Introduction: Exploring the Comparative in Socio-Legal Studies

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This journal article has been accepted for publication and will appear in a revised form, subsequent to peer review and/or editorial input by Cambridge University Press in the International Journal of Law in Context.

The final definitive version in the online edition of the journal article at Cambridge Journals Online is available at:

https://dx.doi.org/10.1017/S1744552316000173

Introduction: exploring the comparative in socio-legal studies

Abstract

Among the diverse approaches to comparison in socio-legal studies those that employ qualitative research, richness of detail, and attention to context are the focus of this special issue. The Introduction draws on comparative law and social science literature to argue that comparison amongst studies of laws in contexts can follow different trajectories: the comparison may start from an assumption of similarity—in form, purposes, or context—in order to identify significant differences; or it may identify significant similarity across social and cultural divides. What unites many of the projects of comparison undertaken by qualitative empirical researchers is that the points of relevant comparison are identified within the complexity of the empirical studies at hand; and they are allowed to emerge, or change, as the researcher comes to understand the facts and issues more deeply.

I. Introduction

As the field of socio-legal studies has diversified the goal of understanding 'law in society 'has expanded into the goals of understanding 'laws in societies'. The field is characterized by research into the nature and role of different types of law and legal phenomena, as well as the part they play in different types of society. It seems important, then, to ask about the ways in which scholars are taking advantage of the possibilities offered by comparison amongst such examples. In what ways are empirical studies of laws in various contexts being brought into comparison with one another, either explicitly or implicitly? How do such exercises differ from, or relate to, the projects traditionally pursued by comparative lawyers? Is there a distinctive element to comparison involving qualitative empirical studies? It is the last question on which this special issue concentrates. The possibilities for comparison are not limited to what might be described as 'law', but also encompass informal legal norms and processes, and related understandings and attitudes.

The themes and debates developed in comparative law often touch upon questions and issues explored by socio-legal scholars, such as the relevance of context to legal change. There have been calls to expand the field. But how, if at all, can we compare the results of detailed empirical research, let alone case studies from very different social legal traditions? David Nelken (in his paper in this issue) notes recurrent problems with attempts to use indicators to compare across contexts. He refers to criticisms about the misleading nature of many measures and variables, about the problems presented by differences in cross-national meanings and local understandings, and about the need to look behind statistics. There is an evident need to explore alternative approaches. In this introduction we review some of these debates and the issues they have identified for socio-legal research.

There is, of course, no single right approach to comparison, and different purposes lead to the use of different methods, with different outcomes. Indeed, the variety of possible comparative questions and methods is a feature of the rich and complex field of socio-legal studies. The purpose of the comparison is generally analysis and interpretation, rather than evaluation or prescription. Socio-legal scholars may not be concerned with the goals of legal change, the promotion or criticism of legal convergence, European harmonization, or processes of globalization (cf. Nelken 2007a: 17, and in this issue). But descriptive and analytic work may, nevertheless, lay the foundation for the projects of those with more practical aims. Indeed, such projects often benefit from the sort of empirical detail with which we are here concerned. Several different possibilities are illustrated by the papers in this special issue.

In this Introduction we discuss how scholars can employ qualitative research, richness of detail, and attention to context as the basis for comparison, often using case-studies as a starting point, and allowing specific points of comparison to emerge from the material at hand. Qualitative and comparative work within the broader social sciences highlights the possibilities offered by using such material as the basis for illuminating socio-legal comparisons; both caution and inspiration can be found in the related debates. A number of different approaches to qualitative, socio-legal comparison are illustrated by the papers in this special issue.

II. Comparative law and socio-legal research

Recent years have seen calls for comparative lawyers to pay attention to the social contexts of the laws they consider and to study diversity as well as similarity (Reimann 2002: 671; Cotterrell 2006: 710, 2007: 133; Dannemann 2006; Nelken 2007: 19–25). But how is this to be done? Classical approaches to comparison identify difference—in legal substance, process, or institutions—against a background of similarity. This is generally found in the overall structure of the legal system or the social problems it seeks to address. Most European states have, for example, developed comparable, albeit not identical, laws concerning the formation of contracts, the institution of marriage, and many matters of public administration, as well as similar legal processes. In such contexts, noting difference—including systemic difference between civil and common law systems—can be undertaken against a backdrop of substantial similarity. Social context might, then, be relevant for explaining difference, or change and development (Nelken 2007: 21–27).

The distinctive ‘functionalist’ approach identifies a basis for comparison in the social problems addressed by a legal regime: it starts from the assumption that ‘the legal system of every society faces essentially the same problems, and solves these problems by quite

different means though very often with similar results' (Zweigert and Kötz 1998: 102; Graziadei 2006). The points of similarity that form the basis for comparison are here identified in social goals, and this approach has been credited with a turn towards 'context' (Michaels 2006: 340; Riles 1999: 235). But can the socio-legal scholar assume that societies always, or even commonly, face 'the same' problems? Appreciation of the fact that many social problems are 'constructed' puts this in doubt (Frankenberg 2006: 444–45; Nelken 2007: 33). This is not to undermine the value of a functionalist approach, so much as to indicate its limits. Mahy's paper (in this issue) takes the criticisms seriously and outlines a successful functionalist comparison, which links different labour arrangements to subtle and sometimes unexpected differences in context, as well as to formal and informal regulation.

When a functional approach is not appropriate, however, how are we to compare laws or legal systems that are substantially unlike, or which seek to address different social problems; and how are we to describe the objects of comparison? Some scholars have advocated the study of 'law in action' (Palmer 2005: 264; Reimann 2002: 679), others the study of 'legal culture' (Cotterrell 2006, Nelken 2007: 29). It has been argued that comparative lawyers should study different 'legal traditions' (Glenn 2000, 2006; Menski 2006; Bussani and Mattei 2012), 'legal pluralism' (Reimann 2002; Cotterrell 2006), and 'globalisation' (Twining 2001, 2007), as well as transnational laws. Calls for expansion in the scope of inquiry have been accompanied by calls to 'open out' the field to other disciplinary approaches (Nelken 2007: 16–19).[1] However, as Örücü (2007: 56–62) points out, scholars face a daunting task when trying to undertake comparison amongst non-Western and non-state laws. Both legal culture and legal pluralism, as objects of study, have given rise to considerable disagreement (Cotterrell 1997; Roberts 2005) and hardly seem to provide a stable basis for the identification of significant difference.

The issue which concerns scholars contemplating forms of comparison that go beyond doctrinal issues and span very different cultural contexts is the assumption of sufficient similarity in order to make the identification of difference meaningful. We need some way of speaking about the diversity of the human world without losing our grounding, to keep something firm in order to evaluate the significance of difference. This is particularly problematic when the subject matter is law in society or other socio-legal phenomena, which vary considerably and are found in different configurations, performing very different roles, across social contexts. Legrand (1997) insists that laws inevitably gain new meanings in

[1] Along with calls to expand the field of comparison in socio-legal studies, Örücü (2007: 53–56) has noted an expansion of purposes. As well as programmatic and doctrinal projects, she says—such as the development of tools to transfer legal knowledge from one legal tradition to another, or to explain and predict legal change—there are descriptive, analytic, and explanatory projects, although practical, policy, and pedagogical purposes are still pursued. See also Twining (2001: 34) and Nelken (2007a: 14–15).

different contexts, always coming to reflect historical and cultural norms, assumptions, and understandings. On this view, both cross-cultural understanding and linguistic translation are inherently problematic, such that foreign law becomes an almost 'unconquerable alien' (Demleitner 1999; Whitman 2003: 322). This argument assumes radical differences amongst 'cultures' which, we suggest, raises an idealistic vision of law as 'a product embedded in the special legal culture of the local actors' (Graziadei 2006: 467–70). Empirical studies of legal imposition and borrowing significantly undermine the universality of this assumption (Graziadei 2006; Frankenberg 2006: 445–46; Pirie 2014: 79).[2] Laws may mirror normative assumptions shared by members of a society, but they may also be imposed or borrowed. The meaning of legal rules and categories is not entirely determined by context and culture. Laws, themselves, 'construct authoritative images of social relationships and actions' (Merry 1990: 8–9); they influence the meaning of basic categories, such as property, contract, trust, responsibility, and guilt (Cotterrell 1998: 177). Laws can mirror underlying social norms and assumptions, then, but superficial similarity may mask different histories and assumptions and, as Whitman suggests, this in itself can provide a basis for comparison. Whitman (2003: 312) presents his comparison between the German and American legal concepts of 'dignity' as a move towards understanding difference and developing a sympathetic grasp of 'other' cultures. This is possible, he says, if we understand laws as normative systems, which justify certain actions, and which are themselves based on important, if tacit, assumptions (2003: 334–36, 343). Laws can be a window onto society, then, although historical and social inquiry may be necessary in order to tease out the origins and roles of the concepts and rules in question. If a superficially similar concept, like 'dignity', reflects different historical assumptions in Germany and the US, this tells us something about the societies in question. However, when laws are borrowed from other contexts, or manipulated for particular purposes, they may be the product of other, equally interesting and comparable, dynamics. In each case, empirical detail helps the researcher identify the relevant points of comparison, whether in the substance or the form of laws, the ways in which they have come about, the roles they play, and the basic assumptions they reflect.

How, then, do we compare without imposing our own categories, or a perception of similar 'problems', on those we study? These, we suggest, are not issues that can ever be wholly overcome. In order to set up meaningful comparison we have to assume, and make explicit, certain points of similarity. In the case of comparison between countries this might involve identifying shared histories or cultures within a geographical region, or a similar nation-building project following a revolution; or in the case of more local comparison, we

[2] Watson's (1974) work on 'legal transplants' has attracted criticism, but the concepts of 'imposition' and 'borrowing' capture the nature of processes that have been described widely within the historical and anthropological literature (Pirie 2013: 176–86).

might assume shared concerns to address deviance or to regulate access to natural resources. In such cases, contrasting the laws, legal practices, or attitudes to law can become meaningful. What is important for the empirical scholar is to be aware of the attendant assumptions—about historical and cultural similarity, or common human concerns—and the possibility that even the most basic assumptions may be confounded on closer empirical study.

Three papers in this special issue illustrate the way in which choice of appropriately general subjects, leading to carefully controlled studies, might address these issues. As Hertogh and Kurkchiyan demonstrate, 'legal consciousness' is a sufficiently general term to allow comparison across European contexts. Their empirical research reveals important differences in the 'collective legal consciousness' of people in different European countries. They are able to link these differences—in attitudes towards the meaning and significance of law—to general attitudes towards the political system in each country. In other projects, the process of delving further into the case studies at hand might prompt the scholar to change or nuance the terms of comparison as the research proceeds, either fundamentally or in matters of detail. This approach is described by both Mahy and Creutzfeldt in their papers in this special issue. Mahy developed a functionalist framework for comparing labour arrangements on the basis of qualitative pilot studies, while Creutzfeldt's comparison of attitudes to European ombudsmen emerged from the answers to open-ended questions contained in more controlled surveys.

Two other papers (Kubal and Pritchard) start from a single case-study, letting the empirical material suggest the terms of comparison. Qualitative empirical research is often associated with the detailed exploration of particular cases or limited samples and these studies demonstrate their potential for the comparative scholar. Empirical complexity is only a problem for such work if the terms of comparison are assumed to be fixed at the outset. Of course, the need for flexibility and adjustment during the course of research poses its own challenges, but qualitative researchers often have to address the unexpected. How, then, have other social science researchers addressed the issue of comparison using qualitative empirical data and thick description? The debates on case-study comparison, in particular, have highlighted several issues that are relevant for the socio-legal researcher using qualitative material, as we discuss in the following section.

III. A social science perspective on qualitative comparisons

Comparative lawyers were not the first to employ a qualitative approach to comparison, paying attention to the richness of detail and the social context across a relatively small number of cases. Mathias Siems, in his most recent handbook of comparative law, seems surprised with his 'discovery' of 'a number of instances where non-legal researchers have

dealt with topics of a genuine comparative legal nature' (Siems 2014: 313). This section reviews some of these debates and the critiques relevant for the project of comparison in socio-legal studies. Most of these have involved case studies, often known as 'small-N' comparisons. Of course, not all comparative research involves case studies and not all case studies involve comparison,[3] but debates about their intersection are often informative for qualitative empirical comparison more generally.

What are known as 'small-N' comparisons (Lijphart 1971) have been ubiquitous in comparative social science research in sociology, politics, history, and international relations. This terminology emerged in the 1970s, when large-scale comparisons (characterizing the early stages of social science research, which often aimed to explain phenomena worldwide) were overshadowed by comparisons involving a small number of cases, often analysed over long periods (della Porta 2008: 213). Growing attention to interpretative social science stressed the relevance of 'thick descriptions' of few, purposefully selected cases (Geertz 1973). In the early 1990s, much of the work aimed at a limited generalizability, with middle-range or even lower-level theories, for which the specificities of the local historical and socio-political context played a crucial role (Mair 1996). Whilst more recently some scholars have been advocating use of larger number of cases, due to the development of new statistical methodologies for multi-case comparison (della Porta 2008: 213), those researchers who emphasize the contribution of interpretative work and qualitative approaches still value small-N, case-study comparisons. They are praised for their detailed knowledge of social processes at different points in time and considered as particularly useful for the accommodation of social contexts (della Porta 2008: 211).

Discussions of this comparative work have often revolved around the starting point, whether similarity or difference, reflecting our discussion of the starting point for comparative law, in Section II, above. Some studies start with 'the most similar cases', as the optimal samples for comparative enquiry, suggesting that the research design in which the cases share many background or 'systemic' characteristics (economic, cultural, or political) allows for more controlled explanation of differences (Przeworski and Teune 1970: 32). It is suggested that if important differences are found among otherwise similar cases, then 'the number of factors attributable to these differences will be sufficiently small to warrant explanation in terms of those differences alone' (Przeworski and Teune 1970: 32). Other studies, by contrast, start with the selection of 'most different cases' and focus on an in-depth comparative analysis of a few, carefully-selected shared phenomena, such as social movements, especially when little is known about them. Given disparate environments, this is a particularly useful way to address certain theoretical problems, such as what we mean

[3] The review of all the social science literature on comparison lies beyond the scope of this paper.

by a ‘social movement’, how they come about, how they develop, and under what circumstances (Collier et al. 2004, Tarrow 2010).

Both approaches might be adopted by socio-legal scholars. Indeed, the well-established position of small-N comparisons in social science should encourage the project of qualitative empirical comparisons in socio-legal studies. However, during the course of a long history of conceptual developments and shifts, comparative studies based on a small number of carefully selected cases, have been heavily criticized from different sides of the methodological and epistemological spectrum (Steinmetz 2004: 371). Positivist critiques have doubted the scientific value of small-N comparisons by referring to their merely ‘idiographic’ nature, suggesting they are of limited, mainly descriptive, relevance (Rueschemeyer 2003). A more orthodox ‘interpretivist’ critique raises the issue of incommensurability of experiences and hence the impossibility of meaningful comparison between different contexts (Steinmetz 2004). ‘Post-modernist’ critiques have questioned the extension of Western or European (implicitly cultural) categories to non-Western or ‘dominated’ social groups more generally, from the perspective of ‘imperialism’ (Lyotard 1988). These critiques all deserve attention and by addressing them we can refine the qualitative comparative approach in the socio-legal field and demonstrate more clearly its virtues.

To start with the ‘positivist’ critiques: scholars stressing objectivity, rigour, and generalizability as the goals of social science research, have criticized small-N qualitative comparisons. Theda Stocpol (1984), for example, argued that theoretically rigorous explanations can only be achieved through comparative research of a series of necessary and sufficient causes for a particular event. Charles Ragin, in turn, holds that comparative knowledge delivers ‘the key to understanding, explaining and interpreting’ (1987: 6) provided that the techniques are based on Boolean algebra. The implication is that a qualitative, or small-N, approach to comparison can only *describe*; it cannot *explain* particular phenomena. Sartori summarizes the broader dilemma that seems to haunt many social science comparativists: ‘case studies sacrifice generality to depth and thickness of understanding, indeed to *Verstehen*: one knows more and better about less (less in extension). Conversely, [large-scale] comparative studies sacrifice understanding-in-context—and of context—to inclusiveness: one knows less about more’ (1991: 253).

As Emma Carmel (1999) convincingly argues, however, this sets up a false dichotomy between contextualization (rich description) and conceptualization (generalizability and theory building) in comparative research. The separation of ‘understanding’ from ‘explanation’ is artificial and analytically unhelpful, as one actually *presupposes* the other (1999: 143). A comparative case study approach *engages* with different contexts, which in turn *facilitate*s the conceptualization of core common features of a particular process,

experience, or event, without any loss of rigour (Rueschemeyer 1991, quoted in Carmel 1999: 143). These conceptualizations are, in turn, embedded in the context from which they arise and thus concretely linked to particular times and places (1999: 143) making any theory building actually 'for someone and for some purpose' (Cox 1981). Qualitative data informs generality and explains uniqueness (Bradshaw and Wallace 1991), while the appreciation of context can refine the assumption or description of both similarity and difference, allowing for finer comparison, even if less wide-ranging.

The interpretivist critiques of qualitative comparisons are primarily centred on the concepts of incommensurability and incomparability. Some refuse any reference to underlying causes and reject the idea of commensuration across 'social mechanisms' (Steinmetz 2004: 384). The idea of 'incommensurability' suggests that 'we have no measure, or no common measure, for something—in other words all concepts are context embedded to the point of being inescapably idiosyncratic' (Sartori 1991: 252). A related critique of comparison argues that 'we are not justified in classifying two individuals or groups as examples of the same thing if they understand themselves under different descriptions' (Steinmetz 2004: 385). Steinmetz illustrates this critique by saying that 'a comparison of, say, positivists and nonpositivists in social science, would be rejected from this position to the extent that the groups in question refuse this definition of themselves' (2004: 385). This debate within the broader social science literature strikes a familiar cord with critiques of comparison and qualitative studies of law conducted by legal scholars, discussed in the previous section (Legrand 1997, Demleitner 1999). But the idea of incommensurability is an extreme position—analytical concepts put forward by social science researchers to understand and compare contextually different experiences are always 'generalizations in disguise, mental containers that amalgamate an endless flow of discrete perceptions and conceptions' (Sartori 1991: 252). Generalizing concepts are heuristics that inform the research endeavour; indeed, they are part of the process by which we make everyday life intelligible, and this does not, of itself, undermine the resulting analysis. The aim, as anthropologists have remarked, is often adequate analytic description, rather than cross-culturally valid generalization (Parkin 1987: 12).

A related critique of incommensurability is made by post-modernists, who argue that the application of comparative concepts originating from the 'West' in non-Western contexts is a form of analytical imperialism, reproducing the asymmetry of power between the observer and the observed (Steinmetz 2004: 387). Non-Western societies and subaltern groups are more likely to be analysed in terms of the categories of the Western and dominant cultures than vice versa (Steinmetz 2004: 388). As a result, concepts like 'civil society', 'the state', or 'feudalism' have on too many occasions been used in comparative social science research only to show that they are lacking or only partially present in specific, non-Western settings

(Chakrabarty 2000). Clifford and Marcus, writing about the politics of ethnography, have called upon qualitative researchers to exercise caution when applying such comparative concepts in the context of colonialism or global inequality, as they may disavow the radical difference of the non-Western social order, its unique or incommensurable aspects (Clifford and Marcus 1986). François Lyotard, in the spirit of post-modernism, goes even further and theorizes this asymmetry with the concept of *differend,* when the regulation of epistemological conflict between the observer and the observed is 'done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom' (Lyotard 1988: 6, quoted in Steinmetz 2004). In legal anthropology similar issues were raised even earlier, by Bohannan (1968), who argued against Gluckman (1967) that western legal concepts, such as 'the reasonable man' could not be applied in African contexts. Although the debate was inconclusive, it is now accepted that careful choice of terms can lead to fruitful comparison, enriching analysis and understanding (Holy 1987). Moore's (1978) seminal work on the semi-autonomous social field, for example, drew analogies between New York garment traders and Tanzanian farmers, while Greenhouse, Yngvesson, and Engel (1994) have drawn illuminating conclusions from comparison of attitudes to law in three American towns.

We can reasonably ask whether the use of Western concepts in qualitative, small-scale comparative research has always, even often, been done un-reflexively and in an 'imperial' manner. Although the idea of 'state law' might be inappropriate for the pre-colonial history of the Indian subcontinent, does this rule out the use and potential analytical applicability of all concepts originating from 'Western' social science? Bourdieu's works on Béarn peasants (Bourdieu 1990), Frenchman in general (Bourdieu 1984), and the Kabyle (Bourdieu 1977), although concerned with practices as diverse as the system of succession in Béarn, the interior disposition of the Kabyle dwelling, or the distribution of tasks and periods in the course of the Kabyle year, have made analytical use of the concepts such as 'fecundity, succession, education, hygiene, social or economic investment, marriage, etc.' (De Certeau 1984: 52).

Although Bourdieu rarely discussed the topic of comparison directly, his work was deeply comparative, concerned with different figurations of race, class, and gender (Steinmetz 2004). In Bourdieu's sociology the Kabyle dwelling could be read as the inverse of the French school, in which he saw the 'reproduction' of the social hierarchies and the repetition of their ideologies (De Certeau 1984: 52). Bourdieu's approach relied on the use of *analogy* to analyse and compare these procedures and practices (De Certeau 1984: 54-5). The use of analogy seems less imposing and more open to negotiation than comparison based on defined categories; it can open up a simple case-study to richer interpretation and analysis,

by identifying similarity between things that are otherwise dissimilar for the purpose of explanation or clarification.

In the following section we demonstrate how the use of analogy, like the conceptualization of core common features and the use of generalizations as heuristics, can all be used in socio-legal comparison, by referring to the papers in this special issue.

IV. Using qualitative empirical data for comparison in socio-legal research

The goals of rich qualitative description and nuanced understanding have, we suggest, been under-appreciated in the field of comparative law. For many comparativists the object, whether explicit or implicit, has been to identify differences as the basis for programmes of legal change and reform, as Nelken describes (in this issue). The identification of suitable indicators or terms of comparison is necessary in order to evaluate the significance of difference, for instrumental ends. But comparison can also be used to highlight the ways in which people do things in similar ways. The object here is often a more nuanced understanding of law in context, on its own terms. Some comparativists seem to dismiss the value of description and understanding as ends in themselves, denigrating such exercises as 'butterfly collecting' or 'mere description', as opposed to the practical aims of justification, legitimation, and evaluation, as Mahy discusses (in this issue). But must comparison have a practical or evaluative purpose? We would suggest that, at the very least, the assessment or evaluation of laws and legal processes in very different cultural contexts must be preceded by a thorough understanding of the context on its own terms, if any form of comparison is to avoid the pitfalls described by Nelken. Identifying a meaningful subject for comparison—and using qualitative data to do so—may be illuminating in its own right, although it may also provide the starting point for more evaluative or policy-oriented studies.

This special issue includes three studies in which the authors have allowed the richness of empirical detail, drawn from qualitative research, to determine the basis for their comparison. Mahy used qualitative pilot studies to identify a meaningful functional basis for her comparison of labour arrangements, which would work across national and cultural divides. The goals of employers in the restaurant sector in cities of Australia and Indonesia, she found, were sufficiently similar to allow for meaningful comparison, and her study indicates the relevance of a variety of factors—formal and informal regulation, religion, and family ideals—in explaining both similarity and differences between them. The same starting point might not work elsewhere—in more traditional contexts where employer and employee relations do not take shape in the same way—but Mahy's familiarity with the cultural context of both research sites allowed her to define a meaningful subject for comparison.

Creutzfeldt set out to undertake a disciplined comparison of attitudes towards European ombudsmen, based on wide-ranging surveys containing carefully-defined questions for

ombudsmen users. This indicated remarkable similarity across national European borders. However, her more open-ended questions also elicited a range of discursive responses, which demonstrated striking differences in the language used by respondents in the UK and in Germany to describe their expectations. Creutzfeldt went on to explore links between the nature of these expectations and what other scholars have identified as nationally-distinct legal cultures in Europe. The qualitative data elicited by the general questions of the surveys, that is, produced an unexpected and illuminating point of contrast.

Returning, then, to the question of what is to be compared, we are suggesting that robust and culturally-appropriate forms of comparison may result when the terms are allowed to emerge, or are nuanced, on the basis of close familiarity with the material at hand. This is true of the study by Hertogh and Kurkchiyan (in this issue). These researchers, who have long experience of research on legal consciousness in European settings, have advanced the concept of 'collective legal consciousness', originally developed by Kurkchiyan (2011), in order to compare attitudes towards law and its meaning in different European countries. Surveys and focus-groups were carefully designed to elicit relevant views, which allowed the authors to link the respondents' attitudes towards law to their attitudes towards politics more generally. The open-ended nature of the discussions produced material which offers a vivid description of opinions and attitudes, adding depth and richness to the authors' conclusions about the nature of the attitudes expressed.

Mahy, Creutzfeldt, and Hertogh and Kurkchiyan have all, then, undertaken disciplined forms of comparison which are based on qualitative data-gathering. The results of their research have both shaped the terms of the comparisons they ultimately draw, as well as adding depth and richness to their conclusions. By contrast, Kubal and Pritchard (in this special issue) allowed the terms of their comparisons to emerge from a single study. This is characteristic of a social scientific, qualitative approach to comparison, whereby a detailed case study is interpreted by analogy (Bourdieu 1984, De Certeau 1984: 54–55), or in contrast, with other cases specifically chosen to illustrate similarity or difference (Pirie 2014). This allows the researcher to explore and compare the complex ways in which people themselves think about, borrow, and develop their laws, as described by Pritchard, and to make cross-cultural comparisons in unexpected places, as discussed by Kubal.

Seeking to understand and analyse the laws and legal processes surrounding migration in Russia, Kubal undertook fieldwork to obtain qualitative data, including the experiences of migrants, themselves. She found parallels between the 'spiral effect of the law', as she analyses it in Russia, and the 'legal violence' noted by scholars analysing the legal situation and migrant experiences in the US. Although not exactly the same, the cases were sufficiently similar to indicate global patterns or trends. As well as being interesting in its own right, this comparative exercise helps her analyse the Russian case, avoiding the picture of

exceptionalism that can result from an overly narrow ‘law in context’ approach, and embedding this case in a broader view of contemporary societies.

The challenge in such cases is to identify significant similarities and to decide how to interpret them. Anthropologists seeking to analyse the data produced by ethnographic work, for example, typically search for analogies and recurrent themes in different cultural contexts, without preconceptions about what they may, or may not, find (Pirie 2014). An essential element of this is deep familiarity with the studied case, allowing the researcher to assess the significance of the legal phenomena and on what terms analogies might be drawn. Can we assume that similar laws and legal practices reflect similar cultural beliefs and practices, or are they the result of legal borrowing? Should we look to political, social, historical, economic, or other factors to explain similarity? The answers often lead on to other questions.

The importance of research designed to identify, rather than assume, similarities amongst legal phenomena across social and cultural divides, has maybe not been sufficiently emphasized in the literature on comparative law, although it has been present in social science studies. Rich empirical work is often the basis for the discovery of unexpected similarities. Finding that people do address similar issues in very different contexts is illuminating in and of itself: noting similarity in the appreciation of, and reactions to, social problems across cultural divides tells us something about recurrent human concerns and dynamics, or those which might be associated with specific social, political, and economic contexts. This often gives rise to further questions, both about differences—do similar-looking laws or legal codes, in fact, play the same role in different contexts—and about the significance of those that do not share the same patterns—can we understand more about legal borrowing by considering contexts in which it seems to be refused? The identification of significant similarity here occurs against a backdrop of difference, thus avoiding the need to make assumptions about similarity at the outset. This type of comparison is rarely controlled or deliberate. As Örücü (2007: 49) notes, it generally begins with facts, rather than hypotheses, and ends in description; but, we might add, it is description that has been enriched by the comparison.

Pritchard’s paper (in this issue) stands out because it involves the study of a form of comparison carried out by her informants, themselves. Undertaking a longitudinal study of ideas about law and nation-building among Kosovar Albanians, she describes how the author of an early twentieth-century legal code made explicit references to classical precedents as a way of establishing legitimacy for his text and for the emergent Albanian nation. At the same time, he emphasized distinctions between Albanian and other traditions, to create a sense of nationhood. Drawing comparisons and distinctions is not just a scholarly pursuit.

V. Conclusions

Comparison amongst studies of laws in contexts can follow different trajectories: the comparison may start from an assumption of similarity—in form, purposes, or context—in order to identify significant differences; or it may identify significant similarity across social and cultural divides. The complexity of socio-legal studies that results from the exploration of empirical detail offers possibilities as much as challenges. This is so whether the comparison is planned and systematic, or it develops out of richness of qualitative research; and whether it involves small numbers of cases or more wide-ranging comparison. For scholars undertaking controlled or deliberate comparison—typically the search for difference against an assumption of similarity—empirical detail serves to nuance the terms of comparison as it reveals complexity and allows the researchers to reassess assumptions of sameness. By contrast, the search for—or realization of—similarity in the context of difference is often a means of extending and deepening analysis originally focussed on a particular case study; here empirical detail serves to highlight similarity and to identify what may or may not be significant behind an appearance of sameness. Of course in practice, comparative work may, and regularly does, involve elements of both.

Undertaking qualitative empirical research is a means of coming to understand particular cases on their own terms. It requires the careful use of concepts that best capture the empirical reality of what is being considered, and to the extent that comparison is possible between different cases, the terms of comparison often emerge from the research, itself, rather than being predefined in terms of categories or indicators. Here, the researchers own cultural sensitivity and scholarly discipline will play a role in making sense of the gathered data.

One of the purposes of this special issue is to draw more recognition to the fact that comparison is a natural part of much good scholarship. In practice, we suggest, socio-legal scholars regularly undertake forms of comparison in different ways, often without being explicit about their methods and purposes. The diversity discussed and reflected in the many edited volumes on comparative law should not be regarded as a problem. Rather than searching for some ideal, prescriptive, and methodologically precise form of comparison, the field should allow for different approaches and purposes. We should make a virtue out of variety. What unites many of the projects of comparison undertaken by qualitative empirical researchers is that the points of relevant comparison are identified within the complexity of the empirical studies at hand; and they are allowed to emerge, or change, as the researcher comes to understand the facts and issues more deeply. Good comparison is often not the initial object, or it may be no more than a general aspiration or hunch that points of similarity will emerge in different cultural contexts. What is relevant and significant as the basis for

comparison may not be apparent until those particular parts of the social world, in all their complexity, are understood on their own terms. This is the essence of the different approaches to comparison that are presented in the contributions to this special issue.

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