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LEGAL THEORY AND THE USE OF COMPARATIVE RESEARCH

Abstract

The idea behind the paper is that legal theory and comparative law studies have a potential to complement each other with their findings, despite different methodology and manner of formulating theorems. It is particularly important that "comparative awareness" is present in the legal theory practice. The awareness can serve as a foundation for research as well as a perspective for allocation of its results. The above ascertainment is applicable to numerous legal theory subject-matters such as divergent normative institutions, law-making and law enforcement, rules of legal interpretation, legal system ingredients and legal cultures. Therefore, there is a need for creation of a new research programme, the agenda of which would involve inter alia a shift from the foreign law studies to comparative law studies, or provision of methodology applicable to comparative law studies so that scholars and academics could combine specific comparative law studies and generalization of the results of research, which is a characteristic feature of legal theory. The programme could bring about the following benefits for legal studies: "depositivisation" of legal theory and philosophy of law, strengthening of a critical base and universalisation of the legal theory theorems.

Keywords

legal theory – comparative law – methodology – interactions

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1. INTRODUCTORY REMARKS

The contemporary theory of law continues[1] to fail to build its propositions as broadly as the circumstances require, with a discernible link to the results of comparative research. Nor are such propositions based on comparative law. Clearly, the diversity of methods applied, as well as a different manner of formulating propositions in both disciplines of study, are not conducive to combining scientific approaches, and, therefore any search for the ways to use the methods of formulating legal propositions is limited at best.

This, however, does not mean that the propositions which bear features of comparative inferences are not entirely absent in the theory of law. They do appear, but they are not formulated with due consideration for the comparative method, and comparative studies are not, in principle, their source material. Consequently, the theory of law lacks a systematic approach to the application of a comparative method, and such propositions, if any, are either randomly made or serve to exemplify more general claims, formulated irrespective of comparative analyses.

The relations between the methodology and the subject matter, as presented in this paper indicate the need to develop the "awareness of comparative methodology" within the theory and philosophy of law. It is not the purpose of this article to replace the well-grounded manner of developing the theory and philosophy of law with comparative studies or to propose that relevant propositions be made exclusively on the grounds of comparative studies. This is largely an attempt to discern the existing methodology-related links between legal comparative research on the one hand and the theory and philosophy of law on the other. These domains share a common research area, a fact which scholars of the latter are not entirely aware of. Highlighting these points should further reinforce

[1] This elaboration is a revised and updated version of the article entitled *Komparatystyka a teoria prawa – powiązania metodologiczne i pola współdziałania* [*Comparative Research and the Theory of Law – Methodological Links and Areas of Cooperation*] published in: Z. Tobor (ed.), *Prawoznawstwo a praktyka stosowania prawa* [*Jurisprudence and Practice of Application of Law*], Katowice: Wydawnictwo Uniwersytetu Śląskiego 2002, pp. 35-48, containing proceedings from the 14th Conference of Chairs of Theory and Philosophy of Law held in Ustroń, Poland on 20-23 September 2000.

an idea of the importance of a need for inter-disciplinary propositions as well as outline general conditions for effective studies in these fields.

Hence, this article points out the arguments in favour of existing methodological links and recommends the development of the "overlapping zone" for the methods and propositions of research. Secondly, the article indicates the ways in which comparative studies in law are conducted and ties some of them with the theory and philosophy of law. Thirdly, the article aims to determine which groups of propositions that fall within the terms of reference of the theory of law can be employed in comparative research and which comparative study propositions contain a strong theoretical element. Equally important is to determine the compatibility conditions for both methodologies. Finally, an outline of the expected effects of the proposed inter-disciplinary research is presented.

2. METHODOLOGICAL RELATIONS

There are three basic arguments which indicate a vital need for methodological links between comparative research and the theory and philosophy of law.

The first argument concerns the demand that the theory and philosophy of law should integrate legal sciences. The second one has been the favourable "doctrinal climate" for over 20 years now which is conducive to developing the theory of law as well as comparative research. The third one refers to the doctrinal imperative (also in the area of the theory of law) to react to current legal issues (in legislation and in the application of the law), referring to already employs comparative studies grounded in the practice of the law rather than in its theory (which, naturally, is deprived of "comparative associations").

2.1. Internal integration of legal sciences

The demand for and programme of the internal integration of legal sciences, present in the Polish literature a long time ago[2], has not lost its topicality[3]. When treated diligently, it cannot be implemented without combining theoretical and comparative propositions. If the theory of law is to play a major role in this integration, a recourse to at least some aspects of comparative research should constitute the basis for formulating propositions concerning real aspects of a legal phenomenon (establishing, applying, enforcing laws, etc.). This particularly refers to the use of the comparative study of law, which, as a systematic approach, is linked to propositions concerning the relations between specific areas of law or legal institutions and legal constructs. These propositions, rich in legal theory, offer a multifaceted dimension (e.g. structure of subjective rights, abuse of law, general reference clauses, principles of law, etc.) Such a comparative method may easily be applied to other legal systems and cultures, thus entering the classic "geography-based" comparative study of law.

However, most importantly, the interest in comparative studies can facilitate overcoming significant "inhibitions" relating to the input of the theory of law for the processes of internal integration consisting in separating theoretical considerations from normative or case-law materials both in respect of developing a common conceptual apparatus as well as generalizing propositions of exact sciences and searching for reproducible features, to name but a few.

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[2] Cf. regarding this subject in: K. Opałek, *Swoistość prawoznawstwa a problem integracji* [*The Specific Character of Jurisprudence and the Issue of Integration*], Państwo i Prawo [State and Law] 1966, vol. 4/5; L. Nowak, S. Wronkowska, *Zagadnienia integracji nauk prawnych w polskiej literaturze teoretycznoprawnej* [*Issues Related to the Integration of Legal Sciences in Polish Legal Literature*], Studia metodologiczne [Methodological Studies] 1968, vol. 5, p. 107 et seq.; K. Opałek, J. Wróblewski, *Prawo, metodologia, filozofia, teoria prawa* [*Law, Methodology, Philosophy, Theory of Law*], Warszawa: Wydawnictwo Naukowe PWN 1991, p. 140 et seq.

[3] It is significant that the subject of the 20th National Conference of the Chairs of Theory and Philosophy of Law held in Łódź in 2012 was "Wewnętrzna i zewnętrzna integracja nauk prawnych" ["The Internal and External Integration of Jurisprudence"].

2.2. RANGE OF RESEARCH APPROACHES

A favourable doctrinal climate which has now been established around comparative studies as well as their use in many legal sciences is undoubtedly connected with the disappearance of ideological and political barriers typical of various autocratic systems. However, there are also other considerations at play here. If one rejects xenophobic attitudes which may lead to the emergence of doctrines undermining the sound basis of a comparative analysis conducted from a broad cross-system (and cross-cultural in terms of comparing legal cultures) research perspective, it may appear that many prevailing doctrines, attitudes or "world views", frequently conflicting with each other, not only allow for, but also justify conducting comparative studies and even directly benefit from them. This refers to various forms of liberalism, globalism, the convergence theory or such contradictory ideas as universalism and postmodernist relativism.

Undeniably, all these attitudes and doctrines (and many others) bear a relation to the theory and philosophy of law and influence the substance of formulated theoretical-legal judgments and concern real legal phenomena to a discernible degree. Thus, they make it possible to reasonably substantiate the presence of factors which support the use of comparative legal conclusions in formulating propositions at a theoretical-legal level.

2.3. NEEDS OF LEGAL PRACTICE

The discussion in this article on encouraging an interest in comparative studies resulting from the needs of legal practice cannot make do with merely identifying the most vital issues. From the methodological point of view, it is of paramount importance to comprehend that whether or not the comparative propositions will be employed in the theory of law (and in legal sciences in general), contemporary legal practice must be "geared towards comparative studies". It concerns both intra- and cross-system comparative studies. This being the case, it would be better if it was based on a solid theoretical-legal foundation.

To illustrate the point, we can enumerate a few phenomena, easily observed in contemporary practice, which should leave no doubt as to the focus of this article. Hence, in order to begin from the one we are perhaps the least aware of, it must be stated that the practice of applying foreign law by national courts[4] cannot be separated, especially in so-called difficult cases, from at least short-term comparative research conducted by judges. What could be indicated at this point is the practice of international law applicable in a given state by national courts. However, considering the principle of the direct applicability of law, this aspect seems to be perfectly understood in our times. Nor can we rule out a situation in which national courts make reference to the principles of international law which is not, in effect, binding in their country[5]. Increasingly, national courts make references to relevant decisions of international judicial bodies, which, in the absence of a precedent, reflects the fact of not only citing the arguments of a given organ, but also acknowledging that the factual and legal status to which a given decision refers is comparable to the status of a ruling pronounced by a national court[6].

The development of European integration creates yet another comparative legal perspective in the organizational system of both the European Council and the European Union. The judgments pronounced by the European Court of Human Rights, when assessing the activity of the authorities of State-Parties, comply with the standards

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4 Cf.: U. Drobnig, *General Report*, [in:] U. Drobnig, S. Van Erp (eds), *The Use of Comparative Law by Courts. XlVe Congrés international de droit comparé/XlVth International Congress of Comparative Law. Athénes/Athens 1997*, The Hague/London/Boston: Kluwer Law International 1999 and in national reports from the 14th International Congress of Comparative Law in Athens (31.07-6.08.1994).

5 This is the case of Canadian courts which in the matter of human rights refer directly to the case law of the European Court of Human Rights – cf.: E. Bechta, *La Charte Canadienne des Droits et Libertes – influence europenne et americaine*, [in:] L. Leszczyński (ed.), *Protection of Human Rights in Poland and European Communities*, Lublin: UMCS 1995, pp. 121-139.

6 Cf.: the practice of referring to or even citing particular summaries of the rulings of the European Court of Human Rights by national courts (in the Polish legal system it happened first in the statement of reasons issued by the Supreme Court invoking the court decision in the matter of ETPC *Castell v. Spain* (provision of 12.05.1994, III ARN 23/94, Orzecznictwo Sądu Najwyższego. Izba Administracyjna, Pracy i Ubezpieczeń Społecznych [Decisions of the Supreme Court. Public Affairs, Labor Law and Social Security Chamber] 1994, item 77).

of the Convention for the Protection of Human Rights and Fundamental Freedoms confronted with the law of these states, thus clearly constituting a kind of a comparative law (the law established with the use of legal comparative methods). On the other hand, judicial decisions of the Court of Justice of the European Union (formerly known as the European Communities), independently of the European Union law (the law of treaties and the codified law) – rely on the traditional acquis of general law[7] and common constitutional tradition of member states[8], which is strictly related to the use of a comparative method, including, but not limited to, a normative layer and encompassing judicial practice. Also, the very process of transforming legislation, the programme of which was already formulated in the 1957 Treaty establishing the European Economic Community (§ 100-102) and which, as part of the harmonisation process, countries of Central and Eastern Europe were participants in, was a good example of "a practical comparative study" affecting the unification of reasoning and argumentation methods. This comparative element will be even more visible when the protection of human rights in Europe acquires not only a national dimension and that of the European Council's system, but also the full dimension of the European Union, which is related to the functioning of the Treaty of Lisbon (by virtue of which the Fundamental Freedoms of the European Union became a binding act) and the accession of the EU to the system of the European Convention of Human Rights resulting in a "triple" protection, i.e. established by way

[7] Pursuant to Article 215 of the Treaty establishing the European Community (incorporated in Article 288 of the Treaty establishing the European Community in a consolidated version and in Article 340 of the Treaty on the Functioning of the European Union), decision-making is „in accordance with general principles of law, common for all State-Members" and it concerns non-contractual liability and is based on the practice of the European Court of Justice, the protection of fundamental rights, and minimum standards for administrative procedures (cf.: F. Emmert, M. Morawiecki, *Prawo europejskie* [*The European Law*], Warszawa: Wydawnictwo Naukowe PWN 1999, p. 112. On common categories of European legal thinking see: M. Zirk-Sadowski, *Prawo a uczestniczenie w kulturze* [*The Law and Participation in Culture*], Łódź: Uniwersytet Łódzki 1998, pp. 108-110.

[8] Cf:. Article 6, Section 3 of the Treaty on the European Union (amending Article 6, Section 2 of the previous version of the Treaty).

of content and scope-related[9] comparative studies based on the systems of the European Council, the European Union and national legal systems.

The postulate of the general unification of law, of which regional harmonisation in Europe constitutes a part, poses a standard challenge for legal comparative studies[10]. This postulate is actually being materialised in the most developed parts of the globe, as can be seen in the longer perspective. More detailed, but at the same time more global, processes, e.g. of the reception of law[11], which tend to be more prominent than the interest they evoke among legal scholars, affect the unification of law and the use of comparative methods when applying and establishing adopted law.

The issues discussed last have shifted our deliberations from the topic of law application towards law-making. The significance of comparative knowledge is clearly visible in this aspect too, and especially in the legislative practice of any state. The process of creating the 1997 Constitution of the Republic of Poland could serve as an example, where comparative arguments referring to other constitutional solutions were present in the debate of the Constitutional Committee[12].

There is no doubt that the above-mentioned problems lead to the implementation of a comparative approach by law practitioners and participants of the legislative process. It is hard to resist the impression that the recognition of these problems and the participation in their solving

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[9] Cf.: M.A. Nowicki, *Nie można dopuścić do powstania elitarnego klubu* [*The Establishment of an Elite Club Cannot be Permitted*], Rzeczpospolita of 24.07.2000, p. C3.

[10] Cf.: K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, Amsterdam: North-Holland Publishing Co. 1977, p. 19 et seq., M. Ancel, *Znaczenie i metody prawa porównawczego* [*Significance and Methods of Comparative Law*], Warszawa: Wydawnictwo Naukowe PWN 1979, p. 107 et seq.; R. Tokarczyk: *Komparatystyka prawnicza* [*Comparative Law*], Kraków: Kantor Wydawniczy Zakamycze 1999, pp. 212-214, 217 et seq.

[11] See e.g. A. Watson, *Legal Transplants. An Approach to Comparative Law*, Edinburgh: Scottish Academic Press 1974, *passim*; G.L. Maskins, *A Problem in the Reception of the Common Law in the Colonial Period*, University of Pennsylvania Law Review 1949, vol. XCVII, p. 842 et seq.; F. Wieacker, *Das romische recht und das deutsche Rechtbewusstsein*, Leipzig: J.A. Barth 1944, pp. 3-46; Z. Kitagawa, *Gakusetsu keiju – mimpogaku hatten no ichisokumen*, Shiho 1967, no. 29, pp. 251-261.

[12] See e.g. the minutes of the sessions of the Subcommittee on the issues relating to the systems of law sources of 16 and 30.10.1994 and on 10.12.1994 in: Bulletin of the Constitutional Committee of the National Assembly 1995, no. 10 (p. 65 et seq., p. 111 et seq.) and no. 11 (p. 147 et seq.).

by means of the theory and philosophy of law would result not only in expressing these phenomena in theoretical-legal terms but, contrary to expectations, would also introduce new aspects of presenting fields of research to this science, bind its propositions with normative and case-law materials, adding a partially more practical or pragmatic character to its judgments and contributing to the realization of the aforementioned function of the internal integration of legal sciences.

3. OBJECT AND TYPES OF COMPARATIVE RESEARCH

Until recently comparative law did not distinguish its types or research perspectives, types of objects or degrees of specificity of its propositions. Hence, at this point, we can only mention a prevalent division into comparative legal studies in geographical or historical terms or point out their material and formal perspective[13].

Alongside these differences, it is also vital, especially considering the subject of this article, to distinguish a practical and a theoretical aspect of comparative legal studies. The former has already appeared when signalling the phenomenon of "enforcing comparative interests" in the conduct (reasoning and providing arguments) of persons participating in legislative processes, the application of law, and legal transactions. In respect of the last, it emphasizes a link with the general theory of law and exact legal sciences. Principally, it assumes that law should be compared for cognitive purposes, and the practical goal, in the form of translating these propositions into (or applying them to) the above-mentioned processes recedes into the background, and depends on approaches to legal sciences and the theory of law.

The degree of specificity may constitute a criterion of another division into general comparative studies, comparative studies of legal cultures (families of law), and legal systems and detailed comparative studies which concern normative acts, their creation processes, legal institutions or even specific legal regulations and decisions, to name but a few.

[13] Cf. Tokarczyk, supra note 10, p. 36.

Searching for the connections with the theory and philosophy of law, there arises the crucial question of whether it is possible to develop a theory of law on the basis of comparative studies (or, in other words, a comparative study presented from a theoretical perspective) in such a way that it would not limit itself to relying on comparative propositions relating only to legal cultures and systems, but would delve into more detail. First of all, it would have to include relevant legal institutions as well as legal and law constructs and even certain normative regulations (thus falling within the terms of interest of detailed disciplines of jurisprudence and, by extension, theoretical comparative studies in the context of legal dogmatics). Secondly, its relation with practice would have to consist not only in formulating propositions based on comparative research relating to the practice of law making or law application, but also to the very theory of law, taking advantage of the most general propositions, but it would have to react directly to relevant practical needs, independently providing specific solutions.

Another essential and related question involves defining the scope of theoretical-legal constructs suitable for a comparative analysis. This issue will be considered in the next section of this article which will point out the fields of cooperation between both disciplines, methodological solutions which are conductive to such a cooperation, and the outline of the programme aimed at cooperation and its potential effects leading, as a consequence, to the development of a specific "comparative theory of law".

4. Comparative law studies and the theory of law

The perspective related to the perception and emphasis of methodological and subjective relationships which emerges as a result of the previous considerations should be preceded by the reiteration of a crucial reservation included in the introduction to this article. It does not postulate such an approach to the theory of law as one in which a comparative context would exist exclusively, with the intention of replacing the findings related to its methods and the subject, already obtained on the grounds of this discipline, nor does it attempt to frame such a concept of a theory of law in which propositions would

be formulated solely on the basis of comparative research. On the contrary, it proposes a use of these results more methodologically-conscious and more distinct than now for developing theoretical assertions and creating yet another research perspective (layer) to the theory and philosophy of law as part of the issues included in the subject.

4.1. Subjective relationships

For the purpose of this article it is fundamental to define a catalogue of issues regarding the theory and philosophy of law which can be presented in a comparative form in such a way that we can make use of the findings of comparative legal studies when expressing propositions related to these disciplines, or we can conduct such research individually (in a more limited scope in contrast to a comprehensive use of a comparative method). It appears that the overview of these issues produces a rather surprising result. It should not be too provocative to claim that in fact such a character may be attributed to any issue, and only in a few cases the scope of comparisons or the weight of conclusions should be limited for the substance of a theoretical proposition.

A limited dimension of comparative studies should accompany the cases of defining law, determining the detailed content of legal notions (*inter alia*, a notion of a legal norm), the law-state or law-society relationship, an analysis of legal doctrines or certain issues related to legality and to the axiology of law. It does not mean, however, that a comparative context will not emerge at all, even if it is not of the utmost importance or if it has no influence on presenting a deeper structure of each of the above-mentioned phenomena.

For instance, if the analysis of legal doctrines does not involve relating someone else's views and, in particular, shows a doctrine against a backdrop of other views connected with a given place and time, hence in other words, if it juxtaposes particular theses of certain concepts with others, it also takes advantage of a comparative method (or speaking more cautiously – it demonstrates a comparative attitude).

The same refers to the issue of axiology. Undeniably, its subject is not easily comparable if it is contrasted with the characteristics

of relevant legal solutions. Nevertheless, if we form catalogues of, for example, constitutional values, fundamental values (principles of law) for specific branches of law, values of the application of the law process[14] or if we compare the role of value of justice and the rule of law in different legal frameworks[15], we simply cannot do without a comparative approach. The same applies to the programme of analysing particular values; to give one example, the analysis of the value of equality or non-discrimination indeed induces, owing to its subject, a comparative approach to a situation in which those values should function.

A more in-depth view could be provided by a full set of issues being the subject of the theory and philosophy of law which would exclude even the aforementioned uncertainties. As an example we can point to:

- principles of law, open clauses, evaluative and undefined terms, main legal institutions and constructs going beyond the scope of one branch of law, elements of legal relationships, and characteristics of legal language (when it comes to the examples of detailed legal constructs, including a distinct theoretical-legal perspective);
- forms of the application of law, the role of precedents, case law and decision-making processes, law-making processes, and in particular forms of legislation (in the case of legal processes);
- legal reasoning and argumentation in the form of findings validation, rules of reconstruction of a legal norm[16], findings of fact arguments, qualification of facts and determining normative consequences or justifying decisions (in reference to the application of law);

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[14] Cf. J. Wróblewski, *Wartości a decyzja sądowa* [*Values and Judicial Decisions*], Wrocław: Zakład Narodowy im. Ossolińskich 1973, *passim*.

[15] Cf. Tokarczyk, supra note 10, pp. 75-108.

[16] The types of interpretation include, *inter alia*, a comparative interpretation (cf.: T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa* [*Introduction to Jurisprudence*], Warszawa: C.H. Beck 1998, pp. 131 and 133). In the case of a systematic interpretation, various comparisons are naturally embedded into it (cf.: J. Wróblewski, *Sądowe stosowanie prawa* [*Judicial Application of Law*], Warszawa: Wydawnictwo Naukowe PWN 1988, pp. 134-140). The special role of comparative legal studies in the interpretation of law is emphasized by Zweigert, Kötz, supra note 10, p. 14 et seq.

- methods and the subject of regulations in particular branches of law, sources of law, normative acts, the role of internal management law (as far as the structure of a legal system is concerned);
- types of social changes and their legal consequences, relationships of law and political and economic systems, the role and the content of social and legal customs, the role and the content of moral convictions (as for the connection of law with its social environment);
- characteristics of the main world legal cultures and detailed cultures, general properties of legal systems, e.g. the reception of law in the transnational dimension.

As part of the issues raised there are fields of research referring to comparative legal studies presented in theoretical and dogmatic terms, in general and detailed terms, in external (cross-system) and internal (inter-branch) terms, which create the possibility of presenting the whole network of the overlapping fields of comparative research, important from the point of view of the theory of law.

4.2. Methodological aspects of interaction

Such a broad-ranged "set" of common research fields makes the question about the methodological basis of interaction between two disciplines of legal sciences even more valid.

It seems reasonable to presume that their common assumption is the specific universality of formulated propositions as a research attitude, the aim of which is to avoid any accusation of "locality" (provincialism) of the reference points of propositions which would limit a subject, making it inadequate for other groups of phenomena (separate in historical or geographical terms).

The role of this attitude in a research process of both disciplines varies. In the theory of law it exists in connection with the generality of this discipline, which is manifested in the universalism of its concept, included in the content of developed propositions and presented as an assumption at the very beginning of a research process. In comparative legal studies overcoming "locality" underlies the content

in its final part and only in a situation in which comparative studies constitute something more than the basis of detailed knowledge or information on foreign law. Comparative legal studies in the form of appropriately generalized propositions may achieve the purpose of "an escape from locality", but in a specific manner, because comparative research originates in locality at the beginning of a research process in order to go beyond it and gain the form of generalization at the end of this process.

However, there are also certain methodological distinctions which do not facilitate such a direct cooperation.

The comparative method, by its nature, poses some implementation problems. These include the possibility of "ending up" at a level of detailed comparisons from which it is easier to draw conclusions and so, by referring to facts, the conclusions can appear more attractive (this also causes comparative studies to be more of "the research base" for the history of law and legal dogmas than the theory and philosophy of law).

In addition, a natural barrier related to the depth of knowledge concerning the compared phenomena hinders a fair comparison, especially when the knowledge is not complete, as it results from a superficial contact between a researcher and the phenomena in question or when the knowledge is not consistent in respect of two or more subjects of research (which occurs more frequently when comparing some elements of one's "own" and a foreign legal system).

Also, the difference in the depth of a research process can be easily observed. The theory of law immediately delves into a deeper structure of a legal phenomenon, which, however, does not have to be preceded by pooling adequate detailed knowledge. Comparative legal research usually does not enter the deeper structure of examined phenomena instantly, nor does it have to get into this level at all if it stops at the previously mentioned stage of detailed comparisons. Furthermore, difficulties in determining the appropriate depth of a comparison may result from the features of a research subject. It is fairly uncomplicated to reach a sufficient depth when exploring directly and externally tangible phenomena (specific regulations or legislative constructs), but problems arise when studying reasoning, argumentation, legal axiology or legal and cultural phenomena.

What imposes limitations on the usefulness of comparative research for the theory and philosophy of law is the translatability (which is not always satisfactory) of the phenomena which are intended for comparisons. This refers mainly to phenomena existing in various legal cultures. In fact, this factor is losing its significance as the differences between legal systems gradually diminish. However, it cannot be completely overlooked. Each piece of comparative research assuming, for example, the application of findings in the discipline of the theory of the application of a legal process in one culture to the analysis of judicial decision-making and administrative processes in another legal culture has to be characterized by great caution[17].

Finally, speaking of a comparative context to be employed in the theory of law, there arises a question as to the way in which comparative propositions should "reach" the awareness of a theoretician of law. It would be rather hard to indicate only one proper way of conduct. They all seem to be admissible including: independent comparative legal research, making use of "ready" comparative conclusions, and taking advantage of selected comparative theses existing in various legal-dogmatic research papers (the option which tends to be the most popular). Propositions developed in such diversified ways are bound to be used differently and play different roles (also owing to the different degree of their depth) and this should be taken into account when presenting theoretical-legal propositions.

5. FINAL REMARKS

What kind of "an outline of a cooperation programme" between comparative legal studies and the theory and philosophy of law could be developed then? In what way could the thesis proposed at the outset

[17] This refers, for instance, to the Japanese legal system which assumes basic features of the Western legal culture (e.g. by way of two main receptions of law) but "filtering" them through its own cultural system, distinctly different from the western one, (see e.g. S. Ehrlich, *Refleksje o dwóch kulturach prawnych: europejskiej i japońskiej* [*On Two Legal Cultures: the European and the Japanese*], Państwo i Prawo [State and Law] 1987, no. 6; L. Leszczyński, *Gyoseishido w japońskiej kulturze prawnej. Nieformalne dzialania administracji a prawo* [*Gyoseishido in Japanese Legal Culture. Informal Administrative Actions and the Law*], Lublin: UMCS 1996).

of this article concerning a greater need for the use of comparative propositions in the context of the theory and philosophy of law find its place in its initial minimum?

We should start with the assertion that in the whole period after World War II comparative research in Poland was not conducted on any systematic basis[18]. It must have resulted from ideological and political restrictions. Currently, a research assumption rather than a separate discipline is being developed in a conscious, explicit, and systematic way (these are predominantly publications on comparative law, presented in a not strictly comparative manner), which reflects foreign achievements in the area of methodology and subject research, with the latter being oriented either towards knowledge about foreign law or towards comparative law at a general level (e.g. knowledge of legal cultures)[19]. The latter, in the light of the discussed context has the advantage of bringing comparative analyses closer to the research field of the theory and philosophy of law. However, there is a lack of detailed research referring to constructs or institutions to the extent that would seem interesting from the point of view of e.g. legal dogmas (this,

[18] While this elaboration does not aim at analysing the condition of Polish comparative law, it cannot be ignored that some publications of a comparative character (or relating to research on foreign law) have appeared, and, naturally, not only in relation to historical comparative studies, but also relating to "geographical" comparative studies of a cross-system character and additionally in the area of the public law, which was more exposed to the influence of ideologies than was the private law (e.g. publications of W. Zakrzewski: *Działalność prawowtórcza w doktrynie francuskiej* [*Law-making Activity in the French Doctrine*], Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze [Scientific Papers of Jagiellonian University. Legal Studies] 1969, vol. 9; *Działalność prawodawcza w świetle teorii niemieckiej* [*Legislative Activity in the Light of the German Theory*], Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Rozprawy i Studia [Scientific Papers of Jagiellonian University. Works and Studies] 1959, vol. 10; *Ustawa i delegacja ustawodawcza w Anglii* [*Acts and Legislative Delegation in England*], Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Rozprawy i Studia [Scientific Papers of Jagiellonian University. Works and Studies] 1960, vol. 28. The cross-system comparative study within the subculture of Communist law was simpler, albeit not entirely simple (e.g. I. Andrejew, *Zarys prawa karnego państw socjalistycznych* [*The Outline of the Penal Law in the Socialist Countries*], Warszawa: Wydawnictwo Naukowe PWN 1975).

[19] The publications by R. Tokarczyk are pertinent here, especially the previously mentioned publication titled *Komparatystyka prawnicza* [*Comparative Law*], supra note 10 as well *Współczesne kultury prawne* [*Contemporary Legal Cultures*], Warszawa: Wolters Kluwer Polska 2012 and the scholarly work resulting from the studies of foreign law – *Prawo amerykańskie* [*The American Law*], Kraków: Kantor Wydawniczy Zakamycze 2003).

on the other hand, appears to correspond to such a degree of detail as comparative legal studies should aspire to)[20].

Currently there are a lot of publications which partially rely on comparative findings, even at the level of theoretical-legal propositions[21]. Also, monographs are being created, with a theoretical-legal character or a partially comparative approach, resulting either from the use of findings made by other authors or using the author's own research into foreign law[22]. In addition, an increasingly more explicit orientation towards dogmatics and case law in the Polish theory and philosophy of law, in the sense of relating theoretical considerations to the characteristics of particular legal institutions[23], sparks hope for reinforcing a research attitude combining the theory of law and a comparative study of law

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[20] This does not exclude certain exceptions (e.g. a collective work: A. Śledzińska-Simon, M. Wyrzykowski (eds), *Precedens w polskim systemie prawa* [*Precedent in the Polish Legal System*], Warszawa 2010) and, specifically, T. Stawecki's *Precedens w polskim porządku prawnym. Pojęcie i wnioski de lege ferenda* [*Precedent in the Polish Legal System. The Concept and Conclusions De Lege Ferenda*], p. 59 et seq.

[21] A number of papers presented at the 13th Congress of Chairs of Theory and Philosophy of Law in Kazimierz Dolny in 1998 may serve as cases in point, including the papers by M. Zirk-Sadowski, A. Redelbach, and, to a lesser degree, by W. Lang or J. Kowalski (published in: L. Leszczyński (ed.), *Zmiany społeczne a zmiany w prawie – aksjologia, konstytucja, integracja społeczna* [*Social Changes and Changes in the Law – Axiology, Constitution, and Social Integration*], Lublin: UMCS 1999.

[22] Cf. previously quoted Zirk-Sadowski, supra note 7; Leszczyński, supra note 17; S. Ehrlich, *Wiążące wzory zachowania* [*Binding Patterns of Behaviour*], Warszawa: Wydawnictwo Naukowe PWN 1995; idem, *Norma, grupa, organizacja* [*Norm, Group, and Organization*], Warszawa: Wydawnictwo Naukowe PWN 1998; A. Korybski, *Alternatywne rozstrzyganie sporów* [*Alternative Dispute Resolution*], Lublin: UMCS 1993; A. Kość, *Prawo a etyka konfucjańska w historii myśli prawnej Chin* [*The Law versus Confucian Ethics in the History of Chinese Legal Thought*], Lublin: Pracownia Poligraficzna przy Prywatnym Liceum Ogólnokształcącym 1998; L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* [*Main Problems of the Contemporary Philosophy of Law. The Law in the Course of Transition*], Warszawa: Wydawnictwo Naukowe PWN (chapters VII, VIII and IX in particular) and H. Rot (ed.), *Główne kultury prawne współczesnego świata* [*Main Legal Cultures in the Contemporary World*], Warszawa: Wydawnictwo Naukowe PWN 1995.

[23] This can be easily observed in the proceedings from the 13th Congress of Chairs of Theory and Philosophy of Law (Cf.: Leszczyński (ed.), supra note 21; especially scholarly works included in this collection, written by W. Gromski, B. Liżewski, S. Pilipiec, T. Pietrzykowski and Z. Tobor, M. Kordela, S. Tkacz, J. Niesiołowski and P. Sut, K. Kukuryk, J. Mikołajewicz, H. Jakimko, and R. Piszko); also see the proceedings from the 12th Congress on Philosophical and Theoretical Problems of the Application of Law by the Courts – M. Zirk-Sadowski (ed.), *Filozoficzno-teoretyczne problemy stosowania prawa* [*Philosophical and Theoretical Problems of the Application of Law*], Łódź: Wydawnictwo Uniwersytetu Łódzkiego 1997 (especially the publications by J. Leszczyński, T. Niemiec, J. Guść, and A. Municzewski).

in the future. However, there still have been no publications (and this is a significant gap) which would "explore" a comparative method itself in a new and more systematic way, or in broader terms – the methodology of legal comparative studies as viewed from the perspective of the methodology of legal sciences.

A few issues related to outlining a common research programme are already connected to this cursory review and to previous considerations. Preliminary conditions for the realization of such a plan, attributable to comparative legal studies, include, among other things: 1) a gradual transition from the position of research and discussion on foreign law to strictly comparative research; 2) a shift away from publications on the subject of comparative studies to comparative research papers; development of research into the methodology of a comparative study of law; and 3) a continuation of research as part of detailed comparative studies concurrently aiming at the generalization of conclusions as a final result of a research process.

On the other hand, the prerequisites on the part of the theory and philosophy of law mainly include: 1) formulating and developing the assumptions of the comparative method, adequately for making theoretical assertions and at the same time participating in the development of the methodology of comparative studies in connection with the methodology of the theory and philosophy of law; 2) continuing fragmentary comparative research conducted during theoretical-legal research; 3) reinforcing one's own "systematic" comparative research conducted for the purpose of formulating specific theoretical-legal theses; 4) shaping a certain degree of "practical orientation" in the theory and philosophy of law, connected with a direct interest in normative solutions and case law, which may lead to moving away from potential speculation on theories (verifiability of theoretical propositions) and propagating the comparability of source material for theoretical theses or, 5) removing ideology from the theory of law which would facilitate comparative research and the concentration of intellectual energy, not on disguising the results of comparisons, but on their fair use for theoretical generalizations.

It is worth pointing out the fundamental premise of this programme which is not about replacing currently applied methods of the theory

of law, but adding new ones and providing them with a different context, in other words, creating yet another layer of research. Such a perception will allow us to discern substantial effects which can result, *inter alia*, from the cooperation between methodological comparative studies and the theory and philosophy of law.

These effects, aside from the above-mentioned certain degree of "practical orientation" of the theory and philosophy of law and the tendency to remove ideological content from this theory, include: 1) specific "de-positivizing" of the theory and philosophy of law (as the comparative verification of propositions must refer to the decisions of law application as well as the phenomena belonging to the social environment of law); 2) specific "universalization" of the range of reference points for its assertions (shifting away from "locality" or "provincialism" in the meaning outlined above), and 3) reinforcing critical attitudes towards normative solutions and legal practices as part of propositions and judgments formulated in the theory of law.