COMPARATIVE LAW AND LEGAL SCIENCE

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ABSTRACT

This paper argues that it is useful for law students to gain some knowledge of comparative law for the following reasons:

1. A lawyer who has familiarised him or herself with the law of foreign jurisdictions is less likely to experience the 'threshold of the unfamiliar'.
2. Occasionally legal decision makers base their decisions on comparative considerations.
3. The study of comparative law broadens one's horizon and makes it easier to relativise one's parochial law. Thus, the national law can be seen as one possible solution to societal problems, and not anymore as *the* legal structure of human society.
4. Comparative law can be a useful *heuristic tool*. It allows legal scientist to generate valuable hypothetical answers to research questions both more easily and with a wider scope.
5. Depending on the type of research questions one tries to answer and on one's view of the law, comparative law can also play a role in scientific *method* (in the sense of standards for what are relevant arguments).
   - Such a role is undisputable for some kinds of explanation of the law's contents (legal transplants).
   - Comparative law in a broad sense may provide data which are relevant for questions of evaluative legal science.
   - Comparative law can play a role in descriptive legal science too, for instance if one takes law to be the best possible regulation for collective enforcement.

KEYWORDS

comparative law, legal education, heuristics, legal method

PRELIMINARIES

In the Maastricht European Law School, much attention is devoted to comparative law. This raises the questions what makes comparative law so important, and why law students should devote a considerable part of their time to the law of different countries and to the similarities and differences between these different jurisdictions. To answer these questions, we take a closer look, both at the different ways in which comparative law can be useful for legal scientists, and at the way in which the study of comparative law should benefit law students.

If we want to know why the study of comparative law is useful, the first thing we should be clear about is the *nature of comparative law*. Zweigert and Kötz characterise it as the description of the law of different legal

[1] The author thanks Anne Ruth Mackor and Remco van Rhee for useful comments on a draft version of this contribution.

systems for the purpose of 'comparative reflections'. They also seem to assume that these comparative reflections should end up with conclusions about the proper policy for the law to adopt.[2] This is quite vague, but a more specific characterisation of comparative law would run the risk to exclude valuable types of research which are generally classified as comparative law, such as the study of legal transplants.[3] In the following we will encounter different useful forms of 'comparative reflection'.

The focus in this contribution will be on the use of comparative law for legal science in a broad sense. This does not imply that comparative law has no use in *legal practice*. Law students who have familiarised themselves with the law of different jurisdictions are less likely to experience the threshold of the unfamiliar when they encounter in their practical work cases or situations which have points of contact with more than one legal system. To give an obvious example: a legal practitioner who works in a standard legal practice in either Dutch or Belgian Limburg will surely encounter cases for which familiarity with both Dutch, federal Belgian and Flemish law is crucial. Experience with comparative law facilitates the search for law in the foreign jurisdictions and prepares the lawyer for the possibility that what seems obvious in, for instance, The Netherlands may nevertheless be different in Flanders.[4] On a less mundane level we see that legal decision makers such as judges occasionally base their decisions on comparative considerations.[5] Legal counsels are therefore well-advised to take this into account.

Apart from applicability in legal science and legal practice, the study of comparative law brings the advantage of broadening one's view of the law. Without comparative insight, the law may seem to consist of the rules that govern a number of situations and cases; it seems to be the fixed structure of society. After familiarisation with comparative law, the law of a jurisdiction – notice the relativisation – has become one of several possible ways of dealing with societal situations. Comparative insight makes it possible to take a less committed stance towards one's own law and thereby creates the opportunity to use one's parochial law more creatively.[6]

METHOD

Comparative law can play a role in legal science, both as a scientific method and as a heuristic tool. To obtain a clear view of what these uses amount to, it is necessary to delve a little deeper into the nature of scientific research.

Science in general, and therefore also legal science, is a social phenomenon, a cooperative enterprise aimed at the acquisition, accumulation and systematisation of knowledge. The advantage of science over individual acquisition of knowledge is that scientists can build on the results of their colleagues and predecessors. To quote Newton: 'If I have seen further it is only by standing on the shoulders of giants.'[7] Science is a way in which people collaborate in the pursuit of knowledge.

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[2] Zweigert & Kötz: *Introduction to Comparative Law*, 6.

[3] Cf. Fedtke: *Legal Transplants*.

[4] An example would be that family allowances, which are granted in The Netherlands on territorial basis, are granted in Belgium on the basis of one's labour contract.

[5] A brief discussion of this phenomenon can be found in Smits: *Influence on National Legal Systems*.

[6] The author of the present contribution experienced this opportunity himself when he used the common law construction of economic property (trust) to deal with some problematic cases concerning the use of marital dwellings after divorce (Hage: *Echtelijke woning*). At that time only to receive the learned comment that this was not Dutch law….

[7] Original Latin: 'Pigmaei gigantum humeris impositi plusquam ipsi gigantes vident.' Letter to Robert Hooke of February 15th 1676. Source: http://en.wikiquote.org/wiki/Isaac_Newton (last consulted on December 15th 2009). The phrase 'standing on the shoulders of giants' appears to stem from Bernard of Chartres (12th

Here is where method enters the picture. For what is a scientific method? A scientific method indicates what count as good reasons for adopting or rejecting a potential piece of knowledge. Take for instance two lawyers. One of them thinks that the contents of the law can be established through the study and interpretation of authoritative texts such as statutes , treaties, guidelines, and case law. The other one thinks that the contents of the law should be established by empirical research aimed at the discovery of which rules would make human beings most happy if they were enforced by collective means. These two lawyers would disagree fundamentally on what are good reasons in a discussion about the contents of the law, and most probably they cannot cooperate in legal research.

The adoption of a particular method boils down to agreement on what count as good reasons. Since such an agreement is a precondition for science as collaborative knowledge acquisition, a shared method is almost by definition a precondition for science.[8] Reasons in general, and therefore also reasons for accepting or rejecting a particular piece of potential knowledge, are facts that are *relevant* for what they are reasons for or against.[9] The adoption of a method is a choice for what counts as relevant in selecting the right answer to a research question.

The adoption of a method is also a choice concerning the kind of data that must be collected in order to argue for or against a potential piece of knowledge. For instance, on a hermeneutic method for legal science the relevant datum for a particular legal conclusion might be that this conclusion is supported by the literal interpretation of a statute. The proper way of performing legal research, method in the derived sense, is to a large extent[10] determined by method in the primary sense, the recognition of particular kinds of data as relevant for answering a particular kind of research question. A method is therefore always related to a research question, because the research question, in combination with a view as to which data are relevant for answering this type of question, together determine which information should be collected.[11]

There are different kinds of science, which can be distinguished on basis of the kinds of knowledge pursued in them. In the *physical sciences* we look for the explanation (and prediction[12]) of physical phenomena. The phenomena are explained by bringing the facts of a particular case under a law like generalisation and by deriving the facts that need to be explained from these facts and the law. An example would be the explanation why a rod of iron expands from the fact that it was heated and the law that metals expand when heated. The physical sciences aim to explain facts through the discovery of the laws which make explanations possible. Their method is, amongst others, to test hypothetical laws against empirical data.

In the *humanities* we try to explain human behaviour by showing how this behaviour made sense in the eyes of the persons who exhibited this behaviour.[13] The method is then to test hypotheses against data concerning the

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century). See http://en.wikipedia.org/wiki/Standing_on_the_shoulders_of_giants (last consulted on April 25th 2010).

8 That science requires a shared method does not exclude that this method is mostly implicit, or that it changes in the course of time. If such a change is drastic, for instance if physics comes to be based on experiments rather than on interpretation of authoritative texts, the nature of the science changes too.

9 An extensive discussion of the nature of reasons can be found in Hage: *Reasoning with Rules*, chapter 2.

10 Other factors might be conventions on how results are to be published, and restrictions on how research may be financed.

11 This is essentially the point that Toulmin made with his claim that warrants (the standards that determine which data are relevant, which also function as inference rules) are field dependent. Cf. Toulmin: *Uses of Argument*, chapter 1.

12 On the so-called 'covering law model' the only difference between explanatation and prediction is that explanation deals with phenomena from the past, while prediction deals with phenomena in the future. See Hempel: *Studies in the Logic of Explanation*.

13 See for instance Dray: *Rationale of Actions*.

beliefs and attitudes of the acting persons. There are also sociologists and psychologists who try to give causal explanations of human behaviour, analogous to the way in which phenomena are explained in the physical sciences.[14] On this view of the humanities, the method is to test hypothetical laws against actual data concerning human behaviour. Notice, by the way, how these different methods lead to completely different versions of psychology or sociology.

In the *historical sciences* we aim to describe and explain events and facts from the past. The method is in part the same as that of the (other) humanities, including the battle of methods.

In the *moral sciences*, we aim to discover which behaviour is good or bad, right or wrong. Here we have a battle of methods too, especially concerning the proper way to establish moral standards. Utilitarians postulate a standard (maximisation of happiness) and thereby turn most of of moral science into a matter of psychology.[15] Kantians try to base the ultimate moral standard on the free and rational nature of moral creatures (human beings).[16] Aristotelians aim to derive moral standards from human nature[17], and coherentists seek the justification of moral standards in the coherency of, amongst others, general moral standards and moral intuitions.[18]

In *mathematics* we try to discover what follows from a given set of axioms (deductive science), and to find axiom sets from which a number of attractive theorems can be derived (axiomatisation).[19]

The precise nature of *legal science* is disputed.[20] Some believe that legal science aims to describe the positive law that 'follows from' a set of legal sources such as legislation, treaties, and case law. The nature of legal science is then the establishment of the proper meaning of these texts, and the relevant method is then hermeneutic.[21] Others believe that legal science aims to systematise the legal materials in order to obtain a coherent whole in which the concrete rules follow from legal sources and a set of principles and values, while the principles and values can be induced from the concrete rules rules. On this view, legal science would have a lot in common with mathematics.[22] Again others take it that the primary task of legal science is to discover what the best law is, and on this view legal science is similar to the moral sciences.[23] The practice of doctrinal legal science seems to consist of a mixture of these three approaches.

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[14] See for instance Kincaid: *Defending Laws*.

[15] De Geest has proposed the same move in order to transform doctrinal legal science into a 'real' science. Cf. De Geest: *Rechtswetenschap een volwaardige wetenschap*.

[16] An influential recent exposition of Kantian ethics is Korsgaard: *Kingdom of Ends*.

[17] A modern representative of this view is Finnis: *Natural Law and Natural Rights*.

[18] The locus classicus here is Rawls: *Theory of Justice*, section 4. A more general account is Daniels: *Wide Reflective Equilibrium*.

[19] Cf. Beerling e.a: *Inleiding tot de wetenschapsleer*, chapter 2, on the deductive sciences.

[20] At present we deal only with tradtional, doctrinal legal science. Other sciences that have the law as their object, such as legal history and sociology of law will later be discussed briefly.

[21] Het hermeneutische karakter van de rechtsgeleerdheid wordt benadrukt in Smith: *Normatieve karakter rechtswetenschap* en in Van Hoecke, *Rechtswetenschap een empirische wetenschap?*, 43.

[22] In different ways, this view is exposed in Dworkin: *Law's Empire*, chapter six, in Van Rhee, *Geen rechtsgeleerdheid, maar rechtswetenschap*, and in Mackor: *Explanatory non-normative legal doctrine*.

[23] This view is, in different versions, defended in Smits: *Omstreden rechtswetenschap* and in Hage: *Truly Normative Legal Science*.

HEURISTICS AND COMPARATIVE LAW

Although there are many different kinds of science, with different research questions and different methods, at a more abstract level they are all similar. Science has to do with answering research questions. The potential answers are hypotheses, and these hypotheses are tested against other information, such as empirical evidence, moral intuitions, and the derivability of theorems, and they are compared to each other. In this 'struggle for life'[24] the hypotheses which seem best should be[25] accepted provisionally, until even better hypotheses become available.

Within this process, two aspects can be discerned. One is the testing of hypotheses against the available information, including the gathering of information against which the hypotheses are to be tested, and the mutual comparison of available hypotheses to determine which one deserves to survive. For the comparison and testing of hypotheses, a science has a method in the form of a set of standards that determine which evidence counts as relevant for a particular kind of hypothesis and what makes that one hypothesis is preferable above another one. Through the application of these standards the adoption of a particular hypothesis as the answer to a research question is provisionally justified.

The second aspect of the process of science is the generation of hypotheses. Scientific method has to do with the testing and selection of hypotheses, and requires a set of pre-existing hypotheses as the fuel on which to run. Scientific method does *not* generate the hypotheses itself; there is no method for framing correct hypotheses.[26] Still the availability of good hypotheses is crucial for science, because scientific method consists of selecting the best hypothesis from the available ones. Without good 'fuel' the process of generating good scientific knowledge does not fly. Although there is no method which can guarantee the production of good hypotheses, there are techniques to increase the chance that good hypotheses are generated. Such techniques are called 'heuristics'.[27] Heuristics can take many forms, varying from having a good night sleep, via taking some alcoholic drinks to increase inspiration, to studying the already available hypotheses and their shortcomings.

In particular this last heuristic is often very fruitful. Indeed, it is seldom possible to devise fruitful hypotheses as potential answers to research questions if one is not familiar with the problem field and the theories (that is: as yet non-refuted hypotheses) circulating in it.[28] Here lies an important role for comparative law, because it is well possible to view the law of different jurisdictions as so many hypotheses about the most viable solution for some societal problem.[29] The experiences with these regulations provide indications about the quality of the solutions, and suggest what should be maintained and where improvement is desirable. In other words, *the study of comparative law can be a valuable heuristic tool*.

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[24] This biological metaphor stems from Popper: *Evolution and the Tree of Knowledge*.

[25] 'should be' because our discussion deals with what should rationally be accepted and not with the actual practice of science, which does not always satisfy the highest standards of rationality.

[26] As outflow of the logical-empirist movement in the thirties of the previous century, there have been attempts to develop an inductive method for theory *confirmation* (for the *corroboration* of hypotheses). Not much has come out of these attempts. Cf. Howson: *Evidence and Confirmation*.

[27] The idea of heuristics was elaborated in Lakatos: *Methodology of Scientific Research Programs*. More recently it has gained widespread popularity in artificial intelligence, in connection with intelligent search. Cf. Haugeland: *Artificial Intelligence*, 176-179. In Dutch legal science, the role of heuristics was emphasized in Nieuwenhuis, *Legitimatie en heuristiek*.

[28] Too extensive familiarity may be a problem, though, because it may tie the researcher to the trodden paths and prevent him or her from developing bold new ideas.

[29] This is also stressed in Smits: *Influence on National Legal Systems.*

It should be noted, however, that it does not follow that comparative law can tell us what is the most viable solution for a problem. The selection of the best of hypotheses from a set of viable ones is a matter of scientific *method*. Therefore the next issue to be addressed is whether comparative law is also (part of) a method for legal science. This issue can only be dealt with by a more detailed analysis of the kinds of research questions that are asked in legal science.

LEGAL SCIENCES

There are many different research questions that can be asked about the law, but most of them can be categorised under one of the following three headings:

1. Explanation of the law's contents.
2. Evaluation of the law.
3. Description of the law.

EXPLANATION

Explanation of the law's contents can both be logical/systematic, historical and sociological. A logical/systematic explanation shows on the hand how concrete rules and decisions 'follow' from underlying principles, values and policies. On the other hand – but this is more or less the same thing approached from a different side – it shows which principles, values and policies are apparently presupposed by the rules and decisions of positive law. This type of explanation is advocated by Dworkin, Van Rhee and Mackor.[30]

A historical explanation explains the contents of positive law through earlier versions of the positive law, and the internal legal events that deal with it, such as legislation, judicial decision making and doctrinal discussions. A sociological explanation focuses on the effects which the contents and – even more importantly – the operation of positive law (law in action) has on society, and how the feedback from society leads to changes or the lack thereof in the contents of the positive law. Topics that may ask for explanation are that different legal systems that started from the same foundation (e.g. Roman Law) have developed into different directions, while systems with different starting points have nevertheless developed similar legal institutions.

If comparative law is to play a role in the method of explanatory legal science, comparative data should be relevant for the selection of the best explanatory hypothesis. The subfield of comparative law that deals with so-called 'legal transplants'[31] illustrates that this is indeed the case. Legal transplants are pieces of law from one jurisdiction that are adopted in another jurisdiction. The phenomenon that Belgian private law is quite similar to French private law can be explained from the fact that the Belgian civil code was a local adaptation of the French civil code of 1804. The fact that the private law of many countries on the European continent exhibits large structural similarities can be explained from the large scale reception of Roman law in the late Middle Ages. In general, the study of legal transplants provides valuable data that are useful for explaining the contents of a particular regulation.

EVALUATION

Evaluative legal science can take the shape of passing value judgements on actual or hypothetical (proposed) regulations, or of the selection of the 'best' regulation from a set of alternatives. In both cases a standard is needed that specifies under which conditions a regulation can count as good, or as better than some other

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[30] Dworkin: *Taking Rights Seriously*; Van Rhee, *Geen rechtsgeleerdheid, maar rechtswetenschap*; Mackor: *Explanatory non-normative legal doctrine*.

[31] Cf. Watson: *Legal Transplants*, Fedtke: *Legal Transplants* and Graziadei: *Transplants and Receptions*.

regulation. These standards tell us which facts about the regulations are relevant for assessing them as good or bad, right or wrong, or as better or worse than some other regulation. The evaluative judgement will be based on the application of these standards to the data about the regulation. A relatively simple standard would be that a regulation is the better, the more happiness it produces. For practical purposes, this very abstract standard would have to be replaced by more concrete ones. For instance competing possible regulations in the field of criminal law might be evaluated by means of the standard that rules are better, the more they succeed in reducing crime. The underlying assumption would then be that the reduction of crime is good because it produces more happiness. The relevant data for assessing a regulation would then concern the effects of the regulation, in the first place on the level of crime, and ultimately on the total amount of happiness.

The battle of methods that exists in the moral sciences would occur here too, because there is no broad agreement on the proper standard for evaluating legal regulations. However, although there is no agreement on the appropriate standard, according to most standards the effects of rules on society are relevant for the evaluation. Although comparative law in the strict sense of comparing the contents of laws from different jurisdiction does not provide the relevant information, comparative law in a broader sense, which also takes into account what the practical effects of regulations are, does provide information that is relevant for evaluative purposes. It should be noted, however, that only comparative law in a broad sense can provide the relevant information and that even that form of comparative law cannot decide on the standard for evaluation.

DESCRIPTION OF THE LAW

The possible role of comparative law in connection with the description of the law depends on one's conception of the law and its contents. The contents of the law can either be taken as the content of the law

I. of a particular jurisdiction, or
II. in general.

I. The former approach will be appropriate if one takes law to be *positive law*, law that was explicitly made by national or international legislators or judges. If law is taken to be positive law, the contents of the law can in theory be established by studying the legislation and case law that counts as a source of the law at issue. The results of comparative law will then hardly count as reasons why a particular description is true.

However, this simple picture of positive law is not fully correct, amongst others because both legislation and case law require interpretation.[32] If there is disagreement about the proper interpretation of one or more relevant texts, at least two possibilities present themselves.

a. The first possibility is that we have run out of law, and that the choice between competing interpretations is from the legal point of view arbitrary. A legal decision maker must exercise, to use Dworkin's phrase, 'strong discretion'.[33]
In theory it would then be possible to toss a coin, because the choice between the different interpretations is arbitrary. In practice some standard will be adopted, but the choice of the standard is again arbitrary from the legal point of view. One possible standard would be to prefer the interpretation which is best from the moral point of view. Another standard would be to adhere to the views of the majority. And again a different standard is to choose for an interpretation that was adopted in other jurisdictions. In the last case, comparative law provides essential information. In all of these cases, however, comparative law does not provide us with a reason why a particular description of the law is the correct one, but at most why a particular regulation *should* be adopted to fill the gap that exists in positive law.

[32] On interpretation from a comparative perspective, see MacCormick and Summers: *Interpreting Statutes* and MacCormick and Summers: *Interpreting Precedents*.

[33] Dworkin: *Taking Rights Seriously*, 32.

b. The second possibility is that the national law itself contains standards for making the choice between different interpretations[34], and then there are again two possibilities:

1. The standards refer to hard facts such as the intention of the historical legislator or the prevailing public opinion (if it exists), and can be applied without making any value judgements. Then the choice between the competing interpretations can be made on the basis of empirical data, e.g. by establishing the intention of the historical legislator. Another possibility, which seems to be realised mostly in cases where international private law is applicable, is that the standards provided by national law point to the law of foreign jurisdictions. If this is the case, the results of comparative law provide us with reasons why the national law has a particular content.

2. The application of the standards for choosing between interpretations requires an evaluative judgment, e.g. a judgement about the purpose of the rule, or about the needs of society. In that case the content of the law can only be established by making value judgements.[35] What was written about the use of comparative law for evaluative legal science then becomes relevant for descriptive legal science too.

II. Nowadays it is less fashionable than it used to be a few centuries ago[36], but the question after the contents of the law may also be interpreted as dealing not with the positive law of a particular jurisdiction, but with the content of the law in general (ius commune, or ius naturale). This is a feasible approach if one takes the law to be the best regulation to be enforced by collective means, where the positive law of different jurisdictions is a body of rules that must seriously be taken into account for reasons of legal certainty.[37] If one takes law to be the best possible regulation, the determination of the contents of the law is essentially an evaluative matter. What was written about the use of comparative law for evaluative legal science is then also relevant for descriptive legal science.

CONCLUSION

The study of comparative is useful for lawyers and law students for several reasons:

PRACTICAL REASONS

1. A lawyers who has familiarised him or herself with the law of foreign jurisdictions is less likely to experience the 'threshold of the unfamiliar'.
2. Occasionally legal decision makers base their decisions on comparative considerations.
3. The study of comparative law broadens one's horizon and makes it easier to relativise one's parochial law. Thus, the national law can be seen as one possible solution to societal problems, and not anymore as the legal structure of human society.

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[34] The classic example in this connection is article 1 of the Swiss Civil Code, which tells the judge which sources to use if no relevant provisions can be found in the statutory text.

[35] It may seem strange that the description of the law can be based on value judgements. That this is possible nevertheless is because the positive law refers to evaluative standards. This brings along that a description of the positive law in abstract must mention these standards and that a description of the implications of the posive law for concrete cases requires the application of these standards.

[36] The idea that there was a *ius commune* a common law for continental Europe, had found wide acceptance at the end of the 15th century. Cf. Stein: *Roman Law*, 75. From a philosophical perspective, similar ideas gained adherence in the form of a natural law that could be known through reason. Cf. Kelly: *Western Legal Theory*, 186-189.

[37] More on this approach in Hage: *Truly Normative Legal Science*.

Scientific reasons

4. Comparative law can be a useful heuristic tool, which allows legal scientist to generate valuable hypothetical answers to research questions both more easily and with a wider scope.
5. Depending on the type of research questions one tries to answer and on one's view of the law, comparative law can also play a role in scientific method.
   - Such a role is undisputable for some kinds of explanation of the law's contents (legal transplants).
   - Comparative law in a broad sense may provide data which are relevant for questions of evaluative legal science.
   - Comparative law can play a role in descriptive legal science too, for instance if one takes law to be the best possible regulation for collective enforcement.

This both explains and justifies the ample attention for comparative law in the curriculum of the Maastricht European Law School.

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