A Critical Assessment of Comparative Legal Research in the Context of Method and Systematic Approach to Law

Hassan Faruk Al Imran
Assistant Professor & Chairman
Department of Law
Uttara University
Dhaka, Bangladesh.

hassanfaruk@gmail.com; hassanfaruk@uttarauniversity.edu.bd

Abstract:
Comparative law is an important aspect of research field among lawyers, students and researchers. If any problem arises in legal issue, and no solution can be found within own legal system, then a comparative study can be drawn on the comparative research for better solution of the problem. However, in comparative law, there is no specific subject matter like other fields of law (e.g.-contract, tort). This paper will initially discuss the definition of comparative law, advantages and its pitfalls and differences between comparative research and the concept of foreign law. This paper also focuses on the various comparative methods applied by Zweigert and Kotz, De Cruz, Reitz and Kamba. Through this study, my aim is to find out which one is the most effective method for the comparative research. Finally, I have drawn a conclusion on the whole submission.

Key Words: Blueprint, Challenges, Choice of Freedom, Comparative Law, Method, Research, Science.

Introduction
The concept of comparative methodology is a very old one. But it is only from the 19th century the term ‘comparative law’ gets established, that includes a systematic study of its methods and aims as a comparative law itself which comes to be recognized as a specific discipline. At the beginning, it focuses only on legislative texts ignoring jurisprudence and doctrine. However, Ernst Rabel, the founder of comparative functionalism, proclaimed that comparative law not only compares the legislation, it also analyses the court decisions and legal transactions (Zweigert and Kotz, 1998, 49-62).

The comparative law is not a law that is coded in any language oral or written, natural or artificial. It is a methodology that is applied for comparing laws, or legal regulations in different countries, regions or different legal practices. It tries to explore what are the differences and similarities between two or more legal systems. It particularly refers to systematic comparisons of different legal systems and institutions like a comparative economic system (De Cruz, 1993, 2-5).

Definition of Comparative Law
Comparative legal research does not have a core content of subject areas, and does not denote a distinct branch of substantive law. At present, there are around 42 types of legal systems in the world, and traditionally, comparison has focused on the three major legal families in the world: civil law system, common law system and socialist system. ‘Comparative law’ can be said to describe the systematic study of particular legal traditions and legal rules on a comparative basis. To qualify as a true comparative law enterprise, it also requires the comparison of two or more legal systems, or two or more legal traditions, or of selected aspects, institutions or branches of two or more legal systems (De Cruz, 1999, 3 ). On the other terms, the subject matter of comparative law is a method of ‘two or more legal systems; or parts, branches or aspects of two or more legal systems’ (Kamba, 1974, 486).

However, it should be born in mind that the study of foreign law and the study of comparative law are not the same. The comparative lawyer compares their own law from other country; and there should be
necessary intellectual content in the comparative research for the critical comparison, and at the end the researcher will give suggestion for which the policy of other country should be adopted for the reinterpretation of one’s own country (Zweigert and Kotz, 1998, 2 -12.)

**Advantages of Comparative Law**

One may ask- why comparative law is needed. Rather, it would be better to study one’s own national law for increasing knowledge of comparative law. However, there is no doubt that comparative research has many advantages (Grossfeld, 1990). Collins identified four types of popular rationales of comparative study. He commented, comparative study accelerates the international unification of domestic law. A comparative lawyer can identify what changes are indispensable for his own legal system. What may be the best solution of the problem that he is facing in his own legal system? Moreover, it also been pointed that comparative law makes us aware of the elements which are influencing the law at all levels, it confronts us with our own hidden conceptual, ideological framework. He also thinks that hidden understandings are uncovered when we try to find out why foreign legal rules, approaches and the similarities are different from others (Collins, 1991, 396).

**Pitfalls of Comparative Law**

Alternatively, comparative legal research is not free from its pitfalls. Professor Kahn-Freund argues that one of the main problems of comparative law is problem of ‘transplantation;’ i.e. - what should be rejected and accepted by the comparative lawyer during the research? Whether another national law would be adjustable like other’s own law? Is there any yardstick on comparative research? (Kahn-Freund, 1974, 5). The answer is- there is ‘no’ specific yardstick of comparative law, therefore, researcher has to give careful consideration not only at the law of foreign state, but also at the whole environment of the state, such as-cultural, political, historical, economic, religious, etc. Further, the narrow focus of comparative legal research also creates problem. If a ‘comparatist’ takes a very narrow view of the comparative research, then it will reduce to a dry juxtaposition of the rules of one legal culture with another. In that situation, a researcher does not compare, but contrast (Legrand, 1996, 234). Comparative legal research compares the foreign law, which is written in foreign language. Therefore, ‘homonyms’ and ‘synonyms’ are another problems of comparative legal research (Kahn-Freund, 1966, 52). Schelsinger remarked that –“how long does it take to explain that a French ‘no tair’, and English ‘notary public’, and American ‘notary’ are three very different creatures?” (Kahn-Freund, 1966, 53)

**Challenges of Comparative Law**

Comparative law is not free from its challenges. Legrand pointed out that a comparative lawyer faces two types of challenges. Firstly, interpretation and comparison of another legal culture, and secondly, a comparative lawyer acts as cultural intermediaries; therefore, he must determine how to convey his acquired understanding of another legal culture within the inconsonant parameters of his own domestic law. In addition, legal culture introduces a number of questions and uncertainty. The issues are: How does a more profound insight into one’s self related to one’s understanding of others? How does the fact of immersion in another culture change the interpreter? (Legrand, 1995, 262) Professor Kahn-Freund offers that a comparative lawyer must make many decisions entirely for himself; i.e. - decisions on the field that he wishes to cultivate, and decisions on the tools and implement that he wishes to use in cultivating. Moreover, comparative lawyer should select the subject of research, the systems of law. He decides whether he should compare the doctrines or practices, structures or functions. However, Professor Kahn–Freund cautions that a comparative lawyer enjoys the ‘freedom of choice’ on the subject matter and tools of the research, which are the most dangerous issues of the comparative research (Kahn-Freund, 1966, 41 ).

A successful comparative research not only depends on the selection of legal system or topics; there are most factors that directly or indirectly influence the research. One of the factors is - strong element of personal preference, i.e. ‘freedom of choice’ of the comparative lawyer. According to Professor Kahn-Freund, ‘freedom of choice’ is the most dangerous aid of comparative lawyer that he enjoys. It is suggested that this ‘freedom of choice’ is conditioned by various other factors which include: the past
experiences of comparatist, manageability of the subject matter and the time factor, research interests, accessibility of source of materials and language etc. During exercising this ‘freedom of choice,’ it has been suggested by the comparative lawyer that he should limit his research both in geographical sense and on the subject matter. This can be done without defeating the main purpose of the comparative research; only consciousness is needed during the research.

**Dangerousness of Freedom of Choice**

The question is –how would the ‘freedom of choice’ be dangerous in comparative research? A clear answer can be given by the following example. Comparative lawyer has freedom of choice; so, if one comparative lawyer concentrates on a topic of legal system of a small or undeveloped area (e.g. Contract law of any African Tribal), and other researchers do research on same topic (contract law) on a large number of countries, or developed countries (like as UK, USA, Australia) then the question is: whether the results of such researches would be useful? The answer is simple ‘no’. Professor Lawson gave an important comment on this point. He argues that a comparative lawyer should limit his field of research both in geographical sense as regards to the ‘subject matter.’ We may retort the fact that comparative lawyer must be flexible than any other lawyer on finding out a new topic for discussion and research (Kahn-Freund, 1966, 42). Furthermore, it has been pointed out that a comparative researcher at all times must remain critical (Legrand, 1996, 240).

Now, the question is apparent how will a researcher be flexible, and on the other hand, how will a researcher be critical during the comparative research? Is there any method? Then, what is the method? Alternatively, are there any varieties of methods?

**Methods of Comparative Legal Research**

There is no generally accepted framework for comparison in the comparative research. Professor Kamba remarked that in spite of great increase and interest, comparative law still lacks a clearly formulated and widely accepted theoretical framework by which specific comparative legal studies and research may be undertaken in the meaningful and effective manner (Kamba, 1974, 485). Comparative scholars: Zweigert and Kotz, De Cruz, Hoecke and Warrington, Reitz, and Kamba tried to determine theoretical framework and introduced the methods of comparative law. In brief, the effectiveness of various methods has been discussed below.

Zweigert and Kotz introduced a theoretical method on the comparative law. However, it has been criticized that- this method reveals a number of theoretical problem that underlies the whole comparative research (Hill, 1989, 101).

Zweigert and Kotz agreed that the legislation of all over the world have found that good laws cannot be produced without the assistance of comparative law. By examining the different jurisdictions of the world, a comparative researcher can approach and solve his own legal problem. Moreover, the writers expressed the view that comparative law does not merely provide a reservoir of better solutions, it also offers the opportunity to a comparative scholar to find out the ‘better solution’ of his time and place. The evolution of different legal systems is essential to the ‘better solution’ of comparative law. However, the question arises, on what basis a comparative lawyer should be qualified to evaluate the different legal systems. According to Zweigert and Kotz, comparative law is objective one- that provides the answer (Zweigert and Kotz, 1998, 15-16). But there is no specific guideline on the ‘objective’ view, as different researcher has reached on different judgment on the same topic (Hill, 1989, 102).

Zweigert and Kotz also noted that one must consider the comparative research for various solutions of his own law, and to consider - what is the solution of other legal systems. However, the question is-what are the standards? According to Zweigert and Kotz, an evaluation of the various solutions provided by different legal systems is to be made by considering the best justly adapted purposes and functions. However, it is criticized that “standards such as justice, fairness, and common sense (which Zweigert and Kotz employ throughout An Introduction to Comparative Law) are notoriously indeterminate. It is easy to say that the law of obligations is founded on equity and justice, or that –the question raised by cases of mistake is which party should reasonably and fairly bear the risk of error?
But this does not help in providing objective answers to inherently controversial and ultimately subjective questions.” (Hill, 1989, 104).

Professor Peter De Cruz also approached a method of comparative law in *A Modern Approached of Comparative Law*. Nevertheless, this method is not free from criticism. It is expressed that in spite of the promise shown by the title *A Modern Approached of Comparative Law*, De Cruz did little to confound the orthodox approach (Legrand, 1995, 263).

De Cruz supposed that the key of comparative analysis is the collection of sufficient materials and information (De Cruz, 1993, 14). This view was also strongly criticized as a successful comparative analysis not only lies on data collection, but also it lies in meticulous selection and deft interpretation of the relevant materials (Legrand, 1995, 263).

De Cruz further pointed out that a comparison means a strong measure of objective neutrality and critical self-assessment. ‘Comparison’ should be objectively neutral (De Cruz, 1993, 14). Although it is not clear, what is the meaning of objective view? How can it be done? It has been alleged that objective comparison is impossible since cultural prejudice can never be ignored. There is always a measure of cultural suggestibility in the act of comparison. Firstly, one can never be an observer of himself. Secondly, knowingly or unknowingly, the domestic legal culture is projected onto another legal context, and thirdly, the subject always remains a stranger to his object in comparative research (Legrand, 1995, 266-67).

De Cruz introduced a ‘blueprint’ for comparison by eight steps (De Cruz, 1999, 235-39). However, criticized that one of the themes runs throughout the author’s methodological summary is *how easy* it is to pursue comparative work about law. There was no attempt to distinguish the complications to which the act of comparison gives rise, or to ask in compelling manner the scholarly community would expect from a *modern* text whether one can understand the experience of others hermeneutically, or whether a legal culture is the expression of essentialism (Legrand, 1995, 268-69).

John C. Reitz also introduced a principle of comparative research. He addressed the comparative method just as a ‘tool’. Comparison starts by identifying the similarities and differences between legal systems or parts of legal system under comparison. Good comparative analysis should pay ‘careful attention’ to the problem of equivalency by proving how similar and how different the aspects of each legal system under the study are (Reitz, 1998, 620-24). But the question raised, how should one give ‘careful attention’ during the comparative research?

Professor Retiz expressed his view that good comparatist should be sensitive about the limitations on information that is available on foreign legal systems and should qualify their conclusions if they are unable to have access the sufficient information, or if they have and reason to suspect that they are missing important information. In this situation, if the gap is too large, the study should not be undertaken at all; because conclusion about foreign language will be too uncertain. Comparative method is simple to describe, on the other hand, it is difficult to apply because satisfactory results can be obtained only if the comparative researcher has command on large amount of information regarding the legal systems in terms of comparison (Reitz, 1998, 631-35).

Over the past decades, ‘the concept of law as rules’ has been using as border sense and this view was reflected in Zweigert and Kotz as well. They remarked ‘law as a style’ (Zweigert and Kotz, 1998, 68). Because, during the comparative research, a comparatist lawyer not only thinks about the law of foreign state, he also considers the history, institutions, ideology of that states.

Moreover, distinguished comparative law scholars like Kamba, Gutteridge, Clark and Merryman, advocated broader approaches of comparative research and expressed the view that law would not be regarded as ‘rules’ but as a ‘culture’. They argued that understanding of law involves much more than mere reading of statutory rules and judicial decisions, i.e. - law cannot be understood unless it is placed in a broad historical, socioeconomic and ideological context (Van Heoecke, 1998, 496).

**Comparative Law: Whether Science or Method**

Prof. Walter J. Kamba argued whether comparative law is a ‘scientific’ method or not. He remarked that a comparative law embraces any legal study or research by the systematic use of the comparative
technique; and thus comparative law is the systematic application of comparison of law (Kamba, 1974, 486-89).

If comparative law is treated as a scientific method or science, then its function and concept would be restricted, as time-to-time law and legal institutions have been changed according to circumstance, demand and necessity. Thus, it would be better if comparative law is treated as a broader concept, i.e. a systematic application of comparative law.

According to the definition- comparative law should involve two or more legal systems, or branches or part of two legal systems, i.e. macro-comparison, or micro comparison. The former is concerned with two or more entire legal systems. And, micro-comparison is limited on the aspects or topics of two or more legal systems. The word, ‘comparison’ implies the existence of two or more entities. An entity cannot be compared with itself. Therefore, there must be two or more legal system involved, and this is the essence of comparison and comparative law. But the problem is that there are a number of legal systems in the world, and many independent States’ have their own system of law, and often two or more legal systems may exist side by side within the same State (e.g.- EU counties). Then the question remains unsolved- how will the comparative researcher choose the research area?

Selection of Research area in Comparative Law

Macro-comparison may range from two or more legal systems of the entire world, e.g.-Roman law and Common law. On the other hand, the range of topics for micro-comparison is infinite. The important question arises: what legal systems and what topics should be selected for the comparative study, or research? How should such systems and topics be selected? The success of comparative research depends on the selection of right topic and areas of law.

It may be suggested that researcher must limit his subject matter of comparative law by selecting the ‘mature’ legal system (e.g.- Common law, and Civil law system) for the comparison, i.e.-comparatists should maintain that the legal systems that to be compared must be comparable in the sense that they have attained the same stage of legal development. It had been pointed that like must be compared with like; the concepts; rules or institutions under comparison must relate to the same stage of legal, political and economic development. Although this view was criticized by a saying that this strict view of comparison is ‘unnecessarily restricted’ the area of research as a selection of system of law depends on aim and principle of the comparative research (Kamba, 1974, 507).

Therefore, a teacher of English Law in an English University, if he seeks to apply a comparative law to illuminate his student’s understanding of the English law of Contract it would be imprudent and little value to select for comparison a non-western system of law which concept of status dominates and the idea of contract is undeveloped. On the other hand, a law-teacher of African University, who invokes a comparative law as an aid for increasing his student’s comprehension of the modern African law of matrimonial property in many instances as the fusion of elements of western law and non-western indigenous customary law, would find it essential to compare systems at different stages of developments e.g. - English law, local customary law (Kamba, 1974, 507).

On the other hand, the range of topics for micro-comparison is substantially greater than that of systems of law. It is essential that the topics selected to be comparable; e.g.-marriage in English law equivalent to French law. Conversely, it is not always easy to determine the equivalence. Where the comparison is closely related to the same systems of law, e.g.- common law system (most of the British commonwealth countries have this system), there is little difficult in identifying a comparison (Kamba, 1974, 509).

Systematic Manner of Comparative Research

Next question may be drawn how should the comparison be carried out in a systematic manner? Professor Kamba commented that the technique employed must necessarily vary to a considerable extent according to the degree of disparity or similarity in the socio-cultural foundations of the legal orders. The technique which is well suited for intra-cultural comparison i.e.-comparison of legal systems is rooted in similar culture, traditions and similar socio-economic conditions(e.g.-English law
and French law or, closer still, English law and Australian law) would be inappropriate for cross-cultural comparison, i.e. the comparison of legal systems which is totally different culture and socio-economic backgrounds (English or French law on the one hand, and an African system of customary law on the other) (Kamba, 1974, 511).

Van Hoecke, and Warrington agreed with the view of Kamba. They noted that Kamba appeared to be aware of the categorical differences when making the distinction between intra-cultural and cross-cultural comparison (Van Hoecke and Warrington, 1998, 509). Notwithstanding, Kamba is not free from criticism. Kamba thought of gradual difference only, and he was unaware of its fundamental and categorical nature. This obviously led to complicated methodological confusion. (Van Hoecke and Warrington, 1998, 510).

As a result, to overcome this confusion it may be proposed that ‘prescribed specific comparative procedures’ should be followed. Firstly, to identify the legal culture of the world; Secondly, for those interested in the comparison of the laws at an intra-cultural level (e.g.-among EU member states), the analysis should focus on the extent to which the comparison of legal systems which are indeed rooted in similar cultural traditions and operating in similar socio-economic conditions is possible; Thirdly, the difference between written rules and legal practice should be studied; and Fourthly, customary law has to study if it has more influential role in the society (Van Hoecke, and Warrington, 1998, 510).

Conclusion
In conclusion of this article, it is clear that a comparative law has many advantages. One of the advantages is that it helps to reform the law. However, comparative legal research is not free from its pitfalls: a comparative researcher’s freedom of choice since there is no specific subject matter or area of law, and no specific method of comparative research. The researcher has to take decision not only about the aim of comparative research but also about the area of law, the topic of research. Moreover, at the end of the research, comparative lawyer has to take a decision on the result of the research. It may be noted that the success of the comparative research depends on the researcher. If the researcher takes either narrow view, or wide view on the comparative research, or if there is any wrong selection of research area or material, then the aim of the research will not be fulfilled. As a result, Kahn-Freund’s comment of ‘freedom of choice’ is the most dangerous issue of the comparative research.
To overcome the problem of comparative research, scholars had introduced several comparative methods. Zweigert and Kotz gave a theoretical method of comparative law. Nonetheless, it is not clear what the standard of that method is. The standard such as ‘fairness’, ‘justly’ is not clear. Prof De Cruz outlines about the ‘objective’ view of comparison. However, it is not apparent what is meant by objective view, as one cannot ignore his own social and cultural knowledge. Moreover, De Cruz’s ‘blue-print’ of comparative research is too simple and unclear. Reitz also introduced a principle of comparative research, but it is problematic too. Professor Kamba mentioned law as a culture, which is a broad concept of law. He was aware of intra-cultural and cross-cultural comparison. But Kamba also argued that comparative lawyers have to take decision, and it is not possible to prescribe any specific method because the comparative research is not a science. If it is regarded as science, then its application would be restricted.
Therefore, for a successful comparative research, a comparative lawyer should be conscious and careful of the selection of subject matter, topic, aim and purpose of the research. Moreover, during the selection of method of the comparative research, or during taking any decision of the research, the comparative lawyer should try to act impartially; because all the comparative scholars, either directly or indirectly, express the view that it is the comparative researcher’s duty to take the decision on the comparative research.

Finally, in the words of James Grodely, it can be summed up as

I do not think the law of a single country can be an independent object of study. To understand law, even as it is within that country, one must look beyond its boundaries, indeed, beyond one’s own time (Grodely, 1995, 555).
References


