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# Comparative Methodology and Pluralism in Legal Comparison in a Global Age

At the beginning of a comparative enquiry, one of the main tasks for a researcher is the choice of methodologies. Friedrich Nietzsche, in his *The Dawn of a Day*, 1911 (Nietzsche, 1911), emphasised the concept according to which "**There is no exclusive method of knowing in science**.

We must deal with things tentatively, treating them by turns harshly or justly, passionately or coldly. One investigator deals with things like a policeman, another like a confessor, and yet a third like an inquisitive traveller".

The relevance of Nietzsche's words and their dynamic nature requires a legal scholar with comparative interests asking questions on methodology. He must take into account the complexity of legal phenomena and the methodological tools also coming from other sciences (i.e. anthropology, sociology, political science, and neuroscience).

Consequently, the debate regarding the suit-ability of different methods has many and varied facets. It mainly depends on the legal tradition to which the scholar belongs, his/her legal education, the impact of the religious factors on his/her way of interpreting a transnational source of law. From this point of view, it is not surprising that there might be a sliding scale of methods while taking account of the central

role played by the functional method for legal comparison.

The aim is to show how the methodological tools used in comparative analyses are not com-pletely suitable to study complex phenomena, and it is necessary to consider the integration of horizontal and vertical methodologies in legal comparison.

There are several factors that currently affect these enquiries, such as the emergence of new spheres of normativity and transnational actors determining a new configuration of the relationship between centre and periphery.

Furthermore, one might add the consideration that the presence of different forms of pluralism—a pluralism of pluralisms—implies a constant and urgent need to reconsider the adequacy of the methodologies in comparative law. In this regard, we believe that comparative law can play a crucial role in a global world.

We shall start this reflection by the knowledge of our object of study, constructing a reading of materials (Frankemberg, 2006). Since the first approach, a comparative lawyer is alone (Merryman, 1999). He lives with "his epistemological prejudices, his attitude towards the absurd consequences of the theories that he accepts" (Feyerabend, 1978; Adams & Griffiths, 2012).

According to Palmer, "method is now identified by the 'tech-niques' by which comparisons are carried out. These techniques have thereby acquired the status of separate methods: thus we have historical, functional, evolutionary, structural, thematic, empirical and statistical comparisons, and all of these can be carried out from a micro or macro point of view."

Choosing a method is undoubtedly difficult.

Annelise Riles brings out that a comparatist engages in comparison with the purpose "to find a model for modernization or to harmonize legal regimes" (Riles, 2001).

Therefore, a comparatist needs to know the core of the methodological propositions and be in contact with other scholars also belonging to other epistemic communities. He bears in mind that this knowledge can have a significant impact on the results of his research.

Leaving aside other mundane objectives, frequently characterized by decorative results—and, consequently, not very functional—a researcher knows that these results "reveal the skills, methods and talents of their markers; they allow us to distinguish the good, the bad and the temporary in means of production. A thing well-made will last [⋯]" (Glenn, 2010). From this point of view, we regard similarities, between two or more legal systems, as coincidences or dissonances reveal the features of "cultural postures" of other legal systems. However, both perspectives can be helpful for a comparatist to simplify the study of foreign law.

On one hand, it is, therefore, important to make into account the macro-comparative studies, with the aim of identifying factors and variables that influence the transformation of legal systems .

Developments in technology have enabled rapid progress to facilitate this knowledge. On the other hand, the knowledge of the language and the cultural and social factors characterising a legal system may allow revealing, "An experience without theory is just as incomprehensible as is (allegedly) a theory without experience".

"Eliminate part of the theoretical knowledge of a sensing subject and you have a person who is completely disoriented and incapable of carrying

out the simplest action." None of these factors can be separated from the passion which "gives rise to specific behaviour which in turn creates the circumstances and the ideas necessary for analysing and explaining the process, for making it 'rational'" (Feyerabend, 1978).

The structure of this article is simple. After a concise introduction to the methodological tools for studying complex phenomena (1), I discuss the concept of pluralistic methodology and the choice of developing vertical methodology for comparative law.

## METHODOLOGICAL PLURALISM AND LEGAL COMPARISON

From an epistemological point of view, the introductory questions can certainly be useful for a reflection on comparative methodology. A comparatist always searches for the best solution analyzing legal problems inter-related with religious pluralism. It "is an exercise that is no doubt valuable, but it is not really any more comparative in its methodological sophistication than legal reasoning in general" (Samuel, 2011).

Feyerabend has rightly noted that "who wishes to maximize the empirical contents of the view he holds and who wants to un-derstand them as clearly as he possibly can must therefore introduce other views; that is, he must adopt a *plural-istic methodology*" (Feyerabend, 1978).

*The* first element, which we can here take into account, concerns the

spread of tools that enable us to learn faster about "other" cultures and the relations between different legal and cultural traditions. In the ancient world, this circulation of information or models probably had no formal methodology; we can found it in the

common chthonic origins, which would still have had culture-specific character-istics.

The progressive development of other forms of communication and the collection of information on the World Wide Web today reach and transform the comparatists. They are no longer the travellers described by Tocqueville, but could become "virtual comparatists" and acquire sources of inspiration and information from the Web. How and with what results? Moreover, to what extent are there language barriers? On the Web, there is not a global language, but many. On the one hand, the growing wealth of available materials is a valuable aid to set up a comparative research, including a diachronic point of view. On the other hand—according to McLuhan—, this implementation means, "'the message' of any medium or technology is the change of scale or pace or pattern that it introduces into human affairs.

Earlier, the railway did not introduce movement or transportation or wheel or road into human society, but it accelerated and enlarged the scale of previous human functions, creating totally new kinds of cities and new kinds of work or leisure" (McLuhan, 1994).

This view undoubtedly expresses the need to study different legal systems, rather than just what belongs to the legal and cultural traditions of civil law or common law. One could observe that a type of law requires X method; B law requires Y method and C law requires Z method. According to Husa, "this kind of methodological mentality does not take into account legal pluralism in the true sense" (Husa, 2011).

By "**legal pluralism**" Griffiths refers to "the presence of a social field of more than one legal order" (Griffiths, 1986). Different forms and visions of legal pluralism could characterise a cultural tradition and different ways in which existing nations with a pluralistic legal system. For instance, some countries could accept that ethnic

or religious communities may operate their rule systems with official legal effects on family law. “Marriage, di-vorce inheritance and other matters dealing with personal status may be regulated by the rules of that particular community on the basis of the sanction of the state” (Edge, 2013). However, they may also be oblivious of, or consciously seek to counteract state sanction. In the United Kingdom, e.g. “Muslims are relating to something more than the norms of the English legal system alone. Issues then arise over how the different systems of norms interact and might coexist.” From this point of view, we could have at least two forms of legal pluralism: “where, within a state, enclaves with separate legal rules may operate; and legal systems which sanction or enforce different systems of legal rules in state-wide but separate and parallel court systems” (Edge, 2013).

The coexistence of different sources of law represents a significant problem for the lawyer accustomed to the principle of hierarchy coined within the constitutional law of national states. This problem does not only concern the issue of legal pluralism, but also that of globalization that can create uniformity in some places and integration in others (Riles, 2006). Legal rules such as, e.g. statutes, acts, cases, customs can coexist and circulate in the global arena. It is normal to wonder what happens in cases of collision between different norms that the courts could apply to the case at hand.

It is evident that a key element, in such debates and processes, is the power to determine what the law is and what is not, or what is legal and what something else is. All these processes of globalization or regionalization—such as the process of Europeanisation—“are challenging the mechanical understanding of methodology” (Husa, 2011), as well as the coercive and unifying roles of legal centralism.

By the way, if the role of the state is necessary to allow the entry of rules coming from other geographical areas, there are mechanisms by which the opposite could happen. For example, the rules and norms of Muslim communities in England could form a new system of law (called *angrezishari'at*) (Menski, 2014). Muslims living in the UK transmit the requirements of English law into the Islamic law.

The creation of a system of sources not deriving from legal centralism is the product of conceptions that con-sider legal pluralism as a fact. From this last point of view, "what are the consequences for the methodology of legal research [...]? And, if there is no legal centralism, but pluralism what method(s) should one deploy? (Husa, 2011).

This question clearly relates to the methodology of comparative law. It is difficult, for example, to imag-ine a comparative analysis of the sources of law in a global space crossing the borders of states, without an ap-propriate methodological choice. According to Adams and Griffiths, "there is no single comparative method because there is no single question" if you compare domestic and foreign law. The method will mostly vary, from formalism ("law in the books") through legal realism ("law in practice") to various sorts of functional comparison (Adams & Griffiths, 2012).

Furthermore, the presence of different forms of pluralism—a pluralism of pluralisms—implies a constant and urgent need to reconsider the adequacy of the methodological tools have been used up to now by comparative lawyers.

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