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The benefit of using the comparative method in studying public administration

O pożytkach z badań prawnoporównawczych nad administracją publiczną

Summary

The article focuses on the origins and history of comparatist studies, the objectives of this research method, especially as regards administrative law, as well as possible results of its use, which can be used in legislation, practice administrative, case-law, and finally in the study of administrative phenomena. A separate thread of the article is the presentation of the achievements of Wrocław school of administration, whose particular feature is the use of administrative comparatist.

Keywords

public administration, comparative method, Wrocław school of administration

Streszczenie

Artykuł poświęcony jest omówieniu genezy i historii badań prawnoporównawczych, założeń tej metody badawczej, zwłaszcza w odniesieniu do prawa administracyjnego, a także możliwych wyników jej stosowania, które mogą być wykorzystywane w legislacji, praktyce administracyjnej, orzecznictwie powstałym na jej tle, a wreszcie w nauce zajmującej się badaniem zjawisk administracyjnych. Osobnym wątkiem artykułu jest przedstawienie dorobku wrocławskiej szkoły administratywistycznej, której szczególną cechą jest stosowanie komparatystyki administracyjnej.

Słowa kluczowe

administracja publiczna, metoda prawnoporównawcza, wrocławska szkoła administratywistyczna

Introduction

The second Seminar of Students of Administration in International Organizations, Bachelor of Business and Administration and International and European Law programmes at the Faculty of Law, Administration and Economics at the University of Wrocław entitled

Comparative Perspectives for Public Administration and Administrative Law encourages a deeper reflection on issues of fundamental importance to the essence of this project. In other words, the answer to the question about the need and consequence of applying the comparative method for studying administrative phenomena.

As Professor Wieńczysław Józef Wagner von Igelgrund zum Zorstein, one of the leading representatives of Polish and American comparative studies, rightly pointed out, "Whoever knows only his own law, does not know his own law". This statement leads us directly to the answer to the first of the questions posed, as it is impossible to examine the essence of any institution of national law today without using comparative research, because, in contemporary law, almost no state has an institution which is solely domestic or even of national provenance. Contemporary law is not only a result of intra-state evolution, but also of numerous influences of foreign law, which are diverse in terms of intensity, scope and quality, while a comparison of the features of relatively homogeneous legal institutions enables the establishment of the degree of identity, similarity or differences between them through a comparative study, revealing their common roots or influences of other legal cultures that are common to them.

1. The Growth and Development of Comparative Studies: A European Perspective

The reasons for this phenomenon can be found in the times of the original tribal communities, when their rivalry for territories encouraged their leaders to conduct a comparative analysis of the enemy's forces, but also to take advantage of their structural, military and economic solutions. The subsequent development of civilization meant that this process became intensified and enriched. Of particular importance was the development of trade, which enabled non-antagonistic contacts to be made between the first countries of that time (e.g. Mesopotamia and Egypt). The first descriptions of foreign law and political systems, as well as their comparison with the law and their system and even the first examples of using the results of this comparison to create their own law originate from those times. Most of the examples are provided by the area occupied by today's Greece, where, in ancient times, there were hundreds of city-states, each of them based on their own law and their own very diverse political systems, from democracy to tyranny. Although we mention them most frequently because of the numerous wars between them, despite the conflicts and the dangers that arise from them, the representatives of the two most warring cities – Sparta (Likurg) and Athens (Solon) – travelled around the world to learn about foreign institutions of law, so as to perfect their own state, like Solon, in his reforms from the sixth century BCE. It was due

to these same travels, description and comparative analysis of the Hellenic city-states that Plato, first, in the treatise *Laws,* presented a vision of the ideal state system after which Aristotle, in *The Constitution of the Athenians,* presented his vision of the ideal city-state compared with the solutions of 158 cities that were described and critically assessed. Theophrastus of Eresos went furthest in his comparative research. In the third century BCE, in the book named *Laws*, he analysed all policies existing at that time, indicating the differences between them and, in particular, the criticisms he considered inappropriate.

The most perfect example of the creative use of cognition of foreign law are the beginnings of the Roman Empire, when the Romans, who were at a lower level of civilization, conquered the city-states of the region of the much better developed Hellenic culture. The commission of the decemviri that was appointed at the time for writing the laws of the Twelve Tables used the law of the Greek cities. Meanwhile, when the Empire was being converted to Christianity in the third and fourth centuries CE, a comparative work, *Collatio Legum Mosaicorum et Romanorum,* was written, in which a comparative analysis was made of the writings of classical lawyers from the *Law of Moses* to demonstrate the lack of contradiction of Roman law with respect to biblical law (hence the alternative name of this document *Lex Dei*). The Middle Ages, which immediately followed this period, were not conducive to comparative law studies because of the dominance of Roman and Church law on the continent, so it is hardly surprising that John Fortescue's treatise, *De laudibus legum Angliae,* devoted to the comparison of English and French law (its resumption in English, *The Governance of England* appeared in 1885) only appeared on the British Isles in 1470.

It was only the Renaissance period, with its return to ancient times, but also the era of great geographical discoveries, which gave the opportunity to encounter non-European societies and legal cultures, that encouraged and even forced the return of comparative law research. There are two trends in comparative law studies, namely the search for the ideal state system and a more pragmatic use of the results of the comparison for *ad hoc* solutions. The criticism of the English monarchy and those of other European countries led Thomas More to *Utopia* (1516), as it led Tommaso Campanelle in 1602 (*Civitas Solis Poetica. Idea Reipublicae Philosophicae*) to the ideal monarchy, whereas it led Jean Bodin to praise the *Six Books of the Republic* (1576) of the French absolute monarchy. Pragmatist Niccolo Machiavelli in *The Prince* (1515) encouraged the rulers to observe the governments in other countries and take advantage of their solutions that enable them to more effectively achieve their objectives. Even the more pragmatic professors of law of the German universities: Samuel Stryck in Frankfurt in 1690 (*Specimen Usus Moderni Pandactorum*) and Georg Struve in Saxon Jena in 1658 (*Syntagma Iuris Civilis*

Universi) focused on using the institutions of Roman law to create an independent civil law in the German lands.

In the historical assessment, we owe the greatest achievements of the Enlightenment to the use of comparative law studies, because both John Lock, when presenting the theory of classical republicanism in *Two Treatises of Civil Government* (1690) deduced it from a critical analysis of all previous state systems, and Jean-Jacques Rousseau conducting a critical analysis of ownership rights and the monarchical system in *Discours sur l`origine de l`inégalit parmi les hommes* (1755) proposed the idea of a new state system based on the sovereignty of the people (*Le contract social*) in 1762 and, finally, Charles Louis Montesquieu, after the criticism of the French system in 1721 (*Lettres Persanes*) proposed a concept in 1748 (*De l`esprit des lois*) of the separation of powers, which remained a universal concept adopted by the majority of the later emerging states. It was already at the end of the seventeenth century that the awareness of the benefits of comparative law studies was so great that, in the methodical paper, *Nova Methodus Discendae Docendaque Jurisprudentiae*, in 1667, Gottfried Wilhelm Leibniz presented the vision of *Theatrum Legale Mundi*, for which he undertook to create a network of research academies for conducting research into law of all times and throughout the whole world, bringing about its emergence in Berlin (1700) and St. Petersburg (1714), whereas his death stopped work on the emergence of such an academy in Vienna.

The turn of the eighteenth and nineteenth centuries related to the founding of the first republican state on the American continent and the fall of the absolute monarchy in favour of the establishment of the first French Republic is sometimes referred to as the "constitutional laboratory", because throughout the nineteenth century, new countries emerged with new regimes, all as a result of the rapid development of comparative law research. They will be favoured by the effects of the industrial revolution, drawing with them not only better conditions for communication, but also new conditions of social life and a political revolution, dragging with them codification processes of the main branches of law and, in particular, the universal constitutionalization of state systems, especially in the second half of the nineteenth century. Comparative law studies crossed the borders of the continent for the first time when Alexis de Tocqueville, who had been sent by the French government to the United States, conducted a comparative law analysis of the republican American and French regimes (*De la démocratie en Amérique*) in 1834–1840, and then, also for the first time, applied a legal/historical comparative law study evaluating the consequences of the Revolution for France in 1856 (*L'Ancien Régime et la Révolution*). At that time, comparative law studies started to be read at the faculties of law of European universities (1835 Collége de France, 1846 Paris University, 1869 Oxford), comparative law research societies are formed (1869 France – *So-*

ciété de législation comparée, 1878 Germany – *Internationalen vereinigung für vergleichende rechtswissenschaft und volkswirtschaftslehre*); specialized scholarly publications also appear (1834 France *Revéue Étrangère de Législation*, 1869 Belgium *Revue de Droit International et de Droit Comparé*), and a special Foreign Legislation Office was even established in 1876 in the French Ministry of Justice to translate into French and publish acts of law of other European countries, which was especially useful in the case of business contacts.

The twentieth century starts a very significant event – the First International Congress of Comparative Law organized in Paris in 1900. This idea will be continued by *l`Académie internationale de droit comparé* (*International Academy of Comparative Law* – IACL) which was established in The Hague on 13 September 1924, which organized congresses in The Hague in 1932 and 1937; after the interruption caused by the Second World War, the regular meetings every four years in different cities around the world were restored, starting from 1950 with a congress in London (the 20th International IACL will be held in 2018 in Fukuoka, Japan). It was accompanied by the process of the emergence of further research institutes (in 1916 in Munich, in 1926 in Berlin and in 1931 in Paris), while *The American Society of Comparative Law* (ASCL), which publishes *The American Journal of Comparative Law*, was established after the Second World War, in 1951.

Three main research directions were typical of comparative law studies of the twentieth century: the first focused on legal/historical comparative studies with strong elements of sociology of the law, the second focused exclusively on positive law institutions, the comparison of which was supposed to bring about the establishment of common principles of universal law, while the representatives of the third direction developed this idea by striving to create a universal system of law that would replace the particular system of national law [Tokarczyk, 2008]. None of these dominated comparative law studies as such and each has its continuers, although undoubtedly the second and third are more frequently present in the works of comparatists in the past and in contemporary times. This was undoubtedly influenced by the political events of the twentieth century, the period of fascism, the Second World War and the period of so-called Cold War, which were not conducive to comparative law studies at all and decidedly historical references. Overcoming the hostility of the political camps, especially the collapse of the Soviet Union, freeing the countries of Central and Eastern Europe from its domination, opened new opportunities for mutual comparative law research, but directed rather towards positive law. Likewise, the second factor, namely the fact that the systems of the continental law culture and the common law system are getting closer to each other gives greater encouragement to conduct research into the applicable law than historical considera-

tions, especially when the move started away from directly comparing legal institutions towards studying their functionality, namely searching the legal system for an equivalent of a foreign law institution fulfilling a specific function.

For the practical benefits of comparative analysis in the global dimension, the establishment of *L'Institut international pour l'unification du droit privé* (Unidroit – *The International Institute for the Unification of Private Law*) by the League of Nations of the time in Rome in 1926 played a significant role, initially as an auxiliary unit of the League and, after 1940, as an international government organization, currently with 63 members from 5 continents. Its task is to prepare draft international conventions (it has already prepared over 70) to unify legal solutions mainly in the area of commercial law and broadly understood civil law, as well as to develop model legal solutions for use in national law, legal principles promoted in legal guides and draft contracts which have been prepared and published. Furthermore, continental institutions for the unification of the law are emerging on individual continents in line with the *American Law Institute* (ALI), which was established in 1923. The European Law Institute (ELI) was established in Paris, at the Founding Congress in 2011, as a response to the European Union's needs for the appropriate orientation of European law and its implementation at the level of the member states Zimmerman [Zimmermann, 2011]. The Institute has the objective of developing the activity of the European Jurists' Forum in the European dimension, which has been limited to date, which has been held in two-year cycles since 2001, but has never had the ambition of becoming an institutionalized form of a consultant or even a critic of the legal solutions adopted by the European Commission [Zimmermann, 2011]. This is the objective set for itself by ELI. The advantage of the Institute is to combine theoreticians and practitioners of the law in it, as well as to enable a joint analysis of certain projects from the point of view of various families of law: Romanist, Germanic, Nordic and common law.

2. The Growth and Development of Comparative Studies: A Polish Perspective

Compared with the brief relationship with the history of global comparative law studies, especially European law, the features of the roots and achievements of Polish comparative law studies require a separate presentation. The lack of Polish statehood in the nineteenth century, and hence at the time of the birth of European comparative law studies in France and the German-speaking countries, Polish lawyers (practitioners and theoreticians) could only deal with foreign law, the law of their partitioning states (respectively Russian) [Okolski, 1876], Prussian and Austrian law) [Kleczyński, 1876]. In a way,

it naturally made comparatists of them, which, many years later, Franciszek Longchamps aptly described as "Poland is a place of historical drafts, history has made us comparatists" [Rutkiewicz, 1966, p. 200]. Even so, works also appeared then, which went far beyond the corset of the partitions [Konitz, 1886] and even described the common law[1] [Konitz, 1886] model to the Polish reader, which was completely unknown to him. It was only the regaining of independence in 1918 and the reconstruction of statehood that opened not only the freedom of comparative law research to representatives of Polish legal studies, but it was even expected that their results were to be used in the legislative work of the young state[2]. The high rating of the first Act on the Civil Service, or the establishment of the Act Unifying the System of Territorial Self-Government is largely due to such comparatists as A. Pragier [Pragier,1924], J. Panejko [Panejko, 1926], T. Bigo [Bigo, 1928], S. Wacholz [Wacholz, 1934] and S. Starzyński [Starzyński, 1926].

The outbreak of the Second World War not only ended the existence of the Second Polish Republic, but also interrupted the natural conditions for conducting research, including comparative law research. After its end and after regaining independence in 1945, the political reality turned out to be so different that Poland was dominated by the influences of Soviet ideology, which was so ruthless that, taking up threads of reference to the law and science of Western Europe without a critical attitude to them led to the harassment of the author, together with censorship decisions[3]. The comparative works that emerged during the Socialist period were most frequently limited to the law and science of the countries of the "people's democracy"[4]. It was only the political transformation from the turn of 1989 and 1990 that opened up the possibilities of comparative law research, as well as the requirement for their results, just as at the beginning of the inter-War period, which were useful for intensive legislative work on new systemic solutions. This process is continuing into contemporary times, while the number of publications and representatives of modern comparative studies is impressive and simultaneously exceeding the possibilities of describing it in this publication. It can be said with certainty that, without many publications by such authors as Z. Niewiadomski[5], authors of the collective work edited by J. Jeżewski[6] and many others, work on the restitution of territorial self-government in Poland would not have progressed in such a short time and with such a result.

3. Modern Polish Comparative Studies: Tendencies, Future and Development

The works of contemporary Polish comparative studies pursue both of the objectives of comparative research which were developed a long time ago: cognitive, when

the authors only explain foreign law to us, without prejudging whether the reader will stop at purely learning about this law, or whether it will inspire him to conduct further research; and a constructive objective, when the research has the objective of proposing solutions for domestic law which are taken from foreign law, although doubtlessly the latter is widely considered as more demanding and more valued[7]. Initially, the work was represented by the legal/historical comparative study trend, where the subject was taken to be the genesis and evolution of foreign law solutions, sometimes compared with the solutions of Polish law which were applicable at the time, which mainly arises from the objective of catching up on the delays from the period of the Socialist state. Over time, works representing the current comparative trend of legal analysis started to appear increasingly frequently, when the subject matter of the comparison is the state of law in force in the countries selected for the comparison. In terms of territorial scope, works are more often encountered, which are based on bilateral comparative studies, when the author compares Poland and a different country of his choice in a comparative pair. However, examples of unilateral comparative studies are also encountered, when Poland is compared with several countries, although, in this case, F. Longchamps' objections should be borne in mind, when he argued that the choice of country for the comparative process has a decisive influence on its outcome, because a comparison of countries with very different legal systems cannot lead to a different result, but a conclusion about the dissimilarities of the legal institutions in these countries, which rules out the constructive objective. The subject matter of the work is sometimes a comparative study of legal thought, when ideological directions and trends are studied in the countries being compared, as well as doctrinal comparative studies when fundamental doctrinal treatises, monographs and scholarly articles that have influenced the shape of the doctrine, issues of legal education arising from a comparison of academic textbooks and finally important areas of scholarly debates and legal journalism are compared to each other. However, the comparative law study of legal institutions, their normative expression and the sources of law devoted to them are the most widespread.

The repeatedly mentioned F. Longchamps warned against many threats presented by a comparative law study initiated without proper knowledge and experience, but also without making preliminary findings. First of all, he dispelled the simplified vision of research as being targeted at seeking similarities between various legal orders, because, in his opinion, they cannot be identical because of cultural differences, so he tended to seek the slightest differences between them. He later drew attention to the correct definition of the subject matter of the research, so that the constitutive elements of the definitions are common to the institutions appearing in the countries studied, while the differences would apply to the remaining elements (he referred to them as non-defini-

tional features). As a result of the correct interpretation, their identification enabled a distinction to be made between the views of a foreign doctrine and elements of a foreign law that had to be subjected to critical analysis in order to establish the differences between and similarities with the doctrine and domestic law. According to F. Longchamps, they brought two important benefits. First, they allow for the assessment of one's own law and the improvement of its institutions. Second, they help improve research into one's own law, which affects the state of the national doctrine.

4. Traditions and State of Research of Contemporary Wrocław School of Comparative Method in Administration

Finally, attention should be drawn to the Wrocław school of administration. It should be emphasized that the comparatist trend is even its distinguishing feature, as each of its founding fathers (Tadeusz Bigo and Franciszek Longchamps), as well as their students (Adam Chełmoński, Jan Jendrośka and Tadeusz Kuta), former continuers (Jan Boć, Iwona Dyrda, Jan Jeżewski, Małgorzata Longchamps and Konrad Nowacki) and contemporary continuers (Marcin Miemiec, Jerzy Korczak, Piotr Lisowski and Jerzy Supernat), and finally the youngest continuers (Dominika Cendrowicz, Agnieszka Chrisidu-Budnik, Barbara Kowalczyk, Renata Kusiak-Winter and Łukasz Prus), used the comparative method in their research and used their results in numerous publications. Despite significant limitations in access to foreign-language legal literature and sources of law of Western countries, the employees of the Institute of Administrative Sciences made efforts to establish contacts with German, Austrian and French universities and, in the 1970s, professors Jan Jendrośka and Tadeusz Kuta, together with a group of professors from several Polish universities established cooperation with a group of German professors, as a result of which Polish-German colloquia devoted to administrative law are held every two years, one of them, the sixteenth, being held in Wrocław in September 2009, devoted to the subject of control of administrative actions.

A particular intensification of this research took place after 1990, when not only did the political and systemic conditions begin to favour it, but also the research opportunities opened up as a result of the study tours to European countries for shorter and longer scientific and research stays. This was also supported by the visits of Western European representatives of legal and administrative studies, for whom the trip behind the "Iron Curtain" ceased to be associated with risk. A special publishing series *Publiczne Prawo Porównawcze* [Public Comparative Law] was created in the Kolonia Limited publishing house, which was established by Jan Boć, in which 13 monographic and collective works were published, being devoted to, among others, Switzerland [Schaffhauser, 1993], Bel-

gium [Boć, 1993], France [Jeżewski, 2004], Germany [Miemiec, 2007], Italy and Spain [Kozłowska, 2012], as well as cross-border issues [Korczak, Nowacki, 2006; Korczak, Nowacki, 2008; Kusiak-Winter, 2011]. The activities of such employees of the Institute of Administrative Sciences as professors Jan Boć and Konrad Nowacki in 2009 led to the establishment of the German-Polish Centre for Public Law and Environmental Network (GP PLEN) as a joint research unit of the University of Wrocław and the Brandenburg University of Technology (BTU) Cottbus-Senftenberg. Ph.D. Renata Kusiak-Winter's commitment has meant that cooperation with Fachhochschule für öffentliche Verwaltung und Rechtspflege Meißen, has been established since 2015 which has resulted in the first truly comparative law conference "Aktuelle Forschungsschwerpunkte in den Verwaltungswissenschaften in Deutschland und in Polen" with a joint post-conference publication [Kusiak-Winter, 2017]. It is not by chance that a Public Administration Comparative Unit was established in 2016 at the Institute of Administrative Sciences under the supervision of Professor Jerzy Supernat, who particularly intensively conducts research and teaches in the area of broadly understood comparative law research.

Everyone at the Wrocław school of administration is under the influence of the words once spoken by Professor Franciszek Longchamps "Poland is a place of historical drafts, history has made us comparatists", to which we try to be faithful continuers.

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Notes

[1] W. Szuszkiewicz's translation of the work by W.B. Odgers, *Local Government*, appeared in Warsaw in 1905, while J. Gościcki's translation of the work by M.A. Ashley Percy, *Local and Central Government: A Comparative Study of England, France, Prussia, and the United States*, appeared in Lviv in 1910.

[2] R. Tokarczuk notes that a situation appeared in the inter-War period in Poland, which was probably unknown in any other country, when domestic comparative law studies were being conducted because of a law coming from outside the country (Russian, Prussian, Austrian and Hungarian law), which was not even regulated by the Act on the Law that Applies to Private National Relations of 2 August 1926 (Journal of Laws No. 101, item 580) [Tokarczyk, 2008].

[3] An excellent example is F. Longchamps' postdoctoral paper, *Założenia nauki administracji* of 1948, which, despite making reference to "Soviet science" because of being excessively strongly seated in Western science was considered incompatible "with the spirit of the state system" and the entire edition was destroyed, while the Professor himself was dismissed from the university, where he returned after the "October thaw" in 1956. The work was published as late as in 1991.

[4] See, as an example, J. Jendrośka, *Postępowanie administracyjne w kodyfikacjach europejskich państw socjalistycznych*, Warsaw 1970; J. Starościak (ed.), *Instytucje prawa administracyjnego europejskiego państw socjalistycznych*, Ossolineum 1973. It was only in the eighties that the climate for research into Western law became open enough that, among others, two significant monographs appeared: J. Łętowski, J. Pruszyński (ed.), *Administracja Republiki Federalnej Niemiec*, Ossolineum 1983 and J. Łętowski (ed.), *Administracja Republiki Francuskiej*, Ossolineum 1984.

[5] Z. Niewiadomski's post-doctoral paper, *Samorząd terytorialny w warunkach współczesnego państwa kapitalistycznego (na przykładzie; Francji, Republiki Federalnej Niemiec i Szwajcarii)*, Warsaw 1989 became the starting point for work on draft territorial self-government acts, which were modelled on German and French solutions.

[6] J. Jeżewski (ed.), *Gmina w wybranych państwach Europy Zachodniej*, Wrocław 1995 and its later publication *Samorząd terytorialny i administracja w wybranych krajach. Gmina w państwach Europy Zachodniej*, Wrocław 1999.

[7] The transfer of solutions from foreign law to national law has both a continental dimension, as in the Polish case after 1990, but also an intercontinental dimension, as the process described by Peter de Cruz of the acceptance of English law in the countries of Southeast Asia (Malaysia, Singapore and Hong Kong) [de Cruz, 1999].