(2003)

I. COMPARATIVE LAW

Written by Att. Sevket Guney Bigat

A) THE INTRODUCTION

The Comparative Law is the study, analysis, and comparison of the different national law systems.

Each of the more than 190 nations in the world today has a different set of laws governing its people and its relations with the rest of the world. Whereas international law governs relations betweeen states, institutions, and individuals across national boundaries, municipal law governs these same persons (including the private or commercial conduct of foreign states) within the boundaries of a particular state. Comparative lawyers classify countries in to legal families. The two most widely distributed families are the *Romano – Germanic Civil Law* and the *Anglo – American Common Law*. Another family that has become important internationally in recent years is *Islamic Law*. Each of these families has many subfamilies; for example , within the *Romano – Germanic family* these are the *Romanis, Germanic and Latin American subfamilies*. Additionally, many legal systems are hybrids: The Japanese and The South African Legal Systems thus have elemets both the civil and the common law. Finally, some legal practices are truly unique to a particular country, especially in some African countries that use varying degrees of tribal customary law[1].

The Comparative Law, goes beyond the boundaries of municipal law. But both of these laws differs in respect to their functions. In recent years The Comparative Law which is claimed to be an independent discipline of legal science, was already existent as a procedure of legal research. This procedure was about comparison of legal norms that handels the same issue in different legal systems. The legal norms in question are compared and at what extent are these similar or not is determined. The Comparative Law procedure is applicable in all branches of law and especially in The Private International Law. The Private International Law norms of various nations are compared, altough the comparison is mostly done for juristic works , obtained information is used for making new codes. Undoubtfully, the use of The Comparative Law in this respect became possible right after the codification of The

[1] August, Ray, International Business Law, 2. Baskı, New Jersey, 1997, 41-42

Private International Law. A vital role is wanted to be given to The Comparative Law related with the commentary and the implementation of the *conflict of laws*[2]. If the foreign material legal norms which are quoted to be competent by The Private International Law , are different in content and in meaning then these can be required to be compared to clarify and apply accuretely. In order to avoid inevitable desperation , The Private International Law requires the assistance of The Comparative Law. The Comperative Law has an importance in the unification of law, proportionally, for the assistence to The Private International Law. If the prepratory element of justice of The Private International Law as an external cohesion of decisions are considered, the final purpose of the P.I.L. is the accurate and effective *common world private law* (*droit commun de l'humanité / gemeinsames welt privatrecht*)[3]. Most of the states make codification in respect to model laws that is called *uniform laws* (*lois uniformes / fusionieres recht*) and thus a common law emerges. Also there is supronational law of international organisations which the signatory states transfer some of their sovereignty to. And the international customary law originated from international courts. The unification of law is not a juristic work but a reform. By this reform, the great codification stream that is about to go beyond the boundaries of states in the 20th century which was started in the 18th century, is still tried to be completed[4]. On the other hand, purporting to provide a *world private law* which could bring the end of The International Private Law is still a low probability. Especially the contraversies between *Continental European Law* and *Anglo – American Law, - Civil Law* and *Common Law* – are numerious. But an international unification can be maintained by international treaties[5].

B) THE SPECIAL TERMS

1. Types of Approaches in The Comparison of Legal Systems

The Comparison of Legal Systems may be made by two types of approaches:

i) *Macrocomparison*

This is the comparison of spirit and style of different legal systems, the methods of thought and procedures used. Here, instead of concentrating on individual concrete problems

[2] Nomer, Ergin, Devletler Hususi Hukuku, 9. Baskı, Istanbul, 42

[3] Nomer, 43

[4] Nomer, 44

[5] Nomer, 45

and their solutions, research is done into methods of handling legal materials, procedures for resolving and deciding disputes , or the roles of those engaged in the law[6].

ii) *Microcomparison*

This deals with special legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interests[7].

Since The Comparative Law has to deal with foreign law, it must be distinguished from those other branches of legal science which have to do mainly or occasionally with other legal systems. The neighbouring areas of legal science which also deal with foreign law, from which Comparative Law must be distinguished, are Private International Law, Public International Law, Legal History, Legal Ethnology, and finally Sociology of Law.

Comparative Law and Private International Law, are entirely distinct but they interact. Private International Law or Conflict of Laws, is a part of positive national law, while Comparative Law seems to present it self as a *science pure*. Private International Law tells us which of several possible systems of law should be applied in a particular case which has foreign connections; it contains rules of competence which determine which specific national law is to be applied and which lead to its application. Private International Law is basically more selective than comparative but Comparative Law deals with several legal systems[8].

Comparative Law and Public International Law, for Public International law is essentially a supranational and global system of law. Yet Comparative Law is essential to the understanding of "the general principles law recognised by the civilized nations" which are laid down as being one of the sources of Public International Law by article 38 Statute of The International Court of Justice – whether this means principles of law accepted by all nations without exception, which would include only a few trivial truisms, or rather the principles of law accepted by a large majority of nations[9]. These "general principles" were to be applied by analogy, and would be derivied by selecting concepts recognised by all systems of municipal law. The Court should be representative of "the main forms of civilisation and of the

[6] Zweigert/Kötz, Introduction to Comparative Law, (Çeviren, Weir, Tony), 3. Baskı, New York, 1998, 4

[7] Zweigert/Kötz, 5

[8] Zweigert/Kötz, 6

[9] Zweigert/Kötz, 7-8

principle legal systems of the world" and the attemp by certain writers to give some other interpretation to these words is both artifical and unconvincing[10]. On several occasions the former Permanent Court of International Justice found it necessary to apply or refer to such "general principles". For example *res judicata* rule[11].

Comparative Law, Legal History and Legal Ethnology, while Comparative Law studies legal systems coexistent in world, Legal History studies systems consecutive in time. All Legal History involves a comparative element. The institutions and procedures evolved though the history is compared too[12]. The Legal Ethnology studies general world history of law as part of a general history of civilazation. It stands on the teachings of Hegel and Comte of folk ideas. All peoples develop as it were in parallel from a common original condition, was controverted principally by the so – called *theory of cultural groups* (*Kulturkreislehre*) according to which every cultural development of any group anywhere was, as a historical event, unique[13].

Comparative Law and Sociology, sociology of law aims to discover the causal relationship between law and society. It seeks to discover patterns from which one can infer whether and under what circumstances law affects human behaviour and conversely how law is affected by social change, whether of a political, economic, psychological or demographic nature[14].

2. The Comparative Law Legal Systems and Legal Families

The Comparative Law is the study of comparison of legal systems of legal families so this is the best time to talk about these families. The Legal Families are classified on the basis of the study of their substance. The Legal Systems are put into legal families on the basis of similarities and relationship, but it is never made really clear which common qualities are the crucial ones. It is often obvious enough that one system is a parent system (like The Common Law of England), but we need more help with the difficult question whether a system is affilated to one parent or to another, especially as legal systems have been known to adopt new parents. The groupings are highly relative. It is quite possible that a system is to be put

[10] I.A. Shearer, Starke's International Law, 11. Baskı, 1994,.29

[11] I.A. Shearer, 30

[12] Zweigert/Kötz, 8

[13] Zweigert/Kötz, 9

[14] Zweigert/Kötz, 10

in one family for private law purposes, and in another for purposes of constitutional law. Thus German Private Law unquestionably belongs to German legal family. One might well put German Constitutional Law in a group which included U.S.A. and Italy and excluded England and France, depending on the weight one attributes to the presence or absence of judicial review of constitutionaly as being hallmark of constitutional system[15]. Also grouping depends on the period of which one is speaking. Usually comparatists may ignore the sudden legislative changes, since the meat of The Comparative Law is not positive law but critical comparison. But the division of the world's legal systems into families is susceptible to the alteration as a result of legislation or other events[16]. Other distinction opinion is that instead of basing categorizations so much on historical development, legal content or the observable techniques of the rules of law, one should inquire whether countries have the same legal culture that is whether its citizent have similar attitudes to law and similar expectations of it, with further refences[17].

3. The Style of Legal Families

These are determined by a serries of factors including: historical background and development, predominant and characteristic mode of thought in legal matters, distinctive institutions, legal resources and finally the ideology[18].

II. CONCLUSION

Comparative Law is a important branch of law.There are different legal systems due to existance of different cultures and also understandings.This is a natural obstacle on the way to the unified world legal order. Beside this utopia, comparative law has a usefull function to fill the gaps in the municipal laws on certain issues which has not yet been set by any rule or norm through the time and maintains better relations among nations to interact with eachother peacefully and unconflicting. Reception of laws meet great requirements of nations especially at the times of essential political changes in a particular country. For example, reception of continental European Codes at the first times of the Turkish Republic. It helped Türkiye to save time and carry on the change at top speed to become contemporary state, but of course

[15] Zweigert/Kötz, 65

[16] Zweigert/Kötz, 66

[17] Zweigert/Kötz, 67

[18] Zweigert/Kötz, 68

some changes were made on these codes to adapt to the Turkish society. A rule which will be entitled to reception must be well aplicable in the country of origion and must be aplicable in the recipient country.