ТЕОРИЯ И ИСТОРИЯ ПРАВА И ГОСУДАРСТВА; ИСТОРИЯ УЧЕНИЙ О ПРАВЕ И ГОСУДАРСТВЕ

ON SOME ASPECTS OF METHODOLOGY OF COMPARATIVE LEGAL STUDIES

S.B. Zinkovskiy, N.G. Pavlova

The Department of Legal Theory and History of Law and State
Peoples' Friendship University of Russia
6, Miklukho-Maklaya st., Moscow, Russia, 117198

The article is devoted to the problems of applicability of different methods of comparative legal research. The authors prove the dependence of such methods from the nature of the analyzed legal phenomena. The article also points out general rules of comparative legal analysis.

Key words: comparative legal studies, methodology, methods, legal system, legal culture, comparability, compatibility, similarity and differences.

- **Terms and Purposes**

Comparative law describes the comparison of various legal systems and their elements. Macro- comparison is concerned with entire legal systems; micro-comparison deals with specific institutions or specific problems. The actual comparison of legal systems — the discovery, explanation and evaluation of similarities and differences — is only one of several themes of the contemporary Comparative law. A second theme concerns the influence between legal systems, especially the reception of law, whether of individual legal institutions or of entire legal systems.

With regard to Europe, this encompasses on the one hand the influence on European private law of different legal systems (Roman law, the law of member states, the law of non-European states). On the other hand, it includes the transmission of European law to non-European legal systems.

The third theme of Comparative law is the development of a general theory of law. Here, comparative law functions as the discipline which attempts to understand the various legal systems in their totality and in their relationship to each other, without necessarily trying to avoid or minimize the existing differences between them.

The Comparative law has different purposes: it should inform national lawmaking, assist judges in the resolution of difficult questions, provide a basis for legal unification or harmonisation, or simply increase knowledge and extend awareness, especially in legal education.

While studying the method of the Comparative law first we should answer at least three questions: why, what and how to compare.

The first question (why to compare) necessitates the identification of the aim of comparison.

The second question (what to compare) refers to the sources of comparison and the levels of abstraction with respect to the comparison.

The last question (how to compare) examines the way in which the comparison is carried out.

- **Why to compare**

The law presents various examples of forms and content during all periods of history. Some of them become inappropriate by some reasons and let the other forms and content take their place. So the law should be examined not as a static system but in its permanent development. Here we talk about so called diachronic comparison.

The other aspect of the problem drives us to the presumption that one and the same text of a legal norm can resolve different social problems, play different social roles and be applied differently in two or more societies. The reasons of such difference can be examined by comparison. Here we talk about synchronic comparison.

The legal experience of different societies can present some break-througs in the legal regulation, contrary, it can present some fails. While comparing the law the person can understand, what legal means are effective in the respective social conditions and what of them are inappropriate. We can also estimate the pre-conditions and obstacles facing legal initiatives.

Legislatures and courts can make use of comparative law for a variety of reasons. Firstly, legislatures and courts can make use of comparative law as a source of fresh ideas and, particularly, in order to find a solution to a given problem.

Thus, the legislature may want to know which new topics to address; or if it does already know the topics to be placed on the legislative agenda, it may want know how to draft rules to address the issues which they raise; or, if it does already know how to draft such rules, it may want to know how they will operate in practice. In all these cases foreign law may offer inspiration. Similarly a court that does not know how to solve a case, how to interpret a national rule, or how to deal with a certain argument, may look for inspiration elsewhere.

There is no need for the legislature or court to give any justification for looking at foreign law at this stage. Often the use of foreign law will be 'hidden' in the sense that it does not show in the explanatory memorandum or in the court decision. In other cases the fact that foreign law has been consulted will be mentioned 'in passing'. But this is not important because no normative weight is attached to the foreign law.

Secondly, legislatures and courts may refer to foreign law as a normative argument. This means that foreign law plays a role in justifying a court decision or a statute.

There are two types of such 'normative' use of foreign law. It may be that foreign experience is looked to as an illustration of how a certain rule is applied in practice, turning foreign experience into an empirical argument for the legislature or court. When the American Supreme Court decided against the legality of assisted suicide, it

took the Dutch experience into account and considered the evidence that the Dutch guidelines had in practice failed to protect patients from involuntary euthanasia.

But it may also be that the content of foreign law itself is a normative argument to adopt a certain solution. In such cases, foreign law contributes directly to the court decision or legislation.

There can be very good reasons for a court to look at foreign law, in particular where national law does not offer a solution to the case at hand, either because the applicable rule is unclear or because there is no rule available at all. It is the famous Article 1 of the Swiss Civil Code which relates the task of the court to that of the legislature by stating that: «If no relevant provisions can be found in a statute, the judge must decide in accordance with customary law, and, in its absence, according to the rule which he would, were he the legislator, adopt. In so doing he must pay attention to accepted doctrine and tradition».

Thirdly, foreign law can be used for 'ornamental purposes'. If references to foreign law are used in explanatory memoranda or court decisions without any visible connection with the statute or court decision.

Besides practical purposes Comparative legal research enriches the methodology of legal theory and philosophy of law. The comparative law method is often regarded as bringing objectivity into legal reasoning. It also provides the migration of ideas between legal systems and gives the basis for the drafting of the international model treaties and acts.

Finally within the frames of globalization and integration in the world Comparative legal studies help to estimate the influence of foreign law on national legislation in other countries.

C. What and How to Compare

Meaningful comparison requires understanding the historical, social, economic, political, cultural, religious, and psychological context of legal rules. In particular, different mentalities have to be taken into account.

Thus, the comparative lawyer has to understand the cognitive structure of the law. The result of this comparative exercise is that there are deep ontological differences between legal systems.

Rule-based comparisons are bound to be superficial. The «traditional simplistic approach» to comparative law is mainly focused on an accurate description of a particular foreign legal system. And thus it's not sufficient. Such approach is focused on providing information about different legal systems, without offering a fuller picture of the law in action or detailed comparative explanations.

For comparative law, accordingly, legal norms should be treated not as value-free rules but as fitting into the differing mentalities of the legal systems.

From this there also follows the impossibility of «legal transplants». Even formally identical rules are differently interpreted and applied in different legal systems. Sometimes the transfer of a legal rule from one country to another is also called a 'legal irritant', which means that this transfer does not lead to convergence but triggers a whole series of new and unexpected events. As far as legal systems are converging, comparative law becomes pointless unless it focuses on this process.

In recent times there has been increased debate about the methods and theories of Comparative law. No consensus has emerged, and the discussion has not yet exercised substantial influence on practical legal comparison. Beyond mere doctrinal comparison, there are fundamentally two different methods, functional and cultural legal comparison.

Functional comparison, popularised above all by Konrad Zweigert and Hein Kotz, starts from the premise that the function of law lies in responding to social problems and that all societies face in essence the same problems. This makes it possible to compare legal institutions, even if they display different doctrinal structures, as long as they fulfil the same function, because in this case they are functionally equivalent.

Understanding legal norms as responses to problems supposedly also makes it possible to designate which law is better and, on this basis, to reform domestic law or to create an international uniform law.

Cultural comparison in contrast rejects the reduction of law to its function and instead understands national law as an expression and development of the general culture of a society (legal culture). The focus here lies on the mentality expressed in a legal system, which is not fully observable by outsiders and can only be fully experienced by participants of the legal system. Because cultural differences (particularly those between civil and common law) are seen as unbridgeable and because different legal cultures are deemed worthy of protection, cultural comparison usually opposes comparative evaluation and legal unification as both impossible and undesirable. Instead, it promotes tolerance for foreign law and for difference in general.

What is needed is a deep, interdisciplinary, critical, or even post-modern Comparative law. Some scholars emphasise the limits of comparability. In particular, it is sometimes said that Western and non-Western countries are too different to provide a meaningful comparison: You cannot compare apples and oranges. That's why the main part of comparative legal analysis is the estimation of comparability and compatibility of the compared legal phenomena.

D. A Concept for Consideration

To identify the objects of legal comparison we suppose that the concept of legal culture can give us the best result. John Bell defines legal culture as «a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts» [1. P. 70; 2. P. 97–98; 6. P. 55].

The concept of law as culture emphasises that law is more than just a set of rules or concepts. It is also a social practice within a legal community. It is this social practice which is determining the actual meaning of the rules and concepts, their weight, their implementation and their role in society [2. P. 97–99].

However, if law is not just a set of rules or concepts, neither is it an isolated social practice. Law and legal practice are one aspect of the culture to which they belong. «Legal cultures» are part of more general cultures. Understanding law implies a knowledge and an understanding of the social practice of its legal community. Understanding this social practice presupposes a knowledge and an understanding of the general culture of the society in which the legal community is embedded.

Comparing and distinguishing legal families is possible only when locating these legal orders and legal cultures within the broader context of the societal culture to which they belong.

The concept of legal culture includes, at least, the following points which can constitute the object of the comparative analisys:1) A concept of law. What is law? What is its relationship to other social norms? 2) A theory of valid legal sources. Who has the power to create law, and under what conditions? What is the hierarchy of the legal sources? How, and by whom, are problems of collision between legal sources solved? What is the respective role of the various legal professions? Are non-legal texts or decisions, such as religious ones, direct sources of law? 3) A methodology of law, both for the making and for the adjudication of law. This consists in the first place of a theory of interpretation of the law. To what extent do the adjudicators of the law have the freedom and/or the duty to interpret the law? Which methods of interpretation may be used? Do they have any hierarchical relationship? Which is the standard style of writing, e.g. for statutes or for judicial decisions? 4) A theory of argumentation. Which kinds of argument and of argumentation strategy are acceptable? Are these strictly legal elements, or social, economical, political, ideological and religious ones as well? 5) A theory of legitimation of the law. Why is law binding? What if it conflicts with some other, non-legal, social norms, such as religious norms? What kind of legitimation may give a binding force to the legal rules: a purely formal legitimation or (also) an ideological legitimation (e.g. moral or religious values)? What kind of legitimation gives the whole legal system its binding force? Is it sociological, historical or axiological legitimation? And, in case of more than one kind of legitimation, in which combination, and under what conditions? 6) A common basic ideology: common basic values and a common basic world view. A common view on the role of law in society and on the (active or passive) role of lawyers. A view on which problems are considered to be legal problems, to be solved properly by the legal system, and not just, e.g., moral or economic problems, which remain outside the realm of the law [6. P. 55–56; 5. P. 514–515].

E. General Rules of Comparative Legal Analysis

Conducting of comparative legal research requires compliance with a number of rules.

Firstly, the objects of legal comparison should be comparable. Secondly, the objects of comparison have to be learned in their communication with the social environment. Thirdly, when comparing the objects of comparison should not be subjected to deformation and distortion.

Yu.A. Tikhomirov identified the folowwing main methodological rules of comparative legal studies: 1) correct choice of the object of comparative analysis and correct statement of the purposes, due to its nature and needs of the subject-researcher; 2) legal comparison at different levels, using the methods of systemic -historical, logical analysis, analogy for the internal relationships and dependencies, as well as for the development of the object; 3) correct identification of the characteristics of compared phenomena, determination of regularities of the historical evolution of a particular society, which led to their appearance and development; 4) revealing of degree of simi-

larity and differences of legal concepts used in the compared legal cultures; 5) development and application of criteria for the evaluation of the similarities, differences and the incomparability of the legal phenomena; 6) definition of the practical importance of comparative legal research [4. P. 30–50].

K.Zweigert has identified the stages the comparative-legal analysis, following which we can get the best results: 1) the primary stage of comparison — learn foreign law; 2) the second stage — a comparative study of descriptive nature, — a description of the similarities and differences; 3) the third stage — theoretical generalization of the results of a comparative research, study of the doctrines and legal institutions, their content and their functions [7. P. 8–75].

In general the legal comparison scheme includes: 1) the definition of comparability, the choice of criterion of comparison of legal phenomena; 2) the identification of similarities and differences of the compared legal phenomena on the basis of the criterion of comparison; 3) the identification of the essential features of the phenomena under study, the identification of trends of their development, the assessment of the specific forms in which the phenomena are displayed.

Applied comparative legal research includes the following stages: 1) understanding of the task of an applied nature of comparative legal analysis; 2) verification of the authenticity of the analyzed acts according to official publications; 3) generalization of law enforcement statistics: 5) comparison of regulatory decisions on one and the same issues in different legal cultures, identifying their common features and differences in terms of quantitative characteristics; 6) correlation of normative-legal solutions to the needs of society, the resources in a separate legal cultures; 7) correlation of normative-legal solutions with the constitutional legislation and the international obligations of the recipient country.

F. Methods and Directions of Comparative Legal Analysis

Methodology of comparative legal research is not confined to the comparative legal method, in parallel with him in comparative legal studies are used the following methods: the dialectical method, historical method, formal-legal method, functional method, the system-structural method.

The dialectical method determines the study of all the aspects of the legal phenomena from the point of view of transition of quantitative changes into qualitative development as a result of the struggle of opposite elements (alternatives), the destruction of old by the new as well as the reproduction of the old in the new. The historical method allows to reveal the origins of the phenomenon, to trace its development at different historical stages, to evaluate the current state. Formal-legal method allows to reveal the nature of comparable institutions, the identity of the definitions. Functional method allows assessing the social tasks, solved by the phenomenon, social consequences caused by them. Similar norms and institutions in different legal cultures have different tasks and function differently. Systemic-structural method allows to estimate a place of legal phenomena among other phenomena with legal and other social properties, identify gaps (lacunas) in legal regulation, the internal communication of the various components of the legal culture, patterns and dynamics of their interactions.

Also we may point out the following directions in comparative legal studies: 1) the civilizational approach gives the opportunity to consider the history of the mankind as a multidirectional-process, its use allows to make the vision of the evolution of the legal systems multi-dimensional and stresses the importance of the research of different legal cultures; 2) the hermeneutical approach reveals by the interpretation of the spirit, and not just the letter of the sources of law; 3) the axiological approach allows to reveal the values and principles which are in the basis of the legal cultures; 4) the anthropological approach — allows you to determine the actual place of the person in the legal life of the society in its relations with the society, the state, in the influence of factors related to the characteristics of the individual on the law.

General tendencies of development, which should be taken into account when conducting comparative legal studies:1) the sustainable regularities associated with the universally recognized values (rule of law, rights and human freedom, democratic principles of right — juridical equality, the presumption of innocence); 2) the global imperatives — limitation of sovereignty, the priority of the norms of jus cogens direct action, application of international legal protection of human rights and freedoms; 3) the homogeneous trends and processes in the great legal families with same philosophical and legal sources; 4) the coordinated legal development in the framework of the inter-state associations; 5) the regional trends of legal cooperation and the harmonization of their national legislation; 5) the local trends of varied legal development, associated with the formation of new States [3. P. 17].

In general Comparative legal research leads us at least to the four types of national-state differences: 1) the organic or permanent — which reflect national-historical traditions; 2) the relatively stable — for example, the list and the hierarchy of sources of law; 3) the historically temporary — for example, formed in conditions of the transitional period, the specifics of the economic and social development; 4) the political-situational — depend on the concrete actions of individual States [3. P. 19].

REFFERENCES

[1] *Bell J.* English Law And French Law — Not So Different? // Current Legal Problems. — 1995. — Vol. 48.
[2] *Muromtsev G.I.* Kulture I pravo: aspecty sootnosheniya // Pravo I kultura. — M.: RUDN, 2009.
[3] *Pavlova N.G.* Sravnitelnoe pravovedenie (dlya magistrov). — M.: RUDN, 2013.
[4] *Tikhomirov Yu.A.* Kurs sravnitelnogo pravovedeniya. — M.: INFRA-M-NORMA, 1996.
[5] *Van Hoecke M., Warrington M.* Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law // International and Comparative Law Quaterly. — 1998. — Vol 47.
[6] *Zinkovskiy S.B.* Pravovye kultury. — M.: RUDN, 2009.
[7] *Zweigert K., Ketz H.* Vvedenie v sravnitelnoe pravovedenie v sfere chastnogo prava. — M.: Mezhdunarodnye otnosheniya, 2000.

О НЕКОТОРЫХ АСПЕКТАХ МЕТОДОЛОГИИ СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ

С.Б. Зинковский, Н.Г. Павлова

Кафедра теории и истории государства и права
Юридический институт Российского университета дружбы народов
ул. Миклухо-Маклая, 6, Москва, Россия, 117198

Статья посвящена проблемам применения различных методов в сравнительно-правовых исследованиях. Авторы доказывают, что набор таких методов находится в прямой зависимости от природы исследуемых правовых явлений. Статья также освещает общие правила проведения сравнительно-правового анализа.

Ключевые слова: сравнительно-правовые исследования, методология, методы, правовые системы, правовые культуры, сравнимость, совместимость, сходства и различия.