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Comparative Media Law Research and its Impact on Policy

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Introduction

In this essay, we assume—perhaps too broadly—that research is useful for policy formations and ask, rather, why engage in *comparative* research? And because of our own work, we focus on comparative research concerning media law and policy. Comparisons can lead to fresh, exciting insights and a deeper understanding of issues that are of central concern in different countries. They can identify gaps in knowledge and policies and may point to possible directions that could be followed, directions that previously may have been unknown to observers or, in the case of media law, legal reformers. Comparisons may also help to sharpen the focus of analysis of the subject under study by suggesting new perspectives.¹ Comparative media law research can give us a better understanding of how one country, or even medium, borrows from the traditions and conventions of another (such as the links between film and broadcasting, the PSB models within Europe, free speech notions in Latin American countries); how intellectual property migrates across various media over time; and where best practices exist in the world for the regulation of new communications technologies.² Moreover, comparative research can give us an improved knowledge as to whether specific media patterns and structures are causally conditioned by social, political, economic, historical and geographic circumstances. Without a conscious effort, however, comparisons can be mangled, inadequate, often a disservice.

Partly because of the growing internationalisation and the concomitant export and import of social, cultural, and economic manifestations across national borders, and partly because of political, economic, social and technological transitions, the demand for comparative research has grown. It is increasingly evident that contemporary communications structures and patterns can only be understood from a comparative perspective. Only by examining relationships across media forms, across national and regional boundaries, across cultures, institutions and environments and over time,³ can a full picture of

1. See Linda Hantrais, *Comparative Research Methods*, Soc. Res. Update, 1996.

2. Most examples used within this paper are based upon the work conducted at the Programme in Comparative Media Law and Policy. For more information see <http://pcmlp.socleg.ox.ac.uk/>

3. The vocabulary for distinguishing between the different kinds of comparative research may prove to

the processes of change and globalisation be created. Hence, the growth of the use of comparative research and the increased need, as well as demand, for comparisons.

Yet, despite the benefits and the growing demand, little informed discourse exists on the opportunities of comparative media law and on the potential methodological challenges of the preparation of such work.⁴ This reluctance and narrowness of scope may be explained not only by a lack of knowledge or understanding of different cultures and languages, but also by insufficient awareness of the research traditions and processes operating in different national contexts. This is certainly the case in the field of comparative media law and policy, which combines the research traditions of comparative social research, in general, with comparative law, in particular. The purpose of this paper is to analyse the needs, possibilities, limitations and pitfalls of comparison, and to probe problems of definition, methodology and presentation.

Growing Demand for Comparative Research

One way of thinking of the issue is environmental. What kind of context is ideal for comparative media law and policy research? One could look at the loci where this kind of work is done, or where it is attempted to be done. A principal characteristic is to have some sort of institutional commitment and something like a critical mass. Communities of scholars are built with a comparative bias. Efforts have been made at the University of Westminster, in the UK, at the School of Business at Columbia University. We both have been engaged in trying to establish such centers (Programme in Comparative Media Law & Policy at Oxford University, 1996, and the Center for Media and Communications Studies at Central European University, 2004). Currently, one of us directs a Center for Global Communication Studies at the Annenberg School for Communication and the other continues to nourish comparativism from a perch at the Markle Foundation. MIT is another prominent university to have created a center dedicated to comparative media research: offering a two-year course of study, the Comparative Media Studies Department allows students to study for a master's degree.

A somewhat unconventional example is offered by the Learning Initiatives on Reforms for Network Economies (LIRNE.NET), an international collaboration between four universities: the Center for Tele-Information (CTI), Technical University of Denmark; the Economics of Infrastructures Section, Delft University of Technology, Netherlands; Media@LSE, the media and communications programme at the London School of Economics; and the LINK Centre at the University of Witwatersrand in Johannesburg. This network, which is one of the key partners in the World Dialogue on Regulation (www.regulateonline.org), has produced a number of comparative and cross-country analyses, primarily in

be redundant and not very precise in many cases. Concepts such as cross-national, cross-cultural, cross-institutional, cross-societal, etc. are used both as synonymous with comparative research in general and as denoting specific kinds of comparisons.

4. See, e.g., Else Oyen, *Comparative Methodology: Theory and Practice in International Social Research*. London: Sage, 1990 and Stefaan Verhulst and Monroe Price, *A Methodological Perspective on the Use of Comparative Media Law*. In: Monroe Price and Stefaan Verhulst, *Broadcasting Reform in India. Media Law from a Global Perspective*, OUP, 1998.

the field of telecoms regulation. A similar, yet broader, kind of network is ORBICOM, the Network of UNESCO Chairs in Communications which has conducted some comparative analyses.⁵ The Hans Bredow Institute in Hamburg is an example of an interdisciplinary institute with comparative ambitions but rooted in a German legal context. It also is an example of a research entity funded, in the first instance, by public service broadcasters, but then branching out. One important recent entrant, Ofcom, the British regulator, has emphasized evidence-based policymaking and the need to look comparatively to understand regulatory possibilities.

Each of these units takes a different approach to comparative research. Seen together, however, they mark the growing importance of the field. Their emergence, and more generally the growth of comparative research, has its roots in a variety of forces.

Globalisation, the end of the Cold War, the rise of Asian economies and the growing geopolitical importance of the Middle East are just some tendencies that have led to a general call for broadening of the usual scope of research to include more comparative studies. The increased transnational flow of people and information has clearly challenged the universality of Western theoretical models and concepts,⁶ and has forced scholars to look beyond their borders and disciplines. Moreover, amidst a growing homogeneity and uniformity, the emphasis of research has shifted from seeking uniformity among variety to studying the preservation of enclaves of uniqueness. Anthony Giddens has, for instance, observed that "globalisation today is only partly westernisation. Globalisation is becoming increasingly decentered."⁷ Indeed, while some cultural differences are diminishing as a result of globalisation, others are becoming more salient. Only comparative research succeeds in capturing this richness of variety across nations, institutions and cultures.

The need for more comparative media law research clearly fits within this broader framework of globalisation. In many cases, however, comparative media law has emerged in response to a more complicated mix of forces. Technological transformations, political transitions, and institutional and market re-structuring are among the most important pressures. In addition, advanced telecommunications and the worldwide expansion of media markets create an urgent need to understand our emerging "global media culture," the cross-fertilisation of national and international cultural traditions, and the new styles and genres developing in this context. The world is engaged in a vast re-mapping of the relationship of governments, corporations and societies to the images, messages and information that course within and across traditional boundaries. States, governments, public international agencies, multinational corporations, human rights organisations and billions of individuals are all involved in this process. All is under construction, yielding, as it were, a thorough shaking and remodeling of media and communications systems. The result, at the moment, is a teeming experiment in reconstruction and reaction of media laws and policies. The various players are seeking a vocabulary of change and a set of laws and

5. <http://pcmlp.socleg.ox.ac.uk/>, www.lirne.net, <http://www.orbicom.uqam.ca>,
<http://web.mit.edu/cms/index.html>

6. For a detailed description of this unease with so-called Western parochialism within media studies. see James Curran and Myung-Jin Park, *De-Westernizing Media Studies*. London: Routledge, 2000.

7. Anthony Giddens, *The Reith Lecture Series: New World without an End*, *The Observer*, April 11.

institutions that provide legitimacy, continued power, or the opportunity to profit from the technological prospects for change. Only with a comparative and interdisciplinary grasp of the massive changes taking place can there be a more sophisticated and nuanced understanding of the impact of media changes on democratic values and economic development.

Among the various forces driving comparative media law, technological change is, clearly, one of the most important. The introduction of a new medium is often met with both utopian visions of a more perfect society and apocalyptic anxieties about the collapse of an old order. In much the same way, the emergence of new media forces us to rethink relationships and regulatory assumptions regarding previous communication technologies. It challenges the application and value of older models of regulation to a newer environment. To understand the true complexity of technological convergence we must improve our understanding of the interrelationships among many different technologies and media environments. We must therefore compare and think across media. A fully comparative insight of the meaning of convergence and technological change across nations, its importance for regulators over time, and the different perspectives with which to assess its impact are clearly among the most important threshold issues to address before it is possible to consider specific regulatory responses at, for instance, a pan-European level.⁸

Moreover, the massive transformations in the media sector, brought about by technological convergence, economic liberalisation and globalisation of manufacturing processes, have resulted in major changes to media ownership patterns throughout the world. Media ownership that was once bounded by the geographical limitations of the nation-state has become transnational. Transparency of media ownership structures and guarantees of pluralism are challenges for every government and institution. The need for global mapping of media ownership and control patterns has become a major motivator behind comparative media research.⁹

These transformations, however, are more than changing the way media are controlled and analysed; they are also changing the regulatory mechanisms for the communications sector altogether. Self-regulation has, for instance, been suggested as a panacea for many of the current problems on the Internet. It illustrates the move away from traditional command-and-control regulation toward more and newer responsive regulatory systems. Clearly, to analyse self-regulation on the Internet the scope of study has to be transnational and comparative. Moreover, in order to examine, for instance, codes of conduct as effective responsive mechanisms to content concerns on the Internet, the units of analysis have to be the major transnational Internet Content and Service Providers (e.g., MSN, Yahoo, Google). Cross-institutional and cross-instrument research is therefore a new and important field of comparative media law research.

8. For a discussion of the need for comparison of the approaches to convergence. see Stefaan Verhulst and Chris Marsden, *Convergence in European Digital TV Regulation*. London: Blackstone, 1999.

9. See Monroe Price, *Media and Sovereignty: The Global Information Revolution and Its Challenge to State Power*, MIT Press, 2002.

In addition to these technological and institutional transitions, a growing demand for comparative data exists in transitional societies that are (re-)considering the balance between state regulatory prerogatives and the freedom of media outlets. The post-Cold War period has not only opened previously inaccessible countries for a comparative media law perspective, but has demonstrated that the shaping of media laws and administrative agencies involved in implementing them are key determinants in the emergence of stable democracies. Much, in addition, has been learned during this period about styles of preparing laws, needs of groups involved in improving the process and entities dedicated to establishing a media sphere that includes independent newspapers, television and radio stations.¹⁰ In some societies, there has been the challenge of inventing a media law where none existed before. In others, where a government or regime has been discredited and where control of the press was characteristic of its excesses, revision of the media law is often necessary. In a third group of societies, often in the post-Soviet transition, there are difficulties in providing technical assistance in implementing media laws and revising flaws in a first generation of legislative reforms. Problems exist because of the lack of reliable information about regulatory models, legal and societal changes within a given state, challenges of new technologies and changes in the international scheme of trading and regulation with respect to the media. Often, groups participating in the process of media law improvement (as a step toward enhancing the role of the press in a democratic society) do not have an adequate sense of the Western or neighbouring models available and how they might be interpreted and adjusted. Hence, more cross-national media law studies than ever before are being carried out and the demand for comparisons across countries is immense.

Finally, the demand for comparative media law research is also dispersed over time. It may be most intense while a statute is being drafted or debated, or a new technology is being introduced, but it is equally valuable during implementation, even though the requirement for discourse and alternatives may not be so evident. To be responsive, media law research must be able to react to these rhythms of demand.

Comparative Media Law Research

Comparisons are an integral part of most sciences. Many scholars would therefore argue that the very nature of their method is comparative and that thinking in comparative terms is inherent to their research. In truth, no phenomenon can be isolated and studied without comparing it to other phenomena. This is certainly (or especially) the case for law as well as for media related issues: the two major strands that make up comparative media law. The question may therefore be posed whether comparative media law research presents a different set of theoretical, methodological and epistemological challenges, or whether this kind of analysis must be treated just as another variant of the (comparative) problems already embedded in traditional law and/or media research.

One could take the view that conducting comparative research across countries is no different from conducting any other kind of media and/or legal research. Another approach is to pursue comparisons without considering whether the research adds to the complexity of interpreting the results of

10. See Monroe Price and Peter Krug, *Media Law Enabling Environment*. Washington: USAID, 2000. See also Peter Krug and Monroe Price, "A Module for Media Intervention: Content Regulation in Post-Conflict Zones," *Cardozo Law School, Public Law Research Paper No. 58*.

the study. Our view is that it is necessary to be aware of the many problems of doing comparative research in a world of complex interdependencies. Without becoming paralysed in the face of these complexities, it is important to go ahead, opting for compromise and trying to use existing tools for new insights.¹¹ To advance our knowledge about comparative media law research it is necessary to consider some distinctive characteristics of comparative studies.

Not all comparative studies are alike. Several distinctions within comparative research can and should be made. One can, for instance, distinguish two broad types of research in comparative media law research. Exponents of *micro-comparison* analyse the laws belonging to the same legal family, within a single jurisdiction. Researchers pledged to *macro-comparison*, on the other hand, investigate laws in different jurisdictions in order to gain insight into alien institutions and thought processes.¹² For some legal scholars concerned mainly with legal technicalities, micro-comparison holds the greater attraction, whereas macro-comparison is the realm of the political scientist or legal philosopher, who sees law as a social science and is interested in its role in government and the organisation of the community. Micro-comparison appears to demand no particular preparation. A specialist in one national system considers himself or herself qualified to study those of various other countries of the same general family. His main need is to access bibliographical material. But even this mechanical approach avoids certain built-in problems which we deal with later. With macro-comparison, no comparison is possible without identifying and thoroughly mastering the fundamentals of the legal and social systems as they differ from place to place. The scholar must, as it were, subvert his own background and seek to reason according to new criteria.

Within comparative media law, both types of investigation are often employed. In analysing regulatory responses to the changing media,¹³ for instance, both micro- and macro-comparisons can be used. Micro-comparison then takes priority when a range of regulatory challenges and problems, such as data protection, competition, content control and others are examined within a specific nation and described by a country expert. Macro-comparison follows when the research project managers compare the selected jurisdictions and their detailed descriptions.¹⁴

11. See Else Oyen, *The Imperfection of Comparisons*. In: Else Oyen (ed.), *Comparative Methodology. Theory and Practice in International Social Research*. London: Sage, 1990, pp. 1- 18.

12. One may, however, argue that a micro-comparison always implies a macro, as well, and vice versa.

13. See Stefaan Verhulst, David Goldberg and Tony Prosser. *Regulating the Changing Media. A comparative study*. Oxford: Clarendon Press, 1999.

14. For examples of macro research, see:

Chris Dent, "Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and U.S. Newspapers," *Media & Arts Law Review*, Vol. 9, No. 2, pp. 89-112, 2004.

Chesterman, Michael, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt with in Australia and America," 45 *Am. J. Comp. L.* 109 (1997)

Klik, Peter, "Mass Media and Offers to the Public: An Economic Analysis of Dutch Civil Law and American Common Law," 36 *Am. J. Comp. L.* 236 (1988).

For an example that includes both macro- and micro-research, see Kati Suominen, "Access to Information in Latin America and the Caribbean," *Comparative Media Law Journal*, 2, 2003, p. 29.

Many similar distinctions,¹⁵ for example, between heterogeneous and homogenous comparative research can be made. One particularly useful distinction is between vertical and horizontal comparison.¹⁶ Vertical comparison concerns social and legal contexts showing different levels of economic and technological development, such as Internet penetration or take-up of digital television. Horizontal comparison is concerned with contexts sharing a relatively similar level of economic and technological development, but largely differing in their development, their production organisation, their political and legal regime and/or other relevant characteristics.

Again, many comparative media law research projects may combine both approaches. For example, the European Commission launched a research project in 1997 called ESIS (for European Survey of Information Society¹⁷), with the objective of comparing European data concerning new regulatory developments in the field of telecommunications and Information Society as well as presenting a mapping of the actors offering Information Society infrastructure, services and applications. The project was extended to Central and Eastern European countries and the Mediterranean countries in 1999. These two regions were compared from a vertical perspective and within the regions it was obvious that, for example, Albania and Poland differed from each other substantially in a macro way. Tunisia and Morocco, however, were compared from a more horizontal and micro-comparative perspective. Clearly, as is described below, different types of problems arise with regard to both kinds of comparison.

Another way of considering comparative media law research as a distinctive method is to look at the paradigm field in which it operates. At least four conflicting models and poles underpin most comparative media law projects:

1. Uniformity and Diversity Paradigm

Because of globalisation and the creation of free markets, it is predicted that media laws and policies will present a considerable measure of similarity and uniformity, at least with respect to communications infrastructure and economic regulation. Yet, owing to the endurance of social traditions or cultural preferences that are still quite different in many parts of the world, there is and will be much less harmony between the rules dealing with content. Moreover, diversities of media law within one country

15. Kohn identifies for instance four kinds of comparative research on the basis of the different intent of the studies. Countries can be (1) the object of the study – the interest of the researcher lies primarily in the countries studied, (2) the context of the study – the interest is mainly vested in testing the generality of research results concerning social phenomena in the countries compared, (3) the units of analysis – where the interest is chiefly to investigate how social phenomena are systematically related to characteristics of the countries researched, and (4) trans-national – namely studies that treat nations as components of a larger international system. See Melvin Kohn, *Cross-National Research in Sociology*. Newbury Park: Sage, 1989.

16. See Vincenzo Ferrari, *Socio-Legal Concepts and their Comparison*. In: Else Oyen, *Comparative Methodology: Theory and Practice in International Social Research*. London: Sage, 1990, p. 67.

17. See <http://www.eu-esis.org/esis2pres/esis2pres.htm>

may also exist on an ethnic, religious or federalist basis. Even within national borders, differences still exist, for instance, among the *Länder* of Germany towards media regulation.

Searching for uniformity and unearthing and explaining diversity lie at the heart of comparative media law research. Comparative media law considers the benefits and burdens of uniformity and plumbs the contexts demanding diversity and tries to establish a terminology that enables comparison. Comparative research has moved from justification for uniformity to studying the uniqueness and variety among homogeneity.¹⁸

II. Rhetoric and Reality

One interesting challenge of comparative research is to face the "grass is greener on the other side" syndrome, or in some cases, "dark side of the moon" comparisons. Indeed, comparisons are often used by vested interests (e.g., incumbent operators) to prove, for reasons of political or rhetorical expediency, the effectiveness or harmfulness of a specific foreign policy. Comparative data, in particular, is sometimes utilized in a deliberately muddled way to advance a particular agenda. One key task of comparative media law research, as with all methodologies, is to put legal and policy practices within their appropriate contexts to create a better understanding of reality rather than ammunition for exchanges of heated rhetoric.

III. Metaphors and Models

During the process of comparative thinking about the global restructuring of the media and when conceptualising regulatory responses, two specific techniques are often applied: the methods of model and metaphor.¹⁹ First, comparing the experience of others, proponents of one system or another invoke what they deem to be a "model" for imitation, such as looking at the BBC for public broadcasting or the "newspaper model" for regulation. The second technique for conceptualisation involves the use of metaphors to simplify the task of articulating the path of change, such as the metaphors of the "information superhighway," "cyberspace" or "killer applications." Metaphors and models are useful and common tools within comparative research and analysis. They can help guide researchers and policy makers through uncharted territory.²⁰ But there are limitations. Metaphors can be poetic devices that

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18. See Bernd Holznagel, "New challenges: Convergence of markets, divergence of the laws? - Questions regarding the future communications regulation," *Int'l Jnl of communications law and policy*, Web-Doc 5-2-1999. Available at http://www.ijclp.org/2_1999/ijclp_webdoc_5_2_1999.html
- Eko, Lyombe. "Many Spiders, One World Wide Web: Towards a Typology of Internet Regulation." *Communication Law and Policy* 6.3 (2001): 445-84.
19. See Monroe Price, Chapter 2. *Media and Sovereignty*. MIT Press, 2002.
21. For discussions of the uses of metaphors and models, see:
 Stefaan Verhulst and Monroe Price, "In Search of the Self: Charting the Course of Self-Regulation on the Internet in a Global Environment," *Cardozo Law School, Public Law Working Paper No. 015*
 Verhulst and Price, "Privatization and Self-Regulation as Tropes of Global Media Restructuring," *Cardozo Law School, Public Law Working Paper No. 010*.

wrap complex ideas in appealing words; they can be used to persuade even when acceptance is not wholly warranted. Both metaphors and models can be shortcuts that avoid more complex reasoning.²¹

IV. Transfer and Exclusion

Comparative media law research provides the evidence for the use of models and metaphors in policy or law transfer debates. The basic thrust of current theories of policy and law transfer²² is the idea that law and policy diffusion is a process explained by imitation, copying and adaptation on the part of policy-makers. Comparative media law and policy plays a crucial role within this process of identifying "success policies" and best practices that can then be exported to other countries via a process of learning, interpretation and even translation. Lesson drawing²³, as a process of interpretation and translation, is a major goal of comparative media law. In some exceptional cases, comparative media law has also been used for "forced" policy and law transfer, by conditioning on the adoption of certain media policies financial assistance or other incentives and even to determine exclusion from membership to specific international authorities, such as the Council of Europe.²⁴

Functions and Aims of Comparative Media Law

From the above, it may be obvious that comparative media law research serves multiple aims and functions. In general and at a more epistemological level, one could define comparative research as an "ecole de verite," a methodology that seeks to supply comparative solutions and a better international understanding. More concretely, at least four key uses for comparative media law research can be identified: further study of historical and cultural components, commercial application, legislative assistance, and international law and harmonisation.

1. Historical and cultural relativism

Price, Monroe E., "Market for Loyalties and the Uses of Comparative Media Law," 5 *Cardozo J. Int'l & Comp. L.* 445 (1997).

20. It has also been claimed that in the case of the Internet for instance any metaphor will fail because of its uniqueness. For a further analysis of the role of metaphors see Raymond Gozzi, Jr., *The Power of Metaphor in the Age of Electronic Media*. New Jersey: Hampton Press, 1999.
22. For an overview of the policy transfer literature see David Dolowitz and David Marsh, "Who Learns from Whom: a review of the policy transfer literature," In *Policy Studies XLIV*, 1996, pp. 343-357. The law transfer process has been described in James A. Gardner, "Legal Imperialism: American Lawyers and Foreign Aid in Latin America," 14, 1980.
23. See for instance Bennet, Colin and Michael Howlett, "The lessons of learning: Reconciling theories of policy learning and policy change," *Policy Sciences*, 25, 1992, pp. 275-294.
24. For a good discussion of policy transfer within the new EU accession states, see Alison Harcourt, "The Regulation of Media Markets in selected EU Accession States in Central and Eastern Europe," *European Law Journal*, Volume 9 Issue 3 Page 316, 2003.

We may view comparative media law from the standpoint of its value to the historical and cultural study of legal and policy decision-making in the field of communications (including the political economy of policymaking). Ideas regarding the place of law in society, the nature of the law itself and its relationship with new communications technologies become appreciably clearer when comparative law is joined to historical research. Indeed, to some extent, historical background may aid in forecasting the future of certain national systems and the applicability of existing law to new tendencies. A closely related consideration prompts many Western jurists, political scientists, and sociologists to acquaint themselves with non-Western methods of reasoning. For example, comparative studies can reveal that sources and conceptions of free speech and its role vary widely. The notions of a rule of law and of rights of the individual — fundamental to Western civilisation — are not wholly recognised by societies that, faithful to the principle of conciliation and concerned primarily with harmony within the group, do not favour excessive Western-style individualism or the modern Western ideal of legal supremacy. These differences may be used as a justification for authoritarian rule, but they also may reflect important variances in structuring the relationship of the individual and society. Comparative law may enable an improved understanding from a viewpoint of historical and cultural relativism.²⁵

II. Commercial uses

Comparative media law may be used for essentially practical ends. Industry leaders, for instance, need to know what benefits they can expect, what risks they may run, and generally how they should invest capital or run businesses abroad. This practical aspect has encouraged the growth of comparative law in the United States, where the essential aim of law school has been usually to turn out practitioners; and one need hardly mention the strong link in Germany between big industry and the various institutes of comparative law. Sometimes it is said that studies with such a focus should not be considered a part of comparative media law, but practical considerations certainly have helped to finance and promote the development of comparative legal studies in general.²⁶

III. Aid to legislators

The re-mapping of communications structures because of all kinds of transitions (from planned economies to free markets, from analogue to digital, from war to peace) requires an ongoing reform of legal systems. When considering new regulatory frameworks, policy-makers and legislators quite often have a desire to identify foreign models that already have been tested, instead of framing a new,

25. See Richard Ross, "Communications Revolutions and Legal Culture: An Elusive Relationship," *Law and Social Inquiry*, Vol. 27, No. 3, pp. 637-684, 2002.

Wei Li et al. (2001), "The Political Economy of Privatisation and Competition: Cross-Country Evidence from the Telecommunications Sector," Discussion paper No. 2585. London: Centre for Economic Policy Research. Available at <http://www.cepr.org/pubs/new-dps/dplist.asp?dpno=2825>

26. For an example of comparative legal research with business applicability see Urs Gasser, "iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media - A Case Study," Berkman Center for Internet & Society at Harvard Law School Research, Publication No. 2004-07.

revolutionary system. Seeking foreign inspiration for a number of legal rules or institutions is a well-known phenomenon; sometimes so all-embracing that one speaks of "reception" or "transfer." The study of comparative media law is therefore used by legislators to identify "transferable models" and has found a special place among scholars in those countries where such a reception or transfer has occurred.²⁷

IV. Use in international law

Globalisation of communications and the growth of the Internet have led to calls for more international and regional efforts to harmonise the regulatory framework of specific transactions. Those engaging in cross-border communications, for instance, do not know with certainty which national law will regulate their content, since the answer depends to a large extent on a generally undecided factor, namely, which national court will be called upon to decide the questions of competence. The sole lasting remedy appears to be the development of a more harmonised international system. The development of the TV without Frontiers Directive in 1989 (reviewed in 1997 and recently) was a regional answer to a similar call from transnational satellite broadcasters. Harmonisation can succeed only through the medium of comparative law. Regional authorities are highly dependent on comparative material in order to identify policy issues and monitor, for instance, the implementation of existing multilateral agreements or to highlight the need for action in certain areas. An important function, therefore, of comparative law research is its significant role in the preparation of projects for the international unification of law.²⁸

Methodological Problems

Despite growing demand and multiple benefits, comparative media law studies are still at the pioneering stage²⁹ and are both difficult and risky. It is therefore necessary to examine the limitations and potential pitfalls of such studies. Comparative research in general poses certain well-known problems (e.g., accessing comparable data³⁰ and comparing concepts and research parameters).³¹ Additionally,

27. See Christina Spyrelli, "Regulating the regulators? An assessment of institutional structures and procedural rules of national regulatory authorities," *Int'l Jnl of Communications Law and Policy*, IJCLP Web-Doc 1-8-2004. Available at http://www.digitallaw.net/IJCLP/8_2004/ijclp_webdoc_1_8_2004.htm

28. The political aim behind such unification is to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to adopt common principles of law. The method used in the past and still often practiced today is to draw up a uniform law on the basis of work by experts in comparative law and to incorporate it in a multipartite treaty which obliges the signatories, as a matter of international law, to adopt and apply the uniform law as their municipal law. See Cowhey, Peter F., 1990, "The International Telecommunications Regime: The Political Roots of Regimes for High Technology," *International Organization*, 44: 2, 1990, pp. 169-199.

30. For some notable contributions comparing media laws, see Eric Barendt, *Broadcasting Law: A Comparative Study*. Oxford: OUP, 1993 and Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries*, 1996.

31. See Margaret Stacey, *Comparability in Social Research*. London: Heinemann, 1969.

32. See Linda Hantrais & Steen Mangan, *Cross-National Research Methods in the Social Sciences*. Pinter

when comparing different jurisdictions and legal systems, researchers may be subject to further pitfalls: 1) Clashing linguistic and terminological perspectives; 2) cultural differences between legal systems; 3) potential arbitrariness in the selection of objects of study; 4) difficulties in achieving "comparability" in comparison; 5) the desire to see a common legal pattern in legal systems (the theory of a general pattern of development); 6) the tendency to impose one's own (native) legal conceptions and expectations on the systems being compared; and 7) dangers of exclusion/ignorance of extralegal rules.³²

As for comparative media law specifically, one might observe three additional sources of limitations:³³ 1) inadequate availability of statutory and secondary material for those engaged in comparative research; 2) the quick "expiration" of information due to the rapid and constant change of communications law (a process itself driven by rapid technological change); and 3) the possibility that information, even if available and correct, may not be easily summarised, compressed, or reduced to elements that are comparable. These are questions of organisation, terminology and presentation. Each of these potential difficulties is worth discussing briefly.

- ***Limitations on Availability of Statutory and other Regulatory Sources***

Despite researchers' expertise and experience in the field, the absence of ready, comprehensive and up-to-date material remains a definite limitation on the capacity to undertake meaningful comparative media law and policy research. This shortcoming restricts the way advocates and legislators can use comparative research in their process of reform. But, even if the statutes and decisions are available, formal language and legal terminology within statutory or regulatory material are potentially misleading as the exclusive source of law.³⁴ Words alone do not convey the manner in which concepts are variously carried out and enforced. In some societies, a formal prohibition may be quite strict, but the practice may be quite lenient. A similar divergence may exist when interpreting constitutional principles, such as freedom of speech.

- ***The Speed of Change of Regulation and Law within the Communications Sector***

A second potential difficulty has to do with the pace of change. Comparative research usually provides only a snapshot of regulatory formations when a motion picture is required. While this is a problem of research generally, and certainly of research that depicts the way in which the world is organised as of a certain date, it is particularly true in the area of telecommunications and broadcasting,

Publishers, 1996.

33. See Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*. Oxford: OUP, 1989.

34. See Stefaan Verhulst and Monroe Price, *A Methodological Perspective on the Use of Comparative Media Law*. In: Monroe Price and Stefaan Verhulst, *Broadcasting Reform in India. Media Law from a Global Perspective*. OUP, 1998.

35. A fairly extensive literature acknowledging the importance of language as a factor in comparative research and law exists. See, e.g., Bernhard Grossfeld, *The Strength And Weakness Of Comparative Law* Ch. 13, 1990.

where technological innovation often outstrips legal developments. Thus, the need to keep up-to-date with fast-moving technological change often muddies the waters for would-be comparatists. In particular, convergence, a favourite doctrine of regulation analysts, suggests that existing categories for regulation are being confounded.³⁵

- ***Limitations Based on Selection, Comparability and Simplification***

The comparability of regulatory regimes depends on a number of factors, some constant, many transient. Some commentators³⁶ list the following determinative factors: the cultural, political and economic components of a society, the particular relationships that exist between the state and its citizens, a society's value system and its particular conception of the individual. Other general factors include the homogeneity of the society in question and its geographical situation, language and religion. It is indeed difficult to find countries that have achieved a similar stage of development in those areas.

Even more difficult than the problem of selection is the problem of simplification and definition: almost all forms of comparison require the articulation of similarities so that resemblance and differences can be noted. Therefore, a related problem to be addressed in any comparative study is one of context. In terms of media law and policy, for example, it is important to understand the reasons why a comparison is being made, reasons that may not have to do with the law itself, but with the objectives of law. Often the goal of a broadcast regulatory structure is to increase the diversity of voices or to enhance the right of a citizen to receive or impart information. A restriction on foreign ownership may have an impact in a society rich in broadcast signals that is totally different from that in one where such signals are few and competition is just beginning.

Strategy and Conclusion

If we are to overcome these stumbling blocks to comparative research, compromises and methodological strategies have to be adopted. In many cases, simply being aware of the limitations and risks may offer preventive solutions to the comparative methodological problems. In addition, according to Rosengren, McLeod and Blumler, there are three fundamental tasks that need to be carried out in all comparative studies, whether temporally or spatially oriented:³⁷

36. For two good discussions of the interaction between legal and technological change, see Kohl, Uta (1994), "Legal Reasoning and Legal Change in the Age of the Internet—Why the Ground Rules are still Valid," *International Journal of Law and Information Technology* (7:2), p. 123; and Lawrence Lessig (1999a), *Code and Other Laws of Cyberspace*. New York: Basic Books.

37. See, e.g., Peter de Cruz, *A Modern Approach to Comparative Law*. Oxford: OUP, 1993.

38. See Jay C. Blumler, Jack M. McLeod and Karl Erik Rosengren, (Ed.), *Comparatively Speaking: Communication and Culture Across Space and Time*. London: Sage Annual Reviews of Communication Research, Volume 19, 1992, p. 287.

- *Identifying a set of basic parameters and their structural interrelationships;*
- *Measuring the parameter values, as well as assessing the strength of their relationship; and*
- *Comparing differences and similarities in parameter values and structural relationship over space, as well as charting the development of parameter values and structural relationships over time.*

According to the authors, the first task is primarily a theoretical one, the second is an empirical one and the third represents the essence of comparative research. A successfully tested method within this set of tasks is the creation of a uniform template that indicates and defines the parameters and allows consistency and coherent comparisons, as well as flexibility and functionality. When drafting the template, parameters should clearly be theoretically justified and founded. If they are embedded in a theory, they are potentially theoretically relevant. (Indeed, in many cases, the central problem of comparative media law research is not technical but theoretical). Moreover, experience has proven that the empirical implementation is best approached via a "federalistic project management" by which "native scholars" measure the parameters within their own region or country. As Rosengren et al., also note:^{38:}

In order to be really successful, comparative research demands that - at least in the long run - all three types of tasks be solved. There is a natural order in solving the tasks and it is only in the nature of things that progress is quite differential in varied areas and fields of research.

This is just one among many possible strategies to deal with the challenges we have outlined above. The primary purpose of this paper, as we stated at the outset, was to examine the benefits, challenges and current approaches in comparative media law studies. The demand has been growing at a dramatic rate in recent years. To an extent, some of the challenges can be attributed to this rapid growth. These are but growing pains, and in the coming years we can expect that some of the conceptual and theoretical vagueness that afflict the field will gradually solidify. Nonetheless, it is essential that researchers conduct their work while remaining aware of the bigger picture (including the challenges confronted by their field). We are not just conducting research in a vacuum, but as part of something bigger; every piece of comparative research is also an act of definition, contributing to a better understanding of the field itself.

Finally, it is worth noting that this act of definition is one of the key tasks remaining in the years ahead. As with all inter-disciplinary disciplines (and particularly nascent ones), comparative media studies are always in danger of being subsumed by a sub- or parent-discipline. This can be added to the list of challenges mentioned above. Yet as we have seen in this paper, the field has its own unique identity, and its own distinctive set of contributions to make. Comparative media researchers therefore have the

39. Id.

possibility not only of contributing to the definition of a new field; in the process, they will also sharpen that field's insights, and enhance its many contributions.