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Comparative Procedural Law in the Contemporary World[1]

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This article points to the internalisation of the diverse fields of knowledge, as a growing phenomenon interconnected with many sectors. Therefore, the article analyses the functions and aims of the law, in the national, foreign and comparative context, with brief considerations about the difficulties, particularities, and challenges.

Keywords: *Comparative Procedural Law; Comparative studies; International Procedural Law; Unification and standardisation of law.*

Introduction: The Internationalisation of the Branches of Knowledge

The contemporary world experiments increasingly frequent changes in the most different areas, especially technology innovations and social changes. It can be said that, with the population increase, the scientific progress, and the communication and transportation improvements, the information and experience exchanges were geometrically boosted. The internationalisation, or globalisation, has become increasingly remarkable, without prejudice to concern for local reality and cultures. The dichotomy between the preservation of regional values and expressions and contact with other cultures considered dominant continues to provoke debates in various spheres. In the political and economic perspective, conflicts between nationalists and internationalists have been giving the emphasis in several countries.

However, from a scientific point of view, the search for the improvement of knowledge usually crosses borders, even if they serve for possible difficulties or competitiveness. The purely local or national parameter for studies has been giving rise to broader research and studies involving some or several countries. It is difficult to conceive that a scientific branch is limited to the national level. On the contrary, we seek the affirmation of discoveries, the elucidation of issues, the

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formulation of theses that find support, usefulness, and viability of a universal character, without prejudice to solutions and peculiar innovations.

In law, this situation could not be, and it is not, different. On the contrary, legal norms try to follow this movement and flow of people and goods circulating across borders. The study of other national laws becomes a necessity for trade, tourism, immigration or for projects involving people or companies in more than one country.

In this context, this article intends to analyse the Comparative Procedural Law as a methodological tool for the studies of procedural law institutes. To this end, the approach begins with the demonstration of the relevance of comparative law and its possibility of application to Procedural Law. After the main functions and objectives of Comparative Procedural Law are analysed, emphasizing micro and macro comparison approaches, the study compared as a legislative reform tool and mechanism for unification and standardisation of law. Finally, some difficulties and challenges related to Comparative Procedural Law are examined.

The Relevance of Comparative Law and its Application in Procedural Law

The reality of the 21st century has been pointing to the combination of elements that converge for the progressive transformation of the classical structures of the institutions of justice. This is because the phenomenon of globalisation, associated with the emergence of new technologies, directly influences the way individuals relate to state power structures and ultimately impacts the forms of social conflict resolution.

Already in the 1990s, Cândido Rangel Dinamarco identified four factors relevant to legal transformations: (i) the need for collectivisation of judicial protection in a mass society; (ii) the legitimacy crisis by which the judiciary passes and consequent proposals for its external control; (iii) the assimilation of new institutes by the law of the process itself (especially the techniques of collective redress, the enforcement proceedings and the urgent measures in the cognitive process); and (iv) the growing rapprochement between sovereign cultures and nations (the Mercosur phenomenon). According to him "such pressure factors make legal comparisons that have always been useful to the institutional improvement of a country's law and now prove to be a real need."[2]

These circumstances form a fertile field for the development and improvement of comparative law, which allows not only the best knowledge of foreign law but also the internationalisation of legal institutes. Observing what has been done beyond its own borders, the analysis from Comparative Law offers a number of models on how to solve a problem that has developed within national limits.

It should be noted that the theme of Comparative Law was treated by the author of this article in the Aula Magna of the Faculty of Law of the State University of Rio de Janeiro (UERJ), given on August 19, 2019. As stated in the following excerpt:

[2]Dinamarco (1998).

> Moving towards the end, we must record the aspect of universalisation. Today there is no purely national law. At law school, in all branches of law, and even outside it, knowledge is exchanged between professionals and academies around the world and, therefore, it is very important to study comparative law. In a way, in some countries, there is a trend of uniformity and harmonisation between applicable standards. See the European Union and, in a way, to a lesser extent, Mercosur. There are also international court and arbitration courts. Moreover, the so-called international precedents, because there are universal issues, such as gender and discrimination, that exist today around the world and that often the judicial decision of one country will serve as a reference for another. The academy can improve when studying neighbouring countries or other countries, to compare, exchange experiences and evolve in its own law.3

In fact, if a single judge can be creative in the construction of legal solutions, teachers, lawyers, judges and professionals of the world law acting together are significantly more inventive in formulating solutions to the same problem[4]. In this scenario, the jurisprudence cannot be understood only as the science of the interpretation of national norms, on the contrary, should cover the search for models of prevention and resolution of social conflicts in the context of a globalised society. Thus, Comparative Law becomes a true "power plant of ideas", rich in a range of possible solutions, to the extent that it enhances greater chances of building better instruments for a specific country, being certain that there is no more reason for restrict research at the national level.

It is a notorious fact that legal systems have increasingly merged legal institutes from various backgrounds and countries. This occurs, for example, in most national legal codes and statutes, which end up being a combination of influences and institutes from different legal systems, even when the legislator does not expressly declare the foreign sources of the respective institutes[5].

Within comparative law, it is necessary to pay attention to the possibility – and, more than that, to the need – of its application under procedural law. As it will try to demonstrate throughout this text, comparative procedural law has peculiarities in relation to comparative law. Firstly, because procedural rules generally follow national or local rules (*lex fori*)[6], while in the branches of substantive law, it is admitted, within the rules of law or regulating the applicable law, the use of rules of the foreign law, as can be seen in the Law of Introduction to the Norms of Brazilian Law. However, despite some peculiarities and difficulties, there is no reason to step aside or diminish the importance of Comparative Law in the sphere of Procedural Law, considering that also here the exchange of ideas and experiences has become increasingly more frequent and important in the sphere of instruments relevant to solutions of conflicts.

At the turn of this century, José Carlos Barbosa Moreira gave a lecture entitled "*The Brazilian civil process between two worlds*", an opportunity in which he addressed the influences exerted by the legal system of *common law* on civil

[3]Mendes (2019) at 30.
[4]Gottwald (2005).
[5]*Idem*.
[6]Mendes (2009).

procedural law Brazilian. The exhibition – whose content was published by the Journal of the School of the Judiciary of the State of Rio de Janeiro[7] and later selected to integrate the Eighth Series of "*Temas de Direito Processual*"[8] - addresses the dissimilarities between the Brazilian civil procedure and the American, but it does not fail to observe that "the weight of the Anglo-Saxon universe has increased in Brazilian law"[9]. It could be complementary that *common law* has also been changing by influence and in the direction of characteristics traditionally linked to the countries of civil law. In this sense, it is worth mentioning the edition of legal statutes, increasingly present in common law countries, such as the *Civil Procedure Rules of English law*, and even today's practice of replacing oral statements and procedural acts by written statements. This is an illustrative effort of the reflections provided by the Comparative Procedural Law.

In fact, the intense exchange of information that the doctrine of civil procedural law has been providing to scholars today is a factor of much appreciation of legal comparisons in this area[10].

These factors indicate that the importance of comparative analysis does not go unnoticed by procedural law, whose main tendency is characterised by the enormous interest of its scholars in knowing what is happening in other countries and other regions of the emerging needs of intensified international relations and the increasing appreciation of the principles of Procedural Law.

Comparative Law has a huge significance in terms of oxygenation of ideas and can be mentioned even that it represents an exciting intellectual activity, capable of transporting its precursors and directors to distant realities and initially unimaginable. It can thus mean a theoretical and practical investigation capable of moving amorphous realities and awakening great dreams and fantasies, in the best sense, as drivers of great transformations. However, in order for comparative law to be carried out at satisfaction, it is mandatory, with its discipline, because good comparison demands appropriate methodologies, uniform questions, the study of norms, structures, culture, practical results and not just loose and disconnected elements.

Functions and Objectives

It is possible to identify some specific functions and objectives performed in the Comparative Procedural Law.

[7]Barbosa Moreira (2001).
[8]Barbosa Moreira (2004).
[9]Barbosa Moreira (2004) at 54.
[10]In the words of José Carlos Barbosa Moreira: "No one is lawful to doubt, in the days that run, the importance of comparative studies, indispensable, among other purposes, so that legal systems can benefit reciprocally from experiences carried out outside national borders" (Barbosa Moreira (2004) at 7).

Deepening Knowledge of Own National Law

In order to better understand its own national law, comparison with other systems is essential.

First, when research and comparison are developed in the sphere of procedural systems, it is frequent that common and specific precepts have been found in their national systems. As a consequence, it can be identified whether the norms considered as principles or structuring in certain countries have a universal character, whether or not the certainty about the general or peculiar character of their precepts is strengthened. The question has, of course, great theoretical importance, especially for the classification, conceptualisation, and determination of the content of principles and rules, with practical developments. The General Theory of the Process, in particular, and the various branches of Procedural Law need to deepen this debate so that the study of procedural principles can be strengthened in its pillars.

The differences are reasonable between national structures. For example, the principle of due process of law has had a broad meaning in common law countries, while the values added in this principle end up fractionating in other principles, or subprinciples, such as that of the natural judge or impartiality, in countries of civil law. In Germany, the notion of reasonable duration of the case is also found in the principle of access to justice, which has been extended under a specific constitutional guarantee in Brazilian procedural law, in accordance with art. 5th, item LXXVIII, of the Constitution of the Republic.

On the other hand, institutes with completely different characteristics and functioning can be found, indicating, clearly, what is peculiar. As a result, it is possible to identify the common and peculiar aspects between the systems, which is elementary for the knowledge of the national legal system itself, based on rational bases.

The comparative studies help to expand the knowledge of national legal institutes, as they allow the analysis of their historical equivalents in foreign law. Thus, it is possible to deepen the understanding of the national law itself in order to reflect, defend or improve the national position or the reasons for that position. This is what Michele Taruffo says: "the best way to know the planning itself is to know other systems"[11].

Contribution to the Interpretation of the Law

As mentioned earlier, national legal systems have common and peculiar characteristics with other systems. Sometimes the separation itself from what is identical, similar or diverse, is not so simple, considering that miscegenation and combination of cultures and legal institutes end up providing a great profusion of combinations. However, when there is the incorporation of new alien institutes into national law, the modifications tend to raise doubts of interpretation about previously unknown practices of local law. Therefore, comparative law can be very important for the location of the origin of innovation as well as the

[11]Taruffo (2013) at 12.

knowledge and study of the institute in the country, or countries, in which there was already the legal provision or use of the respective legal entity.

Comparative Law can thus represent an economic measure, as it will allow the use of the accumulation of knowledge already exhausted in the countries that originated from the new incorporated institute. In this respect, national characteristics and peculiarities should not be disregarded. However, in what is common or applicable, foreign experience, from the rules, doctrinal writings and interpretation of the courts, it may be useful the expertise of other countries to dispel doubts arising from the lack of practice related to the innovation introduced.

Thus, national courts may use foreign precedents, alien doctrine or even existing rules in other countries in the interpretative activity of legal institutes that have been extracted from those external systems.

Comparative Studies as a Basis for the Improvement of National Law

Comparative Law is of great importance so that it can evaluate and improve national law. The lack of efficiency or the need for better results can lead to the search for new solutions and legal instruments, which can be analysed from the experience of other countries. The comparative studies are a valuable and increasingly frequent practice for the improvement of national law. The method comprises not only the formal law, that is, provided for in the codes, statutes, and rules in general, but also their practical use, with the collection of data, reports, and elements that enable an assessment of problems and results, in order to recommend or not the foreign experience.

The incorporation of institutes in other countries may represent a more radical attempt at a rupture with worn practices or even intermediate solutions. They may or may not lead to solutions to problems, but in any case, represent a window or the opening of new perspectives, which could only be viewed from comparative law. The introduction should not be mechanical, but rather accompanied by reflections on compatibility and need for adjustments, in order to allow a more useful and efficient use for the foreign institute introduced into national law.

Often, the reason for comparative research is not merely academic. Legislators realise that their country's legal rules, in certain fields, are insufficient and research solutions from other legal systems adaptable to their social, cultural and legal reality around the world. In this sense, the comparative study can serve as material for the legislator to develop proposals for reform and improvement of the legal system itself.

In fact, many coding and contemporary statutes are a combination of different legal systems, even if the legislator has not revealed how and where he found his ideas. The Brazilian Code of Civil Procedure of 1973, for example, received Italian, Portuguese and German contributions[12]. Similarly, the Brazilian Civil Code of 1916 was intensely influenced by the Napoleonic Code (Code Civil des Français) of 1804[13].

[12]Barbosa Moreira (2001) at 13.
[13]Souza (2004).

In addition to a source of inspiration for legal statutes development, Comparative Law also motivates the construction of new legal institutes. In Brazil, an example of this is the introduction of art. 103-A in the Constitution of the Federative Republic of Brazil, which created the summary statements with binding effect, thus evidencing the source of inspiration in the mechanism of American binding precedents, but with some changes. Most recent example of this phenomenon is the repetitive demands resolution incident (IRDR), an institute created by the Code of Civil Procedure 2015 and which has as sources of inspiration several experiences of foreign law: the American and Britain test claims; the two Musterverfahren systems in Germany; the Group Litigation Order (GLO) of England and Wales; and even in international courts, such as the Pilot-judgment procedure of the European Court of Human Rights[14], not to mention also the European and Brazilian incidental system of constitutionality control, as well as repetitive appeals introduced in 2006 and 2008 in the former Brazilian Civil Procedural Code.

Comparative Law and the Unification, Standardisation or Harmonisation of Rules

The phenomenon of internationalisation and globalisation has been demanding an increase in legal certainty for the countries, people and companies involved. The frequent problem stems from the diverse regulations found in each country, either in the context of material or procedural law. Several solutions have been used for the elimination or mitigation of difficulties arising from varied regulations, including the unification or harmonisation of rules. Unification as well as harmonisation may come from the establishment of commonwealths, such as the European Union or Mercosur, but also multilateral or bilateral treaties between countries. Examples are rich, especially in the European Union, where unification or harmonisation reaches rules, in the material, and procedural law, in terms of consumer, environment, etc.

The comparative study serves as a means of transnational unification or harmonisation of law. In this respect, Peter Gottwald[15] identifies three forms of action of Comparative Procedural Law: (i) driving force for integration; (ii) instrument for drafting international conventions and regulations; and (iii) model code-making instrument.

Treating Comparative Procedural Law as a driving force for integration, Peter Gottwald says that European experience demonstrates that the first steps towards procedural unification have consequently led to the need for unification or harmonisation of the substantive law[16]. Thus, in Germany, the Code of Civil Procedure was enacted in 1877, approximately 25 years earlier than the Civil Code. Similarly, the 1968 Brussels Convention far preceded any harmonisation of civil law.

In addition, Comparative Procedural Law also plays an important role in the process of drawing up international regulations. This is the case with European

[14]Mendes (2017) at 27.
[15]Gottwald (2005).
[16]Gottwald (2005).

Regulations on civil procedure, which are generally based on comparative studies on the legal situation in their respective countries with the aim of crystallizing the need for new regulations or the necessary points of harmonisation or unification. In this context, in its 2017 recommendation, the European Parliament urged the European Commission to "present a legislative proposal establishing a harmonised system of collective protection of EU consumers on the basis of best practices adopted both within the EU"[17], which culminated in the presentation of the Proposal for a Directive of the European Parliament and the Council on collective actions to protect the collective interests of consumers.

Another technique, which can contribute to the standardisation or harmonisation between procedural rules in several countries, is the development of Model or Type Codes. As an example of this phenomenon, it is possible to mention the Model Code of Ibero-American Civil Procedure, approved in the Congress of the Ibero-American Institute of Procedural Law, held in 1988, in Rio de Janeiro, Brazil, and the Model Code of Collective Processes of the Ibero-America, approved in the Congress of the Ibero-American Institute of Procedural Law, held in 2004 in Caracas, Venezuela18.

Macrocomparison and Microcomparison

The comparing approach varies according to the amplitude of its object and can be performed at a macro or micro perspective.

Traditionally, there are two legal families: a family considered common law, which is based on the custom, and a family of Civil Law, in which there is the primacy of the statutory law. Despite the tendency to approach the two legal families[19], a fact is that the characteristics of a legal system belonging to one of these families tend to be historically and traditionally distinct from those of the systems of another legal tradition. Comparing, therefore, the system of precedents of English law and Brazilian law is a task that requires the scholar more than a mere juxtaposition of rules, being certain that the analysis presupposes a profound study of the legal culture of each country. This is exactly the concern of macrocomparison, which the object has is the study of the differences between the various legal systems, according to their more general classifications. It is, therefore, a broad comparing analysis of procedural systems or procedural codes.

Microcomparison, on the other hand, studies better-defined aspects, such as a specific problem, a legal institute or any other element or aspect that can be analysed in isolation. Thus, while the Brazilian and American procedural systems could be the subject of macrocomparison, because it involves not only an institute but a complex of procedural standards, the study of the class actions in both countries could be the subject of a micro comparison, given that its historical roots find corresponding institutes in foreign law.

[17]Excerpt from the Explanatory Memorandum of the Proposal for a Directive.
[18]Mendes (2010).
[19]This separation, which might have been clearer in the past, is no longer as remarkable now.

Both macro and micro comparisons have their value, although the second is more viable to perform in a relatively short period of time because the first requires a broad and deep knowledge about the systems compared.

Foreign Law and Comparative Law: Difficulties and Challenges

When mentioning the branch of comparative law, not only is it intended for a mere incursion of foreign law from another country, but rather the comparison between two or more legal systems or institutes. Therefore, there is no need to confuse, first, a study of foreign law with the comparative law.

Facing the myth that *"the neighbour's chicken is always fatter than mine"*, Barbosa Moreira drew attention to the risks associated with the overvaluation of foreign models, specifically warning about the "naïve dazzle that impels the uncritical imitation of foreign models."[20] Taking this alert into account, it is necessary to examine some problems related to comparative studies.

General Problems of Comparative Law

It must be careful with the survey and study not only formal of the law, but also from the perspective of reality, using the adequate methodology and original sources.

In Comparative Law, it must be understood that one should not only compare texts of statutes but also praxis, and legal cultures. The problem concerns the need to perform also functional analysis. This means that the study should not be restricted to the dogmatic or literal study of rules. It consists of the comparison of living law. To understand the rules and assess their relevance or suitability to solve specific problems, sometimes sociological studies and practical information are necessary.

As mentioned, one should seek the original sources, direct, and not those of second or third hand, except when these are, in fact, connoisseurs of foreign law. This is because translations and comments can always add some of the subjective understanding, constituted from their own reality. Of course, in some situations, the full and deep concomitant knowledge of two or more legal systems can even facilitate exposure, highlighting the similarities and distinctions, in a didactic and enlightening way. However, if accomplished by those who do not know, broadly and deeply, the alien legal system, there will be no lack of mischaracterizing simplifications of the context and meaning of foreign institutions.

The linguistic aspect should not be disregarded. In legal studies, it is not mandatory, although it is recommended, historical or comparative analysis. Better, perhaps, not to perform it, if the researcher lacks past or linguistic knowledge. And all the care of the language should be used. It means to say that both the translator and the comparatist need to stay attentive and avoid errors arising from the so-

[20]Barbosa Moreira (2004) at 7.

called false cognates – words from two languages formally equal to each other or very similar, but with different meanings in one and the other.

The fourth general problem of comparative law is the research and preparation of the necessary information. The comparative right consists of a comparison between at least two legal orders according to a specific model. This comparison requires correct preparation and searching of information in the material to be compared, based on uniform, coherent and logically chained questions. Therefore, standardised questions should be formulated for all countries surveyed. One cannot question, for example, one aspect of one country and another of the others. That way, you won't be comparing the same aspects and therefore you probably won't get a profitable result.

Specific Problems of Comparative Procedural Law

In addition to the general problems of Comparative Law, there are also specific problems of Comparative Procedural Law.

The *first problem* concerns the principle of *lex fori*. To solve a transnational case of substantive law, connection rules must be applied, when the rules of the international law point to foreign material law. In civil proceedings, national procedural rules are generally applicable. As a consequence, there is generally no need to consider and examine foreign procedural statutes in a forensic day-to-day basis. Therefore, law professionals do not work directly with foreign procedural rules in common practice, except in matters of jurisdiction, recognition, and enforcement of foreign judgments. Therefore, comparative procedural law would become, in a thesis, predominant object only of the academy. However, this reality, or apparent cause of disinterest in relation to Comparative Procedural Law, has been giving in to the phenomenon of globalisation, with the internationalisation of companies and joint ventures, with the hiring of offices or consultancies which end up carrying out not only an analysis of material law, but also of the Procedural Law of the related countries, with the aim of studying and verifying which would be the best country to host any controversies, from the point of view of the functioning of the judiciary and the procedural system. Therefore, the economic world and legal services end up conducting, increasingly, procedural comparative studies. This phenomenon has been further increased with the so-called jurimetrics, that is, through data analysis, usually with the help of powerful technological means, to predict favourable results in each court, being also subject to study to a comparison between countries.

In the financial area, another relatively recent innovation, at least in Brazil, are third party funds, that is, funds that invest in judicial causes. Like other investment funds, there are those who have a global character, that is, the channel resources into the acquisition of rights that are being the subject of disputes in cases filed in different countries. Thus, comparative procedural studies are carried out in parallel to economic surveys, thus forming the collection of elements constituting risks and options for the purchase and sale of "procedural" cases assets.

Finally, still related to contemporary legal practices, there is an increase in services focused on consensual solutions or the constitution of international arbitral tribunals, which take into account comparative procedural studies, side of the substantive rights.

The second problem related to the Comparative Procedural Law is that of the lack of uniformity in the jurisprudence of the courts, sometimes organised in specific branches or according to local standards. As already mentioned, comparative studies should not be subject only to the text of the legal standard and should investigate how that standard has been applied by the courts. Although necessary, the task becomes more challenging when practice in the courts is usually guided by regimental or local standards. Thus, the analysis of the comparatist becomes more difficult and complex, being more costly and should be even more accurate, to achieve conclusions from a very diverse reality. There are not a few countries that have these characteristics. For example, the United States has, alongside its Federal Courts, 50 States with their own structures and rules. In Germany, the Common Justice is composed of state judicial bodies, with only specialised bodies or higher courts in the federal sphere.

Finally, there is the "*political*" problem of the integration of the judiciary as part of the State and the diversity of conceptions about fundamental rights, justice itself and what constitutes due process. Therefore, the content of the minimum and fundamental guarantees relevant to the jurisdiction is also not a unanimous response.

Final Considerations

Comparative studies, besides being useful to the institutional improvement of a country's, regional or international law, reveal themselves, in the context of globalised contemporary society, a real need. The dissolution of national borders, promoted by technological advancement, has achieved the legal scope, causing the old national doctrinal debates to turn into cross-border dialogues. In this scenario, the use of comparing analysis under Procedural Law is a task that cannot be ignored by scholars and law enforcement operators.

To the guise of completion, Peter Gottwald's lesson is transcribed:

> *Comparative jurisprudence and civil procedure, in particular, is working like a wonderful mirror: It opens your mind. The comparison increases your knowledge and wisdom. And if you are lucky, it may help not just to improve your own national law but to find solutions for practical legal problems of transnational relations in our world of globalisation*.[21]

[21]Gottwald (2005) at 35.

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