De preliminaire fase van het rechtsvergelijkend onderzoek

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Summary

The preliminary phase of comparative legal research is the phase preceding the actual research. At this stage, a number of fundamental questions must be answered. In the literature on the methodology of comparative law, the preliminary phase as such is scarcely discussed, if at all. On the other hand, various specific methodological questions have been addressed by several authors. On the basis of an orientation study of a small number of well-known treatises, I have identified four fundamental issues that must be resolved at the outset of comparative legal research: defining the objective of the research, choosing the research topic, selecting the relevant legal systems, and determining the objects to be compared. Other preparatory questions that are not, or not exclusively, related to the planning of the research are outside the scope of this study.

In the literature on comparative law, the degree of attention given to questions of the preliminary phase differs per author and per question. Furthermore, the literature suffers from a lack of terminological clarity, generally paired with confusion regarding the contents of the concepts used. Also, the interrelations between the various parts of the preliminary phase are insufficiently dealt with.

The main objective of this study is to clarify the contents of the preliminary stage of comparative legal research: to show the ambiguity of certain terms, to render a more accurate description of the available options, and to show the connections between them.

To achieve this goal, I have chosen to take a two-fold approach to my research. Part I of this study contains a description and a critical analysis of the literature in this field. Here, the subject-matter is approached from a theoretical angle. Part II, on the other hand, focuses on applied comparative law: in these chapters, the results of an analysis of reports of existing comparative legal research are presented. In the third and final part of this study — the synthesis — the results of the analysis of theory and practice are linked together.

In each of the three parts of this book, there are recurrent references to the four basic questions of the preliminary phase of comparative legal research. In Part I, each of the four questions is covered by a separate chapter.

Chapter 1 offers an overview of the literature regarding the objectives of comparative law research, for which I have chosen a critical analytical approach. On the basis of an analysis of the usual descriptions and presentations of the objectives, I have found three different aspects that may have contributed to the confusion on the objectives of comparative law. The first aspect concerns the blurring of the distinction between the goal, the uses and the effects of comparative legal research. Although the majority of authors do make this distinction, they fail to carry it through in their presentation, or they allow the distinction to become blurred in some other way.

The second aspect concerns the emphasis that, in the description of the objectives of comparative legal research, is often laid on the field of application of the results rather than on the application itself.

The third aspect is connected to both the first and second aspects and concerns the various grounds that, in the twentieth century, have led to the discussion of the objectives of comparative law: the description of possible objectives of actual comparative legal research
on the one hand, and the self-justification of comparative law as an academic discipline on the other. In a separate paragraph, I have summarized the views presented by a minority of authors who have described the objectives of comparative law in a less stereotypical fashion.

The conclusion of this chapter shows that no clear description of the various types of ‘objectives’ can be given without a clear distinction of their various aspects. Secondly, it is submitted that the applications rather than the areas of application should be emphasized in the presentation of comparative legal research. Thirdly, scholars should be aware of their motives for mentioning certain objectives.

Chapter 2 provides an overview of the literature on the ‘topics’ covered by comparative law research, a term which is used both in the sense of ‘theme’ and ‘object’. The focus is mostly on the objects of comparison as indicated in the literature. After an extensive discussion of the twin concepts of microcomparison and macrocomparison, their respective objects are discussed in more detail: on the one hand, legal systems and their structures, and their various aspects on the other. It can be concluded that, at first sight, the authors are more or less in agreement on the topics that should be ranged under the headings ‘macro and micro-comparison’, but in detail their views do not always seem to correspond. Apparently, the distinction between the possible objects of comparison — and the purpose of such a distinction — is considered a more important methodological issue than that of an exact classification or a consistent use of the categories described.

The third chapter focuses on the way in which the literature deals with the way the selection of legal systems to be included in the research should be justified. First, I have sketched the perspective from which the authors tend to approach this problem. This paragraph is followed by an overview of the various guidelines generally offered for a well-reasoned selection of legal systems. In the next paragraphs, the contents of these guidelines are discussed: the guideline pertaining to the division of legal systems into legal families, the guidelines pertaining to the objectives and/or the topic of the research, and the guidelines pertaining to the researcher personally.

Unfortunately, the literature has no more to offer — and, given the many factors influencing the selection, it probably cannot offer more — than a few guidelines that each individual comparatist should judge on their soundness and suitability. It is submitted that there is a direct link between the lack of a thorough and critical treatment of the selection of legal systems, and the scant attention for a fundamental premise of the selection process: either all legal systems are eligible for selection, or only a number of certain (pre-selected) legal systems are relevant.

Chapter 4 starts with an overview of the positions that comparative law scholars have taken on the issue of determining the objects to be compared. First, attention is given to the various frameworks within which the methods for determining the objects to be compared are dealt with. The two frameworks that are most frequently used are the object and the method of comparison. Within these contexts, the requirement of comparability is often used as a sub-context. This requirement is discussed in more detail in a separate paragraph. By requiring ‘comparability’, the authors generally mean that a comparison must be useful, which, according to the majority, is the case if the objects to be compared have at least one
characteristic feature in common (tertium comparationis). Function, structure or effect qualify as features that legal rules or legal institutions may have in common.

The next paragraph covers the methods developed in the literature to identify the objects that have a similar function or structure. There seems to be no separate method for tracing objects that have similar effects. The method for determining objects with a similar function (the ‘functional method’) is the most detailed one and receives the most attention. By contrast, comparative law literature hardly offers any guidelines for pinpointing ‘structurally’ comparable objects. Nor does the literature address the question in which situation either method should be preferred. Scholars in the field of legal sociology have rightly criticized the scant and inadequate attention given to these methodological questions in comparative law literature. However, there is no indication that comparatists are willing to heed the propositions by legal sociologists.

The second part of this study is focused on applied comparative law, in that the results of my analysis of a number of comparative legal studies are described. Following chapter 5, which is an account of the analytical model I have used, the results are presented of an analysis of thirty nine reports submitted to the Netherlands Association for Comparative Law (Nederlandse Vereniging voor Rechtsvergelijking). This account is followed by an analysis of thirty four studies included in the series Arbeiten zur Rechtsvergleichung of the German Gesellschaft für Rechtvergleichung. These analyses have been made on the basis of a model comprising a series of questions directed at the objective of the research, the topic of the research, the selection of the legal systems and the method to determine the objects to be compared. In chapters 6 and 7, the general results of the analysis are reported for each of the four major questions: chapter 6 covers the results of the analysis of the Dutch studies, chapter 7 deals with the German studies. For each of the reports included in the analysis, detailed results can be found in appendices.

The results of the analysis of both the Dutch and German studies offer a varied impression of the practice of comparative law research. In general, most authors focus on the objective of their research and on the selection of legal systems. Only a few of them explicitly deal with the method of determining the objects to be compared. A general conclusion that can be drawn from the analysis of these studies is that a number of accepted theoretical notions should be reconsidered, or, conversely, that actual comparative research should be more closely attuned to the theory of comparative law.

In Chapter 8 (Synthesis), the results of the analysis of the literature and the comparative law studies are mutually tested and linked together. With regard to the objectives of comparative legal research, it is submitted that a distinction should be made between the immediate objective of the research, the acquisition of knowledge, and the desired application of the knowledge. Furthermore, it is suggested that the objectives of applied comparative law be divided into two main activities (forming and reflection), each with a neutral and a progressive variant.

With regard to the topic of comparative legal research, the first significant conclusion is that – as far as the preliminary phase is concerned – it is not necessary to make a distinction between private law and public law comparisons. Secondly, the distinction between microcomparison and macrocomparison can be better described as comparative research
directed at either the microstructure or the macrostructure of the law. The distinction between micro and macrocomparison is only useful for the categorization of the type of knowledge desired. It is of no use for the categorization of the objects to be compared. Thirdly, ‘objects to be compared’ should be understood to cover legal concepts in a broad sense, possibly supplemented by social mechanisms in special situations. Further, Kokkini’s ‘approach’ idea is reduced to the idea of a starting point, i.e. the way in which researchers explain their points of departure. Making the point of departure explicit is important both for comparative researchers themselves and for those studying the results of their research, as it could explain the link between the comparatist’s choice of topic and the way he or she has looked for the objects to be compared.

With regard to the selection of the legal systems, it is submitted that, generally speaking, there is no principle supporting or defying a comparison between certain legal systems. The objective and the topic of the research are the basic indicators for the question of whether it is useful or not to include a particular legal system in the research. Thus, the arguments arising from these two indicators carry the most weight. Having applied the guidelines pertaining to the objective and the topic of the research, the comparatist will often be confronted with too many legal systems that are eligible for research. In this case, one could make use of the notion of Lösungstypen, or — if the research is geared to reflection — of the notion of ‘representative legal systems’. Personal reasons can be advanced for the final selection. The arguments used can be grouped in various ways. My own preference would go to what I call a ‘cumulatively limitative structure’.

Comparability is the key to finding the objects to be compared. When using this term in this context, one should not confuse the words ‘comparable’ and ‘incomparable’ with ‘almost alike’ and ‘different’. Furthermore, one should bear in mind that the notion ‘comparable’ only acquires meaning when it is linked to a certain objective. If two objects are to be compared they should at least share one common characteristic and they should differ at least on one point. Possible common elements (tertia comparationis) to be discovered in comparative legal research are the function and/or structure of the objects. The method by which objects with an equivalent form are indicated is best referred to as the ‘conceptual method’. The methods by which a more or less similar function can be traced are best referred to by one of the alternative names given to the three manifestations of the functional method: the functional-institutional method, the problem-solving approach and the factual approach. The difference between these methods lies in their point of departure. For a proper use of these methods, it is important to determine and describe the content of a certain social or legal problem, the function of a legal institution, and what in fact must be considered as the structure or form of a legal institution or legal rule. The task attributed to the objects can be derived from the legal system in which they are embedded. Depending on the topic of the research, it could be restricted to either the general function or a specific function, or it could cover both. The ‘structure’ of a legal institution or legal rule can best be described in a negative way, by defining the status and content of the legal rule or legal institution as such, apart from its function. The problem or function need not be formulated in neutral, social terms. Depending on the chosen systems and the topic, universal legal terms can be used.
At the end of the synthesis, the four core questions of comparative legal research are linked together, as the various problems to be solved in the preliminary phase are clearly interrelated. Per issue, the connections between them are assessed in the abstract.
With regard to the application of the legal systems, it is important to consider the principle underlying the analysis. In comparing certain legal systems, the objective and the type of research are the two main indicators of the conclusions. It is useful to include a particular legal system in the research. These are the two indicators that are essential for research. However, it is not necessary to include all systems. If the research is geared to reflect the nature of representative legal systems, personal systems can be advanced. If the objective and the topic of the research are not necessarily comparable to other systems that are eligible for research in institutions, the methods of the research may vary. Therefore, if the research is geared to reflect the nature of representative legal systems, personal systems can be advanced. If the objective and the topic of the research are not necessarily comparable to other systems that are eligible for research in institutions, the methods of the research may vary. Therefore, if the research is geared to reflect the nature of representative legal systems, personal systems can be advanced. If the objective and the topic of the research are not necessarily comparable to other systems that are eligible for research in institutions, the methods of the research may vary. Therefore, if the research is geared to reflect the nature of representative legal systems, personal systems can be advanced.