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Comparative Legal Policy and its Significance for Legal Reform

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The authors describe the Comparative Legal Policy as a new discipline devoted to consideration of foreign legal experience from the point of its reception or non-reception. Public opinion about legal innovations is necessary to study and to take into account.

Keywords: comparative legal policy, complex, interdisciplinary comparative analysis, social and legal monitoring, legal reform.

Comparative Legal Policy is a new direction in Legal Sciences which attempts to study foreign law and legal life from the point of view of their possible reception or non-reception in a concrete country at a precise moment¹. Comparative Legal Policy has become important thanks to extreme complexities of the post-modernizing society with its erosion of state sovereignty, appearance of new actors such as transnational monopolies and international non-commercial organizations. More differentiated and flexible civil society is waiting that its opinion is to be taken into account more fully. Much strain upon law life under information revolution stimulates systematization of law².

Comparative Legal Policy is a continuation of Legal Policy which started to be studied by **Saratov branch of the Institute of State and Law of Russian Academy of Sciences**. The

Lectures and monographs has been published³. The concept of Legal Policy up to 2020 has been prepared⁴. Special magazine 'Legal Policy and Legal Life' stimulates further research work. But how to make Legal Policy more effective?

Legal policy is to be based comparative approach. Comparative method was used by many ancient and medieval authors⁵ Comparative law as a discipline has been born in the early 19th century⁶ as a result of achievements of industrial production and communication revolutions (thanks to railways and telegraph), internationalization of politics and war in Europe and then in other countries⁷. For the purpose of economic cooperation it was necessary at that time to study foreign law and compare it to native law. Nowadays under postmodernization and globalization the task is more practical and difficult- to study foreign legal experience from

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the point of view of its adaptation or non-adaptation (or may be its postponement), possibilities of harmonization or unification of law. Decision-making in this sphere is to be very balanced and sophisticated because of high price of risks to social stability and state sovereignty⁸.

The procedure of **Comparative Legal Policy** may include **comparative legal analyses** as a starting point. For example, striving to improve using institute of jurors we are to study foreign experience. "The idea of trial by jury prompts contrasting responses from lawyers, policy-makers, politicians and members of the public. It is regarded by many as powerful democratic element in the process of delivering justice, a means by which ordinary people can pronounce on the merits of the case before them. It is viewed by others, however, as an irrational, costly and cumbersome institution which demands that ordinary people, with all their frailties of inattentiveness, ignorance and prejudice pronounce upon, sometimes extraordinarily complex and consequential matters⁹.

We have multiplicity of jury models in different countries. «When England began its expansion into empire, the jury was imported to the colonies of America, Africa and Asia admiration for the institution of the jury in the 19th century led to its adoption in various forms in France, parts of Germany, Russia, Spain and other European countries and parts of South and Central America...as we begin the 21st century the criminal jury appears alive and mostly well in Australia, Canada, England and Wales, Northern Ireland, the Republic of Ireland, New Zealand, Scotland, the United States and at least 46 other countries and dependancies around the globe»¹⁰.

We confront with different quantity of jury members, different powers, modes of decision, significance in legal and court life, etc. We know that the elements of concrete jury model

depends upon not only **legal culture of legal professionals but former and presents forms of state, division of powers in it, traditions of governance**, etc. Political factors are also important including **political culture of population, political ideology of the elite and political attitudes of the masses**. For example, American highly individualistic legal culture of law superiority in the former pioneering society is based upon American grass-roots democracy and strong presidential republic of federal character. The classical, the most consistent mode of division of powers with checks and balances, is interconnected with mass political participation. And broadly applied American jury system with approximately 100,000 cases decided every year is the manifestation not only of mass political activity and democratic values of population but of peculiarities of American state.

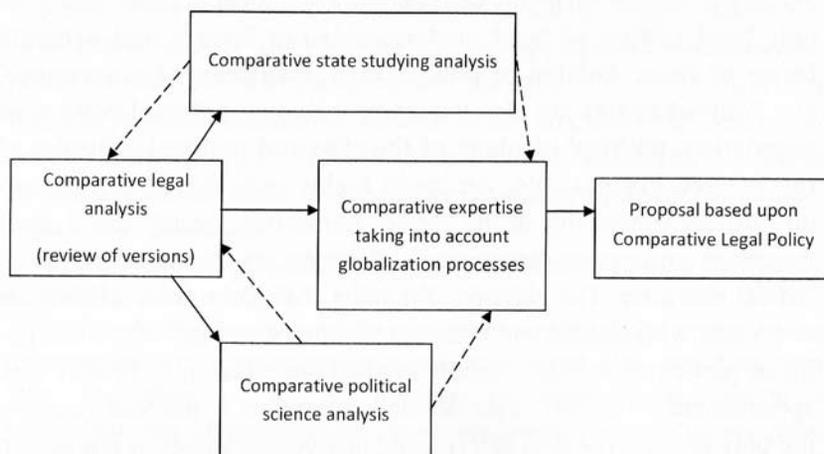
On the contrary, in Great Britain the blossom of jury system is in the past. English legal conservatism and slow evolutionism is provided by constitutional monarchy and the spirit of aristocracy. Jury system was a good thing in medieval ages and under absolutism. It spread king's justice in compact kingdom and withstood to some extent king's despotism. But it was not so urgent to aristocratic and bourgeois elite and cautious, reformist minded masses under industrialization.

Thus the significance of jury system varies not only from one country to another but from one period of time to another.

Complex comparative analysis is implied that it necessary to be interdisciplinary. The starting point – comparative review of versions of foreign legal experience concerning this or that event or institution, must be supported by comparative state studying analysis and comparative political science analysis (see the Scheme №1).

We even suggest that some kind of expertise from the point of view of globalization is desirable

Complex, interdisciplinary comparative analysis



if we sure that studied event or institution has taken root in contemporary society. In our case it seems that this or that jury system in a concrete country does not influence globalization process, but we may suppose that some objects of study in legal policy may be important from the global perspective. In any case the final result of our efforts is a proposal for state organs to reform or not to reform law in accordance with this or that foreign experience.

It's highly important that our research would be based upon public opinion expertise. We are ready to offer for legal professionals and public opinion representatives some versions of legal reform according to the lines of former legal experience in this country and foreign legal experience. Testing versions by professional is to based upon interdisciplinary procedure of comparison which includes Comparative Law, Comparative State Studies and Comparative Political Science and which we name **Comparativistica**. Different specialists may be enlisted who study material from different sides.

Public opinion representatives would participate in testing proposals mainly under focus group studies (with 7-12 members) or

in-depth interviews as the most effective way of collecting data not only about attitudes, but motives also¹¹. As this procedure may be repeatable we call it **social and legal monitoring**. Unfortunately legal science is not usually interested in perception of norms by population¹². 'and where is human being? Where is his or her consciousness, appraisals, behavior?'¹³. According to Chief Justice of Constitutional Court of Russia V.Zorkin it's of high importance to find a middle way between legal positivism and sociological jurisprudence because to be effective normative order is to be supported by masses¹⁴. And masses is to participate in comparative analysis. They may choose the best versions of foreign legal experience and make to it some practical addition.

The final moment of Legal Policy is formulating proposal for government (or parliament). Of course not all proposals may be realized. 'Government will always use research to serve political ends, and it will likewise do its best to ignore those findings which are politically inconvenient. We would prefer to emphasize independence rather than influence. The key for empirical researchers is to maintain their independence of government (and of any other

research customers) in order fully to do justice to the research evidence¹⁵

To do the work best is to disperse it widely among different experts and expert bodies, refusing from any intellectual and organizational monopoly¹⁶. That's why not only academy of Science in Moscow but legal departments of universities outside the capital may be responsible for legal policy research.

For example, **Center for Comparative Legal Policy at Penza State University** is ready to participate in general or branch projects devoted to reformation of law. We

have accumulated experience in such fields as Comparative Constitutional Justice, Comparative Immigration Legal Policy, Comparative Models of Modernization of State and Law. The Center has started Master's Programme in Law '**Legal Policy in Russia and European Union Countries**' in 2010. Different studying books and collection of articles has been published¹⁷. We invite potential foreign and Russian partners to cooperation. We believe that comparative approach makes important addition to the intellectual pluralism applying foreign experience of different legal systems to improve legal life in Russia

¹ See: *Sravnitel'naia Pravovaia Politika* [Comparative Legal Policy]. Edited by Prof. A. Y. Salomatin. Moscow, 2012.

² Malko A. V., Salomatin A. Y. O Nekotorykh Chertakh Modernizatsionnykh Protessov v Sovremennykh Usloviakh [On Some Features of Modernization Processes Under Modern Conditions] *Gosudarstvo i Pravo*, 3, 2004.

³ *Rossiyskaia Pravovaia Politika* [Russian Legal Policy]. Edited by Matuzov N. I. and Malko A. V., Moscow, 2003; *Pravovaia Politika Rossii: Teoriia i Praktika* [Legal Policy of Russia: Theory and Practice]: monograph. Edited by Matuzov N. I. and Malko A. V. Moscow, 2006; *Pravovaia Politika v Rossiyskoy Federatsii: Regional'nyy Uroven* [Legal Policy in the Russian Federation]: monograph. Edited by Malko A. V. Tambov, 2008; Malko A. V. *Teoriia Pravovoy Politiki* [Theory of Legal Policy], Moscow, 2012 etc.

⁴ *Pravovaia Politika: Slovar' i Proekt Kontseptsii* [Legal Policy: Dictionary and Concept Project]. Edited by Malko A.V., Saratov, 2010.

⁵ See: Laftitskiy V. I. *Sravnitel'noe Pravovedenie v Obrazakh Prava* [Comparative Law among Law Branches], volume 1, Moscow, 2010, P. 12-68.

⁶ Kresin A. V. Formirovanie Teoretiko-Metodologicheskikh Osnov Sravnitel'nogo Pravovedeniia v Rabotakh Paulia Ioganna Anzel'ma Fon Feyerbakha [Theoretical and Methodological Formation of Comparative Law Basis in Works by Paul Johann Anselm von Feuerbach] *Komparativistika-2011: Sravnitel'noe Pravovedenie, Sravnitel'noe Gosudarstvovedenie, Sravnitel'naia Politologiya. Mezhdunarodnyy Uchebno-Metodicheskiy i Nauchnyy Ezhegodnik*. Penza, Penza State University Press, 2012.

⁷ Malko A. V., Salomatin A. Y. *Sravnitel'noe Pravovedenie* [Comparative Law], teaching materials. Moscow, 2008. P. 79

⁸ See: Salomatin A. Y. *Sravnitel'naia Pravovaia Politika Kak Instrument Reformirovaniia Pravovoy Sistemy* [Comparative Legal Policy as a Tool of Reforming the Legal System]. Open lecture. Kiev-Lviv, 2012.

⁹ *World Jury Systems*/Ed. by N. Vidmar. Oxford, 2003, P. V.

¹⁰ *Ibid.*, P. 2, 3.

¹¹ See: Malko A. V., Salomatin A. Y. Sotsial'no-Pravovoy Monitoring Kak Instrument Prodvizheniia Rossiyskoy Pravovoy Reformy [Social and Legal Monitoring as a Tool of Promoting Russian Legal Reform] "*Chyornye Dyry*" v *Rossiyskom Zakonodatel'stve* (6), 2007, P. 464.

¹² Grevtsov Y. I. *Sotsiologiya Prava* [Sociology of Law], Saint Petersburg, 2001, P. 33-34.

¹³ Tikhomirov Y. A. Povedenie v Obshchestve i Pravo [Social Behaviour and Law] *Zhurnal Rossiyskogo Prava* (2), 2001, P. 5.

¹⁴ Zor'kin V. Pravoprimenenie Kak Strategicheskaya Problema [Law Enforcement as a Strategic Problem] *Pravo i Pravoprimenenie Rossii: Mezhdistsiplinarnye Issledovaniia*. Edited by Volkov V. V. Moscow, 2011. P. 23, 24.

¹⁵ Baldwin J., Davis Y. *Empirical Research in Law*//The Oxford Handbook of Legal Studies/Ed. by P. Cane M. Fushnet. N. Y., 2003, P. 897.

¹⁶ Grishkovets A. A. K Voprosu o Reforme Gosudarstvennoy Sluzhby (Organizatsionno-Pravovye Aspekty) [On the Civil Service Reform (Organizational and Legal Aspects)] *Gosudarstvo i Pravo* (2), 2012, P. 31.

¹⁷ For example: Malko A. V., Salomatin A. Y. *Osnovy Pravovoy Politiki* [Legal Policy Basics], Moscow, 2013

Komparativistika-2012: Sravnitel'noe Pravovedenie, Sravnitel'noe Gosudarstvovedenie, Sravnitel'naia Politologiya [Comparative Studies-2012: Comparative Law, Comparative Constitutional Law, Comparative Political Science]. Edited by Prof. Salomatin A. Y. Moscow, 2013.

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Сравнительная правовая политика и ее значение для правовой реформы

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Авторы описывают сравнительную правовую политику как новую дисциплину, посвященную рассмотрению зарубежного правового опыта с точки зрения его рецепции или отказа от таковой. Подчеркнуто, что необходимо изучать и принимать во внимание общественное мнение по поводу правовых новаций.

Ключевые слова: сравнительная правовая политика, сложный междисциплинарный сравнительный анализ, сравнительно-правовой мониторинг, правовая реформа.
