COMPARATIVE LAW IN THE DIGITAL ERA

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Abstract: *The conservative way of doing comparative law has largely been supplanted by digital comparison. The functions, methods and aims of comparative law are, or should be, the same as ever but, the data that it is based on is now in a different form than before. Instead of reading printed books in academic libraries, it is possible to look for the foreign norms online. There are, however, problems with converting digital comparative information into true knowledge which meets the quality criteria of comparative law. In this article it is claimed that quantitative increase in available information does not necessarily lead to an increase in knowledge if the incommensurability of legal concepts and the specificity of the legal system remain unnoticed or ignored by the researcher. While in the past the barrier to information access was basically physical distance, with the new electronic data warehouses and the use of AI, physical distance has turned into informative distance. In the article it is discussed how to navigate through the myriad online sources of foreign law and what is the proper methodological framework of (digital) comparative law.*

1. Introduction: why do we compare?

Comparison advances knowledge and it is often used in different fields of law. The factors that necessitate the operation of comparative law (or, comparison of laws) are manifold. The primary function of law comparison, as Zweigert and Kötz has put it, consists in gaining knowledge, 'Erkenntnis'.[1] EBERLE has written that the insights gathered with comparison can usefully illuminate the inner workings of a foreign legal system. And these insights can be applied to our own legal system, helping illuminate different perspectives that may yield deeper understanding of our legal order.[2]

Studies of comparative law can be informative, necessary and even compulsory depending on the legal issue and goal at hand. For instance, comparative law has value in the preparation of new legislation. Legislators usually acquire information of foreign attempts to meet and solve the same issues in order to find *de lege ferenda* solutions. Comparative law, in other words, enriches our supply of legal solutions.[3]

In applying international conventions such as European Convention on Human Rights, it is essential that the court takes a look at principles incorporated in the European Court's jurisprudence and also carries out research into the case law of other legal systems. The goal is to guarantee the efficient, uniform application of the provisions of the Convention in different legal systems, in different legal environments.[4] From the same

[1] Zweigert/Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts. Mohr, 1996.

[2] Eberle, The Methodology of Comparative Law pp. 51–52, Roger Williams University Law Review, Vol. 16, No. 1, http://docs.rwu.edu/rwu_LR/vol16/iss1/2 (accessed on 7 December 2023).

[3] See for instance Mourby/Gowans/Aidinlis/Smith/Kaye, Governance of academic research data under the GDPR–lessons from the UK, International Data Privacy Law, Vol. 9, No. 3, 2019 and Sudarwanto/Kharisma, Comparative study of personal data protection regulations in Indonesia, Hong Kong and Malaysia, Journal of Financial Crime, Vol. 29 No. 4, 2022.

[4] Experience from one country can serve as an inspiration for the improvement of implementation of the Convention in another country, as well as a way to overcome some common obstacles and issues. Comparative law is therefore important to achieve the goals set forth by the Council of Europe. For the comparative research see for instance Cozzi (etc.,eds.), Comparative Study on the Implementation of the ECHR at the National Level. Council of Europe 2016.

perspective, also the EU has brought an inevitable addition to the world of legal comparison. We see the same provisions, same text translated in different languages, but what is the systematic environment of these provisions in order to apply them in a uniform way? For instance, for the interpretation of GDPR, the role of the European Data Protection Board (EDPB) is significant.[5]

Furthermore, comparative law has an inevitable connection to the private international law. The provisions of the latter can lead to the application of the law of a foreign country and comparative law is, naturally, crucial in order to apply foreign law in a correct, loyal way. It should be remembered that the acceptance of and respect for the differences of laws are the foundations on which the whole of private international law rests. Acceptance and respect, thus, require understanding and understanding requires knowledge. Gaining knowledge, thus, requires a proper method.

Especially from the perspective of comparative law, it is interesting that the amount of available legal information has increased and its storage methods have also changed. The digital era has metamorphosed the architecture within which knowledge is generated, exploited and disseminated.[6] Now most legal research done is usually conducted via computerized databases and the conservative way of comparing has largely been supplanted by digital comparison. However, the change of the position of comparative law and the increase in online information have not changed the fact that research results produced by legal science should be reliable, credible and justified. This goal cannot be achieved only, for instance, with the help of the AI tools, without methodological skills and methodological self-understanding.

In this article it is claimed that the transformation of utilized data has created challenges in comparative studies because of the *methodological uncertainty*. While in the past the barrier to information access was basically physical distance, with the new electronic data warehouses, physical distance has turned into *informative distance*. Thus, the purpose of this paper is to discuss what is the proper methodological framework of (digital) comparative law and to provide an overview of the most important conceptual tools to deal with the challenges of comparative methodology in order to convert legal information to true legal knowledge.

2. How to compare: a comparatist as a chameleon?

Comparative law – in its basic form – centers around similarities and differences between excavated data points. But, in order to achieve true knowledge of a foreign legal system, it is not enough simply to exchange information on legal norms. A comparatist has to go deeper in order to perceive foreign legal system as a social and cultural practice including its normative, conceptual and methodological elements.

In my doctoral thesis I asked how to achieve knowledge of a foreign legal system and what are obstacles achieving it.[7] How to find a path to the legal worlds that exist beyond our own state borders ? Even though I defended my thesis for almost thirty years ago, I still find its conclusions relevant today. I concluded that one cannot just collect and lean on fragmented pieces of information. Instead, as Legrand has stated, the comparatist must try to illuminate the stories (narratives) a legal culture (including legal language) tells about itself, both to others and to itself.[8] This requires that one grasps the difference between a legal order and a legal system. The latter includes normative, conceptual and methodological elements. The normative elements refer to the general legal principles of different fields of law. The conceptual elements include the concepts that structure different fields of law. By the methodological element I refer to functional side of law, the way to read and apply legal rules, the interpretation and the patters of argumentation. Via getting to know these

[5] The EDPB ensures that the General Data Protection Regulation and the Law Enforcement Directive are applied consistently and ensures cooperation, including on enforcement. For more information concerning the board, see https://edpb.europa.eu.

[6] Pagey, Comparative Legal Research in the Copyright in the Digital Age, p. 83, ILI Law Review 2020.

[7] Mikkola, Oikeudellisen tiedon yhtenevyys ja sen esteet. Suomalainen lakimiesyhdistys 1999.

[8] Legrand, European Legal Systems are not Converging p. 61, ICLQ Vol. 45, 1996, pp. 52–81.

elements, one is able to compare – as he/she will be able to read t*he instructions for use of a foreign legal system and act as a legal chameleon* and also to navigate through different online sources of legal information.[9]

The functions and the method of comparative law are the same as ever, even though the data that it is based on is now usually in a different form than before.[10] The conservative way of utilizing comparative law (reading printed books and other on-the-ground-material) has largely been supplanted by digital comparison.[11] Instead of reading printed books in academic libraries, one takes a look on the online material. There is access, often also free of charge – to many existing databases, platforms, search engines and glossaries and new ones are constantly being built.[12]

The fact is that quantitative increase in available information does not necessarily lead to an increase in knowledge. I have noticed that there are serious *problems with converting digital comparative information into true knowledge* which meets *the quality criteria of comparative law*. It is usually because one has, for instance, ignored the incommensurability of legal concepts. The amount of information does not make up for possible qualitative deficiencies of research. One can‘t even build a house if the plinth is not in order, and a webpage introducing legal provisions or an IT supportive translation tool usually cannot be seen as a one-stop destination for all the comparative material a legal researcher might need. This is explained by the fact that *translation tools cannot study or understand the mentality of a legal text or reveal the legal mileu surrounding the specific norm or legal concept.*

Naturally, a researcher should work in an original language whenever it is possible. Law is communication, and that communication is built on legal language, the concepts of which are quite unique in each state. Legal language is bound to legal relationships and social conditions in general and has national roots.[13] Despite all the online translation tools, knowing another language is still a very powerful entry into another worldview.[14]

3. Conclusions: comparison as a basic skill

To conclude, I will firstly state the obvious: restricting one´s research to a single legal system is not enough. Bogdan has stated that in a globalized world of today every lawyer must be an international lawyer regardless of the legal field one is specialized on.[15] International lawyers compare which requires methodological skills which include understanding and expressing the function, the goal(s), of the comparative research. One also

[9] It has been discussed whether a comparatist can ever reach an objective perspective as lawyers from different countries are not tabula rasa observers but their normative commitments have left a mark on the scheme of interpretation through which they approach different legal systems. We will, thus, not discuss this problem in more detail here. See i.e Mikkola, Oikeudellisen tiedon yhtenevyys ja sen esteet., pp. 394–395, Helsinki, 1999.

[10] Note that digitalization of the material has somewhat transferred the paradigms of copyright law. As Pagey notes: “The predominant cause of such transformation is that traditional copyright principles conceived in the analog world of hard copy, simply do not work when applied to the Internet. For instance, prior to the digital technological advances, the accepted view was that private copying for personal use is harmless, which no longer holds true for personal uses on the Internet.” See Pagey, Comparative Legal Research in the Copyright in the Digital Age, p. 82, ILI Law Review 2020. Also Zimmerman, Finding New Paths through the Internet: Content and Copyright, p. 145, Tulane Journal Of Technology And Intellectual Property 12/2009.

[11] See also Fraas, Legal Databases: Comparative Analysis, https://www.crl.edu/collections/topics/legal-databases-comparative-analysis. Fraas further writes that “Currently researchers seeking original trial transcripts, case documents, evidence, warrants, and sources on the day-to-day workings of courts will largely find little help from large online databases. On-the-ground legal documents are especially important for studying law in parts of the world and time periods for which printed case reports and widely disseminated judicial decisions are uncommon.”

[12] For instance, in Finland Finlex is an internet service on legal information, owned by the Finnish Ministry of Justice. It is a public service, available free of charge at finlex.fi. However, most of the databases are available in Finnish or Swedish, and only some information is available also in English and other languages.

[13] Mattila, Comparative Legal Linguistics, p. 305. Ashgate Publishing 2013.

[14] Skytioti, Comparative Law and Language with Reference to Case Law, p. 107, Studies in Logic, Grammar and Rhetoric, Vol. 66 (2021). Also Rheinstein, Gesammelte Schriften I, p. 253, Tübingen 1979.

[15] Bogdan, The Effects of Globalization on Legal Education p. 184, Kilaw Journal, May 2019.

has to grasp the idea that utilizing comparative method is more than mere comparison of legal rules; more than exchanging norms in the transnational sphere called the internet.

Strangely, it is sometimes assumed that comparative research is a research ”light” and methodological skills are not required. I am not alone with my observations as Pieters has also claimed that many texts presenting themselves law comparisons, suffer considerable methodological flaws undermining their feasibility to reach the objectives set by the comparatist.[16] I have for instance noticed that in many studies the function (the goal) of the comparison is not stated and information on foreign law seems to be pasted on to the text without the researcher him/herself even knowing why. If the researcher does not have a self-understanding of the purpose of the comparative extract, it does not open up to the reader, either. The lack of methodological skills has also meant that there sometimes exists a different research depth for the comparative part of the study than for its domestic part. Reference is, for instance, made to foreign sources of law without taking into account the hierarchic relationships of sources in the country of origin. Even indirect references are used quite often. The result is a sporadic and descriptive account of foreign legal information, without any true research merit.

There have been no changes to the comparative method per se, but the data banks, translation tools and other online information now easily create *the illusion* that information is the same as knowledge. In the digital era, every lawyer must be digital lawyer, as my mentor Saarenpää has reminded us, but he does not mean that the search for information on law is only a technical delivery. Instead, he means that the digital lawyer has to employ a broad range of skills, including information literacy skills in a number of languages.[17] In addition, Saarenpää has always strongly emphasized that precisely *method is the mark of a lawyer in the profession*. What is more, he has also noted at an early stage that the digital era and digital information environment is going to challenge the methods and quality of comparative law.[18]

Even though the internet has created a global village, this does not evade but instead underlines the fact that we have to come up with a sound methodological framework to better understand the role, structure and application of law in each, original country. In our global village, buildings (legal systems) are not the same with regard to floor plans and the uses (or even names) of the rooms. The researcher has to obtain a key to each building in order to view its lay outs and structural solutions. The key is obtainable only in case one masters the proper comparative method and determinately aspires to act as a legal chameleon.

[16] Pieters, Functions of comparative law and practical methodology of comparing, https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf.

[17] Saarenpää, The Digital Lawyer, Jusletter IT 26 February 2015.

[18] See for instance Saarenpää, Legal Informatics: a Modern Social Science and a Crucial One, pp. 20–24, Scandinavian Studies in Law, Vol. 65, 2018, with references.