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General Considerations on Comparative Law

Rozważania ogólne o prawie porównawczym

DEBATE ABOUT THE NAME

The name "comparative law", occurring in numerous languages in the world, has in fact no specified designates in the realm of legal phenomena, and hence it does not refer to any clear-cut object in legal science. First of all, contrary to what the term implies, there is no set of at least fairly uniform norms governing particular social relations, which could be called comparative norms. Thus, for example, the name "civil law" is justified by the uniformity of civil legal relations, "criminal law" – by the uniformity of criminal legal relations, "administrative law" – by the homogeneity of legal administrative relations, and "international law" – by the uniformity of legal international relations. In fact, however, there is a special approach to civil, criminal or administrative law, which consists in comparing the ways of its creation, application and execution in different countries. A question arises, therefore, whether the results of such a comparison together constitute comparative law as a separate branch of law, or should we rather speak only of elements of law, shaped by comparisons within particular established legal branches – civil, criminal or administrative – whose separateness does not raise any substantial doubt.

The name as well as the content of "comparative law" involve difficulties which have been subject to debate ever since the beginnings of scientific comparative movement[1]. Opinions expressed in the dispute, though quite diverse, tend to point out to the range, the methods and the functions of what is called comparative law, and should not, therefore, be neglected. Thus, on the one hand

[1] The first Congress of Comparative Law held in Paris in 1990 is generally considered as the beginning of the scientific movement of legal comparative studies. For further details see: E. L a m b e r t : *Rapport sur les communications d'orde général concernant la deuxième section* [in:] *Congrès International de Droit Comparé, Procès-verbaux et Documents*, Paris 1905, vol. I.

there are adherents of the view which conceives of comparative law as a branch of law of the same status as others and subject to special cognitive procedures of legal science[2]. On the other hand, however, there are theoreticians who identify comparative law with the method of legal research and studies[3]. Even those, however, who deny the existence of comparative law can hardly do without the term "comparative law". In order to prepare a proper theoretical ground for further analyses it is necessary to survey, at least generally, the various meanings the name "comparative law" can assume; as well as the synonymous names it is substituted with, and to attempt their systematization.

Comparative law is, in its essence, the comparing of laws, or legal comparative studies which fall within the scope of comparative literature in a broad sense[4]. In all the comparative literature in this broad sense there seem to be two basic points of view, quite distinct ones, though not actually separated by a "Chinese Wall" – a practically-oriented approach, and a largely theoretical one. By comparing the adherents of the former standpoint aim at creating and developing new contents, at shaping special branches of literature. In the case of legal scientists it is the comparative law, understood as a separate branch of law, that would create this special "literature". Those who create the theoretical orientation treat comparison as one of numerous methods of acquiring new knowledge about literature in general or, for that matter, knowledge about legal science in particular. The former scientists are mainly interested in the practical use of "comparative literature", while the latter focus their research on "comparing literatures", "comparative studies of literatures" or on "comparative criticism of literatures" (*Die Vergleichende Literatur*). Whereas the legal practitioners create law in a comparative way, theoreticians of law explore the content of comparative law conceived diversely.

Thus conceived, either chiefly practical or mainly theoretical comparative approach to literature has marked its presence in its specialized variants. Hence the scope of "comparative literature" in the broadest sense includes, among others, "comparative *belles-lettres*", "comparative history", "comparative sociology", "comparative psychology", "comparative ethnology", "comparative economy", and the object of our interest here – "comparative law". Hence, "comparative studies in literatures" embrace, respectively, such disciplines as "sociological comparative studies", "psychological comparative studies", "ethnological comparative studies", "economic comparative studies" and – what interests us here – "legal comparative studies".

Analyses connected with names of disciplines frequently show that their long-term traditional use tends to be stronger than apparently obvious arguments. Similarly, the name "comparative law" is widely accepted despite its am-

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[2] This group includes e. g. Cambell, Constantinesco, Hall, Lawson, Merryman, Rheinstein, Rodiere, Yntema, Watson, Zweigert.

[3] This view is shared by e. g. Gutterridge, David, Graveson, Kahn-Freud, Wagner, Winterton, Kamba.

[4] The term "comparative literature" used here is wider in meaning than "literary comparative studies" including only *belles-lettres*. On the latter term see: H. Hanaszek-Ivaničkova: *O współczesnej komparatystyce literackiej*, Warszawa 1980, p. 6 ff.

biguity and lack of designate in the real domain of legal phenomena.The English term "comparative law" has exact equivalents in French – *droit comparé*, Italian – *diritto comparato*, Spanish – *derecho comparado*, Russian – *sravnitelnoye pravo* and Polish – *prawo porównawcze*. The Polish terms *prawodawstwo porównawcze, legislacja porównawcza, legislacyjne prawo porównawcze, prawne porównywanie użytkowe, prawna komparatystyka użytkowa, nomotetyka porównawcza*, are close in meaning to the term *prawo porównawcze* ("comparative law"). Some of those terms have synonymous equivalents in other languages: the former two – in the French *législation comparée* and the English "comparative legislation", while the latter in the list – in the English term "comparative nomothetics".

Let us stop for a moment at the family of names connected with the term "comparative legal studies". Among others, there are the following names: "comparative jurisprudence", "comparative legal science", "comparative theoretical law", "pure comparative legal studies" (as different from the "applied comparative legal studies"), "comparative descriptive law".

The German *Rechtsvergleichung* is a synonym of the first three terms and is frequently used by comparative scholars because it denotes the process of comparing laws directly without raising ambiguous connotations. The name "descriptive comparative law" is used in English (as an equivalent of the Polish term "prawo porównawcze opisowe"). English comparative scholars are also familiar with the division of comparative law into "comparative nomoscopy", "comparative nomothetics" and "comparative nomogenetics"[5].

The attempt to find mutual manifold connections among the names shows that for almost every name included in the 'practically' oriented group an equivalent can be found among the names belonging primarily to the 'theoretically' oriented group of names. To put it differently, the family of names centered around the term "comparative law" find their equivalents in the family of names oscillating around the term "legal comparative studies". Here are a few examples of such couples of respective 'practical' and 'theoretical' names: "comparative law" - "comparative legal studies", "comparative legislation" – "comparative legal science", "practical legal comparison" – "theoretical legal comparison" etc. Irrespective of their semantic and logical content, such equivalent names confirm facts which are quite apparent and indicate mutual relations and determinations between the theoretical and the practical in law, as well as in the science of law.

MEANINGS OF THE NAME

The division of sciences and research into practical and theoretical has its own history and abundant bibliography[6]. Although detailed discussion of this matter seems to be superfluous to our purpose here, yet it can be generally

[5] A. Watson: *Legal Transplants, An Approach to Comparative Law*, Edinburgh 1974; earlier – J. H. Wigmore: *Panorama of the World's Legal Systems*, Washington 1936.

[6] See e. g. A. Podgórecki: *Charakterystyka nauk praktycznych*, Warszawa 1962.

stated that a special manifestation of the division in natural and exact sciences is the distinction between what is called applied and basic studies. The former aim at satisfying precisely defined practical needs. The practice of the latter requires no justification by any *a priori* practical needs; it is rightly assumed that it would be difficult to forsee a possible use of the results of basic studies in the future. Reasoning by analogy one might explain in this context the nature of comparative law and of comparative legal studies. If we accepted the view of real existence of comparative law as a separate branch of law, it would undoubtedly be similar to the range of applied studies. Consequently, although comparative legal studies are primarily associated with basic studies, they would also contain a potential characteristic of findings in applied studies, although generally deleted in time.

An etymological and logical analysis of the term "comparative law" indicates intellectual activity with "law" as its object, and "comparing" as its cognitive method. A resulting basic question – leading to endless disputes, arguments and discussions – is whether the process of comparing the laws of different countries can itself be the source of new legal norms, of new law – comparative law. The answers formulated in legal studies are highly diversified and range from extreme opinions recognizing "comparative law" as an autonomous branch of law, equal in status to its other branches – to standpoints on the opposite extreme – strongly denying the independent status (ontology) of "comparative law". For example, according to Zweigert and Kötz, two German scholars supporting the former extreme view, a kind of comparative law – a general German system of law – emerged in Germany in mid-nineteenth century upon the wave of codification and unification of law by comparing the hitherto-existing laws in particular German countries[7]. On the other hand, Ancel, a French scholar adhering to the latter extreme view, expressed the opinion that comparative law is in fact "the process of comparing [...]: there is no 'comparative law' in the same sense as one can speak of civil law, criminal law or administrative law[8].

Discussing the meaning of the name *droit comparé*, Eduard Lambert and Raymond Saleilles, two French pioneers of comparative law, dreamed that the name could denote the common law of the humanity (*droit commun de l'humanité*)[9]. It is, perhaps, this dream, connected with the rise of comparative law, pretending to acquire the status of a special branch of knowledge, that told upon the meanings which have been sometimes ascribed to the name "comparative law". Understood in this sense, it implies the independence of comparative law as both an autonomous branch of law and as its theoretical equivalent in legal science,

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[7] K. Zweigert and H. Kötz: *An Introduction to Comparative Law, The Framework*, Amsterdam-New York–Oxford, vol. I, pp. 44 ff.

[8] M. Ancel: *Znaczenie i metody prawa porównawczego, Wprowadzenie ogólne do badań porównawczych*, Warszawa 1979, pp. 49 ff; also: R. Tokarczyk: *Metody porównawcze w historii doktryn politycznych i prawnych*, „Folia Societatis Scientiarum Lublinensis" 1984, vol. 26, Hum. 2.

[9] R. Saleilles: *Conception et objet de la science du droit comparé*, „Bulletin de la Societé de Législation Comparée" 1900.

of international or even universal range[10]. The French pioneers of modern comparative legal studies, inspired by the spirit of progress dominating in their age, believed that such law would, sooner or later, emerge in the future. They had great hopes connected with it and expected that it would solve conflicts resulting from the differentiation of national laws. They believed – a little too optimistically perhaps – that it would soon help to improve international relations and the standard of living of the humanity.

Still, for a practising lawyer, who has to solve problems resulting from international relations, the term "comparative law" acquires another, quite current and utilitarian meaning, limited to a particular method of comparing the content of his national law, which he is familiar with, with foreign laws constituted for the needs of other countries[11]. Comparing the laws of different countries is a necessary condition of solving international problems regulated by law. It can not only bring about the awareness of differences between particular systems of national laws, but also – in the cases of their incompatibility – create the need for constituting supra-national international law. Still, even the international law emerging in such situations could hardly – within the rules of logic – be called "comparative law". Norms created by comparing laws of different states and exceeding the boundaries of national legal systems do not, in fact, regulate comparing as such, but – generally speaking – international public or private relations, or – more specifically – various kinds of relations, such as economic, cultural, communicational, military, cosmic, etc.

In order to get a deeper insight into the content of the name "comparative law" it is proper to consider the meaning of the two terms – "law" and "comparative" – separately. In the name "comparative law" the term "law" appears usually in the meaning of juridical statutory law, less frequently – of customary law, and least frequently in our contemporary times – in the meaning of natural law. On the other hand, the term "comparative" has more numerous and sometimes quite loose connotations, such as e.g. internationality or even universality. This internationality or universality may refer either to the range of the binding force of the comparative law in question or to the interests of legal comparative studies. In relation to the ever-increasing systems of national law a practising lawyer within particular legal branches somehow has to learn more and more about less and less. A comparative lawyer, on the other hand, must usually limit the range of his analyses, studying what actually becomes less and less, while getting more and more in the legal science[12]. While the former lawyer can, as a rule, confine himself to the knowledge of national law only, the essential prerequisite of the latter's activity is an attempt to include in his comparison the largest possible number of national laws.

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[10] So e. g. G. Del Vecchio: *L'idée d'une du droit universel comparé (Extrait de la Revue critique de législation et de jurisprudence)*, Paris 1910, p. 23.

[11] M. Rotondi: *Technique de droit, dogmatique et droit comparé*, „Revue Internationale de Droit Comparé" 1968, pp. 15 ff.

[12] F. H. Lawson: *The Comparison, Selected Essays*, Amsterdam–New York–Oxford, 1972, vol. II, p. 59.

Various interpretational possibilities of the word "law" in the name "comparative law" indicate that the term is ambiguous. An analysis confined to the broad term "law" will fail to reveal clearly enough the character of the object of comparison. It is not at all clear which laws are to be compared with each other: statutory with statutory, customary with customary, natural with natural, statutory with customary, statutory with natural or customary with natural. The term "law" does not indicate directly what legal units are meant – systems of law, branches of law, legal institutions, rules, norms, or even smaller units constituting legal norms, i.e. hypotheses, dispositions and sanctions. While remaining a blank name in this sense, still to be supplemented each time with a particular meaning, it easily assumes senses and meanings which are alien to its form and assignable function. Less pretentious names like "comparative legislation" or "legislative comparative law" are more precise and univocal, for that matter, and indicate more clearly that the point at issue is creating a new law on the basis of comparing laws.

It seems, however, that the name "comparative legal studies", free from the disadvantages of the name "comparative law", has several advantages unknown to the latter. It implies intellectual activity which can lead not only to comparative cognition of laws, but also to creation, application and enforcement of law on the basis of comparing the existing laws. Thus it includes both the 'pure', 'theoretical' cognition by comparison, and the 'useful', 'practical' application of the results of the comparison of laws by legislators and codifiers co-ordinating, unifying and adjusting laws, and by the administrators of justice, dealing with interpretation, application and execution of laws. Whereas "comparative law" in the sense of practical instances of law-making by comparing different laws has existed ever since people, compelled to develop international relations, realized the diversity of legal systems, "comparative legal studies" are a fairly new branch of science and emerged only at the beginning of the twentieth century.

COMPARISON AND COGNITION

If the widespread view that all human knowledge is based on comparison is true then all cognition involves comparison[13]. Learning by means of comparison consists in putting together what is already known and what is not – the 'old' and the 'new' – and in introducing the knowledge achieved in this way into a coherent idea of the world. To put it differently, one could assume it as an axiom that comparison is generally-accepted epistemological rule whose basic aim is gaining knowledge – cognition. These most general statements refer, essentially, to all sciences, yet with certain qualifications.

It is quite obvious that a comparison must be based on putting together the knowledge of two or more phenomena. The essence of the problem lies in the fact that knowledge of this kind can be acquired – even in the light of the

[13] Compare e. g.: A. K u h n: *La fonction de la méthode comparative dans l'historie et la philosophie du droit* [in:] *Introduction à l'Edouard Lambert*, Paris 1938, pp. 315 ff; J. H a l l: *Comparative Law and Social Theory*, Baton Rouge 1963.

afore-mentioned view – only by comparison, being the necessary condition; it is thus derived from a comparison. The question arises, therefore, whether this kind of knowledge can be the source of new, more profound knowledge. The answer to this question, which is only apparently theoretical, is essential for explaining the foundations of the conceptions connected with the existence of comparative law as a separate branch of law and of comparative legal studies as an autonomous scholarly discipline.

If the comparison of laws were accepted as a new source of knowledge, or – to put it differently – if it helped to acquire further information about the studied phenomena, than its creative, scientific character could hardly be questioned. In the reverse case, however, comparing would be nothing else than just making use of knowledge acquired by different methods and from different sources. If comparative legal studies were to be recognized as an autonomous scholarly discipline, they would have to have clearly specified goals which they would attempt to achieve by means of methods familiar to them, irrespective of the applicability – theoretical or practical – of the cognitive results arrived at in this way. The difficulty, however, lies in the fact that the latter factor is usually decisive: the choice of knowledge to be compared, whatever its sources, is largely determined by practical reasons.

It would hardly be possible to disprove that the criteria affecting the choice of knowledge for comparison appear in their immense variety. It would be equally hard to deny that general methodological canons for the description of the studied phenomena collide with the requirements of more detailed characteristics, corresponding to their specificity. The questions – where the present knowledge is in demand and whether it is to be the *comparatum* or the *comparandum* in the process of comparing – cannot fail to accompany the comparative scholar permanently, and are not likely to be answered in a fully satisfactory manner. There will always remain a certain degree of uncertainty whether the previously obtained knowledge (*comparatum*) is the result of comparison (*comparandum*), and if so – whether it can serve as its precondition – point of departure. In such a case, the comparandum, apparently new in its contents, would be expressed by an appropriate combinaton of the previously-known contents of the *comparatum*, being, at the outmost, a more or less perfect instance of craftsmanship rather than creative science, which comparative legal studies pretend to be.

The problem of comparing, outlined above, finds different solutions in the two domains of scientific cognition[14].

In the light of natural phenomena it is enough to recognize by comparison the features of several cases of a studied phenomenon, or a few specimen of a species, in order to be able to formulate, on this objective basis, the knowledge about all the phenomena or species of a given type. One should also accept the thesis that what we encounter here is cognition by means of comparison. To a certain degree the results of cognition arrived at in this way can replace cogni-

[14] A slightly different approach: J. J. Merryman: *Comparative Law and Scientific Explanation* [in:] *Law in the USA* [in:] *Social and Technological Revolution*, ed. Hazard and Wagner 1974, pp. 81 ff.

tion by direct experience when acquiring knowledge through experience is no longer necessary or possible. When it is necessary to use the accumulated knowledge in natural sciences, it is on the basis of the knowledge alone that conclusions are formulated and extended to include instances of phenomena or species which have not been studied directly. It is possible due to the specific character of the studied subject, expressed in the repeatability of the results of cognition in the form of a basic similarity of its features. Admittedly, general knowledge is always confirmed in particular cases from within its range.

In the sphere of social phenomena, to which legal phenomena belong, we have to do with their individual, often unique character. Thus far it is not safe to extend the characteristics of the whole group of studied social phenomena onto phenomena which – though belonging to this group – have not been studied directly. Thus, the results of cognition, derived from the comparison of the features of investigated social phenomena, cannot be – contrary to similar results relating to natural phenomena – the source of knowledge about social phenomena which have not been studied directly. In social sciences the results of comparison are applicable only to the instances of phenomena included in the comparison. Only on the basis of such results can social phenomena be classified and categorized, and generalizations formulated. Contrary to natural sciences, the results of the comparison of particular phenomena in social sciences cannot be taken as a substitute for the cognition – by means of direct experience – of phenomena not included in the comparison.

In social sciences, particularly in comparative legal studies, comparison may be rendered secondary insofar as it implies the necessity to use other methods in order to acquire knowledge as the material for comparison (*comparatum*). The task of comparative legal studies at this stage of the process of comparing is confined to indication of methods – legal, sociological, historical, philosophical, ethnological and others – necessary to obtain this kind of material. This indication precedes the comparison proper chronologically and logically. The aims which legal comparative studies strive towards decide on the choice of the comparative material which, in turn, determines the choice of suitable cognitive methods. At this point the question occurs again, to what extent comparison as an aim determines the choice of other cognitive methods which are not comparisons either in their names or their assumptions.

The selection of material for comparison as well as the methods of obtaining it in social sciences are almost always more or less arbitrary or one-sided, leaving quite a lot of room for permeation of subjectivism. Ultimately, however, to use most general terms, comparative studies in social sciences, including comparative legal studies, are determined in two ways. On the one hand, legal comparative studies are determined at the level of the quality of knowledge accumulated for comparison, assuming that *de nihilo nihil*. On the other hand, they are determined at the level of the comparison proper – by the quality of their own methodology meant to help accomplish the aims they strive towards. If we agree with the view that almost every science is more or less determined by such external factors, we shall thus assent to one of the reasons necessary for the distinctness of comparative legal studies.

PHILOSOPHICAL PREMISES OF COMPARATIVE STUDIES

The characteristics of philosophical premises of comparative studies – or, in other words, of comparing – should be preceded by at least an attempt to give a brief definition of the concept of comparative studies or comparison. Thus, to put it as simply as possible, comparative studies or comparing consist in bringing together relatively similar features of at least two objects in order to state the identity, similarities and differences occurring between them. It is usually done in order to make an appropriate choice through the evaluation of that identity, similarity and differences. Comparing is a procedure constantly repeated in the professional activity of lawyers – both practitioners and theoreticians. Though in different scopes, they both assume legislative solutions, judicial decisions of courts, opinions of legal and juridical doctrines as objects of comparison. Legal comparative studies can be conceived of in a small, larger or large scale with respect to the extent of the afore-mentioned legal units chosen as the object of comparison. It is noteworthy that in our century legislative techniques were chiefly the first to be compared. Selected legislative solutions in national legal systems have been compared since about 1925 in order to find common solutions of international problems (e.g. in international trade). Finally, since about the middle of the century the range of the object of legal comparative studies has extended even further while the trend towards its unification has slowed down.

Philosophical premises of comparison fall into two general groups – a basically substantial one and a methodological one. The former group includes, first of all, differentiation, openness and objectivism. The latter includes primarily determination of the object of comparison, choice of comparative criteria, description and evaluation of the results of comparison.

Among the substantial premises of comparative studies the main is the differentiation of social relations regulated by law: the differentiation of people, behaviour, events, ideas, laws, political systems etc. In other words, lack of differentiation, the existence of a certain homogeneity of things and phenomena in their respective type groups would not create premises for comparison and would exclude its purposefulness and necessity. Within the realms of law and legislation, extensive in respect of time, territory and subject matter, differentiation is particularly sharp. The differentiation of law itself, appearing in the form of various norms, regulations, institutions, systems, decisions, precedents, customs, principles and doctrines, has a universal range. Generally, particular states base on their own national laws which are seldom heterogeneous and essentially separate legal doctrines.

A great variety of laws and legal doctrines includes a great abundance of solutions of similar social situations. Universalist laws and doctrines, being in force in all the world, searching for sources and support in the effects of comparative studies, have not yet gained fuller approval. If universalism on this scale, striving to overcome differentiation, became a fact, the purposefulness of comparing on international scale would diminish, leaving out only the possibilities of comparing the contemporary with the historical.

Openness towards what is external in relation to e.g. national laws and legal doctrines is another substantial premise of comparative legal studies. Hence,

"where the model of culture is closed, the comparative aspect is absent – as the point is to cover up the traces of any influences in an illusive conviction that any culture can derive the sap only from itself"[15]. From this point of view the development of comparative studies can be sometimes hampered by a hermetic, isolationist character of the policy of states belonging to the so-called political camps or of some religious families of law rejecting ecumenical ideas (e.g. Islamic or Hindu). Nevertheless, the demads of contemporary times, resulting from the necessity to keep multilateral international raelations on the part of states interesed in their own development, break this type of hermetic or isolationist attitudes.

Lack of openness, contrary to the requirements of the needs of societies, has annihilated many a culture and civilization and quite a number of legal systems considered powerful under circumstances favourable for them. In the contemporary times when quick exchange of information is almost an absolute necessity, a national legal though claiming to be self-sufficient, closing within itself, is usually doomed, sooner or later, to petrification, dogmatism an lagging behind the pace of world change representing development and progress, which are still highly valued. Openness of national legal thought to external inspiration is the condition of high level of law and – at the same time – of its more definite acceptance by the social circles in which it is in force. This thesis is confirmed by the historical vicissitudes and the influential power of some currents of legal thought, such as liberal, Christian or socialist, which have been relatively open and flexible, and hence most long-lasting.

Legal comparative studies should be developed, as any other scholarly discipline, according to the principles of objectivism, cognitive honesty and reliability. Hidden or even manifested non-scientific intentions contradict this postulate. They can consist, for instance, in attempts to prove the 'superiority' of one legal system over another, or of one legal doctrine over other doctrines, at any price and with disregard of scientific argumentation. Such intentions can also manifest themselves in imposing national legal solutions upon countries with different mentality of citizens and with a different culture. Practices connected with fascism and racism are particularly flagrant abuses of this kind. The comparative thought generally opposes this type of practices, as being in contradiction with the postulates of both humanitarianism and scientific objectivism.

A lot of controversy – not only among comparative lawyers – is created by the view that, being the oldest and most influential, the tradition of written statutory law is of higher value than the tradition of customary law. Such a comparative conclusion cannot fail to arouse strong opposition of lawyers representing the common law. They point out that the very way of posing the problem is wrong. They claim that it is not the matter of superiority or inferiority, but simple diversity. Every law is rooted in the culture upon which it has grown and reflects the specific needs of the society of its time and place. This refers to both the written and customary law. In the context of this argument it isnoteworthy that similar controversies are connected with ideas claiming the superiority of secular legal systems over religious ones or vice versa.

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[15] On this point see e. g. R. Tokarczyk: *Komparatystyka w myśli politycznej*, „Studia Nauk Politycznych" 1982, 5–6.

METHODOLOGICAL PREMISES OF COMPARATIVE STUDIES

According to the principle of logical sequence of comparative considerations, the characteristics of the methodological premises of comparative studies should start with the definition of the object of comparison. In other words, the point should be to answer the question what can be compared with what and on what conditions[16]. The object of comparative legal studies is constituted by typical legal phenomena, here called the units of law and the forms of legal thought. The former include the following units listed in the order of their increasing degree of complexity: constituent elements of legal norms (hypotheses, dispositions, sanctions), legal norms, legal regulations, legal institutions, branches of law, legal system, legal families and types of law. Moreover, one can also compare e.g. different legislative techniques, legal procedures, contents of judicial decisions, principles of the execution of law. The forms of legal thought most frequently compared with one another are legal ideas, ideologies, doctrines and programmes.

Particular units of law and forms of legal thought can be compared in formal manner; in that case only their structure is considered. A substantial approach to comparative studies involves the consideration of the contents of the comparable legal units and thought. If comparing includes both the form and the contents of the object of comparison, the comparative studies are called total, full or global. Naturally, one should try to include all the significant aspects of the compared objects, yet in certain cases it might nor be really essential. Thus, the supporters of the analytical-linguistic normativist trend, for instance, confine themselves, as a rule, only to the analysis of the formal sides of the compared legal norms, without dealing with their social and material contexts which, in turn, are considered very important by the adherents of sociological studies of aspects of law.

In common parlance one can compare almost 'everything with everything'. However, the requirements of scientific methodology limit the ranges of the compared objects by setting out appropriate conditions for comparison. According to the rules of methodology, in order to have a deeper sense and meaning, comparative legal studies should cover only those objects which belong to a common, homogeneous category, significant in view of the comparison. As a philosopher would express it, the objects compared should belong to the same ontological group – to a defined, common category of being. Thus, according to the rules of methodology, it is justified to compare legal norms with legal norms, legal institutions with legal institutions, systems of law with systems of law, or legal doctrines with legal doctrines; comparing e.g. constituents of legal norms with branches of law would be senseless from the scientific point of view.

The conditions of comparison determined by the requirements of scientific methodology are called compatibility. Objects which are compatible in the scientific sense must be similar in at least one aspect. Although *duo reperire similia penitus est labor*, the very attachment of objects to a common category, to the

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[16] J. Wróblewski: *Metodologiczne zagadnienia porównywania systemów prawa*, „Państwo i Prawo" 1975, nr 8–9.

ontological group, is regarded as similarity. Selection of objects fulfilling this condition is sometimes called standarization. After standarization one should indicate the features with respect to which the objects in question are to be compared. The impossibility of making standarization and, therefore, of finding the features of compatibility justifies the statement of incompatibility[17]. It is noteworthy that selection and justification of the features of compatibility is one of the most controversial problems of comparative legal studies. There are numerous factors, both within juridical and in extra-juridical (moral, political, economic, religious etc.) axiology, which decide what is significant, less significant or quite insignificant.

The units of law which fulfill the conditions of compatibility can be compared with each other on the basis of selected criteria - linguistic, ordering, axiological, functional or others.

Ideally, comparative legal studies based on linguistic criteria would consist in proper setting up of semantically identical – or at least similar - names from different natural (ethnic) languages in order to perform comparative linguistic analyses. Then, if the use of computers favoured comparative purposes, names in natural languages should be translated into an artificial language according to the construction of the main computer system. In practice, however, carrying out such general model directives encounters difficulties lying, first of all, in the translation of names in various natural languages into an artificial one.

Difficulties involved in the translation of the contents of names from one natural language into another have become a rich source of misunderstandings in comparative legal studies[18]. These start from the most basic terms in all legal considerations, i.e. "law" and "right". In Polish these two terms are equivalent to *prawo* and *uprawnienie*. In many languages, however, e.g. in Latin, French, Italian, German, there is only one name - *ius, droit, diritto, derecho, Recht* – meaning both "law" and "right". Some lawyers who do not make use of the distinction between the two terms dispute about law in the subjective sense ("right", *uprawnienie*) and law in the objective sense ("law", *prawo*), which is not always expressed quite clearly. In Chinese and Japanese the term "right" was not known until quite recently when the influence of Western jurisprudence affected those countries. Similar observations can be made with respect to African customary law.

There are terms which sound similar in different languages, yet their meaning is different[19]. The semantic relations between the terms "divorce" (Polish *rozwód*) and "separation" (Polish *separacja*) are particularly interesting. Roman lawyers used the term *divortium* in the meaning of the English "divorce" and the Polish *rozwód*. Countries exposed to the influence of canon law, such as Spain, some Latin-American countries, having accepted the Catholic view of inviolability of marital bonds, used the term *divorcio* in the meaning of "separation". There are

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17 J. Wróblewski: *Problem nieporównywalności w komparatystyce prawniczej*, „Państwo i Prawo" 1975, nr 8–9.

18 On further complexity of these problems see: J. Wróblewski [in:] *„Rapports polonais" na XII Kongresie Prawa Porównawczego*, Ossolineum, Wrocław–Warszawa–Kraków 1986.

19 For further discussion see: R. B. Schlesinger: *Comparative Law, Cases – Text Materials*, Mineola, New York 1970, pp. 618 ff.

countries in which the term *divorcio* means both "divorce" and "separation" or – which is most proper - only "divorce". In German "divorce" is *Scheidung* and "separation" – *Trennung*, while in the German language spoken in Austria the meaning of these two terms is quite reverse.

Bilingual dictionaries explaining the meanings of words can help to solve linguistic difficulties. Such difficulties with translation are a nightmare not only for lawyers – theoreticians. Three "Hague Conventions" of 12th June 1902, for instance, took binding force in Italy by virtue of the Royal Decree of 18th September 1905. However, on 18th January 1906 the Italian text of those conventions was published again to eliminate numerous errors of translation of the previous legal act. Similarly, the Swedish translation of those three conventions had soon a normative linguistic correction. The German, French and Italian translations of the Swiss civil code, edited very carefully, are considered to be authoritative, and yet various interpretative and linguistic discrepancies arise there in practice in those countries. Semantic differences between the English and the French versions of the "Versaille Treaty" – both considered "authentic" – brought about various interpretative judicial decisions (referring, for instance, to the meaning of the English term "debts" and the French *dettes*).

Comparison of legal units, based on ordering criteria, involves various kinds of classifications and systematizations. If we assumed that ordering aims at creating systems consisting of the ordered legal units, it could be characterized as determining the place of particular units in the system. By determining the place in the system for all the units included in the ordering, their hierarchy, significant for the status of comparative evaluations, is worked out. Ordering criteria – linguistic, logical, axiological etc. – facilitate comparison of legal units with respect to the same criteria and make it possible to maintain the same level in the hierarchy of the system.

Legal comparative studies, like any other comparative studies, are involved in the problems of values[20]. The key role here is played by various axiological criteria comprised in such systems as moral, religious, ideological etc. Comparative lawyers can either refer to values existing beyond the compared legal units or base on their intrinsic values. In the former case it is essential to bring the compared units down to a pattern common to them in at least one respect, e.g. in order to unify, coordinate or harmonize them. In the latter case, one of the compared units is usually considered axiologically superior to the other or the others, and this is meant to facilitate an appropriate axiological choice. The French maxim, *comparaison n'est pas raison*, holds true in either of the cases of axiological choice.

The use of functional criteria in comparative legal studies has already got its own history. The beginnings and development of the systems of socialist law – in the Marxist thought considered, by its adherents, as a type of law superior to the capitalistic one performing functions unknown to earlier types of law – created a special methodological and also ideological problem for comparative legal studies. Initially Soviet theoreticians (as well as some scholar from other

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[20] Comp. Z. P e t e r i: *Goals and Methods of Legal Comparison*, [in:] *The Comparison of Law*, ed. by Z. Peteri, Budapest 1974, p. 58.

countries) defended the view – considered an extreme one – of the existence of an obvious superiority of the functions of socialist law over the functions of capitalist law. It was on the basis of this kind of criteria that they claimed any comparative considerations in this respect to be pointless. Now, after numerous debates, discussions and disputes, the prevailing, more moderate standpoint is that even if one assumed the view of the superiority of the functions of socialist law over those of the capitalist law, it does not have to be in conflict with the premises of compatibility; on the contrary, claiming such superiority is an implicit assumption of compatibility. On the other hand, however, it is important to perceive differences in the compatibility of particular branches of law belonging to different political systems, more visible in the so-called public law and less marked in the so-called private law. If the differences in the functions of the institutions of a particular legal branch are too big, compatibility is less justified.

Determination, measuring and recording comparative results is one of the least developed methodological premises of comparative legal studies. The basic difficulty usually lies in the axiological, qualitative differentiation of evaluations which, as a rule, do not satisfy the conditions of standard methods in the taxonomy of legal phenomena, expressed in quantitative and statistical terms. Attempts to develop a special branch of cybernetics called jurymetry, capable of providing the taxonomy of legal phenomena, quite promising as they are, have not yet gone beyond the preliminary stage of development. In this situation, fairly inexact criteria, e.g. the researcher's intuition or the place of the evaluations in the system of values whose part they constitute – still play a principal role. Semantic and logical evaluation scales graded, between the extremes of compatibility and incompatibility, for identity, similarity and difference are also of limited applicability.

When the compared legal units have some common features, they are similar with respect to those features. When all the features of the compared units are common, they can be called identical. Identical objects are called "equipollent" in terms of philosophy, while in mathematics they would be joined by the sign of equivalence. The compared legal units are different when at least one feature of one of the compared units does not vest in the other unit. With respect to the number of significant similar and dissimilar features, both the similarity and the differences of the studied things and phenomena can be graded. The above considerations can be concluded with a remark that legal comparative studies, like any other comparative studies, cannot be satisfied with the description of the objects alone; their essence are evaluations.

AN OUTLINE OF COMPARATIVE LEGAL STUDIES

The analysis of particular problems included in legal comparative studies may induce us to defend the view that we have to do with a specialized branch of knowledge which belongs to the theoretical disciplines of jurisprudence, yet with very wide application in legal practice.[21] As such, it has its language, me-

[21] See e.g. R. Tokarczyk: *Wprowadzenie do komparatyptyki prawniczej*, Lublin 1989.

thods and functions which are as close as possible to the language, methods and functions of legal theory. However, the question whether it draws one-sidedly on the theory of law or, perhaps, the theory of law is also based on the findings of comparative studies, deserves separate consideration. Clinging to the view that legal theory consists of generalizations following from comparative analyses of individual phenomena, one should claim that comparative legal studies are primary in relation to the theory of law, which remains secondary in the light of this view. The theory of law, on the other hand, seems to be more conscious of its own methodology than comparative legal studies. Thus, on the whole, the inference of a broad symbiosis of these two branches of legal science could be considered justified.

The theory of law adopts its outer forms and inner contents on the basis of the assumptions of particular currents of general philosophy. For example, the Marxist theory of law is based on the general assumptions of Marxist philosophy. The theory of law in particular (associated with the philosophy of law by some scholars) adopts – from particular currents of general philosophy – basic propositions on being (ontology, metaphysics), on cognition (epistemology, gnosiology), on values (axiology) and exemplifies them, in a particular methodological formulation, on the basis of its own domain. Hence, comparative legal studies as a branch of jurisprudence being in symbiosis with legal theory, pervaded with the assumptions of a particular philosophical current, cannot fail to comprise considerations of the being, the cognition, the values and the methodology of the legal units under comparison. Undoubtedly, for more detailed discussion of this matter it is necessary, first of all, to determine the character of the philosophical current to which a given conception of legal theory or legal comparative studies is related (e.g. positivist, natural law or Marxist philosophy).

Revealing the fields of research on being as part of the conception of comparative legal studies postulated here, it can be stated that the basic question remains whether it is possible to form a new being – a new legal thought or a new law – on the basis of comparing the existing beings – the existing forms of legal thought and laws being in force. While quantitative creation of new forms of legal thought resulting from the comparison of the already-existing forms of legal thought raises no special objections, the problem of comparative creation of binding law remains the matter of endless disputes. In our opinion comparative formulation of a new law is an unquestionable fact – not only historical – though what we encounter here is not comparative law as such but rather law formulated by means of comparison, e.g. civil, penal, administrative, commercial, transport or postal law. Consequently, on the basis of these assumptions one could speak of a conception of legal comparative studies including both legal beings (law created by means of comparison) and comparative views (legal thought created by means of comparison).

Other conceptions of the ontology of legal comparative studies would only refer either to law created in a comparative way or to legal thought created by means of comparison. According to standard conceptions of law-making processes legal thought usually procedes the creation of law itself. In practice, however, law-making is often too hasty and ensues from legal thought which is so immature that, in fact, its existence in the ontological sense is doubtful. It is also

noteworthy that not every new legal thought leads directly to the formulation of a new law. Therefore, the conceptions of legal ontology discussed here refer exclusively either to law created in a comparative way or only to legal thought created on the basis of comparison.

Considering the problem of cognition as a constituent of comparative legal studies it seems proper to focus, first of all, on the objective character of law and legal thought created in a comparative way and on their cognizability. When dealing with the problem of the objective character of cognition we want to know whether the subject of cognition can acquire knowledge about the object of comparative legal studies i.e. about beings external to the thinking self. Materialistic interpretations of legal theory, such as the Marxist view, accept the thesis that the objective reality, existing irrespective of human consciousness, is the object of cognition. The question of cognizability also covers the doubts which concern its quality: can human cognition give images of such objects as they are in reality, or are those images always distorted due to the imperfection of human senses and minds? More detailed discussion of the epistemology of comparative legal studies would require introducing a certain general philosophy accepted by the scholar into the reflection of comparative legal studies concerning particular elements of epistemology.

Axiology would thus constitute the third part of such a conception of the outline of comparative legal studies. It could be assumed as the point of departure that every national system of law and every form of legal thought embodies particular values. If the development of comparative legal studies consists in transition from 'lower' to 'higher', from 'worse'to 'better' and from 'less perfect' to 'more perfect' values, it might be necessary to create a kind of metaaxiology determining what is higher, better and more perfect. Metaaxiology becomes even indispensable while creating law for the needs of international relations, when the axiological contents in the compared units of national laws are too narrow. Successful discovering of metaaxiological contents would favour supranational unifying contents with their universalist ideals.

Finally, a conception of the outline of comparative legal studies as an independent branch of jurisprudence could not leave out methodological problems. Considered in most general terms, these problems include, among others, statementes on the existence of legal-comparative phenomena, possibilities of their theoretical formulation, research methods and techniques adequate to them, sets of notions and propositions concerning these phenomena.

STRESZCZENIE

Komparatystyka prawnicza, szerzej znana pod niezbyt adekwatną dla jej przedmiotu nazwą „prawo porównawcze", uprawiana jest w mniejszym lub większym zakresie niemal we wszystkich państwach współczesnego świata. Założenia teoretyczne komparatystyki prawniczej są przedmiotem długotrwałego sporu toczonego przez jej badaczy i praktyków. W związku z tym scharakteryzowano spór o nazwę przedmiotu, treść nazw przedmiotu, relacje pomiędzy porównywaniem a poznawaniem, przesłanki ogólne komparatystyki, przesłanki metodologiczne komparatystyki i kontury przedmiotu komparatystyki prawniczej. Ponadto podjęto próbę uzasadnienia adekwatności nazwy „komparatystyka prawnicza" i określenia jej przedmiotu.