

BOOK REVIEW

ANTAL VISEGRÁDY

Péteri Zoltán: Jogösszehasonlítás. Történeti, rendszertani, és módszertani problémák [Comparative Law. Historical, theoretical and methodological problems].¹
Pázmány Péter Catholic University Faculty of Law, Budapest, 2010. 284 p.

In the spring of 2010, an impressive book was published to celebrate the 80th birthday of professor Zoltán Péteri. The first part comprises short personal greetings from internationally known colleagues—Attila Harmathy, Géza Herczegh, Vanda Lamm, Ferenc Mádl, Csaba Varga and János Zlinszky. The second part offers a panorama of professor Péteri's most important writings related to the theoretical questions of comparative law.

In the early years of his career, Zoltán Péteri focused his research on the questions of legal and political theory. Following this period he turned to problems of the rule of law, human rights and constitutional law. However, the focus of his oeuvre has always been related to the world of comparative law. He edited several volumes of the Hungarian national reports submitted to the international congresses of comparative law and he has been teaching at the *Faculté internationale de droit comparé* for long decades.

1. In the first essay—The Beginnings of Comparative Law in English Jurisprudence—, following a well-developed historical introduction, the author points out that the comparative method was adopted in English jurisprudence due to the influence of Maine. Pollock, who also accepted the interconnected nature of historical and comparative methods, warned that comparison only makes sense among institutions of civilizations being at the same stage. Another important step was the establishment of the Society of Comparative Legislation—following the example of the French *Société de législation comparée*—in 1894. The main aim of this scholarly society was to study the law of people living in the British Commonwealth and to make the findings of these studies applicable for practice. It must also be mentioned that this society did not neglect the study of European legal systems either, e.g. for the reform of English criminal law.

2. In the introduction of the second paper—Theoretical Questions of Comparative Law in Soviet Jurisprudence—, Péteri refers to the process during which the rejection of comparative law gradually turned to the acceptance of a socialist version of comparative law. Then he discusses the fundamental questions of comparative law in the light of a monograph written by A. A. Tille, the leading personality of Soviet comparative law of the time. Concerning the origins of comparative law, Péteri rejects both the antique and medieval origin of comparative law, and points out—contrary to Tille and others—that the birth of comparative law dates back to the turn of 19th and 20th century. Péteri bravely

¹ Editors: Balázs Fekete and András Koltay.

advocates the autonomy of the theory of comparative law against those approaches of Socialist jurisprudence emphasizing its secondary and applied nature. Last but not least, the author does not even share the conception of Tille about the existence of comparative law within the frontiers of a given country. The solution of collisions of the different legislative levels within the Soviet Union is a problem of the system of legal sources rather than one of legal comparison, since the precondition for comparison is the existence of at least two legal systems.

3. The next essay—Some Preliminaries to the Comparison of Legal Cultures—inspiringly discusses one of the most important questions of today’s comparative law, the role of legal cultures in the comparison.² In the introduction, the author rightly stresses that the connection between law and cultural phenomena was already recognized by the philosophical schools of the late 19th century. In the literature of comparative law, the approach to law as a cultural phenomenon was related to Kohler, who was otherwise named Hegel-redivivus by his contemporaries. One of Kohler’s main points was that law should always adapt to the culture of a given people, including its transformations, and it should also offer solutions to new challenges. Péteri shows that culture also has a value-function in Kohler’s approach.

A leading personality of Neo-Kantian philosophy, Radbruch, defines law as cultural power, thus improving Kohler’s thesis. He also explains that the type of law (*Rechtstyp*) and the idea of law are the two standards that have to be applied in the comparison of different legal systems.

During the first International Congress of Comparative Law (Paris, 1900) the whole issue got a new interpretation in the discussions related to the emergence of the new discipline of *droit comparé*. Kohler, for one, pointed out that a nation can only accept foreign rules which are in harmony with its conditions and institutions. Moreover, Zittelmann argued that the main value of comparative law was its capacity to approach law as a cultural phenomenon.

The author concludes by claiming that the advantage of the approach called “comparative legal cultures” consists in enabling comparative law to find a way out of the uncertainties related to a recent paradigm shift. It also seems possible, however, that the “comparative legal cultures” approach may make comparative law lose its relationship to law and assimilate to legal theory, legal anthropology or even to the sociology of law.

4. The fourth essay—Paradigm Shift in Comparative Law?—analyses an exciting and important problem. Péteri draws attention to the fact that the analysis of the paradigms of comparative law is part of the history of comparative law not yet written. Furthermore, he cannot accept the approach in the history of ideas which declares that the beginnings of comparative law could be discovered even at the earliest stages of human thinking.

The dominant view suggests that comparative law—called *droit comparé* in the years of its birth—has a relatively short history. Some scholars say it starts with the First International Congress of Comparative Law (Paris, 1900), others date it back to the 1860s or the

² From the Hungarian literature see Kulcsár, K.: *Jogszociológia* (Sociology of Law). Budapest, 1997; Varga, Cs.: *Összehasonlító jogi kultúrák* (Comparative legal cultures). Budapest, 2000; Visegrády, A.: *Jogi kultúra, jogelmélet, joggyakorlat* (Legal culture, legal theory and the practice of law). Budapest, 2003; Kondorosi, F.–Marosi, K.–Visegrády, A.: *A világ jogi kultúrái – a jogi kultúrák világa* (Legal cultures of the world—the world of legal cultures). Budapest, 2008.

establishment of the first scholarly society (*Société de législation comparée*, 1869) devoted to the field.

From the aspect of the history of ideas, Maine's *Ancient Law* can be regarded as a starting point. However, as the author points out, the so-called legal ethnology was also seriously related to the first paradigm of comparative law. This first paradigm had been dominant until the First International Congress of Comparative Law (Paris, 1900).

According to the new concept or paradigm emerging at this congress, it was reasonable to draw a dividing line between the formerly dominant, mostly theoretical comparative law and *droit comparé* properly understood. As Lambert argued, the former is strongly related to legal history or sociology of law, while the other is a new branch of the study of positive law. During the interwar period, the research of similar or different solutions in Common Law and Civil Law systems came to the fore at the levels of both written and case-law. This transformation was a sign of paradigm-shift in itself and it could imply that Far-Eastern or even Socialist laws could also be compared. After World War II, scholars tried to find some convergence between Socialist and Western laws, some of them even regarded Socialist law as a degenerated branch of Western Law. But from the 1950s, the new paradigm identified Socialist Law as an independent legal family on the basis of ideological factors, and it focused on the research of the style of legal families as well as their "determining" and "interchangeable" elements.

If a new paradigm shift may happen in the close future, it will be lead by advocates of the so-called "comparative legal cultures" approach—Péteri argues.

5. The fifth study—Sociological Questions in Comparative Law—discusses the problems of sociological approach in comparative law. Péteri starts by emphasizing that the failure of promising opportunities in legal unification based on comparative law was related to socio-economic relations behind the legal regulation. There is, however, a serious question related to this point. Does the research of sociological background of the legal institutions in the context of Socialist legal system mean the twilight of the classical approach in *droit comparé*? The author answers negatively, since the sociological approach was also applied by representatives of Western *droit comparé*, mostly in order to achieve practical means.

The reason why the earlier, unilateral normative approach was replaced with a sociological one is the fact that the main goals of comparative law cannot be achieved nowadays by simply juxtaposing legal rules. Consequently, one really needs the sociological approach. Moreover, this complex approach allows for a better consideration of value elements in the theory of comparative law. By way of a conclusion, Péteri points out that this approach is the essence of comparative law, and it could also serve as the proper basis for a "realist" comparative law capable of studying the sociological roots of legal and state-related phenomena.

6. In the sixth essay—Theoretical Questions of the Application of the Comparative Method in the Sphere of State Phenomena—the author highlights that this issue has been rather neglected in the literature of comparative law thus far. However, new behaviorist approaches show a comprehensive departure from the rule-centered approach in comparative law. Furthermore, the view has also been spreading among scholars that the aim of comparative law is not only the observation of similarities, and that the study of differences is equally of scientific value.

The sociological aspect in general or in particular can be the starting point of any comparison. As Péteri emphasizes, the real task is to give some relevance to the sociological aspects of state phenomena in terms of comparison. The term "state phenomenon" refers to legally defined state phenomena or institutions. This special socio-legal approach has the

following main criteria: (1) besides the legal framework, also principles have to be taken into account, (2) in the study of a given state institution, historical, moral and other traditions should also be considered, and (3) the function of the given state institution should also be analyzed.

7. The following pages—Goals and Methods of Comparative Law—introduce the reader to the goals and methods of comparative law. The author begins by asserting that there is no “Chinese Wall” between the fields of theoretical and applied comparative law, but their intersection is increasingly typical. However, the extension of comparative law to the legal practice and other factors influencing both legislation and practice enriched the so-called “legal approach” with sociological elements. Last but not least, the emergence of Socialist state and law also enforced the reinterpretation of the goals and methods of comparative law.

One of the fundamental questions of modern comparative law is whether Western and Socialist legal systems can be compared at all. According to the position of Péteri, the opportunities of the comparison of earlier legal systems are limited since their social principles are rather different. Thus, a sociological approach has to be applied in research, as a simple declaration of formal similarities does not make much sense in a comparative study—he argues. This is also relevant when one investigates the development of states and legal systems or evaluates state and legal phenomena.

8. The next paper—Comparative Law and Legal Theory—analyses the relationship between comparative law and legal theory. The first important problem discussed here is the recognition of comparative law as an independent discipline. Emphasizing the significance of Maine’s oeuvre, Péteri also points out the important role of Pollock, who stated that jurisprudence has to be historical and comparative at the same time. Thus, comparative law was regarded as an autonomous field of research. Moreover, from the 1870s it had a department in Oxford under the direction of Maine and his fellows.

A new approach to the scientific nature of *droit comparé* was formulated during the First International Comparative Law Congress (Paris, 1900). Lambert claimed that the task of comparative law is to help the formulation and emergence of the so-called common legislative law (*droit commun législative*). This position was refined in the following decades by dividing comparative law to two fields of study: comparative legal history and comparative legislation.

In Hungary, comparative law occupied a central position in the oeuvre of Szalay and Wenczel. In a few decades, however, another approach became increasingly popular. It emphasized the subordinate nature of comparative law to general legal theory, and was advocated by scholars like Pikler or Moór. The jurisprudence of the Socialist era regarded comparative law as a method or transitory science. Péteri convincingly refutes this view and stresses the independence of comparative law.

In the concluding section, the author formulates an interesting and important position: “If one can speak of some kind of plurality within general legal theory, the basis for that can only be the different levels of abstraction. On the basis of that, one could even speak of general legal theories belonging to different legal families (as the Romano-Germanic, Common Law or Scandinavian legal families). Yet for formulating the most general theoretical conclusions, the best instrument is a legal theory having the most general scope and embracing all the legal systems. Thus, plurality within legal theory is possible and we think that a general legal theory has to be developed, which recognizes the different groups of legal systems.”

9. The work continues with a discussion of the concept of “Western Law”—Some Remarks about the “Decline of Western Law”. After an overview of the main ideas concerning the taxonomy of legal systems, Péteri quotes an opinion, according to which the simple comparison of all the legal systems is impossible and unnecessary. Therefore, what is really needed, is their classification. The approach based on the concept of legal culture can enrich comparative studies with new insights.

But what does the concept of “West” mean for comparative law? On the basis of the widely spread distinction between Common Law and Civil Law, Péteri reminds the reader that the term of Western Law was introduced in comparative law by David in 1950. The aim of David was to distinguish it from Socialist Law. It also has to be mentioned that by using this term David emphasized the unity of Civil Law and Common Law due to capitalism, liberalism, and Christian ethics. Even though David did not think this concept of Western Law was applicable in 1969, the concept of a common Western Law is still used in comparative law.

10. The author discusses the question of whether Hungarian Law can be integrated into any legal family of the world in a most interesting and scholarly paper—Hungarian Law and the Legal Families of the World. He thinks this question can be answered by focusing on the “styles” of the different periods of Hungarian legal history.

Medieval Hungarian law was part of the so-called Romano-Germanic legal family, but it also had some peculiarities. Either the doctrine of the Holy Crown and the lack of a codified constitution, or the resistance to the codification of private law can be regarded as differences from the general features of this legal family.

In the wake of World War II, Hungary got under Soviet influence and rule and consequently it became a member of the Socialist legal family. However, this was a somewhat unusual situation, since the Hungarian legal system underwent serious transformations, not only in a material, but also in a formal sense. Péteri points out that this formal transformation disrupted both the ancient roots and the former style of Hungarian law. In this process of transformation the newly enacted Socialist codes and the consequent rejection of both customary law and judge-made law played an important role. The constitution of 1949 symbolized a rupture with the former historical constitutional system. Moreover, Péteri adds, this constitution—contrary to many changes—remains the constitution of Hungary up to our days. The democratic transition in 1989 meant the return to the Romano-Germanic legal family in a legal sense.

11. As a first problem of the next paper—Traditions and Human Rights in Hungary—Péteri mentions three factors which influenced the formation of political and human rights in Hungary: first of all the English, French and German ideas, secondly the historical Hungarian constitution, and thirdly the Marxist ideology.

Imposing limits on the king’s power, the Golden Bull of András II is rather similar to the English Magna Carta. This act, indeed, codified the legal position and privileges of the nobility emerging in the 13th century. The *Tripartitum* of 1514 also comprised these and it was living law until the 19th century. The improvement of the position of the peasantry could happen relatively slowly, mostly by the abolition of the feudal tenures in the 19th century. In the reformist movement emerging at the end of the 18th century, it was not the so-called third class (*tiers état*) but the nobility which acted as the leading force of the socio-political transformation.

As an example of the 20th-century Marxist interpretation of civil and human rights, the author gives a detailed analysis of the constitution and statehood of both the Soviet Council’s Republic and the People’s Republic. Lastly, Péteri points out that the main feature of the

recent developments is that the role of human and civil rights includes the limitation of state intervention as well as the protection of the individual sphere of liberty.

12. In what follows—Comparative Aspects in the Administration of the Law—the author scrutinizes the responsibility of judges and other functionaries dealing with the application of law. He first defines the three main features of the application of law: it is (1) not a mechanical activity, it is (2) obligatory for the judges, and (3) it has a comprehensive nature.

Placing the issue into a more general framework, Péteri continues his discussion with the comparison of European legal families. In so-called “Continental” legal systems, the “birth” of law is basically limited to the process of parliamentary legislation. However, Common Law systems look for the origin of law in the conventions, customs and traditions of society, that is, in the real behavior of people living together.

There are further differences between the two legal families in terms of the relationship of legislation and application of law. The prohibition of judge-made law is still a valid rule in Continental systems, although one can mention certain efforts to change this attitude.³ Without doubt, Common Law is judge-made law.

The author reminds that if we look for the road leading back to Europe, we should harmonize our ancient traditions with the determining factors of European legal development. And we can count on the fact that both legal families are parts of what is called Western Law. Moreover, we should recall Zlinszky’s dictum: the more legal knowledge, the more empowerment from the society, and the more responsibility.

13. One of the most important challenges to both European and Hungarian legal development is legal unification and legal harmonization. In the theoretical foundations of these processes, certain aspects of comparison can play a prominent role.

As the author rightly points out, legal harmonization only means the application of similar or equivalent solutions, while legal unification implies more. It implies that a new common regulation replaces former—divergent—rules. In terms of legal unification, one can speak of “internal” (within the national law) or international ones, while legal harmonization can be bilateral, regional or multilateral.

For all kinds of legal unification or harmonization, there are two fundamental questions to be discussed. Are they possible and desirable at all?

Obviously, the simple knowledge of legal rules is insufficient for legal unification. Their social, economic, political and ideological context has to be studied as well. For instance, unification is much less difficult between two countries having the same or similar ideological and political background. It is not mere coincidence that the traditionally successful fields of international legal unification were private and commercial law, while the unification of public law was considered as a mere dream by the participants of the First International Congress of Comparative Law. The author concludes that the activity of EU member states in the field of legal unification is really facilitated by the fact that their common intellectual heritage is strongly related to the Mediterranean culture with Jewish and Christian roots.

14. The last paper—Teaching of Comparative Law and Comparative Law Teaching—is devoted to the problem of legal education. The author starts from two premises. Firstly, he

³ See Visegrády, A.: *A bírói joggyakorlat jogfejlesztő szerepe*. (The role of jurisprudence in the development of law). Budapest, 1998.

declares the necessity of a reform of legal education. Secondly, he accepts that the challenges of globalization render the spreading of a comparative attitude necessary.

When dealing with the question of comparative law in legal education, one has to discuss two different aspects: the teaching of comparative law as an independent subject on the one hand, and the reform of the entire legal education by applying a comparative attitude on the other.

Nowadays there exist different models of comparative law teaching in the law schools of the world: (a) the teaching of comparative law within the framework of legal theory, (b) the teaching of the main legal families of the world, (c) the teaching of national law compared to a foreign legal system, and lastly (d) the teaching of a given legal institution on a comparative basis.

According to Péteri, it is more suitable to talk about two different courses: (a) an introductory and theoretical course and (b) the comparative discussion of foreign legal systems. The first has its own place in the curriculum of legal theory classes, while the second is related to the teaching of various fields of law. The author endorses the proposal that an independent introductory comparative law course should be integrated into legal curricula.

Discussing the history of comparative law teaching in Hungary, Péteri points out that it started in 1850 at the law faculty of Pest (Wenczel). Subsequently, there were two main tendencies. Some scholars studied the kinship between Hungarian and Common Law (Grosschmid), while others interpreted comparative law as one of the methods of studying positive law (Pauler, Somló and Pikler).

As for the developments after 1945, it should be mentioned that besides the courses concentrating on the comparative aspects of a given legal institution, also introductory classes on general comparative law appeared in Hungarian law faculties.

In addition to the above chapters, the book also includes a bibliography of the author and the abstracts of the papers, in French or English.

One final remark. This volume is an important piece of *droit comparé* for many reasons. Its value is, first of all, due to its subject and methodology, then to its insightful findings, and finally to the fact that it deals with some of the most fundamental and current questions of comparative law. These questions are analyzed with a critical attitude. One may conclude by saying that this book deserves a place in the library of everyone—legal academics as well as practitioners—who deals with questions of legal theory, legal history, or EU law.