

PARADIGMS OF MODERN COMPARATIVE LAW  
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Toward a New Interpretation of the History of Comparative Law

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PhD Thesis Abstract

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## I. Subject of the thesis and research objectives

The history of comparative law thinking is certainly not among the most studied issues in legal literature dedicated to general questions of comparative law. The common feature of these publications is that they are mostly devoted to some particular problems<sup>1</sup> – as for instance: the study of a given period in comparative law,<sup>2</sup> the analysis of the oeuvre of a selected author,<sup>3</sup> or the overview of certain national achievements<sup>4</sup> –, so they are missing the comprehensive scope by nature. These papers and chapters are obviously valuable contributions to the scientific study of the history of comparative law, even though their linguistic and thematic diversity renders it more difficult to draft a coherent picture on the history of comparative law thinking.

The main aim of this research was the examination of the question of how and to what extent could the achievements of Thoms Kuhn's philosophy of science be used for the better understanding of the history of comparative law. The so-called "theory of paradigms" based on the concept of paradigm and that of scientific community has already proved many times that by its help the history of a given science could be interpreted on such a way whose achievements can exceed the result of traditional approaches.<sup>5</sup> These traditional conceptions in the history of sciences could be labeled as linear and basic since they only intend to summarize and enlist the facts and events related to the history of a given science. However, research based on the approach of Kuhn may contribute to both: a new interpretation of the history of a given branch of science and the examination of the "final questions" of sciences.

However, – it must be stressed at the beginning – this doctoral dissertation does not at all intend to summarize and analyze the entire history of modern comparative law with an encyclopedic scope. Its primary aim is the verification of the hypothesis that by the historical research of comparative law thinking, seeming to be not too interesting and relatively unnecessary at the first glance, how could we get closer to the fundamental problems of a given science. The historical inquiry based on the principles of Kuhn is not only able to help in the deeper knowledge of the history of comparative law thinking but it can also orientate us toward some theoretical questions having primary importance. These rudimentary questions could be among other things what science is, whether comparative law is a real science, and what the aims of comparative law are and so on and so forth.

In this sense this thesis was inspired by two claims. On the one hand it tried to elaborate a new and slightly different interpretation of the history of modern comparative law thinking; on the other hand it also attempted to formulate certain statements about the most fundamental theoretical questions of comparative law.

All in all, the objective of the research was an inquiry into the history of modern comparative law thinking by applying the theory of Kuhn. Moreover certain theoretical questions of comparative law, being closely related to this historical investigation, were also

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<sup>1</sup> One can find only one exception in the literature on comparative law, which approaches comparative law with a comprehensive view. CONSTANTINESCO, L.-J.: *Traité de droit comparé I. Introduction au droit comparé*. LGDJ, Paris, 1972. 50–161.

<sup>2</sup> For example: PL.: HUG, W.: The History of Comparative Law. In: *Rechtsvergleichung* (hrsg. K. Zweigert – H. J. Puttfarcken). Wissenschaftliche Buchgesellschaft, Darmstadt, 1978. 109–161.

<sup>3</sup> For example: RADBRUCH, G.: Anselme Feuerbach, précurseur du droit comparé. In: *Introduction à l'étude de droit comparé*. Recueil d'études en l'honneur d'Édouard Lambert. Sirey-LGDJ, Paris, 1938. 284–291.

<sup>4</sup> For example: CAIRNS, J. W.: Development of Comparative Law in Great Britain. In: *The Oxford Handbook of Comparative Law* (ed. by Reimann, M.-Zimmermann R.) Oxford, Oxford University Press, 2006. 131–173.

<sup>5</sup> See, for example the researches of Kuhn on the history of physics KUHN, T. S.: *A tudományos forradalmak szerkezete* (The Structure of Scientific Revolutions). Osiris, Budapest, 2002. 36-54.

scrutinized by it. This work tried to realize these research objectives by studying the oeuvre of some eminent scholars in the field of comparative law and the related secondary literature as well as by looking into the details of the literature of philosophy of science.

## II. Research method

The historical scope of the thesis claimed the systematical examination of sources. These sources can be divided into two different groups: firstly the primary and secondary sources of the history of modern comparative law, and secondly various sources related to philosophy of history and other theoretical questions. The first group of sources comes to the front in the historical chapters (chapter 2, 3, 4 and 5), while the second played a prominent role in chapter 1 and 6 dealing with the preliminary theoretical questions as well as final conclusions.

It must be mentioned concerning the sources of the history of modern comparative law that they were not selected by any predetermined conception, but in the light of the work of a given paradigm-creating scientific community. So, in the framework of a paradigm the thesis analyzed those authors who were regarded by the given scientific community as its members. The question of whether an author could be regarded as a member of a given scientific community was never decided by any predetermined choice but it was always answered on the basis of the references of articles and books that appeared in the given era or other works – as for instance: laudations or various secondary sources – representing the *communis opinio doctorum*.

The historical chapters are primarily based on Hungarian, English and French literature. In those cases when the thesis touched upon the oeuvre of German scholars it used the translations or, in some cases, the secondary literature which was relatively rich in quotations. It should also be emphasized that the thesis always aimed at using primary sources. It only partially deviated from this method when it presented the achievements of Josef Kohler and Ernst Rabel. Moreover, the use of secondary sources in these historical sections was mostly necessary to introduce the development of comparative law institutions and to facilitate the better comprehension of certain facts and events related to the formation of scientific communities.

The two chapters focusing on theoretical questions are also based on a well-determined literature. Chapter 1 dealing with the applicability of the theses of Kuhn in the field of social sciences analyzes the book of Kuhn (*The Structure of Scientific Revolutions*) in detail as well as refers to some secondary literature regarding certain peculiar problems. In addition this chapter also uses other general works from the literature of history of science. The last chapter, which focuses on the most important theoretical problems of comparative law in order to better explain and illustrate its position, refers to both classic manuals and the works of certain contemporary authors, as for instance Pierre Legrand, Jaakko Husa and Csaba Varga.

Having summarized the sources, those influences which shaped the intellectual background of the thesis must also be mentioned. Obviously this thesis, as all scientific works dealing with historical problems, significantly relies on the achievements of earlier research. Firstly, the role of the article entitled *Paradigm Shift in Comparative Law?*, written by Zoltán Péteri,<sup>6</sup> must be emphasized since it was the most important inspiration of those fundamental historical and methodological insights which determined the entire thesis. The article of Péteri

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<sup>6</sup> PÉTERI Z.: Paradigmaváltás a jogösszehasonlításban? (Paradigm shift in Comparative Law?). In: *Placet experiri – Ünnepi tanulmányok Bánrévy Gábor tiszteletére* (szerk. Raffai K.). Print Trade, Budapest, 2004. 228–238.

first discussed the problem of whether it is possible to interpret the history of modern comparative law by using the Kuhnian approach in the Hungarian legal scholarship. By connecting the theory of Kuhn with the history of modern comparative law the article of Péteri provided the most important starting point of the thesis.

The approach of the thesis was also influenced by the oeuvre of two authors from international scholarly literature who were diverged in many aspects. One of them was Marc Ancel and the second was Léontin-Jean Constantinesco. It could be unambiguously admitted that the articles of Ancel written about the history of French comparative law are determined by a unique dynamic approach since they always discussed the problems of comparative law in a historical context, they also frequently tried to build up a special classification for the various forms of comparative law.<sup>7</sup> This dynamic approach trying to differentiate among certain lines of thought also significantly influenced the scope of the thesis since it made it clear that conceptions of comparative law change from time to time. Moreover it also indicated that these approaches in comparative law are more or less incommensurable. So, every insight of Ancel suggested the opportunity and the pertinence of an interpretation of modern comparative law by the theses of Kuhn focused on paradigms and paradigm shifts.

Contrary to the dynamic approach of Ancel the works of Constantinesco influenced the thesis by their thoroughness and extensive richness. That being said, they demonstrated such a scientific ideal which might be approached, but never can be reached by a researcher.<sup>8</sup> The books of the Romanian professor working and teaching in France and the huge material incorporated in them formed the base of the historical research of the thesis. As well, it provided the most important starting points even though the historical classification of the thesis considerably differs from the interpretation of Constantinesco. Without the books of Constantinesco it may have been likely that the thesis would miss many tiny, but very relevant details which proved to be essential during the draft and interpretation of certain problems.

The collection of the necessary materials is a result of almost five years of research and in this process the holdings of the Library of the Pázmány Péter Catholic University Faculty of Law, those of the Library of the Institute for Legal Studies of the Hungarian Academy of Sciences, those of the Library of the Hungarian Parliament and the Law Library and Central Library of the Katholieke University Leuven provided a considerable help. Besides these libraries the thesis used the Heinonline electronic database when it needed such rare sources which were almost inaccessible in printed form.

### **III. A brief summary of the thesis and an overview of results**

#### **Subject of the thesis and its structure**

The thesis consists of six chapters and its backbone is four essentially historical chapters discussing the three paradigms of modern comparative law as well as the history of modern Hungarian comparative law thinking. These chapters attempt to discuss the paradigms in detail and, besides the examination of their theoretical framework, they also intend to follow the steps of institutionalization and the inner transformation of the scientific community. The reader can get to know the historical-evolutionist paradigm (dominant in the second half of the 19<sup>th</sup> century), the paradigm of *droit comparé* (the paramount line of thought in the first

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<sup>7</sup> For example: Pl.: ANCEL, M.: Les grands étapes de la recherche comparative au XX<sup>e</sup> siècle. In: *Rechtsvergleichung* (hrsg. Konrad Zweigert – Hans Jürgen Puttfarcken). Wissenschaftliche Buchgesellschaft, Darmstadt, 1978. 350–360.

<sup>8</sup> Cf.: CONSTANTINESCO: *op. cit.*

decades of the 20<sup>th</sup> century and the interwar period) and the modern paradigm of comparative law (emerging in the 1950s) through these chapters. The chapter dealing with the history of Hungarian comparative law thinking analyzes the Hungarian developments in the light of the earlier chapters by using the paradigms as international models for the national legal science. This chapter also tries to reject the interpretation of Imre Szabó on the history of Hungarian comparative law which was manifestly based on Marxist preconceptions.<sup>9</sup>

The first and the last chapter of the thesis have no historical interest and scope, but they are focused on preliminary questions of the history of science and the conclusions emanating from such a research. The first chapter tries to answer the question how the theory of Kuhn is applicable in the research of comparative law. It also goes into the details of such problems like the question of paradigm shift in social sciences or the applicability of the concept of “pre-paradigm period” in the analysis of the history of comparative law. The last conclusive chapter endeavors to provide an overview of some general questions frequently discussed in the legal literature in light of the earlier historical researches. This part of the thesis deals with the problem of the autonomy of science, the nature of the history of science, the nature of comparative law and its aims. Moreover it discusses some new developments including the possibilities of a new paradigm shift and some other methodological perspectives.

## Overview of the results

The achievements of the thesis could fundamentally be divided into two parts. In the first group one can find the theoretical results including both the achievements related to the preliminary theoretical questions and lessons stemming from the historical researches. The second group of results is comprised of those historical conclusions which might be eligible as a basis for a comprehensive survey and interpretation of the history of modern comparative law.

The most relevant theoretical result of the thesis is definitely the demonstration of the fact that the approach based on the concept of scientific paradigm coined by Kuhn is fruitfully applicable in the understanding of the history of modern comparative law. Obviously, in order to apply this method, that was primarily created for the study of the history of natural sciences, in the world of social sciences its basic tenets should be shaped according to the distinctive features of socio-historical phenomena.

Here the starting point of the argument is that the phenomena being studied by social sciences fundamentally differs from the phenomena of natural sciences and this difference renders necessary the modification of some points in the theory of Kuhn. The phenomena studied by social sciences are indeed related to human existence. It cannot be disputed on the basis of historical experiences that socio-historical phenomena comprised of human acts cannot be modeled on such a high level which could be similar to the modeling opportunities in natural sciences. It follows from this that socio-historical phenomena could never be assessed by a clear mechanical or teleological approach – so on the basis of an exclusive aspect –, but we need a more sophisticated approach. According to the position of the thesis from a scientific point of view human phenomena, conceived of in the most general sense, always incorporate more than one equally defensible scientific interpretation.

The relevance of this interpretive plurality inherent in the nature of socio-historical phenomena concerning the theory of paradigms is that it seems to be impossible to

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<sup>9</sup> SZABÓ I.: Az összehasonlító jog Magyarországon (Comparative Law in Hungary). In: SZABÓ I.: *Szocialista jogelmélet – népi demokratikus jog*. KJK, Budapest, 1967. 196–218.

differentiate the successive paradigms of comparative law as precisely in time as it would be in the field of natural sciences. So, it might be more proper to accept the possibility of the parallel existence of paradigms, since it could be easily presumed that various interpretations can exist about a problem side by side and each of them is able to provide a solid basis for the scientific community. This point is illustrated in the thesis by the oeuvre of the Italian scholar, Del Vecchio, who consequently followed the principles of the historical-evolutionist paradigm even though he was working in an era when the second paradigm of comparative law, having a practical scope, was dominant in comparative law thinking.

The second important theoretical point of the thesis is the clarification of the problem of how the Kuhnian model of paradigm shift could be modified in order to make it able to grasp social science issues. According to the approach of the thesis this task could be solved by a partial reformulation of the concepts of anomaly and crisis having a distinctive role in the theory of Kuhn. This reformulation has to soften their content compared to the original interpretation provided by Kuhn. The anomaly should be perceived as a qualitatively new problem which is able to challenge the structural principles of a given paradigm and induce some tension. The crisis, from the aspect of this interpretation, should be approached as a summary of questions raised by the various anomalies and as having no proper answers in the framework of a given paradigm. In conclusion, concept of paradigm shift could also be partly changed. In the eyes of the thesis – with special regard to the above mentioned inherent interpretive plurality of the subject matter in social sciences – paradigm shift could be better conceived of as a distinctive change in the structural premises of a paradigm in the world of social sciences which comes forth gradually from the earlier set of theses to a new set of research premises.

It must also be emphasized in harmony with the aforementioned that it is not so likely that the previous paradigm will totally disappear following the crisis since it is easily supposed either that it will be pushed into the background for decades or will play a marginal role in the scientific life. One may conclude that amongst the parallel existing paradigms there should always be a dominant one which can be regarded as the mainstream of scientific thinking, however the other paradigms could also have some limited influence.

Concerning the theoretical results the third important point of the thesis is that the concept of the so-called pre-paradigm period describing a special phase in the history of science can be properly applied for the interpretation of the history of comparative law thinking. By differentiating between the pre-paradigm period and the emergence of the first paradigm Kuhn wanted to emphasize the *sui generis* nature of modern scientific thinking. In this concept the pre-paradigm period is characterized by both the lack of coherent theoretical premises and the competition of various theoretical conceptions. Subsequent to the emergence of the first paradigm in a given branch of science this above mentioned plurality disappears since the acceptance of a paradigm leads to the unification of the premises shared by the entire scientific community. With the help of this distinction the problem of the so-called “forerunners” has been discussed rather frequently in comparative law literature. It can easily be solved since for all the early efforts of these “forerunners”, which were so divergent and conceptually non-homogenous, the concept of pre-paradigm period can provide a common denominator. These were namely such attempts where the commonly shared premises being able to establish a paradigm were lacking and therefore cannot be classified into any paradigms. And, obviously, the emergence of the first paradigm should be regarded as a decisive moment in the history of modern comparative law since it fundamentally changed this history.

Besides the clarification of the earlier preliminary theoretical questions the thesis also formulates certain points regarding some repeatedly discussed theoretical problems. Firstly,

the thesis contends a statement often expressed in the Hungarian comparative law literature that in the background of the development of comparative law one can always find some “social direction”. The problem of this approach emphasizing the role of this “social direction” is that it implies an instrumental conception of science due to its Marxist background and therefore it ignores all those lessons that may stem from the acceptance of the autonomous nature of science. Kuhn accepts the autonomy of modern science manifested in its internal and organizational independence and it obviously determines his historical researches. The thesis does not at all deny the fact that social and other influences being outside the world of science could play a considerable role in the history of comparative law thinking but it stresses that these factors could mainly be taken into consideration during paradigm shifts. The reason of this is the fact that following a paradigm shift in the work of the members of a given scientific community the emphasis will shift to the inner development of the paradigm from the assessment of the external influences which was essential during the paradigm shift.

Following this the thesis points out that the development of modern comparative law thinking could also be conceived of as a history of a sequence standing out from successive paradigms.

This sequence, which might also be interpreted as the independent time scale of science in a Braudelian sense, consists of three qualitatively different elements: (i.) the period of the so-called normal science, (ii.) the crisis summarizing the anomalies raised by the new problems during the development of the paradigm and (iii.) the paradigm shift. The distinction of these three elements can facilitate the better comprehension of the history of modern comparative law since it can help in the understanding of the role of crises and the relevance of continuous renewal by new paradigms.

The nature of comparative law, so to say the question of whether comparative law is a science or a method, is definitely a popular issue in the literature of comparative law. The thesis arrives at a unambiguous conclusion in this topic, since it finds out that comparative law fulfills all the criteria provided by Kuhn’s concept of science. Therefore it could be regarded as science in this sense, since: comparative law is fostered by (i.) an autonomous scientific community, there is (ii.) an institutional network consisting of university departments, research institutes, scientific associations and scientific reviews, which is able to sustain the internal communication of the members of the scientific community and also provides the education and socialization of the new generations of scholars, moreover (iii.) it possesses such solid and coherent theoretical premises which could be proper base for a scientific paradigm as well as for systematic researches. We can also place the earlier statement on the scientific nature of comparative law in the general framework of jurisprudence since Kuhn accepted without any reservations that scientific communities could also be classified in a vertical way beside the horizontal approach, and in this sense comparative law could be regarded as an autonomous but lower field of general jurisprudence which meets all the criteria of scientific nature.

Regarding the constantly transforming goals of comparative law the thesis highlights the fact that these goals cannot generally be regarded as a crucial factor from the point of view of its scientific nature. In this sense their significance is that through their analysis we can also study the values orienting the work of the scientific community of comparative lawyers. The historical research leads to the conclusion that there are always in the background of comparative research value constellations from which the research goals can also be deduced. This value-constellation, which is always an autonomous unit consisting of the universal value of scientific research and other additional values related to a given paradigm, is another essential element in the description of a given paradigm in addition its structural principles.

The last theoretical topic discussed by the thesis is the problem of a contemporary paradigm shift. Various authors contend the premises of the recent dominant paradigm in the international as well as in the Hungarian scientific literature and therefore urge a shift toward a cultural approach of comparative law from the traditional, rule and similarity oriented concept thereof. Regarding these efforts related to a cultural approach the thesis formulates some conclusions without committing itself to either position. First of all it points out that the cultural research of law cannot be regarded as a novelty from a historical perspective since Josef Kohler already elaborated on a comprehensive cultural philosophy of law at the turn of 19<sup>th</sup>-20<sup>th</sup> century, and one can even trace back its historical roots through the *Volksgeist* concept coined by Savigny until the almost one century older Romantic philosophy. From the aspect of paradigm creating and sustaining systematical research it could also be a problem that this cultural approach demands such requirements from the researchers which can hardly be easily met. It is not at all sure that lawyers have wide-ranging knowledge about other cultures than their own. It might even be more true in the case of non-European cultures, and the overemphasized claim of interdisciplinary approach in the research of legal cultures – sociology, anthropology, political science and economics – can also raise severe questions. So, the question of cultural paradigm shift in comparative law thinking cannot be answered nowadays because of the problems of the emergence of such a scientific community which could be able to work out and sustain a theoretically coherent paradigm.

The problem of contemporary paradigm shift could be further shaded by the fact that in today's comparative law literature some new initiatives have just appeared which attempt to renew the premises of the current paradigm by integrating certain elements of the cultural critics. For instance, a contemporary Finnish author tried to reformulate the functional method on the basis of the earlier cultural critics presented by Pierre Legrand and others. The so-called moderate version of functionalism developed by Jaako Husa puts away the largely debated presumption of similarity and therefore accepts that the research of differences is equally important in the method of comparative law. According to the author with this shift from similarity the functional method remains applicable in comparative law contrary to all the aforementioned critics. It was also a new initiative in the literature that functionalist research could also be extended to those fields of law which are heavily influenced by political and moral ideas, and these efforts have already been verified by fruitful researches in the last decade. The most important lesson of the earlier discussion could be the recognition that the cultural critics called up some counter-reactions as well and these tried to adjust the principles of the recent paradigm to the new challenges in the light of the cultural critics without attempting to establish a new paradigm. So, the paradigm shift is still an open question, not a closed discussion.

The historical result of the thesis is a novel interpretation of the history of comparative law which has not been discussed in the legal literature thus far. The relevant chapters intend to reconstruct three paradigms of modern comparative law thinking from the second half of the 19<sup>th</sup> century by applying the Kuhnian theory of paradigms and its premises. During the reconstruction of these paradigms the thesis mostly endeavored to study the structural principles determining the given paradigm, and took into consideration the features of the scientific community and the process of institutionalization of the era.

It can be inferred from the research that one can distinguish three paradigms in the modern history of comparative law: (i.) the fundamentally theoretically oriented historical-evolutionist paradigm intending to know and analyze the laws of legal development, (ii.) the paradigm of *droit comparé* whose essential aim was the development of national legal systems and legal unification, and (iii.) the paradigm of the so-called modern comparative law with a special

interest toward the classification of legal systems and the sociologically oriented, functionalist research of legal institutions.

The first modern and scientific paradigm of comparative law emerged in the second half of 19<sup>th</sup> century and was essentially influenced by the positivist approach of science and evolutionism being dominant in the public thinking of the era. Besides this approach the structure of the paradigm was also determined by the aversions to the highly influential natural law thinking and analytical jurisprudence since the representatives of this paradigm generally contended such a legal theory which was exclusively based on *a priori* starting points and deductions. The scholars of this paradigm indeed attempted to define the general laws of legal development and its peculiar steps by their empirical study, that is, by comparing the legal systems of different ages, various people and nations. It was *inter alia* highly important since one of the essential hypotheses of this paradigm was the idea that historical development of law the same in all the legal systems and therefore one can get to know those early phases of the legal history of the most developed nations by the study of non-civilized people about which legal historians have no written sources.

English and German scholars played a preeminent role in the establishment of this historical-evolutionist paradigm and the Historical and Comparative Jurisprudence department at Oxford, as well as the German review entitled *Zeitschrift für vergleichende Rechtswissenschaft*, can be regarded as its institutional centers. The thesis discusses the beginning of the paradigm through the detailed analysis of the methodological premises of Sir Henry Sumner Maine, Albert Herman Post and Franz Bernhöft, and then studies the inner development of the paradigm by examining the method of Sir Paul Vinogradoff and Josef Kohler. Having analyzed some insights and achievements of Sir Frederick Pollock and James Bryce the thesis points out that the most essential principle of the paradigm was the general acceptance of the inseparability of historical and comparative method, moreover the connection of these methods made possible by that research which was unlimited in both time and space.

On the basis of the aforementioned such a picture of a paradigm-creating scientific community may evolve in the eyes of the reader which was seemingly unable to change the preeminent positivist and dogmatic scientific framework of jurisprudence of its age. But it created such methodological premises and reached such achievements which were eligible to become a scientifically well-established basis of the first paradigm of comparative law thinking. It is more than very telling about the thoroughness of this paradigm that the representatives of the new approach always formulated their theses contrary to those of this paradigm or, at least, they comprehensively contended these during the paradigm shift at the beginning of the 20<sup>th</sup> century. The thesis also points out that the oeuvre of Giorgio del Vecchio, dedicated to comparative law, is obviously a part of this paradigm even though these studies were written in a rather different era, some decades later. This strong interrelation of del Vecchio's works with the first paradigm may illustrate the existence of parallel paradigms as well.

The second paradigm of comparative law thinking emerged in the first decades of the 20<sup>th</sup> century and its birth could symbolically be associated with the first International Congress of Comparative Law held in Paris in 1900. During this congress the “founding fathers” of this paradigm, Raymond Saleilles and Édouard Lambert, forged out their novel theses of comparative law which were unambiguously contrary to the approach of the historical-evolutionist paradigm. Besides the paradigm shift and the inner development of the paradigm, the thesis also analyzes the role of the International Academy of Comparative Law in the

formation of the scientific community of comparatists. It also touches upon the establishment of various comparative law institutes in Lyon, Paris and Berlin.

Having analyzed the conceptions of comparative law of Saleilles, Lambert, Lévy-Ullmann and Gutteridge one can discover that the most important characteristic feature of the second paradigm is the claim to a sophisticated method. The authors thinking in the paradigm of *droit comparé* insisted much more on the elaboration of a proper methodology than the scholars of the earlier paradigm have ever done. It was especially important since the incompleteness of the methodology of the first paradigm was an essential deficiency according to these scholars. The emerging new methodology could be regarded as a result of the interconnection of certain methodological insights and these intersections could easily be identified. The most important methodological starting point for the authors of this new approach was the recognition that comparative law is not a philosophical or historical field but a practical field of legal sciences. Among the essential ambitions of this practical orientation one can find the development of national legal systems as a paramount aim. This practical and optimistic foundation determined the other methodological premises.

The most essential of these premises is the acceptance of the fact that a comparatist can never intend to know all the legal systems of the world, but he should be satisfied with the study of countries belonging to the same civilization. With this shift of perspective the scope of research, basically unlimited in both time and space in the age of the first paradigm, has been confined to countries of the Western civilization. It was also an important aspect that these authors wanted to focus on the questions of private law, which is a very limited terrain compared to the entirety of jurisprudence, and therefore they did not endeavor to research each field of law. It must also be added that the representatives of the second paradigm were mostly looking for the similarity of Western legal systems – as one can recognize this orientation in the invention of various conceptions of *droit commun* – so they did not insist on the study of difference.

So, the private law of developed Western countries stood in the scope of the second paradigm contrary to the thematically, spatially and temporally unlimited orientation of the earlier paradigm. It was a considerable achievement in the inner development of this paradigm that its scope, being focused on the continent, was broadened with the systems of common law and therefore the field of research of the paradigm consisted of both the Continental and Anglo-Saxon legal systems at their zenith in 1930s.

This sharpening of the subject-matter facilitated a shift toward the careful study of detailed questions instead of the examination of general problems. This approach, sensitive to details, led the scholars toward the perhaps most surprising insight of this paradigm. Each representative of this paradigm supported the view that for comparative studies it is simply unsatisfactory to exclusively study the legal rule in itself. Its legal and socio-political context should also be scrutinized if one really wants to understand the given question. This insight led Lévy-Ullmann to the invention of his contextual approach based on the concept of legal system and the so-called “human dimension” as well as the emergence of the functional method of Rabel. This approach meant a considerable transformation of the view on legal problems compared to both the first paradigm and the legal thinking of the age and therefore it anticipated the strengthening of a new line of thought in jurisprudence.

Obviously, this paradigm also had its own debates which inspired the inner development thereof. One can identify two big issues. Even though the French authors unambiguously accepted the independence of comparative law as a science, their standpoint was never universally accepted since English comparatists regarded comparative law as a method and not a science by definition. The unificatory goals based on various conceptions of *droit commun* also received severe critics from the other side of the English Channel and these

critics really contributed to the recognition of many unprecedented problems related to legal unification. These debates mutually provided numerous impetuses for scientific thinking and therefore kept the development of the paradigm. In addition they also further shaded the pictures created by certain problems. That being said, the paradigm of *droit comparé* can only be complete with both the enthusiasm of French authors and the skepticism of English scholars since both of them mutually assumed each other.

The new world order that emerged following the Second World War decisively influenced the development of comparative law. The transformation of the reality of world politics, so to say the emergence of the so-called Socialist Bloc, constrained comparatists to face the problem of socialist law. The paradigm of *droit comparé* was only able to produce certain anomalies – that is, such statements which could not be taken seriously, as for instance: socialist law cannot in fact be compared to Western law due to ideological reasons, or that these legal systems are only degenerated and simplified versions of Western law – and it showed the scientific community that the only way out from this crisis was the renewal of its methodology.

This unambiguous crisis situation therefore directed the scholars of this age toward novel problem horizons and stimulated the essential rethinking of their methodology. A new problem appeared in the third paradigm: the theoretical underpinning of the classification of the world's legal systems, as well as the elaboration of new research method awake of different social systems. Concerning the taxonomy of legal systems the thesis does not endeavor to discuss every concept developed after the Second World War but it insists upon discussing the theoretical background of certain representative approaches. Having presented the concepts of the Arminjon – Nolde – Wolff manual, René David, Konrad Zweigert, the *International Encyclopedia of Comparative Law* and Ake Malmström, the thesis points out that a theoretically well-founded approach of the classification of legal system emerged in the 1970s. This approach admits the natural relativity of all classificatory attempts (*materiebezogene Relativität* and *zeitliche Relativität*), moreover it can also be stated that they are generally based on multifactual and multilevel premises. The thesis illustrates the methodological renewal with the presentation of the theses of the so-called functional method and it analyzes the methodology of Josef Esser, Konrad Zweigert and Rudolf Schlesinger in detail and touches upon the postmodern critics of functionalism as well as certain new functionalist research programs in European law started around the millennium.

It is worthwhile adding apropos of functionalism that the theoretical foundation of the classification of legal systems made possible the integration of socialist law into the great legal systems of the world and by this the detailed study of socialist legal institutions could also be initiated. With the spread of classificatory attempts, Western comparative law accepted the peculiarities of socialist law and socialist legal systems – contrary to all ideological difference – became comparable to Western law. The classification of legal systems in fact established the “macro-level” of the third paradigm which examined the legal systems of the world in their entirety compared to each other.

In parallel to the abovementioned the functionalist method, with its deep roots in the oeuvre of Rabel, was significantly developed in Germany and the United States and therefore the questions of social systems were also productively integrated into the method of comparative law. That is to say, the functionalist method established the “micro-level” of this paradigm, where the institutionally oriented researches were carried out, incorporated into the context of legal families. One should also bear in mind that behind both aforementioned fields one can discover that the concept of law applied during research considerably broadened with substantial, social and ideological elements. Moreover this concept was increasingly

dominated by the approach of law as a system, not a unitary phenomenon. Stemming from these achievements emerged the new structural principles of the paradigm of modern comparative law on which much detailed research has been based in recent years.

The fifth chapter of the thesis – an inquiry into the history of Hungarian comparative law – is based on the theoretical framework of the paradigms earlier studied. Contrary to the general view on the history of comparative law in Hungarian legal thinking, fundamentally stemming from a study of Imre Szabó,<sup>10</sup> the thesis intends to present the history of Hungarian comparative law in the context of international developments. So, not in the light of a political history, that is, by presenting it as a phenomenon dominated by the struggle of progressive and nationalist political forces, but by examining the appearance of the earlier delimited paradigms in the Hungarian legal thinking.

The premises of the historical-evolutionist paradigm first appeared in their entirety in the works of the well-known legal historian Gusztáv Wenzel, who gave lectures on comparative law in 1850 and 1867 for various assemblies of the Hungarian Academy of Sciences, which was founded in 1825. These published lectures call the attention of Hungarian lawyers to comparative law and introduced the premises of the historical-evolutionist paradigm. Moreover, Wenzel also indicated that comparative law could play a considerable role in the development of private law. The next important step in the Hungarian reception of the first paradigm was the Hungarian publication of Maine's *Ancient Law* in 1875. This work was translated to Hungarian by Ágost Pulszky, who was otherwise fairly interested in comparative law with special regard to the Indian legal development, and Pulszky also prepared an almost 120-page commentary for the book. These notes of Pulszky might even be regarded as an independent work in itself since one can find references in the pages to each related scientific work published in Maine's first edition.

Between 1894 and 1895 an interesting methodological debate took place on the pages of the review entitled *Jogtudomány Közlöny* [Review of Jurisprudence] which was unambiguously associated with the premises of the evolutionist comparative law and also proved the acknowledgement of this paradigm in Hungarian legal thinking. The initiator of the debate, János Reiner, contested many premises of the paradigm and passionately argued that the method of comparison can be applied only with severe precautions and reservations. Basically, it can only have relevance in the study of written laws as it was argued by Reiner. The critique of Reiner was answered by József Illyasevits, a scholar with considerable international experience and the author of the comparative law entry in the *Jogi Lexikon* [Legal Encyclopedia] published in 1904, who argued for the comprehensive application of comparative method in his article. In his view this method unites the synchronical and chronological approach of legal development and therefore it is eligible for the research of legal history contrary to all deficiencies. One may conclude that the premises of the historical-evolutionist paradigm became public and were mostly applied within legal historians and ethnographers.

The essentially private law oriented and practical paradigm of *droit comparé* mostly influenced the work of Gusztáv Szászy-Schwarz and István (Étienne) Szászy. Szászy-Schwarz sketched the relevance of comparative law in fairly impressive historical relationships. His starting point was that the aim of each science is the unity of cognition and therefore sciences must strive for a unitary approach instead of particular techniques. This insight dominated his view on the historical development of legal sciences since he thought,

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<sup>10</sup> Cf. SZABÓ: *op. cit.*

in harmony with the theses of Rudolf Jhering, that both the emergence of various national laws in Europe and the differentiation of particular legal branches had decomposed the unitary legal science of the Middle Ages. Due to this deep transformation the claim of universalism disappeared from European legal thinking at the beginning of the 19<sup>th</sup> century. This tendency was arrested by the new developments emerging in the last three decades of the 19<sup>th</sup> century which set forth the claim of universalism in legal sciences. So, following the centuries of fragmentation and atomization the idea of integration reappeared in European legal thinking in the forms of comparative law and general jurisprudence. According to Szászy-Schwarz the main task of extensive and intensive comparative law is the reestablishment of legal universalism.

Szászy did not regard comparative law as an independent science contrary to the dominating French approach in the paradigm but considered it as a method. In his private law manual he insisted on the renovation of the traditional structure of private law with the help of comparative law. Additionally, he also tried to introduce such foreign achievements – from English, French, Russian and Muslim law – to the Hungarian science of private law which essentially differed from the earlier German-originated patterns. One can state that his idea on the place of comparative law within legal sciences was decisively influenced by the legal philosophy of Gyula Moór. Stemming from the concept of Moór on the branches of legal sciences Szászy distinguished amongst four great areas of comparative law: (i.) comparative science of various fields of law, (ii.) comparative legal history, (iii.) comparative sociology of law, and (iv.) comparative politics of law. Szászy must have retired in 1950 due to political pressure – he was the head of the department of international private law and comparative law at the University of Budapest until 1949 – and he did not have any further opportunities to continue his work on the general questions of comparative law any more but he was engaged in the comparative research of special legal branches.

Following the termination of the department of Szászy in 1949 it seemed that the emerging popular democracy did not at all need the fundamentally Western-originated comparative law, however the idea of comparison reappeared in the Hungarian legal thinking in the 1960s. It happened parallel to a general transformation of legal thinking in the countries of the Socialist Bloc since the attitude of general negation of the idea of comparative law begun to change to a slightly more permissive approach from the end of the 1950s. In the reception of comparative law in Hungary two Marxist authors, Imre Szabó and Gyula Eörsi, played a preeminent role since they represented a very tolerant view on comparison in jurisprudence and they also encouraged participation in the international movement of comparative law. In the academic life of this age they tried to legitimize comparative law with the necessity of a better legal propaganda and the emphasis of the political principle of peaceful coexistence.

Imre Szabó mostly insisted on the creation of the theoretical foundations of socialist comparative law and in this context the application of the concept of law types was considerably important. The second very important theoretical step was the differentiation between “external” and “internal” comparative law which made possible the comparison of different legal types, that is, the contrast of legal system based on differing social systems. In the assessment of the oeuvre of Szabó it should also be pointed out that by creating the concepts of “external” and “internal” comparative law based on the concept of the law type and by stressing their co-equality he found that “thin path” which made it possible to meet the requirements of both the Hungarian and Western scientific and political life. All in all, the theoretical background developed by Szabó made possible for Hungarian socialist lawyers to participate in the international academic life. A later classic of Hungarian science of socialist private law, Gyula Eörsi keenly studied foreign private law from the beginning of his academic carrier. As his first work of comparative nature a briefer book published by the

University of Szeged could be mentioned. From the beginning of the 1960s Eörsi published novel papers on comparative law from which his study on the prohibition of torts must be mentioned at the first place. This study pointed out what kind of perspectives comparative law can offer for socialist jurisprudence on a very high academic level. The *opus magnum* of Eörsi discussing the entirety of comparative civil law was published in 1975. From the aspect of the theory of comparative law the most important parts of the volume are the chapters dealing with the world's legal system. In these chapters Eörsi elaborated a coherent Marxist theory of the classification of legal systems through the critical analysis of the Western classificatory attempts. Even though the concept of Eörsi stems from a comprehensive critique of the Western approaches it must be pointed out that it shares the premises of the third paradigm from every relevant aspects: it only discusses contemporary legal systems with special regard to Europe, it only deals with private law and it also applies a multi-level approach. When assessing the relevance of the work of Szabó and Eörsi it cannot be forgotten that their activity made possible the continuation of comparative law following a more or less ten-year break in an environment which was not essentially familiar with it.

### **Application of the results**

The application of the results of the thesis is possible in many aspects. Firstly, it could be taken into account that the findings of the historical research confirm that the paradigm theory of Kuhn is applicable to the study of jurisprudence. The thesis additionally marks those points from which this theoretical construction developed for the research of the history of natural sciences should be considerably tuned or modified. In this sense the findings of the thesis can even contribute to the self-reflection of other fields of jurisprudence.

An additional relevant opportunity to apply the achievements is the fact that the theoretical and historical theses of the thesis – due to their strong relationship with the theory of Kuhn and the bias stemming from it – provide many possibilities to carry out discussions. And these debates could really contribute to the better comprehension of the history of comparative law. Those authors who are skeptical with the theory of Kuhn or even do not want to accept it due to various reasons can shade many findings of the thesis and these debates and discussions will finally lead to a refinement of our view on comparative law.

As a third aspect it should be mentioned that the “raw material” of the thesis offers a good starting point to write a chapter on comparative law for university manuals since it could be very suitable to introduce students to the basic questions and schools of comparative law due to the structure of the theory of Kuhn. It might be also an important application since there is not much literature on comparative law available to law students in Hungary.

#### IV. Related publications

##### a. edited volume

*A jogösszehasonlítás elmélete – Szövegek a jelenkori komparatiztika köréből* [Theory of Comparative Law – A Reader of Contemporary Comparative Law] (szerk. Fekete B.). Szent István Társulat, Budapest, 2006.

##### b. studies and briefer papers

FEKETE B.: Az összehasonlító jogi funkcionalizmusról – elmélettörténeti vázlatkísérlet [On Functionalism in Comparative Law – Attempt for a Historical Inquiry]. *Állam- és Jogtudomány*, 2009/2. 199–227.

B. FEKETE: The Unknown Montesquieu – An essay on Montesquieu’s intellectual background. *Iustum Aequum Salutare*, 2009/1. 151–159.

FEKETE B.: Jogösszehasonlítás az Európai Bíróság gyakorlatában – nemzeti és szupranacionális jogrendek interakciója a közösségi jog fejlődésében [Comparative Law in the Practice of the European Court of Justice – Interaction of National and Supranational Legal Orders in the Development of Community Law]. In: *Európai jog és jogfilozófia* (szerk. Paksy M.). Szent István Társulat, Budapest, 2008. 361–372.

FEKETE B.: Henri Lévy-Ullmann (1870-1944). Egy életmű a „világjog” vonzásában [Henri Lévy-Ullmann (1870-1944). An Oeuvre in the Attraction of “droit mondial”]. *Állam- és Jogtudomány*, 2008/4. 497–510.

B. FEKETE: Post-socialist Legal Systems in East-Central Europe – toward a Comparative Framework. In: *Legal Transitions – Development of Law in Formerly Socialist States and the Challenges of the European Union* (ed. Elemér BALOGH et al.). Pólay Alapítvány, Szeged, 2007. 109–114.

FEKETE B.: Jogösszehasonlítás: tudományelméleti és tudománytörténeti töredékek [Fragments of a Theory and a History of Comparative Law]. *Állam- és Jogtudomány*, 2007/4. 555–588.

FEKETE B.: A századforduló szellemi körképe a Varázshegyről [The Intellectual Overview of the Turn of Century from the *Zauberberg* of Thomas Mann]. *Iustum Aequum Salutare*, 2007/2. 19–29.

FEKETE B.: Két vázlat a magyar összehasonlító jogi gondolkodás tablójához [Two Drafts for a Painting on Hungarian Comparative Law]. *Állam- és Jogtudomány*, 2005/1-2. 143–169.

FEKETE B.: Az első magyar összehasonlító jogi szöveggyűjtemény [The First Hungarian Reader on Comparative Law] (Badó Attila-Loss Sándor: Betekintés a jogrendszerek világába). *Jogtudományi Közlöny*, 2005/4. 183–188.

c. translations and translation proofreading

(as translator) Edouard LAMBERT: Conception générale et définition de la science du droit comparé, sa méthode, son histoire; le droit comparé et l'enseignement du droit. In: *A jogösszehasonlítás elmélete*. 9–21.

(as translator) René DAVID: Le droit comparé enseignement de culture général. In: *A jogösszehasonlítás elmélete*. 22–24.

(as translator) René DAVID: Existe-t-il un droit occidental? In: *A jogösszehasonlítás elmélete*. 99–105.

(as proofreader with Dóra BOYTHA) Xavier BLANC-JOUVAN: Les différentes tendances et conceptions du droit compare dans les pays romanistes. In: *A jogösszehasonlítás elmélete*. 31–36.

(as proofreader) Rudolf B. SCHLESINGER: The Common Core of Legal Systems – An Emerging Subject of Comparative Study. In: *A jogösszehasonlítás elmélete*. 116–127.

(as proofreader) René RODIÈRE: Introduction au droit compare (one chapter). In: *A jogösszehasonlítás elmélete*. 149–153.

(as proofreader) Marc ANCEL: Le comparatiste devant les systèmes (ou »familles«) de droit. In: *A jogösszehasonlítás elmélete*. 154–158.