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REMARKS ON THE METHODOLOGY OF COMPARATIVE LEGAL RESEARCH IN THE CONTEXT OF THE HISTORY OF LAW IN POLAND

Abstract. Is there anything outstanding about the history of law in Poland? Is it particularly conducive to comparative research? In my attempt to answer these questions, I focussed on presenting two distinct comparative law methods: historical legal comparison and comparative legal history.

The paper is divided into two parts. The first part elaborates on the characteristics of the respective methods and on the challenges of comparative legal history in a temporally diachronic perspective and why they are not so pronounced in historical legal comparison. In this part, I tried to document the claim that the existence of a comparative platform of similarities is a condition to obtain more reliable and better-documented results of comparative research.

In the second part, I focussed on three cases visualising the possibilities for comparative legal research on the history of law in Poland. Regarding the pre-partition times, I analysed the comparative possibilities related to an analysis of the impact of the Roman law on the Old Polish legal culture. The other two examples concerned the history of law in post-partition Poland. First, I explored the potential triggered by the adoption of foreign laws in Poland in terms of comparative research. I used French commercial law to exemplify the problem. Then, I undertook to show the dormant potential of the particular situation of Poland divided into different legal areas for the development of the country's own codes of law.

Keywords: methodology, historical legal comparison, comparative legal history, diachronic, synchronic, Poland, reception of Roman Law, French Commercial Code, codification, legal transplant.

UWAGI O METODOLOGII BADAŃ PRAWNO-PORÓWNAWCZYCH W KONTEKŚCIE HISTORII PRAWA W POLSCE

Streszczenie. Czy dzieje prawa w Polsce wyróżniają się czymś szczególnym? Czy historia prawa w Polsce stwarza wyjątkowo korzystne warunki dla prowadzenia badań komparatystycznych? Podejmując się odpowiedzi na te pytania, skoncentrowałem się na prezentacji dwóch różnych ujęć prawno-porównawczych – na tzw. historycznym porównywaniu praw oraz porównawczej historii prawa.

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Artykuł został podzielony na dwie części. W pierwszej z nich zawarłem rozbudowane uwagi wstępne charakteryzujące oba podejścia i wyjaśniające, na czym polegają problemy związane z zastosowaniem porównawczej historii prawa w ujęciu temporalnie diachronicznym oraz dlaczego one nie występują w takim stopniu przy stosowaniu historycznego porównywania prawa. W tej części starałem się udokumentować twierdzenie, iż istnienie tzw. porównawczej platformy podobieństw stanowi warunek osiągnięcia pewniejszych i lepiej udokumentowanych wyników badań komparatystycznych.

W drugiej części skupiłem się na trzech egzemplifikacjach obrazujących możliwości prowadzenia badań prawno-porównawczych nad dziejami prawa w Polsce. W odniesieniu do czasów przedrozbiorowych koncentruję się na możliwościach komparatystycznych związanych z analizą wpływu prawa rzymskiego na staropolską kulturę prawną. Pozostałe dwa przykłady dotyczą historii prawa na ziemiach polskich w czasach porozbiorowych. Najpierw skupiam swoją uwagę na potencjale, jaki dla badań komparatystycznych stworzyła sytuacja przeszczepienia na grunt polski obcych praw. Analizuję ten problem na przykładzie francuskiego prawa handlowego. Następnie staram się wskazać na potencjał, jaki drzemie w szczególnej sytuacji, w jakiej znalazły się ziemie polskie podzielone na różne obszary prawne i wykorzystania tego faktu w pracach nad stworzeniem własnej kodyfikacji.

Słowa kluczowe: metodologia, historyczne porównywanie praw, historia prawno-porównawcza, diachroniczne, synchroniczne, Polska, recepcja prawa rzymskiego, francuski Kodeks handlowy kodyfikacja, przeszczep prawny.

1. METHODOLOGICAL REMARKS ON HISTORICAL LEGAL COMPARISON AND COMPARATIVE LEGAL HISTORY

There are two distinct approaches to comparative legal research: historical legal comparison and comparative legal history (cf. Löhnig 2014, 113–120; Donlan 2019, 78–95).

Historical legal comparison examines on legal norms that form legal concepts and principles. They originate from at least two different orders and the purpose of comparison is to understand law in different jurisdictions (cf. Ibbetson 2012, 131–145; Heirbaut 2013, 89–92). The law is determined by the legislator who establishes legal principles, after which it is interpreted in legal decisions and school of thought. As a rule, historical legal comparison pays little or no attention to the contextual factors of the creation and interpretation of the law. Also, comparison of different schools of academic thought does not meet the requirements of functional comparative law. Usually, legal scholars, in an effort to prove that their thought is objective (otherwise, it would be easy to discredit), avoid any broader self-critical presentation of contextual factors that could distort their views. This means that, essentially, historical comparison of law and school of thought as an elaboration of law analyses research material in disregard of the surrounding reality and narrows the object of comparison down to the wording of legal norms and their academic interpretation (Michelsen 2019, 105–107).

It should be noted, however, that juxtaposing historical legal comparison with comparative legal history that would ideally lead to a dichotomous division is

an oversimplification, because neither the legislator that creates the law nor the authorities that apply the law, nor legal scholars that interprets the law are able to entirely isolate their ideas from the context. If, however, exegesis of legal texts and focus on linguistic interpretation of the content of legal norms, that are being compared, are fundamental to historical legal comparison, it seems reasonable to juxtapose it with the typical techniques of comparative legal history.

In the latter method, historical research is dominant over legal research. Comparative legal research, rather than on legal norms, focusses on the functioning of law in the society (cf. Michaels 2006, 339–382), economy and politics, i.e., on the interactions of legal norms and the society, economy and the exercise of public authority. Central to such deliberations is an analysis of the factors that shape legal systems and orient their development. The object is not so much the content of legal norms as the elements that comprise legal cultures.[1] A comparatist focusses on social attitudes and reactions.[2]

In this approach, first of all it is safer to narrow the research field down to a limited section of a legal system, in which case, however, it would be methodologically unsound to extrapolate the characteristics of an entire legal order in a given jurisdiction from heuristic conclusions. However – on the other hand – a too broad object of research results in superficial analyses that may lead to erroneous reasoning (Dyson 2014, 131–145).

Secondly, an analysis of closely related cultural circles leads to more reliable conclusions. A higher number of similar or the same phenomena affecting the object of comparison makes the analysis easier. On the other hand, it is questionable how to approach countries and cultural circles whose legal orders show a number of similarities, even though they have developed independently of one another. What is the reason for those similarities, if there exist no direct (or even indirect) links between the respective cultures? Also, it is difficult to understand why systems differ if there are not enough points reference.

Thirdly, the risk of making cognitive errors is lower when comparing phenomena from the same historical era, i.e., ones that are temporally synchronous. This does not mean, however, that temporally diachronic comparative research is not possible in certain circumstances (Löhnig 2014, 114–115). Yet, the latter bears a higher risk. In diachronic comparison, legal cultures from different historical eras differ in a number of factors that affect the law. The atmosphere, or the spirit, of every era is different, and so is the level of development and political and geopolitical contexts, etc. The realities surrounding the examined laws are, in principle, different (cf. especially Gordley 2006, 763–767). Usually, a comparative platform (a platform of similarities), meaning a set of similar contextual conditions,

[1] See notes on comparative methods "zwischen unterschiedlichen Phänomenbereichen […] in variierende historisch-kulturelle Situationskomplexe" (Schriewer 2003, 24).

[2] On the complex nature of the concept of "legal culture" see: Nelken (2004, 1–29; 2012, 1–51).

is unavailable. A platform based on a set of similar contextual conditions is an anchor point for comparative research. If such a platform is unavailable, a researcher is confronted with an excess number of intersecting variables. As a result, the comparison of phenomena is done as if in the dark. Too many unknown factors need to be evaluated, whereas there exists only a narrow and fragile basis of what can be really taken for certain either by building a platform of similarities or by relatively precisely determining the reasons for differences between the compared legal culture phenomena.

It should be the intention of a comparativist to identify the causes behind specific changes and similarities. Yet, there are a number of causes that have a varying (or no) effect on the phenomenon that is subject to a comparative study. In comparative legal history, the researcher focusses not only on the interpretations that shape the normative characteristics of legal concepts but, more importantly, on the external aspects: the functioning of specific norms and concepts in the real world and on their application in real life, in the court, etc. However, the problem becomes more complicated if there is no platform of similarities when comparing phenomena from different eras. The dominance of differences in contextual conditions determining the functioning of legal norms and concepts makes it difficult to assess the reality. It is only too-frequently impossible to clearly and meaningfully explain why – despite the many differences between distant eras – there still are similarities between the compared phenomena and the legal cultures they are embedded in (Danemann 2006, 383–420). The problem consists in a different understanding and interpretation of that which is universal both in the world history *in genere* and in legal history *in specie* (Gurevich 1966, 3–18; Earman 1978, 173–181). The eternal dispute over universals in law and social relations does not make diachronic comparative research easier.[3]

Nonetheless, certain societies and legal cultures may find themselves in similar contextual conditions in different eras. In legal history, a platform of similarities is often created as a result of the reception and later assimilation of foreign law. In order to conduct comparative research focussed on the social reaction to a "transplant," the law transferred to a new jurisdiction needs to be the same (e.g., the same code) or at least a related set of norm (for example one that draws from the same patterns). To build a more stable platform of similarities, the initial conditions preceding the transfer of a foreign law should also be similar. This often happens when the reception of law results in rapid transformation of a legal culture dominated by customary law into one founded on the idea of comprehensive codification. Such a breakthrough took place in Poland at the turn of the 19th century (first, due to the partitions and later, as a result of the establishment of the Duchy of Warsaw) and it was not unique either in Europe

[3] I would like to thank Professor Jacek Wiewiorowski for drawing my attention to this aspect of the problem.

or elsewhere in the world (Gałędek 2020, 3–4). Similar reactions of social shock to such radical changes encourage comparative analyses that – as it seems – need not always be temporally synchronous.

However, similarities must not necessarily arise from radical changes in the fundamental assumptions of a given legal system, although studies on turning points and social reactions to thorough transformations of social relations seem to be the best for diachronic comparison.[4] Such turning points may not be directly linked with law. Below are presented three examples of revolutionary transformations: the first is a mental and cultural transformation, the second – intellectual,[5] and the third – economic and social.

The first example concerns the mental and cultural transformations linked with the formation of modern nations. In Europe, those processes took place mainly in the 19th century. This does not mean, however, that they happened simultaneously in every nation, as may be exemplified by the French and English nations on the one hand and the Lithuanian and Ukrainian nations on the other hand. Neither is the entire 19th century one and the same historical era, considering the rapid acceleration of civilisational processes. The social, economic and political reality of the early 19th century was completely different from that of the end of the century. Also, the change dynamics makes the first decade of the 20th century different from the post-war reality. Thus, a comparative study of two periods in the 19th or 20th century, respectively, that were only a few decades apart should be classified as diachronic comparison.

The same is the case with the second example – of the intellectual revolution in the scientific world, in philosophy or in views of the state and of the law. In Western Europe it happened sooner than in the East of the continent, making it reasonable (under certain conditions) to conduct diachronic research focussing on an earlier period in the West compared to other regions both in Europe and elsewhere in the world, which followed the same path later on in the 19th and 20th centuries, respectively.

Also, in the third example – of dynamic economic and social changes that were usually linked with fast development of commercial and industrial relations, those changes happened first in the West and later they spread to Eastern Europe and other regions of the world, which means that comparative research may focus, for example, on private law governing socioeconomic relations in other eras, given a similar level of their development, and reveal a number of similarities typical of a given stage of development.

To sum up, diachronic comparative analysis seems methodologically plausible in each of the abovementioned cases, giving a much higher probability

[4] Classical turning points are presented by Jean-Louis Halpérin (2014).

[5] Intellectual transformation relates to the narrow circle in society (intellectual elite) and their ability of understand ideas at a high level, whereas mental and cultural transformation relates to the way of behaving and thinking of society as a whole.

of correct results than if the research material were to be selected on a more discretionary basis. Despite time differences, there exists a relatively stable platform of similarities between the situations that are compared. If, however, there is no such platform of similarities, a comparison of comprehensively different phenomena is scientifically unsound, because differences in the compared phenomena are usually dominant and, moreover, they result from different overlapping causes. In such case, it is difficult or even impossible to conduct a proper study and reasoning.

All the abovementioned examples in which temporally diachronic research is plausible require the use of the methodology of comparative legal history. Historical legal comparison that focusses on the content of legal norms can only be subsidiary. This type of research is not problematic when it is diachronic. The methodology behind this technique does not require the comparativist to analyse the reality in which a given law is embedded or to take into consideration the factors that affect the content of regulations, and even if they do, it is not enough to understand the entire complexity of the contextual conditions of the law. Thus, if the object of research is the content of legal norms rather than the complex context, the risk of coming to wrong conclusions is much lower in comparative historical research using the temporally diachronic methodology than in comparative legal history. This concerns, in particular, private law in jurisdictions influenced by the Roman law. The universal and timeless Roman private law constructs became the foundations of contemporary legal systems in many countries in Europe and beyond (Dajczak 2004, 383–392; Dajczak 2005, 7–22). Because the changes taking place in private law were not dynamic, the risk of errors in historical legal comparison, even temporally diachronic, is not high. But even in public law, which, lacking systemic Roman models, underwent more thorough transformations in the history of Europe, comparison of legal norms from different eras should not pose insurmountable obstacles. In principle, historical legal comparison is a simplified study of law isolated from the non-normative context and, as a rule, any cognitive elements are limited. In this method, the contextual conditions of the development and functioning of the analysed legal norms do not require an in-depth analysis. Thus, the things that constitute the essence of differences between historical eras, hindering temporally diachronic research, may be in fact dismissed *a priori.* However, the simplified cognitive method of historical legal comparison only works on the condition that those who use it, aware of its cognitive limitations, refrain from drawing any far-reaching conclusions. Researchers notes technical similarities and differences but, for lack of data, do not comment on their genesis, not having studied the contextual conditions of the formation and functioning of the law that is subject to comparison.

2. THE POTENTIAL OF COMPARATIVE RESEARCH ON POLISH LAW

Example I. The impact of the Roman law on the Old-Polish legal culture

A classical topic of studies on the pre-partition law is the effect of the Roman law – with its typical principles and concepts – on both the Old-Polish law and the legal culture of the First Polish Republic (Godek 2001, 27–84). The problem attracts the attention of legal scholars even though the influence of the Roman law on the legal relations in Old Poland was limited or even residual in certain areas (the law of the noble class) and periods (the Middle Ages) and indirect (through the canon law; Vetulani 1969, 372–386). Nonetheless, studies on the impact and reception of the Roman law constitute the axis of legal research in Western Europe, and those patterns continue to penetrate the Polish scholarship (Wołodkiewicz 2009). Consequently, the formative significance of the Roman law for the European legal culture has undoubtedly become a central to scholarly deliberations, and it is impossible to describe world history, including Eurocentic history, without in-depth comparative legal research. Scholars of the Roman law are strongly convinced that historical legal comparison may help create the European private law in particular. In this context, the Roman law seems to serve as a methodological and material element (substrate) in the process of European codification of private law (Löhnig 2014, 113–114). Undoubtedly, comparative studies of Old-Polish law and legal culture and the laws and cultures of other countries and regions of Europe conducted through the prism of Roman influences constitute an attractive conglomerate of study topics.

For the methodological reasons described in the first part of the paper, the safest choice of topic is to compare problems associated with the impact of the Roman law to countries that have a similar legal background as Poland, both in terms of moderate and indirect influence of Roman patterns and similarities in contextual conditions. These criteria seem to be fulfilled mainly by neighbouring countries, such as Hungary and Czech Republic (Grodziski 1997, 73–82; Uruszczak 2005, 45–61), but not only by them. Perhaps it is equally possible to find sufficient analogies in such countries as Spain (cf. Lelewel 2015) or England, or 18th century Sweden. However, it would be difficult to conduct a comparative study of the effect of the Roman law on the German and Polish legal cultures, respectively, given different contextual conditions of the two countries and no equivalent of *usus modernus pandectarum* in Polish circumstances.

Comparative studies on the impact of the Roman law on the legal orders of respective countries, usually founded on historical legal comparison, may be either narrow and limited to a specific legal concept or particular legal principle, or they may be broad and cover an entire set of concepts and principles. A typical example of a broad research topic are studies on a legal code.

Meanwhile, research on selected aspects of legal culture, rather than legal norms, are by nature studies on a law in context. Thus, different tools are needed to analyse the influence of the Roman law on the Old-Polish legal culture. What makes this type of research attractive is the fact that social attitudes and the opinions on the Roman law may constitute an important component of a given legal culture. However, as has already been mentioned, comparative legal history analyses require first of all an entire spectrum of cognitive historical instruments, the legal qualifications of the researcher being of secondary importance. The most extensive studies on the impact of the Roman law may cover legal culture *in corpore*, or they may be limited to a certain aspect, such as a single state legal order and an analysis only of the impact on the law of the noble class or municipal law. The researcher must also remember that the natural transmission belt for the Roman law penetrate non-Romanised legal areas and saturate legal cultures with Roman elements was the canon law (Dębiński 2007).

Studies on the impact of the Roman law may also be limited in other ways to a specific legal culture research problem. One of such topics could be the role of universities as the basic channel of penetration of the Roman law to Poland. At least two different aspects of the problem, which could constitute independent research issues, would need to be analysed, namely the teaching of the Roman law in Poland, the popularity of studying abroad, and foreign influences in Poland (Godek 2013, 42, 49–53). The above example of contextual legal research belongs to a broader group of studies on the Roman law impact on the legal culture. All of them could also be present to a greater or lesser extent in other countries, offering an opportunity for comparative analyses. These issues could be reviewed in different ways: objectively, subjectively or functionally. Processes of the penetration of legal concepts, principles and ideas in a new territory are in a way universal problems and suitable for various comparative studies that can often – without too much risk – involve the temporally diachronic methodology.

To sum up the discussion on the potential of studies on the impact of the Roman law on the Old-Polish law and legal culture, it should be noted that the vector may be turned in the opposite direction on the same axis and a comparative analysis may focus on the elements of the local customary legal culture that survived despite the influence of the Roman and canon laws (Korpiola 2018, 404–429). Models based on the universal law significantly affected the evolution of the customary law and comparative studies on the specificity of local customs must not disregard the infiltration of the principles and concepts of the Roman law to customary laws.

Example II. Reception of French law in Poland

Regarding the partition and interwar periods – critical for the development of modern law – the situation of Poland in that time is particularly conducive to comparative research. This is due to the reception of a number of different legal systems in the respective regions of the country split between the invading empires. It is also the time when – as was discussed in the first part of the article – the law, science and philosophy as well as socioeconomic aspect underwent revolutionary transformations. The situation in the Congress Kingdom of Poland (formerly the Duchy of Warsaw) and in Polish Galicia (once autonomous) was different than in the Prussian Partition or in the areas incorporated into the Russian Empire (Taken Lands). In the former two regions, despite having lost their statehood, Poles preserved – albeit to a limited extent and not throughout the entire period of partitions – the national justice system and the autonomy of domestic scholarship and school of thought. Unlike in the Prussian Partition or in the Taken Lands, the Polish legal elites in Galicia and Congress Poland did not lose their ability to creatively adapt the legal systems in their jurisdictions.

Such situation is particularly conducive to in-depth comparative research. This is illustrated by the reception and adaptation of French private law codes first introduced in the Duchy of Warsaw and later maintained in the Kingdom of Poland.[6] Napoleon's Civil Code in particular and, to a lesser extent, the Commercial Code and the Code of Civil Procedure served as a model of codes for other countries across the world. The processes of their adaptation are particularly suitable for comparative analyses. Comparative studies may also include France, whence those codes originated.

An example is the synchronic research (I conducted together with Anna Klimaszewska) on the adaptation of the *Code de commerce* in the Congress Kingdom of Poland (and previously in the Duchy of Warsaw) and in France in the 19th century (Klimaszewska, Gałędek 2018). A number of levels of the adaptation processes may be identified and reactions to the Commercial Code may be discussed in several dimensions: the legislative and political dimension, the conceptual and academic dimension, the dimension of legal decisions and the social dimension.[7] Studies in each of the above areas required first of all adequate techniques of comparative legal history and research in the law in context. Different amendments of the Commercial Code in France and in Poland and different interpretation of the provisions of the Code, from the perspective of the language and of the system, respectively, were of some significance but did not essentially result in different interpretation of the *Code de commerce* in the respective countries.

[6] French private law codes were also maintained in the Free City of Krakow. On the adaptation of law there see Dziadzio (2020, 269–277) and Michalik (2021, 307–330).

[7] For more information, see Klimaszewska (2020, 143–163).

The starting point for the first of the identified levels, namely modifications in the code and an analysis of their causes, is a comparison of normative changes, the basic goal being to understand the causes and motivations driving the reform. A law is amended if it does not meet certain requirements. Changes may be triggered by technical defectiveness of a law (in which case the causes are usually not related to the reality surrounding legal concepts) or they may be a reaction to socioeconomic transformations or caused by political factors. In the case of the Polish law, however, the cause was different. The *Code of commerce* was amended (for example, by force of the *Organisation of the Merchant Class* of 1817), because the development of commercial relations in Poland did not match the regulations laid down in the Code. In this case, the *Code de commerce* was amended to suit the situation in the country which in the early decades of the 19th century was only beginning to undergo capitalist transformations with many features of the feudal system still in place (Gałędek 2015, 37–60). Only after several decades of socioeconomic evolution in the direction determined by Western capitalist patterns did the French Commercial Code become more suitable for the needs of the Polish economy. Since the 1840s, there was a growing interest in the most advanced organisational forms designed in the code, such as companies.

More frequent use of French commercial law concepts attracted the interest of the Polish scholarship and school of thought, which, in the first years after introduction of the *Code de commerce*, almost entirely disregarded commercial law. There was no tradition of teaching commercial law and there were no qualified scholars. This started changing only in the 1840s. However, the first Polish handbooks on commercial law were imitative. They focussed on propagating the French school of thought and unquestioningly accepted their ideas. With few exceptions (Pomianowski 2015, 235–236), no original assessments or adaptations of the teachings of French authors to the Polish reality were offered (Klimaszewska 2015, 219–231). In this context more creative – though equally rare – was the legal decisions and legal arguments of attorneys in records (Klimaszewska, Gałędek 2017a, 147–167; Klimaszewska, Gałędek 2017b, 169–182). However, neither judges nor attorneys representing the parties took recourse to the opulent patterns of French theory and practice of commercial law. Perhaps those were unavailable to them. Despite definitely insufficient knowledge of the commercial law and lack of qualifications to apply that law, Polish jurisprudence had to be able to adapt the Code to the Polish context. Yet, the conditions to autonomously develop the Polish studies of commercial law improved only a few decades after introduction of the *Code de commerce* in the Congress Kingdom of Poland, when the Central Warsaw School was founded in the 1860s. At that time, original studies on the French commercial law became more frequent.

Studies have identified the following three stages in the process of adapting the French commercial law: (1) the non-assimilated transplant stage up to the 1840s, when, in principle, the Polish scholarship and school of thought were silent; (2) the stage of uncritical imitation of French patterns in mid-century in the first reaction to the capitalistic approximation of the Kingdom of Poland to the relations that existed in France (at the time when the Code was created); (3) the stage of creative adaptation of the Commercial Code with the scholarship and school of thought emancipating themselves from the French influence and development of domestic legal decisions reflecting the local context of the Congress Kingdom of Poland. The last – and longest – stage ended when the *Code de commerce* was replaced by the Polish Commercial Code of 1934.

The process of adapting the French Commercial Code in France in the 19th century was entirely different. Although the starting point for research was almost identical in both countries, with the French Commercial Code entering into force in 1808 in France and in 1809 in Poland, in this case, the temporal synchrony is only apparently comfortable for comparative purposes. There is an entire conglomerate of differences between the two cultural regions. The Code was developed by the French for the French and it was tailored to centuries-old French commercial customs and to the French model of commercial judicial system. Moreover, it was mostly founded on the previous law – the 1673 Code Savary and on the rich pre-revolutionary commercial case law. Last but not least, the Commercial Code as a modernised and extended version of the pre-revolutionary legislation provided for the high level of development and specificity of the French economy (Klimaszewska 2011, 103–104). Consequently, the entry into force of the *Code de commerce* in France was, in principle, a continuation of long-established relations, principles and concepts. Adjusting to the formally new Code could not have been problematic either for merchants or for other entrepreneurs, nor for the commercial judicial system and school of thought.

Meanwhile, the *Code de commerce* was an entirely foreign construct in Poland. No one knew the French commercial customs nor the legal regulations that governed them, perhaps with the exception of a few merchants doing business in French markets. Thus, the norms of the French commercial law had to be learned and assimilated from scratch. There were also other disparities, typical of relations between a developed country and a country that strenuously tried to bridge the civilisation gap.

The differences in terms of preparedness for the application of the French commercial law in the first half of the 19th century were so numerous and so significant that the research could only identify them and determine their causes. Due to lack of conclusions based on similarities, other comparative goals could not be achieved. This only changed in the second half of the 19th century, after some of the discrepancies had been removed, making comparative studies possible on the basis of a comparative platform that guarantees a more comprehensive use

of materials. The question is whether, for methodological reasons, temporally diachronic research would be perhaps more plausible, for example assuming that the adaptation of the French commercial law in Poland in the first half of the 19th century should be compared to the reality in which that law was created in France in the 16th and 17th centuries, or that it would be worth juxtaposing the French reality of the first half of the 19th century and the Polish reality of the second half of the same century. It is a classical research problem and it comes down to choosing the right comparative optics in order to compare a more developed country that – like France – developed the object of reception and a less developed cultural environment, where – at least initially – it is difficult to successfully adapt the transferred law due to significantly different contextual conditions.

Example III. Comparative legal analyses of the authors of the Polish law

Another possible object for comparative legal research is the Polish attempts to create a new legal order based on the extensive and diverse experiences linked to Poland's direct contacts with other legal systems and cultures, combined with the deeply rooted conviction of its own national uniqueness embedded in Old-Polish traditions and distinct cultural heritage. This is best shown by Polish modern (founded on legal positivist assumptions) codification attempts, which were undertaken from scratch three times. The first two – interrelated – codes (*Collection of Court Laws* by Andrzej Zamoyski and *Stanisław August Code*) were compiled till 1795 by the end of the First Polish Republic; the second attempt at national codification was initiated after the collapse of the Napoleonic Duchy of Warsaw in 1814, when the decision was made to create the Congress Kingdom of Poland in a union with Russia; the third attempt, which left long-lasting results and was the only successful one, was launched with the establishment of the Codification Commission in 1919 and continued, based on the existing legislation, after Second World War both in the times of the People's Republic of Poland and in the Third Polish Republic. In each of this historical moments, the belief that there existed a certain universal canon of modern principles triggered a search for external patterns in countries that – as was assumed – had achieved a higher level of legal development to help build a new legal system in Poland.

Only in the first case – in the Stanisław August era – codification concepts and the research conducted on their bases were not of comparative nature (Borkowska-Bagieńska 1986, Szafrański 2007). Meanwhile, the codification efforts undertaken both in the Congress Kingdom and – which is of particular significance for the history of law in Poland – the measures taken in the 20th century were an attempt to rearrange and modernise the Polish legal space by representatives of the Polish legal elite mostly founded on non-Polish legal experiences. Their eclectic comparative analyses of foreign legal orders were supposed to enable creative

transformation and adaptation of those orders to the Polish context. They studied mainly the legislation of the invading empires and of France, whose codes were – obviously – also in force in Poland. The codes of the turn of the 19th century were also a new normative material that could be used in research in the reality of the Congress Kingdom, even though it still lacked sufficient case law and school of thought. Some of the legal elites working on new codes for the Congress Kingdom of believed, in the Enlightenment fashion, that they could find universal solutions that would at all times meet uniform standards for the whole mankind and equally satisfy the needs of every nation. They believed that such concepts and principles were already hidden in different codes existing in Poland – French, Austrian and Prussian ones. All that remained to be done was to confront them with one another and to understand the reasons for the differences between them and to choose the best solution – one that would be the least distorted by "outdated customs," prejudices and particular interests (Górnicki 2017, 135, 138–140; Gałędek 2021a, 41–58; Gałędek 2021b, 52–73).

A similar belief of legal elites underlined the codification efforts undertaken after the Great War. This time, too, the codifiers were convinced that humanity was entering a new stage in history and that universal progress was taking place in terms of socioeconomic relations, democratisation and social solidarity. Thus, the law had absolutely to be based on universally modern foundations. The difference was that in the previous century, the codifiers of the Congress Kingdom believed that the codes already existing in Poland were modern enough to be transplanted as ready-made solutions to Poland; in the Second Polish Republic, however, things were complicated by the fact that the respective regions had different foreign (Prussian, Austrian, French, Russian) codes that were mostly considered anachronistic and rooted in a bygone era, which made them useless in modern codes unless thoroughly transformed. Consequently, the focus of comparative studies intended to develop new codification shifted from comparison of provisions of positive law to a comparative analysis of different approaches to the law and school of thought in order to determine on this basis the direction of evolution of both social and legal relations.

Compared to the early 19th century, in the interwar period the Polish elites working on new codifications in the liberated country could confront much broader comparative legal material, not only foreign but also domestic, due to the fact that foreign codes had been in force in Polish lands. They analysed both foreign legal regulations and foreign and domestic case law and school of thought that had set the direction for the evolution of legal cultures in the course of the dynamic transformations in the 19th and early 20th centuries. In the interwar period, the codifiers were particularly determined to do an ambitious job. Assuming that their code would remain in force for many decades to come, they wanted it to be as perfect and as modern as possible. The purpose of comparative studies was

to detect solutions (concepts and principles) in foreign codes that would best reflect the spirit of the new era (Gałędek 2021a, 51–58; Gałędek 2021b, 63–71).

For all those reasons, source studies on Polish codifying work and the accompanying legal discourse create additional research possibilities arising from the specificity of Polish history. Even though in this case, they are not comparative analyses *sui generis* but rather studies on the Polish legal thought, they not only require the use of comparative instruments due to the specific nature of the research material, but they also make it possible to understand the achievements of the domestic jurisprudence in this field, which were naturally interested in comparative legal studies.

3. CONCLUSIONS

It seems that comparative legal research is an important and often indispensable element of most historical legal studies. Even in studies that do not use comparative analyses as a means to achieve their basic objective, establishing a point of reference seems useful and sometimes even necessary in order to understand the nature of a problem and to evaluate it. In order for comparative research to be of value, it is necessary not only to select and obtain the right comparative material but also to explore the context, i.e., the set of factors accompanying the development of legal norms and their interpretation.

As far as Poland is concerned, comparative legal history as a research method focussing on exploring the contextual background seems to have a unique potential. This is a side effect and a product of its history determined firstly by the cultural potential of the First Polish Republic that, to some extent, makes comparative studies of its unique development attractive and afterwards – since the partitions – by the historic upheaval at the time of revolutionary transformation of custom-based Old-Polish legal culture into the modern positivist legal thought paradigms. Analyses of the reception of law at that time create specific cognitive conditions for intercultural comparative legal research. The main problem in such studies is the reception of transplanted solutions in school of thought, and in case law, by the authorities and by the society. These studies also try to understand the differences that developed in the process of reception and the reasons behind them. Concerning the latter, it is possible to identify different categories of motivation: political, social, economic, philosophical and academic, or – looking from a different perspective – ideological, axiological, anthropological or cultural. A number of other questions arise, too, that need to be answered, such as the conditions that must be fulfilled to make the reception of a law successful, the possible forms of reception, and whether identical solutions and regulatory approaches may have the same effect in different social and political contexts.

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