ANNALES
UNIVERSITATIS MARIAE CURIE-SKŁODOWSKA
LUBLIN—POLONIA

VOL. XL, 27 SECTIO G 1993

Instytut Administracji i Prawa Publicznego UMCS
Zakład Teorii Organizacji i Kierownictwa

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Remarks on Functions of Comparative Law

Uwagi na temat funkcji prawa porównawczego

GENERAL INTRODUCTION

Comparative law in performing its functions leads to the accomplishment of certain objectives regarded as useful[1]. It fulfills these functions because it involves activities whose end results can be described. The functions of comparative law consist of sets of activities performed in accordance with the selected methods of comparison in order to accomplish the assumed objectives. In analyzing the concept of functions performed by comparative law, its object can be considered as a relatively ordered whole consisting of elements contributing towards the accomplishment of its objectives. In the light of the above, its functions constitute one of the essential elements of this whole.

Sometimes the concept of function is identified with the concept of purpose, even though the former refers in fact to the processes leading to the accomplishment of the latter which is the result of this process[2]. However, such an identification tends to emphasize that the functions of comparative law are characterized by a conscious rational intention. Anyone who realizes the comparative function within law does so in order to attain certain goals. These goals can and ought to be subjected to evaluation by means of the categories of the useful, the economic, the legal, the efficient, etc. Actions which cannot be controlled by the subject or evaluated are not purposeful. Generally speaking, comparative law which performs many practical and theoretical functions has many practical and theoretical functions. On account of the hierarchy of goals we

[1] A concise survey of different views on comparative law can be found in L. Constantinesco: *Traite de Droit Comparé*, Paris 1972, vol. I, p. 166 ff; a comprehensive bibliography is given by R. B. Schlesinger: *Comparative Law. Cases – Texts – Materials*. Mineola, New York 1970, pp. 643 – 816.

[2] M. Rheinstein: *Comparative Law – Its Functions, Methods and Usages*, "The Arkansas Law Review" 1968/22.

could distinguish its fundamental functions and goals from secondary ones, positive functions and goals from negative ones, long-term functions and goals from short-term ones, those that can be gradated from those that cannot. Other dichotomic divisions are also possible. Sometimes these functions and goals turn out to be incompatible. Whereas some scholars regard the practical functions and goals of comparative law as fundamental and the theoretical ones as secondary, other scholars may adopt a totally different hierarchy. Whilst some focus on the positive functions and goals of comparative law manifesting themselves in the intentions of constructing new laws and ideas of law, others reduce its use to negative functions and purposes, to pointing out what mistakes connected with the legal practice of other countries ought to be avoided.

Examples of classifications of the functions and goals of comparative law can be multiplied. Winterton mentions four categories of such goals: practical, sociological, political, and educational. He observes that the content of comparative law is wholly dependent on the object and purpose of comparison[3]. Gutteridge differentiates between the goals of descriptive comparative law, applied comparative law and speculative comparative law[4]. According to Kamba the plurality of goals means that the comparative lawyer is free to decide which of these goals is to dominate at a given stage of his studies[5]. The functions and goals of comparative law are often associated with scholarly studies, legislation, legal reforms, application of law, unification and harmonization of law, construction of international law and establishing international agreements.

The functional conception of comparative law is characteristic primarily of those scholars who regard it as significant only in the form of specific methods of the study of law. They stress the fact that the goals for which comparative law is studied and taught define the form of studies and teaching[6]. On the other hand, in those conceptions of comparative law which consider it as a separate branch of legal studies, its functions and goals are regarded as its component parts defined by the nature of the object of study. Accepting the latter view we will find sufficient grounds for considering the functions of comparative law in terms of cognitive, didactic, legislative, interpretive, unifying, and ideological functions.

COGNITIVE FUNCTIONS.

The cognitive functions of comparative law manifest themselves mainly in gathering knowledge about law in order to make it available to all concerned. This knowledge can be used spontaneously or in an organized form where comparative law is taught at universities[7].

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[3] G. Winterton: *Comparative Law Teaching*, "The American Journal of Comparative Law" 1975/23, p. 97 ff.

[4] H. C. Gutteridge: *Comparative Law. An Introduction to the Comparative Mathod of Legal Study and Research*, London 1949, p. 7 ff.

[5] W. J. Kamba: *Comparative Law: a Theoretical Framework*, "The International and Comparative Law Quarterly", no. 23, p. 490.

[6] G. Winterton: *op. cit.*, p. 80.

[7] O. Kahn-Freund: *Comparative Law as an Academic Subject*, "Law Quarterly Review" 1966/82.

In the second half of the twentieth century the knowledge and understanding of differences, similarities and identities of various laws are almost unanimously regarded as one of the principal functions of comparative law. The knowledge and understanding contributes to finding the best legal solutions of social problems which are similar in different countries. Comparative lawyers who generally agree as to the key role of cognitive functions among other functions of comparative law often differ in their views on the very nature of this knowledge and understanding. On the one hand, there are the adherents to the positivist approach in jurisprudence who search for "pure" knowledge devoid of any evaluation. On the other hand, there are those who maintain that any knowledge, especially knowledge based on comparative methods must involve value judgments and evaluation.

It seems that the postulates of "pure" knowledge applied to the object of comparative law are based on illusions. If the functions of this object manifest themselves, among others, in the selection of the best solutions among the laws which are compared, it is impossible to escape the necessity of making value judgments and evaluations. After all, no choice is possible without value-judgments and evaluations; value-judgments and evaluations constitute the very essence of the methods of comparative law. Accepting the view that legal studies in general and comparative law in particular search for the best solutions to legal problems one cannot at the same time renounce the idea of their evaluative character. In this sense comparative law deserves its name of "ecole de verite" and "supply of solutions".

For a scholar studying comparative law the primary function of making comparisons is the development of the knowledge of law which can be used for a variety of different, more or less noble purposes, in practice. Although theorists of law generally reject the use of the results of their studies for morally dubious purposes, the actual practice is governed by its own rules and norms. However, both of them have no doubts that the use of cognitive instruments of comparative law may provide a far greater number of solutions of particular legal problems than analyses of laws of only one country. Even a highly imaginative lawyer who, nonetheless, thinks in terms of the law of one country could not cope with the diversity of legal conceptions that emerge from comparative studies. Nowadays, no one aspires to discover the universal truth about law which the pioneers of comparative law tried to find. The idea of truth has become relative, bound to the actual time and place. The primary concern is with the knowledge of different solutions of similar problems regulated by law and the choice of the one that is the most proper in given conditions.

The history of law and legal thought suggests that it would be difficult to understand the concepts of development, progress, stagnation, and regress in the policy of law without comparative studies. Comparative studies lead to a better awareness of legal facts and ideas, demonstrate the recurrent elements and regularities, construct classifications and typologies. Ambitious scholarly research invariably involves comparative law. The adoption of the comparative cognitive approach is almost identical with going beyond local (linguistic, cultural, political, religious, methodological, etc.) particularities. It helps to improve our understanding of the directions of the development of law and legal thought

in the world and, against this broad background, the law and legal thought of one's own country. Thus, one tends to accept the idea of those practicing comparative law that the knowledge of only one legal system and only one form of legal thought denotes lack of comprehensive knowledge of law and legal thought as a whole.

DIDACTIC FUNCTIONS

The didactic functions of comparative law are the organized manifestation of its cognitive functions which appear mainly in the academic forms of the teaching of law. In the majority of countries the models of teaching law are usually restricted to national law. These models transcend these limits only in the presentation of the influence, reception and incorporation of elements of foreign law in national law (e.g. Roman law in relation to the legal systems of European countries). Educational models which in a methodically and organizationally differentiated way compare legal systems of different countries and the so-called families of law (e.g. positive, customary, Islamic, Buddhist law, etc.) are still rare.

The shaping of curriculum in law restricted to the teaching of national law used to be justified in the days when people's mobility in the world was rather restricted and when international relations were governed by the principles of political and legal isolationism. In contemporary times which are characterized by intensive movement of people and events the idea of restricting legal studies to national law is obsolete as it does not meet the existing demands. The study of comparative law must be regarded as as a major factor in improving law and its practice. The knowledge of foreign laws provides appropriate standards of judgment for evaluating national law and it is conducive to looking for the ways of its improvement. The comparative perspective facilitates the awareness of the social conditioning of law, the differentiation of its forms despite the similarity of content, similarity of its functions despite differences in forms, etc.

The comparative study of law is useful not only in cognitive but also in practical terms. Most of all, it is impossible to overestimate the significance of comparative law in relation to international conflict law, the interpretation of international treaties, in judicial decisions in international affairs, in international arbitration, in various attempts to harmonize and unify international law. The unprecedented "internationalization" of legal relations is deepening, within the blocs of, closely cooperating countries (socialist, capitalist, or third world countries). It could be argued that the closer cooperation between particular countries leads to the necessity of uniform legal solutions based on comparing their local laws.

Nowadays there are universal, global problems which cannot fail to attract the attention of those studying law. These are problems like the prevention of a global military conflict and struggle for permanent peace, environmental protection, elimination of racial, ethnic, national and religious conflicts, the advancement of the broad conception of justice in international affairs. These problems which can be regarded as decisive as far as the survival of mankind is

concerned cannot be solved by individual, isolated countries. They simply necessitate international cooperation; studies of law ought to define and consolidate the awareness of this necessity. Comparative law may contribute to the forms and substance of this enforced cooperation. This is where its educational function resides. In realizing its function comparative law opposes narrow isolationism and promotes the universalism of legal solutions which is in high demand nowadays; it rejects blind nationalism and emphasizes the necessity of internationalism, it criticizes self-contained dogmatism and legal formalism in the name of political flexibility and international rule of law.

The position of comparative law has so far become the strongest in American law schools, especially academic ones[8]. In the United States the significance of teaching of comparative law was appreciated as early as the nineteenth century but its rapid development occurred only after the Second World War. Since then most American schools of law regard comparative law as a compulsory course for all students. It is usually taught by properly trained professors who specialize in comparative law. On the basis of a long teaching experience in comparative law it can be observed that the main problem facing American students is connected with their lack of knowledge of foreign languages which is the necessary condition of any thorough studies of comparative law.

France was another country where the significance of comparative law in legal studies and practice was appreciated at a relatively early stage. Drawing on the pioneering work of Montesquieu the teaching of comparative law at universities has been postulated for many decades. However, it was only in 1955 that all French faculties of law began to offer a course entitled "introduction to comparative law". The course includes a general comparative survey of the fundamental principles of different legal systems such as Roman, German, socialist, and common law. Other specialized courses encompassing comparative studies of two or more legal systems are also planned, for example, comparative studies of English, American, Islamic, European or African law. Ethnology of law considered in comparative terms has also met with much interest.

All faculties of law at Swiss universities offer an introductory course in foreign legal systems. However, only in the French-speaking part of Switzerland students of law are obliged to take examination in comparative law.

In the Federal Republic of Germany comparative law has been taught at universities since 1951. The emphasis is put on a comparison of German law to one foreign system, mainly chosen out of the three (American, English, and French). It is an optional course. Moreover, many German theorists of law, especially the younger generation, take up studies of comparative problems which they regard as attractive objects of research.

Educational authorities of the communist countries did not grant to comparative law the status of an autonomous discipline among legal studies in university curriculum despite frequent calls for such a decision supported by pra-

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[8] Cf. R.H. Graveson: *The Teaching of Comparative Law in USA*, "Journal of Comparative Legislation and International Law", 32/1950; H.E. Yntema: *Comparative Legal Studies and the Mission of the American Law School*, "Louisiana Law Review" 1957/17.

ctical needs and considerable scholarly achievements in comparative law. In the third world countries the situation in this respect is rather complicated. It depends on the capitalist or socialist orientation of a given country and its relations with the two political and economic blocs.

Looking for a proper place for comparative law in university education it is necessary to consider a number of things. It is well known that university curriculum includes both the fundamental branches of law (civil, criminal, administrative, constitutional, financial, and labour law) and supplementary branches such as history of law, Roman law, theory of law, history of political and legal doctrines, sociology of law. Comparative law is considered to belong to the latter. On the other hand, it is commonly known that restricting the teaching of law to the fundamental subjects can at best produce relatively competent "technicians of law". On the other hand, excessive number of courses regarded as essential must, due to the limits of students' capacities of perception, lead to the restricting of the number of courses regarded as supplementary. This common fate of supplementary courses defines to a large the position of comparative law.

It seems that until comparative law attains its rightful place in the teaching of law other possibilities should be explored. First of all, the comparative perspective ought to be employed more extensively in the teaching of other branches of law. In other words, the teaching of particular elements of comparative law could be integrated with the teaching of related branches of law. However, this would require major changes in the form and content of textbooks, lectures, seminars, and classes. As a result links could be established between the "local" and "international" in law and the existing differences of opinion among the adherents to comparative methods and their opponents might be settled.

LEGISLATIVE FUNCTIONS

Considering the problem historically in relation to families of law and, at the same time, in macro-comparativist categories, there are various methods of law-making in the sense of establishing general and abstract norms[9]. Law-making in systems based on positive law is not the only method of making law, which may be conducive to comparative studies. Considerations of the "great dichotomy" of positive law with the legal practice of common law is a typical example here. In both types of systems the general form of the object of comparisons consists of the forms of law-making, the policy of law-making, the characteristics of legislators, and the organization of legislative procedures.

Comparison of the existing forms of law-making provides the basis for distinguishing two basic types: positive law and practice, which also appear in two varieties. Positive law consists both in a unilateral passing of a law-making act by the authorized legislative body and a contract as at least bilateral law-making act which establishes the binding norms which appears in civil law and interna-

9 For a comprehensive bibliography see R.B. Schlesinger: *op. cit.*, p. 650 ff.

tional law. Practice as a form of law-making manifests itself in the process of sanctioning certain customs and establishing legal precedents.

A comparison of different ideas of the strategy of law-making policies makes it possible to distinguish at least three points of view; the extremely voluntaristic approach, moderately voluntaristic approach, and the non-voluntaristic approach. The adherents to extreme voluntarism emphasize the fact that the legislator forms the content of law on the basis of his own will alone. According to the followers of moderate voluntarism, the legislative activity is conditioned by a multitude of different factors even though it is the legislator who makes laws. In the light of the non-voluntaristic approach inherent in the doctrines of natural law the legislator only discovers the legal norms with the help of reason, emotion, and will in the nature of man, society, the world, universe, and God. Contemporary considerations of law have been pervaded by elements of the theory of modelling. Consequently, different models of law and their typologies are often constructed. In the comparative typology of legislative models major importance is usually assigned to comparisons of descriptive and normative models, theoretical and normative models, procedural and material models, general and particular models, etc. The problem of modelling in jurisprudence is connected with the problems of ideology of law-making which also possess a rich comparative potential.

The problems of the law-making processes has many comparative aspects. Generally speaking, each case of law-making is connected with the necessity of comparison insofar as each new law changes the existing one. Thus, law-making takes place through a comparison of the existing law with the law that replaces it. From the legislator's perspective this is a prospective problem – it leads from the law that has been replaced to the law that replaces it. A historian of law finds the retrospective point of view more appealing. A theorist of law who discusses law-making must take into account both these perspectives.

Legislative practice demonstrates that rational making of relatively "good" laws cannot usually take place without prior comparative studies. There is a popular term "carefree plagiarism" to describe those legislators who make use of comparative studies simply to copy the results of other legislators. This kind of law-making can be considered in terms of the legislators' copyright, originality of legislative ideas, their rationality, and reception. However, the decisive factor is the applicability of foreign legal solutions to the needs of national legislation. According to Rudolf von Ihering, foreign inspirations in legislation testify to the essentially similar social needs of different countries, and the very adoption of foreign legal solutions is not wrong in itself.

Every developed legal system contains as a rule a number of borrowings from other legal systems. Comparative use made of foreign legislation was taking place thousands of years before the appearance of first studies in comparative law. Historians tell us that Solon's laws were formed under the influence of earlier laws of Greek city-states. Comparative studies preceded the Twelve Tables which, in turn, gave rise to the development of Roman law.

The practice of comparing legislation of other countries before passing new legal acts has survived in Europe until recent times. All matters of this kind are usually in the hands of the Ministry of Justice and its specialized organs. In

Great Britain where there is no Ministry of Justice these problems are dealt with by specially appointed legal commissions. The situation is different in the United States of America where problems of his kind are dealt with by New York Law Revision Commission.

Legislators of some countries devote less attention to comprehensive comparative studies deciding, for their own reasons, in favour of wholesale or partial adoption of lawof another country. The majority of legal codes in the Latin American countries are eclectic combinations of various elements of European laws. An example of the wholesale adoption of foreign legal solutions is the adoption of the Swiss civil code and a slightly modified German commercial code in Turkish law. After the Second World War, Japan underwent a radical modernization of its law taking the models from the so-called Western countries. The adoption of foreign laws may be voluntary or enforced by political and even military pressure.

Many examples of enforced adoption of foreign law can be found in modern history. The Spanish, having defeated the French, subjected the French settlers in Louisiana to Spanish law. The Anschluss of Austria in 1938 meant the subjection of its population to German law. The influence of Soviet law on the law of communist states has received much attention. At the same time, there are cases when laws that had been passed under foreign pressure were not abolished when the pressure was no longer there. Some European countries continued to use Napoleon's code after his defeat and regaining their independence. Japan has preserved many legal institutions imposed by the United States after the Second World War. India retained the common law system after gaining its independence from Britain.

The reception of law, regardless of its character, offer rich comparative material: comparing the received law and the transformations occurring in the recipient country. However, in the United States the system of English common law which was adopted and transformed in America is not regarded as an alien component of American law. This attitude to English common law has been determined by a variety of factors: the evident Americanization of common law, its long history in America, influences of French and Spanish law brought with the settlers from these countries.The law of the state of Texas contains many borrowings from Spanish law, and the law of the state of Louisiana includes numerous elements taken over from French law.

INTERPRETIVE FUNCTIONS

The history of legal thought and practice confirms the significant role of comparisons in the processes of interpreting law[10]. In Roman law the Latin term *interpretatio* denotes the interpretation of meaning of legal provisions or actions. Modern legal interpretation is synonymous with understanding the meaning of law, judicial decisions, and legal doctrine. The need for interpreta-

[10] For a bibliography see *ibid, loc. cit.*

tion is unavoidable whenever law, legal decisions and legal thought give rise to doubts, especially when contradictions or ambiguities are involved or when the formulation of law does not correspond to the intentions of the legislator. There are different kinds of interpretation of law. Each of them is to a greater or lesser extent based on comparing legal texts, judicial decisions, the opinions of legal doctrine and thought. Insofar as the comparative interpretation of law understood in this way leads to assigning a new meaning to it, the use of the term "comparative law" seems justified. In the light of the above the name comparative law can be given to these new contents formulated on the basis of comparing legal texts, judicial decisions, and opinions of the legal doctrine which could not have been formulated without such comparisons. The interpretive functions of comparative law, apart from its legislative functions, determine the validity of the differentiation of comparative law as an independent branch of law. From the point of view of comparative law it is interesting to consider to what extent the result of the interpretation of law comes from the interpreted law and to what extent it is influenced by comparison with other laws.

Four kinds of interpretation (authentic, legal, judicial, and doctrinal) can be distinguished depending on the subject of interpretation and the binding force of its results. The scope of comparison is the smallest in authentic interpretation and the greatest in doctrinal interpretation. In the case of authentic interpretation the legislator in interpreting his own law compares it to the kind of doubt that gave rise to this interpretation. A specially appointed state agency as the author of the legal interpretation being the interpretation of law which has not been instituted by this agency can adopt as a point of reference the text of the law, any authentic interpretation, and the kind of doubts that necessitated interpretation. The court as the subject of judicial interpretation, the range of interpretations that can be compared increases even more, this time encompassing the meaning of law derived from the subsumption of the state of facts under the corresponding provision of law. Finally, on the level of doctrinal interpretation all known kinds of interpretation of law can be subjected to comparison. The results of this kind of interpretation have historically variable significance for the subjects of authentic, legal and judicial interpretation.

On the basis of the kind of rules explaining the ways of establishing the meaning of law, interpretations of law can be classified as linguistic (grammatical), systemic (systematic, logical), and functional (teleological, historical) interpretations. Linguistic interpretation characterized by the features of language in which the interpreted law is formulated is based on comparisons depending on the ambiguity of this language; unambiguous languages exclude the possibility of making such comparisons. Systemic interpretation which defines the meaning of law in relation to the system to which it belongs refers to comparisons of elements which constitute that system. For example, if we were to consider the family of socialist law as a system only comparisons within this system would be justified, to the exclusion of all others. The scope of possible comparisons is most extensive in functional interpretation which consists in defining the meaning of law in relation to its functions, evaluations, and goals. Here the scope of comparison encompasses different interpretations of these functions, evaluations and goals.

On account of the relation between the results of linguistic interpretation and the results arrived at by means of other kinds of interpretation of law, literal, restrictive and expanding interpretations of law are analyzed. If the comparison of the results of linguistic interpretation with the results of other kinds of interpretation confirms the scope of the former then we have literal interpretation. If the comparison of the results of linguistic interpretation with other kinds of interpretation leads to restricting the limits of the linguistic interpretation we have restrictive interpretation. Finally, if the comparison of the results of linguistic interpretation with the results of other kinds of interpretation justifies the expansion of meaning of the interpreted law we are dealing with expanding interpretation. Comparing results of different kinds of interpretation (linguistic with systemic and functional interpretations) may give rise to some doubts as to the language and form of their comparability. Ideally, we should construct some meta-language and meta-form of comparing interpretations of the linguistic, systemic, and functional aspects of law.

Classification of interpretations according to their legality, accordance with law encompasses the following types: interpretations in accordance with law *(secundum legem)*, interpretations outside of law *(praeter legem)* and interpretations contrary to law *(contra legem)*. This kind of classification of interpretations of law presupposes agreement as to what is in accordance with law, outside of law, or contrary to it, which is not so easy as it may seem. Generally speaking, in the case of interpretation in accordance with law the compared interpretations overlap. The case of interpretation outside of law may involve comparing the existing law both with materials connected with its preparation and other legal systems, e.g., the system of positive law with the system of common law. According to the Swiss civil code if there is no positive law the judge ought to apply customary law, respecting the doctrine and tradition. Going outside the existing law may be justified, though this is always questionable, by its ambiguity or contradictoriness with the interpreter's intentions. Finally, decisions to accept interpretations contrary to existing law can be based on the broadest spectrum of compared laws that is difficult to represent in an abstract way.

The existing theories of legal interpretation can be descriptive or normative in character. Descriptive theories of interpretation of law offer comparative analysis of its different interpretations, e.g., in terms of the subject, content, language, system, or function. If they formulate prognoses of the interpretations of law they do not regard them as binding. Binding directives come from normative theories of legal interpretation which indicate the values that a given interpretation ought to take into account. The static versions of the normative theories of legal interpretation adopt such values as the constancy of law, certainty of law, constancy of meaning of legal regulations, legal security, the rule of law. On the other hand, according to the dynamic theories of legal interpretation the changeability of law is a value if it is brought about by the changing social needs which law ought to serve. Obviously, on a higher level of comparative thought it is possible to compare descriptive theories of legal interpretation with normative theories, and dynamic and static theories within the latter.

THE UNIFYING FUNCTIONS

There are connections between comparative law and the unification of law, understood as the uniformization of the existing law in a given country, group of countries which constitute a certain region, or even on a global scale involving all countries of the world[11]. Apart from the geographical scope other domains of unification can be differentiated. Unification can be complete or partial, bilateral or multilateral, intended or spontaneous. Each case calls for comparative studies without which it would be impossible to define the similarities and differences among the laws subjected to unification and choose the most appropriate solutions for all parties involved in the process of unification. Undoubtedly, the unification proceeds more easily if the laws involved exhibit some similarities. The principal task consists in reducing the differences of these laws to legal norms that they share.

Although tendencies towards unification have manifested themselves throughout the history of political and legal thought, it was only at the turn of the nineteenth century when these tendencies assumed a more organized and practically significant character. The pioneers of comparative law considered the unification of law on a global scale. Similar thoughts were contemplated by the makers of many international organizations. At present, a more realistic approach seems to predominate; it manifests itself in the unification of laws of federal states, regional and global unifications, which are only partial, having been enforced by immediate dangers. So far unification has reached the following branches of law international public law, international private law, commercial law, industrial law, transport and communications law, copyright law, and space law.

The main factors conducive to the unification of law are the tendency to increase the security of legal transactions in international relations and the tendency to eliminate complications arising from the use of norms of conflict law. Final unification can be arrived at by the gradual assimilation of laws of states belonging or forming a federation, alliance, agreement, pact, etc. One can distinguish forced and voluntary assimilation. The former can be illustrated by expansion combined with the imposition of the conquerer's laws, annexation, colonization, territorial gains. Sometimes in such situations these-called mixed laws come into existence which combine elements of local and foreign laws, e.g. the combination of local law with elements of common law in Sri Lanca and Puerto Rico. Voluntary assimilation can be exemplified by major or minor borrowings in legislation and the reception of law.

Attempts at the unification of laws by means of reception usually encounters difficulties. As a rule, reception cannot eliminate completely traditional local-laws, e.g., customary laws, especially in a rural environment. In those African countries which reached for foreign models population continues to accept customary law whilst rejecting the received law. This legal dualism, the concurrent existence of two different legal cultures is not conducive to the rule of law and produces undesirable consequences as far as sense of law, its interpretation,

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11 For a bibliography see *ibid*, p. 633 ff.

application, and execution, etc, are concerned. It provides an interesting object of comparative studies in itself.

Despite obvious advantages that the unification of laws can sometimes offer, the tendencies towards unification encounter serious opposition and many obstacles. These include prejudice (political, nationalistic, cultural, religious, and racial; xenophobia of the public opinion; lawyers who distrust new laws whose scope is not restricted to their own country; difficulties in applying uniform law in different social conditions. "It seems that what is missing most is cooperation among lawyers and universalistic attitudes on the part of lawyers and representatives of the doctrine"[12]. Consequently, the unifying function of comparative law does not occupy a major position in the hierarchy of its functions. Calls for radical unification are replaced by the more moderate postulates of harmonization, adjustment, or coordination of laws of different countries[13].

IDEOLOGICAL FUNCTIONS

Scientific comparative law performs mainly non-ideological functions. Its cognitive methods which belong to heuristic methods realize the cognitive needs of legal studies and their contribution to the formation of new laws is less significant. In the days of coexistence of opposing political systems and ideological confrontation comparative law can play a major role in the shaping of international sense of law. On the whole, the weaker the pragmatic functions of comparative law, the stronger its ideological functions and vice versa. Of course, the realization of particular pragmatic functions of comparative law determines, as a rule, the significance of its ideological functions.

In comparative considerations the description of the forms of law subjected to comparison usually goes hand in hand with their evaluation. Comparative law cannot avoid value judgments because they constitute its very essence, which is stressed especially by socialist thinkers. Socialist comparative thought evaluated legal phenomena on the basis of their relations with the objective laws of social development. Formulating such evaluations of law as a political phenomenon, socialist thought invariably combined them with ideological problems. Comparing, different political solutions took place at the point of intersection of political theory and practice. The judgments of the theorists could encounter resistance on the part of politicians, and politicians could influence the evaluations made by the theorists. The conceptions of the theorists were often ahead of the common opinion but they also used to be verified negatively in practice.

Ideological evaluations determine the development of comparative law, the results of comparing laws can affect the transformation of ideological evaluations. The division of the world into the capitalist and socialist blocs of countries after the Second World War faced comparative law with a rather funda-

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[12] M. Ancel: *Znaczenie i metody prawa porównawczego* [The Significane and Methods of Comparative Law], Warszawa 1979, p. 112.

[13] J. Szabo: *Le droit comparé de nos jours*, (in:) *Tendencies and Functions of Comparative Law in Contemporary Society*, Budapest 1971, p. 140.

mental methodological problem derived from ideological assumptions. It was often formulated as a question: "can legal systems of socialist countries be reasonably compared with those of the capitalist countries?". The problem divided the scholars of socialist and capitalist countries into the supporters and opponents of such comparisons.

For a long time the dominant view in the Soviet Union was that the only legitimate function of comparative law was to demonstrate the superiority of socialist (Soviet) law over all other kinds of law, especially capitalist law. Those who maintained this position relied on the Marxist principles and tried to demonstrate the qualitative superiority of the origins, contents, form, and functions of socialist law over all other types of law. This extremely reductionistic conception of the role of comparative law met with opposition not only from theorists in capitalist countries but also from some socialist countries. They argued that the Soviet conception would lead to the decline of comparative law[14].

Although in other socialist countries socialist law was regarded as essentially different from other kinds of law, the differences were seen as implicit premises of their comparability. Without abandoning the thesis of the superiority of socialist law over the capitalist one it did not define the scope of comparative studies. Moreover, it was acknowledged that capitalist law solves some of the problems of the countries in which it exists.

Western scholars also expressed contradictory opinions about the use of comparing capitalist law with its socialist counterpart. Oto Bilinsky regarded such comparisons as practically useless, theoretically futile, and ideologically meaningless. On the other hand, Loeber and other equally outstanding theorists of law stressed the usefulness of comparing laws of different types, which he regarded as a legitimate activity. He pointed to the similarity of many real social and legal needs of the citizens regardless of differences in political systems and ideologies. The fact that different types of law aim at fulfilling these needs makes them, according to him, comparable.

In 1970's the moderate view which allowed making comparisons between socialist and capitalist law gained currency in comparative law. Differences between these two types of law came to be regarded as interesting material for comparison. It was stressed that there is a group of branches of law, called imprecisely private law (e.g. family law, copyright law) where the differences are less striking. There is also a group of branches of law belonging to the so-called public law (e.g. constitutional law, administrative law, arbitration law, and industrial law) where the differences are fundamental in nature. In the first group the scope for comparison is greater, in the second smaller, but in both cases comparative studies are possible and even desirable for the proper development of law and legal thought.

There is evident incoherence between the cognitive and ideological functions of comparative law. The realization of the former demands that the laws subjected to comparison are analyzed in terms of differences or even oppositions.

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[14] See *The Comparison of Law*, ed. by Z. Peteri, Budapest 1974, p. 45 ff.

When transferred to the level of ideological functions these differences between the compared laws tend to be used for propaganda purposes when the superiority or inferiority of one type of law over another is stressed. As the long history of law and politics tells us all talk about superiority or inferiority produces tensions between the parties involved and undermines the normal exchange of scholarly ideas. At the same time, it can be argued that the demonstration of superiority or inferiority of the compared laws may belong to important cognitive functions despite the unquestionable ideological context. Only the accepted superiority of one type of law elevates it the status of a model, and the inferiority of another type ought to be conducive to its change.

However, it must be stressed that the majority of scholars accepts the thesis of the (axiological) equality of all laws regardless of the sometimes far-reaching differences between them.

Ideological connections of different systems, and especially of families of law are very complex. Despite the predominance of schematic views that capitalist law is pervaded by the spirit of individualism and socialist law by the spirit of collectivism, the latter is related to Roman law which is far removed from socialism in its genesis. "Since the only or principal aim of comparative law is no longer the construction of common global law and the scope of comparative studies begins to encompass different socio-economic and political structures, lawyers from the East and West can enjoy all the benefits of mutual acquaintance and cooperation."[15]. Consequently, comparative law which used to be regarded as a curiosity, a sophisticated entertainment for amateurs, or at best as a useful way of studying national laws, is gradually becoming almost a political necessity. It is interesting to observe that the increased emphasis on ideological contradictions between the opposed political blocs was accompanied by the call for equal treatment of laws of all countries on the part of scholars studying comparative law.

The recent crisis of the socialist system which has begun in 1980's poses new tasks for comparative law, especially those connected with the unification of law on a regional and supra-regional scale.

STRESZCZENIE

Komparatystyka prawnicza, spełniając określone funkcje, służy osiąganiu pewnych celów, uznawanych za pożyteczne. Spełnia ona określone funkcje przez to, że dokonują się w niej czynności o możliwych do opisania wynikach końcowych. Funkcje komparatystyki prawniczej odznaczają się świadomym, racjonalnym, z góry zamierzonym charakterem. Ze względu na hierarchię zadań należałoby odróżniać jej funkcje podstawowe od funkcji ubocznych, pozytywne od negatywnych, długoterminowe od krótkoterminowych, stopniowalne od niestopniowalnych. Możliwe są też inne podziały dychotomiczne funkcji komparatystyki prawniczej

W koncepcjach komparatystyki prawniczej, pojmowanej jako odrębna dyscyplina nauk prawnych, funkcje uznawane są za jej elementy składowe, wynikające z charakteru przedmiotu objętego zakresem zainteresowań. Podzielając ten pogląd znajdujemy dostateczne uzasadnienie dla ujmowania funkcji komparatystyki prawniczej w następujące grupy: poznawcze, dydaktyczne, legislacyjne, interpretacyjne, unifikacyjne i ideologiczne.

[15] M. Ancel: *op. cit.*, p. 102.