REFLECTIONS ON CONDUCTING COMPARATIVE LEGAL RESEARCH*

Abstract

This article attempts to capture some of the challenges inherent in undertaking comparative legal research as well as some useful insights on how to overcome these challenges. Insights and lessons from this article are based on the writer's own experience of successfully undertaking a doctoral research project using the comparative approach. The Article argues that more than at any time in history there is demand, especially in developing countries for cross-national comparisons of specific problems to reduce unexplained variance and find patterns and relationships to solve these problems.

Keywords: Comparative Legal Research, Reflections, Challenges, Solutions

1. Introduction

Comparative research projects typically involve some form of comparison of one's law or legal system with that of another. There is no gainsaying that comparative law exercises are often fraught with dangers because of explicit and sometimes subtle differences in law and practices. Anyone who wishes to undertake comparative legal research between two jurisdictions or different states would quickly realise that differences in national culture, local traditions, power structures, belief in state institutions, and differences in the degree of civil society development are some of the difficult challenges that need to be addressed. More importantly, there is usually a difference in the style of legal interpretation and the application of legal issues between the states that are up for comparison in legal research. There could also be a problem in the statute's logical interrelationship in cases where the research aims to compare the laws of the states. These issues make it risky to embark on a comparative study that one is not familiar with at the preliminary/proposal stage. But despite all these differences, comparative research is mainly interested in developing and testing theories that could be applicable beyond the boundaries of a single society, irrespective of cultural, historical or political differences.[1]

More than at any time in history there is demand especially in developing countries for cross-national comparisons of specific problems to reduce unexplained variance and find patterns and relationships to solve these problems.[2] One of the easiest ways to address issues with the 'comparability' of empirical units selected for comparison and analysis in legal research is to compare and contrast 'like for like.' This is done by distinguishing between casually and non-casually connected attributes. For instance, in the writer's doctoral research, the definition of terrorism, arrest, pre-charge detention, and proscription of terror suspect under Nigeria's TPA 2011 was compared with the definition of terrorism, arrest, pre-charge-detention and proscription under the UK's T.A 2000. Despite comparing 'like for like' occasionally lessons and insights derived from the comparative analysis of our law with that of another State/legal system may not always produce the same result. It could also produce conclusions and results that are not realistic. Sadly, this is the truth. This could be attributed to several reasons depending on the nature and the research area. Again, using my research which focuses on counterterrorism and human rights as an example, it is common knowledge that terrorist attacks are sudden and unpredictable**.** Therefore, the writer was careful in putting forward proposals and recommendations that are common grounds solutions to both Nigeria and UK, especially those that can be applied to Nigeria's domestic legal patterns. Comparing the Terrorism Acts of both states provided an opportunity for an evaluation of the strengths and weaknesses of the Nigerian and UK Terrorism Acts to acquire knowledge on how to improve the Nigerian TPA 2011 (as amended) and how to make it human rights compliant.

It is also important to establish the extent of what is to be compared without taking too much on. There have been instances where students embark on comparative law study only to realize halfway that it is simply not achievable under one single research project. For instance, a student that wishes to compare a piece of UK legislation with all the 28 EU member states might run into some serious challenges. A good way around this may be to select just a few countries, say two or three with similar legal systems or federal structures. This is not to say that one cannot compare a State with a different legal system. The truth is that it can be risky, and the recommendations and proposals put forward at the end might not be very useful or largely superficial. Equally, a comparative study on States with identical legal rules could also lead to differing results depending on the underlying theory. There are simply no guarantees on the outcome or result. But despite these challenges, the benefit of undertaking a comparative legal cannot be overemphasized. The comparative approach provides a valuable framework through which conflicts and differences between legal concepts and particular provisions can be explained and common ground solutions identified. Comparative research introduces legal concepts, styles, ideas, and categorisations that

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[1] Else Oyen, *Comparative Methodology Theory and Practice in International Social Research* (Page Publisher, 1990) p 1.

[2] ibid

are previously unknown thereby opening possibilities in the very notion of law.[3] Lessons from comparative legal research can help understand the workings of a foreign legal system and at the same time helps to understand our laws and culture better.[4] Likewise, comparing a law with similar legislation in another jurisdiction makes us question and re-examine core principles of constitutional order and human rights values and through these ideas, rules, norms, and principles are revealed that could improve the status quo. This is in turn may lead us to question our presuppositions about justice, fairness, rule of law, and how the law is created in our legal culture. As a result of globalisation, we are increasingly affected by what is done elsewhere and increasingly aware of developments in other places. The comparative methodology allows the borrowing of ideas and concepts from other jurisdictions and disciplines and attempts to develop a new paradigm.[5] Comparing and contrasting our statutes and judicial decisions with that of other legal systems can challenge our received categorisations and shed light on some of our laws as inaccurate or inconsistent. For example, the writer found that insights derived from comparing Nigeria's TPA 2011 with UK's Terrorism Act could be honed and then applied to Nigeria's legal patterns to improve her terrorism legislation. Lessons derived from comparing our domestic law and legal cultures with foreign law and legal cultures are also helpful in enhancing one's ability to critique our domestic law.

However comparative legal research raises a series of interesting methodological issues which can affect the degree and nature of the comparative enterprise itself. As Tamanaha rightly pointed out, laws and practices in States have histories and can change with time.[6] Hence there must be a careful transposition of ideas with much attention paid to the cultural origins and social preconditions of the country that they are introduced to. It is also important to bear in mind that applying lessons and insights derived from the comparative analysis of our own law with that of another State/legal system may not always produce the equivalent result. It could also produce conclusions and results that are not credible or convening. A recent study by Masferrer and Walker found that much of the legal academic discourse over the years has been produced by authors who have lacked the appreciation that different perspectives are necessary for a sound appreciation of topics such as terrorism and counter-terrorism.'[7] However, the past decade has seen a rapid increase in comparative legal research. The question that the writer often gets from students is whether it is possible to combine the comparative approach with other methodologies. The answer is Yes! However convincing justifications must be provided for adopting a mixed method approach. Simply importing rules based on a comparison with another legal system may not always work because of differences in context and due issues that have been earlier highlighted. In some cases, students might want to combine the comparative approach with a more thorough contextual approach.

Increased comparative legal research within one legal culture has the potential to illuminate the significance of that legal culture as much as the study of other legal cultures. A study by Grosswald showed that legal research which involves the comparison between statutes and judicial decisions challenges our received categorizations and suggests that hierarchies in legal authority we generally take for granted may be inaccurate.[8] This may in turn lead us to question our presuppositions about justice, fairness, equality, and how the law is created in our legal culture. Comparing our judicial practices with that of other legal systems can help develop one's legal patterns and broaden our outlook. More importantly, it helps to enhance the students' analytical and comparative skills.

As we continue to move into a more globalised environment where borders are no longer a barrier in academic research, comparative study is becoming attractive to legal scholars, especially international students. As in any other area of law, the scholar must ensure that the pros and cons of adopting a comparative approach should be weighed against the topic with the help of your supervisor(s).

[3] David Price, *Legal and Ethical Issues of Organ Transplantation* (Cambridge University Press, 2000) p 8
[4] Edward Eberle, the Method and Role of Comparative Law (The Washington University Global Studies Review, Vol 8, 2009) p 451
[5] Reza Benakar, Max Travers, *Law Sociology and Method: Theory and Methods in Socio-legal Research*. (Hart Publishing, 2005) p 10-11
[6] Brian Tamanaha, *A General Jurisprudence of Law And Society* (Oxford Uni Press, 2001) p 165
[7] Clive Walker, Aniceto Masferrer, *Countering Terrorism, Human Rights and the Rule of Law: Crossing of Legal Boundaries in the Defence of the State* (Edward Elgar Publishing, 2013) p 4
[8] Vivian Grosswald, 'Dealing in Differences: Comparative Law's Potential For Broadening legal Perspectives' American Journal of Comparative Law, 657 fall, 1998) p 660