# SEVERAL ASPECTS OF THE COMPARATIVE METHOD IN LAW

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***Abstract:*** *The aim of the text is a closer analysis of the main method of comparative law and its individual aspects. It approaches the method from a broader perspective and points out its basic features, as well as a non-uniform view of the method itself and the perspectives of its further variations.*

***Keywords:*** *comparison, functionalist approach, tertium comparationis, pluralism of methods*

## INTRODUCTION

Similarly to other social sciences, the legal science was gradually becoming institutionalized during the 18th and 19th century. This science continuously systematized its knowledge about its prime subject of interest – the law, which has been studied from different aspects. Since law is a multifaceted phenomenon, it is necessary to distinguish its individual areas and features and to formulate specific questions of interest that explain its individual aspects. These become the basic subject of various disciplines of legal science. Concurrently, individual disciplines are being profiled under the influence of relevant legal-philosophical concepts, other disciplines of legal science, as well as under the influence of other social sciences (sociology, philosophy, history, psychology, political science, etc.). They form together a coherent system of knowledge of law, its essence and principles, and they explain the purpose of law in society, the mechanism of its operation, its creation and other aspects of the existence of law. Therefore, in the process of learning about law, the theory contributes to the development of the level of scientific legal thinking.

However, legal science is not only a system of knowledge, but it is also a system of procedures and methods by which that knowledge is acquired. The theoretical mastering of legal reality and progress in this process is accomplished by the adequate application of particular methods so that they lead to the scientific clarification of reality. The ways and means of scientific cognition and the principles of scientific inquiry are clarified by the methodology of science. It represents a theory of scientific cognition that studies the processes and ways of knowing and shaping objects that are the subject of specific scientific disciplines. Methodology is therefore basically seen as an empirical science, the object of which is the creation of science itself.[1]

Individual legal-theoretical disciplines theoretically master legal reality, specializing in specific aspects of the phenomenon of law. This process is characterised by a unity of content and methods and approaches to that content, i.e. the set of methods used is dependent on the nature of the object under study. Thus, the overall set of methods used ultimately varies depending on the nature of the subject of study.

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[1] FILKORN, V. *Introduction to the methodology of sciences.* Bratislava: SAV, 1960, p. 72.

Legal science (or social sciences in general) provides a set of basic theoretical methods that are generally applied in all disciplines, regardless of the specifics of the object of study. The most common methods are analysis and synthesis, induction and deduction, and abstraction. Alongside these, individual disciplines are often characterised by their underlying methods. Comparative Law, as one of the specific disciplines within legal science, is characterized in particular by the fact that it uses the comparative method as the main method in its study of law.

## 1. BASIC METHODOLOGICAL BACKGROUND

The method of science, in the sense of the considerations outlined above, is determined by the object of study. The nature and properties of a given object indicate the ways in which it will be studied. The object of study of legal disciplines is law in the broadest sense of the word. In a narrower sense, Legal Comparative Study always examines several objects of legal reality at the same time. Most often two, but there can be more. From the narrower object of inquiry thus defined, it logically implies that these objects will be primarily subjected to comparison with each other.

Comparison itself is one of the most elementary cognitive procedures. From early childhood, the individual compares the facts that surround them, evaluates the similarities and differences between them, categorizes and systematizes them, and this process significantly helps one to get to know the world in which one lives. Since time immemorial, this procedure has also been used in connection with law for both theoretical and practical reasons. As early as in antiquity, there were works in which philosophers compared selected elements of a system of law, both domestic and foreign. Comparisons can be found, for example, in Aristotle, who in Politics compares the constitutions of the most important city-states of the world at that time – Athens, Crete and Sparta. For the purposes of legislative practice, even such great legislators as Lycurgus, Draco or Solon[2] visited foreign states and studied their law. Notable collections and studies containing comparisons also appeared later, but comparison as a method has been systematically applied since the creation of the legal comparative studies.

The methodology of comparative legal scholarship in the period after the First Congress of Comparative Law was elaborated and developed by Professor Ernst Rabel. He is considered the founder of the functionalist method, which is not reduced to the theoretical definition of methods, but focuses primarily on legal facts in different legal systems and compares their solutions for specific cases. The essence of the functionalist approach is primarily the identification of specific social functions of legal rules. In doing so, it does not limit itself to comparing official legal texts, but also considers ways of applying and interpreting their content.[3] Rabel comments on this: *"Rather than comparing fixed data and isolated paragraphs, we compare the solutions produced by one state for a specific fac-*

[2] SCARCIGLIA, R. A Brief History of Legal Comparison: A Lesson from the Ancient to Post-Modern Times. *Beijing Law Review*. 2015, Vol. 6, No. 296-310, pp. 298 et seq, [2023-01-16]. Available at: <DOI: 10.4236/blr.2015.64026>.

[3] FROHLICH, A. Comparative Law History. In: *comparelex.org* [online]. [2023-01-16]. Available at: <https://comparelex.org/category/comparative-law-history/>.

*tual situation with those produced by another state for the same factual situation, and then we ask why they were produced and what success they had.*" (Rabel in "Fachgebiete des Kaiser Wilhelm Instituts" at 187 as quoted by Gerber, Sculpting the Agenda of Comparative Law, 199).[4]

The functionalist method is nowadays still seen as a basic, popular and often overused method in comparative procedures. It is the subject of many scholarly texts that discuss the meaning and place of functionalism in Comparative Law. On the other hand, this method is far from uncontroversial, and several "alternatives" to it have emerged over the last decades: comparative law and economics, numerical comparative law, cultural comparative law... etc.

It would probably be more accurate to consider the functionalist approach as a principle rather than a method or technique. The comparison itself is a methodological procedure and it does not seem appropriate to "superimpose" it on another method. The functionalist approach corrects the method of comparison. Therefore, in the actual comparison, it may not be at all certain whether the functionalist approach will be applied.[5]

The renowned comparatists Konrad Zwigert and Hein Kötz, in their textbook *An Introduction to Comparative Law*, also consider functionalism as a starting point for comparative law. It is, in their view, the basic principle from which all other procedures and rules derive, such as the selection of the objects to be compared, the scope of the comparison, the construction of the system of Comparative Law itself, and more. As they state further: *"Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function. This proposition may seem self-evident, but many of its applications, though familiar to the experienced comparatist, are not obvious to the beginner."*[6]

In accordance with to the functionalist approach, the law of different countries can be compared by finding a common social issue and identifying different legal solutions thereto. These solutions can be found in conventional sources of law, such as legislation, legal textbooks and court judgements, but can also be provided by non-legal sources. Different solutions to a common social issue arise from different factors related to national sovereignty, historical and territorial specificity of the law of a given region.

Obviously, different legal systems face very similar issues, and although they (often) address them by different means, they generally arrive at very similar final solutions. In different legal cultures, people generally have similar attitudes towards certain life situations, such as childcare, respect for property rights, fulfilment of contractual obligations, compensation for damages, etc. The practical solutions to similar issues in these areas are therefore likely to be similar, although the legal institutes by which these phenomena and situations are expressed may differ. However, institutes, even doctrinally distinct ones, are comparable if they are functionally equivalent, provided they perform similar functions in different legal systems.

[4] Ibid.
[5] PLATSAS, A. E. The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks. *Electronic Journal of Comparative Law*. 2008, Vol. 12, No. 3, [2023-01-16]. Available at: <http://www.ejcl.org>.
[6] ZWEIGERT, K., KÖTZ, H. *An Introduction to Comparative Law*. 3rd edition. Oxford: Oxford University Press, 2011, p. 34.

Therefore, it is necessary for comparatists not to think in terms of their own legal order (with regard to the methods of legal regulation used) but to carry out the comparatist study on a purely functionalist basis. For example, instead of asking the question: *"What formal requirements are there for sales contracts in foreign law*", it'd be better to ask *"How does foreign law protect parties from surprise, or from being held to an agreement not seriously intended?*"[7] The functionalist principle offers a particular guideline, according to which it is necessary to focus on (common) legal issues and legal solutions in the compared legal order rather than on (different) rules and doctrinal frameworks. It emphasises the comparison of ways of dealing with practical issues, especially in the case of conflicts of interest.

The functionalist approach itself may have special applications. Jaako Husa points to its structural dimension, in which if structurally similar elements are found, the research focuses on explaining their socio-legal functions in the legal systems under study or how they originated and acquired their current form. It is actually a question of examining legal architecture, since modern private law codes have been built with the same bricks (mostly Roman law rules, principles, institutes and doctrines), but according to a different architecture. Husa continues to consider the alternative of a systemic approach, in which a particular legal institute (or structural part of a given system) is "isolated" from its national context and confronted with solutions to the same socio-legal issue in another legal system being compared. If the object under examination is also contained in the legal system of the entities carrying out the comparison, the systemic comparison provides an insight, as it were from the outside, into their own national solution and an assessment of the question of how the domestic law approximates the corresponding provisions in other legal systems. Finally, he mentions critical study approaches influenced by the postmodern outlook, which tend to be critical of both method and content.[8]

The opposite of the functionalist principle is formalism, which focuses on individual rules, compares only the wording of the text of the legal norm, or its content, without taking into account the aim or purpose of the legal regulation and its effect in social practice. However, the formalist approach itself may also have its uses and offer interesting results, possibly clarifying other aspects, such as what type of sources of law each norm is included in, differences in legal style and legal concept, etc.

## 2. COMPARISON

We view the comparison itself as a method of detecting identical or different properties of the objects under study. Its essence is the mental operation of comparing selected objects, the result of which is to determine whether the compared objects are identical, similar or different. Its use therefore presupposes an analysis of the objects to be compared, including a description of the features and characteristics that will be taken into account in the comparison.

[7] Ibid. Similarly also Van HOECKE, M. Methodology of Comparative Legal Research. *Law and Method.* 2015, Vol. 4, No. 12, [2023-01-16]. Available at: <DOI: 10.5553/REM/.000010>.
[8] HUSA, J. *A New Introduction to Comparative Law.* Oxford: Bloomsbury, 2015, pp. 117–135.

It is a general method of cognition, applicable in all branches of science. At the same time, it is an integral part of some other methods – e.g., the method of observation, the method of experiment, the genetic method, the historical method, and others.

Traditionally, a four-step process of comparing is being mentioned. The first and at the same time preparatory phase is the preliminary considerations, which, taking into account the functionalist approach, identify the range of issues and then identify which legal institutes or standards will be the subject of the comparative analysis. The second step is the description of the selected objects. Consequently, the comparison process itself is carried out, i.e. the similarities and differences of the compared objects are identified, which are critically evaluated in the final phase, explanations are provided and, if necessary, recommendations for the practical use of the obtained knowledge are made.[9]

## 2. 1 Comparison scheme

An important element of comparison is the *tertium comparationis (lat. the third part of the comparison)*, which represents a common feature, a common denominator, a feature, trait, or characteristic of the objects being compared. It is considered a unifying element of comparison. It basically defines the area of comparison. It can also be seen as a common superordinate concept involving elements of comparison. The success of the comparison presupposes an appropriate *tertium comparationis*, so as to allow a reasonable comparison. The clarification of this element of comparison presupposes the clarification and analysis of the compared objects, proceeding by way of penetrating from the phenomenal aspect to their essence, i.e. starting from the phenomenal form of the compared object and proceeding to the action of the object in society – to its function. After this three-level analysis (i.e. from the form, its functioning, to the very essence of the law, i.e. the social relations regulated thereby), we can determine the common elements in the essence of the compared phenomena and identify a common general concept – *tertium comparationis*, as a common comparative basis.

Simultaneously, the *tertium comparationis* is an element of the ternary comparison scheme. The first element is the *comparandum*, the element being compared, i.e. what is being compared, usually the object of research interest. The second element is the *comparatum,* the comparative element, i.e. that with which the *comparandum* is compared. The third element of this scheme, the *tertium comparationis*, ensures reasonable comparability of the elements.[10]

## 2.2 Comparability

In light of the above, reasonable comparability of the selected objects presupposes the existence of one or more common denominators, or common attributes, and in this sense the *tertium comparationis* guarantees comparability.

Zweigert and Kötz consider convergence at the functional level as a comparability criterion. In this respect, even different institutes, principles, and rules serving similar pur-

[9] E.g. SIEMS, M. *Comparative Law.* 2nd edition. Cambridge: Cambridge University Press, 2018, pp. 15–30.
[10] E.g. KNAPP, V. *Velké právní systémy. Úvod do srovnávací právní vědy.* Praha: C. H. Beck, 1996, p. 3.

poses can be meaningfully compared.[11] Especially when they share the social, political or economic values and principles through which societies strive for progress.

In the comparative study literature, there are also reflections on the limits of comparability, e.g. it is pointed out that systems that are too different (e.g. ideologically and culturally very distant systems) cannot be compared in a meaningful way. You can't compare apples to oranges. However, it depends on the level of generalization, as both components are comparable within the fruit context as *tertium comparationis*. Similarly, across individual legal systems, the basic common features of law allow for comparability. The question remains, however, what is the significance, either from a theoretical but above all from a practical point of view, of comparison in such a broadly and generally defined *tertium comparationis*.

The properties of similarity and dissimilarity are a condition for the comparability of objects. Similarity is the simplest and most inevitable relationship, which is perhaps the first necessary condition of knowledge. It is a relationship between at least two phenomena that have some common elements. This means the identity of certain elements being compared, such that at least one of the elements of the units being compared is identical and at least one of the elements is not identical. It exists due to dissimilarity, because in order for objects to be similar (not identical) they must also contain dissimilarities.

Difference is the negation of identity; it manifests itself in differences, in the fact that there is an element in the content of the object being compared that is not found in the other object. Comparison is based on the fact that the phenomena being compared have a common denominator (*tertium comparationis*) at some level. The comparability of objects is given if the compared objects are subsystems (or are subordinate) of a more general (superior) object and this relation of superiority and subordination has a reasonable sense.

In the spirit of universalism and unification, the presumption of similarity of legal systems is emphasized in the comparatist literature. This view is based on human nature and, in this sense, it is clear that the underlying issues identified by the different systems are generally similar and similar solutions are offered to eliminate them. While there are differences in the ways in which different solutions are achieved, the essence of the solution is often similar.[12] The basic functionalist approach thus leads to the assumption of a common epistemological understanding of what is meant by "law" across legal systems.

When considering comparability, we must also take into account the fact that phenomena or objects may be similar in some respects but different in other respects, so we must always be clear about the objectives and perspectives from which comparisons are being made.

Comparability is thus dependent on the *tertium comparationis*, but some other assumptions of comparison have to be taken into account – e.g. the number of objects to be compared.

[11] ZWIEGERT, K., KÖTZ, H. *An Introduction to Comparative Law.* 3rd edition. p. 34.
[12] MOUSOURAKIS, G. *Comparative Law and Legal Traditions.* Cham: Springer, 2019. pp. 117–120.

## 3. METHODOLOGICAL PLURALISM

### 3.1 The key methodological approaches

While in its early days comparative studies concentrated on the functionalist principle, it now emphasizes a pluralistic view of individual methodological approaches. It presents a set of tools that includes the following methodological approaches:

The basic and starting point is the functionalist approach, which, as outlined above, focuses on real societal issues (e.g. a train accident) and the ways in which different jurisdictions address them (e.g. how they compensate the victims of that accident). While this is a basic principle it is not entirely unproblematic. It is pointed out that it was created in theory and it is not always certain how it can be applied in practice. There are no specific instructions on exactly how to apply it. This is an abstract concept rather than a practical guide to comparison. The presumed universalizing function of this approach, in particular due to the presumption of similarity, may also limit the relevance of legal comparative studies itself.[13]

The analytical method analyses (complex) legal concepts and norms or individual institutions (e.g. property, contracts, insurance, etc.) in different legal systems in order to identify their common features and differences.

Functionalism is symptomatic for micro-comparison. From a broader perspective, the structural analysis is applied, which is also usually presented as an alternative to the functionalist approach. The structural method focuses on the structure of the elements hidden within the observed phenomenon reconstructed using an analytical approach. The structural approach has been the basic starting point for classifying Major legal systems or legal families. Differences between legal systems at the level of specific rules have proven to be irrelevant if they share a sufficient number of common structural features (e.g. Roman law principles and concepts in private law). The selection of the most relevant criterion is always important for the result.[14]

An essential part of the comparative method is the historical method. The historical-comparative approach traces individual phenomena in development, recognizing the different developmental stages of the same phenomenon, or even of different phenomena existing in different developmental stages. It allows a better understanding of qualitative changes, internal structural changes and individual patterns of development. In the process of comparing different legal families, this method will be an essential component for understanding the place and significance of deeply rooted traditions in traditional and religious legal systems, as well as the significance of particular historical events for the emergence and shaping of particular solutions. The historical method can reveal and at the same time clarify individual similarities or differences at a deeper level, compared to a simple analysis of objects in the current era.

The law-in-context method focuses on the contemporary social context of law, including the fields of culture, religion, economics, psychology, etc. Compared to the function-

[13] More e.g. PLATSAS, A. E. *The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks*. pp. 13–14.
[14] Van HOECKE, M. *Methodology of Comparative Legal Research*. pp. 11–16.

alist approach or the analytical method, it draws on a broader context, applying insights from other social disciplines. As Van Hoecke points out, even this method cannot be isolated from other methodological approaches, as they are complementary and together lead to an adequate understanding of law. While some forms of analysis may be carried out at an abstract, conceptual level, both functionalist and structuralist approaches by their very nature inevitably involve some degree of consideration of the legal context.[15] Concurrently, a law-in-context approach often requires the use of knowledge and methods from other social sciences, especially history, economics, political science, sociology, anthropology and others. Social science methods are then used as a tool within the comparative method.

In the second half of the 20th century, new initiatives emerged with the aim of finding a common core among legal systems in different areas (primarily, however, at the level of the fundamental institutes of private law), which were subsumed under the notion of the common-core method. Research projects taking this aspect into account were and are particularly relevant in the context of a unifying Europe. The search for a common core of law in Europe presupposes the identification of its elements within the individual Member States of the European Union in order to successfully harmonise the law.

Most of these methods or approaches force one to proceed from the external phenomenal aspect of the objects being compared to a deeper level of comparison.

### 3. 2 Comparison levels

The choice of methodological approach depends on a variety of factors, particularly the research questions themselves, the research objectives and the hypotheses. One of the factors is the level of chosen comparison. The most commonly applied levels are as follows:

*a) macro and micro level*

As V. Knapp mentions, macro comparison is most often implemented according to different legal styles and provides a distinction of Major legal systems or legal families. Micro-comparison involves comparing smaller sets, most often legal institutes or individual legal norms.[16]

*b) basic general (theoretical) level*

It is a deeper level within which legal culture, legal reasoning, judicial decisions, legal doctrine, legal professions, etc. are learnt and compared. It has a strongly theoretical dimension and applies mainly analytical and historical approaches.

*c) law in action vs. law in books*

The comparison of legislation in relation to the decisions of the bodies applying the law is important for the knowledge of the law, as practice may deviate from the content of the written law. In traditional legal cultures, customary law and traditions must also be taken into account.

[15] Ibid., p. 16.
[16] KNAPP, V. *Velké právní systémy. Úvod do srovnávací právní vědy.* p. 24.

*d) surface level vs. deep level*

Often a deeper level is required for an adequate comparison. When comparing law in radically different legal cultures, it is clear that a meaningful comparison will require a deeper level and the use of other social science methods, such as anthropology.

*e) doctrinal framework vs. underlying legal culture*

The comparison requires consideration of an aspect of the influence of the basic doctrinal framework, which is currently determined in the field of civil law by the world's three main legal systems, namely the Anglo-American, the French and the German. These systems, for various reasons (but mainly due to colonisation), have influenced the shape of law for a large part of the world's population. At the same time, however, these influences have been embedded in the specific cultural framework of each system, which can lead to peculiar interpretations and applications.[17]

## 4. THE IMPORTANCE OF LEGAL LANGUAGE IN LEGAL COMPARATIVE STUDIES

A key issue in the process of comparative law is the question of the language in which the objects being compared are expressed. This is because the most often are compared legal solutions that are expressed in different languages. Therefore, one of the most frequently asked questions is – shall we translate or not? This issue can be divided into the problems of translating European Union law and the problems of translating other foreign law and legal texts.

The European Union has created a unique legal system in which many institutions and constructs have no equivalent in national legal systems, so legal terminology can be created in a way that may not take into account the meaning of a given term in national legal terminology. Interpretation of Community and EU law in practice has its own specificities, and in the process of applying the law, often in the case of ambiguities and inaccuracies, there is a need for comparative linguistic interpretation, i.e. the interpretation of an unclear version of Community law in the domestic language on the basis of its comparison with the English, French or German version. The obligation of comparative linguistic interpretation in the process of application of the law places considerable demands on the judges of the general national courts in particular.

The issue of translating non-EU foreign legal and legal texts is becoming more and more important nowadays due to the significant number of persons affected by cross-border legal proceedings, and this number is expected to increase. The biggest issues in these relationships are caused by so-called untranslatable terms, which are usually untranslatable mainly because the institutes they refer to simply do not occur in the legal system of the language into which they are translated. The rule in this context is that terms are not translated but substituted with suitable equivalents, which are often impossible to find. In solving the problems of the lack of a suitable equivalent, the following options are offered – to leave the term in its original wording, to describe it, or to introduce a neologism. All these options have

[17] Van HOECKE, M. *Methodology of Comparative Legal Research*. pp. 22–25.

their pitfalls. It may not even be simpler, and usually not even in systems where the same national language is used (e.g. German, English, or French), as the legal and juridical language of these countries usually differs, e.g. by different terminology, but also by stylistic, syntactic, and lexical differences – the differences in the legal language of Germany, Austria, and Switzerland are classical examples of this. To overcome the difficulties in translating legal terms or identifying them (especially in the field of justice), a variety of programmes and activities are emerging, most of them at the European Union bodies.

In the comparatist literature, opinions have long been emerging that favour the need for a common legal language as a prerequisite for European legal unification. At the level of legal theory, the development of a scientific meta-language is being considered as a tool for the comparison of law. The conceptual apparatus of this language could permeate national legal systems and become a common legal language, as the need for a common language emerges not only at the level of theory but also at the level of practice. This is a broader issue, also affecting legal language and legislative practice. It seems that the essentials of such a common language are already forming, and legislators are relying mainly on Roman law terminology, as well as on the concepts of individual national legal orders (especially French, German, English), in order to develop it. Concurrently, as mentioned above, they also create completely new concepts, denoting new as yet unknown legal institutes.[18]

## 5. RETHINKING OBJECTIVES AND METHODS

Contemporary legal comparative studies, according to some authors, needs new impulses and also needs to address certain "developmental issues" that have emerged in it. For example, according to David Gerber, there is currently an obvious split in the correlation between goals and objects on the one hand and methods on the other. As a result of the development of society and law, new issues arise and the methods currently used provide only limited possibilities in the process of their investigation. The methodology of Comparative Law should undergo an inevitable process of revival, while the author sees the basic deficiency in the absence of the language of legal comparative studies. The said absence of the language of comparative legal scholarship is a consequence of pursuing goals that do not generate its creation. Their common feature is that they are norm-centred and do not pay enough attention to the dynamics of individual systems and the understanding of the processes that take place within them.

Changing social conditions bring the need to formulate new objects and goals in Comparative Law and corresponding methods, which D. Gerber divides into three categories:

- The first is scientific – and asks for new insights into HOW legal systems work,
- The second is related to practice and concerns the application of scientific knowledge in legal practice and for policy purposes,
- The third involves the transfer of information on legal systems.

[18] For more details see TÓTHOVÁ, M. Interpretation of law and legal language. In: R. Dávid – D. Sehnálek – J. Valdhans (eds.). *Dny práva – 2010 – Days of Law,* 1st edition. Brno: Masaryk University, 2010. Available at: <http://www.law.muni.cz/content/cs/proceedings/>.

A better understanding of how legal systems work remains a central objective and the basis for successfully addressing other issues. Much broader analytical framework is necessary to answer these questions – constructed in a language designed specifically for the analysis of the functioning of legal systems.[19]

[19] GERBER, D. J. System Dynamics: Toward a Language of Comparative Law? In: *kentlaw.edu* [online]. [2023-01-16]. Available at: <ww.kentlaw.edu/faculty/dgerber/publications/system_dynamics.pdf>.