Some Reflections on the Comparability of Laws Based on Different Socio-economic Systems

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1 Introductory Remarks

This short paper discusses, in a concise and somewhat simplified manner, one of the most central methodological issues of comparative law research, namely the issue of comparability, in particular the question of comparability of laws of countries with different socio-economic systems (such as a planned economy or market economy). This question was much discussed a few decades ago, primarily with regard to the comparability between the socialist law of communist-governed countries and Western (capitalist or bourgeois) law. Due to the collapse of the economic and political system of the communist regimes and their replacement with political democracy combined with a market-oriented economy, the issue of that particular comparability has lost most of its immediate relevancy. However, similar questions may reoccur in the future and they may also come up in connection with the comparison between Western law and the law in certain developing countries with a predominantly feudal society. The discussion on the comparability between Western law and socialist law is, in addition, rich in tradition and of such a great general comparative interest that in my opinion it deserves a short discussion even today.

2 Comparison and the Problem of Comparability

It is the comparison that is the essence of comparative law: this means to place comparable elements of two or more legal systems against each other and determine their similarities and differences.[1] The comparison can be of many kinds: it can be bilateral (between two legal systems) or multilateral (between more than two legal systems). It can be a rules-oriented microcomparison (between substantive rules dealing with a specific legal problem) or a macrocomparison (between whole legal systems in their entirety or between entire families of legal systems). It can compare laws of societies sharing the same cultural and socio-economic features (intracultural comparison) or societies fundamentally different in these respects (cross-cultural comparison).

The value of rule-oriented microcomparisons has been contested by some authors, who consider comparisons based on substantive rules of law to be trivial, of no real significance and a waste of "intellectual horsepower".[2] In fact

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1 The comparison is, however, not the only task of comparative law, which includes, in addition, the processing of the similarities and differences that have been ascertained, for instance by explaining their origin, evaluating of the solutions utilized in the different legal systems, grouping of legal systems into families of law, or searching for the common core of the legal systems, as well as the treatment of the methodological problems that arise in connection with these tasks, including methodological problems arising in connection with the study of foreign law.

2 *See* e.g. Merryman, interviewed by Legrand in 47 American Journal of Comparative Law pp. 4, 46 and 63–64 (1999). *Cf.* also van Hoecke & Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: towards a New Model for Comparative Law*, in 47 International and Comparative Law Quarterly pp. 495–536 (1998), on p. 495.

however, most comparative legal research is rules-oriented and it is a relatively very small group of legal scientists who prefer solely to focus on and compare the general legal and social features of whole legal systems, such as their systems of sources of law, legal institutions and legal culture. Both macrocomparisons and rule-oriented microcomparisons can be scholarly or trivial depending on their quality, but to generally declare the former to be scientific and the latter to be trivial is nonsensical.[3] Comparing how two or more legal systems deal with a certain particular problem of substantive law does not of course mean mechanically comparing the wording of statutes or judicial statements, but rather comparing the *real* rules, which presupposes the taking into account, *inter alia*, the general features of the legal systems under scrutiny.

For a comparison to be meaningful, the two objects of the comparison (*comparatum* and *comparandum*) must share some common type of characteristics, which can serve as the common denominator. This common feature, constituting the third element of any comparison and therefore called *tertium comparationis*, is required not only for comparisons of law, but for any comparison in general. A Big Mac hamburger and a ride by train from Stockholm to Uppsala can, for instance, be compared in terms of price, as both are sold for money. It would, on the other hand, be less meaningful to compare them in terms of taste, as the train ride does not have such a feature.

Within comparative law, one is normally interested in comparing the substantive contents of the legal rules, or more specifically, how the various legal systems regulate a certain situation or problem that arises in both (or all) of the countries involved. Such a comparison requires that the legal rules being compared in fact deal with the same matter, constituting the comparison's *tertium comparationis*. When comparing legal rules from different countries one should consequently strive to compare those rules that regulate the same situations in people's lives. Whether two legal rules, which at first view appear to be comparable, in fact deal with the same problem will often not be apparent until one has begun the comparison. Consequently, one frequently begins with a working hypothesis that they are comparable. The conclusion in itself that the legal rules being compared do or do not concern the same thing will at times require extensive comparative work.

It is obvious that the use of an identical or similar term in the legal terminology of the two countries does not guarantee comparability. On the other hand, the legal rules may be comparable even when the differences between the legal terminologies are so great that one purely linguistically has difficulties to recognize the common problem.

If one wishes to ascertain the real similarities and differences between the substantive contents of two (or more) legal systems, one must consequently not pay much attention to the names and labels of the legal rules, but should instead consider the real or potential conflict situations that the rules being studied are intended to regulate. The compared legal rules and institutions must be comparable functionally, i.e. they must be intended to deal with the same

3 *See* Bogdan, *On the Value and Method of Rule-Comparison in Comparative Law*, in Festschrift für Erik Jayme, vol. 2, München 2004, pp. 1233–1242.

problem. The theory emanating from the realization of this rather elementary fact, often called "functionalism", defines the common problem as the comparison's *tertium comparationis*. To a certain extent, this necessitates a case-to-case approach to the comparison. One does not compare general or abstract notions and terms but rather how the compared legal systems regulate the same factual situations in real life, i.e. the same "segments of life". To ascertain whether two factual situations are the same or at least sufficiently similar in relevant respects is, of course, frequently a task that cannot be performed by legal research alone. Comparative law must regarding this crucial task in dubious cases rely on assistance from other social sciences, such as sociology, economics and anthropology.

For the purposes of his paper, it is important to realize that for two legal rules to be comparable, it is not necessary that they also are intended to achieve the same political goals. Consequently, abortion legislation in two countries can be compared even when the purpose of the legislation in one country is to limit the population growth and in the other country to promote it. Of course, knowledge of the different purposes of the legal rules being compared is unquestionably one of the important prerequisites for the understanding of the differences discovered by the comparison. The different purposes of the rules must also be taken into consideration at the comparative evaluations of the solutions used.

3 Comparability of Laws of Countries with Different Socio-Economic Systems

Certain legal authors in the then socialist countries regarded socialist law to be so different from the law in the Western countries that they were of the opinion that any comparison between the two was impossible or meaningless.[4] They argued that socialist law was a law of a totally new, "higher" quality and with an entirely new, revolutionary character, and that it was based upon an entirely new economic system and served entirely different class interests than the bourgeois legal systems. Socialist law and the law of the Western countries were said to fulfill different functions and, consequently, lack the *tertium*

4 *See* e.g. Szabó, *La science comparative du droit*, in Annales Universitatis Scientiarum Budapestiensis. Sectio Juridica 1964, pp. 91–134, on pp. 114–115; Tchkhikvadze & Zivs, *L'évolution de la science juridique et du droit comparé en U.R.S.S.*, in Livre du Centenaire de la Société de législation comparée, vol. 2, Paris 1971, pp. 581–600, on p. 596; Zivs, *La méthode de recherche comparative dans la science juridique*, in Acta Juridica Academiae Scientiarum Hungaricae 1971, pp. 175–180, on p. 177. *Cf.* Bobek, *Socialistická srovnávací právní věda*, in Bobek *et al.*, Komunistické právo v Československu, Brno 2009, pp. 401–424, on pp. 405–416 ; Hazard, *Socialist Law and the International Encyclopedia*, 79 Harvard Law Review pp. 278-302, on p. 279 (1965–1966), and in *Pourquoi le droit comparé ? L'U.R.S.S. et les Etats-Unis*, Revue de droit international et de droit comparé 1979, pp. 292–308. Some Western comparatists have also expressed doubts about the comparability of socialist and Western law, *see* e.g. Zweigert, *Méthodologie du droit comparé*, in Mélanges offerts à Jacques Maury, vol. 1, Paris 1960, pp. 579–596, on pp. 585–586.

comparationis required for a meaningful comparison. It has even been asserted that socialist law was the direct opposite to bourgeois law: ”*le type socialiste du droit est la négation et le contraire du type bourgeois*”.[5] In connection with the then and still ongoing work on The International Encyclopedia of Comparative Law, it was even discussed whether socialist law should not be treated entirely separately in its own volumes, since direct comparability between socialist and Western law did not exist.[6]

It is very possible that socialist law served other class interests than the Western legal systems. However, one must not confuse the legal norm's legal/political goal (for example to contribute, in one manner or another, to the development of society in a socialist direction) with its function, i.e. the actual problem or situation that the legal norm regulates. It is only the identity as far as the function is concerned that is necessary for considering two legal rules as mutually comparable. If and to the extent the same situations and problems arose and were subject to legal regulation in both the Western countries and the socialist states, one could compare that regulation to discover to what extent it diverged. To take a very simple example, it is hardly possible to deny that traffic regulations served the same function in both societies, and that these therefore to a significant degree could be compared with each other.[7] One does not, however, need to rely upon such an elementary example, as many important segments of life in the socialist countries, at least in Eastern Europe, were not significantly different from the life in the Western countries. This included many such situations which in both societies were subject to legal regulation.[8]

No socialist country has, for example, entirely done away with the use of money as a means of exchange for goods and services. In other words, instead of a direct distribution to citizens of goods and services, the distribution was made with the assistance of money, in a kind of a market.[9] In connection with this, there arose a number of problems which were similar in both the socialist and Western countries, for instance the matter of the seller's responsibility for the quality of product sold to a consumer. Furthermore, even a legal concept so loaded with subjective values as the right of ownership had to a certain extent

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5 *See* Szabó, *op.cit*., p. 114.

6 On this *see* e.g. Hazard, in 79 Harvard Law Review 279 (1965–1966) and in Revue de droit international et de droit comparé 1979, pp. 292–308.

7 This was not undisputed though. The Czechoslovak author Luby wrote in the Czechoslovak legal periodical Právny obzor 1970, pp. 16–17, that the legal system was a totality and that there were no legal rules which were neutral from a class point of view, not even traffic regulations. Therefore, according to him, the socialist and the bourgeois traffic regulations were ”in opposition to each other”.

8 *See* e.g. Friedman, *Law in a Changing Society*, ed. 2, 1972, pp. 23–24.

9 *See* e.g. Eörsi, *On the Problem of the Division of Legal Systems*, in Rotondi, ed., Inchieste di diritto comparato 2, Padova – New York 1973, pp. 181–209, on pp. 199–203; Markovits, *Civil Law in Eastern Germany – its Development and Relation to Soviet Legal History and Ideology*, in 78 Yale Law Journal pp. 1–51 (1968–1969), on pp. 7–8; Zweigert & Puttfarken, *Possibilities of Comparing Analogous Institutions of Law in Different Social Systems*, in Acta Juridica Academiae Scientiarum Hungaricae 1973, pp. 107-130, on p. 122.

the same function in both socialist and Western law and consequently was also comparable to the same extent.

In connection with the comparison between legal systems in countries with different socio-economic orders there are consequently grounds to distinguish between those legal rules than regulate situations specific for a particular type of society and legal rules that regulate situations existing in both types of societies.[10] The latter category includes i.a. the majority (even though not all) of the rules pertaining to family law.[11] On the other hand, antitrust laws are limited to countries with a market-oriented economic system, in the same manner as detailed planning regulations are specific to countries with a planned economy. In these cases the comparison is impossible, with the exception of the observation that the rules lack comparable counterparts in countries with a different economic system. Nevertheless, even such economic legislation may be comparable on a higher level of abstraction, where the comparative task is not to compare legislation on competition or central planning but rather legislation on state interference into the economy (such interference exists in both planned and market economies, albeit through different legal instruments).[12] On such a higher level of abstraction, comparisons are not only possible but even very interesting. They show, for instance, that the socialist legal systems used prohibitions and commands to a considerably larger extent than Western legal systems, which ordinarily prefer to rely on various economic stimulants (taxes, fees, customs duties, interest rates, subsidies, etc.).

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10 *See* e.g. Loeber, *Rechtsvergleichung zwischen Ländern mit verschiedener Wirtschaftsordnung*, in Rabels Zeitschrift für ausländisches und internationales Privatrecht 1961, pp. 201–229, on p. 226; Zweigert, *Methodological Problems in Comparative Law*, in 7 Israel Law Review pp. 465–474 (1972), on p. 471. *Cf*. also Drobnig, *Rechtsvergleichung zwischen Rechtsordnungen verschiedener Wirtschaftssysteme, Zum Problem der intersystemaren Rechtsvergleichung*, in Rabels Zeitschrift für ausländisches und internationales Privatrecht 1984, pp. 233–244, on pp. 239–243; Schwarz-Liebermann von Wahlendorf, *Droit comparé. Théorie générale et principes*, Paris 1978, pp. 207–208.

11 So says David in Livre du Centenaire de la Société de législation comparée, vol. 2, Paris 1971, p. 155, with certain irony directed towards the dogmatic socialist comparatists, that he, during his visit to the socialist countries, did not notice any significant differences between the socialist and the capitalist family life: «*Quand j'ai vu des familles socialistes – car on m'a fait l'honneur et le plaisir de m'inviter dans des familles socialistes – j'avoue qu'à certains moments, je ne me suis pas senti dans un milieu tellement étranger et je n'ai pas observé des comportements qui opposent, d'une manière très nette, la famille socialiste aux familles françaises et dites capitalistes qui me sont plus familières!*»

12 The problem can be illustrated by the following metaphor: as oranges are not grown in Sweden, it is impossible to make a meaningful comparison between Spanish and Swedish oranges, whereas it may be meaningful to compare Spanish and Swedish fruits (that comparison would include, among other fruits, both Spanish oranges and Swedish apples). *Cf*. Reitz, *How to Do Comparative Law*, in 46 American Journal of Comparative Law pp. 617–636 (1998), on pp. 625–626; Valcke, *Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems*, in 52 American Journal of Comparatie Law pp. 713–740 (2004), on p. 720.

4 Concluding Remarks

It can thus be concluded that legal rules and institutions in practically all countries are mutually comparable, at least in part and to the extent they have to deal with the same or similar problems.[13] The basic features of human and societal behavior result in some – even though not all – problems being universal.[14]

It deserves, however, to be stressed that comparability does not mean likeness, as the two qualities are often confused even by experienced comparativists. The socialist comparativists' original denial of comparability was perhaps partly based on a misunderstanding caused by the fact that the word "comparable" in many languages can also mean "approximately similar" or "not too different" (in English there is, however, supposedly a difference between "comparable with" and "comparable to"). When one for example says that the salaries of two individuals are comparable, one as a rule means that they are about the same, rather than it would be meaningful to compare them. To acknowledge that there were fundamental similarities between socialist and "bourgeois" laws was, for many socialist comparativists, unacceptable due to ideological reasons. Comparability, as the term is used here, means merely that the compared elements share a feature or property in relation to which they can be compared; it does not imply or predict anything about the degree of similarity the comparative research will ultimately disclose. Those socialist comparativists who became conscious of this adopted a more positive attitude to the issue of comparability.[15]

An echo of the old discussion concerning the comparability between socialist and capitalist law appeared relatively recently in a very different context, when the very essence of comparability came in the 1990s under attack by some "post-modern" jurists, who claimed that objective and scientific comparative legal research is impossible, attempts to achieve it are naïve and doomed to be futile, and all comparisons are inescapably biased.[16] The central argument of this school, which seems to be an outgrowth of the leftist "critical legal studies" movement that enjoyed considerable influence at certain universities in the USA some years ago[17] but whose appeal now appears to be declining, seems to be that there can be no objectively and neutrally formulated

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13 *See* Constantinesco, *Rechtsvergleichung*, vol. 2, Köln 1971–1972, p. 128.

14 *Cf.* Husa, *Farewell to Functionalism or Methodological Tolerance?*, in Rabels Zeitschrift für ausländisches und internationales Privatrecht 2003, pp. 419–447, on p. 434.

15 *See*, for example, Štefanovič, *Porovnávanie práva – socialistická právna komparatistika*, Bratislava 1987, pp. 142–143.

16 *See*, in particular, Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, in 26 Harvard International Law Journal pp. 412–455 (1985) and the papers presented at a symposium held in 1996 at the Utah Law School and published in (1997) Utah Law Review pp. 255 *et seq*. For a well-balanced criticism of the exaggerations and absurdities of such generalizations, *see* Peters & Schwenke, *Comparative Law beyond Post-Modernism*, in 49 International and Comparative Law Quarterly pp. 800–833 (2000).

17 *See* Mattei, *Comparative Law and Critical Legal Studies*, in Reimann & Zimmermann, eds, The Oxford Handbook of Comparative Law, Oxford 2006, pp. 815–836.

problems that can be used as *tertium comparationis*, because whatever turns a factual situation into a legal problem already contains a value judgment inescapably rooted in the national legal system and thereby in the ethnocentric political (usually Western) ideology of the comparativist, thus legitimizing and fostering Western hegemony and domination. This argument, if taken literally, denies the possibility not only of comparative law research but of any scientific legal research altogether. It is also noteworthy that the proponents of this criticism against mainstream comparative law research have an agenda aimed at deconstructive disruption[18] rather than at offering constructive alternatives[19]. Of course, the comparativist, being human, is not always immune against the influence of his values and beliefs, but this should not make him give up his research and hinder him from doing his best to overcome his preconceptions. Besides, it is not necessarily desirable that the comparativist be neutral in the sense that he places himself outside all the legal systems he compares. For example, there is nothing wrong with a research project focusing on a problem in the comparativist's own legal system and investigating whether corresponding problems arise in other countries and, if so, how they are dealt with there.

18 *See* Bucher, *Komparatistik – Rechtsvergleichung und Geschichte*, in Rabels Zeitschrift für ausländisches und internationales Privatrecht 2010, pp. 251–317, on p. 275; Mattei in Reimann & Zimmermann, eds, The Oxford Handbook of Comparative Law, Oxford 2006, p. 819.

19 An attempt to provide an alternative to *tertium comparationis*, namely "empirically substantiated behavioral patterns", was made by de Coninck, *The Functional Method of Comparative Law: Quo Vadis*?", in Rabels Zeitschrift für ausländisches und internationales Privatrecht 2010, pp. 318–350, on pp. 344–349, but her suggestions can be said to suffer from the same weaknesses as the functionalism she criticizes, *see* Michaels, *Explanation and Interpretation in Functionalist Comparative Law – a Response to Julie de Coninck*, in Rabels Zeitschrift für ausländisches und internationales Privatrecht 2010, pp. 351–359.