



COMPARATIVE LEGAL RESEARCH

By Perrine SIMON



UNIVERSITÉ DU
LUXEMBOURG

What is comparative legal research?

- Comparing how one legal issue is regulated in two or more legal systems
- In space: compare state compensation law in Luxembourg vs state compensation law in Laos (and in Thailand)
- In time: compare fundamental rights in France before and after the French Revolution

Comparing...

- Comparing two or more legal systems is not about simply studying and describing in general the laws of these systems.
- It is mostly about :
 - Finding and describing differences/similarities
 - Understanding the differences/similarities
 - Explaining the results
- Example: A comparative focus on two or three constitutional orders might lead us to question and reexamine core principles of our constitutional order, like freedom of speech, freedom of religion, equality etc.

Object of the comparative legal research: the Law

- Choose to compare : a specific legal issue or a broader issue concerning the organisation of a State
- What has to be compared :
 - Legislation
 - Case-law (judicial decisions)
 - Socio-economic and historical context of the law
 - “invisible powers” or “legal formants”

Object of the comparative legal research

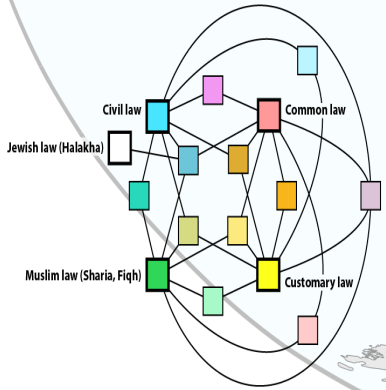
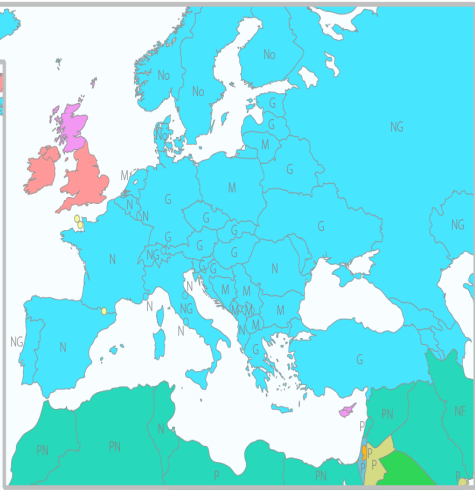
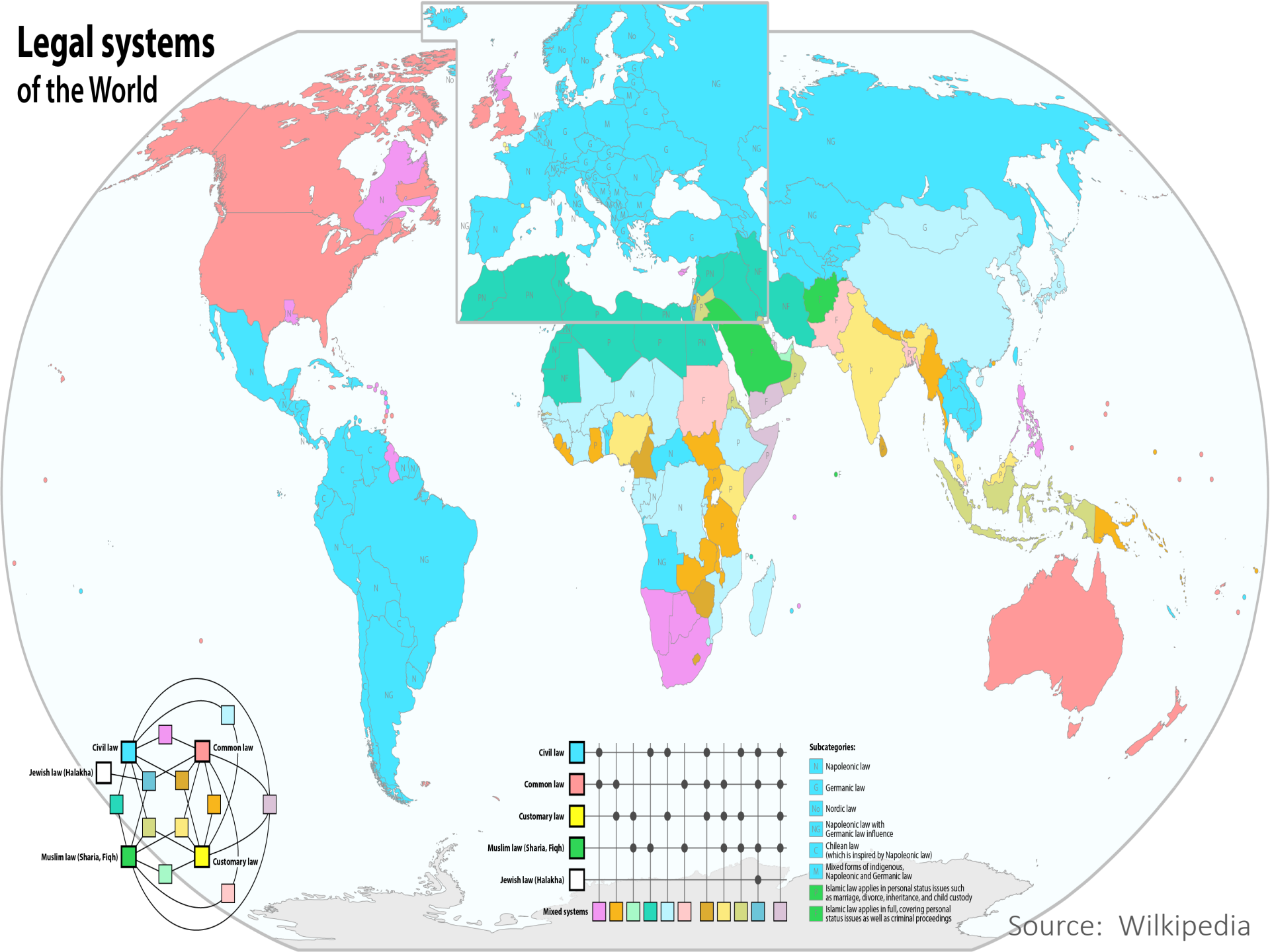
Attention !

- Not all “law” is written.
- A deeper part of law lies beneath the surface and is less visible.
- Example: The UK has no written Constitution. The constitutional rules are a product of customary law (*Habeas corpus*).

What « law » do we compare?

- It is not enough simply to compare words on the page.
- Law sits within a culture. Law is influenced by the culture of the home country.
- So, we must look beneath the law as written formally in text.

Legal systems of the World



- Civil law ■
- Common law ■
- Customary law ■
- Muslim law (Sharia, Fiqh) ■
- Jewish law (Halakha) ■
- Mixed systems ■ ■ ■ ■ ■ ■ ■ ■ ■

- Subcategories:**
- N Napoleonic law
 - E Germanic law
 - No Nordic law
 - NG Napoleonic law with Germanic law influence
 - C Chilean law (which is inspired by Napoleonic law)
 - M Mixed forms of indigenous Napoleonic and Germanic law
 - Islamic law applies in personal status issues such as marriage, divorce, inheritance, and child custody
 - Islamic law applies in full, covering personal status issues as well as criminal proceedings

Aims of comparative legal research

- Contributing to one's own legal system (understanding it better, including the resistance of its traditions, improving it, using it as a means for interpreting the Constitution)
- A discipline to understand foreign law and culture as well as to better understand our own culture through the process of comparison to another culture
- Harmonization of law (within the EU context)

Choice of the different countries to compare

1. Relevance

- Choose two (or more) countries that have legislation on a new legal issue.
- Choose countries that have very different solutions on a specific legal issue.
- Can you find some examples ?

2. Knowledge of language

- You need to read and understand the original legal sources (language).
- Attention to problems of legal translation: the same technical term can have very different or slightly different content within the two countries of your research.
- Example of a different meaning of a legal term: the “rule of law” in the Anglo-Saxon legal system or “état de droit” within the French legal system. Define the term of “rule of law” in both legal systems and then start your analysis (analytical method).

Important skills of the comparatist

- Avoid the native bias: scientific and neutral observation
- Critical reasoning skills
- Assess the data within its cultural context
- Start from similarities, then differences
- Step back and distance yourselves from the legal order under review
- First describe, then understand, then assess the results

- Ability to identify the origins and major characteristics of a legal system
- Ability to compare legal concepts and institutions across systems
- Ability to apply legal concepts drawn from a non-domestic law system

- Explain the various cultural mentalities.
- Law really cannot be understood without understanding the culture on which it sits.
- Example: we cannot really understand the French Constitution today without an appreciation of the influence of the 1789 French Revolution (historical method).

How to perform comparative legal research?

For your comparative research, ask questions like:

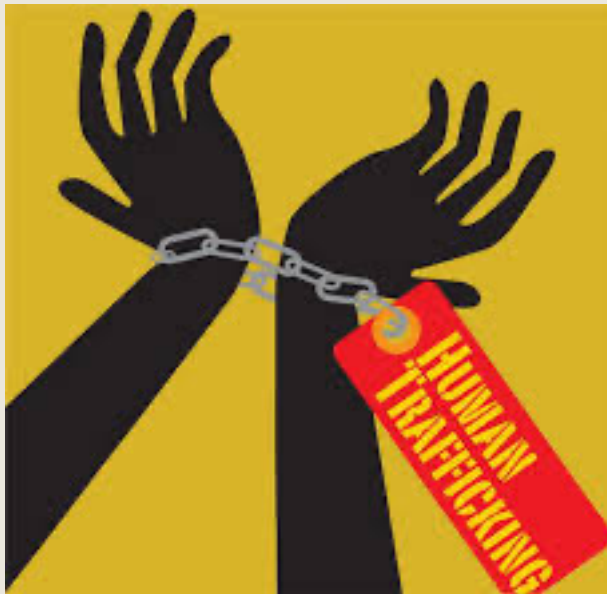
- How are the systems similar/different?
- Is the similarity/difference based on words or context or else?
- What is the concrete meaning of the difference/similarity?
- What does the similarity/difference reveal?
- Why is there this difference/similarity?
- Is there something in the other system that can improve ours?
- Is our system effective?

Examples of comparative research

Comparing the freedom of speech in the USA and Europe

- In the USA, free speech is textually protected without limitation; Of course, the US Supreme Court does limit free speech if a clear and present danger is present.
- In most European countries, freedom of speech is protected, but with explicit textual limitations.
- You are asked to compare these two dimensions of freedom of speech. Where do you start from?

Compare the anti-trafficking law in Laos, Thailand and Malaysia



Compare criminal procedures in the ASEAN to facilitate mutual legal assistance?



Examples of Comparative Research articles in Asia

LEE, J., & WOO, J. (2019). Assessment of the Jury Systems in Asia: A Comparison of Korea and Japan. *Asian Journal of Comparative Law*, 14(S1), S77-S96

With this article the authors show how Korea has experimented with both the German and the US models of jury trials, whereas Japan based its jury system mainly on the US system. This is an interesting comparison of the adoption of different Western models in two Asian jurisdictions.

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Maartje De Visser, Ngoc Son Bui, Contemporary Constitution Making in Asia-Pacific, *The Chinese Journal of Comparative Law*, Volume 7, Issue 2, September 2019, Pages 241–250

This article argues that the Asia-Pacific region has gone through several stages of constitution making since the late 19th century, in particular with decolonisation. In more recent years, a new wave of constitution making has been taking place: East Timor, for example, adopted the nation's first Constitution in 2002. More recently, Thailand and Nepal have adopted new constitutions in 2016 and 2015 respectively, while Sri Lanka and Myanmar are currently facing the difficulties of constitution-making processes.

Question: What kind of information can you provide about Laos in this respect ?

Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia, Ed. Penelope Nicholson and Sarah Biddulph, Brill - Nijhoff, 2008

This book focuses on how legal transplantation and reform in the name of globalisation is central to the transformation of Asian legal systems. The contributions of the book analyse in particular legal changes in China, Indonesia, Malaysia, Singapore, Thailand, Taiwan, and Vietnam.

Practical advice on writing a comparative law research paper

- Find a topic that interests you personally.
- Make sure that the topic is “researchable”.
- Don’t avoid a topic simply because you know nothing about it. You can search the sources in the library and/or online.
- After choosing a certain topic, focus on one or two questions that you would like to answer.
- Focus on one legal aspect in a given area and compare this aspect within two or more legal systems.
- Focus on the legal issues in your research paper. Please remember that you are not writing a political science or history paper.

Practical advice
on writing a
comparative
law research
paper

- Find comparative law journals and submit an article!
- *The Asian Journal of Comparative Law (AsJCL)*
- *The Korean Journal of International and Comparative Law (KJICL)*
- *The Asia Pacific Law Review*
- *The Indonesian Journal of International and Comparative Law* (quite new Journal started in 2014)
- Why not a *Lao Journal of Comparative Law...?*

Further reading

- Mark Van Hoecke, 'Methodology of Comparative Legal Research' (December 2015) *Law and Method* 1-35.
- S. Glanert, « Method? », in *Methods of Comparative Law*, P. G. Monateri (ed. by), 2015.
- Mathias Reimann, Reinhard Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2008.
- Mathias Siems, *Comparative Law*, Cambridge, Cambridge University Press, 2018, 2nd ed.

THANK YOU FOR YOUR ATTENTION!

For any questions, you can contact me at:
perrine.simon@ext.uni.lu

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