

1 THE SUBJECT OF COMPARATIVE LAW TEACHING

As lawyers we have been trained in doubting ready-made solutions, questioning their rationale, and offering new solutions that are adapted to the changed circumstances. But how can we offer other solutions? The easiest way to find inspiration for developing a different solution or rule is to cross legal borders, since outside our own jurisdiction a plethora of different approaches and solutions exist which might provide a better approach, might be more efficient, might comply with our needs, and might, however, also dispel possible doubts that our solution is the right one under the given circumstances. In order to effectively use the many opportunities offered by looking across the border, training in comparative law is needed.

Teaching comparative law encompasses various components.² First, one can think of the history and use of comparative law. This can be deployed by telling the story of ancient Greek and Roman law³ followed by classifications of jurisdictions into legal cultures⁴ and legal families.⁵ Legal transplants⁶ and the global and regional unification and harmonization of the law through supranational organizations⁷ are other areas where the use of comparative law can be clearly illustrated. Another approach consists of introductions to legal systems other than the one in which the students are educated. In Europe, usually the common law (the US and UK) and the civil law (France and

2 See K. Boele-Woelki & D.P. Fernández Arroyo & A. Senegacnik (Eds.), *Contemporary Challenges to the Teaching of Comparative Law, Ceremony of 16 May 2022 in Honour of 5 Great Comparatists*, Brussels, Larrier Intersentia, 2023.

3 See W. Hug, 'The History of Comparative Law', *Harvard Law Review*, Vol. 45 No. 6, Apr. 1932, pp. 1027-1070; G. Frankenberg, 'Critical Histories of Comparative Law', in M. D. Dubber & C. Tomlins (Eds.), *The Oxford Handbook of Legal History*, Oxford University Press, 2018, pp. 42-63.

4 See S. Koch & J. Øyrehagen Sunde (Eds.), *Comparing Legal Cultures*, Fagbokforlaget, 2020, with introductions to the Norwegian, Finnish, Estonian, German, Polish, England & Wales, Scottish, Belgian, French, Austrian, Italian, Romanian, American, Australian and Chinese Legal Cultures.

5 See U. Mattei, 'Three Patterns of Law', *American Journal of Comparative Law*, Vol. 45, No. 1, 1997, p. 44; Y. Chang & N. Garoupa & M. T. Wells, 'Drawing the Legal Family Tree: An Empirical Comparative Study of 108 Property Doctrines in 128 Jurisdictions', *Journal of Legal Analysis*, Vol. 13, No. 1, 2021, pp. 231-282; V. V. Palmer, 'A Descriptive and Comparative Overview', in V. V. Palmer (Ed.), *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2nd ed., Cambridge University Press, 2012, pp. 19-91.

6 See R. Michaels, 'One Size Can Fit All, On the Mass Production of Legal Transplants', in G. Frankenberg (Ed.), *Order from Transfer—Studies in Comparative (Constitutional) Law*, Edward Elgar, 2013, available at <https://ssrn.com/abstract=2191543> (retrieved on 30 June 2023).

7 See K. Boele-Woelki, 'Unifying and harmonizing substantive law and the role of conflict of laws', *Recueil des cours*, Vol. 340, 2009, pp. 271-461.

Germany) are taken as examples.⁸ The hierarchy and interpretation of legal sources, the prevailing way of legal reasoning, the structure of the law, characteristic legal concepts and institutions, and the organization of the judicial system are some of the relevant aspects to reveal the differences and similarities and to explain their existence.⁹ If, without any comparisons, merely introductions to the foreign systems are provided, the teaching boils down to the so-called *Auslandsrechtskunde*. Knowing other and different solutions and approaches, however, enables the students to compare.

Another way of teaching comparative aspects of law is to focus on a particular area of law (e.g. corporate or family law), a legal institution (a contract or marriage), or a human right (access to justice) from a comparative perspective, whereby at least two different systems should be included.¹⁰ In a course on comparative tort or property law, for example, the teaching usually includes several other jurisdictions and, specifically in Europe, the European legal order should be one of them. Similarly, in case-oriented comparative law teaching the starting point for the analysis is a case scenario that raises a legal question for research and then guides the students through their work with the legal materials.¹¹

Finally, comparative law methodology can be addressed.¹² In this part the first question to be answered is how to define comparative law. It is an academic discipline¹³ and it is commonly agreed that a legal comparison is a scholarly process in which specific 'objects' of at least two jurisdictions are set against each other in order (1) to determine their similarities and differences; (2) to explain the causes of the similarities and differences; and (3) to evaluate the solutions.¹⁴ Personally, I think that the methodological part should always be included since only by knowing how to compare will a comparative

8 See V. V. Palmer, 'A Descriptive and Comparative Overview', in V. V. Palmer (Ed.), *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2nd ed., Cambridge University Press, 2012, pp. 19–91.

9 Illuminating G. Winterton, 'Comparative Law Teaching', *American Journal of Comparative Law*, Vol. 23, No. 1, 1975, pp. 69–118.

10 See J. M. Smits (Ed.), *Elgar Encyclopedia of Comparative Law*, Edward Elgar, 2006, brings together specific areas of law with introductions to different legal systems and methodological issues.

11 See T. Kadner Graziano, 'A Multilateral and Case-Oriented Approach to the Teaching and Studying of Comparative Law: A Proposal', *European Law Review*, Vol 23, No. 6, 2015, pp. 927–944 (940). This method has been applied by B. Braat, *Indépendance et interdépendance patrimoniales des époux dans le régime matrimonial légal des droits français, néerlandais et suisse*, *European Family Law Series*, Vol. 6, Intersentia, 2004.

12 See E. Örüçü, 'Methodologies for Comparative Law', in J. M. Smits, J. Husa, C. Valcke & M. Narciso (Eds.), *Elgar Encyclopedia of Comparative Law*, Edward Elgar 2023, pp. 42–50.

13 Convincingly argued by C. Valcke, *Comparing Law, Comparative Law as Reconstructions of Collective Commitments*, Cambridge University Press, 2018, pp. 219–223.

14 See K. Boele-Woelki, 'What comparative family law should entail', *Utrecht Law Review*, Vol. 4 No. 2, 2008, pp. 1–24 (7).

law course enable its potential to be developed for the students' later professional career as legal scholars, lawyers or decision makers.¹⁵

In brief, teaching comparative law entails the challenge of focussing on one or several of the above-mentioned components (the history and the use of comparative law, introductions to other legal systems, teaching a specific legal field from a comparative perspective and comparative methodology) whereby a balance between all four approaches should be achieved.¹⁶ Many books on comparative law¹⁷ provide assistance in reaching the final decision and comparative law teaching in specific areas has also been subject to publications.¹⁸

15 See J. Basedow, 'Comparative Law and its Clients', *American Journal of Comparative Law*, Vol. 62, No. 4, 2014, pp. 821-858.

16 See among others M. Rheinstein, Teaching Comparative Law, *The University of Chicago Law Review*, Vol. 5 No. 4, 1938, pp. 615-625; Steenhoff, Teaching Comparative Law, Comparative Law Teaching, Electronic Journal of Comparative Law 2002, <https://www.ejcl.org/64/art64-4.html>; M. P. Waxman, 'Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy', *Journal of Legal Education*, Vol. 51, No. 2, 2011, pp. 305-312; J. Husa, 'Comparative Law in Legal Education – Building a Legal Mind for a Transnational World', *The Law Teacher*, Vol. 52, No. 2, 2018, pp. 201-215, F. Cownie, 'Comparative Legal Education,' in: J. M. Smits, J. Husa, C. Valcke & M. Narciso (Eds.), *Elgar Encyclopedia of Comparative Law*, Edward Elgar 2023, pp. 350-357.

17 See M. Siems, *Comparative Law*, Cambridge University Press, 2022; M. Adams & J. Husa & M. Oderkerk, *Comparative Law Methodology: Volumes I & II*, Edward Elgar, 2017; U. Kischel, *Rechtsvergleichung*, C.H. Beck, 2015; M. Adams & D. Heirbauts (Eds.), *The Method and Culture of Comparative Law*, Bloomsbury, 2014.

18 See J. M. Scherpe, 'Comparative Family Law and Family Law Teaching', in H. Kha & M. Henaghan (Eds.), *Teaching Family Law, Reflections on Pedagogy and Practice*, Routledge, 2023, Chapter 4; T. Kadner Graziano, *Comparative Contract Law, Exercises in Comparative Methodology*, Edward Elgar, 2023; T. Kadner Graziano, *Comparative Tort Law, Cases, Materials and Exercises*, Routledge, 2018; A. Cahn & D. C. Donald, *Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, Cambridge University Press, 2018.