

COMPARATIVE LAW: Method, Science or Educational Discipline?

Djalil I. Kiekbaev (Bashkir State University)¹

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Abstract

The article represents an attempt to contemplate one of the major methodological issues in contemporary juridical science - the debate on the nature of comparative law, which is presented in three opposite aspects: whether comparative law is a scientific method, or an autonomous science or a purely educational discipline. The author highlights the role of comparative law as an independent branch of juridical science in the processes of European integration and globalization.

Notwithstanding the fact that comparative law for several decades has been the subject of ardent academic discussion and scientific scrutiny, there still is some ambiguity as regards its principal designation in contemporary juridical sciences: what is comparative law *per se* - a scientific method, a pure science or an educational discipline? This problem has been exciting comparatists since the very birth of comparative law at the dawn of the 20th century.

Let us proceed from the thesis of comparative law as a method of study of various legal phenomena. Thanks to the application of the comparative method, it has become possible to reveal the general and the special in world legal systems of today. Among adherents of this stream are such scientists as Pollock, David, Gutteridge, Patterson, Grossfeld, Kahn-Freund, De Cruz, and Szabo. Furthermore, in the 1950s, 1960s and 1970s of the 20th century the overwhelming majority of comparatists were inclined to doubt the existence of the science of comparative law, claiming that if comparative law were a distinct science, what should consequently constitute its subject. It was then considered an axiom that comparative law only consisted of a variety of methods of investigation of jurisprudence.²

The theory of comparative method puts in the forefront comparison itself, while comparative law is frequently associated and even sometimes equated with it. However, there are always certain discrepancies about this theory concerning the purpose and the subject matter of comparison. The comparison has to represent a process. H. Gutteridge, for example, devoted an entire of his book on comparative law to the comparison process.³ He discusses various obstacles to comparison, including identifying sources and objects of comparison, and also proposes approaches to surmount these obstacles. Nevertheless, it appears hardly possible to determine the character of the comparison process. The comparatist only refers to the necessity of comparison of similar legal systems. He fails to mention the significance of comparison for the establishment of differences in those legal phenomena which were initially believed to be identical, or similar. In this connection, the well-known German comparatists K. Zweigert and H. Kötz recognize, that the process of comparison represents the most complicated aspect of comparative law and that it is deemed rather problematic to establish any rigid rules regulating this process. The point of view propounded by H.

Gutteridge was further elaborated in scientific works of R. David, the founder of the theory of legal systems.⁴ R. David holds that comparative law is nothing but a method of study of legal systems. This theory was dominant in the USSR as well as in the rest of East and Central Europe in second half of the 20th century, and it will not be far from the truth to mention that David's theory still is popular in Russian legal thought even today. Acknowledging the given thesis, Hungarian comparatist I. Szabo developed it further, asserting that 'comparative law' is a much broader concept in comparison with simply a method of jurisprudence; it is characterized as 'a whole movement'.⁵ However, I. Szabo and such scholars as Z. Peteri and W. Knapp highlight the role of the comparative method in the 'peculiar and original' development of socialist jurisprudence as opposed to 'bourgeois comparative legal science'.⁶ There will probably be little doubt that similar approaches are discriminatorily oriented towards comparative scholarship in Western Europe and the USA. Furthermore, it has always been emphasized that the comparatist should remain neutral and impartial with respect to the legal systems under investigation.

Another distinctive feature of the theory of comparative law as a method of legal science is that it plays an important role in the interpretation of legal norms pertaining to various legal systems, as well as in the adaptation of one socio-legal system to another. Some comparatists are inclined to regard the applicability of comparative jurisprudence as a tool for a more profound understanding of legal data, whereas such purposes of comparative jurisprudence as legal reform and the interpretation of laws are regarded as minor or subsidiary in comparative legal research.⁷

It is interesting to observe the views of G. Samuel, who contends that comparative law is nothing more or less than a methodology and that its main task consists in acting as a tool for the study of internal structures of legal knowledge.⁸ This point of view is maintained by M. Ancel, who believes that comparative law is neither an independent science nor a branch, but merely a method of research, which can be applied in any sphere of jurisprudence. In accordance with the comparatist, comparative law does not have sufficient theoretical and methodological standing to claim for existence as a separate branch of legal science, since it does not consist, as opposed to public or civil law, of a well-coordinated system of acting norms.⁹ However, college and university readers, text-books and case-books on comparative law recently published in Russia and abroad serve a vivid refutation of the above.

Intensive processes of international cooperation in the second half of the 20th century occurring alongside scientific and technological progress and changes in the political, economic and cultural life of societies, the integration of European countries in the European Union, the development of a science of European law and of the idea of a new European legal order, making comparative law an indispensable component of academic curricula of many law schools and universities in Europe and the USA, attention to the theoretical problems of comparative law - all contributed to the revaluation of the designation of comparative law as a method of legal science.

According to the second thesis, comparative law acts not so much as a method but rather as an independent scientific and educational discipline.¹⁰ Among adherents of this theory are comparatists such as Ewald, Rabel, Saley, Watson, Constantinesco, Butler, Öricü, Bogdan, Nersesyants, Tikhomirov, Saidov, Marchenko and others.

It should be acknowledged that the period prior to the 1970s and 1980s of the 20th century is characterized by the domination of the 'method theory', while at the turn of the century more and more comparatists tended to support the theory of comparative law as an independent scientific discipline. In this connection it is possible to draw parallels with other humanities and social sciences that widely used the comparative method and, consequently, gave an impetus to the emergence of new comparative sciences. For example, in philology the

branch of science as comparative linguistics may serve as a vivid manifestation of the large-scale value of the comparative method, while scholarly works of such Russian linguists as V.D. Arakin, N.A. Baskakov, N.Z. Gadjeva, D.G. Kiekbayev and R.Z. Mouryasov acquired international recognition. Within the humanities and social sciences, there are also such fields as comparative political science, comparative sociology, comparative history, comparative religious studies, etc.¹¹

A. Saidov holds that there are autonomous concepts: the 'comparative method' and 'comparative jurisprudence'. If the first definition represents a means of cognition of socio-legal phenomena, the latter is a scientific field aiming at studying contemporary legal systems.¹² Y. Tikhomirov adheres to the same positions and asserts that comparative law as a science has its own research subject and methodology - the comparative method. H. Chodosh comments that the comparative method is the 'starting point' of all comparative legal researches. K. Zweigert and H. Kötz extend this theory and take the functional approach as the basis of legal comparisons. They stress that function is the starting point and basis of all comparative law and that different legal systems can be compared only if they solve the same factual problem, satisfying the requirement in adequate legal regulation.¹³

Undoubtedly, comparative law is a method of the comparative research of legal systems. However, is it relevant to attribute the results of comparative investigations to comparative law? Is it possible that they constitute its integral component or should they be considered something independent, a separate domain of legal scholarship?

The comparative method is applied in comparative law as the basic specialized method of the research of legal phenomena. Besides, the emergence of comparative law as a science resulted from analysing and resolving new problems in general jurisprudence. A. Saidov asserts in this connection that when defining the designation of comparative law it is necessary to speak not so much about the institutional recognition of a new discipline, but rather about the acknowledgement of a number of new problems that have appeared in legal science.¹⁴

It is interesting to note the opinion of Nersesyants, who argues that the method of comparative law represents a general legal method correspondingly adapted to the conceptualized perception of legal phenomena, compared with one another on the basis of various forms of expression of the formal equality principle.¹⁵

Another viewpoint is that the science of comparative jurisprudence originates from the synthesis of the comparative method with legal philosophy. Put differently, comparative jurisprudence is a philosophical direction representing a comparative study of conceptual notions which constitute the institutional basis of one or more legal systems. The role of comparative jurisprudence in this case consists in constructing the methodological pillar of legal philosophy and pursuing the informational function.¹⁶

Since comparative jurisprudence is the study of the relations of one legal system with other legal systems, the character of these relations and reasons for similarities/differences can be revealed only by means of theoretical and historical studies of legal systems.¹⁷

An original compromise is reached by those comparatists who define comparative law to be both a method of legal science and an independent scientific discipline. The first case may be exemplified via comparative investigations in any branch of law, where the comparative method is used as the tool for collecting information on compared systems or legal phenomena. In the second case, comparative law is juxtaposed with general theory of law and, therefore, it is obviously more expedient to speak about comparative jurisprudence as a science constituting an independent field of knowledge than merely a comparative method. It should be admitted, however, that it is rather difficult to establish a precise evaluative criterion as to what constitutes an independent science as well as to determine

ambits between traditional legal disciplines. A compromise may be a thesis about comparative law as a group of methods that composes in an aggregate a methodological basis of comparative research in any branch of law.¹⁸

There is a group of scholars aspiring to prove an indissoluble connection between comparative law and theoretical jurisprudence. In their opinion, this unity corresponds to the unity of form and contents, i.e. these are basic elements of legal knowledge, the two sides of one coin. Without comparative law, theoretical jurisprudence remains an incomplete and formal science, while without theoretical jurisprudence comparative law is an inapplicable method. The path to theoretical jurisprudence goes through comparative law and vice versa.¹⁹ When conducting research comparatists apply notional categories elaborated by legal theorists and, on the other hand, results of comparative investigations require a substantive theoretical evaluation. However, categories of theoretical jurisprudence can hardly encompass the peculiarities of all legal systems and difficulties may occur in the determination of sources, juridical systematization, fact-finding, etc. There are also other trends in the comparative law discourse of today, such as comparative law and legal history, comparative law and culture, comparative law and sociology, comparative law and economics, comparative law and religion. Some scholars welcome such successful scientific syntheses, while others argue that 'comparative law must maintain its independent character and not be swallowed up by new relationships. It must retain a separateness and distinctiveness.'²⁰

A number of legal scholars tend to assert that comparative law is by no means a legal science for it exclusively represents an educational discipline which is taught in law schools and universities. It is argued that the designation of comparative law consists in the application of the comparative method in those instances where the process of comparison exceeds the frameworks of one legal system. The process of comparison does not in itself create legal norms; it only contributes to the creation of legal norms within the framework of one or more legal systems.²¹ This thesis may, nonetheless, be refuted by the fact that in the course of judicial proceedings the European Court of Human Rights and courts of member states of the European Union now more and more often resort to the comparative practice of analysing the judicial decisions and national legislation of member states. It thus confirms an evolutionary role of practical application of comparative law in the process of European integration.

At the dawn of a new millennium, it is possible to assert with ever greater reliance that comparative law both structurally and functionally appears as a relatively independent and scientifically detached educational discipline having its own subject, method and sphere of application, playing its own role in the system of legal knowledge and education, and also having its special social designation.²²

Comparative law for a long time seemed an object of purely scientific research and not directly connected with daily life. Substantial upheavals in the political and legal climate were undoubtedly brought about by the processes of European integration and of globalization. At the same time, this was all to a certain extent enhanced by scholarly quests for new ideas and hypotheses.

It will hardly be erroneous to say that nowadays Europe is experiencing 'comparativomania' in the most positive sense of this word. The importance of comparative legal studies extends far beyond matters of theory, cardinal as they are, and raises salient practical issues.²³ No wonder that thanks to the communicative function of comparative law legal comparatists speaking different languages of the world can understand one another.

Irrespective of how we perceive comparative law - as a method or as an autonomous direction in legal research - today it has become a reality, it has acquired a solid standing and won universal application in other legal sciences. Comparative law is a relatively young

science in the system of jurisprudence. It has not yet been sufficiently investigated and there are many unanswered questions as regards its theoretical and methodological basis. Attempts to find answers to the question ‘What is comparative law?’ have received a great range of answers. It is most probable that comparative law will remain a stumbling block for legal scholarship for generations to come.

Notes

- ¹ Djalil I. Kiebaev is an assistant instructor at the Law Institute of Bashkir State University and a PhD student at the Public Law Chair (Ufa, Republic of Bashkortostan, Russia). He is also a member of the editorial committee of *Public Law Problems Journal (Ural - Idel Law Review)*. His areas of scientific interest include comparative law, constitutional law and human rights. Correspondence address: Bashkir State University, Law Institute, Dostoyevskiy Street 131, Ufa 450005, Republic of Bashkortostan, Russian Federation, E-mail: KiebaevAI@ic.bashedu.ru, djalil_kiebaev@yahoo.com.
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