

INTRODUCTION: THE POSSIBILITIES OF COMPARATIVE LAW METHODS FOR RESEARCH ON THE RULE OF LAW IN A GLOBAL CONTEXT

Since its rise at the beginning of the twentieth century, comparative legal research has gained an influential place in legal research concerning national legal systems. Comparative legal methodology is used to acquire insight into foreign legal systems, to find solutions for problems of a specific legal system, or to promote the unification of law between national legal systems. Its methods consist of a comparison of different legal systems or legal traditions (external comparison), or of fields of law within national legal systems (internal comparison). With the proliferation of regulatory regimes at the international level (e.g. in the context of the United Nations or the WTO), comparative legal research has expanded its focus to include international law. Consensus, however, has not been reached on the most suitable way of applying comparative law methods to the global context. Can the concepts and methods developed to conduct comparative legal research of national legal systems be transposed to study the international legal system?

A striking observation is that comparative law methods are used and perceived differently by legal scholars with a background in national (constitutional) law and those with a background in international law. A pertinent example is the discussion regarding the role of the rule of law in the global context. When investigating problems of global governance and adjudication, national law-oriented lawyers tend to advocate the transplantation of national solutions to international legal settings. International lawyers, on the other hand, generally take *aspects of the rule of law* as a starting-point for their reflection, building new solutions on the basis of the 'rule of law' principle and the basic requirements flowing from it. Both approaches have advantages and disadvantages. The national law-oriented approach provides well-developed solutions for problems of institutional organisation. However, it glosses over the specific problems that arise at the international level, especially with regard to the relationship between the rule of law and democracy. According to most commentators, the latter is not a readily available or desirable alternative at the international level. The international law approach in turn, offers a more 'open' perspective and thus might yield more diverse and possibly more appropriate solutions for the global context. However, this 'open' approach entails the risk of jeopardizing respect for the rule of law in the global context, and ultimately at the national level, given the intertwined nature of the various levels at which law is being developed. The question remains open as to which perspective on the use of comparative law methods produces 'optimal' results in order to ensure legitimacy and accountability of global institutions. Alternatively, more integrated approaches might be required. Such approaches do not consider legitimacy and accountability, and thus the rule of law, within systems of law that are perceived of as separate

(national and international), but consider the rule of law in a given situation in which the law that emerges from various sources applies. After all, most law, whatever its source, exerts its influence at the most local of levels, and it is at this level that a lack of legitimacy or accountability exerts its toll.

Hence, the diverging perspectives regarding the use of comparative law methods for researching questions of international or global law are at the basis of an interesting and complex interaction, which as yet has not been thoroughly mapped. How do the uses of comparative law methods by lawyers with different backgrounds compare? Which approach offers the best results for developing insights into the role of the rule of law at all levels, given the exigencies of global governance?

In this issue of *Erasmus Law Review*, a number of scholars with different legal backgrounds reflect on these questions.¹ In the first article, Momirov and Naudé Fourie focus on ‘vertical, bottom-up’ comparative law methods to find tools for conceptualising the rule of law at the international level. The authors’ doctoral research projects, which concern the accountability of international institutions in the context of international territorial administration and the World Bank Inspection Panel, respectively, are taken as a starting point for this analysis. It is shown how both projects took shape on the basis of a four-staged method. Momirov and Naudé Fourie come to the conclusion that the use of ‘vertical bottom-up’ comparative law methods is increasingly justified because of the emergence of a ‘common zone of impact’ of public power of states and international institutions, as well as by the potential of these methods for addressing problems at the international level.

Next, De Jong and Stoter analyse the potential of the interdisciplinary method of institutional transplantation for enhancing the legitimacy of international organisations. They study the World Bank Inspection Panel as a recent example of institutional innovation at the international level. They argue that the rule of law should not be seen as an absolute given with universal applicability but rather as a political ideal and a means to constructive international dialogue and the establishment of legitimate international organisations.

In the third article, Makinwa discusses the search for civil remedies for international corruption. She argues that the functional comparative method is the most suitable for the analysis of this topic, as it allows a better understanding of the legal responses that might influence an eventual international consensus. Thus, a ‘common platform’ may be developed which reflects the rule-of-law based systems, processes and solutions of the legal systems involved and contributes to the stability and effectiveness of international trade.

In the final article, Ambrus analyses the use of comparative law methods by the European Court of Human Rights. She investigates to what extent the judicial decision-making of the Strasbourg court complies with the requirements imposed by the formal rule of law as regards the methodologically correct way of carrying out legal comparisons. The Court’s case law is analysed in the light of the aim of the comparison, the sources of comparison and the level of abstraction of the comparison, as well as the way in which the comparison is carried out. Ambrus shows that the application of the comparative method by the Court lacks both transparency and consistency. She submits that more attention should be paid to these requirements of the formal rule of law. In any event, the result of legal comparisons should not have more than a guiding influence on the Court’s judgment of cases.

These diverse contributions make clear that there are no easy solutions for the use of comparative law methods to elaborate the rule of law at the global level. However, we believe that the insights offered by all the authors offer valuable guidelines for further discussion of this topic.

¹ See also the previous issue of *Erasmus Law Review*, which dealt with the rule of law in the European Union: see 2(1) *Erasmus Law Review* 2009.

Finally, it should be mentioned that the draft papers for this issue of *Erasmus Law Review* were discussed during a seminar that took place at the Erasmus University Rotterdam on 23 January 2009. We are grateful to Wouter Werner, Erika de Wet, Xandra Kramer, Hanneke Luth, Nicholas Dorn and Janneke Gerards for their useful comments on the papers.

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