

TOOLS, GAPS AND FALSE MYTHS IN COMPARATIVE LEGAL RESEARCH ON HUMAN RIGHTS

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Abstract: In recent years, the comparative perspective has become increasingly used as a methodological approach to human rights research in the scientific literature. This paper is not intended to summarise the virtues and shortcomings that can be attributed to comparative legal research in the specific field of human rights. Rather, its aim is to critically reconsider its interdisciplinary role and, in particular, to reflect on two of the most popular methods in this field of research: legal comparison and the case study method. Firstly, this paper reviews the method in question, including its typologies and grounds for use. Secondly, it outlines the techniques that determine what and how to compare. Finally, a SWOT evaluation of comparative legal research on human rights is provided, identifying its strengths and weaknesses in order to dispel false myths.

Keywords: methodology, comparative analysis, legal comparison, human rights, critical function, SWOT.

Contents: INTRODUCTION; I. THE COMPARATIVE PERSPECTIVE AND THE GENERATION OF KNOWLEDGE: HISTORICAL EVOLUTION, GROUNDS FOR USE AND MAIN ELEMENTS; I.1. A historical evolution on what to compare; I.2. Grounds for use: questions that can be answered by comparing; I.3. Main elements of comparative analysis in human rights research; II. SOME METHODS AND ‘TRENDING TOPIC’ EXAMPLES IN COMPARATIVE RESEARCH ON HUMAN RIGHTS; II.1. The legal comparison method; II.2. The case study method; II.3. A practical example of applying the comparative perspective: the integration of migrants; III. A SWOT ASSESSMENT OF COMPARATIVE LEGAL RESEARCH ON HUMAN RIGHTS; III.1. Strengths...; III.2. Weaknesses...; SOME FINAL REFLECTIONS: DISPELLING FALSE MYTHS.

INTRODUCTION

Historically, the comparative approach has been undeniably important in the production of scientific knowledge, including interdisciplinary human rights research, an area where its use will predictably increase further in the future because it is an attractive proposition for all fields of study. Firstly, because it is a way of seeing and a cross-cutting cognition process that allows the method to be extended. Secondly, as noted by Landman (2002: 891), comparative research can be considered ‘the best social scientific work’ (Stanfield 1993: 25) or it can be categorically stated that unless one makes comparisons, one cannot claim to be doing science (Sartori 1991) and thirdly, common issues related to human rights research can be found in countries around the world.

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Generally, human rights studies tend to compare experiences or solutions in different contexts and situations to better understand the complexity of the legal, political, economic and cultural systems involved. In fact, the main object of comparative research in human rights is to identify and grasp the differences between institutions and legal systems from a global perspective, as well as to offer specific solutions to legal conflicts or issues raised to combine both systematic capacity and analytical capacity. The action of comparing can be an extremely complex task, because human rights cannot be understood without a historical-political and socioeconomic perspective (Losano, 2002: 25-35). This has been a field where the use of ‘prefabricated’ categories and concepts derived from the doctrine and jurisprudence has traditionally been deemed to be valid, without considering the contexts or the socio-historical circumstances involved. The need to analyse human rights from within and from the perspective of specific contexts is very recent, and has occurred thanks to a paradigm shift. A paradigm that has led to with a departure from the traditional predominance of the positivist-formalist conception or theoretical/cognitive thinking in human rights research, and to the introduction of new approaches relying on complex thinking.

As a result of this shift, it has been possible to rise above a binary conception of knowledge within strict parameters: theory/practice, what-is/what-should-be and structure/function; the absence of critical thinking in the face of memory-based and discursive accumulated knowledge. In contrast, despite some resistance, the progressive move towards complex thought has promoted an analysis of knowledge on the assumption that reality is changing, multidimensional, and indeterminate. According to this, it is necessary a dynamic articulation (texts and context), empirical references are sought (Aymerich 2001), and theory is subordinated to the effort of reconstructing the problem by shifting the initial problem into a theoretical object of study (Witker 2017).

The versatility and methodological centrality of the comparative approach in this field makes it possible to successfully analyse the complexity of social transformations and how those systems and sources of human rights address a specific issue in a ‘cross-cultural, cross-national or transcontinental’ way (Fideli 1998). In addition, the introduction of comparative research into the social sciences and legal studies replaces empirical experimentation and makes it possible to order images, classify them and highlight their qualities, identify differences and similarities between them, propose classifications, discover trends and counter-examples and reveal successful models as opposed to others in decline.

Although the action of comparing is an almost instinctive reflex and a remarkable approach, this is not always the preferred or chosen methodology for human rights research among all the myriad of methods available to the researcher. In fact, when looking at the contents of specialist journals on human rights, it becomes clear that legal comparison and/or comparative methods have a relative scientific impact. This is in contrast with the number of doctoral theses or monographic publications in the area of human rights, totally or partially, which –strictly speaking– include a comparative

analysis.² These are largely doctoral dissertations that include some Comparative Law aspects or the micro-comparative method, but in most cases, they are intuitively applied. Any attempt at legal comparison is inherently difficult precisely because of its methodological and content-based nature, which involve identifying differences and/or similarities. The more sustainable or viable legal comparisons are those that capture a kind of global cartography or a mere contextualisation at the macro or micro level. However, if the different normative realities are separated, the comparative analysis is usually a simplified and performative instrument to shape a global law (Moreno 2017).

Beyond providing quantitative evidences, its presence in human rights research is more significant when measured in qualitative terms because this varies across countries, specific topics, different levels of development of research teams, the degree of interdisciplinary of scientific institutes and legal training programmes in human rights. For instance, an illustrative field of interdisciplinary research on human rights is that of international migrations and, particularly, migrant integration studies. I choose this as a comprehensive, critical and heterogeneous example of comparative methods due to these gaps and limits. Except for a few exceptions, the migration comparative perspective has a marked discursive sociological, historical and political focus that is almost exclusively centred on verifying figures, facts or social factors. This results in other ways of situating the object of the immigration or 'integration' from an analytical and normative perspective are disregarded (La Spina 2016).³

Given the miscellaneous areas and interests found, this article will explore the complexity and versatility of comparative analysis in human rights research, looking transversally at migrant integration studies. This involves identifying what can be compared, how it can be compared, and for the purpose is of making a comparison, and whether it could or should be done, especially bearing in mind the different functions pursued at the methodological level and the most widespread techniques. The cross-

² For example, a quick review the table of contents of *The Age of Human Rights Journal*, *Revista Deusto de Derechos Humanos* and *the Revista Derechos y Libertades*, among others, from 2008 (the year in which the project started and the HURIMAGE Consolider network was created) to the present day shows, include very few studies using a comparative perspective, and even fewer that include –strictly speaking– a comparative methodology. See among others, those that include the use of a comparative perspective in their content, and analyse two or three contexts or systems of protection in Human Rights, are merely exceptions. However, the situation is very different for international specialist human rights journals, such as for example, *Human Rights Law Review* (https://academic.oup.com/hrlr/search-results?page=1&q=comparative&fl_SiteID=5167&SearchSourceType=1&allJournals=1) and others in the Dialnet repository ,

(https://dialnet.unirioja.es/buscar/documentos?query=Dismax.DOCUMENTAL_TODO=perspectiva%20comparada%20y%20derechos%20humanos&filtros.DOCUMENTAL_FACET_ENTIDAD=artrev).

This is without prejudice to some theses that do choose the comparative perspective, according to the result of a simple search in Teseo or Dialnet, for example,

(https://dialnet.unirioja.es/buscar/tesis?query=Dismax.DOCUMENTAL_TODO=perspectiva+comparada+y+derechos+humanos).

³ These include some articles published in the *European Journal of Migration and Law*, and some publications in the IMISCOE Research series. But a good part are comparisons with those carried out strictly by jurists that predominantly use the format of reports produced either by European Union institutions in collaboration with academic institutions or by international organisations, including selected case law. See, among others IOM, EMN, ECRE, ILPO, FRA, AIDA, and the OECD.

sectional study of the integration of migrants will be briefly outlined as a practical example of how a comparative perspective can be used in human rights research and why false myths are associated to legal comparative research.

This article is structured as follows: firstly, it reviews the method in question, its historical evolution, its typologies and its grounds for use; secondly, it outlines the two most established techniques: legal comparison and the case study; and, thirdly, it provides a SWOT evaluation of comparative legal research, taking into account its potential and weaknesses in order to dispel false myths or barriers within this interdisciplinary field.

I. THE COMPARATIVE PERSPECTIVE AND THE GENERATION OF KNOWLEDGE: HISTORICAL EVOLUTION, GROUNDS FOR USE AND MAIN ELEMENTS

In recent decades, explanations, descriptions and interpretations of complex realities that contribute to, and can be made on the basis of, comparative analyses have occupied a prominent place in the social sciences (Della Porta 2013: 211). Not only is it a useful tool for diagnosing social problems or identifying human rights violations, but it is also useful for designing and monitoring public policies. For example, it allows a parameter to be determined when seeking different sources of critical legitimation of social transformations, and even enables solutions to problems or conflicts to be proposed.

Within the social sciences, the use of comparative techniques is usually based on the triangulation of variables: properties and object; and in some branches of sociology and political science, it is focused on the strict analysis of cases, given the good results achieved. However, the situation is qualitatively different within legal studies. This is somewhat paradoxical, as the comparative perspective is even more isolated in this field, despite the fact that human rights have traditionally been included in it. An explanation of why this method is rarely used is that it is closely related to the social and socio-legal sciences and, to a lesser extent, to the so-called ‘pure normative inquiry’ (Örücü, 2001: 52), which is predominant in other types of legal research on human rights. However, such isolation cannot be justified, since an expanded, supranational dimension is needed in order to establish viable legal conclusions on human rights, to be supplemented by approaches and contexts based on political, sociological, economic and anthropological research (Etzioni and Dubow 1970).

I.1. A historical evolution on what to compare

Engaging in comparison and in comparative analysis are significantly recurrent cognitive activities that are—often tacitly—used to organise and establish connections within social knowledge. This explains the evolution and historical significance of the comparative method in the generation of knowledge, as indicated by Sartori and Morlino (1994: 12), since it depends on, and adapts to, the various areas where it is applied. Therefore, there is no specific or exclusive logic of the comparison at the disciplinary level; rather, it is a shared logic that depends on the aim pursued, and the various means

available to carry it out. And yet there is an open debate and strong criticism on its scientific or methodological nature in the field of the social sciences and legal studies. This is particularly the case with regard to the historical, epistemological and methodological issues related to comparison, the comparative method and comparative studies.

The classic and contemporary authors who have applied comparative methodology in their research, according to Morlino's classification (2005: 16-20), there are numerous examples that evidence the historical (r)evolution as to how comparisons should be made. For example, for Descartes and the logical school, there was a confrontation between a 'more and less' and 'better and worse', while Locke held that comparison is the foundation and origin of any demonstration and certainty. For Hegel, following the Cartesian tradition, it involved moving to a thesis/antithesis procedure, and it would be Auguste Comte who started to explicitly consider it as empirical/historical control or confrontation, and later John Stuart Mill regarded it as a phase of discovery. Alexis de Tocqueville's proposal to juxtapose different forms of comparison is worth noting, in contrast with the 'comparing logics' attributed to Durkheim and Weber. While Durkheim opted for the method of concomitant variation, Weber put forward the method of concordances and differences. Within contemporary doctrine, Morlino (2005: 18) highlighted the contribution of Sartori and Lijphart, among others, who relied on premises and critiques of neo-positivist theories and they ultimately arrived at constructivist theories that demanded greater methodological relativism in comparative analysis.

I.2. Grounds for use: questions that can be answered by comparing

Beyond understanding what comparing means, it is most important to identify what can be compared, why, and what the purpose of comparing is. Seeking to quickly establish what can be compared is often seen as a priority, leaving aside 'why' and 'for what purpose', even though these questions are closely linked to, and determine the answer to the former. None of the three questions that comparative analysis tries to answer has a simple answer, nor is it doctrinally settled. Hence, it has been argued that, if there is no specific rationale or objective (other than the general aim of explaining), the comparative method and comparative methodology does not properly exist. According to Sartori (1991) and Lijphart (1971), practically nothing and almost nobody holds that the comparative method is an entity in itself. Rather, the comparative method is justified and developed as a specialisation within the scientific (scientific-empirical or scientific-logical) method in general.

This is confirmed by the fact that there are differences between comparison as a way of thinking, and comparison as a scientific procedure within the social sciences. The former compares simple operations, while the latter compares complex operations, although the difference lies in the selection and definition of the objectives and properties that are compared, as well as in the care taken in systematising the production and data analysis procedures used to perform comparisons. In this sense, it is important to have a preconceived theory that encompasses the objects studied and proposes a structure that is similar for both. If comparison is regarded as a scientific procedure, it is an intellectual

operation through which the states of one or more objects are placed in contrast with each other on the basis of at least one common property (Sartori and Morlino 1994: 23 and following).

Therefore, according to Sartori (1991: 29 and following), comparison is a method for controlling generalisations or models in a specific area of study (laws, policies, cultures, models or systems). To compare is to contrast one thing with another, but if the aim is to control, then the immediate question is what is expected to be derived from control. Obviously, comparing or contrasting something serves to control, verify or falsify whether a generalisation fits the cases to which it is applied. The interest in control makes it possible to justify in detail why comparison is useful, and what the purpose is of choosing this method rather than a different one in the design of the proposed research.

For example, it can be used in order to achieve the proposed research objectives; to develop research hypotheses that provide important results; and, most importantly, to control the hypothesis formulated without losing control, (a) whatever the generality level of the issue; (b) whatever the interest that motivates the research, be it explanatory, cognoscitive or with a more explicit aim; and (c) whatever point of view (either more strictly national or referring to more or less widespread phenomena).

I.3. Main elements of comparative analysis in human rights research

The question of why use a comparative methodology remains unanswered, so it cannot be reduced to a justification of its mere existence. However, a different issue is the design of comparative research in the field of human rights. For this purpose, it is essential to develop a theoretical structure, or at least a series of hypotheses to be compared, and to make decisions or choices about several of their main elements, which can be used as a basis to opt for one available typology or another. Some of these determining elements will now be discussed.

1) *Operation and context.* It is not possible to compare systems, institutions or norms without knowing how they operate, and the cultural, economic and legal context of the society in question. Firstly, some knowledge is required of their main outlines, their purpose and their operating mechanisms; and it is also necessary to have empirical and practical knowledge that allows the conceptual categories to be separated out, so that they can be examined in the light of a different system. And, secondly, integrating the contextualisation of two systems into a study at the macro and micro levels must be considered.

2) *Horizontal space or dimension of the comparison.* The most important choice refers to the number of cases. This first decision also needs to consider which the most appropriate cases are in order for them to be included. For example, Lijphart (1971) recommends increasing the number of cases to as many as possible; a recommendation which in comparative legal research involves an almost superhuman effort. The underlying reasons are clear: this makes it more likely to control the hypotheses formulated or to reach more precise and localised hypotheses. Cases with a greater

number of variables are often used in collective research involving scholars of different nationalities.

3) *Establishing which and how many cases or systems to choose.* This is inevitably linked both to the longitudinal dimension, in other words, to the scope of the period to be considered, and to the variables to be analysed. For example, taking into account the properties involved, a preselected criterion needs to be established to determine what is: comparable due to having fairly similar properties or characteristics; and what is not comparable, due to having properties or characteristics that are too different from others. There are three problems that must be solved at this stage: how to define and delimit the temporal units as a basis to observe the past, or how periodisations can be devised; to see if the relations established between variables observed in time have some specificity to them; and how to include multicollinearity (Morlino 2005: 140). That is, the presence of numerous factors that are strongly connected and have developed in parallel.

4) *Properties and variables.* The fourth decision that the researcher must consider refers to the variables to be considered, that is, what is comparable and in what aspect. According to Lijphart (1971), the number of independent variables (causes), dependent variables (effects) and intervening (control) variables to be analysed must be reduced to include only those that are critical to guide the comparative analysis. With regard to the number, attention must be paid to whether the cases are increased and when it is necessary to extend the time considered or, on the contrary, to decrease the number of variables analysed. Ultimately, to obtain a good result, the theoretical conceptual apparatus must be well articulated and the research must be very clearly focused. Even though research has been conducted previously, the latest investigations must increase the number of aspects to be considered.

5) *Tertium comparation.* This involves knowing how to choose similar systems or different systems with the same or a common social need. In the first case, the researcher compares systems that are similar and close to each other in as many characteristics as possible, which allows a large number of similar variables to be set aside. The important thing here is to find entities that share all the same variables except for one, the specific variable that is of interest. In the second case, the researcher makes connections between systems that differ as much as possible in everything except for the phenomenon being investigated. Comparative control refers to generalised hypotheses where the problem results from the exceptions.

Once these elements are identified, a second stage is finding the tools and different typologies that provide guidance as to how to make comparative research. Undoubtedly, there is a long doctrine tradition about the different ways of comparing, although some prevail more than others according to traditional disciplines involved in human rights research.

II. SOME METHODS AND ‘TRENDING TOPIC’ EXAMPLES IN COMPARATIVE RESEARCH ON HUMAN RIGHTS

A brief review of the usual comparative methods in the field of human rights shows that the two most popular at present are legal comparison and the case study method. The first is traditionally employed in legal studies and the second has mostly been used in the social sciences, although, both can, and usually are, combined. Basically, this is due to the fact that this area is made up of a normative corpus between different universal and regional systems of protection of human rights, or to its compatibility in its legal-political implementation at national level. Despite its methodological imperfections and its difficulty, it can become a useful analytical tool either used on a complementary, combined or single basis, thanks to the phenomenon of the ‘Europeanisation’ or ‘convergence’ of national public Law and its policies (De Cruz, 1999: 45).

II.1. The legal comparison method

According to the above, legal comparison as a methodology of comparative analysis in the strict sense has not been used much since legislative positivism (Alchourron and Bulygin, 1971), which has traditionally set the roadmap for human rights research. Several authors have catalogued or integrated different movements in legal comparison within the so-called ‘rebellion against formalism’ and the resistance to legislative positivism (Moreno 2017, Somma 2014: 60). Both agree that the methodological component of legal comparison has a ‘parasitic’ character and lacks epistemological autonomy, as it constructs its methodologies by using and reformulating the contributions of other social sciences.

Traditionally, there are two variants associated with the comparative method in legal studies, where there is usually an opposition between the **macro-comparison** and the **micro-comparison**. The first deals with the study of legal systems from a global perspective, while the second deals with specific issues and institutions, and requires thorough knowledge of the applicable assumptions and norms. Although up to five methods can be identified (Van Hoecke, 2015), there are no limitations, but several possible combinations:

a) The **functional method** consists in examining a real social problem and the way in which it is resolved in different jurisdictions with similar or different characteristics and results. Here the analysis of the cultural context is less profound, and, therefore, is more accessible and less complex for the average legal researcher. However, the explanatory power of this method is smaller, which makes it possible to constrain the comparison to ‘universal facts’ such as human rights.

b) The **analytical method** involves analysing (complex) legal concepts and norms in different legal systems so as to detect common parts and differences. The use of ‘ideal types’ allows legal concepts, norms and institutions to be classified on a scale according to the degree of adaptation to the essential characteristics of the ‘ideal type’.

c) The **structural method** focuses on the framework of the law, or of reconstructed elements, by the use of an analytical approach. This is not the structure of each of the legal systems that are compared, but a way of understanding them.

d) The **historical method** is almost always a necessary part of the methods used, as it seeks to understand the differences and commonalities between legal systems, and to determine whether there is a degree of affiliation to a deeply rooted tradition or, rather, to accidental historical events.

e) The **law-in-context method** inevitably also has a historical dimension, but focuses on the current social context of the law, including culture, economics, psychology, religion, and others as appropriate. This involves studying a much broader context compared to the functional or analytical method, and using (results from) other disciplines. They are complementary and interdependent for a proper understanding of the law, and in the field of human rights this method is usually always available thanks to the results of research published by international agencies and organisations.

Most methods derived from legal comparison allow the researcher to move from a superficial level of comparison to a deeper level, but the choice of method or level of comparison will depend mainly on the project's research question or questions. Naturally, different objectives often (albeit not always) involve different methods, and the current approach of seeking the best solution to the legal phenomenon under study is explicitly or implicitly the background to many comparative law research projects.

Somma usually discriminates (2014: 70) between the comparison that unites and that which divides by establishing four groups of methodological proposals or methods: structuralism, functionalism, comparative economic-legal analysis, and postmodern schools. This means that three predominant variants have been traditionally identified in interdisciplinary research on human rights. First, the comparison of various systems of norms or jurisprudence to determine the differences or the similarities between them in the resolution of a certain legal problem. In other words, pursuing the best solution to the problem. Second, the comparative study between different state, local, regional or supra-state normative orders in order to determine what the causal relationships between them are. And, third, a somewhat comparative historical study in which the evolution of a given legal problem, concept or institution is discussed (Morán 2002).

These variants are consistent with the classification proposed by De Cruz (1999: 7), which distinguishes between different roles. Firstly, the comparison of foreign systems with the domestic system in order to ascertain similarities and differences with an objective and systematic analysis of the solutions to a specific legal problem provided by different legal systems. Secondly, the investigation of the causal relationship between different legal systems; and finally, the comparison of the different developmental stages of legal systems and examining legal evolution generally according to periods and systems.

Given the different methodological proposals, the central core of the criticism of legal comparison has been a deeply rooted and polarised theoretical discussion about its contours and nature. In other words, a debate as to whether it is an autonomous legal science, or rather, yet another method of research applicable to other settled disciplines. The first is more inclined to the self-identification of comparative law as a science and its self-presentation at the service of a theory of progress. And the second leaves aside the erroneous claims of legal comparison, which range from: being downgraded to being a mere technical translator; to being an improvement or modification of the national or international normative corpus, or merely a ratification of its virtues. As a scientific method, legal comparison is applicable to all disciplines in legal studies (Constantinesco, 1981: 258-260). Therefore, seeing it as a method is, in itself, a simplistic view of the methodology, which can be extrapolated to its purposes and object of analysis (Sacco, 1994: 11). However, beyond the problematic issues that have marked the legal comparison, as Örüçü reminds us, nothing prevents making its threefold nature perfectly compatible. It can be the only way to observe the legal situation, a research method, and also one of the ways of approaching reality or social transformations (Örüçü, 2001: 17). Therefore, it can be considered as a critical extraction of legal knowledge about human rights that allows a greater association to be made with positive observation, and to a lesser degree, with philosophical speculation (Van Hoecke, 2015; Örüçü, 2001: 14-15). Ultimately, the use of legal comparison involves promoting *law in action*, and not just *law in the books*.

II.2. The case study method

The main input of comparative analysis in political and social science is the diagnosis of social problems, the design of public policies, and the search for parameters (Piovani et al. 2017). Therefore, emphasis is placed on properties and objects, either through a quantitative or qualitative approach, or in the triangulation of both variables.

Briefly, in this field it is easier to systematise three approaches in compared or comparative analysis (Della Porta 2013: 211). First, a method with an **experimental, statistical and comparative approach**. Experimental and statistical approaches are both very limited in the investigation of social phenomena, whereas the comparative approach deals with a small number of cases and is the preferred strategy for studying institutions and other macro-political phenomena. For instance, among others, it is relevant the collaboration between statisticians and other professionals (nonmathematical) in the field of legal comparative research on human rights, (Jabine and Claude 1992, Spierer 2001). The three of them convert most of the variables into parameters in order to isolate them from the effects of the other variables. However, there is a certain terminological confusion about the terms ‘comparative method’ and ‘comparative analysis’, because sometimes they are used to refer to all three approaches, and at other times only to one of them.

Similarly, there are two other forms of comparison centred on properties or objects, which follow the classic distinction between quantitative and qualitative methods in social research. For example, comparative approaches that emphasise properties are

generally regarded to be part of a **quantitative** perspective, and those that emphasise objects are included in a **qualitative** perspective.

Nevertheless, depending on the period analysed, a **synchronous comparison** can be made if it is decided to consider different cases at the same time, while a **diachronic comparison** can be made when analysing the same case at different, successive times in order to see the influence of certain phenomena that have occurred, and observe their change over time.

Another typology determines that comparative analysis can be either close or remote. For the Cambridge School, there only exists the application of the **close comparative method** in the case of countries belonging to the same civilisation that have reached an equivalent degree of economic social and political development; whereas the **remote comparative method** basically involves different objects of study for which similarities are to be found in the absence of an encompassing theory.

However, in the practice of the social sciences two main approaches can be identified as been central within comparative research. One is **variable-oriented** comparative analysis, used to establish generalised relationships between variables, and another is a **case-oriented** analysis, which aims to understand complex units, consisting in making exhaustive descriptions of a few examples of the same phenomenon. The latter occupies a prominent place in human rights research, given its characteristics and the level of discussion of results (Landman 2002).

Generally, the purpose of this comparison is based on the analysis of comparable data between two or more nations, and is usually based on either a 'cross-national' case study (Kohn 1987) or on 'cross-cultural' case study. The typology of cross-national case studies is as follows: the nation as an object of study, the nation as the context of study, or the nation as a unit of analysis, or otherwise, it may be transnational. The typology of cross-cultural case studies is not a comparison between cultures, but a detailed description of a specific non-Western culture.

In fact, the case study method is expressly chosen because it is useful for generating hypotheses, or because it is crucial for either confirming or refuting a theory. When this is the case, it is clear that case analysis and comparative analysis methods are complementary ways of searching that reinforce each other. Hence, the case studies in question must be implicitly comparative, even if they only have one variable. Sartori (1991) and Della Porta (2013) argued that linking universal elements to particularities allows categories to be organised along scales of abstraction governed by the rule of transformation in both ascending and descending directions. For the correct selection of cases, according to Gerring (2001), different aspects must be taken into account: (a) Plenitude: broad samples help specifying propositions; (b) Boundedness: inclusion of relevant cases and exclusion of irrelevant ones; (c) comparability: possible similarity in some relevant dimensions; (d) independence: autonomy of the units; (e) representativeness: capacity to reflect the properties; (f) variation: spread of the scores

obtained; (g) analytic utility: methodological usefulness; and (h) replicability: possibility of repeating the model.

Although the single case study tends to predominate in human rights research, the gradually increasing availability of global data and national and regional reports showcases comparative research using methods to compare a greater or lesser number of countries (Landman, 2002, Andreassen, 2017). This contrast of data to select either a single or several cases usually requires a careful selection of research sources by researchers if they are only drawing from secondary sources rather than direct sources.

For Landman (2002, 922), comparing a greater or lower number of countries and the results expected are also clearly problematic issues in comparative policies. Basically, by comparing a larger number of countries it is possible to ensure statistical control, limit the selection of countries under study, cover an extensive scope in order to have a good theoretical component and obtain noteworthy evidence, as well as to identify cases which deviate from those that follow a model or benchmark. In contrast, the advantages of a micro comparison include strengthening the theoretical construction, avoiding conceptual extension, and achieving an in-depth understanding of the matter in order to make a selective control of the most similar or different systems to promote a good contrast of contexts and responses. The weaknesses of macro-comparison are the availability of data, and the fact that, using a broader sample there is a very abstract level of generalisation, with a high time cost and waste of resources. This is not the case when reducing the amount of evidence and having restricted field work.

II.3. A practical example of applying the comparative perspective: the integration of migrants

An illustrative example of the ‘infectious’ use of the comparative perspective when facing the thematic content on human rights is the integration of migrants within the study of international migrations. This area raises questions and provides some answers in connection to both the current and future scope of the comparative perspective and the interdisciplinary of human rights research. Migrant researchers use comparative in various ways as identified before and bring insights from different disciplines. Furthermore, they frequently develop different comparative research designs and use different (qualitative as well as quantitative) research methods. In addition, migration research was and regularly still is rather nationally oriented and researchers should go beyond a strictly national approach in the belief that cross-national comparison is and will continue to be important as international migration study. Consequently, these involve the level of interdisciplinary and cross-national approach recommended in those miscellaneous studies that encompass different analyses: legal, political, sociological, anthropological and economic (Martiniello 2013: 3; Fitzgerald, 2012).

By way of synthesis, the comparative method in the study of migrations in Europe has had a delayed impact in both legal and social disciplines. And yet, significant literature has been produced from within European socio-political and anthropological studies that has made a contribution to the study of social migrations from a comparative

perspective. This contribution has been by means of a choice of antithetical compared models that have facilitated the knowledge of good practices and answers for intervention in host societies (Arango 2012, King 2000), or through the selection of specific cities. Broadly speaking, there are two major types of predominant comparisons.

The first category includes those studies that compare the integration processes of the different groups of immigrants into the same institutional and political context of a nation or a city. These studies show that different groups of immigrants can follow different paths to achieve integration. They include the research by Bonjour (2014), Van Oers (2011), among others. The second category of comparative studies examines the integration of the same groups of immigrants in different national, federal or local immigration contexts (Joppke, Seidle 2012, Schain 2012). This group also includes the research by Koopmans (2010) on the effects that integration policies and state welfare regimes have on the socioeconomic integration of immigrants in eight European countries. Another study within this category delimits not only the spatial context but the 'integrable' subjects, focusing on the integration of the so-called second generations through a comparative analysis of 15 cities in eight different European countries (Crul et al., 2012).

With some exceptions, these studies have analysed integration as a national, regional or local compartment of their own, despite the progressive opening and implementation of European Union Law, which has determined the content, validity and direct effect of some decisive aspects of its articulation. A line of research that is becoming increasingly popular, based on the so-called 'end of national models' (Jacobs and Rea 2007, Joppke, 2007, Heckmann, Schnapper, 2003), demands more critical observation to analyse the different implementation of the main integration programmes established at European level (Freeman, 2004: 961). At the theoretical level, several authors (Koopmans et al., 2005: 9, Bertossi, 2009) have not only questioned the validity of these models for being mere 'conceptual spaces', but also have recommended not grouping countries along these 'model' dimensions. Far from being homogeneous blocks, national models are in constant contradiction with social, political and institutional practices. While these are not seen as 'pathologies', they are a later construct that shows a high level of strategic ambiguity and can be easily manipulated by the different actors who seek different results on the object of study (Bertossi, 2009).

A polarised debate about the theoretical construction of these compared models has been increasing, because the convergence of integration policies has made the use of distinctive national models manifestly obsolete (Joppke, 2007: 2). However, they have continued to be promoted by other studies, including those by Jacobs and Rea (2007), which have underlined the distinctive and continuous nature of European integration policies and the value of working with traditional classifications, due to their analytical potential over integration models (Jacobs; Rea 2007: 265). Bertossi has successfully argued against this, by saying that it is much more problematic to prove their existence between countries grouped on the basis of the philosophies or cultures of national integration, and even more so based on models. Basically, it is easy to conclude that these predetermined differences are explained by pre-established models of integration of

immigrants and citizens without accounting for the situation of migrants, the orientations of the policy, and the structure of public discourse in the different countries (Bertossi, et al. 2012).

Consequently, based on the reconsideration or rejection of certain pre-established variables in integration models, international comparisons pose serious methodological problems, given the lack of adequate data (Favell, 2003). In fact, different countries use different statistical categories, or even lack official data, and the composition of the immigrant population varies according to the countries, the types and the opportunities provided by integration models designed to properly addressing migratory flows (Triadafilopoulos, 2011). Again, in line with this trend, the existing approaches are largely general. As a result of the new requirements for civic integration being implemented, attempts have been made to categorise models that mostly limit themselves to a description, without establishing comparisons with other cases (Brubacker, Michalowski, et al. 2006; Bauböck, Collett, et al., 2006). This is also evident in the study of social welfare models which, according to Freeman (1996), are inevitably excluding (Koopmans 2010); and it also occurs in the construction of indicators that omit certain basic social protection rights, such as health care, education, housing and social support, and the differentiation of rights by categories of migrants.

III. A SWOT ASSESSMENT OF COMPARATIVE LEGAL RESEARCH ON HUMAN RIGHTS

After a brief presentation of the different techniques and typologies to carry out a comparative analysis in human rights research, it is necessary to reflect on what the best method is for legal comparisons, and if a comparison in fact occurs. There is clearly a substantial number of decisions, tools and choices to be taken into account to design a comparative study, and even more so when it is a legal comparison. The interdisciplinary nature of human rights means that the risks involved are very different and highly interrelated. For example, when choosing the research question, it is important to adhere to specific, and precise criteria in terms of the countries, regulatory systems, cultures, societies and geopolitical contexts to be studied. An interest in a specific geographical or geopolitical context, family, legal branch can lead to putting any of those above the formulation of a research project, which can alter the sequence of tasks involved: research topic; working hypothesis; choice of countries; data collection.

A method is a systematic and functional way of working to ensure the attainment of the end pursued, and the researcher has a duty to decide to what extent the categories used must be either inclusive, or narrow and discriminant. Therefore, how, and why and for what purpose a study is conducted depends on the researcher's own experience. It cannot be said whether the concepts should be fine-tuned and the classification carried out before or after the selection of the cases or the temporal range to be analysed. And yet, different strategies may have been followed according to the specific method used within the comparative analysis selected.

In any case, methods do not exist in the abstract; rather, methods are chosen to best meet the objectives of the comparison, and no single method suffices. Any comparison and, therefore, any comparative legal analysis in human rights research, must be more than an enumeration of and contrast between legal texts or instruments for the protection of human rights in different geopolitical contexts. Paradoxically, there is more consensus as to what a comparative analysis is not, than as to defining what it is. This justifies the strong criticism it receives about what it is not. Strictly speaking, comparing is not collecting norms on the object of study from all over the world with no connection between them other than the compiler, and no other justification than to seemingly deal with the same social event relevant to human rights. A comparative approach is not discriminating between comparative studies and those that are merely exegetical, nor is it simultaneously examining the differences and similarities, assuming that the objects to be compared are not totally identical or totally different. This would not be met by a parallel presentation of two or more systems, or two or more institutions belonging to different legal systems, as the intention to compare would be purely instrumental, and not a purpose in itself. Similarly, the criteria indicated above would not be fulfilled by a mere analysis of textual data if the effects of the implementation of the rule are left aside, or the socio-cultural implications of language and its geographical variants are disregarded, by providing references to foreign authors who discuss the same topic and not making an effort to compare.

Ultimately, a legal comparison is not a search engine for models with the sole purpose of proposing possible reforms or valid parameters for the creation of a uniform regulatory framework. For example, legal transplants are more of an objective or a result than an actual comparative method. What seems to work well in a one regulatory system may not do in a different legal system due to the different contexts involved. Hence, the mere fact of ‘copying’ or ‘emulating’ foreign legislation could hardly be considered a ‘method’ *per se*. This is typically an example of lack of method in comparative law (Van Hoëjk 2015). A legal comparative method would not be taking the system or systems characteristic of a legal family as the most suitable and merely making a comparison of regulations, institutions, or jurisdictions. Rather this try to assess the similarities of a given social problem or need, or of what would be the necessary political, regulatory and other kinds of interventions that should be adopted to obtain optimal results (Cappelletti, 1994: 17).

III.1. Strengths....

If the purpose is to use the legal comparative method on human rights to persuade, providing a catalogue of uncritical virtues and praise for a method that undoubtedly is characterised by a complex vision of the objects studied may be a misjudgement. The strengths are:

(a) *A dynamic, non-static vision.* It provides a harmonic amalgam between the evolution and the diffusion of the object studied that makes it possible to ‘qualitatively’ contextualise the social situation under observation. The purpose is either to show

divergences and synergies, or to develop general propositions or hypotheses that can explain and describe future trends.

(b) *Versatility and functionality.* It raises interest in completing or seeking new angles of analysis to continue to critically observe and analyse (Merryman, 1999). This means that the socio-legal reality can be contrasted or distorted, with the sole purpose of gaining a better understanding of the relationship between Law and society, by apprehending all its complexity.

(c) *Heterogeneous references and sources.* This involves a greater effort when selecting the appropriate bibliography, not only by merely compiling literature but also through interviews with different stakeholders and agents that help to better contextualise the scope of the analysis.

(d) *A more factual, diachronic vision.* This vision is at the same time synchronic, and provides further insight into the elements that *de facto* determine and hinder a greater drive for innovation based on the results obtained. It is therefore used to improve and consolidate knowledge of human rights and understand law in context.

(e) *Development of the explanatory function.* It sharpens the capacity of description and synthesis of differentiating and common elements. It seeks to explain both the differences and the similarities, exploring existing patterns and processes.

III.2. Weaknesses....

The purpose of noting the weaknesses of legal comparative analysis is not to discourage its unequivocal methodological capabilities, but rather to bring them to the fore. In this way, they could be turned into opportunities for methodological improvement that minimise future threats through practice. Identifying possible weaknesses is not an exhaustive task, but a reflexive act intended to explore its uses and the experience gained in the implementation of the comparative perspective in the short- and long-term.

(a) *Sociolinguistic problems* are among the most common problems that comparatists must face (Sacco 1984: 17). It is reasonable to carry out a comparison on contexts, sources and systems in a language that is known to the researcher; otherwise there is a risk of showing various national data in parallel without addressing aspects that may arise from it. The doctrine basically relates this to the complexity in managing specific legal terminology or assessing cross-cultural systems by researchers from other countries (Örücü, 2001: 57);

(b) *A difficult balance between practical and theoretical activity.* As it provides a laboratory for the analysis of different issues that are treated as variables or cases that are juxtaposed, compared and contrasted for practical purposes, solely depending on the actual availability of data, the theoretical component may be neglected.

(c) *It is an expositional resource rather than an explanatory one.* It is one of the best ways to discover resemblances between similar and different legal systems or models is to explain similarities and even differences to construct theories to the extent that the comparison is a dialogue in and about a given phenomenon (Örücü, 2001: 34).

(d) *Independence.* Comparison and the comparative analyses have no subsistence in themselves, since the methodologies that they comprise can be extended to other disciplines. Basically, they would be in terms of *lege ferenda* in that they make it possible to find more efficient or simply better answers to solve similar problems.

(e) *Excessive purposes and expectations.* Sometimes research objectives can be too ambitious, due to a lack of awareness of the limits of all comparative research.

(f) *Difficulty involved in making proper comparisons.* This is often due to the complexity of concepts, and the abstraction levels, the collection of data, but also to the presence of phenomena of diffusion, imitation, importation and the like;

(g) *Incommensurability.* Every empirical or normative concept is deeply and inextricably linked to the context in which it is produced, so that there must be a clear perception of the problems and the environment to which they refer or where they are applied (Morlino, 2005).

(h) *Conjunctural coincidence.* This implies that any phenomenon under study can have different causes associated with it, which makes it more difficult to find a satisfactory explanation.

SOME FINAL REFLECTIONS: DISPELLING FALSE MYTHS

Comparative research not only helps to explain something about the world, but also to predict and contrast future trends, past traces, synergies or even convergences that may be derived from more than one case within and outside a given field. Therefore, the comparative process can make many important contributions to the generation of knowledge in both substantive and methodological analysis. Although the action of comparing is an almost instinctive reflex, a comparison is only reflexive if it achieves a substantive and methodological balance.

The comparative approach makes it possible to distort images in a way that other analytical perspectives would not allow, but without compromising the viability of an interdisciplinary analysis. The findings from research on human rights, and in particular, on the study of the integration of migrants, show relevant evidences that the comparative method is becoming increasingly appealing and established. However, there is still much to explore about the centrality of its methodological and epistemological approach, that is, the possibility of comparison in itself, the object of comparison and its role in interdisciplinary fields of research. It has been widely accepted that the epistemological and methodological dimension in political science and sociology has been more often

used and has been more fertile, while its implementation in other fields, such as Law, requires more sophisticated technical knowledge.

In fact, the first barrier faced by legal researchers embarking on comparative legal research is the approach to methodological issues, which can easily cause them to become disoriented. Basically, not all perspectives or comparative research approaches can be considered useful for a legal comparison in strict terms. The interdisciplinary nature of human rights also favours the case study method to the detriment of the legal comparison method. Legal comparison is more rigid and cannot be limited only to the use of foreign law by legislators or courts, but also to the key doctrine and methodological questions and answers to identify explanatory factors, legal frameworks, and conditions for intra- or inter-state application.

However, the protection and monitoring of human rights inevitably merits the effort of engaging in comparison in order to obtain a reliable understanding of the context, or to identify possible gaps in their application. Here the comparative approach is a key method for the analysis of the level of compliance with human rights in an increasingly fragmented and global legal framework. Even though there is no agreement on the type of methodology to be followed, or even on the methodologies that could be used in the field of human rights. It is possible to combine different comparative methods, since they are complementary and not mutually exclusive. Undoubtedly, the main priority of the comparative approach is its functionality and versatility to achieve total optimisation and a deep contextual understanding of human rights globally. The first myth to be dispelled is that it is necessary to have a complete ‘tool box’ or a strict methodological roadmap. The essence of the comparative method is engaging in contrast, in order to identify differences or similarities at the national, regional or supranational level.

However, as Sartori recalls, the theoretical component of the comparison is difficult to ‘manage’ without a compass (1994: 12) and sometimes, even having one, it is necessary to know how to orient and reorient oneself constantly. The most difficult task is knowing why a comparison is to be made. Once this has been ascertained, one can identify an object for comparison, and address this issue on three phases (Moran 2012: 525):

1) **Choosing phase:** the importance of having prior knowledge about the object of comparison for the appropriate choice of the research topic. This requires developing the **cognitive function**. In other words, to investigate or analyse realities in different countries or contexts to better understand the complexity of the phenomena studied and the disparities between them.

2) **Descriptive phase:** the parallel study of systems to discover their structure and how they operate to enhance the **identifying function**, and be able to explore analogies and differences, as well as attempting to provide tentative explanations for their nature or their internal logic.

3) **Concluding phase:** allows reinforcing both the **explanatory function**, by arguing which is the preferable explanation, and controlling equally plausible hypotheses. It also has a **critical and applicative function**, by (re)formulating conceptual interpretations based on doctrine and theories on the observed similarities and the differences.

In contrast, the second barrier does not focus so much on what it is being compared, as this depends on the sources of comparison and the levels of abstraction with respect to the comparison. It rather focuses on how to compare, in order to understand the resources, skills and aptitudes necessary, and a sense of boundaries and moderation. Undoubtedly, being strict with moderation can sometimes lead to reducing or limiting the initial research design, but ultimately, unlike other methods, it makes it possible to approach the complexity of the object of study from other angles that are not exhausted and can continue to be explored.

It is undeniable that comparative analysis is a technique that involves significant risks, and therefore it is associated with a number of false myths. But this does not mean that comparison should not be used for fear of not being able to control the object of investigation or of misusing the variables to compare. Rather, it is crucial to look for a reflective balance. An equilibrium that is necessary for the thesis of the incommensurability of concepts, which are so imbued with contexts, and so rooted in their respective culture, history and locality, that they are incommensurable from another methodological perspective.

All that remains is to readjust the compass and take as a starting point that it is preferable to ‘compare *adagio*’ than not at all. Research depends on the ability to achieve that the point of arrival is a rhythmic, synchronised and measured sequence, and therefore this comparison must be done ‘*adagio ma non troppo*’.

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