Country.

Qualitative comparative techniques were used to investigate the social and the legal definition of victim. Even though the distinction between the social and the legal is an artificial one, this study employed the division for analytical purposes. The exploration of the legal definition was conducted through the collection and thematic analysis of the legislation that defines victims of political violence (legislation from Northern Ireland, Spain and the Basque Autonomous Community) and two sets of the most significant judgements in the European Court of Human Rights regarding the definition of victim: cases related to Article 2 (right to life) in Northern Ireland and Article 3 (prohibition of torture) in the Basque Country. Given the complexities of defining society itself, the social definition of victim was addressed through the analysis of 35 qualitative interviews with representatives of victims' groups in both settings. Despite the huge limitations of the sample chosen, it was considered a relevant group to interview since it represents a section of civil society that is directly affected by the definition of victim and, indeed, mirrors the meta-conflict.

The analysis of the data collected illustrates how the meta-conflict is reflected in both law and 'society' (victims' groups). The current piecemeal legal definition is a consequence of the social division and the conflicting narratives (political conflict versus terrorism). However, this study also demonstrates that the definition of victim has been transformed over time, mainly because of the

initiatives carried out in the context of conflict transformation. From a legal perspective, legal initiatives on state violence have been implemented in the new context; coincidentally, some of these initiatives meet the main violations raised by the ECHR: in Northern Ireland, the Bloody Sunday inquiry was set up in 1998 in the context of the Good Friday Agreement (although it is not a case dealt with by the ECHR, it is related to the right to life, Article 2) and, similarly, the Basque government has taken the first steps to set up a commission to investigate torture of prisoners (Article 3) in the aftermath of ETA's announcement of the end of its armed campaign (2011). The lack of agreement about how to deal with the past has been an obstacle to establish an overarching mechanism that studies the patterns of violence from both state and non-state actors. Yet, the conflict transformation process created legal opportunities to address victims' needs.

From a social perspective, there is a general perception of a greater acceptance (less denial) of different types of victims today (victims of state and non-state actors). Peace-building initiatives that promoted conversations between victims, the element of time, civil society campaigns, research and journalistic work are some of the factors of the transformation. Apart from these, legal inquiries are also a significant factor for the change in the perception, something that illustrates the role of law in transforming social norms. Despite this acceptance, a hierarchy of victims on the basis of the division 'innocent-guilty' is still demanded by some victims' groups; mostly the groups that encompass victims of ETA and the IRA. Their position of framing the past into the terrorism narrative and not a political conflict is their reason they give to make the distinction between victims.

The final findings illustrate how the legal definition is more narrow than the social one, which focuses principally on the dead and the injured. In contrast, victims' associations generally refuse to employ a fixed definition of victim and include in their groups victims of different violations of human rights and suffering (trauma, etc.).

This research concludes that the main features regarding victimhood in Northern Ireland and the Basque Country are (1) the mixture of ordinary and transitional legal mechanisms, (2) the piecemeal model and the absence of an agreement to deal with the past, (3) the fact that conflict transformation created opportunities to investigate state violence and to address victims' needs, and (4) the social definition is more inclusive than the legal one in terms of variety of human rights violations.

Ania Zbyszewska

Undoing the European Social Model from Within? Comparing the Role of Central Eastern European Member States in the Re-making of the European Union Labour Law

The post-2008 economic crisis put significant pressure on European welfare states, with many European Union (EU) member states deregulating their national labour law frameworks and adopting austerity measures in response to policy directions, new fiscal rules, and other reforms undertaken at the supranational level since 2010 (Barnard 2012). According to some labour lawyers, while this latest deregulatory impetus is largely consistent with the neoliberal tendency that has driven the EU's single market-making project from its onset, the accession of post-communist states during the 2004 round of enlargement (the Eastern enlargement) had contributed to strengthening this policy direction (Supiot 2012, 34), leading to a 'seismic shift' in EU labour law (Moreau 2011).

These sentiments are not without merit, particularly in light of other recent developments in EU labour law (i.e. in relation to the posting of workers) and previous studies anticipating and warning that Eastern enlargement might lead to social dumping and a 'race to the bottom' due to disparities in social and legal protections institutionalized in old and new EU members (Vaughan-Whitehead 2003; Guillen and Palier 2004; Vaughan-Whitehead 2005). Yet, apart from contributions that have anticipated the indirect consequences of enlargement for labour law models in the 'older' EU members or examine the impact of Europe on the norms and political cultures within acceding states (Falkner et al. 2004; 2005; Leiber 2005, Leiber 2007, Sedelmeier 2012), very few studies in EU law or comparative politics have explicitly addressed whether those newer EU member states have also begun to play an 'active' role in the making of EU policy and law since their accessions, and what that role has been (see Szczerbiak 2012 or Copland 2012, for some exceptions).

This paper sets out to better understand whether the new member states indeed are changing EU social and employment policies 'from the inside' (Vaughn-Whitehead 2003, viii) in a way that undermines the European social model and national systems of labour law. Specifically, adopting a socio-legal, comparative approach, it examines the consultation and negotiations surrounding the unsuccessful revision of the EU Working Time Directive (2003-2010) to reflect on the roles of Poland and Slovenia as policy and legal actors.

The two countries have been selected to capture the diversity among the new EU members, representing the largest (Poland) and one of the smallest (Slovenia) 2004 accession countries that, while sharing a socialist past, also differ in terms of their post-transition political economy and industrial relations. Slovenia, like Poland, is a former socialist command economy. Unlike Poland, however, Slovenia is already a member of the Economic and Monetary Union (EMU) of the EU, having joined it in 2007 following a fairly quick recovery from a post-transition economic slump, a feat that took Poland a longer time. Slovenia's neo-corporatist industrial relations, coordinated market economy, and stable political culture are also very distinct from Poland's more liberal market orientation and higher level of political turnover and polarization, at least before 2008 (Kohl, Lecher, Platzer 2000; Fink-Hafner 2006; Crowley and Stanojević 2012).

The Working Time Directive is a key EU labour law instrument that sets minimum baseline standards for regulation of work hours in all member states. Prior to their EU entry, both Poland and Slovenia were required to bring their hours of work regulations in conformance with those set by the Directive, an instrument that neither country was able to influence as it was adopted in 1993, thus more than a decade prior to their membership. Despite the major differences in the Polish and Slovenian industrial relations systems, both countries transposed the Directive in a timely and largely correct manner. Their initial stance on the Directive's revision in the 2004-2010 period, was also one

that aligned with the UK to support the maintenance of the Directive's deregulatory impetus, as represented by the individual opt-out provision originally included at the UK's insistence (Copeland 2012). The negotiations eventually failed as the co-legislators, the Council and the European Parliament were not able to reach a political agreement.

To better understand Poland and Slovenia's positions in the negotiations surrounding the Working Time Directive and how those positions articulated with interests of other EU states, thereby affecting the negotiations, the paper anchors their comparison to an examination of the policy preferences and approaches to working-time regulation adopted in each country. To that effect, the paper sketches out the historical development and content of the Polish and Slovenian national working-time regimes vis-à-vis each other, as well as against the EU's own regime. Close attention is paid to the institutional and political-economic developments, as well as dominant discourses that have shaped national legal reforms and preferences in this policy area. The paper examines national and EU-level legislation, preparatory documents (proposals, communications, position papers, and impact assessment studies), as well as relevant court jurisprudence. It also examines transcripts of parliamentary hearings, public statements, and press coverage to get a better understanding of the broader political debates surrounding the Working Time Directive's negotiation and national implementation, as well as debates and political discourses surrounding the issue of working-time regulation more broadly.

The comparison of Poland and Slovenia's working-time regimes and their stance in the negotiations on the Working Time Directive is not only intended to facilitate understanding of whether, and how, these countries influenced the process of EU legal reform in the political sense, but also to test the explanatory utility of theories that have been used by socio-legal scholars to conceptualize multilevel dynamics and interactions between supranational and national labour law systems of the old EU members. For instance, British labour law scholar Brian Bercusson (1995), characterized this relationship as one that is characteristically "symbiotic" and, more recently, scholars have theorized this dynamic as "reflexive" in nature (Lo Faro 2000; Ashiagbor 2004; Sciarra, Davies, and Freedland 2004; Countouris 2007; Rogowski and Deakin 2011). Inherent in both conceptualizations is the idea that national and supranational norms are in the process of *co-development*, meaning that the rules and regulatory approaches adopted at the EU level are not abstractly drawn, but rather reflect and reinforce policy preferences and practices of the member states. To what extent are such conceptualizations also useful in relation to these newer member states, as well as in the context of the broader dynamics of policy making and legal reform in the enlarged EU?

Marc Hertogh and Marina Kurkchiyan

Towards a European Rule of Law? A Comparative Study of Collective Legal Consciousness in the UK, Poland and Bulgaria

The 'Rule of Law' discourse has become an inseparable part of contemporary debates about the European Union, both in relation to the accession of new member states and in relation to the EU's foreign policy (Nicolaidis & Kleinfeld 2012; Pech 2012; Hertogh 2014). Most legal debates and policy documents follow an 'anatomical approach' to the rule of law (Krygier 2007). First, their focus is on legal institutions and the norms and practices directly associated with them. Second, a list of such institutions and practices is presented as adding up to the rule of law. However, in this paper it will be argued that the rule of law is not simply a collection of institutional nuts and bolts or a set of legal principles. It is also a socio-legal ideal type (or a particular model of legal culture) that reflects, along with specific institutional and legal doctrines, the ideas and expectations that people have about law.

The present legal discourse is based on the idea that there is widespread convergence and normative consensus about the rule of law across all EU member states (see, e.g., European Commission 2014). In this paper, we will analyze this assumption from an empirical perspective, focusing on the UK, Poland and Bulgaria. Using a comparative research design, the paper draws its evidence from data collected by means of national surveys, focus group discussions and semi-structured interviews. Our aim is to describe the 'collective legal consciousness' in these member states, understood as a pattern of thinking among people about what law is, and how they relate to it in relation to legal traditions, current institutional arrangements, and the social relationships in the society. Earlier research has suggested that a public's legal ideas and expectations are not isolated values but instead are closely connected with their views about politics and their trust in the overall political system (Kurkchiyan 2011). In this paper, we will further explore this idea by analyzing people's perceptions of law and politics both in their home country and in relation to the EU.

The first part of our empirical analysis focuses on people's perceptions of domestic law and politics. Our data suggest that in the UK, people generally share fairly positive views about law. Moreover, their positive perception of law corresponds with an equally positive view about the political system. Although people criticize individual politicians and day to day politics, they still have faith in the parliamentary process. By contrast, people in Poland and Bulgaria are rather cynical about law. Their negative perception of law corresponds with an equally critical view of the political system in these countries. They feel powerless and they feel that politics only serves the interests of the elite. The second half of our analysis focuses on people's perceptions of EU law and politics. In the UK, people are quite skeptical about EU rules and regulations. These negative views about EU law are strongly related to equally critical views about the EU political process. By contrast, people in Poland and Bulgaria generally support EU rules and regulations. Moreover, they feel that the EU will improve the political process in their own country.

From this, we conclude that - unlike the legal assumption of convergence and consensus - people's collective legal consciousness in these three member states is still quite diverse and closely related to the functioning of the political system in these countries.

This paper makes three contributions to the present legal consciousness literature. First, this study demonstrates that a public's legal ideas and expectations ('legal consciousness') are not isolated values but instead are closely connected with their views about the political system and their sense of political empowerment ('political consciousness'). Second, unlike most previous studies that focus on legal consciousness as it exists in the mind of an individual person, this study further develops the

concept of a 'collective legal consciousness'. Third, this study suggests that there are different dimensions to people's legal consciousness. More in particular, it introduces the idea of 'inward' legal consciousness (aimed at domestic law) and 'outward' legal consciousness (aimed at EU law).

The paper will conclude with a discussion about the implications of these findings, both for future comparative socio-legal studies and for future EU policy on the rule of law.

Regional Socio-Legal Comparison: Asia

Petra Mahy

Like Chalk and Cheese? A Comparative Study of Informality in Work Arrangements in Australia and Indonesia

This paper reflects on the potential for an explicit, conceptually justified, comparative analysis of the results of an existing research project. In this project, data has been collected on the formal laws and informal norms and institutions that affect work arrangements in restaurants and other eateries in two very different cities: Melbourne, Australia and Yogyakarta, Indonesia.¹ This was a pilot project aimed at initial exploration of the topic and to discover if the planned semi-structured interview methodology would be successful in studying this particular phenomenon in two very different country contexts. The separate studies in the two cities have begun to produce a rich dataset about aspects of informality in work arrangements and its links with formal labour standards laws. Initial impressions of the data suggest that there are a number of overlaps and similarities in the findings, and therefore that the project's potential may be enhanced by comparatively analysing the two cases. This paper, in other words, presents a justification and defensible strategy for comparative analysis of the material collected in the two cities which recognises the limits of the types of conclusions that can be drawn.

In both Yogyakarta and Melbourne, workers in a range of restaurants and other eateries were interviewed about their personal backgrounds, the full scope of their work arrangements including recruitment, rewards, discipline and social security, knowledge of labour laws and standards and their motivations for preferring or accepting more formally or informally regulated workplaces. Two main questions drove this research: What informal norms and institutions play a role in regulating work arrangements? How do these informal modes of regulation interact with formal labour standards laws? The purpose of extending these questions comparatively will be primarily analytical rather than instrumental, although it is likely that the research will have implications for efforts to formalise informal work (such as the programs of the ILO). The value of a comparison between two such different cases must ultimately be found in the uncovering and explanation of at least some unexpected similarities.

Despite being near neighbours, the political, legal, economic and cultural differences between Australia and Indonesia are obvious; at a very general level Australia has a developed economy, a common law heritage, a small population with a small informal economy while Indonesia is a developing country, has a civil law heritage, the fourth largest population in the world and a very large informal economy. This paper argues that a functional approach (Zweigert and Kötz 1998) provides a first step to bridging the differences between the two contexts and overcoming issues of comparability. A functional approach requires the assumption of a similar social problem in each place. Here, it is argued that the need for the procurement and management of labour in restaurants is indeed common to the two places. From there, the solutions provided by the systems in each place is described and analysed. A functional approach is particularly suited to this kind of micro-level study and, very relevantly to this project, acknowledges that the solutions to particular problems may not necessarily be 'legal' but may be produced by informal norms and institutions.

A basic functional approach, however, is not sufficient on its own for this study. Others, too, have advocated a 'moderate functionalism', that is, using functionalism only as a first step in the

¹This project was funded by a University of Melbourne Interdisciplinary Seed Grant for the project titled 'How are Low Protection Workers Regulated? A Pilot Study in Australia and Indonesia' (Sean Cooney, Martina Boese, Peter Gahan, Petra Mahy, Richard Mitchell, Joo-Cheong Tham, and John Howe) (2013).

comparative process (Husa 2003; Valcke 2014). In focusing on the social problem, the functional approach strips away all of the systemic and cultural differences between the cases. To explain the differences and similarities in the findings in this project, a move beyond the basic functional approach is needed and certain contextual elements need to be reintroduced to the analysis. The advantage of starting with the problem and then selectively referring to context for explanatory purposes means that one does not drown as deeply in the differences between the two places. For example, the division between common law and civil law heritages has no apparent explanatory value in this study and can be safely ignored. Meanwhile, the more prominent role of religion in Indonesia compared to in Australia appears to account for a number of the differences observed between the work arrangements in the two places. It is, however, likely that explanations of the links between the micro-level findings and the wider context can only be speculative as causality cannot be proven (Cotterrell 2010). For instance, it may be that similar norms in the two places have different legal, societal or historical causes. Hence, any conclusions made at this point will need to be carefully qualified as to their speculative nature.

Another danger with the functional comparative method, one that particularly arises in this type of project, is it could incorrectly assume that both systems have similar conceptions of law and non-law and that they both share positivist ideas about the links between laws/norms and outcomes (Samuel 2014:80). In this project a causal leap needs to be made in each of the two cases between the work arrangements observed and the assumption that it is a particular type of regulation that causes it. In some instances this is easier to infer, such as where the detail of a particular law was exactly reproduced in reality or when the subject matter of a practice was completely missing from the formal law and hence it could be inferred that it can only be related to an informal norm. To render this process of inference comparable across the two cases is even more problematic. It may be that combined 'outer' and 'inner' understandings of the social problem (Samuel 2014:106) will assist with overcoming this issue of comparability. The data collected in this project can support analysis of an 'inner' understanding of how workers view their circumstances and in particular how they view any links between their own work arrangements and formal labour laws and other informal norms, and indeed if and how they make a distinction between law and non-law. Further analysis of this material will be needed in order to determine how the two sets of data may be bridged on this point.

Beyond the requirement to work within the limits of comparability, there is a further need to avoid legal ethnocentrism and to ensure equal 'discursive dignity' (Baxi 2003) between the two cases of Australia and Indonesia. For Baxi, the danger lies in attributing too much significance to the colonial moment and engaging in progress narratives when describing developing/post-colonial countries' legal systems. Such issues can easily arise when engaging in discussion of the informal regulation of labour and its links to capitalist development. It appears that an extended/moderate functional approach is useful in this respect because equal legitimacy must be given to the solutions in the two different systems, and the conclusions will need to fall short of making definitive causal explanations and in doing so necessarily avoid value-laden progress narratives. Beyond this, a commitment to equal 'discursive dignity' and acknowledgement of personal standpoint of the researcher will still need to be declared in the comparative work.

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Role and limit of sociology of law in comparative law studies in the case of China

The sociological study of law aims to discover causal relations between law and society. The approach often serves to provide useful answers when comparative lawyers feel handicapped in conducting positive comparisons of different legal systems. Such approach has been often used in comparative law studies when foreign legal systems with vastly different political, economic and social context are involved. This can be observed in the case of Chinese law studies with a comparative perspective, in particular in the study of Chinese laws supporting its market economy which have shown increasingly similarity with international legal norms. However, in reality such comparative study has often led to the identification of same non-law factors repetitively and provokes the question of what is next?

The paper targets its research on scholarly publications in the form of journal articles in English on corporate governance and competition regulation and their relationships with State Owned Enterprises in China from 2001 to 2011. The time frame was set on the ground that China acceded the WTO in 2001 and declared to have completed a socialist legal system with Chinese characteristics in 2011.¹ During the ten years, China has adopted, amended and repealed a large number of legislations, which rationalized and filled in gaps of its legal system.

In the context of economic globalization, legal frameworks on corporate governance and competition regulation are de facto functionally converging with each other.² China is no exception to this process. Corporate governance and competition regulation are, on the one hand, two fields where China actively referred to international legal norms for inspiration when making the laws; on the other hand, the laws' regulation against state owned enterprises have remained detached from international practice and often been regarded as essential parts of Chinese characteristics.

The paper used key word search on Chinese law and SOEs within the west law and Hein on-line databases in accordance with the time frame set above. The search in west law generates 109 scholarly papers and that in Hein on line (within the category of core US journal) generates 127 scholarly papers. The 229 papers have been further scrutinized based on the following criteria: relevance to corporate governance in China, to competition regulation in China, with a comparative angle and with contextual analysis elements. As a result, 31 papers satisfied the criteria set out above.

The 31 papers have, at various levels, undertaken contextual analysis and used non law factors for analysis. One or multiple non law factors have been identified and utilized in the analysis. In general, these identified non-law factors can be summarized into the following categories:

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² White Paper on the completion of Socialist Legal System with Chinese Characteristics available at http://www.china.org.cn/government/whitepaper/2011-10/27/content_23738846.htm visited 1 Dec. 2014.

³ R La Porta et al, 'Investor Protection and Corporate Governance' *Journal of Financial Economics* 2000, David Gerber *Global Competition: Law Markets and Competition*, OUP 2010.

Category	Non law factors (with appearing times in bracket)
Legal culture/ tradition	Confucianism (3), Guanxi(4), Legal tradition (1) legal awareness (2)
Institutional embeddedness of legal system	Legal policentricity (2) State intervention (3) Institutional obstacle(2) Path dependence (2)
Legal Transplant	Sinonization (2) legal transplant (1)
Ideology	CCP (1) Maoism (1)

In terms of legal culture, scholarly work seems to mainly refer to the concept of Guanxi to explain the difference of corporate and business environment in China.⁴ Scholarly work however advocates going back to Confucianism in order for China to develop its own conceptual basis for legal development.⁵

In terms of institutional embeddedness, legal policentricity where no single authority has the power, capacity or wish to be the final decision maker in the making and enforcement of law, is used to explain the lack of effective enforcement of law in practice.⁶ State intervention on legal enforcement, in particular its instrumental use of law to achieve non law goals , e.g. maintaining control of large SOEs are used to explain why law converging with international norms diverge from the latter in enforcement. ⁷ In terms of legal transplant, China's strategy in the process has been conceptualized as sinonization, where international legal norms are instrumentally adjusted to suit China's needs. ⁸ Scholarly work have also referred to China's communist ideology and Maoism and the CCP's influence in their efforts to analyse Chinese law in comparison studies. However, the number of times ideological factors are referred seems to be less than that of other non-law factors.

Comparative legal study involving Chinese law has often attributed the difference or divergence resulting from the comparison, to the so-called Chinese characteristics. However, little effort has been made to understand, explain and delineate the concept of Chinese characteristics per se. The paper argues that the Chinese characteristics are built upon the coexistence and interaction of China's legal culture, institutional embeddedness and legal transplant strategy. The paper then moves on to evaluate to what extent the Chinese characteristics as defined facilitates better understanding of comparative legal studies on Chinese law and what are the limits faced by researchers during the comparison.

⁴ Y.R.K. Reddy, The ethics of corporate governance: an Asian perspective, *Int. J.L.M.* 2009, 51(1), 17-26; Lin Zhang, Corporate governance of Chinese state-controlled listed companies: a revisit through the lens of E.B.O.R. 2014, 15(1), 107-139.

⁵ Angus Young, Conceptualising a Chinese corporate governance framework: tensions between tradition, ideologies and modernity, *I.C.C.L.R.* 2009, 20(7), 235-244.

⁶ Donald Clarke, How Do We Know When an Enterprise Exists - Unanswerable Questions and Legal Polycentricity in China, *Columbia Journal of Asian Law*, 19 *Colum. J. Asian L.* 50 (2005-2006).

⁷ Yu Guanghua, Using Western Law to Improve China's State-Owned Enterprises: Of Takeovers and Securities Fraud, *Valparaiso University Law Review*, 39 *Val. U. L. Rev.* 339 (2004-2005).

⁸ S.H. Goo and Fidy Xiangxing Hong, The curious model of internal monitoring mechanisms of listed corporations in China: the sinonisation process, *European Business Organization Law Review*, 2011 12(3), 469-507.

Kerstin Steiner

Exploring Islamic Law in the Southeast Asian context: a case for comparative socio-legal studies

Historically comparative law at the macro-level has been focusing on comparing legal systems of different nations. Scholarly work by Rene David¹ or Zweigert and Kötz² have established classifications or categorisations of legal systems into legal families or 'grandes systemes'.

These approaches of comparative law have been criticised as promoting a Eurocentric assumption of law which undermines comparative analyses of non-Western legal systems.³ At the heart of this criticism is that if cultural aspects are taken into account it is European culture that 'while offered as universal, is distinctively its own [references omitted]'.⁴ Esin Örucü has suggested going beyond studies of America and Western Europe – and exploring the 'extraordinary'. The study of non-Western legal systems should therefore not remain the sole domain of anthropologists, regionalists, or cultural studies proponents alone.⁵ Pierre Legrand in a similar vein criticised the neglect of social, political, economic, and other external factors has being the major impediment to successful comparative legal analysis.⁶ This criticism has opened up a more interdisciplinary methodological approach towards comparative law.

One geographical area study where a more contextualised approach to comparative law is essential is Southeast Asia. The Asian region has been described as a 'comparative law paradise'⁷ comprising legal systems that originated in civil or common law legal traditions which in due course have adapted to local circumstances. This means that historically part of their legal system originated from these traditional legal families at some point but developed according to local circumstances. The adaptation process necessitates an engagement with social, political, economic and moreover religious factors. The localisation of these laws quite frequently resulted in the creation of a plural legal system, combining the historically imported Western-style law with forms of customary, religious or personal law.⁸

¹ Rene David (1985), *Major Legal Systems of the World Today*, translated by John Brierly, 3d ed. London: Stevens.

² Konrad Zweigert and Hein Kötz (1998), *Introduction to Comparative Law*. 3rd rev. ed. Oxford, Great Britain; New York, USA: Clarendon Press; Oxford University Press.

³ William Twining (2007), 'Globalization and Comparative Law', in David Nelken and Esin Örucü, *Comparative Law: A Handbook*, Portland Oregon: Hart Publisher, 69-89; Werner F. Menski (2006), *Comparative Law in a Global Context*, Cambridge University Press, Cambridge; Upendra Baxi (2003) 'The Colonialist Heritage' in Pierre Legrand and Roderick Mundy (eds) *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 46-75; Andrew Harding (2001) 'Comparative Law and Legal Transplantation in South East Asia' in David Nelken and Johannes Feest (eds) *Adapting Legal Cultures*, Portland Oregon: Hart Publishing, 199-221.

⁴ Kenneth B. Nunn (1997), 'Law as a Eurocentric Enterprise' 15 *Law and Inequality: A Journal of Theory and Practice*, 323-70.

⁶ Pierre Legrand, (1996) 'How to Compare Now' 16 *Legal Studies* 235–8.

⁸ Khilnani, Sunil, Vikram Raghavan and Arun K. Thiruvengadam (2013) *Comparative Constitutionalism in South Asia*, Oxford: Oxford University Press.

In the Southeast Asian countries Singapore, Malaysia, Brunei and Indonesia a combination of common law or civil law traditions with Islam is prevalent. This mix of different legal traditions challenges preconceptions in comparative legal studies and in Islamic legal studies.

For instance, Singapore, Malaysia and Brunei share a common colonial history and adhere to the same *maddhab* (classic Islamic school of legal thought), namely the Shafi'i school of legal thought. During the colonial period, the law applicable to all Muslims in what are now Malaysia, Singapore and Brunei was seen by the British colonial administration as a separate body of law. A hybrid mixture of legal doctrine developed through a long and complex process of regulatory intervention and judicial interpretation that Hooker, with a nod to British Indian 'Anglo-Mohammedan Law', has called the 'Anglo-Malay maddhab'.⁹

Using a socio-legal approach an investigation into the administration of Islamic law under the contemporary systems opens new possibilities of understanding contemporary Islamic law and the different routes its development took.

After achieving independence in the decades following World War II, nationalist leaders of Southeast Asian countries with Muslim populations naturally treated their Muslim populations in ways very different to their former colonial overlords. In Malaysia and Brunei, Muslims (who formed the majority) were now the rulers as well as the ruled. In Singapore, they were an important minority. Each government however, been concerned to influence the trajectory, content and style of the legal traditions of their Muslim citizens to match wider policy objectives and has usually been effective in this.

This is evident in three key points: (1) at the outset is the question as to how the newly independent states are negotiating the relationship between the state, law and Islam; (2) closely linked to this is the relationship between the different legal systems, that is how arguably imaginary borders between these legal systems are delineated; and (3) whether the Islamic courts are standing in the common law tradition, the Islamic legal tradition or are something new altogether.

One point of divergence is the position of Islam within the state and the constitutional framework. The Republic of Singapore maintained a model for the administration of law for Muslims built upon the colonial experience. This meant that Islam was to be accommodated within a secular system,¹⁰ restricting religion to the personal sphere and consequently limiting Islamic law to private legal matters. It also meant subjugating Islam to the interests of the ruling party.

This is in contrast to Malaysia and Brunei, where Islam is part of the political, ideological, and constitutional framework.¹¹ In the case of Malaysia, pursuant to article 3 of the Constitution of Malaysia, Islam is the official religion of the State and thus has a privileged position compared to any other religion. The result of this is a politically and socially hotly contested debate over whether or

⁹ As cited in Tim Lindsey and Kerstin Steiner (2012), *Islam, Law and the State in Singapore*, London: IB Tauris, 15.

¹⁰ For details on the Singaporean approach to secularism and the Muslim minority, see Kerstin Steiner (2011), 'Religion and Politics in Singapore – Matters of National Identity and Security? A Case Study of the Muslim Minority in a Secular State', 58 *Osaka University Law Review*, 107–34, 107.

¹¹ See Tim Lindsey and Kerstin Steiner (2012), *Islam, Law and the State in Malaysia and Brunei* Lindsey and Kerstin Steiner (2012), *Islam, Law and the State in Singapore*, London: IB Tauris.

not Malaysia is an Islamic state. ¹²

For Brunei, Islam and state authority are even more intertwined. Brunei Darussalam is an anachronism as it is one of the few remaining absolute monarchies,¹³ the only one in East Asia, and one of the few states that styles itself 'Islamic'. ¹⁴ The authority of the sultan is enshrined in the Bruneian state ideology of 'Melayu Islam Beraja' (MIB, 'Malay Muslim Monarchy') which is founded on the indivisibility of Malayness, the religion of Islam and the right to rule. MIB conflates sovereignty and political legitimacy with the Sultanate, Islam and Malay identity. It has allowed the ruling dynasty to co-opt both the legal system and Islamic religious authority to legitimise its own absolute authority. The ideas underpinning MIB derive, in many respects, from the colonial period, when pre-colonial notions of the authority of the Crown were relied upon as a tool of British rule. Yet, the role and positioning of Islam has changed. Islam and Islamic law have taken centre stage while beforehand they played a supporting role.

The role given to Islam in the overall state framework is also evident in the relationship between the different legal systems, that is how common law and Islamic law interact in areas of overlapping interest. This creates situation in which two or more legal system interact within the jurisdiction of a single state. This legal pluralism is dealt with very different in each of these countries. The delineation of jurisdiction between the civil and the Syariah courts is a heavily contested area in Malaysia where cases of conversion as well interfaith divorce and unilateral conversion of children

¹² Globally, there is no theoretical consensus as to what constitutes an Islamic state. For an overview of the different possibilities of defining Islamic state in the context of Malaysia, see Andrew Harding (2002), 'The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia', 6 *Singapore Journal of International and Comparative Law*, 154–80.

Tunku Abdul Rahman, who later became the first prime minister, commented that 'this country is not an Islamic state as it is generally understood [...] Islam shall be the official religion of the state' and that 'unless we are prepared to drown every non-Malay, we can never think of an Islamic Administration'. See Ahmad Ibrahim (1985), 'The Position of Islam in the Constitution of Malaysia' in Ibrahim, Siddique and Hussain (eds.), *Readings on Islam*, Singapore: ISEAS, 213–20, 213, and Fred R. von der Mehden, (1963), 'Religion and Politics in Malaysia', 3(12) *Asian Survey*, 609–15, 673. In 2001, the Prime Minister at the time, Dr Mahathir Mohamad declared that Malaysia should be regarded as an Islamic state. In 2007, this sentiment was partially re-asserted by Deputy Prime Minister Najib Razak, who declared that Malaysia was never a secular state, see 'Malaysia Not Secular State, Says Najib', *Betnama*, 17 July 2007.

¹³ The few states still ruled by absolute monarchies, where the ruler claims full power as both head of state and head of government, include Vatican City, Oman, Saudi Arabia, Qatar and Swaziland.

¹⁴ Funston, John (2006), 'Brunei' in Greg Fealy and Virginia Hooker (ed), *Voices of Islam in Southeast Asia – A Contemporary Sourcebook*, Singapore: Institute of Southeast Asian Studies, 19-22.

by one parent have received significant public, academic ¹⁵ and political ¹⁶ attention in Malaysia. These cases go to the heart of the question of what type of legal and political system, Islamic or non-religious, prevails in Malaysia or is even desired and by whom. Yet this delineation of power between the different legal systems receive arguably no attention in either Brunei or Singapore. In Brunei, this is because Islam is wholly incorporated into the political and legal system while in Singapore the secular system prevails. Conflict of laws as such appear to be non-existent as the hierarchy between the different legal systems is clearly defined.

Even the development of Islamic law in the different court systems is determined by these unique national factors. The Syariah courts in all three countries are navigating the difficult question of whether they are principally located in a British common law tradition or an Islamic legal tradition; and whether they are a common law courts or something else altogether. ¹⁷ The frequency in which the courts are using classical Islamic legal sources and to which purpose varies greatly among the different jurisdictions.

Therefore while all these three countries have a shared common law heritage, the ways in which Islamic law interacted with this heritage after post independence can only be understood if the different social and political developments are taken into context.

¹⁵ Shuaib, Farid S. (2007), 'Parallel Court Systems and Conversion of One Spouse to Islam: A Case Commentary on *Saravanan Thangathoray v Subashini Rajasingam and Another Appeal*' *The Law Review* 246; Whiting, Amanda (2008), 'Desecularising Malaysian Law?' in Sarah Biddulph and Penelope Nicholson (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Boston: Martinus Nijhoff Publishers, 223-67.

¹⁶ For instance, the Committee on the Elimination of Discrimination against Women regarding Malaysia's country report commented that it 'is concerned about the existence of the dual legal system of civil law and multiple versions of Syariah law, which results in continuing discrimination against women, particularly in the field of marriage and family relations'. Committee on the Elimination of Discrimination against Women, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia' (CEDAW/C/MYS/CO/2, 2006: 13)

¹⁷ See Kerstin Steiner (forthcoming), 'Comparative Law in the Syariah Courts: A Case Study of Singapore, Malaysia, and Brunei' in Duncan Fairgrieve ed., *Comparative Law before the Courts*, Oxford: Oxford University Press.

Eleanor Pritchard

Nation-building through comparative thinking about Albanian law

'It's strange', mused one of my Kosovar informants, 'we [Albanians] have our own law (drejtësi), we have the oldest constitution in the world, we recognised women's rights when others were still stoning them and, in Yugoslavia, all we wanted was equal [legal] status with the other republics. But Serbia, which had all the 'laws', was mistreating us, abusing our human rights, and breaking international standards'

As this example illustrates, in Kosovo, contemporary popular discussions about the [Albanian or Kosovar] nation, are often littered with comparative references to 'law'. Ideas about law, Albanian and 'other', have played significant parts in the development of a sense of 'Albanian-ness' since the late-nineteenth century, and remain central to the ongoing construction of the nation. In this paper, I examine how Albanians have used comparative thinking about Albanian law for nation-building ends, with particular reference to comparative thinking in, and about, the *Kanun* of Lekë Dukagjin, an early-twentieth century legal code rooted in northern-Albanian customary practices. Through this, we gain a more nuanced understanding of the context of the *Kanun's* production, and its continued relevance today.

Comparative thinking in the text of the Kanun

The *Kanun* of Lekë Dukagjin was prepared by Fr Shtjefën Gjeçov, a nation-building Albanian Franciscan priest, and published serially between 1913 and 24. It is a 135-page legal code, with themed sections and numbered provisions within each section, which contains rules, descriptions, and definitions pertaining to the lives of Catholic northern-Albanians living in the mountainous Mirdita region, and is written in that region's dialect. The text is laced with around 100 notes which refer to legal texts (including Justinian's Institutes, the Laws of Manu, and the Pentateuch), and non-legal texts which address ethics and [social norms]. In the breadth of his textual comparisons, it looks as though not only was Gjeçov seeking evidence in other times and societies of practices and principles similar to those of the Albanians, but also thinking about the nature of law and legal authority. Gjeçov drew no conclusions from his references, leaving the reader to determine what he intended them to indicate, but the comparative thinking in the *Kanun* encourages the reader to make inferences about the contents of the text and the people from whom it came. It suggests a people with legal practices and a law code which stand comparison with the world's great examples.

Comparative contemporaneous thinking about the text of the Kanun

Fr. Gjergj Fishta, one of Gjeçov's closest colleagues and fellow nation-builder, wrote the introduction to the single-volume edition of the text, published in 1933. Fishta starts from the position that society and social institutions do, and should, develop as an evolutionary model, subject to internal and external influences, and argues that the *Kanun* (as both practices and Gjeçov's text) should be understood in that context. Using 'law' (in a broad sense) as his point of reference, this evolutionary model leads him to explicit comparative thinking about the current position and condition of the Albanian people, relative to both historical and contemporary societies.

Fishta is also concerned to demonstrate the actual and potential links between 'nation' (which he seems to take as adequately demonstrated by Gjeçov's text) and 'state'. As he wrote his Foreword, the Albanian state was in its turbulent infancy, characterised by a high turn-over of governments, lack of functional cohesion, and tension between pre-existing tribal power structures and newly minted state institutions and hierarchies. With reference to the ideals of the German Historical

School and, more broadly, a Germanic-influenced Romantic view of 'nation', Fishta claimed Albanian 'customary law' to be an expression of the spirit and values of Albanian people and argued that the legitimacy of a modern nation-state legal system needed to be rooted in, and reflect, the customary practices of its people.

From Fishta's comparative thinking, we get a sense that he understood Gjeçov's *Kanun* served multiple ideological and pragmatic purposes. It was ideological, in that it expressed ideas of Albanian morality and – at least superficially – synthesised diverse ideals and influences from Albanian tribe and church, and other historical legal texts and systems. On the other hand, it was pragmatic, in that it recorded 'authentic' Albanian practices and could have been used as a 'legal' bridge between pre-state Albanian society, and the newly-established state: a bridge towards being a 'civilised' nation and state.

Contemporary Kosovar comparative thinking about the Kanun as practices and text

As Yugoslavia broke up in the 1990s, ideas of an Albanian legal tradition re-emerged in Kosovo, in the *Pajtimi i Gjaqeve*, which drew on traditional values and customary practices to effect intra-Albanian conciliations. In talking about the *Pajtimi*, and also about their experiences of modern state law, informants often used comparative references to the *Kanun* to carry the 'deep' meaning of their story, and to make sure it was being understood as intended. Such references were often elliptical and fleeting, but attached the surface story to deeper nation-building themes, and depicted contemporary events as continuations of historical patterns of 'national' behaviour.

Academic lawyers and 'Albanologists' tended to focus on Gjeçov's text rather than what is happening on the ground in Kosovo. Their comparative thinking focussed on looking for points of correlation with modern legal texts or systems, and they tended retrospectively to label phenomena in the *Kanun* with legal terms of art. This has led to comparative papers on topics such as the *Kanun* as a very early constitution, or the liberal treatment of married women accused of adultery relative to the treatment of a woman accused of similar actions under the *şeriat*.

Older informants compared the *Kanun* (as practices) to the operation of state law in both socialist Yugoslavia and independent Kosovo. They stressed the unwritten, historical and timeless nature of the *Kanun*, and talked about it in the sense of 'what we did' rather than of Gjeçov's text. There was a fluidity in their terminology but, broadly, they drew a distinction between '*Kanun*', which they used to stand for a general sense of customary practices which carried legal authority, and *adet* or *zakonet* [customs], which did not. They talked about the *Kanun* as a body of customs which belonged to Albanians, applied only to Albanians, and was a key part of what made Albanians distinct from neighbouring peoples such as 'Serbs' or 'Turks'.

Middle-aged informants talked about the *Kanun* as an historical phenomenon, which had applied in Kosovo, but did not use the term in relation to their own experiences. They described what had existed alongside Yugoslav state law as *adet*, which they used in the sense of 'customary rules', and *zakonet*, the practices which underpinned or flowed from these rules. There was a range of perspectives on the place of *adet* and *zakonet* in today's Kosovo, and the relationship between *adet*, *zakonet* and state law. Most respondents believed *adet* and *zakonet* should be considered both a source of law and a real-world factor conditioning its implementation; this links closely to Fishta's position on the *Kanun*.

My informants' comparative thinking about the *Kanun* set their experiences and understandings of the past 25 years in the context of national history. It showed and reinforced the continuity they saw between contemporary and historical Kosovar Albanian nation-building endeavours, and emphasised the ongoing nature of the nation-building project.

Socio-Legal Comparison: United Kingdom

Sophie Boyron

Comparative law, socio-legal methodology and constitutional change in the United Kingdom: A difficult Mix?

We may be witnessing some significant evolutions of the British constitution this year: not only has the Supreme Court announced that it would rely on the common law to enforce basic rights and freedoms (see the decisions in *Osborn*, *HS2* etc) but the Political and Constitutional Reform Committee of the House of Commons is leading an in-depth inquiry into the codification of the British constitution as a way of celebrating 800 years of Magna Carta. What is less well known is that both judges and Members of Parliament have relied at some point on comparative law to support their reasoning and decision-making process that lead to the change in the case law and the proposals for constitutional reform.

Indeed, the recent decisions of the Supreme Court can only be understood in light of the extra-judicial speeches made by Lord Reid, Lord Sumption, Lord Neuberger and Laws LJ that are replete with debatable references to comparative law. Similarly, the PCRC of the House of Commons called upon considerable comparative expertise in order to guide its reflection and make its proposals. However, the PCRC was careful in its use of the comparative law.

For a comparative public lawyer, this contrasting reliance on comparative law is not only fascinating but incredibly rich in potential lesson learning with regard to the interactions between comparative law, socio-legal methodology and constitutional change. Consequently, the opportunity should not be missed to use these examples of constitutional change to enhance our understanding of comparative law, theory and methodology. Indeed, the relationship between comparative law, socio-legal methodology and constitutional change would benefit greatly from being clarified and theorized. Constitutional change is often a difficult topic for public lawyers: one rarely makes proposals for constitutional reform when the constitutional system works perfectly or when it fulfills the demands of the various political actors (institutional or otherwise). While it is common to resort to some form of comparative law in a process of constitutional reform, the practice can be controversial and its real efficiency difficult to judge. As a result, this paper hopes to draw from the analyses of the evolution identified above to begin theorizing on the type and use of comparative law in the context of constitutional change. Not only would this help create better analytical tools to study 'the comparative' in experiences of constitutional change, but a reflection on these issues of comparative methodology may help push back the limits that many believe are inherent to a comparative approach in the context of constitutional change.

Orla Drummond

Comparatively examining socio-legal developments in post devolved societies: A child's rights perspective.

The political and legislative autonomy bestowed upon devolved regions in the late 1990's shifted legal development from the centrality of Westminster to the now self-governing regions of Scotland, Wales and Northern Ireland. This new constitutional structure incorporated the notion of enabling differing legal approaches to accommodate specific regional issues. This new environment provides numerous opportunities for comparative examination of nascent, legal developments in order to generate insights into the contextual nature of unfolding and flourishing legal initiatives, highlighting best practice and aiding the dissemination of learning.

One example, which highlights the legal divergence between regions facilitated by the devolution project, is the advancement of a child's rights perspective in post devolution societies. Wales, in particular, has initiated a number of innovative measures and, since the devolution settlement and establishment of the National Assembly of Wales in 1999, has generated an abundance of policy and legislative developments relating to children and young people. From the outset, the Welsh administration acknowledged the influence of the United Nations Convention on the Rights of the Child in providing a foundation of principle for dealings with children in Wales.¹ A legislative development of note was the enactment of the Rights of Children's and Young Persons (Wales) Measure 2012. Here, the Welsh Assembly voted unanimously to incorporate the UNCRC into domestic law, imposing a legal duty on Welsh Ministers to have due regard to the rights and obligations generated by the Convention and its Optional Protocols. This due regard applies to any proposed new legislation, new policies or a review of, or change, to any existing policy.

Another pioneering innovation in the development of children's rights in Wales can be witnessed in the enactment of the Education (Wales) Measure 2009, which granted children the full right to appeal to the Special Educational Needs Tribunal. The Welsh Government stated that the Measure's foundation was firmly built upon the UNCRC, providing children with a parity of those rights possessed by their parents to make Special Educational Needs appeals and claims of disability discrimination. Subsequent Regulations placed a further duty on Local Authorities to inform children of these new rights and provide access to independent advocacy services and, in addition, provided for an initial legislative pilot and evaluation phase to learn from best practice. The right of appeal extends from the pilot areas to apply to the whole country in 2015. Comparatively, Northern Ireland has witnessed a much more conservative approach not only to child rights but to social policy development in general. Recent research highlights limited development in early years and childcare provision, similar poor performance in relation to support for long term care, and a failure to reach consensus on high profile issues such as academic selection for secondary schools.² Northern Ireland also retains the traditional notion of exclusive parental right to appeal to Special Educational Needs Tribunals.

It is essential to appreciate that Northern Ireland's experience of devolution has been a singular one and is significantly different to the experience of Wales. Devolution ascended from the accord of a peace process following a prolonged period of political conflict, instability and violence.

¹ National Assembly for Wales, *Children and Young People: A Framework for Partnership* (November 2000) Section 4, p 3

² A.M. Gray and D. Birrell, 'Coalition Government in Northern Ireland: Social Policy and the Lowest Common Denominator Thesis' (2011) 11(1) *Social Policy and Society* 15-25 p16

Subsequently, Northern Ireland's engagement with devolution has been disjointed, with intense political wrangling and extended periods of stagnation, created in part by entrenched constitutional debate. This has generated an environment hostile to the development of social policy with academic recognition that a 'lowest common denominator' approach operates in a cautious and conservative atmosphere, which can be traced to historical deference to constitutional issues over social and economic concerns.³

The early Welsh experience of devolution was initially confined by restrictions on legislative autonomy. Rhodri Morgan, the First Minister of Wales from 2000-2009, acknowledged that due to these restrictions the devolved National Assembly was essentially a social policy parliament, which at that time did possess powers in the field of children's policy and this, therefore, was one of the key areas which allowed policy making to take place with considerable coherence and few limitations. In addition, the burgeoning of social policy reform in Wales has been theoretically attributed to the gender balance of the Welsh Assembly, the rejection of neo-liberal consumerism and the advanced notion of citizenship in Wales.⁴

The comparative socio-legal tracking of the trajectory of children's rights refracted through the prism of devolution in both Northern Ireland and Wales enables us to sharpen our awareness and develops our understanding of the legal, social and cultural environments in which we live. As Bell asserts law, and in particular administrative law, is closely bound to national institutions and traditions, as well as national constitutional values and ways of operating. Therefore it is essential to take account of the institutional context.⁵ The comparative examination of legal development within the above social contexts, aids in part our ability to identify why legislative advancement of a child's right agenda has flourished in one jurisdiction and floundered in another. The demarcation of the different experiences of the devolution project, in particular the Welsh battle for legal autonomy and the Northern Irish transition from conflict, goes some way to lay the foundation for explaining the differing approaches to the development and implementation of a child's right agenda. Whilst this has indeed resulted in divergent socio-legal outcomes, the identification of these differences provides us with space for discussion on key issues and best practice. From this vantage point we can acknowledge institutional limitations or advancements and create an environment for challenging legal deficits and championing successes.

³ E. McLaughlin, 'Governance and Social Policy in Northern Ireland (1999-2004):the devolution years and postscript' in M. Powell, L. Bauld and K. Clarke, *Social Policy Review* 17 (The Policy Press 2005) p 107-124

⁴ Speech by the Rt. Hon. Rhodri Morgan, First Minister of Wales 2000-2009, delivered at NICCY's Inaugural Annual Children's Rights Event (Belfast, 20 November 2012)
<http://www.niccy.org/uploaded_docs/2012/NICCY%20Event%2012/Rhodri%20Morgan%20NICCY%20Childrens%20Rights%20Event%20Speech%2020%20Nov%202012.pdf> accessed October 2014

⁵ J. Bell, 'Comparative International Law' in M. Reimann and R. Zimmerman, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) Chapter 39 p 1260

Roger Ballard

Law in Plural Britain: from Status to Contract – and the need to accommodate Status once again?

Two centuries ago, the European powers – of which Britain was the most salient – began to acquire a series of territorial possessions of a distinctive kind: those in which the indigenous populations was far too numerous, and above all far too sophisticated in socio-cultural cultural terms for the incoming colonists to be able dismiss their new-found subjects as mere savages. Faced with the task of re-establishing law and order in which indigenous forms were almost as sophisticated, and certainly more ancient than their own, colonial administrators found themselves facing a major conundrum: how should they set about administering a territory who ordered both their established modes of governance, as well as the customary premises and practices on the basis of which they ordered their interpersonal interactions differed radically from the own?

Empire, Jurisprudence and the impact of the premises of the European Enlightenment

Prior to the beginning of the nineteenth century, European adventurers had for the most part been able to dodge these issues in two distinct ways. On the one hand they could deploy a strategy of colonisation by force by means of a mixture of enslavement and extermination, further conveniently reinforced by the indigenes lack of resistance to the European diseases with the settlers brought with them. In these circumstances all forms of indigenous jurisprudence, no matter how sophisticated, to readily be swept to one side on the grounds of their inherent deficiency, and replaced by more progressive, more rational and more above all more enlightened Jurisprudential premises. By definition the European colonists were already familiar with own indigenous premises: indeed they frequently set out to improve them in their new-found nominal *terra nullius* of the New World. As a result the began to construct numerous colonial jurisdictions overseas, in which they routinely established themselves as a firmly privileged elite, whilst what remained of the indigenous population, supplemented where necessary by slaves imported elsewhere, was incorporated into the colonial order as a disjointed and disprivileged proletarian underclass. In doing so the settlers effectively constructed colonial jurisdictions which were wholly European in jurisprudential terms, for even if the non-European subalterns outnumbered their European hegemons, the institutional foundations of the subalterns' varied ancestral social orders were routinely deliberately undermined as a means establishing the integrity, and hence the stability of their colonial states.

But whilst colonisation by force turned out to be a relative push-over in the so-called New World, pioneers encountered much more serious difficulties when they sailed east rather than west, if only because the inhabitants virtually all of the Asiatic world – stretching all the way from the Levant to Japan – were at least as prosperous, if not more so, when Magellan circumnavigated, and remained so until the early years of the nineteenth century. Hence even though the sophistication of European navigators, further reinforced by the power of their cannons, enabled them to take control of global seaways by force, there was no way in which they could replicate the same strategy on land, since Asia's shore bound Empires were initially far too strong to challenge head-on. Hence colonisation in the New World sense was not an option, such that trade, rather than agriculture and the extraction of precious metal, was the driving force behind the growth of vast English and Dutch trading networks, based in seaports ranging all the way from the Indian Ocean through Indonesia to the East China Sea.

But whilst all each of the trading companies established local colonies (usually described as factories) right across this region, in no way did they gain control of the ports in which they established their factories, let alone of their vast Imperial hinterlands in which the goods which they were so keen to purchase were manufactured. Rather the only way in which they could do so was by

gaining a licence allowing them to trade, and also to settle their internal disputes within their semi-sovereign factories. In other words so long as they acknowledged the overall sovereignty of the overall jurisdiction, and ensured that their behaviour was ordered in terms of premises and practices when they stepped outside their own networks, they were nevertheless entitled to revert to their own jurisprudential premises when they stepped back in again.

Moreover in no way was the application of force necessary to secure these pluralistic arrangements: on the contrary the avoidance of such threats was a prerequisite for acceptance in this intrinsically plural jurisprudential structure, in which Armenian, Iranian, Indian, Indonesian and Chinese merchants had all long since engaged. Nor were these pluralistic jurisprudential arrangements in any way unique to Asiatic seaports: rather they were merely a local instance of a much wider phenomenon, albeit one which has attracted less and less attention jurisprudential attention in the course of the past two centuries, a period during which all the European empires experienced a period of exponential growth which reached its peak early in the twentieth century, in the course of which they engineered the collapse of all their Asiatic counterparts, before collapsing themselves during the course of the latter part of the twentieth century.

Jurisprudential plurality in the contemporary global order

But if we consequently live in a post-colonial order, and hence in an era within which the jurisprudential foundations of virtually all contemporary jurisdictions are in principle located in the premises of the European enlightenment, all is not well at a political level, and most especially in terms of coping with the presence of religious and ethnic plurality. It is not difficult to see why. From a historical perspective only very smallest of social orders have ever been homogeneous in socio-cultural terms; hence as social arenas have become steadily larger, and as long distance travel has become both swifter and cheaper, so every jurisdiction has become steadily more ethnically and religiously diverse. It consequently follows that plurality is in no sense a novel phenomenon: rather it has become steadily more salient in the hyped-up globalised world order which we currently inhabit. Moreover in doing so ever more salient patterns of plurality are currently precipitating ever more serious dilemmas for social policy makers tasked with the challenge of delivering equitable public services to members of a population which is becoming steadily more actively diverse.

What I find striking, however, is that despite the severity of the conundrums which social policy makers in so many contemporary jurisdictions currently find themselves facing – no less in the global South than the global North – as a result of the developments, remarkably few analysts have seeking either to historical or to comparative guidance as to how these dilemmas might be most effectively resolved. To be sure the many aspects of dilemmas which we currently face on the score may seem at first sight to be unprecedented in character – if only on the grounds that the speed-ups precipitated processes of globalisation have had a radical impact on the jurisprudential character of every post-colonial nation-state, of which close to two hundred have by now signed up to the United Nations.

Yet despite their manifest diversity, all these jurisdictions have a common core: namely the vision of state construction which came into being during the course of the growth of a uniquely European vision of progress and enlightenment, which was in due course exported round the globe during the course of Imperial expansion. To be sure the tide has by now long since flowed out from beneath all of these edifices, but as that occurred it rapidly became that clear that although the colonists themselves may have moved back into European jurisdictions, the steel frames of governance which had been constructed during the colonial period had for the most part so far undermined more indigenous forms of administrative Jurisprudence that multiplicity of post-colonial jurisdictions which emerged as the Imperial tide retreated were in almost every case inspired by the

presumptively progressive premises of the European enlightenment. From a formal jurisprudential perspective, all pluralistic Empires had in principle been replaced by sovereign, autonomous and intrinsically homogeneous nation-states. At least on the face of things plurality had been eliminated by the face rationalistic progress, so much so that comparative jurisprudence would in future be a matter of exploring variations on a singular set of premises, all of European provenance.

Yet but just how does that assumption stand up to critical scrutiny as we enter the twenty-first century? To be sure the premises are still firmly in place, especially in the context international discourse; however if we drill down more deeply within almost every such jurisdiction, all sorts of contradictions and imperfections begin to emerge, two of which are especially salient, one of which appears to be universal, whilst the impact of the second is a great deal more diverse. At a global level, lack of homogeneity, or to put it more positively, the presence of diversity – whether of indigenous or of migratory origin – is everywhere becoming a major source of socio-political contradictions, which all too often serve to threaten the very integrity of the jurisdictions in which they manifest themselves; at worst these processes lead to comprehensive failure of the state itself, causing threats to jurisprudential stability in the entire region in which such developments take place. Meanwhile the individualistically oriented premises embedded at the socio-cultural heart of the European enlightenment turning out to have equally corrosive jurisprudential consequences at the other end of the spectrum: this time in terms of erosion of the integrity of extended networks of kinship reciprocity, and eventually of those which underpinned the integrity of the family itself. These institutions, grounded in tight-knit relationships of mutual reciprocity, had hitherto provided the foundations of every known socio-cultural order; but as waves of modernity spread around the globe, the coherence of these networks has everywhere been undermined by a rising tide of individualism, and nowhere more extensively in Euro-American jurisdiction, in which they have been shredded almost into non-existence.

Sir Henry Maine's exploration of the dynamics of Comparative Jurisprudence

But although these developments have become unprecedentedly corrosive throughout the contemporary world order, it would be idle to assume that the underlying contradictions which have precipitated these outcomes are in any way wholly unprecedented. On the contrary, officials seeking to establish an appropriate form of governance in what had recently become British India found themselves facing much the same dilemmas, and in doing so precipitated vigorous debate about various potential forms jurisprudence in the UK, in which Sir Henry Maine, who was elected as initial occupant of a chair of Comparative and Historical Jurisprudence in this very University in 1869, played major role. But although his arguments and conclusions appear by now to have faded into the background amongst contemporary English lawyers, they are nevertheless widely remembered amongst in anthropological circles, most particularly in the form of his key assertion, to the effect that

The movement of progressive societies has been uniform in one respect: through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. As that occurred, the networks of reciprocity in rights and duties which had hitherto been the foundation of family life were steadily eroded, so much so that the movement of all progressive societies has hitherto been from Status to Contract.

In so doing his conclusions were far from being theoretical: rather they were grounded in his initial training as a classical scholar, so much so that his most widely read publication was entitled 'Ancient Law', whose contents were in principle devoted to a comparative analysis of the premises Roman jurisprudence as it was in its initial phase, in comparison with the radical way in which those premises subsequently were comprehensively revised and reinterpreted during post-Republican

period. That was not all, however: wound into all this was a further strand analysis, based on his reading of accounts of local custom and practice in the newly acquired province of Punjab, where British administrators were busy seeking to establish the most appropriate form of governance to apply in their newly acquired jurisdiction – where, so Maine concluded, indigenous forms of jurisprudence were structured on a very similar to those whose presence he had also detected in pre-Republican, and above all in pre-contractual Rome.

Moreover having done so, he took several steps further in order to establishing his vision of comparative jurisprudence. In the first place he noted that the tight-knit networks of mutual reciprocity between kinsfolk ('status' in Maine's vocabulary) was not just an ancient phenomenon: it was also an equally salient feature of most contemporary non-European socio-cultural orders, with whose Indian manifestations he was most familiar. Moreover he was most reluctant to identify premises of this kind as 'primitive', partly because they provided the foundations of Roman jurisprudence, partly because their presence was widespread in virtually all indigenous non-European jurisdictions, and last but not least because he took the view that wherever the erosion of networks of mutual reciprocity got out of hand – as the new-found premises of the enlightenment demanded – the integrity of the entire socio-cultural in which these developments occurred would be hollowed out from within, with extremely dangerous consequences.

Maine's critique of Austin's *Province of Jurisprudence Determined*

That was not all, however. In the course of arguing that the study of jurisprudence should always be conducted on a comparative basis, he fired a major shot across the bows of John Austin, whose analytical perspective was rooted firmly in what he (and most of his colleagues) others identified as the rational and hence inherently positivistic premises of the enlightenment, which – in sharp contrast to Maine's ethnographically informed approach to the issue – was largely speculatively grounded. Nevertheless in the midst of the enlightenment Austin has plenty theoretical sources on which to build thesis, with the result that he was able to draw on the arguments which had progressively articulated successively by Hobbes, Locke and Bentham to produce his exceptionally influential account of *The Province of Jurisprudence Determined*, which he set out what he regarded as a positivistic, rationally grounded, and hence universalistically applicable definition of Law – of which Maine was deeply critical.

In doing so, Maine directly challenged the plausibility of Austin's positivistic – and unilateral vision of Jurisprudence, on the grounds that the phenomenon is much more sensibly approached on an empirical and above all a *comparative* basis. Hence in the midst of his arguments in *Ancient Law* – which he carefully subtitled *Its connection with the early history of society and its relation to modern ideas* – he set out his critical analysis Austin's positivistically oriented vision of *The Province of Jurisprudence* in two steps, the first of which was essentially historical:

Bentham, in his "Fragment on Government," and Austin, in his "Province of Jurisprudence Determined," resolve every law into a *command* of the lawgiver, an *obligation* imposed thereby on the citizen, and a *sanction* threatened in the event of disobedience; and it is further predicated of the *command*, which is the first element in a law, that it must prescribe, not a single act, but a series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and, by straining of language, they seek to argue that they correspond with all law, of all kinds, and in at all epochs.

But it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a

compound of the elements which Bentham determined. It is certain that, in the infancy of mankind, no sort of legislature, nor even a distinct author of law, is contemplated or conceived of.

With this in mind, and looking back into history, Maine went to observe that in sharp contrast to Bentham and Maine's assumptions, whilst powerful sovereigns were a regular feature of the ancient world – as well as in many contemporary extra-European jurisdictions – their jurisprudential powers of the sovereigns were severely limited, since they were largely confined to the domain of what could best be described as administrative law. In the same vein he also observed that when that was the case, law-making legislatures, as well formally appointed judges with the power to enforce sanctions in the face of disobedience were similarly absent, as were the freestanding individuals whose personal activities the Austin's vision of Law, and hence of Jurisprudence, was designed both to order and constrain.

If so, it followed that although a Jurisprudential order of the kind which Austin envisaged was rapidly becoming ever more salient in the aftermath of both the French and the American revolutions during the latter part of the eighteenth century, Maine effectively sought to argue that this was a more or less unprecedented development. It consequently followed that did Austin's model exhaust the conceptual premises around which viable systems of Jurisprudence could readily be constructed. Hence Maine set out to demonstrate that there was by then substantial evidence – no less in the from recorded evidence from the ancient past than from empirical observations of Jurisprudential practice in the non-European jurisdictions which the European powers were busy incorporating into their rapidly expanding overseas Empires, and once again used empirical evidence to challenge Austin's premises.

On the basis of his knowledge of the organisation of governance in Punjab immediately before Maharaja Ranjit Singh's kingdom was incorporated into the British Raj, he observed that:

At first sight, there could be no more perfect embodiment than Ranjeet Singh of Sovereignty, as conceived by Austin. He was absolutely despotic. Except occasionally on his wild frontier, he kept the most perfect order. He could have commanded anything; the smallest disobedience to his commands would have been followed by death or mutilation, and this was perfectly well known to the enormous majority of his subjects. Yet I doubt whether once in all his life he issued a command which Austin would call a law. He took, as his revenue, a prodigious share of the produce of the soil. He harried villages which recalcitrated at his exactions, and he executed great numbers of men. He levied great armies; he had all material of power, and exercised it in various ways.

But he never made a law. The rules which regulated the life of his subjects were derived from their immemorial usages, and these rules were administered by domestic tribunals, in families or village-communities. I do not for a moment assert that the existence of such a state of political society falsifies Austin's theory that 'What the Sovereign permits, he commands.' The Sikh despot permitted heads of households and village-elders to prescribe rules, therefore these rules were his commands and true laws.

In doing so Maine identifies the presence of two distinct dimensions of Jurisprudence, the first of which took the form of the administrative procedures which by means of which the integrity of the state was maintained. As ever, this entailed the collection of taxes from the population at large, and their subsequent expenditure on the provision of infrastructural services such as roads and irrigation systems, further reinforced by the military resources which were the prime source of the Maharaja's

sovereign powers. By contrast Maine made it plain that the second dimension of Punjabi Jurisprudence – which covered the greater part of the premises and practices on the basis of which the mass of his subjects ordered their lives on a parochial basis was routinely delegated to local communities. In these circumstances laws in the Austinian sense were of no particular concern to the Sovereign, since such matters were delegated to, as well prescribed and maintained by, heads of households and village elders.

But if behaviour within these local communities fell below the sovereign's radar – always provided they continued to pay their taxes in good time, on just what premises was law and order maintained within the multiplicity of more or less autonomous communities subject to his jurisdiction? Once again Maine had an empirical answer: in these circumstances the individualistically oriented premises of the enlightenment were unknown. In no way did members of such communities regard themselves as autonomous individuals, with an inherent right to manoeuvre their way through the social order in any way they chose, as both Bentham and Austin had assumed in their utilitarian vision of the social order. Hence in sharp contrast to their assumption that it was safe to assume that free-standing individuals were of necessity the subjects of all systems of Jurisprudence, Maine argued that in the greater part of past history, as well in the vast majority of extra-European jurisdictions which had not yet been fully colonised, such premises were unknown. It followed that in these circumstances it was not so much freestanding individuals who formed basic the building blocks around which local socio-cultural communities were constructed: rather far greater priority was given to corporately ordered collectivities, held together by tight-knit networks of mutual reciprocity, formed the foundations of the local social order.

Moreover to the extent that corporate families were the order of the day, the only way in which one could become a free-standing individual was to step right outside the network of reciprocities into which one was born – as in the case of ascetic Hindu *sannyasi*. In these circumstances it followed that one's personal status was not God-given; nor was it a product of their own unique personal characteristics; rather one's personal status grounded in one's hereditary birth-rights deriving from the corporate family in which one was conceived and born, and too whom one's primary loyalties would henceforth directed. Hence one's status had two dimensions: firstly as a member of the collectivity, whose honour and integrity one was at all times expected to sustain and defend; and secondly in terms of one's position in the collectivity's internal hierarchy, within which in the fulfilment of one's obligations to other steadily enhanced one's personal rights, and hence one's personal status within the collectivity. Hence as Maine put it

The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves; indeed, the relations of son-ship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself. The flocks and herds of the children are the flocks and herds of the father, and the possessions of the parent, which he holds in a representative rather than in a proprietary character, are equally divided at his death among his descendants in the first degree, the eldest son sometimes receiving a double share under the name of birth-right, but more generally endowed with no hereditary advantage beyond an honorary precedence.

[Hence] in primitive times was not what it is assumed to be at present, a collection of *individuals*. In fact, and in the view of the men who composed it, it was an *aggregation of families*. The contrast may be most forcibly expressed by saying that the *unit* of an ancient society was the Family, of a modern society the individual. We

must be prepared to find in ancient law all the consequences of this difference. It is so framed as to be adjusted to a system of small independent corporations.

As such it has a peculiarity. It takes a view of life wholly unlike any which appears in contemporary jurisprudence. Corporations never die, and accordingly primitive law considers the entities with which it deals, i.e., the patriarchal or family groups, as perpetual and inextinguishable. This view is closely allied to the peculiar aspect under which, in very ancient times, moral attributes present themselves.

The moral elevation and moral debasement of the individual appear to be confounded with, or postponed to, the merits and offences of the group to which the individual belongs. If the community sins, its guilt is much more than the sum of the offences committed by its members; the crime is a corporate act, and extends in its consequences to many more persons than have shared in its actual perpetration. If, on the other hand, the individual is conspicuously guilty, it is his children, his kinsfolk, his tribesmen, or his fellow-citizens who suffer with him, and sometimes for him.

Having identified in some detail precisely what he had in mind by largely self-governing status-based communities – which by definition had had no inherent necessity for the presence of an over-arching institution of governance to keep them in order – Maine went on to consider what transpired when jurisprudential systems of this sort began to be drawn into adopting the contractual premises of the European enlightenment, whether in the case of European jurisdictions themselves, or in the multiplicity of overseas colonies which they were in the process of accumulating. Hence he went on to argue – on strictly empirical grounds – that:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organisation can only be perceived by careful study of the phenomena they present.

But, whatever its pace, the change has not been subject to reaction or recoil... Nor is it difficult to see the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract.

Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared—it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract.

So too the status of the Son under Power has no true place in the law of modern European societies. If any civil obligation binds together the Parent and the child of

full age, it is one to which only contract gives its legal validity. The only principle on the grounds of which persons are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, that all the forms of Status taken notice of in the Law of Persons were derived from, and to some are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status to signify these personal conditions, we may say that the movement of the progressive societies has hitherto been *from Status to Contract*.

However in no way did Maine regard this process as being either an inevitable or a trouble-free phenomenon. Indeed he took care to emphasise that status-based socio-cultural orders constructed around morally grounded networks of kinship reciprocity could provide just as sound a basis on which to construct societies which are just as viable – and in many senses a great deal more stable – than those constructed around utilitarian, time-limited, unstable and hence potentially exploitative contractual arrangements to which the premises of the enlightenment was giving rise. Likewise he was equally impressed by resilience self-renewing corporate networks, within which there was collective commitment resolve internal contradictions by negotiation. In those circumstances there was little interest in determining just who was in the right or the wrong, such that the loser could be appropriately a sanctioned; rather the central object of dispute settlement was to find a means of reordering patterns of rights and obligations underpinned the fabric of the local social network, in such a way that all concerned could agree that it be reconstructed on more a more equitable basis, thereby resolving the contradictions which had caused disruption in the first place. It follows that such customary premises and practices – and the resultant modes of dispute settlement – could hardly be more distant from those implemented in contractual contexts, in which the rules of the game are laid down on a statutory basis, that disputes are thrashed out in formally organised courts of law, in which formally trained counsel represent each of the litigants, and which the ultimate of aim of the proceedings is a hard edged determination as to who was right and who was in the wrong, arrived at by judges and juries who had no prior knowledge of the litigants, or indeed of their preferred lifestyles.

A wider view

In no way was Maine the only critic of the consequences of the ever-growing impact of the premises of the enlightenment on the social order at large, or the on the jurisprudential order which underpinned it. Whilst few, if any, lawyers followed in his Maine's critically comparative footsteps, both Marx and Weber took up the cudgel in this sphere, so much so that force of their arguments continue to reverberate to this day. A full decade prior to the publication of *Ancient Law*, Karl Marx had already taken up much the same issues as Maine in *The Communist Manifesto*, in which argued that

The executive of the modern state is but a committee for managing the common affairs of the bourgeoisie. Wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn asunder the feudal ties that bound man to his "natural superiors", and has left remaining no other nexus between man and man than naked self-interest, than callous "cash payment".

Likewise Max Weber, writing in the immediate aftermath of the immensely destructive impact of the 1914-18 war, spoke out even more loudly:

Our age is characterized by rationalization and intellectualization, and above all, by the disenchantment of the world. Its resulting fate is that precisely the ultimate and most sublime values have withdrawn from public life.

They have retreated either into the abstract realm of mystical life or into the fraternal feelings of personal relations between individuals. It is not accidental that the gnostic spirit which in former times swept through the great communities like a firebrand, welding them together, has faded into abeyance.

If we attempt to construct new religious movements without new, authentic prophetic foundations, it only gives rise to something monstrous in terms of inner experience, which can only ever produce fanatical sects, but never a genuine community.

From a contemporary perspective, Weber's alarming conclusions have proved to be even more prescient than those of Marx and Maine: whilst the global order which we currently inhabit is by now infinitely more prosperous, more technologically sophisticated, and above all more mobile and hence interconnected than it was a century ago, and although all the European empires which once straddled the globe have by now collapsed, any suggestion that the current global order is more stable, more well-ordered, or more egalitarian or more stable is simply laughable. To be sure its jurisprudential foundations have changed: whilst two hundred independent nation-states – all of which are formally constructed around one version or another Austinian premises – have affiliated to themselves to the United Nations as all the world's Empires collapsed, any suggestion that the structure of the global order has become more stable than it was in the past is quite unsustainable.

Moreover that lack of stability is by no means confined to international contradictions: in the aftermath of the sudden demise of pluralistically constructed Empires of all kinds, and their replacement with a multiplicity of autonomous nation-states. Rather in the contemporary world the principal source of socio-cultural instability has turned out to be the ever more salient presence of ethno-religious plurality within the borders implicitly homogenous nation-states – especially (although by no means necessarily) when that condition of plurality is a product of the arrival of large numbers of migrant workers who found their way, most usually on their own terms, into distant jurisdictions on the back of ever-intensifying processes of globalisation.

Long-distance Migration and its consequences

During the period of European colonial expansion settlers invariably arrived from above: as such they far better armed, and could call on far greater resources with them. As a result that they could not only promptly set about reconstructing their own preferred forms of jurisprudence in their new found overseas colonies; they were also in a position to require the indigenes whom they had systematically side-lined to conform to those premises if they wished gain a legitimate position in the new-found jurisdiction which the settler's had created around themselves. By now, however, those roles have been reversed: the outflow of European migrants to the global South has shrunk to a trickle, whilst the inflow from South to North has by now become almost as large as that of its predecessor flowing in the reverse direction. Nevertheless was one very obvious difference in the personal experiences of those caught up in the two parallel migratory flows: whilst the Europeans routinely established themselves in their new destinations as hegemony arriving from above, non-Europeans moving North routinely found themselves right at the other end of the scale. As alien 'immigrants' – as opposed to settlers – they were virtually powerless; hence they had little alternative to look to their own resources if they were to survive in an alien, and all often unhelpful

jurisdictions. But just because they routinely find themselves marginalised in this way, in no way did this hinder them from adopting precisely the same strategies as those adopted by their predecessors who had recently set off in the reverse direction: they, too, closed ranks on their own terms, and promptly set about constructing ethnic colonies around themselves, within which they set about reconstructing all the premises and practices in terms of which they had ordered their inter-personal relationships prior to their departure.

The consequences of these developments are now plain to see. Thriving ethnic colonies inhabited by migrants from the global South, as well as an ever-growing number of locally-born offspring can now be found in major towns and cities throughout Western Europe, and most especially in Britain, within which they have successfully reproduced the greater part of their ancestral cultural traditions. And since a large majority of the settlers were of rural origin, and hence drawn from communities whose everyday premises had so far remained largely untouched by those of the European enlightenment, interactions within each of these colonies was far less contractual in deployed by members of the indigenous majority. Not that this was any handicap as far as the settlers themselves were concerned. Ties of mutuality provided an excellent foundation around which to construct survival strategies, both in the form of extensive cooperation within kinship networks, which in turn facilitated the familial construction of all manner of entrepreneurial enterprises, thereby enabling them to circumvent the worst of the impact racial, ethnic and religious marginalisation.

Of course ethnic plurality was in no sense an unusual feature of most Europe industrial cities, since they had all attracted large numbers of migrant workers far afield result of the during the course of the nineteenth century industrial revolution. However in that context the migrants were of European origin, Christian by religion, and had had consequently already been introduced to the premises of the enlightenment; hence even though they, too, routinely constructed ethnic colonies of their own, they were much less markedly distinctive than their twentieth century successors.

From this perspective there is much that is distinctive about the conundrums which we currently face. In the first place ethno-religious plurality is in no sense a novel phenomenon in any of contemporary Europe's jurisdictions, most especially in the light of wars between Protestants and Catholics, as well as efforts to eliminate the entire Jewish minority. But whilst one of the key objectives of the European enlightenment was to obliterate contradictions of this kind, efforts to achieve that goal have proved to be nugatory. By now it should be clear just why this should be so. Given the virtually universal adoption of the progressive premises of the enlightenment, together with the parallel adoption Austin's unilateral vision of Jurisprudence – which has served both to legitimised and yet further reinforced view that nation states must of necessity be ethnically homogenous if they are to sustain their integrity – the whole edifice to which this set of premises gives rise leaves little or no space within which ethnic plurality can legitimately be accommodated – other than by ignoring the Elephant in the room.

In these circumstances social policy makers around the globe currently find themselves facing much the same set of conundrum with which colonial administrators found themselves confronted in British India, into which Maine tapped with considerable insight. To be sure roles have by now been reversed in contemporary Britain, in the sense the contemporary invasive colonists are of Punjabi, rather than British of descent. However the dilemma faced by policy makers remains just the same: on what basis should we set about administering a jurisdiction which is significantly plural in character? Should we set about finding a means of readjusting our established form of jurisprudence in such a way that it can readily accommodate ethno-religious plurality, whilst still retaining the integrity of our over-arching socio-cultural order? Or to the contrary, should we insist that the only way of achieving that objective is to enforce compliance with premises the dominant majority, and

in doing so to maintain the presumptive condition of equality and homogeneity precipitated by faithfully following the rational premises of the European enlightenment?

But if we follow UKIP in that direction, can we avoid civil war?

This analysis is best read as a background paper: I intend to build on the arguments set out here by reflecting on my experience of acting as a 'cultural expert' in all manner of proceedings in the UK in which South Asian settlers and their offspring have found themselves entangled.

Actors in Socio-Legal Comparison

Wendy Kennett

Studies in comparative civil procedure

Adams and Bomhoff's *Practice and Theory in Comparative Law* (CUP 2012)¹ aims "to address the wide – and widely perceived – gap between practice and theory in comparative legal studies". The introduction to this volume highlights four axes concerning the nature of comparative projects: question-driven or theory-driven project design; choices as to relevant interdisciplinary perspectives; the role and limits of functionalism; and the contribution of comparatists to research on convergence and divergence between national systems. These considerations are useful in reflecting on my own experience of comparative research in the area of civil enforcement

As a researcher with an essentially black-letter background working in the area of comparative civil procedure, my first approach to civil enforcement law resulted from an invitation to write a *Chronique* on enforcement of judgments for the *European Review of Private Law* (ERPL). Following the pattern of previous *Chroniques* written for the journal, it was based on questionnaire responses provided by contacts in a number of EU Member States. My objective at that time was simply to discover what methods of enforcement were used in different Member States and to describe briefly the governing legislation. A small part of the questionnaire was concerned with the personnel involved in the enforcement process, and with access to information about a debtor's assets.

The responses to these latter questions – and particularly the surprising access to debtors' tax and banking data enjoyed by some enforcement agents – shifted my focus to the "who" rather than the "what" and "how" of enforcement. It became apparent that the range of enforcement agents in Europe reached from employees with a fairly basic level of education, limited legal knowledge and a limited range of enforcement tasks (e.g. the English bailiff) to independent professionals within a regulated profession requiring a law degree as a minimum entry standard (e.g. the French *huissier de justice*: an *officier ministériel* acting with state authority who claims to act as a neutral interface between debtors and creditors).

The role and limits of functionalism

Civil enforcement is a backwater. It attracts little academic attention – even in countries where there is a respectable tradition of research on civil procedure. In order to understand the role of enforcement personnel it was essential to identify local agents to visit, observe and interview. But while the methods required to obtain relevant information were obvious, the appropriate methodological approach was less apparent. A functional definition of my field of enquiry proved elusive. There are certain core enforcement functions – the seizure and realisation of assets – but those functions may be distributed among several different agents. If the field of enquiry is extended to cover each of the agents with a role in enforcement then – "casting the net wide" (Adams and Griffiths) – it becomes relevant to consider the other functions that each agent performs. The scope of my research rippled inexorably outwards. Moreover a comparison of legal rules alone seemed insufficient. The wider legal, business and indeed political culture all had a contribution to make to an understanding of the dynamics of enforcement practice.

There was undoubtedly a value in these un-theorized investigations. Lemmens discusses the role of the comparatist in reconstructing the foreign legal system for a given audience: "Whatever the flaws

¹ The authors referred to or quoted in this abstract are contributors to the collection of essays edited by Adams and Bomhoff.

may be, the comparatist's efforts are extremely valuable for an audience that, without them, would be worse off and remain ignorant of the foreign law." Enforcement issues are prominent in civil justice policy within the EU, as the expression of the free movement of judgments. Basic comparative information about the differences between national systems illuminates the obstacles to harmonization of the law and explains the resistance of some Member States to legislative proposals. Such information may also be of use to domestic legislators considering law reform, as suggesting a range of regulatory options that may be available.

Nevertheless, as my investigations spread beyond legal rules and systems, I began to feel the need for focus: for research frames that would both limit and direct data collection.

Research questions and interdisciplinary perspectives

Many of the contributors to Adams and Bomhoff's volume stress the, perhaps rather obvious but often under-emphasized, point that the appropriate methodology for a comparative study depends on the question to be answered, or the end in view. "Questions go before methods, and until one has specified what the question is, no sensible discussion of methodology is possible." (Adams and Griffiths).

The 'external' perspective gained by a comparison between systems may be useful in highlighting fruitful avenues for research. In addition to sparking curiosity about the historical factors that gave rise to the diverse models of enforcement regulation in Europe, several inter-related research questions kept recurring during my investigations – further exploration of which would require an interdisciplinary approach that would be beyond my capabilities.

- i) An objective of enforcement law is to try to ensure that efficiency is combined with ethical conduct in debt collection. It has long been a complaint of advocates of enforcement reform in England and Wales that the financial incentives in place encourage bad practice, raising the question of how far appropriate incentives exist in other jurisdictions, and how far systems can be designed that create appropriate incentives.
- ii) French, Belgian and Dutch *huissiers de justice* are a driving force for the harmonisation of enforcement measures in the EU. They control the *Union Internationale des Huissiers de Justice*, which markets the *huissier* model around the world and has been active in assisting with law reform projects in Eastern Europe as well as advising the European Commission and the World Bank. They have traditionally enjoyed a secure position within the national political economy, with both functional and territorial monopolies, and the status of privileged interlocutors with the state. This raises questions about the ability of the *huissier de justice* model to adapt to changes in political and economic climate. Studies of the fate of that model when it has been transposed to a new legal system, or been subjected to greater competitive pressures (as in the Netherlands) could be useful in relation to e.g. competition theory, the politics of interest groups and the theory of transplants.

Convergence and divergence

These latter considerations are also relevant to the fourth project design axis identified by Adams and Bomhoff: studies of the interaction between legal systems undergoing change. In particular the 'success' of the instrumentalist approach promoted by the *Union Internationale* can be explored by reference to any adaptations to the *huissier* model necessitated by its insertion into a different economic and political environment. Relatedly, an investigation of the way in which European competition policy impacts on the different models of civil enforcement and the extent to which this creates convergence pressures might also produce useful insights.

Conclusion

The enforcement of judgments – and the wider field of civil enforcement - is a neglected area that offers scope for much interdisciplinary research of both theoretical and practical interest. The differences between national systems, highlighted by comparative research, contribute both to the generation of research questions and also to the production of data that may suggest answers to those questions.

Karolina Sieler

Local NGO activists as 'vernacularizers' of international social and economic rights

Women's social and economic rights

International human rights conventions are instruments of a unique nature because they regulate aspects of life which are considered by many as culture-relative matters suited more for domestic rather than international debates. They also rarely have any meaningful enforcement mechanisms and so often provide little institutional incentive for states to comply, even after full ratification. Recent studies show that states can often adopt international treaties as an act of 'window dressing', that is without having the intention to change their human rights practices. In this context, the case of women's human rights is particularly interesting because most women's rights' issues revolve around either basic, everyday activities such as pay equality and other aspects of equality at work, or violations which women are reluctant to discuss in public, such as physical and sexual violence. As a result, the field of women's human rights is often construed as a matter of cultural values (Zwingel, 2012). This approach is partly reinforced by the United Nations' Convention to Eliminate All Forms of Discrimination Against Women (CEDAW convention) which permits ratification by states subject to reservations to particular articles on the ground that national law, tradition, religion or culture are not congruent with Convention principles.

Role of NGO activists in implementation of CEDAW

There are several theories emphasising the role of national and international non-governmental organisations (NGOs) in implementing human rights conventions at a national level. Notably, Keck and Sikkink (1999) proposed that NGOs, along with other actors sharing common values and discourses, create Transnational Advocacy Networks (TANs) in which they work internationally on selected issues. TANs are considered as key players contributing to the processes of regional and international integration, and key contributors to the convergence of social and cultural norms (Keck & Sikkink, 1999:89). Apart from NGOs, TANs can include research organisations, social movements, foundations, media, churches, trade unions, consumer organisations, intellectuals, regional and international intergovernmental organisations, as well as parts of the government. In particular, Keck and Sikkink propose five stages of the process of implementation of international human rights conventions from the perspective of TANs: (1) Networks 'frame' the issue and bring it to the public attention through media, public meetings and campaigns with the aim of putting it on the political agenda; (2) Public debate initiated by the networks influences domestic human rights discourses, TANs pressure the governments to make more binding commitments by signing international human rights treaties; (3) Institutional procedures are brought in line with the changed public discourses; (4) Policies are changed by the 'target actors', e.g. states, organisations, corporations etc.; (5) State's human rights behaviour changes. In the recent years several studies have confirmed, using quantitative methods, that international human rights treaties influence state behaviour in relation to human rights most effectively when they are ratified by states with strong presence of international and national NGOs (Neumayer, 2005; Hafner-Burton & Tsutsui, 2005). The studies argue *that* networks influence state behaviour but do not address the question of *how* they do it and, in particular, what approaches do they use in framing human rights issues, as well as what is the role of international human rights conventions such as CEDAW in shaping those approaches.

NGOs as 'vernacularizers' of human rights

Another theme in the literature on agents involved in the interpretation and implementation of international human rights conventions emphasises the value of NGOs' advocacy and investigates

various ways in which NGOs frame human rights issues. Literature in this strand perceives NGOs as 'vernacularizers' of international human rights who 'translate' those rights into the local discourses, just like one translates a text from a high-status language into a vernacular language which has a lower prestige as a written language (Crossgrove, 2000). In both processes the meaning is to a certain extent distorted or reshaped to fit local contexts and discourses. For example, as Goldstein (2013) reports, activists from an NGO in Bolivia working with local communities in the barrios frame human rights in terms of a 'right to security', which is not usually considered to be a part of the 'transnational human rights package', because this makes the unfamiliar concept of human rights more acceptable to local citizens who are concerned about their own security (Goldstein, 2013:114). On the other hand, Berry (2003) describes how, in India, an NGO focusing on women's rights shows to the local women the slides of pre-Aryan goddesses whilst explaining the concept of "feminine spiritual power" – *shakti* – to help women find their own power to contest "all forms of oppression". Although the 'vernacularization' studies provide an important insight into the way NGO activists translate international human rights concepts, they are limited in that they focus purely on the activists themselves and the meaning that they assign to human rights. But the studies fail to address the question of the extent to which activists rely in their advocacy on international human rights instruments, such as the CEDAW convention, despite the fact that an insight into this area would enable us to better understand the real impact and value of international human rights conventions not only as legal instruments influencing domestic legal systems, but as institutional frameworks affecting social practices within the states.

Introducing a three-step approach

The present study proposes a more holistic approach to investigating how the shared meanings of women's rights travel between the CEDAW convention and NGO advocacy networks in individual states. In particular, we propose a three-stage approach in which we: (1) analyse the text of the CEDAW convention and the reports issued by the CEDAW committee to elaborate an interpretation of particular women's human rights as propagated by the United Nations; (2) through the interviews with key players in Transnational Advocacy Networks (including NGO activists) we investigate how the meaning of international women's rights is created within particular domestic contexts, and how those key players interpret particular women's rights; and (3) we compare the two interpretations and seek to understand to what extent the CEDAW convention is relied on by NGO workers when framing women's rights concepts.

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Po-Hsiang Ou

The Bridge, the Club and the Ponte Vecchio: Two Expert Networks of Risk Communication Compared and Combined

The regulation of risk has puzzled scholars and practitioners alike for ages. The conventional wisdom is to characterise risk regulation by three major elements: risk assessment (the science-based process of evaluating risks), risk management (the policy-based process of deciding regulatory measures) and risk communication (the interchange of information between different actors). Some claim that there can be no clear distinction between these elements, while others advocate a clear-cut functional separation between risk assessment and risk regulation. A common ground of this debate is the central role of risk communication. However, current studies of risk communication concentrate mainly on the relations between the government and the public, seeing risk communication as a strategy of establishing dialogues between experts and lay people. While this focus on the expert/lay relationship and the science/democracy dichotomy is important, I argue that risk communication should also cover the relations between scientific experts and policymakers. This field of *inter-expert risk communication* is less studied.

This paper therefore seeks to explore the issue of inter-expert risk communication and focuses particularly on the 'expert networks' of risk communication. By comparing two cases of risk regulation standard-setting in the European Union (EU), I identify two types of expert networks, the *bridge* and the *club*. In the case of EU climate targets, its expert network can be described as a 'bridge'; in the case of fiscal rules in the Eurozone, experts have formulated a 'club' network. After comparing the pros and cons of these two expert networks of risk communication, I propose that a hybrid network resembling Florence's *Ponte Vecchio* can be a new institutional structure that facilitates reforms in risk regulation regimes.

Bridge: the two-degree climate target

In order to combat climate change, in 1996 the Council of Ministers of the EU adopted the famous *two-degree target*, i.e. global mean temperature should not rise above 2°C comparing to preindustrial levels. This was eventually adopted globally in the 2009 Copenhagen Accord. Many studies conclude that there is no clear origin of the two-degree target. Through interviews and available archival data, however, I identify three groups of actors that were highly involved in the process of creating the two-degree target in the 1990s. These were the expert groups of the EU, the Dutch research team and the scientific advisory council in Germany. They provided three different layers of interfaces as a *bridge* between scientists and policymakers.

Visualising the expert network of the climate case as a bridge implies that there is a gap between science and policymaking, and the network links two clearly separated groups of actors. In terms of network analysis, it is as an open network with many 'structural holes'. Such kind of network guarantees the variety and transparency of information flow, but the process of communication is less efficient. This reflects the reality of the EU climate debate: inter-expert risk communication was *critical* but more *sporadic*.

Club: the EMU fiscal rules

The Economic and Monetary Union (EMU) was established by the 1992 Maastricht Treaty. In order to manage 'excessive deficits', the EMU fiscal rules, also known as the excessive deficit criteria or the Maastricht criteria, require member states to limit the ratio of government deficit to GDP under 3% and the ratio of government debt to GDP under 60%. Historical studies suggest that the fiscal rules were mainly decided in the Monetary Committee. My empirical data not only confirm this claim, but also notice the influential role of the Commission in the EMU discussion. The Commission and the Monetary Committee formulated a tight-knit *club*.

This club-like network, emphasised by many interviewees, indicates that there was not clear distinction between economic expertise and policymaking in the case of the EMU fiscal rules. In terms of network analysis, a club represents full 'network closure' with high degrees of centrality. This means that economic experts work closely within the policymaking circle, with less external inputs. Empirical observation of the EMU negotiation supports this argument: inter-expert risk communication was *harmonious* and *intensive*, but less transparent and left several regulatory blind spots.

Ponte Vecchio: an open market on a bridge

Both expert networks have their own weaknesses: the club is not transparent and less critical, while the bridge is less efficient. However, the two networks can be mutually complementary. I argue that a 'hybrid' model, using the *Ponte Vecchio* in Florence as a metaphor, can be a better expert network that facilitates critical, transparent and efficient risk communication. The *Ponte Vecchio* is an open market *on* a bridge. On the one hand, the centrality of economic expertise facilitate efficient communication of risk; on the other hand, the market and the overall bridge structure guarantee transparency and critical information to be included in the discussion. This hybrid model of expert network can guide future risk regulatory reforms.

In fact, the image of *Ponte Vecchio* (literally means 'old bridge') might represent an 'embryonic' structure of risk communication network. In other words, both the bridge and the club were evolved from the original hybrid structure of *Ponte Vecchio*, through the process of risk communication. Whether an expert network evolves into a bridge or a club, I argue, is decided by the attitudes of experts towards risks. Therefore, in order to implement the idea of *Ponte Vecchio*, we need to change not only the organisational structure of risk communication network, but also the risk conceptions of experts.

Interpretation in Comparative Socio-Legal Studies

Stewart Field

Making Sense in/of Cross-Cultural Research in Criminal Justice

In this presentation, I want to talk (necessarily briefly and schematically) about the way in which my approach to cross-cultural research has developed over a number of different kinds of studies, the conceptual tools that I have found useful, and the potential use of such research in informing policy choices. The title was intended to evoke two senses in which we might try to 'make sense' of cross-cultural research in criminal justice. First, trying to make sense in cross-cultural research raises the methodological question: how do we understand what we are observing or hearing or reading in the files when we come from a different set of background assumptions about legal theory and practice? I will explain my own preference for using concepts of legal culture and procedural tradition as a way of understanding and explaining criminal justice practices in different jurisdictions. The second sense in which we might try to make sense of cross-cultural research is to ask whether, and if so how, it might be used as a basis for domestic or transnational policy-making or reform. What are the limits of interpretive approaches to legal cultures and procedural traditions in learning lessons from the practices of others that can be applied in other contexts?

Over a number of years I have conducted cross-cultural research in a variety of ways. My first experience was of cross-cultural collaborative writing, working with Dutch researchers to compare various aspects of criminal process in England and Wales with the Netherlands. What this brought home was the importance of not taking for granted shared meanings and the interpretive struggle to discover the 'unknown unknowns' in comparative research, that is to say the way that apparently similar concepts take on very different meanings in different cultural contexts in ways of which the researcher may be unaware. Such an early experience led to an interest in interpretive approaches to cross-cultural research rooted in the analysis of legal cultures.

My second experience, observing French defence lawyers in the late 1990s, gave me a clear idea that such cultural readings of the meaning of rules and practices needed to be rooted in both institutional contexts and in an understanding of tradition, in this case procedural tradition. As a common lawyer trained in England, studying the introduction of new powers of intervention for French defence lawyers, it emerged clearly that what formal defence rights meant on the ground depended not just on the rights themselves but also the way that those rights were interpreted in the context of established traditions (in this case the limited conception of the role of the defence in the inquisitorial tradition). Furthermore, the availability of legal aid, the institutional organisation of criminal defence and in particular the organisation of duty-lawyering by local Bars provided particular material and institutional contexts that supported the traditional cultural assumptions of French lawyers as to the role of the defence lawyer in the pre-trial process.

My third experience was based on trying to construct matched empirical samples to enable comparison of youth justice in Wales and in Italy in order to identify what made it possible for one system to operate on a less interventionist basis than the other. What this brought home was the fundamental difficulty of trying to identify and isolate comparable elements within criminal justice systems that operate according to different cultural 'logics' (including established institutional categories). The interpretive approach, that seemed so necessary to really understand the way that actors conceptualized early intervention, depended on the way particular cultural beliefs, practices and contexts interconnected to fit into a broader pattern. This has made it very difficult to isolate and even to think in terms of particular explanatory variables.

Stepping back from these particular studies, I want to explain how they have led me to adopt particular conceptions of legal culture and procedural tradition to frame my research into particular rules and practices. The conception of legal culture that I have been drawn to derives from the general work on culture developed by the Welsh cultural theorist Raymond Williams. I want to suggest that his work provides a framework to bring together legal (and other) frames of interpretation on the one hand, and institutional and doctrinal practices around the law on the other. I will also argue that Raymond Williams provides a way of avoiding some of the globalizing dangers of using the concept of legal culture, by asking us to examine the particular relations between institutions, traditions, intellectual formations and structures of feeling. I will also point to the ways in which his separation of emergent, residual and dominant elements of culture may enable us to resist the homogeneity and stability that may be associated with the general concept of legal cultures.

This is probably an over ambitious agenda for 20 minutes or so but if I have time, I want to say something about the limitations, but also the possibilities, that these interpretive concepts of legal culture offer for deriving policy lessons from this kind of comparative or cross-cultural work. In the particular context of youth justice there are many in England and Wales that would like to derive policy initiatives from some of the less interventionist practices abroad. But what our study enabled us to do was identify a set of interrelationships which seem to make it culturally possible, indeed perhaps logical, to avoid intervention through the criminal process in Italy, which give cultural coherence to non-intervention as a response. But, given the accent on the interrelatedness of cultural elements, it is not easy (perhaps even impossible) to isolate the causal impact of particular cultural elements (such as Italy's mixed civil and criminal youth justice jurisdiction, its professional and specialized youth magistrates or the nature of Italian family life). Thus what we can learn from interpretive criminal justice studies and an analysis of legal cultures is not so easily translated into policy lessons.

David Restrepo Amariles

Unpacking Transnational Legal Indicators in Socio-legal Studies: A Pragmatic Approach

In the last five years, transnational legal indicators have become prominent tools in the comparison of legal institutions, rules and concepts across legal systems_ some of them are the *World Governance Indicators* (annually since 2002), *Doing Business* (2006), *the Rule of Law Index* (2009) and the *Global Rights Index* (2014). Other relevant transnational legal indicators are emerging in the fields of human rights, financial regulation, European governance and international investment law. Legal scholars and practitioners increasingly take part in the process of production and implementation of indicators, often upon request from policy-makers. Issuers of legal indicators claim to respond to a rising demand from managers, legal operators and officials of national and international organisations for socio-legal data to better inform their decision-making processes. The forthcoming number (fall 2015) of the *Journal of Legal Pluralism on Indicators, Global Law and Legal Pluralism* contains persuasive essays and original data in this respect.

As they stand today, transnational legal indicators are multifaceted objects with at least two distinct, but intertwined, functions. They are (a) a method of knowledge-production about socio-legal phenomena and, (b) a tool allowing evidence-based decision-making processes in legally relevant matters. This explains why socio-legal scholars need to engage in their sustained critique and, when possible, refinement. The premise underlying a pragmatic approach to the study of indicators was rightly summarised by Joseph Stiglitz, Amarty Sen and Jean-Paul Fitoussi on the occasion of the works of the Commission on the Measurement of Economic Performance and Social Progress: “what we measure affects what we do, and if our measurement are flawed, our decision may be distorted”. If existing legal metrics are conceptually unsophisticated, methodologically distorted or overall flawed, our inferences and conclusions will be misleading, unfruitful and dangerous. Good legal indicators will help diminishing the harmful effects of those poorly designed and provide socio-legal researchers and decision-makers with useful data to undertake socio-legal comparisons across legal systems

(a) Indicators as tools of production of socio-legal knowledge

Transnational legal indicators produce new legal realities and concepts to describe and compare socio-legal phenomena across legal system. That indicators ‘produce or make reality’ _or social facts, should not be taken to mean they are artificial, and thus false. It rather means that there is an inevitable continuum between the cognitive and active –constitutive- dimensions of reality. I identify three stages in this process:

First, indicators categorise and quantify socio-legal phenomena by means of social science research methods. Issuers conduct surveys, interviews and documentary analysis to have a grasp of law and its context. Second, since much legal phenomena are non-observable in the empirical world, issuers of indicators rely on indirect measurements. The latter allow researchers to pose socio-legal measurement problems as problems of statistical estimation or prediction. Third, indicators produce new generalizable socio-legal categories (e.g. quality of contract enforcement) through aggregation of quantitative data. These categories are analytical concepts empirically informed and, in combination with the resulting metrics, allow comparisons of socio-legal phenomena across legal systems.

From this perspective, transnational legal indicators can be useful to make up for certain deficiencies of comparative socio-legal studies today such as the lack of comparisons based on large sample and quantitative research design. Moreover, the macro reality of law indicators portray may also help comparative law and (empirical) jurisprudence overcoming the impediment of generalisation underpinning verbal and rational approaches to law.

On the other hand, indicators contain several shortcomings, from which I underline two. First, indicators flatten local realities -e.g. alternative dispute resolution- and waive contextual considerations -e.g. cultural, economic and social- in translating local legal categories into numeric macro-variables -e.g. rule of law-. Second, I follow William Twining in that, indicators, as most comparative endeavours of law today, need to develop more sophisticated comparators to ensure comparisons are meaningful across legal systems and cultures. Most existing transnational legal indicators rely on inadequate or dubious comparators.

(b) As tools for evidence-based decision-making processes in law

The empirical evidence and mathematical proceduralisation of legal concepts resulting from indicators has two main implications for decision-making processes. First, indicators become a powerful argument for action in legally relevant matters. They inform decision-makers in issues ranging from the design of legal reforms, assessment of states' compliance with human rights obligations to adjudication in choice of law cases. A revealing example is the indicator and performance-based approach of the European Union (EU). The EU uses indicators to promote convergence in matters relating to the governance of the Economic and Monetary Union (EMU) and the Open Method of Coordination of the European Union (OMC). In the near future, indicators under-development on the rule of law are likely to be used, as those on economic and social matters, to promote legal convergence. For instance, according to article 140 of the Treaty on the Functioning of the European Union (TFEU), a candidate state meets the criterion of a high degree of price stability to access the EMU, when its rate of inflation is close to that of, at most, the three best performing Member States. A similar device can be used in the future to assess the quality of the rule of law or human rights compliance of Candidate States in accordance to the Copenhagen criteria.

Second, legal indicators facilitate managerial models of global regulation and the inclusion of law as a variable in private and public decision-making processes. "Law" as a quantitative variable becomes entrenched in complex mechanisms of assessment and decision-making such as allocation of development-aid or ratings of sovereign credit, which endow indicators with reactivity and compels addressees to respond to the pressure of statistics and empirical evidence.

Max Travers

Why compare? Interpretive challenges for socio-legal researchers

The increasing pace of globalization means that socio-legal researchers can no longer ignore the legal systems and the work of legal practitioners outside their own countries. Comparative research is a rapidly expanding inter-disciplinary field that has already generated much insightful empirical research, and discussion about foundational issues in socio-legal studies and comparative law and in criminology. Unfortunately, the sheer volume of the work produced, and its interdisciplinary character, can be confusing in the same way as other areas of socio-legal studies, even if the comparative has the potential to give the whole field a new focus and purpose. This paper offers a guide to navigating debates relevant to comparison within mainstream or academic sociology, and to challenges that arise when conducting empirical research or conceptualizing comparison within a particular tradition in that discipline.

The first part of the paper argues for the importance of understanding globalization and comparative research through different paradigms, and considers three paradigms, understood as foundational in sociology, that inform comparative research. The first paradigm, influenced by Emile Durkheim, seeks to find universal laws through making comparisons based on quantitative measurement. In recent years, critical anthropologists of law have promoted comparative research as recognizing the wrongs of colonialism. Some sociologists have taken this further by arguing that subordinate groups, such as Indigenous peoples, have different ways of knowing, with implications for how we choose to live in the developed world. The third approach, interpretivism, that includes ethnographic traditions in anthropology and sociology, looks at cultural processes and understandings without constructing an explanatory theory or advancing a political agenda.

The rest of the paper looks at the challenges faced by the interpretive sociologist when conducting or hoping to conduct comparative research on the criminal justice system. It starts with some reflections on a research project that was conducted in Australia about variation in sentencing practices for juvenile defendants. A central methodological challenge in this project was to demonstrate that there are sentencing differences between states. When practitioners or policy makers are asked to comment on statistical differences, they can usually dismiss or ignore any finding. When I raised the differences between New South Wales and Victoria with magistrates in New South Wales, they simply pointed out that Victoria has a lower crime rate. One objective in my study was to demonstrate that there really were differences in sentencing practices through comparing similar cases. The study demonstrates, through comparing similar cases observed in different states, that some magistrates in Victoria, at least those observed in metropolitan courts, were extremely lenient.

The paper also considers the questions that arise when considering how to pursue a cross-national qualitative project about the criminal justice process, drawing on my experiences when attending conferences of the Asian Criminological Association. My impression was that the majority of papers presented at these conferences described and analysed aspects of crime and the criminal justice process in particular countries, but without making international comparisons. There was no discussion of regional problems relating to rapid urbanization, a breakdown in family values or rising crime. However, papers presented at a conference may not always reveal the issues that concern practitioners and policy makers.

How then might one design an international comparative project? My own preference would be simply to arrange a small meeting in which people could present papers about some aspect of criminal justice in their own country, but also consider wider issues about comparison (which should

arise naturally when discussing the papers). I would be most interested in getting together some researchers from Japan, the People's Republic of China, Taiwan and South Korea, perhaps with some participants from Australia and New Zealand. One way to create more coherence would be to require participants to have an interest in qualitative research methods.

The paper concludes by recognizing some challenges that arise when conducting comparative research within the interpretive tradition. The first is to avoid falling back into a Durkheimian framework by constructing causal explanations with the aim of developing an universal theory. The second is to produce good contextual descriptions, but also to ask comparative questions about the legal systems in different countries. The third is to recognise that most practitioners and policy makers have little interest in comparison, so even if the researcher only wishes to offer insightful descriptions, there are often political implications.

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