Qualitative Fieldwork

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Abstract

The use of qualitative fieldwork methods for comparative legal research has the potential to provide valuable insights into the relationships between laws and cultures across different nation-states and other socially defined spaces. Such methods also give rise to a wide range of methodological research design issues including fieldsite selection, the development and use of comparator concepts and the means of handling detailed contextual accounts. This Chapter discusses these issues as they arise in relation to three sub-disciplinary categories: (i) traditional comparative law; (ii) socio-legal comparative law; and (iii) comparative socio-legal studies. Building on this review of comparative legal research design discussions and examples, the authors also reflect on the design for their own ongoing comparative empirical project on labour dispute resolution systems in Southeast Asia.

A. Introduction

Comparative legal scholars have long pointed to the prospective advances in knowledge which may arise from a combination of traditional comparative law and the methodologies of near disciplines in the social sciences which (among other techniques) apply qualitative fieldwork methods.[1] However, in practice studies which actually apply fieldwork methods

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[1] E.g., Annelise Riles, 'Comparative Law and Socio-Legal Studies' in Mathias Reimann and Reinhard Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd edn., 2019); Anne Griffiths, 'Review: Law, Space and Place: Reframing Comparative Law and Legal Anthropology' (2009) 34 *Law and Social Inquiry* 495; David Clark, 'History of Comparative Law and Society' in David S. Clark (ed.), *Comparative Law and Society* (Cheltenham: Edward Elgar, 2012); Roger Cotterrell, 'Comparative Sociology of Law,' in David S. Clark (ed.), *Comparative Law and Society* (Cheltenham: Edward Elgar 2012); Naomi Creutzfeldt et al., 'Introduction: Exploring the Comparative in Socio-Legal Studies' (2016) 12 *International Journal of Law in Context* 377; Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 3rd edn., 2022) (especially ch. 7); Ulrich Drobnig,

to comparative legal research questions are relatively rare. Searches of comparative law journals for papers employing fieldwork methods, and searches of socio-legal, regulatory and social science journals for articles specifically applying cross-jurisdictional (or across other types of spaces) comparisons, each reveal a handful of such studies at most.[2] Researchers in this area do produce theses and monographs,[3] with their more generous word limits and space to present comparative data, but even so the numbers of such studies are still quite small.

The reasons for this are clear: conducting robust fieldwork in more than one location is time-consuming, expensive, and practically difficult (including often involving cross-cultural and multiple language issues). The widespread shift towards neoliberalism in higher education institutions and demands on researchers for quick research output[4] also hinders the long-term engagement required for in-depth comparisons. In addition, fieldwork for a comparative legal project requires the combining of disciplinary knowledge and methods in which researchers may have no academic grounding. Conducting fieldwork also compounds the research design complexities; while a 'traditional' comparative lawyer might need to select and justify the jurisdictions and legal questions in issue, a qualitative fieldworker may additionally need to select 'fieldsites', moments of observations, modes of participation, identity of interviewees, nature and content of interview questions, sources of discourses, or other data points (and all the exclusions that this implies) all with the aim of producing comparable results. Researchers will need to grapple with choices of concepts and how to deal with large amounts of contextual data. While this is certainly a difficult endeavour, it is not impossible, and at the same time offers potential rewards for producing new knowledge and theories of laws in societies.

This Chapter takes a current fieldwork-based research project as an example to ground the discussion of the complexities involved in comparative research design. This collaborative, multi-year project is titled 'Formal and Informal Regulation of Labour Disputes in Southeast Asia' (referred to in this Chapter as our 'Southeast Asia Project') and is funded

'Methods of Sociological Research in Comparative Law' (1971) 35 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 496.

[2] Riles, above n. 1, made a similar observation some 16 years ago in relation to the lack of dialogue between comparative law and socio-legal studies scholars. Also, we acknowledge here that we are only referring to journals and other sources written in English.

[3] E.g. Meredith Edelman, *Judging the Church: Legal Systems and Accountability for Clerical Sexual Abuse of Children* (PhD dissertation, Australian National University, 2020); Marieke Riedel, *Ambivalent Encounters: Law and the Construction of Jewish Difference* (PhD dissertation, Australian National University, 2019); Åse B. Grødeland and William L. Miller, *European Legal Cultures in Transition* (Cambridge: Cambridge University Press, 2015); William Hurst, *Ruling Before the Law: Politics of Legal Regimes in China and Indonesia* (Cambridge: Cambridge University Press, 2018); Elizabeth Jane MacPherson, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge: Cambridge University Press, 2019).

[4] Mark Olssen and Michael A. Peters, 'Neoliberalism, Higher Education and the Knowledge Economy: From the Free Market to Knowledge Capitalism' (2005) 20 *Journal of Education Policy* 313; Peter Roberts and Michael A. Peters, *Neoliberalism, Higher Education and Research* (Rotterdam: Sense Publishers, 2008).

by the Australian Research Council.[5] As the project title indicates, we are investigating the formal and informal mechanisms of labour dispute resolution in three Southeast Asian countries: Indonesia, the Philippines and Vietnam. We are concerned with three sets of questions for each country: (i) How are collective labour disputes defined and regulated under the formal legal systems in each country? (ii) How effectively do these systems operate in practice and what are the major conditions contributing to the relative success or failure of such systems? and (iii) What roles are played by informal institutions and actors in dispute resolution and settlement in each country; how does such informal regulation interact with formal labour law; and what are the effects of such alternative mechanisms in practice? While these research questions are autonomous for each country,[6] we also aim to analyse these questions comparatively across the three countries in order to draw broader conclusions about the conditions under which formal and informal forms of labour regulation interact. We may also conclude with policy recommendations for optimal design of dispute resolution systems if our data and analysis support this, and this might involve reflecting on our own (Australian) system with fresh eyes.[7]

Our data collection involves qualitative semi-structured interviews conducted with participants and observers of the labour dispute resolution systems in each country, coupled with case studies of particular collective labour disputes. Initially fieldwork was to be conducted in person; however, due to the COVID-19 pandemic we have largely shifted to the use of video calls to conduct interviews. The pandemic has also necessitated a 'slow'[8] research approach, with interviews spread out over time rather than being conducted intensively. This has had the benefit of allowing iterative processes of reflections on, and refinement of, the conceptual and comparative framework in relation to specific local research findings and, in response, to adjust our overall research design. This Chapter represents one part of this ongoing reflective approach.

As comparativists often state, there is no one-size-fits-all comparative methodology,[9] and qualitative research in general also follows this principle[10] because the social world is not easily reducible to objective scientific variables. In Section B of this paper, we define and outline the objectives of qualitative fieldwork for comparative legal research. In relation to

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[5] 'Formal and Informal Regulation of Labour Disputes in Southeast Asia' (Australian Research Council Discovery Project #DP19011821). Project website: https://www.monash.edu/business/business-law-and-taxation/our-research/showcase/asian-regulation/labour-disputes-in-southeast-asia.

[6] As recommended by Phil Almond and Heather Connolly, 'A Manifesto for 'Slow' Comparative Research on Work and Employment' (2020) 26 *European Journal of Industrial Relations* 59, 61.

[7] See Nora V. Demleitner, 'Combating Legal Ethnocentrism: Comparative Law Sets Boundaries' (1999) 31 *Arizona State Law Journal* 737 (arguing that the aim of comparative law should be to counter ethnocentrism through the analysis of foreign systems and thereby to challenge researchers' perceptions of their own home jurisdiction).

[8] Almond and Connolly, above n. 6.

[9] Catherine Valcke, 'Reflections on Comparative Law Methodology – Getting Inside Contract Law' in Maurice Adams and Jacco Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012); David Nelken, 'Doing Research into Comparative Criminal Justice' in Reza Banakar and Max Travers (eds.), *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005), p. 249.

[10] Mats Alvesson et al., 'Reflexive Design in Qualitative Research' in Uwe Flick (ed.), *Sage Handbook of Qualitative Research Design* (Thousand Oaks, CA: SAGE Publications, 2022), p. 26.

comparison, while no firm prescriptions are possible, nonetheless there are a number of key research design factors that should be properly addressed in any project of this nature. We argue (in Section C) that it is useful to position a fieldwork research design in relation to three sub-disciplinary categories: (i) traditional comparative law; (ii) socio-legal comparative law; and (iii) comparative socio-legal studies. Then, in Section D, we outline the importance and complexities of 'fieldsite' selection. And finally, in Section E, we discuss the issue of developing lower-level comparator concepts and dealing with context. For each of these topics, we critically appraise the research design in our Southeast Asia Project in light of relevant literature on comparative methodologies alongside our experience of the practicalities of conducting our fieldwork. The aim in doing so is to assist other scholars to orient comparative legal research design involving qualitative fieldwork. Overall, we join others in calling for greater methodological clarity[11] and for open acknowledgement of where aspects of comparative research design have occurred for pragmatic or serendipitous reasons.

B. Qualitative Fieldwork for Comparative Legal Research

We can define qualitative fieldwork as the gathering of qualitative empirical data through methods that require personal interaction between the researcher and the subjects of the research or as 'people studying people'.[12] This includes methods of observation, participant observation, interviewing, qualitative surveying administered in person, and digital engagement that requires the researcher's virtual presence. The gathering of data is conducted 'in the field', and taking a comparative approach would usually necessitate the selection of more than one fieldsite (discussed further in Section D below). This definition of fieldwork excludes the collection and analysis of written, oral and digital records and surveys administered remotely, although these methods are, of course, also often used in combination with fieldwork.

Fieldwork can entail different levels and lengths of engagement. Nelken distinguished between three approaches a scholar might take in conducting research in a foreign environment: 'living there' (conducting ethnography as an observing participant and aiming for immersion in the fieldsite); 'researching there' (making relatively short research visits, mostly conducting interviews); and finally, being 'virtually there' (relying on information from local experts).[13] Living there, or full immersion and enabling the

[11] E.g. Koen Lemmens, 'Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship' in Maurice Adams and Jacco Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012).

[12] Robert A. Georges and Michael A. Jones, *People Studying People: The Human Element in Fieldwork* (Berkeley, CA: University of California Press, 1980).

[13] David Nelken, 'Virtually There, Researching There, Living There' in David Nelken (ed.), *Contrasting Criminal Justice: Getting from Here to There* (Abingdon: Routledge, 2000); Nelken, above n. 9. We include the new technologically-enabled methods such as conducting interviews via video call as being a form of 'researching there' rather than 'virtually there' given the more active role of the researcher.

development of an 'inner' perspective,[14] is often touted as being the most desirable fieldwork approach for understanding cultural phenomena.[15] While being 'virtually there', or outsourcing the data collection to others, may still produce useful information, it arguably excludes all immersive possibilities and obscures the personally reflexive aspects of in-person qualitative fieldwork. 'Researching there' is, therefore, a middle-of-the-spectrum option.

Qualitative fieldwork may be chosen as a research method in response to a wide range of research questions that generally aim to build up detailed accounts of, and to analyse, complex human social phenomena and their meanings in their social settings, including subjective experiences. In relation to law and the basic principle that law is a cultural phenomenon, or is at least embedded in culture, we can assume that understanding can be best obtained through a cultural, qualitative, lens.[16] Qualitative fieldwork may aim to investigate a very wide range of phenomena, including but not limited to: law-making, law enforcement, perceptions of law and justice, legal effectiveness, court and alternative/informal dispute resolution mechanisms, access to justice, and lawyer-client relationships.[17] These are all aspects of stepping outside of lawyers' doctrinal and normative points of view and attempting to find out how the law, and other forms of social ordering, really work in practice, including uncovering the taken-for-granted assumptions that participants may not themselves be consciously aware of.

Generally speaking, the immediate aim of comparison is to examine similarities and differences. This is a necessary basis for general human cognition as well as for any social research,[18] where one piece of information must be compared with another in order to build understanding. Here, though, comparison usually refers to comparison across space (and sometimes also time), and implies the search for cross-cultural understandings of the roles of laws in societies. That is, systematic comparison is aimed at theory building and potentially identifying causal relationships between law and culture or other factors,[19] and is not just a 'mere juxtaposition' of case studies.[20] Comparison may also be aimed at

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[14] See James Q. Whitman, 'The Neo-Romantic Turn' in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) (arguing that an inner perspective of how participants view and describe their legal system is a required starting point, but that the researcher also needs to uncover unarticulated assumptions).

[15] E.g. Hortense Powdermaker, *Stranger and Friend: The Way of an Anthropologist* (New York: W.W. Norton 1966), p. 9; Roger M. Keesing and Andrew Strathern, *Cultural Anthropology: A Contemporary Perspective* (Fort Worth, TX: Harcourt Brace College Publishers, 1998), p. 7; Siems, above n. 1, p. 143; Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (1998) 46 *American Journal of Comparative Law* 43.

[16] Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd edn., 2019).

[17] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Kane and Herbert M. Kritzer (eds.), *Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2012).

[18] Carolin Demuth and Alessandra Fasulo, 'Qualitative Research Design Across Different Cultural Communities' in Uwe Flick (ed.), *The SAGE Handbook of Qualitative Research Design* (Thousand Oaks, CA: SAGE Publications, 2022), p. 433.

[19] Siems, above n. 1.

[20] Cotterrell, above n. 1.

supporting political action on a particular issue.[21] The pragmatics of qualitative fieldwork, though, necessarily limit the comparison to small sample size (small-N) studies with few fieldsites,[22] and also to selected fragments of social life which are used to build theory or at least to lead to larger insights.

For our Southeast Asia Project, as introduced above, we have chosen to employ fieldwork methods to gather data on legal effectiveness in relation to the formal labour dispute resolution systems in the three nominated countries. This includes gathering the subjective experiences and views of participants in, and observers of, these systems. We are also examining informal mechanisms of labour dispute resolution, and while some passing references to these can be found in media sources and secondary literature, in-depth empirical fieldwork is the only viable method for discovering and documenting these processes. Our comparative approach in examining these questions in the three countries is aimed at theory building about the interactions and effectiveness of formal and informal labour dispute resolution mechanisms and their links to industrial peace.[23] As a group of researchers based outside the countries we are studying, for pragmatic reasons, to use Nelken's terminology, we are 'researching there' and conducting semi-structured interviews via video calls. We, therefore, must acknowledge that our approach does not involve the more desirable full 'immersion'.

C. Three Categories of Comparative Law and the Role of Qualitative Fieldwork

Scholars may often use the terms 'socio-legal comparative law' and 'comparative socio-legal studies' interchangeably to indicate the extension of (or blending of) 'traditional comparative law' approaches into the realm of the social through fieldwork and other empirical methods.[24] Although these terms are similar, it is both possible and useful to distinguish between them in order to understand possible options of research design and their implications. The intention here is to delineate three heuristic categories while acknowledging that real research designs may not fully conform with any of them – as is the case with our Southeast Asia Project. The first category, 'traditional comparative law', has a set of core assumptions about the centrality of the nation-state and of positive law. Then, in 'socio-legal comparative law' the traditional comparative law paradigm remains at the core of the inquiry but with some extensions to encompass social context. In the third category, that of 'comparative socio-legal studies', socio-legal approaches are predominant with comparison added as a means of moving beyond single cases towards theory building. These categories are further detailed in the following discussion.

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[21] See, e.g. discussion in James Peacock, 'Action Comparison: Efforts Towards a Global and Comparative yet Local and Active Anthropology,' in Richard G. Fox and Andre Gingrich (eds.), *Anthropology, by Comparison* (London: Routledge, 2002).
[22] Creutzfeldt et al., above n. 1.
[23] Ingrid Landau et al., 'Regulatory Pluralism and the Resolution of Collective Labour Disputes in Southeast Asia (forthcoming, *Journal of Industrial Relations*).
[24] For example, see the three editions of Mathias Siems' *Comparative Law* (Cambridge: Cambridge University Press, 2014, 2018, 2022).

1. Traditional Comparative Law

'Traditional comparative law' is something of a caricature or a foil as there is some doubt as to whether it continues to exist, or indeed has ever existed, in practice.[25] Certainly, the idea of comparative law as a discipline, and its aims and scope, have been the subject of much critical literature, and scholarship in this field has evolved over time.[26] Nonetheless, it is useful to set out the conventions of traditional comparative law here to draw attention to its attendant scope, albeit narrow, within which qualitative fieldwork methods may be employed.

A key assumption of traditional comparative law is the primacy and boundedness of nation-states, with research designs taking this as a central starting point for comparison.[27] That is, Country A is compared with Country B, or as an extension of this, Province C with Province D within formally constituted federal jurisdictions. Then, in traditional comparative law, there is a focus on positivist or 'black letter' state law and the formal legal systems that support it – that is, on the formal rules promulgated by the nation-state's law-making bodies (including formal delegated rule-making), and their application through courts and other formal legal bodies. The aim of comparing such formal legal systems and their rules is often one of taxonomy and the recognition and understanding of legal families,[28] but may also be for the normative purpose of law reform and seeking inspiration for reform in other systems. Often the aim is to promote convergence or at least harmonisation between systems. Thus, the study of 'legal transplants' plays a prominent role in this field of scholarship due to its implications for convergence. Legal transplant studies also rest on assumptions of the primacy of the nation-state and the movement of formal rules from one state to another.[29]

By virtue of its narrow legal focus, research in traditional comparative law tends to have a fixed (rather than flexible) research design. The method here is a 'legal scientific approach'[30] that most often rests on, or is related to, the functional method as set out by Zweigert and Kötz.[31] Here, to overcome the problem of differences in legal terminology between places, a social problem is to be identified in each place (usually in different nation-states) and then the 'legal' and 'extra-legal' solutions to that problem are identified and compared. Explanations for similarities and differences are to be sought from the surrounding context. The social problem is, therefore, the *tertium comparationis*, or

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[25] E.g. Cotterrell, above n. 16, p. 713.
[26] E.g. Husa, 'Traditional Methods', ch. 2 (in this volume).
[27] Griffiths, above n. 1, p.497.
[28] Griffiths, above n. 1, p. 498; Siems, above n. 1, p. 13.
[29] Note, though, that broader conceptions of 'legal transplants' have also been proposed, such as Twining's concept of 'legal diffusion': William Twining, 'Diffusion and Globalization Discourse' (2006) 47 *Harvard International Law Journal* 507.
[30] Siems, above n. 1, p. 13. See also Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmerman (eds.), *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd edn., 2019).
[31] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, translated by Tony Weir (Oxford: Oxford University Press, 3rd edn., 1998). See also John C. Reitz, 'How to Do Comparative Law' (1998) 46 *American Journal of Comparative Law* 617 (setting out a comparative law methodology with functionalism at its core). See also discussion by Husa, above n. 26.

'common point of departure for the comparison'.[32] The research design would therefore often assume a background of similarity in the selected nation-states and would then seek to identify differences in the actual rules. The basic research design here is pre-set by the researcher and is unlikely to change even as new information comes to light.

Fieldwork would only be needed in a very narrow set of circumstances if a traditional comparative law researcher is merely attempting to find the formal law on a particular topic in more than one jurisdiction. For example, understanding which rules belong to which social problem may well require soliciting knowledge from legal practitioners. Beyond this, examples of research applying the full extent of Zweigert and Kötz' functional method, which seeks the 'extra-legal' solutions alongside the legal, and seeks contextual explanations for similarities and differences, are very rare in practice and therefore fieldwork is rarely employed.[33] Still, we should acknowledge here that this method *does* include plural legal and contextual information in theory, if not in practice, and that it has long been debated as to whether traditional comparative law has always been concerned with context.[34]

2. Socio-Legal Comparative Law

Taking a further step along the continuum of comparative legal research design possibilities is what we are calling 'socio-legal comparative law'. Another possible term that could be used here is 'comparative law in context'.[35] The core of the traditional comparative law approach, with its key assumptions about the central primacy of the nation-state and their formal legal systems, is maintained here, but with research additionally seeking to take account of social context.[36] Often doctrinal legal analysis remains a key part of this kind of research.[37] For example, Banakar's review of Örücü and Nelken's *Comparative Law: A Handbook* highlights how that text seeks to 'contextualise legal research by taking into account the social, cultural, historical, economic and political factors that are in constant interaction with law and legal institutions i.e. comparing laws in their socio-cultural

[32] Reitz, above n. 31, p. 622.
[33] Michaels, above n. 30, p. 364. As examples of functional approaches without considering the 'extra-legal', see: Valcke, above n. 6; Eric Feldman, 'Blood Justice, Courts, Conflict and Compensation in Japan, France and the United States' (2000) 34 *Law & Society Review* 651. For an example of research that does seek the 'extra-legal' see: Petra Mahy, 'The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia' (2016) 12 *International Journal of Law in Context* 420; Maurice Adams and John Griffiths, 'Against "Comparative Method": Explaining Similarities and Differences' in Maurice Adams and Jacco Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012).
[34] E.g. Riles, above n. 1.
[35] Both the Cambridge University Press 'Law in Context' book series and the journal *International Journal of Law in Context* define 'law in context' by focusing on law as the central concern while acknowledging relationships to other disciplines and the usefulness of their materials.
[36] Siems, above n. 1, p. 178. See also Eberle who sets out a comparative law methodology within this vein: Edward J. Eberle, 'The Method and Role of Comparative Law' (2009) 8 *Washington University Global Studies Law Review* 451.
[37] See Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632 (explaining the benefits of retaining doctrinal legal analysis in interdisciplinary research).

context'.[38] Other examples that might be classified as 'socio-legal comparative law' include empirical studies of legal transplants or contextualised accounts of aspects of legal families. While law may be understood here as being embedded within legal culture, this is often understood as being lawyers' culture or the professional realm of law[39] rather than as a broader view of societal culture. Researchers in this category are typically legally trained but less familiar with social science methodologies, and thus where they do engage with such methodologies they may only employ them in a loose manner.[40]

3. Comparative Socio-Legal Studies

By contrast, researchers employing 'comparative socio-legal studies'[41] approaches may abandon the key assumptions of traditional comparative law. They are not tied to the assumption that the nation-state is necessarily the primary space within which 'law' is found (see further discussion in Section D below), nor to a positivist view of 'law' and therefore may emphasise legal or regulatory pluralism.[42] In this category, researchers are not just concerned with the context of law – but rather with deeper understandings of the role of law in social orders, subjective experiences, internalised conceptions, processes, and many other concerns. Such approaches are more likely to employ inductive reasoning (though not discounting the role of existing theory and deductive reasoning) and to have a flexible (rather than fixed) research design permitting the research questions and approaches to evolve as more information comes to light.

'Comparative socio-legal studies' projects are more likely to draw directly on various social science disciplines and therefore a greater number of research designs are possible.[43] While the disciplinary lines between, for example, anthropology and sociology may be

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[38] Reza Banakar, 'Review Essay: Power, Culture and Method in Comparative Law' (2009) 5 *International Journal of Law in Context* 69, reviewing: Esin Örücü and David Nelken (eds.), *Comparative Law: A Handbook* (Oxford: Hart Publishing, 2007).

[39] Cotterrell, above n. 15. See also Reitz, above n. 31 and Mark van Hoeke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model of Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 495, where legal culture is understood to be lawyers' culture.

[40] As Mark van Hoeke notes, 'comparative lawyers are often lost when it comes to describing context'. See Mark van Hoeke, 'Deep Level Comparative Law' in Mark van Hoeke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004) 167. See also Esin Örücü, 'Methodology of Comparative Law' in Jan M. Smits (ed.), *Elgar Encyclopaedia of Comparative Law* (Cheltenham: Edward Elgar, 2nd edn., 2012) (which contains several mentions of extending comparative law to contextual approaches but few pointers on how this should be done, and acknowledgement that the help of social scientists may be needed).

[41] Alternative terms in use which appear to have similar meanings are 'comparative sociology of law' – see, e.g., Cotterrell, above n. 1, p. 41; David Nelken (ed.), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997) 1, and 'comparative law and society' (Clark, above n. 1).

[42] For Riles, above n. 1 the study of legal pluralism, especially in non-Western contexts, has been the site of productive interdisciplinarity between comparative law and socio-legal studies.

[43] While much socio-legal research is qualitative fieldwork based, of course not all work is produced this way. Other approaches include: textual discourse analysis, analyses of the social meaning and aesthetics of legal texts, ethnographic reading or content analysis of case decisions, analyses of films, novels and other cultural products, and analyses of naturally occurring data.

blurred here,[44] often sociology brings a focus on case studies, and strives to test hypotheses and build theory through the identification of independent and dependent variables.[45] Meanwhile anthropology brings its ethnographic techniques, and particularly its core method of participant observation and long-term engagement, as well as 'thickly' descriptive and transparently reflexive writing style that incorporates the researcher's subjective experience and acknowledges their influence on the data.[46] Legal anthropologists are also more likely to allow research designs to be inductively and iteratively determined as more information comes to light rather than being pre-set. That is, the terms of comparison may be allowed to emerge from the research data without preconceived assumptions,[47] and this may lead to uncovering unexpected information. However, as Harrison notes, 'ethnography flourishes in the liminal spaces between research design and improvisation',[48] but is not built for efficiency or producing easy policy prescriptions.

We can now consider our Southeast Asia Project in relation to the three categories outlined above in order to pinpoint its sub-disciplinary location. In fact, the project falls somewhere between the second and third categories. We do have nation-states as our fixed starting point for comparison (Indonesia, the Philippines and Vietnam) and this three-country comparison is pre-set and unlikely to change (being written into a grant application is one practical limitation). The social problem with which we are concerned is collective labour disputes and their resolution. In that respect we have a functional aspect that ties our analysis in the three countries together. Formal law is our starting point – that is to say, its operation and effectiveness is our first research question. Underlying this we have a normative concern with labour justice. But we also have adopted regulatory pluralism as a key assumption – that is, the assumption that dispute resolution processes can and often do occur outside the formal legal framework. Within the country studies and at a more detailed level, our parameters of comparison are much more fluid, and this is giving rise to various sub-projects as our understanding grows. Labour regulation and dispute resolution are national issues in each of the three countries, but the existence of smaller spaces of labour

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[44] Cotterrell, above n. 1, p. 47.

[45] Richard L. Abel, 'A Comparative Theory of Dispute Institutions in Society' (1974) 8 *Law and Society Review* 217, 220; Mattei Dogan, 'Strategies in Comparative Sociology' (2002) 1 *Comparative Sociology* 63; Jean-Pascal Daloz, 'Comparative Sociology: Epistemological issues' in Maurice Adams and Mark van Hoeke (eds.), *Comparative Methods in Law, Humanities and Social Sciences* (Cheltenham: Edward Elgar, 2021).

[46] Elizabeth Mertz and Mark Goodale, 'Comparative Anthropology of Law' in David S. Clark (ed.), *Comparative Law and Society* (Cheltenham: Edward Elgar, 2012). We should also note that, in recent decades, anthropology has had an uneasy relationship with cross-cultural comparison and particularly its earlier, since discredited by postmodern critiques, use for developing 'grand theories' of cultural development. See discussion in: Richard G. Fox and Andre Gingrich, 'Introduction' in Richard G. Fox and Andre Gingrich (eds.), *Anthropology, By Comparison* (London: Routledge, 2002).

[47] Creutzfeldt et al., above n. 1. See also discussion of iterative research design in some cognate fields: Almond and Connelly, above n. 6; Richard M. Locke and Kathleen Thelen, 'Apples and Oranges Revisited: Contextualised Comparisons and the Study of Comparative Labor Politics' (1995) 23 *Politics & Society* 337.

[48] Anthony Kwame Harrison, 'Ethnography' in Patricia Leavy (ed.), *The Oxford Handbook of Qualitative Research* (Oxford: Oxford University Press, 2nd edn., 2020), p. 330.

dispute resolution are also emerging from our data. This theme is continued in the following section.

D. Spaces, Scales and 'Fieldsites'

In some cross-national studies, which we can categorise as being 'traditional' or 'socio-legal comparative law', fieldwork (usually in the form of interviews) is conducted without any consideration of local, intra nation-state, spaces. For example, Dietz investigated the enforcement of cross-border contracts in the global software industry by interviewing software industry experts in Germany, Bulgaria, Romania and India.[49] What mattered here was the interviewees' expertise and not their specific location within particular geographical areas or institutions in these countries. In another example, Hertogh and Kurkchiyan utilised focus group discussions and national surveys with individual citizens of different backgrounds, as well as semi-structured interviews with lawyers working in different areas of law to investigate legal consciousness in the United Kingdom, Poland and Bulgaria.[50] This sampling approach was also largely disinterested in the social or physical location of the interviewees. Similarly, Dezalay and Garth conducted more than 50 interviews across a number of countries in Asia to understand the historical role of elite lawyers in transitions away from colonialism,[51] but again there was no intra nation-state spatial analysis.

As another example in the area of family and religious law, Fournier studied the social problem of Jewish women who were not granted a divorce (*get*) by their husband even while state law recognised their divorce.[52] This was a comparative study of Israel and Canadian legal solutions and practices in relation to this problem. Fieldwork, including twelve interviews with Jewish women who had faced this problem, allowed the author to take a critical legal pluralism approach and to document how these women had navigated this problem by drawing on religious, legal and non-legal sources of power. The author did not provide a justification for the selection of Israel and Canada other than the fact the same social problem occurs in both countries. The interviewees were selected without any consideration of their geographical or social locations, but there was passing mention of some rabbinical courts in Israel acting differently to others which hints at a missing spatial aspect to the research design.

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[49] Thomas Dietz, *Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade* (Oxford: Hart Publishing, 2014).

[50] Marc Hertogh and Marina Kurkchiyan, 'When Politics Comes into play, Law is no Longer law': Images of Collective Legal Consciousness in the UK, Poland and Bulgaria' (2016) 12 *International Journal of Law in Context* 404. See also: Grødeland and Miller, above n. 3 (apparently drawing on the same, but expanded, dataset as Hertogh and Kurkchiyan, but with some acknowledgement of sampling within intra-state regions especially in Ukraine, at p. 25. However, the analysis in this study still largely proceeds on a state (and not intra-state) basis).

[51] Yves Dezalay and Bryant G. Garth, *Asian Legal Revivals: Lawyers in the Shadow of Empire* (Chicago, IL: University of Chicago Press 2010).

[52] Pascale Fournier, 'Halacha, the Jewish State and the Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders' (2012) 65 *Journal of Legal Pluralism and Unofficial Law* 165.

In contrast, 'comparative socio-legal studies' often adopts legal or regulatory pluralism approaches. A consequent aspect of pluralism is the acknowledgement that legal and nomic spaces, that is spaces within which cultural norms or living law may develop, in addition to the nation-state, are important. This necessarily opens up a much more complex issue of selection of comparative research fields than exists in 'traditional' or 'socio-legal comparative law' projects. Scholars have developed various conceptions of 'space' within such research project design. In some cases, these concepts correspond to presumed 'real' bounded (or semi-bounded) spaces within which particular law, norms and cultures take shape, such as Sally Falk Moore's concept of the 'semi-autonomous social field',[53] Pierre Bourdieu's 'juridical field',[54] or the 'regulatory space' of regulatory studies.[55] Districts,[56] cities/towns,[57] villages,[58] religious law jurisdictions,[59] indigenous reservations,[60] communities[61] and special economic zones[62] have also figured as the 'spaces' of comparative socio-legal fieldwork, as have other nomic settings such as homes,[63] prisons,[64]

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[53] Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719.

[54] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 814.

[55] Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in Leigh Hancher and Michael Moran (eds.) *Capitalism, Culture, and Economic Regulation* (Oxford: Oxford University Press, 1989); Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 283.

[56] E.g. Maarten Bavinck et al., 'From Indifference to Mutual Support – A Comparative Analysis of Legal Pluralism in the Governing of South Asian Fisheries' (2013) 25 *European Journal of Development Research* 621. See also an earlier version of this group's work examining three districts in India: Svein Jentoft et al., 'Fisheries Co-Management and Legal Pluralism: How an Analytical Problem Becomes an Institutional One' (2009) 68 *Human Organization* 27.

[57] E.g. Hao Zhang and Eli Friedman, 'Informality and Working Conditions in China's Sanitation Sector' (2019) 238 *The China Quarterly* 375; Carol G. Greenhouse et al., *Law and Community in Three American Towns* (Ithaka, NY: Cornell University Press 1994).

[58] The 'Berkeley Village Law Project' is one example of this approach. See: Laura Nader and Harry F. Todd, *The Disputing Process: Law in Ten Societies* (New York: Columbia University Press 1978); Laura Nader, 'Choices in Legal Procedure: Shia Moslem and Mexican Zapotec' (1965) 67 *American Anthropologist* 394.

[59] E.g. Edelman, above n. 3.

[60] E.g. Robert D. Cooter and Wolfgang Fikentscher, 'American Indian Law Codes: Pragmatic Law and Tribal Identity' (2008) 56 *American Journal of Comparative Law* 29; Robert D. Cooter and Wolfgang Finkentscher, 'Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)' (1998) 46 *American Journal of Comparative Law* 287; Robert D. Cooter and Wolfgang Finkentscher, 'Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)' (1998) 46 *American Journal of Comparative Law* 509.

[61] E.g. Oswaldo Ruiz-Chiriboga, 'You Have no Right to Remain Silent: Self-Incrimination in Ecuador's Indigenous Legal Systems' (2017) 65 *American Journal of Comparative Law* 659; Sophie Dascalopoulos-Capetanakis, 'The Notion of Female Property' (1990–1991) 30 *Journal of Legal Pluralism and Unofficial Law* 271.

[62] E.g. James Alan Brown, 'Territorial (In)Coherence: Labour and Special Economic Zones in Laos's Border Manufacturing' (2019) 51 *Antipode* 438.

[63] David Delaney, 'Home as Nomic Setting: Seeing How the Legal Happens' (2010) 48 *English Language Notes* 63.

[64] E.g. Ronald L. Akers et al., 'Prisonization in Five Countries: Type of Prison and Inmate Characteristics' (1977) 14 *Criminology* 527; L. Thomas Winfree et al., 'Prisoner Perspectives on Inmate Culture in New Mexico and New Zealand: A Descriptive Case Study' (2002) 82 *The Prison Journal* 213.

workplaces,[65] courtrooms,[66] and other public institutions.[67] Cyberspaces can also arguably be divided into virtual zones.[68]

One example of a cross-national socio-legal project with fieldwork based in presumedly bounded local communities is Gezelius and Hauck's collaborative ethnographic research on motivations for compliance with fisheries regulation.[69] The larger comparison is between three nations with major fishing industries (Canada, Norway and South Africa) where research began as separate studies before the researchers began to collaborate and design their research to ensure comparability. The community cases in each country were then chosen based on their similarity, each being small communities that were economically dependent on fisheries subject to state regulation but where there were also incentives and opportunities not to comply with such regulation. The differences between the cases were provided through historical patterns of interactions with state authorities, and the states' governmental compliance strategies. These similarities and differences then allowed the authors to test for the factors causally impacting compliance motivations.

Other scholars have taken the view that any spatial concepts must be considered to be arbitrarily drawn by researchers to delineate their field of research due to the acknowledgement that social life is never easily divided into spatio-legal geographies or fixed culturally bounded territories.[70] That is, cultural spaces are viewed as permeable and blurred and any formally defined social boundaries should be treated as suspect. For example, the European Union 'throws its legal shadow' ahead to prospective member states which act in anticipation of a coming legal order.[71] Legal spaces are also not necessarily static in time but have been shown to shift as geographic features themselves transform or the social meaning attached to boundaries changes.[72] Therefore, in this view, research can, and arguably should, seek to test any assumption that spatial boundaries in fact do enclose

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[65] E.g. Yunmei Wu and Benjamin van Rooij, 'Compliance Dynamism: Capturing the Polynormative and Situational Nature of Business Responses to Law' (2021) 168 *Journal of Business Ethics* 579.

[66] Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Abingdon: Routledge, 2011); Linda Mulcahy and Emma Rowden, *The Democratic Courthouse: A Modern History of Design, Due Process and Dignity* (Abingdon: Routledge, 2020).

[67] Irus Braverman et al., 'Introduction: Expanding the Spaces of Law' in Irus Braverman et al. (eds.), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford, CA: Stanford University Press 2014), p. 11.

[68] Lawrence Lessig, 'The Zones of Cyberspace' (1996) 48 *Stanford Law Review* 1403; Dan Hunter, 'Cyberspace as Place and the Tragedy of the Digital Anticommons' in Austin Sarat and Paul Schiff Berman (eds.), *Law and Society Approaches to Cyberspace* (Abingdon: Routledge, 2007).

[69] Stig S. Gezelius and Maria Hauck, 'Toward a Theory of Compliance in State-Regulated Livelihoods: A Comparative Study of Compliance Motivations in Developed and Developing World Fisheries' (2011) 45 *Law & Society Review* 435.

[70] Akhil Gupta and James Ferguson, 'Discipline and Practice: "The Field" as Site, Method, and Location in Anthropology' in Akhil Gupta and James Ferguson (eds.), *Anthropological Locations: Boundaries and Grounds of a Field Science* (Berkeley, CA: University of California Press 1997); Matei Candea, 'Arbitrary Locations: In Defence of the Bounded Field-site' (2007) 13 *Journal of the Royal Anthropological Institute* 167.

[71] Franz von Benda-Beckmann and Keebet von Benda-Beckmann, 'Places that Come and Go: A Legal Anthropological Perspective on the Temporalities of Space in Plural Legal Orders' in Irus Braverman et al. (eds.), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford, CA: Stanford University Press 2014), p. 39.

[72] Ibid.

a particular normative order or culture via comparison of fieldsites on either side of the boundary.[73] Or in other words, 'the researcher should be attentive to epistemological and political issues of *location*'.[74]

Driven by studies of global legal pluralism,[75] notions of discrete legal spaces have also more recently given way to much more complex, interactive, multi-level and polycentric conceptions of how law and norms may correspond with people and places.[76] Within this much more complex conception of the world, the choice of fieldsites is far more multi-faceted and multi-layered than the dilemma usually faced by traditional comparative lawyers in deciding which nation-states to compare. A comparative researcher taking a pre-set approach must decide which spaces to compare with each other, what levels of comparisons are to be conducted (e.g. macro, meso or micro[77] or some combination of levels[78]), whether and what sites within particular nation-states should be chosen, and importantly whether these spaces are to be taken for granted or their existence tested through the research.

As an example, Locke et al. conducted fieldwork in 'matched case studies' of two electronics companies in Mexico and the Czech Republic that both supplied the multinational brand Hewlett-Packard and were subject to the same Code of Conduct.[79] The researchers sought to investigate the interactions between the transnational private regulation of Hewlett-Packard, the state regulatory environments of Mexico and the Czech Republic, and the impacts of these on labour compliance. Here, the supplier companies were their defined fieldsites.[80] In another example, also concerned with the interactions

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[73] Alexandre (Sandy) Kedar, 'Expanding Legal Geographies: A Call for a Critical Comparative Approach' in Irus Braverman et al. (eds.), *The Expanding Spaces of Law: A Timely Geography* (Stanford, CA: Stanford University Press 2014).

[74] Gupta and Ferguson, above n. 70, p. 39. See also Anne Griffiths', above n. 1, review of Drummond (2006) – lauding her ethnography for exploring what constitutes the local rather than treating it as a given: Susan G. Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Vancouver: UBC Press, 2006).

[75] Paul Schiff Berman (ed.), *Oxford Handbook of Global Legal Pluralism* (Oxford: Oxford University Press, 2020).

[76] For example: James Ferguson and Akhil Gupta, 'Spatializing States: Toward an Ethnography of Neoliberal Governmentality' (2002) 29 *American Ethnologist* 981; Julia Black, 'Constructing and Contesting Legitimacy in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137; Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100 *The American Economic Review* 641; Sally Engle Merry, 'International Law and Sociolegal Scholarship: Towards a Spatial Global Legal Pluralism' in Michael A. Helfand (ed.), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015); Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge: Cambridge University Press, 2013).

[77] Siems, above n. 1, p. 14; Esin Örücü, 'Methodology of Comparative Law' in Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2nd edn., 2012), p. 561.

[78] Banakar, above n. 38, p. 81.

[79] Richard M. Locke et al., 'Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains' (2013) 51 *British Journal of Industrial Relations* 519.

[80] We can contrast this research design with that proposed by Yoav Dotan where comparison is similarly based on a multinational corporation (McDonald's), but this design does not directly test the effects of a shared corporate code of conduct and lacks multi-level aspects: Yoav Dotan, 'The Common Real-Life

between transnational private regulation and state legal contexts, Bartley studied the influence of private sustainable forestry and fair labour standards in authoritarian China and democratic Indonesia.[81] Here, rather than focusing on highly particular fieldsites, Bartley took a middle-level analytical approach, 'close enough to see how transnational rules are put into practice but still able to compare across fields and countries'.[82] This meant interviewing a range of participants and observers as well as selecting some sub-issues to explore such as sustainable forestry initiatives in East Kalimantan, a province of Indonesia.

However, much more fluid approaches to research site selection are also possible, particularly that of 'multi-sited ethnography'[83] which has grown in popularity in cultural anthropology in past decades. In this approach, ethnographers may employ multiple sites of observation and participation in order to examine cultural meanings and entities within the world system, eschewing the single bounded site of conventional ethnography. According to Marcus, multi-sited fieldwork is not merely a different kind of controlled comparison but rather allows a 'fractured, discontinuous plane of movement and discovery'.[84] The researcher may follow a person, thing, metaphor, story, allegory, life or conflict[85] as they move through geographical and socially defined spaces. Such multi-sited fieldwork methods have been commonly adopted by scholars studying international law[86] and transnational governance regimes.[87]

Multi-sited ethnographic research is not without its critics. Candea, for example, argues that in practice it still requires the selection of bounded fieldsites, and this selection, while it may indeed occur *a posteriori*, is hidden by discourses of the multi-sited imaginary.[88]

Reference Point Methodology – Or: 'The McDonald's Index for Comparative Administrative Law and Regulation' in Peter Cane et al. (ed.), *The Oxford Handbook of Comparative Administrative Law* (Oxford: Oxford University Press, 2020).

[81] Tim Bartley, *Rules without Rights? Land, Labor and Private Authority in a Global Economy* (Oxford: Oxford University Press, 2018).

[82] Ibid, p. 14.

[83] For a discussion of other (non-anthropological) forms of interdisciplinary multi-sited fieldwork: see, Kathryn Henne, 'Multi-Sited Fieldwork in Regulatory Studies' in Peter Drahos (ed.) *Regulatory Theory: Foundations and Applications* (Canberra: ANU Press, 2017).

[84] George E. Marcus, 'Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography' (1995) 24 *Annual Review of Anthropology* 95, 96.

[85] Marcus provides a number of examples from legal anthropology in relation to following conflicts. Indeed, a focus on 'trouble cases' as providing a window into the core of legal problems has been a conventional methodology in legal anthropology since about the mid-1960s. See: Mertz and Goodale, above n. 43, p. 82.

[86] See, e.g., Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (Chicago, IL: University of Chicago Press 2006); Adelle Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (Ithaka, NY: Cornell University Press 2019).

[87] See, e.g., John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); Kathryn Henne, *Testing for Athlete Citizenship: Regulating Doping and Sex in Sport* (Rutgers University Press 2015); Ingrid Landau, *Rights, Risks and Rules: The Rise of Human Rights Due Diligence and Implications for Transnational Labour Governance* (PhD dissertation, University of Melbourne, 2021).

[88] Candea, above n. 70. On a different line of critique of multi-sited fieldwork, Hage (2005) has argued that multi-sited ethnography is simply not practically feasible because it is too exhausting to be socially involved

That is, a decision is still necessarily being made to cut what is studied from what is not studied at each site of data collection. An example which arguably illustrates Candea's critique can be found in Merry's study of human rights norms on gender violence.[89] For this study, Merry conducted fieldwork to discover how these norms were constructed at the international level and then traced how they were translated or 'remade in the vernacular' in different localities. Merry labelled this work as being 'multi-sited' or 'deterritorialised'. The international part of the research was conducted 'in the world of UN conferences, transnational NGO activism, and academic, legal, and social service exchanges of ideas and practices'.[90] Applying Candea's critique, we would point out that each of these sites still involved the researcher's decisions about what to include and exclude, e.g. selection of particular rooms or caucuses to attend at UN conferences.

The only possible solution to this problem, argues Candea, is to explicitly acknowledge that arbitrary fields are being created by the researcher. Cook and colleagues concur that arbitrary fieldsites must be created and explicitly owned, but that this process can be driven by the theoretical and comparative concerns of the research.[91] That is, dividers can be drawn, and sampling or observations undertaken on either side, in order to test for similarities and differences. In other words, if we follow Cook and colleagues, we essentially come in a full circle back to more explicitly comparative-across-space approaches.

A final point to make with respect to this discussion of space and comparison, following an observation made by Gupta and Ferguson, is that the academic 'vocabulary of justification' tends to require that fieldsite choices be cast solely in terms of the theoretical problems for which the site was especially suited to produce data.[92] Researchers are not supposed to have other personal interests in the site selection. But this ignores practical realities – that sites are often chosen for prior familiarity, personal and scholarly interest, ease of access and so on. Indeed, our literature survey of existing comparative legal studies projects with fieldwork components conducted for this Chapter indicates that a great many are unspecific as to why particular sites have been chosen. One notable example of this is Riles' ethnography of 'collateral' as a legal technology of global private finance.[93] Fieldwork was conducted in large financial institutions in Tokyo, Japan, but neither the choice of Japan as the country of study, nor the particular financial institutions selected, the bureaucrats and lawyers interviewed and for what reasons, is explained. Similarly, Hurst's comparative study of legal regimes in China and Indonesia uses a complex 'between-country', 'within country' and 'across time' comparative approach.[94] While the

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at multiple sites: Ghassan Hage, 'A Not so Multi-Sited Ethnography of a Not So Imagined Community' (2005) 5 *Anthropological Theory* 463.

[89] Merry, above n. 86.

[90] Merry, above n. 86, p. 29.

[91] Joanna Cook et al., 'What if There is no Elephant? Towards a Conception of an Un-sited Field' in Mark-Anthony Falzon (ed.), *Multi-Sited Ethnography: Theory, Praxis and Locality in Contemporary Research* (London: Routledge, 2009).

[92] Gupta and Ferguson, above n. 70.

[93] Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago, IL: University of Chicago Press 2011).

[94] Hurst, above n. 3.

choice of China and Indonesia is explained, the 'within country' site selection is glossed over, arguably weakening the study's conclusions. We can surmise, perhaps, that personal interests, practical considerations and/or the ethical imperative to conceal certain fieldsites to protect informants may have driven Riles' and Hurst's choices, but these factors are not acknowledged in their work.

With respect to our Southeast Asia Project, as noted, we have as our starting point the comparison across the three selected countries. We have justified the selection of Indonesia, the Philippines and Vietnam along various dimensions: these are the three most populous states in Southeast Asia but each has distinctly different legal histories and labour dispute systems. However, our choice of countries is also influenced by personal factors, as amongst us we have prior expertise, interest, local language capacity and contacts in each country. Our study of the effectiveness of the formal labour disputes systems in each country is largely proceeding on a national basis by conducting interviews with judges, government administrators, lawyers, arbitrators/mediators, academics, trade union and employers' association leaders and labour rights activists based on their professional expertise rather than their spatial location. Each selection is influenced by both our theoretical aims and practicalities of access and who will generously give us an hour or two of their time. As our data collection has progressed, we have collected evidence of intra-national diversity including the very real geographical impediments faced by disputants in the more remote areas. We are also collecting data on regional specificities – for example, courts that have developed their own cultures or special economic zones where zone leadership play an important role in dispute processing. As we progress, we must necessarily choose which of these issues and areas to focus on to the exclusion of others. The literature discussed in this section has reinforced our commitment to explaining each of these choices clearly in our published work.

E. Contexts and Concepts in Comparative Legal Research Design

If comparativists already tend to be reticent about their spatial fieldsite choices, then the more granular explanation of their choices of comparator concepts and processes for dealing with contextual detail is even more frequently absent. That is, the process of assembling comparators is 'deeply hidden in almost mystical processes'.[95] This explanatory gap is likely to occur because of the sheer complexity involved, unresolved cognitive conflicts between ideals of perfectly abstracted 'scientific' research design and the realities of data collection, and the difficulties involved in clearly describing comparative analytical processes. Further, being explicit about choices of comparator concepts is not only a problem of scholarly appropriateness, but also requires self-

[95] Jörg Niewöhner, 'Assembling Comparators – Assembling Reflexivities' (2018) 27 *Science as Culture* 563, 565.

awareness of the researcher's cultural biases and the power dynamics inherent in translation.[96]

Complexity arises particularly for comparative research projects involving qualitative fieldwork where the aim is to collect rich contextual data and there is no end to what may seem relevant.[97] As Cotterrell has pointed out, detailed descriptions of legal experiences in different contexts may encompass so many different variables that the comparison remains an unsystematic juxtaposition of accounts of differences.[98] Resolving, or at least mitigating, this problem of non-comparability arising from contextual detail therefore requires the comparativist to find a means of reconciling the requirement for some degree of thematic unity across fieldsites with the societal specifics found at ground level.[99] Additionally, issues of access and the unpredictability of the people being observed or interviewed will inevitably alter the course of data collection in different fieldsites – and each such contingency 'has repercussions for the comparison'.[100] In the remainder of this Part, we consider how these issues of contexts and concepts are likely to play out in each of the three categories of comparative legal research design (as set out above in Section C) before then discussing our Southeast Asia Project.

In relation to 'traditional comparative law', where formal state law is the main focus of comparative inquiry and the scope for qualitative fieldwork is therefore quite limited, claims of comparability usually rest on functionalism (as discussed above in Section C 1). There has been much critical discussion of the potential and limitations of functionalism as the means of enabling cross-cultural comparisons in law.[101] Functionalism aims to avoid the trap of assuming that legal terminology will necessarily refer to the same thing across jurisdictions. Here it is the selected social problem that is assumed to be the *tertium comparationis* or quality that the things being compared have in common. The legal rules which functionally relate to the problem in each place are then selected for comparison. Explanations for similarities and differences between the rules may be sought in the surrounding context, but the source of such contextual material is more likely to be secondary literature rather than primary fieldwork. As a consequence, any conclusions drawn may only be largely impressionistic and unable to establish causation between law and context.

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[96] Nelken, above n. 9, p. 247; Mahy, above n. 33, p. 429. See also the debate in legal anthropology between Max Gluckman and Paul Bohannan in the 1950s–1960s as to the appropriateness of using indigenous legal terms or foreign researchers' imposed terms (explained in Mertz and Goodale, above n. 43, p. 82).

[97] Marit Melhuus, 'Issues of Relevance: Anthropology and the Challenges of Cross-Cultural Comparison' in Andre Gingrich and Richard G. Fox (eds.), *Anthropology, by Comparison* (London: Routledge, 2002), p. 85.

[98] Cotterrell, above n. 1, p. 48.

[99] Almond and Connolly, above n. 6, p. 67.

[100] Joe Deville et al., 'Same, Same but Different: Provoking Relations, Assembling the Comparator' in Joe Deville et al. (eds.) *Practising Comparison: Logics, Relations, Collaborations* (Manchester: Mattering Press 2016), p. 113. See also Robert A. Georges and Michael A. Jones, *People Studying People: The Human Element in Fieldwork* (Berkeley, CA: University of California Press 1980), p. 9 (on the many unplanned events and interactions that inevitably occur during fieldwork).

[101] E.g. Günther Frankenberg, 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411; Husa, above n. 26. See also discussion above in Section C 1.

The design complexities are somewhat heightened in 'socio-legal comparative law' research projects. Here formal state law is still the research focus but comparative lawyers may make forays into discovering how law relates to its surrounding context. Following the functionalist approach, a social problem may still provide the *tertium comparationis* here, but the difference, as compared with the 'traditional comparative law' approach, is that fieldwork might be used to discover the relevant context that explains the similarities and differences found between the legal rules examined. As various authors have argued, the functional approach is potentially problematic as it involves, initially, the artificial stripping of context in the selection of the social problem and its related rules, and then its reintroduction later in the analysis.[102] How context and concepts are used appears quite under-theorised in the literature falling into this category. 'Legal culture' is often used loosely in conjunction with (or as an alternate for) context.[103]

A good example of a study that falls in this category is MacPherson's comparative research on state recognition of indigenous water rights in four countries: Australia, Aotearoa/New Zealand, Colombia and Chile.[104] Indigenous rights to use water was identified as the functional social problem at the heart of the comparison, with the selected countries representing different legal families and different approaches to water governance. This was both doctrinal and empirical research. MacPherson explicitly recognises the importance of social, cultural, political and historical context as a means of avoiding misinterpreting legal languages.[105] However, she does not appear to explain her criteria for deciding what was and was not relevant context, or how usable comparative terminology for explaining this context was identified.

In the third category, that of 'comparative socio-legal studies', the research design possibilities are again more varied given the many forms that qualitative fieldwork can take. And the issues relating to how concepts and contexts are handled is much more complex but also potentially more exploratory and fluid. Here, though, the problems associated with comparison are also better theorised compared with 'socio-legal comparative law' given the relatively elaborate discussions that have occurred on comparison in various social sciences.[106] According to Fox and Gingrich, 'a rich plurality of qualitative comparative methodologies has emerged – none claiming exclusive rights, each offering its insights and evidence'.[107] We can loosely divide these approaches into two categories: (i) isolating particular key variables to focus on from among the many possibilities and/or (ii) allowing for a more holistic interpretive approach based on 'combination concepts'.

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[102] Frankenberg, above n. 97, p. 440; Mahy, above n. 33, pp. 430–431.
[103] Balázs Fekete, 'Inconsistencies in the use of Legal Culture in Comparative Legal Studies' (2018) 25 *Maastricht Journal of European and Comparative Law* 551, 555.
[104] MacPherson, above n. 3.
[105] MacPherson, above n. 3, p. 8.
[106] E.g. Richard G. Fox and Andre Gingrich (eds.), *Anthropology, by Comparison* (London: Routledge, 2002); Joe Deville et al. (eds.) *Practising Comparison: Logics, Relations, Collaborations* (Manchester: Mattering Press 2016); Thomas Scheffer and Jörg Niewöhner (eds.), *Thick Comparison: Reviving the Ethnographic Aspiration* (Leiden: Brill 2010).
[107] Richard G. Fox and Andre Gingrich, 'Introduction' in Richard G. Fox and Andre Gingrich (eds.), *Anthropology, by Comparison* (London: Routledge, 2002), p. 12.

While the first strategy of isolating key variables could be done *a priori* with a pre-set approach to the research design, this is likely to be efficient but ultimately deficient. This approach has been variously termed as a 'scholastic comparison' or 'etic comparison' with its predetermined dimensions set by the outsider researcher,[108] and as 'thin' because it necessarily excludes empirical cultural specificities as being undesirable 'noise'.[109] Researchers using pre-determined variables are likely to need to draw on existing taxonomies (e.g. legal families, varieties of capitalism), and therefore ultimately this approach assumes the validity and comparability of the pre-set variables used.

An alternative, and likely more satisfactory, strategy for isolating key variables is to use an iterative process for discovering and frequently refining 'comparator concepts' during the research process as fieldwork data emerges. That is, comparability is the result rather than the starting point of the research. This has been described as an 'emic comparison',[110] which is conducted from an insider perspective and most likely achieved via ethnography. One way of iteratively discovering such comparator concepts is to use Weber's 'ideal types'. Ideal types are understood as being abstract hypothetical tools against which real-world empirical data can be analysed. To arrive at an ideal type, initial concepts are 'confronted' with empirical reality and if the differences are too large then the ideal type should be adjusted until a good ideal type is arrived at.[111] Here, comparative empirical data may be used inductively to determine an ideal type, and afterwards may be compared deductively against the ideal type to enable analysis.

Relatedly, but not precisely the same, iterative approaches may be used without any ideal type, but where a comparator concept or bridging term is sought – a term that is capable of capturing the social or legal phenomenon in each place. As an example of such an iterative approach, Sørensen argued that it is possible to employ multi-sited ethnography is such a way that *tertia comparationis* (in the plural) emerge from the research process.[112] She describes studying the regulation of computer game content for the purposes of child protection. Sørensen began by conducting fieldwork on German regulatory approaches which then led to re-examination of her own home system of Denmark. Then, through data collection she was able to transform an initially non-comparative multi-sited study into a comparative one by finding and testing *tertia comparationis* or shared concepts that permitted comparison between the sites to occur. One of Sørensen's comparator concepts was 'duality of regulation', defined as the simultaneous restriction and promotion of the computer game industry.

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[108] Estrid Sørensen et al., 'From Scholastic to Emic Comparison: Generating Comparability and Handling Difference in Ethnographic Research' in Uwe Flick (ed.), *The SAGE Handbook of Qualitative Data Collection* (Thousand Oaks, CA: SAGE Publications, 2022).
[109] Almond and Connolly, above n. 6, p. 63.
[110] Sørensen et al., above n. 108.
[111] Richard Swedburg, 'How to Use Max Weber's Ideal Type in Sociological Analysis' (2017) 18 *Journal of Classical Sociology* 181, 188. See also mentions of Weber's ideal type approach for comparative legal studies in Cotterrell, above n. 1, p. 47 and in Riles, above n. 1, p. 779.
[112] Estrid Sørensen, 'Multi-Sited Comparison of "Doing Regulation"' (2008) 7 *Comparative Sociology* 311; Estrid Sørensen et al., 'Producing Multi-Sited Comparability' in Thomas Scheffer and Jörg Niewöhner (eds.), *Thick Comparisons: Reviving an Ethnographic Aspiration* (Leiden: Brill, 2010).

An alternative option to isolating individual variables or comparator concepts is to conduct a comparison using a broader 'combination concept'. Such combination concepts in common use in comparative socio-legal studies include 'legal culture',[113] 'legal consciousness'[114] and 'legalism'.[115] 'Legal culture' has a multiplicity of inconsistent scholarly usages, but one understanding is to view it as being an aggregate or set of cultural patterns which can be 'confronted with a different aggregate or patterning observed elsewhere'.[116] While 'legal culture' has been used to provide causal explanations for cross-cultural differences in law and legal practices, alternatively 'legal culture' can also be something that requires explanation in itself.[117] It is particularly the use of legal culture for causal explanations that has garnered a great deal of critique given the many sub-variables in play.[118] Indeed, some scholars have sought to sub-divide legal culture into more specifically defined aspects while still attempting to capture a more holistic view.[119]

'Legal consciousness' is also a diffuse, multi-faceted notion sometimes concerned with individual subjective understandings and experiences of the law, while in other views it provides a critical window of understanding into the collective everyday experiences of, and hegemonic power, of law.[120] While there are certainly differences in how it is defined, we can view 'legal consciousness' as a combination concept, such as through the aggregation of notions of 'worldview, perception, and decision'.[121] The third combination concept mentioned here – 'legalism' – is perhaps more precisely defined than the other two. Used in history and anthropology to bridge state and non-state legal orders, 'legalism' has been defined as 'the use of explicit rules and generalising categories'.[122] While this definition appears quite narrow, in scholarly practice many other related aspects seem to necessarily come into play to make particular case studies contextually meaningful. Examinations of 'legalism' have various additional concerns including 'critical reflective

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[113] E.g. Nelken, above n. 41.
[114] E.g. Marina Kurkchiyan, 'Perceptions of Law and Social Order: A Cross-National Comparison of Collective Legal Consciousness' (2012) 29 *Wisconsin International Law Journal* 366; W. E. Butler and P. T. Grier, 'Legal Consciousness: Some Comparative Legal Aspects' (2012) 7 *Journal of Comparative Law* 40.
[115] Paul Dresch and Hannah Skoda (eds.), *Legalism: Anthropology and History* (Oxford: Oxford University Press, 2012); Fernanda Pirie and Judith Scheele (eds.), *Legalism: Community and Justice* (Oxford: Oxford University Press, 2014); Fernanda Pirie, 'Comparison in the Anthropology and History of Law' (2014) *The Journal of Comparative Law* 88.
[116] Cotterrell, above n. 1, p. 46.
[117] David Nelken, 'Comparative Legal Research and Legal Culture: Facts, Approaches and Values' (2016) 12 *Annual Review of Law & Social Science* 45, 51.
[118] Cotterrell, above n. 1, p. 46.
[119] E.g. Sally Engle Merry, 'What is Legal Culture? An Anthropological Perspective' (2010) 5 *Journal of Comparative Law* 40; van Hoeke and Warrington, above n. 39.
[120] Susan S. Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323.
[121] Lynette J. Chua and David M. Engel, 'Legal Consciousness Reconsidered' (2019) 15 *Annual Review of Law and Social Science* 1.
[122] Fernanda Pirie and Judith Scheele, 'Justice, Community and Law' in Fernanda Pirie and Judith Scheele (eds.), *Legalism: Community and Justice* (Oxford: Oxford University Press, 2014), p. 2; Fernanda Pirie, 'Comparison in the Anthropology and History of Law' (2014) *Journal of Comparative Law* 88.

attitudes', 'discussion of moral order' and 'how parties are entangled'[123] and 'claims and theories about justice'.[124]

These types of 'combination concepts', for all the criticism that they may attract for their lack of specificity, through their very flexibility and multi-dimensional nature can enable interpretative comparative approaches to be built around them. Such approaches are less interested in extracting causal explanations and instead seek 'thick' or 'deep' comparisons of how certain law and social practices and contexts may be mutually constitutive.[125] This may allow recognition of the interlocking nature of different spheres of social organisation.[126] Rather than stabilising key variables, a thick comparison may aim to capture dynamic relations among social and legal elements,[127] so again here comparability is a result rather than starting point of the research. For example, Field's holistic interpretative approach to understanding youth justice cultures in Wales and Italy was able to demonstrate the interdependencies of certain aspects of each of the two systems that prevented a conclusion that one was more lenient on youth offenders than the other.[128]

To reflect now on our Southeast Asia Project, we should begin by acknowledging that to obtain our grant funding we presented quite a pre-set research design, involving the three countries, a focus on collective labour disputes in the manufacturing sectors in major industrial centres, and an expectation that we would be able to label different forms of dispute regulation as being either formal (state) or informal (non-state). The reality has been rather more fluid and we are necessarily engaging in an ongoing, iterative, process of maintaining and searching for comparability as our team members have been conducting fieldwork in each country. Due to the exigencies of efficiency and expertise, only certain team members have been collecting data on each country. While keeping to our project's overall research questions, each sub-team is tending to pursue particular threads based on their own interests and as directed by the specifics of the system being examined. Each is finding that access to particular groups of interviewees is different, and each interview itself is skewed in different directions by the interviewee and their individual experience and perspectives as well as the identity of the interviewer(s).

In this process, we are constructing detailed accounts of the labour dispute resolution systems in each of the three countries. Each system, of course, sits within surrounding institutional and cultural contexts, positing the problem of how to ultimately produce

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[123] Paul Dresch, 'Legalism, Anthropology, and History: A View from Part of Anthropology' in Paul Dresch and Hannah Skoda (eds.), *Legalism: Anthropology and History* (Oxford: Oxford University Press, 2010).
[124] Pirie and Scheele, above n. 122.
[125] David Nelken, 'Comparative Legal Research and Legal Culture: Facts, Approaches and Values' (2016) 12 *Annual Review of Law & Social Science* 45; Stewart Field, 'Explaining, Interpreting, and Prescribing: Some Tensions and Dilemmas in the Comparative Analysis of Youth Justice Cultures' (2019) 46 *Journal of Law and Society* S51; Almond and Connolly, above n. 6; Jörg Niewöhner and Thomas Scheffer, 'Thickening Comparison: On the Multiple Facets of Comparability' in Thomas Scheffer and Jörg Niewöhner (eds.), *Thick Comparison: Reviving the Ethnographic Aspiration* (Leiden: Brill, 2010).
[126] Almond and Connolly, above n. 6, p. 65.
[127] Thomas Scheffer, 'Comparability on Shifting Grounds: How Legal Ethnography Differs from Comparative Law' in Thomas Scheffer et al (eds.), *Thick Comparison: Reviving the Ethnographic Aspiration* (Leiden: Brill, 2010).
[128] Field, above n. 125.

comparability. Team calibration[129] activities through written accounts and regular group meetings (and sub-group meetings) have been significant to enable handling of on-the-ground findings and discussions of whether such material points us towards seeking similar information in the other countries. As an example of our search for individual comparator concepts, we are continuing to test the utility of the formal/informal regulation dichotomy against the possibility of adopting a broader spectrum of terms able to capture intermediate or blended forms of regulation. At this point we are still unsure as to whether we will eventually draw on, or arrive at, a combination concept such as 'legal culture', but it is certainly an option that we are exploring.

F. Three Categories of Comparative Law and the Role of Qualitative Fieldwork

The writing of this Chapter has been an exercise in reflexivity undertaken somewhere mid-way in the conduct and iterative development of a multi-year, qualitative fieldwork-based, comparative legal research project. The 'slow' approach to the fieldwork for our Southeast Asia Project has allowed us to develop further an initially fairly fixed research design, that was written to obtain funding, into a more flexible, and arguably more robust, comparative approach. This has been an iterative process of confrontation between our initial design and theory-building aims with the practicalities of conducting fieldwork and the specific findings from different fieldsites. This has involved consideration of local fieldsite selection and our approach to conceptual comparability as we collect and analyse a large amount of empirical data. Here, in this Chapter, it has also involved assessing our approach against a broad set of methodological literature from comparative law and social science disciplines. This has also been an exercise in methodological transparency as we practice articulating the decision-making processes involved in our Project.

Such transparency is aimed at improving our own comparative approach, but also to suggest ways in which other researchers may orient their own research designs. We began this Chapter by noting the relative rarity of qualitative fieldwork-based comparative legal research due to the practical and theoretical difficulties involved in designing and executing such research. We have certainly not resolved these difficulties here, but we have discussed them in relation to three heuristic sub-disciplinary categories of 'traditional comparative law', 'socio-legal comparative law' and 'comparative socio-legal studies'. Research designs may not necessarily fit within these categories – ours does not, and in adopting additional flexibility in our research design, our project has shifted further along the continuum between 'socio-legal comparative law' and 'comparative socio-legal studies'. However, we find these categories useful for situating and articulating the range of possibilities for incorporating or basing comparative legal research on qualitative fieldwork. These categories help to explain the choices that need to be made in relation to definition and selection of fieldsites as well as the means of dealing with rich empirical data on context and the development of comparator concepts to enable meaningful analysis. Key choices relevant to all of these themes is whether to adopt pre-set or fixed approaches

[129] Deville et al., above n. 100, p. 111.

rather than flexible and iterative decision-making, or otherwise to adopt some combination of the two.

We have found that some degree of flexibility and dynamism is necessary to encompass the inevitable messiness of researching the complex social world, where each 'people researching people' event or circumstance necessarily leads to contingencies and challenges to comparability. Perhaps the only way out of this morass of complex choices may well be tolerance or even encouragement of a degree of idiosyncrasy in research design, and acceptance that there is no clear end point where all issues or problems of comparability have been resolved.[130]

The observation that much comparative legal research fails to make its methodology explicit[131] holds true for many of the studies examined in this paper. We add our voice to the case for including clear explanations of comparative and fieldwork methodology, and the important implicit choices that must be made including the various pragmatic and personal factors that are likely to arise. We should accept that fieldsite selection and other aspects of fieldwork and comparability cannot be free of personal values and practicalities, and promote the inclusion of 'confessional accounts' of both pragmatics/practicalities and researchers' subjective reflexivity in research publications.

[130] Almond and Connolly, above n. 6, p. 70.

[131] Koen Lemmens, 'Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship' in Maurice Adams and Jacco Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012).