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Comparative Law: An Effort of a Historiographical Rescue and Methodological Issues

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Abstract

Comparative law involves the study of legal systems in different countries and the comparison of their similarities and differences. The field raises the open-ended question of whether it is a discipline or a method. This essay posits that this quarrel is irrelevant. Through historiographic rescue and bibliographic research, the essay summarizes several theoretical and referential contributions of comparative law. This includes founding fathers from Greek and Roman tradition, authors of the twentieth century, as well as its most recurring discussions in light of globalization. As a result of the research, it is emphasized that comparative law faces practical and operational problems that deserve attention. The relevance of problems of translations of legal concepts, the scope of legal families, model transposition, and sources of law make the "method or discipline" debate useless.

Keywords

Comparative Law, Founding Fathers, Epistemological Dilemmas, Methodological Problems, Directions

1. Introduction

As a field of research, comparative law involves the study of legal systems in different countries and the comparison of their similarities and differences. Drawing from a variety of law-related disciplines, which may encompass history, sociology, anthropology, political science, and economics, its approach can help identify patterns, common issues, and differences between legal systems.

Nonetheless, comparative law raises several questions. Why compare? What are the practical uses of the comparison? Could there be a "legal Esperanto"?

Could we imagine a geography of law? Could we conceive of a legal cartography? Can comparative law be thought of as a science of law? What are the differences between the study of foreign law and the study of comparative law? What skills should a comparatist have? Specifically, an epistemological question about the precise definition of comparative law is open to discussion, in the sense of whether it is a discipline or a method.

In this article, these issues are explored using a method that consists of a historiographic rescue as the approach, and a bibliographic survey as the procedure. A synthesis of comparatist efforts is formulated, based on the identification of the founding fathers of comparative law, such as Aristotle, Montesquieu, Max Weber, Edouard Lambert, and Sumner Maine. The article also presents a collection of more recent authors, such as René David, Leontin-Jean Constantinesco, Paolo Biscaretti de Ruffia, Eric Agostini, Konrad Zweigert, and Hein Kötz, Roscoe Pound, Arthur von Mehren, among others. In the present work, we will not target Brazilian authors who dedicated themselves to the subject, such as Clóvis Beviláqua. The goal is a survey of authors from the comparatist tradition in the context of foreign authors. Throughout the presentation of these authors, several points will be evaluated.

The theme of the "circulation or transposition of legal concepts or rights" is the conceptual backdrop of the research, which predicates its results on the mismatches of various legal transpositions. The transposed law is substantially modified. There is much similarity between the methods of investigation of comparative law and the history of law. As will be seen, comparative law and the history of law are close in that they are legitimized by the scrutiny of primary sources. They detach, however, to the extent that comparative law compares legal models in geographical space, while legal historiography deals with comparison in historical time. It is undeniable that Romanists reveal themselves simultaneously as comparatists.

From a methodological point of view, comparative law focuses on the theory of sources, identifying large systems or families, along with the central problem of translatability, which stems from the lack of a legal Esperanto, since there is no universal legal language. Dictionaries of equivalence do not clarify concepts, which normatively originate from institutional idiosyncrasies. A specific legal model can also be identified by its pedagogical forms.

These are the topics initially explored by the incursion into the literature of the founding fathers of comparative law and, later, of twentieth-century authors.

2. The Founding Fathers of Comparative Law

Plato (fifth century BC) studied different legal models when composing some of his *Dialogues*, such as *The Laws* (Plato, 1975) and The Republic (Platão, 1996). The Platonic texts suggest that the Athenian philosopher knew Spartan law. Plato reveals unrestrained admiration for the totalitarianism of the Spartan system. It is in this sense that Karl Popper regarded Plato (alongside Hegel and Marx) as the enemy of an open and democratic society (Popper, 1998).

Plato considered the efficiency of dictatorships in their political and historical context. A government of the strongest would justify the conception that power should be centralized in the wisest, in the *philosopher king.* These impressions, which came from comparisons that that historical period allowed, and the antinomy between Athens and Sparta, between trade and agriculture, between democratic and totalitarian society, between life on the coast and countryside, seem to be very illustrative. It is a somewhat founding line of comparative law.

Aristotle (fourth century BC) would have raised a repertoire of legal texts that revealed the various arrangements of the Greek cities of his time. To the extent that this repertoire fixed the organization of the various city-states of the Hellenic environment, one can infer an effort to map and compare the various models. The *Aristotelian corpus*, however, records only the study made of the constitution of Athens. The other texts would have been lost. The repertoire that Aristotle would have raised would give an account of various regimes and would synthesize information that would be discussed in the Athenian Lyceum. Aristotle reportedly studied 153 constitutions that would have governed the Greek cities (David, 2002: p. 1).

The *Constitution of Athens* is a text that deals with various organizational aspects of the city-state, including references to substantial legal issues, in the set of problems of the time (Aristotle, 1995). Aristotle discussed diverse topics, including the eponymous archons, the months of the Athenian calendar, measures of capacity, weights, and coins (Aristotle, 1985).

Especially about the legacy of Athens, the author established standards of reference, vastly explored by secondary literature (MacDowell, 1995), especially concerning issues peculiar to the tradition of Western law, such as slavery (Garnsey, 1996). Although dealing with the city in which he lived, Aristotle recorded some estrangement and enchantment towards the institutes he described. In this attitude of estrangement and enchantment, one can observe the intellectual substratum of attempts at comparison.

In such a way, to compare is to be strange and be delighted. Herodotus (fifth century BC), the Greek narrator whom our culture identifies as the *father of history*, narrated with enchantment the experiences he saw in his travels (Herodotus, 1998). Although often exaggerated and histrionic, Herodotus revealed concerns that plague those who are willing to compare cultures and ways of life.

Travelers who recounted their wanderings continued this tradition, which can be synthesized in Marco Polo's (sometimes fanciful) narratives (Polo, 1997). Distant cities, unknown customs, incomprehensible languages, and legal systems unusual for a medieval European (Polo would have been born in 1254 and died in 1324) make up his memoirs, once accepted the authenticity of the author and his reports.

Even earlier, the Romans would have studied Greek law when conceiving the legislation of the Twelve Tables. Although endowed with a pragmatic sense, in opposition to the more metaphysical perception of Hellenic case law, the Romans seized on Greek solutions, which would have influenced the composition

of the text of the Twelve Tables (Stephenson, 1912: p. 121; Bretone, 1995). The old saying used to be that *Graecia capta ferum victorem cepit*, that is, that *the conquered Greece conquered the savage victor.* One has an identification of the influence that Hellenic law exerted on the Roman juridical conception. Reportedly, around the year 452 B.C. Roman jurists were in Athens to study Greek law. The law of the Twelve Tables had resulted from the expedition which, perceived with the eyes of today, suggests to us a practical use of comparative law (Bretone, 1995).

A science of law was announced with the reception of Roman law by medieval universities, which considered Roman law erudite (Schioppa, 2014). The medieval university was a place of constant study of comparative legislation, from the Romanistic tradition that persisted as indicative of erudite and elegant law. That is, in the sense that knowledge of Roman law already consisted in some way of a comparative study. Curricula and methods of study in Bologna brought scholastic thought closer to the tradition of Roman law (Berman, 1983). Intuitively, methods and models of comparison were developed, although no specific discipline, method, or field of investigation of what is now understood as comparative law was identified.

The glossers of the Bologna school, such as Irnerium, Acursio, and later Bartolus de Saxoferrato were comparatists, for they explored ancient law as a paradigm for contemporary law, a method taken up by the nineteenth-century German pandects (Barreto, 2012; Ihering, 1943).

In *the Persian Letters*, he imagined an epistolary exchange between a Persian traveler in France and his correspondent who had stayed in Persia. The traveler's information suggests comparisons between politics, justice, and equity, between places as different and distant as Turkey, Persia, Holland, Italy, England, and France (Montesquieu, 1960).

Montesquieu's reception of contemporary doctrine focuses mainly on the theme of the tripartition of powers, which methodologically results from an effort of comparative law. As an institution of English public law, the tripartition excited the French thinker. Quoted twelve times in the *Federalist Articles* (Hamilton et al., 2003)[1], Montesquieu exerted, in this sense, a strong influence on the construction of the American legal system. This influence may also be related to the openness that the "founding fathers of the United States" could have to exogenous systems. They read European political philosophy and regarded Roman law as an important part of the Empire's success (Clark, 2006: p. 180). The episode exemplifies the transposition of legal ideas. It is a subject of comparative law, in its applied perspective.

The structure of the tripartition of powers in Montesquieu was fixed in the excerpt relating to the constitution of England, in chapter VI, of the eleventh book of the first part of the *Spirit of the Laws* (Montesquieu, 2005). A *legislative power* would be responsible for making the laws. Executive power would handle

[1]Montesquieu's name is mentioned by the Federalists in Articles 9 (4 times), 43 (2 times), 47 (5 times) and 78.

the rights of the people, that is, the conduct of the problems of war and peace, which was understood as an *executive of the State.* Another executive power would *punish criminals by judging them*; *it is these powers to adjudicate that would bring this second executive power closer to what we contemporaneously call the* judiciary.

Montesquieu perhaps had in mind only the defense of individual liberties; when legislative and executive were confused in one person there would be no room for freedom: tyrannical laws would be carried out tyrannically. If the prerogative for judgment were not distinct from the others, the judge would become a legislator, exercising authoritarian power over the citizens. For Montesquieu, the alliance between the judge and the *executive* would qualify oppression. That is, all would be lost if the same person monopolized the three powers. For Montesquieu, a despotic prince would aim at the concentration of the three powers, an instrument for the despotic use of his prerogatives.

Montesquieu revealed himself as a comparatist dealing with various subjects such as Japanese, Chinese, and Roman laws, the customs of the Samnites, the freedom of the Arabs, serfdom among the Tatars, the various forms of marriages, families, and filiation. He even dealt with the inquisitors in Portugal. Montesquieu was an extreme determinist, highlighting a theory that linked the nature of a legal system to climate nature. It's its climate theory (Montesquieu, 2005). He also explored the relationship between law and religion; and enunciated Bayle's paradox, holding that it was better to be an atheist than a worshipper, that is, that it would be worse not to follow any religion than to follow a bad religion (Montesquieu, 2005: p. 466). In discussing the most proper ways of legislating, Montesquieu was also a founder of legistics, a science that has as its object the quality of laws (Montesquieu, 2005: p. 601).

In the *Spirit of the Laws* Montesquieu devoted the thirteenth book to compare tax models. This excerpt is called *Of the Relations Which the Levying of Taxes and the Greatness of the Public Revenues Bear to Liberty.* Montesquieu compared models of taxation to question fiscal impositions and the exercise of freedoms. He investigated several tax models, showing some mistakes that were practiced on French territory. Observing the various tax models that were then known, he drew a synthetic picture of taxation in his time, apparently seeking what would be best for France.

Montesquieu questioned the best formulas of taxation, advancing in a contemporary discussion, concerning the taxation of wages or consumption. Montesquieu's observations showed the need to implement simplified collection models. Montesquieu was interested in all the tax systems he had heard of and set up an interesting panel that allowed him to think about the French tax system. He also took care of, always comparatively, the exemption of taxes. Montesquieu linked the collection of taxes to the performance of the bureaucracy concerning the common good, with several examples in comparative legislation. Thus, his interest in comparative law also indicated a strong concern for practical problems of his time.

Later, at the turn of the nineteenth century to the twentieth century Max Weber studied Eastern and theological law to idealize their sociological typology for understanding the rationality of Western law. He conceived the identifying typologies of law from comparative essays. The rationality of Western law has been identified from judgments of comparison. The mandarinate and the Chinese imperial state, the relationship of Confucianism to intellectuals, the reaction of traditionalism in the face of capitalism, the Indian model, the caste system, and Brahmanism, were aspects of Eastern culture that Weber used to draw a panorama of Western law, which linked to rationality and instrumentality that informs social action (Weber, 1999).

In Italy, there is an important set of contributions, from the Neapolitan Giambattista Vico and the Sicilian Emerico Amari. Vico drafted reflections about an erudite law, centered on the crucial points of the legal enlightenment, always in search of references to rationality.

The study of the distinct types of domination, especially the charismatic model, is the result of an accurate analysis of Eastern forms. The very ascetic sense of Calvinism has been compared with religions that are more salvationist and supposedly less committed to schemes of rational domination, such as Confucianism. Max Weber's study of Calvinist ethics in the construction of American law and institutions is likewise an important example of the use of institutional comparison techniques (Weber, 2004). It is comparative law applied.

In 1831 the first chair of comparative legislation was organized in France. The study of the rights of other peoples was used as a form of defense against the volatility of law, which reveals a tendency of positivist thought, then dominant. One feared that the legislator's words might make libraries disappear. In this sense, comparative law also heralded a scholarly reaction against the nationalization of law.

For this purpose, the first known international congress was organized to discuss comparative law. The meeting took place in France in 1900, next to the International Exhibition. Edouard Lambert and Raymond Saleilles were its organizers. This episode links comparative law with modernity and the reconciliation between peoples. It is one of the arguments for its need, regardless as a method or a discipline.

Comparative law could still have represented a reaction to the legal systems that were established in the nineteenth century, in disfavor of other systems, as a reflection of competitive capitalism, neocolonialism, and the European presence in Africa and Asia, in the search for consumer markets, cheap labor, raw materials and centers of strategic domination. It may be a refined reaction to the denial of legal pluralism, as intended by European schools since a deep ethnocentric feeling guided the dominant doctrine on the European continent.

Edouard Lambert (1866-1947) played a vital role in this movement, consolidating comparative law as a field of investigation worth noticing. He organized the most comprehensive and comprehensive text of comparative law, with the collaboration of jurists from various parts of the world (Lambert, 1938). Lambert

directed the Institute of Comparative Law of Lyon, fixing the general lines of subjects studied to this day. He lived in Lyon from 1900 when he became the holder of the chair of general history of law. He studied English law and devoted himself to the study of Muslim law. He researched and taught in Egypt in 1906 and 1907.

Comparative law, in Lambert's conception, approached the studies of sociology and history, resembling them. There was also concern about legal ethnology, which was reinforced by the Europeans' sharing of the Afro-Asiatic space. In this field, Lambert was interested in the rights of China, India, and medieval Germany.

Lambert also guided and stimulated studies that linked law and religion, coordinating research that dealt with monasteries in Cambodia. From the point of view of the relationship with history, Lambert was an enthusiast of Roman law, which he defined as a permanent reference for a comparative history of law. From the more proper methodological point of view, Lambert led a group of comparatists who understood comparative law as a field of causal investigation, which was primarily concerned with the social and sociological motives of legal experience (Lambert, 1938: p. 314).

Among the main founding fathers of comparative law, one should also mention Henry James Sumner Maine (1822-1898), who was noted as a comparatist who focused his work on ancient law (Maine, n.d.). He used as examples institutes of Roman law, such as property, the contract, and the general system of offenses. The evolution of society, according to Maine, moved towards full consideration and deference to contracts. For his explorations into themes of ancient law, Maine is also linked to legal anthropology. He taught civil law at Cambridge and in the 1860s lived in India, where he was an official of the legal system in the then colony. In India, Maine studied the legal models that flourished there, always in a perspective compared to the English model. Returning to England, he taught at Oxford, offering courses in the history and philosophy of law, also in a comparative perspective.

3. Comparatist Successors in the Twentieth Century

René David (1906-1990) appears as the most recurrent reference in comparative law throughout the twentieth century. He methodologically conceived groups of legal families, which he divided into common law families, of Roman-Germanic origin, as well as those centered on religious conceptions, such as Muslim law, the law of India, and the law of the Far East (China and Japan); he also discussed a family of law that he called socialist law (David, 2002).

David was an important contributor to the systematization of the *common law*, for the layman and the scholar who lived in the context of other legal systems[2]. In David's synthesis, the *common law* originates from the decisions of the English judges of the high Middle Ages, developing systematically from the se-

[2]David René (1997). English law. São Paulo: Martins Fontes.

venteenth century. Its case law origin often opposes it to the law of the written and statutory tradition that informs the models of the European continent.

The *common law* was born in England and developed in other places marked by the English presence, namely in the United States (although in the state of Louisiana, it coexists with the codified French tradition), in Canada (despite coexisting with the French ancestry that prevailed in Quebec), in Australia, in New Zealand, in India, and in some African models, as a result of the imperialist occupation of the nineteenth century.

The term *common law* points out to, originally, an English common law, contrary to local customs and traditions. Judges attached to the king granted justice throughout the country, with strict respect for precedent and, in the absence of precedents, the use of discretionary elements. The presence of the king's related judges in the communities was a mechanism for the exercise of royal power, to the detriment of feudal authorities that proliferated throughout the island. The *common* law is the oldest known national law in Europe.

The system had a higher instance, marked by the presence of the king's chancellor, who in the name of the royal authority granted orders, called *writs*, which were sent to the local agents of the sovereign, who implemented them. Throughout the fourteenth and fifteenth centuries, the *common law* became too technical, marked by the influence of French jargon (as a reflection of French rule on the island at the time of the Normans). The rigidity and routine way in which the judiciary worked no longer solved the problems that the development of trade activities posed in England. A new intervention of the king was sought, which led to the development of another model that developed concomitantly with the *common law*, and which the doctrine of English expression calls *equity*.

The *common* law is responsible for institutes typical of Anglo-Saxon law, such as *chattels* (personal property), *mortmain* (the right of the dead hand, expression of medieval legal French, and which identifies immunity of ecclesiastical properties), among many others. It is an instrumental conception of law, whose priority objective is to provide oxygen to business life. The jury trial is typical of the *common law*, designed as a direct means of evaluating evidence. Once transposed to the United States, alongside the biblical tradition of strong Calvinist content, the *common law* provided the realization of the promised land of religious freedom on behalf of one's restriction of freedom of belief.

According to David, one cannot confuse the adjective *common* that precedes the noun *law*, with the idea of law common to all people and social classes. It is common, in its original sense, because it was used in a general way, throughout England, as an expression of sovereign power that was opposed to the local (feudal) powers, represented by the feudal lords. Another peculiarity of the *common law*, especially on English territory, is the fact that it emerges from practical problems so that it was a law ordinarily thought outside of the academic realm. After all, according to David, "*judges or lawyers were never required in England to have a university degree*" (David, 1997: p. 3).

David also dealt with the Roman-Germanic system, focusing on its link with Roman law (David & Brierley 1978: pp. 33-73). This legal system accompanied the history of Rome and distinguished itself through the various political formats through which the so-called *eternal city* passed. It reached the Middle Ages and, in the West, embedded into the university, becoming a markedly erudite law. The Roman law mixed with local laws and informed the law of the traders, the *lex mercatoria.* In the East, it was in a way codified by Justinian, who in the sixth century A.D. would have begun work of compilation that would be the basis for later Romanistic readings. It resurfaced in romanticism, and yet fascinates Germans and French, structures modern codifications, associates itself with positivist reasoning and persists rejuvenated in various places of the world, from France to Brazil, from Japan to Argentina (David, 1982).

David likewise encourages the study of Islamic law. His reflections on the immutable foundations of Islamic law, and its theological background, are essential (David, 2002: pp. 511-44). Islamic law goes with the Muslims regardless of the topography of secular power. It is not politically rooted, limited to a group that lives under the same civil authority. Islamic law provides legal pluralism since it has spread throughout the Middle East, North Africa, and Asia. It may vary, although *Sharia* is their common core.

Islamic law is rooted in the culture of the people who inhabited the western peninsula of South Asia (Bakhtiar, 1996; Fyzee, 1999). From the seventh century, this region witnessed the rise of Islam. Pre-Islamic Arabia was not yet unified, it had a polytheistic religion, with the Kaaba (in Mecca) as its holy temple. The inhabitants of the region were engaged in the foreign trade of spices. There were internal trade relations between the desert Bedouins and the inhabitants of urban centers such as Mecca and Yatreb. Political unification took place simultaneously with religious unification, undertaken under the leadership of the Prophet Muhammad. A syncretic, fatalistic, and monotheistic religion was conceived, and embodied in the Qur'an. After unification, there was a rapid process of expansion.

Islamic law stems from the religion preached by the Prophet Muhammad. It focuses on the concept of *Sharia*, which prescribes to the believer what can and cannot be done. It is complemented by *Figh*, who points out ways to be taken, based on the prescriptions of *Sharia.* The latter indicates the path to which the water *runs or* the path to be followed. It is Islamic law in its canonical form, marked by the entirety of the teachings of the Prophet Muhammad. It is fundamentally a doctrine of obligations. Legal considerations relating to individual rights take a back seat. The perception of religious evaluation concerning the business of human life is a supreme tenet.

Sharia provides for mandatory or forbidden circumstances and attitudes. Between the two extremes, some attitudes are recommended to be implemented, recommended to be avoided, and indifferent to *Sharia.* For example, the five daily prayers are mandatory, wine is forbidden, additional prayers are recommended, some fish are not recommended, and air travel is indifferent to the

classical juridical-religious orientation.

David also discussed the broad outlines of Chinese law (David, 2002: pp. 585-602). Chinese law has an original religious background, it is based on the teachings of Confucius. It focuses on some rituals, called *li*, later supplemented to more specific regulations, imposed by the emperor and his mandarins, especially in criminal matters, called *fa.* The two original concepts, *li*, and *fa*, form the core of Chinese law. The *li* indicates the need for proper behavior about the person's social position. One can see the nobleman, who was guided according to Confucius, and who saw himself as a superior man, with the behavior guided by the principle of *li*, a code that did not apply to the plebs. The latter was guided by the *fa*, who instituted rewards and punishments.

Concerning the rights he called *Eastern*, David also dealt with Japanese law (David, 2002: pp. 603-616), especially in the sense that it was influenced by Chinese law. Of more ostensibly Buddhist religious presence, Japan, however, implemented splits between *li and* fa, especially since Japan was under the control of the emperor and the feudal lords, who formed the important class of the *shogunate*. Japan resisted Western influences systematically until the second half of the nineteenth century, when in 1853 the opening of its borders to trade was revitalized.

After the Second World War, the influence of Western rights was marked in Japan. David predicted that the progress of democratic ideas and the intensification of relations with foreigners would provoke among the Japanese the idea of a kingdom of law as a necessary condition for the achievement of a kingdom of justice (David, 2002: p. 616).[3]

Konrad Zweigert and Hein Kötz also published seminal books on comparative law (Zweigert & Kötz, 1998). One of the methodological points studied in their work is the exploration of the dissimilarities between macro and microcomparison. Comparatists study legal systems of different nations, on larger or smaller scales. Micro and macro comparisons modulate these scales. According to Zweigert and Kötz, macrocomparison is concerned with the general contours of a system, without sticking to minor or particular problems. It is concerned with the judicial model, with the formulas used to administer justice and to deal with the issues that emerge from forensic practice. In this approach, one has an almost obsession with the system of sources, which truly differentiates the different legal systems.

Microcomparison, on the other hand, studies methods to solve particular problems. The boundary between the two models is flexible, and it is assumed that both can live with the same research. More specifically, the macro-comparison would be oriented towards the analysis of systems belonging to different legal families. The micro-comparison would be directed to the study of institutes of legal models of the same legal family.

The macro comparison in principle would be a more ambitious scientific ac-

[3]Putting this thought as a mere hypothesis, we would find, today, the correctness of the premonition. On the subject of Japanese law see also Oda, 1999; Ramseyer and Nakazato, 2000.

tivity, somewhat lacking a specific cut that would limit it more directly. This would be the case, for example, of the comparison between the Brazilian and North American constitutional tax system. The scholar would find in our model an analytical proliferation of rules and would perceive the North American system as a synthetic model, which grants the infraconstitutional legislator a very wide space of action, which can be escalated by the Executive branch.

Yet, from the methodological point of view, the work of Zweigert and Kötz insists on the aptitude that the comparatist must have in the sense of intuiting juxtapositions of normative models with questions of historical development, of forms of legal reasoning, of specific construction of legal institutions, of the regime of sources of law. Zweigert and Kötz also emphasize that one observes ideological aspects of great importance, such as religious or political grounding as a starting point for the organization of a given legal system.

The authors also formulated judgments regarding legal families, a subject that had been developed by René David. They conceived six normative families that could constitute an object of comparison. They mention a Romanistic family (centered on French codification), a Germanic family (based on the civil codes of Germany, Austria, and Switzerland), an Anglo-American family (Common law), a Nordic family (marked by Scandinavian law), a family from the Far East (and here they embody Chinese and Japanese law), and finally a family of religious rights (which would include Islamic and Hindu law).

It should also be noted the major influence of the work of Rodolfo Sacco (Sacco, 2001). The Italian comparativist was noted for his research on *formants*, which form the basis of the source system. Legal orders would have comprehensive sub-chains of normativity. We would thus have, for example, legal formers and doctrinal formers. Sacco starts from the idea that many formants must be identified and analyzed (Sacco, 2001: p. 72). In this sense, the author reiterates the importance of studying the sources.

Sacco was concerned, moreover, with the problem of the translatability of the various rights, and of their specific terms. He notes translation problems arising from the language that embeds the law. According to Sacco (2001: p. 57), the legal rule preexists the linguistic formula with which we describe it. This fact is clearer if the rule is customary: in such a case, it is adequately formulated only when studied by professional jurists. The passage of a legal concept from one language to another requires the formulation of homologation, through which the foreign term, which evokes a distinct institution, comes to life in the law in which it is being studied (Sacco, 2001: p. 67).

Sacco urges us to think about whether there is a possibility of a legal Esperanto or a Babelic version of a legal language. The relationship between language and law, mediated by politics, takes us back to the environment of the Old Testament, especially in the Shinar plains where, shortly after the flood, pontificated the city of Babel, capital of Babylon. Apparently, in metaphorical language, at times when people of the world spoke the same language and the last well of the water of the flood had not yet dried up well, there was a frenzy of construction;

the local sovereign dared to build an immense ziggurat, a pinnacle that would reach to the heavens. At the top of the arrogant building would dwell the god Marduk, with whom the Babylonians would replace Jehovah, of the Noahide tradition.

The biblical narrative (Genesis 11) gives us an account of the attempt to build a tower that would touch the gates of heaven. It was also hoped that no disturbing flood would submerge the tower that was to be built. And because the Creator lost patience with the tower workers, who used the same language to defy God´s power, on a cloudy day, people no longer understand each other. And if the Creator in his omnipotence could bring down the tower that was made, he spared men from physical pain, marking them, however, with the suffering of glotological incomprehension. It is in the wake of Babel's metaphor that men discover that they do not speak the same language. The whole narrative is valid in the deconstruction of a naïve dream of the conception of a universal law because chimeric is also the intuition of a general language.

Thus, the narrative is particularly important for the translatability of legal texts, confirming that one cannot speak of a juridical Esperanto. The problems posed are not only of translation, which could be solved by the proper use of dictionaries. The issue lies in the difficulty in finding expressions of our language that can express institutions that we do not know, such as *arraignment*, *cooling-off*, *disclosure*, *injunctive relief*, *mayhem*, *trust*, *tax racket*, *vicarious liability*, *yellow dog.* And the opposite is also true. How would we translate into English expressions of common use in Brazilian law, such as "*litisconsórcio facultativo*", "*suspensão da exigibilidade do crédito tributário por força de reclamações e recursos na esfera administrativa*", "*exceção de pré-executividade*", "*agravo retido*", "*certidão positiva com efeitos de negative*"?

One must multiply the problem by the various legal models that exist. Our normative system is not universal, our institutions do not exist in all legal systems. Much more than metaphors, circles of language, or lengthy explanations, the search for a legal Esperanto poses a problem of language mastery that distances from the discipline jurists who are not willing to understand beyond the boundaries of the law that they supposedly dominate.

Taking the question to the limit, one could doubt the very scientificity of law if we start from a belief that indicates universality as an identifying character of what science is. Thus, if science were universal (and medicine, mathematics, astronomy, for example, would be), law would be particular, for the contract expert in the United States would not know how to deal with Chinese contract law.

The problem of the translatability of law is one of the central points that emerges from the work of Sacco. Comparative law runs into the inevitable problem of language. Rodolfo Sacco compared the polyglot (comparatist) and the linguist (knower of other legal systems). The study of other legal systems, by dilettantism, by cultural curiosity, does not lead to the implementation of a scientific attitude, which the comparison of law contemplates. The mere factual, contingent, and residual description of other rules cannot transcend the surround-

ings of academic curiosities. The mention of other rights, as a reference in media news, without the vertical deepening that the exercise requires, is mere formalism without more objectively ascertainable consequences. Comparative law, in this sense, for Sacco, is not a matter for dilettantes.

Throughout the twentieth century, several works of comparative law confirmed the importance of the subject. First mention should be made of the work of Patrick Glenn, author of a monograph that won a prize from the International Academy of Comparative Law in Bristol, England, in 1998 (Glenn, 2000).

Glenn thought of taxonomy based on traditions, based on the concept of a constantly changing presence of the past that affects the present. Glenn conceived seven major legal traditions. An autochthonous and primitive tradition had been led by all peoples at the dawn of time. This tradition was mute, did not link effectively to language structures, and was typical of ancient times. This model is an area of interest in legal anthropology and marks the work of authors such as Pierre Clastres, Franz Boas, Robert Lowie, Margaret Mead, Ruth Benedict, Edward Sapir, Radcliffe-Brown, and Malinowski, among others. Glenn described a Talmudic tradition, centered on revelation in Jewish theology. A Roman-Germanic tradition was based on the central position of the individual. Glenn also identified an Islamic tradition, based on late revelation, shaped by the idea of *Sharia.* The *common law* is identically characterized as tradition, with formal limits defined by judicial action. Glenn gave us an account of Hindu tradition, of great poetic dimension, based on the meaning of *Dharma.* An Asian tradition would round off the group, under the domination of Confucianism and its religious conceptions.

The importance and legacy of the work of Marc Ancel (1902-1990) should also be noted. The French comparatist was also concerned with the problem of translatability, emphasizing that one cannot translate *common law* as "*direito comum*" (in Brazilian Portuguese) or *preventive detention* by "*prisão preventiva*" (Ancel, 1980: p. 111). In this sense, he recalled that legal language is not necessarily a literary language and that knowledge of Shakespeare's or Dickens' English does not necessarily imply knowledge of legal English.

The Italian jurist Paolo Biscaretti de Ruffia (1912-1966) applied the tools of comparative law in the study of constitutional law (Ruffia, 1975). He compared forms of state and forms of government as starting points to compare contemporary constitutions. He was one of the first to understand that constitutional texts are not changed only by formal mechanisms. He saw what we now call processes of constitutional mutation as indicative of informal formulas for altering the content of the Constitution (Ruffia, 1975: p. 305).

Eric Agostini, who taught at the University of Bordeaux, dealt with among other topics, import and export formulas of the various legal systems (Agostini, 1988). He exemplified the reception (which is the result of importation) with the cases of Japan and Turkey, especially in the field of private law. There is an undeniable need for adaptation because the simple transfer of a normative model to another environment must take into account the cultural aspects of the envi-

ronment that receives the legal concept.

From the thought of Eric Agostini, one can discuss a critical point when it comes to the reception of European law in Latin America. From a more conceptual point of view, it should also be considered that the history of North American law, Latin American law, and Brazilian law in particular, are narratives of reception and adaptation[4]. The study of European law transcends the geographical boundaries of an idealized Europe; this is the thesis of Duve (2012: pp. 18-71), a German professor, for whom the history of European law must be seen from a global perspective.

Although the geographical space of law is a traditionally defined territory, there are also immaterial spaces, since the territory is not always the space necessary for the realization of a certain legal arrangement (Grossi, 2006: p. 65). This is what happens, among others, with the expansion of European law to Brazil. For example, just as the medieval European order and organization were transported and carried out in Mexico, where they would have somehow prevailed until the nineteenth century (Baschet, 2006)[5], the medieval legal order, also dealt with by Paolo Grossi, an Italian jurist, was somehow carried out in Brazil, which received the Portuguese model of the *Ordinances*.

The concept of *Europe* is variable, endowed with plasticity that allows the imaginary conception of mobile and flexible borders. Grossi drew attention to the fact that, for a long time, the concept of Europe was marked by an exclusively geographical understanding. The spread of humanism and the influence of Erasmus of Rotterdam, Paolo Grossi continues, constructed a more complex defining meaning of Europe, charged with spiritual and cultural values (Grossi, 2007: p. 4).

The European legacy also mentions the contribution of Léontin-Jean Constantinesco (1998). There is in his work a concern with the uncertainties of comparative law, especially in the sense of ascertaining whether it is only an autonomous method or discipline. Constantinesco advocates a universalist conception of the (false) problem that would result in its overcoming. Less than an epistemological question, the discussion reveals an ideological quarrel. The rejection of comparative law as a discipline, and its affirmation as a method, can prioritize specific rights to the detriment of more totalizing legal conceptions. It is at the heart of this discussion that a set of justifications unfolds for the study of comparative law, as a method, or as a discipline, which becomes a secondary and minor problem.

Finally, a section on contributions to comparative law in the twentieth century deserves an analysis of developments in the United States.

The relations between the founding fathers of the United States *and* Montesquieu's ideas have already been put forward, as an example of the transposition of legal ideas and applied comparative law. Likewise, it would be possible to

[4]See Horwitz (1994); Clavero (1992); Díaz & Cifuentes (1992); Martins Junior (1979); Aguilera (1996).

[5]The inspirer and preface to this baffling book is Jacques Le Goff.

mention Joseph Story (1846), for his legacy in *conflict of laws* (first edition 1834), or private international law, as the discipline is better known in Brazil, as part of the chapter of this development. Regardless of the nomenclature to be adopted, it is certain that, among its fundamental issues (conflicts of jurisdiction, applicable law, and the recognition of foreign decisions), the discipline conflict of laws addresses the possibilities of application of foreign law in domestic territory. In addition, the potential objections do not apply it on account of the violation of domestic public policy or order. Inexorably, a comparative and evaluative exercise appears in its technique.

Story, who served as a U.S. Supreme Court justice (1812-1845) and taught at Harvard, is thus seen, along with Livermore, Lieber, and Kent, as a forerunner of the field. Not without caveats. Despite reading Latin, French, and Spanish, Story believed that civilist constructions had little applicability. For Story, according to Michaels (n.d.), civilist writings were abundant in theoretical distinctions, which have little other purposes than to provoke idle discussions, and with metaphysical subtleties, which perplex, if not confuse, the investigator.

It seems, therefore, more convincing that it is only in the twentieth century that a comparative law school appeared with greater organicity in the United States, yet with disagreements about when the movement would have started (Pound, 1936: pp. 56-60).

As Clark explains, 1951 is mentioned as the landmark year of the movement. That year, ten universities and the North American Foreign Law Association reportedly came together to form an association dedicated to comparative law. In 1952, the American Journal of Comparative Law (AJCL) began to be published. For Clark, however, as early as 1904, with the holding of the St. Louis Universal Congress of Lawyers and Jurists, the field of comparative law in the United States would begin to take shape. Clark indicates that the said Congress would have taken place only four years after the Parisian counterpart of 1900. And on the latter, we have already called attention to the protagonism of Edouard Lambert and Raymond Saleilles, as its organizers. From 1908 onwards, annual comparative law bulletins were published. Consequently, Clark took up a position. The combination of sustained academic activities and the existence of organized communication networks, from 1904 onwards, makes this year the real milestone of the discipline in the United States (Clark, 2005: pp. 583-93).

Pound, for example, best known for his contributions to sociological jurisprudence and legal realism in the United States, was on the editorial staff of the annual comparative law bulletins in 1908. In a later article (Pound, 1936: pp. 56-60), he emphasized the benefits of comparing law. Mainly because comparison would teach us to "go slower" in assuming that there is only one necessary and inevitable legal solution to a set of facts. He also recalled that many of the principles of American law would have been formulated in comparisons. For example, originated in analogies to feudal property law, as well as in the writings of the civilists and pandecists. Pound recommended that the interest in comparative law should be in *how* and to *what extent* the discipline could be an instru-

ment of making the legal system more effective for its ends; and more effective in achieving justice—revealing its pragmatism regarding comparative law.

Finally, the work of Arthur Von Mehren, a former Harvard professor, as a contemporary representative of comparative law in the United States deserves attention. Author of more than 200 publications and with legal training in American and German law, he left a vast legacy (Von Mehren, 1971: pp. 624-632). Mehren pointed to the three interrelated dimensions of the comparative studies. The study of the rules and institutions of two or more legal systems (foreign law dimension); the determination of significant differences and similarities in rules and institutions (comparative dimension); and reflection on the reasons for these differences and similarities (case law dimension). His works and distinctions have significantly influenced the development of comparative law in the United States, from the second half of the twentieth century to the present day.

4. Current Perspectives of Comparative Law

Comparative law promotes practical goals that meet the professional aspects of business activity. Knowledge of other systems can inform business decisions, investments, and labor interests. The multiplication of international points of contact in the commercial sphere, as a reflection of globalization, despite recent setbacks, gives comparative law a new form. When companies enter new markets or production centers, they need to be familiar with the legal models they will have to deal with. Thus, globalization prompts the comparison of legal systems since prior study of local legal systems is important beyond the knowledge of the language and the rudiments of local cultures.

Aside from state-based law, there are also commercial and business practices. *Lex mercatoria* is revived, an example of transnational commercial law, as a symptom of the success of the international legal order that develops independently of state normative orders. The normative multiplication that marks some domestic rights is also characteristic of global normativity. The multiplication of rights, internal and transnational, promotes the production of laws, exacerbating norms that qualify as a movement of autopoiesis, that is, the multiplication of legal rules, which are reproduced worryingly.

Comparative law also provides studies of the sociology of law. The study of other rights goes hand in hand with research into the societies in which the rights are shaped. For example, it is the study of American society that can enlighten us on some truly insurmountable issues, such as the problem of the death penalty in that country. The U.S. Constitution prohibits cruel punishment. But U.S. law has historically enshrined capital punishment. The study of the internal contradictions of that society, marked by disputes that involved problems of racial discrimination, with roots that are linked to the civil war, along with the perception of issues related to immigration and marginalization, makes it possible to understand the reasons for the apparent contradiction.

The study of foreign rights promotes an overview of customs and practices. It is an undeniable source of cultural enrichment. The examination of normative

systems of other peoples strengthens the reading of law as a cultural experience. Comparative law allows domestic law to be perceived more clearly. Problems and solutions of other rights shed light on the complexities of domestic law. Comparative law is a reliable guide for legislators and judges.

Comparative law is primarily the subject of history, philosophy, and general theory of law. From the historiographical point of view, comparative law is a discursive part of the justification of legal models. But caution must be taken with the approximations between comparative law and the history of law. The use of history by law can be a dangerous conceptual game because the jurist can use the past to justify the present of the institutions in which he operates. In the same way, comparative law runs the risk of being seized by the legal scholar, in the sense of justifying or criticizing domestic law, without considering other factors.

The process of legal internationalization that the world is going through expands the need for and direction of comparative law studies. At first, it suggests that we study the effects of internationalization on domestic law. Perceptions of quality may suggest that rights are better or worse. The rights are simply different. The student of comparative law must be prepared for the trap that is always laid at him. The exercise of comparison is not necessarily based on guidance that requires the assembly of a qualitative table. In principle, rights are neither better nor worse, more or less advanced, more or less enlightened. The rights are diverse. Comparative law is not necessarily, and naively, an instrument that guarantees a better relationship between the various peoples.

5. Conclusion

Comparative law plays an instrumental function in understanding, which also occurs with comparative linguistics, comparative literature, comparative theology, and comparative biology. They are formulas for apprehending similarities and dissimilarities. There is a glamorous aspect to this study, which sometimes calls for exoticism and the exploration of distinct themes and systems. It promotes a healthy estrangement, which stems from the realization that there is *another* and which also results in an understanding of *oneself.*

Comparative law is an important instrument of legistics, that is, of improving domestic law. It is an important instrument to control the reception of foreign law, providing preparatory measures and specific adjustments. It also acts as a model of harmonization of law, especially in the construction of international treaties. There is still a great didactic interest. Knowledge of foreign law helps to build formulas for understanding the various models.

Comparing legal systems result in a better understanding of one's law. There are practical uses, refinements, and adjustments of domestic law. The lack of a legal Esperanto must be recognized as a direct result of the problem of translatability. This language barrier results in topographic barriers, which reveals that the legal system also contains geographical expression. For this reason, one can envisage the possibility of building a legal cartography.

The study of foreign law is not to be confused with the study of comparative law. The former is merely descriptive, and the latter is evaluative and instrumental. The comparatists must know foreign languages, and master rudiments of sociology, history, and politics. Primarily, however, they must be open to estrangement and the understanding of diversity. Above all, they must be aware that comparative law, as a method or as a discipline, is a problem of studying the sources of law.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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