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What the world needs now is Comparative Law, sweet Comparative Law*

Miguel da Câmara Machado**

«Comparative Law enables an understanding of the legal world map, through the characterization and comparison of legal systems (macrocomparation). It also concedes a better understanding of legal institutes of a given legal order (or, of course, our own legal order), through the comparison with legal institutes that perform the same functions in other legal orders, some of which may have influenced the specific institute in the legal order under consideration (microcomparison). Comparative Law, therefore, contributes to the legal-cultural and technical-juridical enrichment of those who, today students, will be tomorrow jurists, in an increasingly globalized world in which international contacts multiply. Comparative Law breaks ideas of legal isolation, broadens horizons, and strengthens the critical spirit. It may even be important for life decisions, starting with when one thinks in the mobility in the exercise of professions that can also take place in Law, but also promoting their receptivity to new or different solutions, and proportioning lawyers the competencies they may need in the future professional life, when contacting with other legal systems»[1]

EDUARDO DOS SANTOS JÚNIOR[2]

* A convite da Revista.

** Guest Lecturer. Faculdade de Direito da Universidade de Lisboa / Law School of the University of Lisbon.

[1] Original: *«O Direito Comparado permite a compreensão do* mapa mundi *jurídico, através da caracterização e da comparação de sistemas jurídicos (macrocomparação). Permite, também, a melhor compreensão de institutos jurídicos de uma dada ordem jurídica (seja, como é natural, a portuguesa), pela comparação com os institutos jurídicos que desempenham a mesma função noutras ordens jurídicas, alguns dos quais, porventura, com influência no regime concreto do instituto de que se trate na ordem jurídica considerada (microcomparação). O Direito Comparado contribui, por isso, para o enriquecimento jurídico-cultural e técnico-jurídico daqueles que, hoje alunos, serão juristas manhã, num mundo cada vez mais globalizado e em que os contactos se multiplicam. Quebra a ideia de isolamento jurídico, abre horizontes, concorre para o espírito crítico. Porventura, pode mesmo ser importante para decisões de vida, começando quando se pense que a mobilidade do exercício de profissões também pode verificar-se em Direito, mas também pela promoção da recetividade a soluções novas ou diferentes e por proporcionar competências que podem ser necessárias na futura vida profissional, ao contactar com diferentes sistemas jurídicos»*, cf. EDUARDO DOS SANTOS JÚNIOR, *Comparative Law Programme*, available at http://www.fd.ulisboa.pt/.

[2] I want to dedicate this text on the reasons to study Comparative Law to the memory of a great Comparative Lawyer, Professor Eduardo Santos Júnior, who passed a year ago and unfortunately is

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In my school, Comparative Law is an optional course that students can choose, if they wish to.

At the beginning of each semester, when I want to explain the functions of Comparative Law and the advantages of studying it, I often ask students what were their reasons for choosing this course. Here are some of the answers I received over the last years:

"Because I want to work abroad!"; "because I really like to travel"; "because I would like to know something about Chinese law"; "because I want to better understand the Law on which some of my favorite American TV series of lawyers are based on"; "because I read the syllabus of the course and found it the most interesting one!"; "because the other options were courses of History and I've studied a lot of it in previous years"; "because I am an exchange student and I think this will be useful when I return to my country"; because I read things that said that the criminal law of the foreigners was much less favorable and wanted to confirm that"; "because I will have to do a lot of research and write papers and other investigative works and I would like to learn the techniques and methods of Comparative Law, to do them properly"; "because my best friends had this same course and I want to talk to them about it"; "because I think I will better understand our own Portuguese law after I further understand the legal systems

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no longer teaching Comparative Law, but remains in my memory whenever I think on the reasons to study this science and on who needs it. Over the last few years, I have had the honor and pleasure to be Professor Santos Júnior's assistant in Comparative Law classes at the Law School of the University of Lisbon, where he and his classes are missed too much.

This text also emerges from the desire to write a farewell to Professor Santos Júnior, which I cannot and I do not want to say and write. I am convinced that through what he taught, what he wrote, through his example of life, his students and colleagues, he will remain and influence our university forever. I really want our school to be more and more his school, and more and more like him, as I have always seen him, inside and outside our classrooms. He was a brilliant jurist, a careful and dedicated teacher, but, most of all, he was disconcertingly good. One of those people that makes us want to be better just on the account of being with them, owing to what we listen from them, and see from them dealing with others. I remind him discussing the "volcanoes of law" that exist around the world and I only remember the volcano of humanity that Professor Santos Júnior was himself. A teacher who treated each student as the most important person, from the youngest to the eldest, who had an affection with his colleagues which is today still inexplicable and so good to remember. Professor Eduardo Santos Júnior embodied the best principles and rules in treatment, friendship and teaching and discussed Law with a passion and originality that do not exist ... He will be very much missed. I want to thank him for what he had left, and wish that his memory make all those who have had the honor of working with him more like the Professor was: disconcertingly good and disconcertingly always looking for the best.

with which it is more similar, the ones with which it is more different from and the things in which Portuguese law is unique"; "because I've known some immigrants that I would like to help and I would like to know what their rights and laws are and how best to integrate them into our community".

From these answers, and from many others, it is easy and intuitive to attest the importance and relevance of studying Comparative Law in our days[3], either from a more "theoretical" perspective – to individually be more complete jurists – either from a more "practical" one – to solve everyday problems, with Comparative Law having an enormous practical utility in discovering solutions to legal problems, from the ones that have been construed around the world for centuries to the new questions that the future will bring, due to evolution, technological acceleration and the way reality is constantly surpassing the Law that is always chasing after it, and can have a powerful tool in the study of Comparative Law.

In the Introduction to his Comparative Law handbook, DÁRIO MOURA VICENTE distinguishes, for each of these approaches or dimensions of Comparative Law, between *epistemological functions* and *heuristic functions*[4].

As for the first type - the epistemological ones – those are related, as those of any science, to the widening of knowledge and to contributing, through the crossing of frontiers and the confrontation of systems, to elevate Law to a real science (a social one), which it could hardly aspire to if it was confined to the borders of each State.

In this sense, we can at once identify four fields of knowledge that the study of Comparative Law exercises:

(i) through the improvement of the knowledge of each law student about the place of their respective legal systems, they will come to better understand them;

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[3] For a very detailed and in-depth analysis and for the answer to the question on "how much space is given to comparative law in Italian universities?", see GIOVANNI PASCUZZI, *Comparative Law courses in Italian Universities, L'insegnamento del Diritto Comparato nelle Università Italiane*, Sep. 2010, a report based on the information contained in the "offerta formative database", implemented by MIUR (Italian Minister for the Universities, http://offf.miur.it/index.html). This paper refers to the situation up to 2009 and is available online at http://www.comparazionedirittocivile.it/prova/files/pascuzzi_comparative_law_courses.pdf

[4] Cfr. DÁRIO MOURA VICENTE, *Direito Comparado, vol. I (Introdução, sistemas jurídicos em geral)*, 3.rd ed., Coimbra: Coimbra Editora, 2014, p. 20.

(ii) by perceiving that certain legal tools and institutes can perform in a given legal system the same function as other very different mechanisms perform in other systems, this encourages a functional perspective[5], promoting the pursuit and evaluation of legal tools with an outcome logic to be achieved;

(iii) and thus fosters the critical spirit of lawyers and emboldens "out of the box" thinking, stimulating creativity and willingness to perfect legal instruments that were previously known by the comparative lawyer and develop new ones[6];

(iv) finally, it contributes to the cultural enrichment of jurists (and provides excellent "conversational unlockers" and real "chat-up legal tips", making comparative lawyers more interesting, impressive and engaging people!).

As for the second type – the *heuristic functions* – they materialize the more theoretical side of Comparative Law about which we have already written above, almost like a transition from the "Comparative Law in books" to the "Comparative Law in action". These functions stem from the development, on the ground, of a more critical attitude about our own legal systems, opening new perspectives to legal doctrine and case law to extract from the positive rules the best outcomes they can achieve, having a decisive contribution to the reform of the laws (the legislator must always take into account the experiences of other legal orders), being a prerequisite for the preparation of instruments and policies for international harmonization (whether in unitary, unified or harmonized forms of law), playing a relevant role in the coordination of national systems, whenever it concerns the regulation of international private situations or conflicts of law in general.

Thus, Comparative Law inspires the discovery of solutions to the problems posed by the regulation of coexistence[7]. On this, MOURA VICENTE draws some areas in which this science proves particularly useful in (we will try to add something, namely the area of comparative criminal law):

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[5] Criticizing and discussing this perspective, see MAURICE ADAMS and JOHN GRIFFITHS, *"Against 'comparative method': explaining similarities and differences"*, in MAURICE ADAMS and JACCO BOMHOFF, *Practice and theory in comparative law*, Cambridge: Cambridge University Press, 2013, pp. 279-301.

[6] About this topic and on the relevance of Comparative Law in both legal research by scholars and by teachers, see RAINER ARNOLD, *"Comparative Law in research and academic teaching"*, in *Annuario di Diritto Comparato e di Studi Legislativi*, Napoli: 2013, pp. 447-458.

[7] See DÁRIO MOURA VICENTE, *Direito Comparado...*, p. 20 and his numerous references about Comparative Law functions.

(i) the interpretation of the law;

(ii) the development of the law by the courts;

(iii) the preparation of legislative reforms;

(iv) the conflicts of laws (private international law);

(v) determining the most favorable law;

(vi) transposing specific "subjective rights";

(vii) comparative criminal law;

(viii) the discovery of common principles to different States;

(ix) the harmonization and unification of national laws (for instance, in the European Union, but also to other projects of international collaboration).

(i) the interpretation of the law

Firstly, Comparative Law is essential for every lawyer, student or judge who wants to determine the meaning and scope of the norms and institutes of their own national laws. After centuries and centuries of history and contacts between cultures, almost all the legal systems in the world have been influenced by others. The French Civil Code marked, to a greater or lesser extent, civil codes, and private law in all the continents, the American Constitution or some of its Amendments were taken into account in constitutional reforms worldwide, the German systematization of the BGB revolutionized the way of teaching, studying and designing laws in hundreds of countries and there are precedents of English courts that are used in legal discussions in more languages than we can imagine[8]! The students who wanted to "escape History" when choosing this course do not succeed in Comparative Law, since all these legal systems were, to a greater or lesser degree, profoundly influenced by the Greek political and legal thought or the extraordinary Roman Law, because real and trustworthy Comparative Law demands us to travel not only beyond borders and space, but also beyond time, traveling into the past and back to the future.

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[8] See JAN KOMÁREK, "Reasoning with previous decisions", in MAURICE ADAMS and JACCO BOMHOFF, *Practice and theory in comparative law*, Cambridge: Cambridge University Press, 2013, pp. 49-73, and also ALEXIS LE QUINIO, *"Le rocours aux précédents étrangers par le juge constitutionnel français"*, in *Revue Internationale de Droit Comparé*, Paris, a.66 n.2 (avril-juin 2014), pp. 581-604.

Illustrating this "starting point", MATHIAS SIEMS begins his Comparative Law book with a "well-known Irish joke" about a foreigner, who *«asks a local how to go to a particular place, but only receives the advice that 'if I were you, I wouldn't start from here»*. This picture is used by SIEMS to explain that "(without teleportation) one has to start from the place where one is at present", which also means having "traditional comparative law" (and also our own legal systems) is a suitable starting point for any kind of study on comparative law[9].

There are no complete comments or annotated civil, criminal or public laws that ignore the foreign laws that influenced those rules that are being commented. In current Portuguese civil law, a lot was modeled from German laws, so it is not possible to study here any of these institutes in depth without studying the "grandmother laws" and what German authors wrote about the original rules (which were often born of Italian authors' ideas, so we also have to go study the "great-grandfather rules" too!). In Mozambican or Angolan legal systems we can also find numerous rules that are still equal or very similar to Portuguese laws, so there we all have a common legal science that must be shared and used by all[10]. At any level, even administrative[11], to properly apply laws that "descend" from other laws, we must know the "mother laws", and even "daughter norms", "cousin rules" or "neighbor principles", which may have already produced useful and good reflections to be used by the lawyers. The Constitution of South Africa of 1996 itself commands us to do so in its Article 39 (1) (c) when it states that a court, tribunal or forum may consider foreign law when interpreting the South African Bill of Rights[12].

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[9] Cfr. MATHIAS SIEMS, *Comparative Law (Law in Context),* Cambridge: Cambridge University Press, 2014.

[10] On the scope and structure of Portuguese civil codes, when confronted with others, see DÁRIO MOURA VICENTE, *"The Scope and Structure of the Portuguese Civil Code"*, in JULIO CÉSAR RIVERA (ed.), *The Scope and Structure of Civil Codes,* Buenos Aires: Springer, 201, pp. 319-330. Furthermore, this work also deals with many other civil codes, such as the Italian (RODOLFO SACCO, pp. 249-266), the French (JEAN-SÉBASTIEN BORGHETTI, pp. 181-200) or the even the Chinese, with the special case of Macau, likewise with a Portuguese influence (AUGUSTO TEIXEIRA GARCIA, DAN WEI, PAULA NUNES CORREIA AND TONG IO CHENG, pp. 83-104).

[11] On this topic see also TIMOTHÉE PARIS, *"La reconnaissance des actes administratifs étrangers"*, in *Revue Internationale de Droit Comparé*, Paris, a.66 n.2 (avril-juin 2014), pp. 631-655.

[12] Cfr. DÁRIO MOURA VICENTE, *Direito Comparado...*, p. 21, especially note 5, and the reference to KONRAD ZWEIGERT, *"Rechstsvergleichung als universale Interpretaionsmethode"*, in *RabelZ*, 1949, p. 5.

(ii) the development of the law by the courts

A field where this importance is eventually even more significant is the application of the law made by the courts, especially in systems that allow judicial activism or simply live with any kind of judicial development of the law (namely, but not only, through case law). Any judge wishing to be thorough and to make an in-depth analysis of the questions put to him must seek to know how the problem he has to deal with is settled in other legal systems, either in the same logic of interpretation of law already mentioned, either as he is faced with new demands which can have never been posed in his country, but have probably already have been placed in other corners of the world. We can thus identify almost "domino effects" in some of the decisions about privacy or technological issues, even within complex states or unions of different states with different laws, such as the United States of America, with decisions by the courts of the state of California influencing decisions of courts of states on the opposite coast and then, or earlier, persuading also other countries judicial decisions beyond the Atlantic, in Europe or Asia.

In Portugal, only between 2016 and 2017, our Supreme Court of Justice (*Supremo Tribunal de Justiça)* did resort to comparative law to examine such diverse issues as the "right to good name" (*direito ao bom nome*) or honor, freedom of expression, the principle of *in dubio pro reo*, patents and industrial property issues or on the law applicable to contracts to carry out building works or architecture contracts (whatever that unusual contracts are!)[13].

(iii) the preparation of legislative reforms

As Attila Harmathy reminded at the beginning of his works to draft a new Hungarian Civil Code, *«the use of comparative law for working out new legal rules has a long tradition. Studying foreign law had theoretical as well as practical importance from the time when the law lost its international character and became a set of national rules. The topic had a particular interest from the point of view*

[13] See the judicial decisions of the Portuguese *Supremo Tribunal de Justiça* in processes no. 1454/09.5TVLSB.L1.S1 (31/01/2017), by Roque Nogueira; no. 849/12.1JACBR.C1.S1 (17/03/2016), by Pires da Graça; no. 1248/14.6YRLSB.S1 (14/12/2016), by Lopes do Rego; and no. 492/10.0TBPTL.G2.S1 (14/12/2016) by Tomé Gomes, all available online at www.dgsi.pt.

of legislative work»[14], returning to the teachings of RENÉ DAVID on his "grands systèmes de droit contemporains"[15] and on the origins of studying comparative law that began with courses for "comparing legislation" established in the nineteenth century.

But the importance of comparative law goes from the times the political systems are being transformed and when extensive programs of legislation are carried out to the everyday reforms needed to develop new legal regimes to face small issues in criminal, private or public law. Whenever a Parliament or a Government, or even an administrative authority desires to amend or design a new act, bill, legislative instrument or any form a new legal regime can take, it is important to study the legal regimes applicable to the same questions in order legal systems, beginning with those with which we have more affinities or facilities of understanding and interaction. This is all the more important if one is charged with drawing up a new code or an innovative and comprehensive regime.

There are, however, several "temptations" in the modern times. If, on the one hand, there is a much greater ease of access and consultation through web search engines and it is possible to identify and read about foreign regimes with much greater ease than ever, on the other hand, there are much greater urgency and real impatience of politicians and legislators for obtaining results and complete reforms in a "fast and furious" manner. Good Comparative Law takes time and requires deepening of study. As any good legislative procedure, moreover. And current comparative lawyers should learn from the commissions that in the nineteenth and first half of the twentieth century were responsible for reforming or drafting new codes and have done extraordinary comparative law works that are not yet today digitized or, more important, imitated by the impatient and restless modern legislators.

(iv) conflicts of laws (private international law)

Other of the most important fields of application and utility of comparative law is the regulation of private international relations, in particular through the mechanisms of Conflict of Laws that call for comparative law as an essential weapon

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[14] Cfr. ATTILA HARMATHY, *Legal Problems of Transition in Hungary,* Budapest: Z. Péteri, 1998, p. 18.

[15] See RENÈ DAVID, *Les grands systèmes de droit contemporains*, 8th ed., Paris : C. Jauffret-Spinosi, 1982, p. 6.

and as a real "adapter" almost like the ones we have to buy to use the electrical outlets and plugs in other countries for which we travel. Just as we need help with charging our mobile phones when we find English or Mexican phone jacks and plugs, we also need Comparative Law when we have to apply the law to Englishmen who marry Mexicans in Portugal, or English people who buy buildings here or to Mexicans who die in our territories or to the Portuguese people who decide to enter into contracts under Mexican or English law.

There are many situations in which we need to know, interpret and apply rules of foreign law to these situations and legal issues, and lawyers are obliged to cross the borders and frontiers of the national law in which they are versed and have primarily studied. Thus, in Portugal, the Civil Code itself, in its article 23, orders to interpret foreign law *«within the system to which it belongs and according to the interpretative rules set therein»*. According to MOURA VICENTE, this interpretation, as well as the application of foreign law in order to solve conflict of laws issues, must be done taking into account the sources, the judicial organization, the system and mechanisms of control of constitutionality and judicial review of the laws and the ways of discovering the applicable law of the concerned legal orders[16].

Comparative Law emerges as useful similarly whenever we activate mechanisms of "dépeçage" (internationally known in French, the concept of the conflict of laws whereby different issues within a particular case may be governed by the laws of different states, being the customary example in common law countries, the contract which provides that different parts of it shall be governed by different laws) and common to private international law systems throughout the world (enshrined in Portugal in Article 15 of our Civil Code, which states that the competence attributed to a law shall apply and cover only the rules which, by their content and the function they have in that law, are part of the system of the institute referred to in the primary conflict rule that triggers the initial attribution of competence. To characterize any given law, comparative law is essential, every time we take the path from the *lex fori* to the *lex causae*, through the mechanisms known in Portugal as *"selective reference"* and which point toward the determination if and to what extent legal institutions that perform different or equivalent social functions in other legal systems are subject to the same rules of conflicts of laws[17].

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[16] Cfr. DÁRIO MOURA VICENTE, *Direito Comparado...*, p. 23.

[17] See, about these mechanisms, in Portugal, ANTÓNIO FERRER CORREIA, *"O problema da qualificação segundo o novo Direito Internacional Privado Português"*, in *Boletim da Faculdade de Direito da Universidade de Coimbra,* vol. 44, 1968, pp. 39-81 and LUÍS DE LIMA PINHEIRO, *Direito Internacional Privado*, vol. I, 3rd ed., Coimbra: Almedina, 2014, pp. 571-598.

(v) determining the most favorable law

In the same way, Comparative Law is handy to the determination of the most favorable law for a certain category of subjects (the "weaker parties" in legal relationships), also crucial for the application of some conflicts of laws rules, namely in labor law, consumer law or agency agreements. Comparative Law serves as a significant tool to help to convert and to import foreign mechanisms to protect the weaker parties essential in the contacts between different legal systems that want to apply and protect these parties and lead them to fairer situations[18].

(vi) transposing specific "subjective rights"

On the other hand, Comparative Law also serves as a powerful "translation tool" for subjective foreign rights that "travel" between different legal orders. In times when freedom of movement of people has been called into question (but it is also an everyday reality all over the world, with the growing phenomena of migrations[19]), there are many problems of "transposition" also relevant in Conflict of Laws, either in matters of contracts between foreigners, either when accidents happen and non-contractual liability is called into action among different European nationals, either to set up commercial companies in different countries, either to understand under which law we shall register a car, a boat or an airplane[20].

(vii) comparative criminal law

Despite Criminal law being frequently seen as a "parochial discipline", as Luis E. Chiesa explains – *«courts and scholars in the English-speaking world seldom*

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[18] Cfr. Dário Moura Vicente, *Direito Comparado...*, p. 24.

[19] Cfr., on this topic, Nicole Guimezanes, *"La migration et le droit"*, in *Revue Internationale de Droit Comparé*, Paris, a.66 n.2 (avril-juin 2014), pp. 199-247.

[20] See, again, Dário Moura Vicente, *Direito Comparado...*, p. 25.

take the criminal statutes, cases, and scholarly writings published in the non-speaking world. The same is true the other way around. This is unfortunate. Much can be learned from comparing the way in which the world's leading legal systems approach important questions of criminal theory»[21].

Comparative Law can furthermore have multiple sub-functions in the fields of criminal law, namely, as CHIESA also defends, as an essential tool to critically assess domestic criminal law – with the famous examples of some of the United States Supreme Court's death penalty landmark rulings, such as the 2002 decision in *Atkins v. Virginia* in which it was stated that *«within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelming disapproved»*[22] - or as a source of international criminal law, particularly relevant since the creation of the International Criminal Court (ICC) and the adoption of the Rome Statute (also in 2002). However, international criminal law slowly emerged during the past century, also with famous judgments that called comparative criminal law into action, by the Nuremberg Tribunal, the International Criminal Tribunals for Rwanda or for the Former Yugoslavia.

But the Rome Statute purposely calls comparative criminal lawyers in its Article 21 (1) (c) which provides that the ICC shall apply (i) in the first place, the *«Statute, Elements of Crimes and its Rules of Procedure and Evidence»*; (ii) in the second place, *«where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict*; but, more important, for us, (iii) *«general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime (...)»*[23], being Comparative Law obviously required for the proper detection of these general common principles.

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[21] Cfr. LUIS E. CHIESA, *"Comparative criminal law"*, in MARKUS D. DUBBER, and TATJANA HÖRNLE (ed.), *The Oxford handbook of criminal law*, Oxford: Oxford University Press, 2016, p. 1089.

[22] This exercise of Comparative Law was part of the basis on which the SCOTUS supported its conclusion to consider such practices violations of the Eight Amendment of the American Constitution, being "cruel and unusual" punishments, see 536 U.S. 304 (2002), the decision is available online at https://www.law.cornell.edu/supct/html/00-8452.ZO.html.

[23] See the ICC Rome Statute, available online in English at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

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(viii) the discovery of common principles to different States

Trying to reach the end of this paper, we still want to very briefly point that the discovery of common principles to the different national legal systems, and its use of Comparative Law transcends criminal law, as other courts, such as the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR) or the Court of Justice of the European Union (CJEU) have to enter this difficult task of discovery of principles, in which comparative law is always particularly useful. Besides those courts, there are still many arbitration tribunals all over the world that need to seek common principles when the parties have not chosen the applicable law and the situation before those arbitration courts present relevant connections with two or more legal systems and, for this purposes, comparative law must also be used.

See, with a little more attention, the Statute of the ICJ, annexed to the Charter of the United Nations, of which it forms an integral part and provides, in its Article 38, 1, (c) and (d)[24], that this court, *«whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply (...) the general principles of law recognized by civilized nations»* and also, subject to the provisions of Article 59 of the ICJ Statute, *«judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law»,* which also requires the ICJ to enter into comparative law exercises.

In Europe, Comparative Law is also relevant whenever the Convention for the Protection of Human Rights and Fundamental Freedoms is applied, namely by the ECtHR, as this convention begins considering that *«the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law»* and comparing the laws of its member states is constantly required whenever the court is called into action. MOURA VICENTE lists some of the case law determining, concretizing and discovering these principles, not only by the ECtHR but also by the CJEU[25]. And, as the same author points out[26], it is not only the Declaration concerning the Charter of Fundamental Rights of the European Union that refers to the constitutional traditions common to the Member States, but also the CJEU competen-

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[24] Cfr. also the ICJ Statute, available online in English at http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II

[25] See DÁRIO MOURA VICENTE, *Direito Comparado...*, p. 26.

[26] Cfr. *idem, ibidem.*

cies as drawn by the Treaty on the functioning of the European Union call Comparative Law into action[27].

Pursuant to Article 268 of the Lisbon Treaty, the CJEU also has jurisdiction in disputes relating to both contractual and non-contractual liability of the Union and, in those cases, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The European Central Bank shall also make good any damage caused by it or by its servants in the performance of their duties, again in accordance with the general principles common to the laws of the Member States.

According to the Article 223 of the same treaty, the European Parliament also needs to do comparative electoral law, as it must draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

As we can see, the Lisbon Treaty and other European Union treaties draw a field in which Comparative Law is particularly called to act, whenever the approximation of laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which needs to be subject to harmonization measures.

(ix) the harmonization and unification of national laws (for instance, in the European Union, but also to other projects of international collaboration)

Very briefly, we shall lastly refer to the importance of Comparative Law in the unification and harmonization of law, namely private law, a contribution that has already been the focus of a previous paper in *"Comparazione e diritto civile"* law journal, by STATHIS BANAKAS[28]. Usually, authors also refer to the influential

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[27] Also on the importance of this Charter and its relations to Comparative Law, see PASQUALE STANZIONE, *"Diritti esistenziali della persona, tutela della minorità e drittwirkung nell'esperienza europea"*, in *Europa e diritto privato*, Milano, n.1, (2002), pp.41-60.

[28] See STATHIS BANAKAS, *"The contribution of Comparative Law to the harmonisation of European Private Law"*, in *Comparazione e diritto civile*, available online in http://www.comparazionedirittocivile.it/prova/files/banakas_comparativelaws.pdf.

condition of comparative law as an intellectual endeavor in the service of legal harmonization and even unification, mainly in Europe, but also around the world[29].

Some areas of the Law are especially propitious to harmonization, at least to some extent, such as, for instance, the international laws of contracts. About this matters, the Vienna Convention on the International Sale of Goods, the Rome Convention on the Law Applicable to Contractual Obligations or the UNIDROIT Principles of International Commercial Contracts, offer some uniformity and embody unending efforts to produce international standards.

And, in addition to the European Union, other supranational and international bodies or systems, like the Organization for the Harmonization of Business Law in Africa (OHADA)[30] or the United Nations Commission on International Trade Law (UNCITRAL)[31] are also responsible for continuing efforts in harmonizing and unifying laws contributing to what some call "integrative comparison"[32] which is opposed to the more analytical "contrastive comparison"[33] for those who prefer a "sustainable diversity in law", like H. PATRICK GLENN[34].

Conclusion

Other Comparative law handbooks arrange and display the functions of this science in different ways, usually related to how different teachers research and pres-

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[29] See LEONE NIGLIA, *"Taking Comparative Law Seriously – Europe's Private Law and the Poverty of the Orthodoxy"*, in *The American Journal of Comparative Law*, vol. 54, no. 2, 2006, pp. 401 – 427. Also on this topic, REIMANN and ZIMMERMAN defend that, over the last decades, Comparative Law has been revitalized and made considerable progress, facing *«new tasks and challenges arising mainly from the Europeanization of law and, more broadly, the globalizing trends in comtemporary life»*. Cfr. MATHIAS REIMANN and REINHARD ZIMMERMAN, *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2008.

[30] See OHADA legislation online at http://www.ohadalegis.com/anglais/traiteharmonisationgb.htm.

[31] Cfr. UNCITRAL site at http://www.uncitral.org/uncitral/en/index.html.

[32] See UGO MATTEI, TEEMU RUSKOLA and ANTONIO GIDI, *Schlesinger's Comparative Law*, 7th ed., New York: 2009, p. 69.

[33] Cfr., again, DÁRIO MOURA VICENTE, *Direito Comparado...*, p. 29 and his defense of this second perspective, and also his references to LEGRAND, COTERRELL or ZIMMERMANN.

[34] See. H. PATRICK GLENN, *Legal Traditions of the World*, 2.nd ed., Oxford: Oxford University Press, 2004, p. 343.

ent this topic[35] and answer to why we need Comparative law. During this text we followed mainly MOURA VICENTE, whose lessons were also used by SANTOS JÚNIOR, both continuing, in our school, the teachings of CASTRO MENDES who, as early as 1984, distinguished between the functions of Comparative Law related to dealing with the growing internationalization of law to the ones related to its role as a tool for the unification of law[36]. Other examples, in Portugal, include, for instance, FERREIRA DE ALMEIDA and MORAIS CARVALHO, who distinguish five categories of functions[37] which we can summarily list like this[38]:

(i) "utopic" or "realistic" functions, associated with identifying global or universal trends of evolution of the Law (like KOHLER), creating an universal legal science (with RABEL), discovering a "common core" or "common ground" of Law (like SCHLESINGER), determining "ideal institutions" (as SALEILLES) or improving understanding among nations (like A. TUNC);

(ii) functions related to legal orders of origin (namely to create, interpret, construct or better understand or own laws or to solve conflicts of laws);

(iii) functions related to the harmonization or unification of law;

(iv) functions related to the construction of rules of subsidiary application (very much in line with what we already said about the discovery of common principles);

(v) functions related to legal culture and education (recalling ZWEIGERT and his idea that there is no legal science without comparative law).

In conclusion, let us keep remembering that Comparative law is, for some, like ZWEIGERT or SANTOS JÚNIOR, the most important auxiliary science of Law. We can distinguish it from other auxiliary sciences of Law, such as juridical anthropology or juridical sociology, since, in its object, we consider the juridical phenomena as

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[35] On this subject, see also RAINER ARNOLD, *"Comparative law in research and academic teaching"*, in Annuario di Diritto Comparato e di Studi Legislativi, Napoli, 2013, pp. 447-458.

[36] Cfr. JOÃO DE CASTRO MENDES, *Lições de direito comparado ao curso de 1982-1983*, (with the collaboration of ARMINDO RIBEIRO MENDES and MARIA FERNANDA RODRIGUES), Lisboa: AAFDL, 1983, pp. 53-64.

[37] See CARLOS FERREIRA DE ALMEIDA and JORGE MORAIS CARVALHO, *Introdução ao Direito Comparado*, 3.rd ed., Coimbra: Almedina, 2015, pp. 16-19.

[38] For other examples, in Portuguese, see also ERIC AGOSTINI, *Direito Comparado* (translated by Fernando Couto), Porto: Resjuridica, 1988 or, specifically about Comparative Commercial Law, ANA MARIA PERALTA, *Direito comercial comparado,* Lisboa: AAFDL, 1997, pp. 27-31.

normative realities, relying also on a specific comparative method[39], to which the very nature of the object is not indifferent, while those other auxiliary sciences of Law also have as object the Law, not so much as normative realities, but as cultural or sociological phenomenon. Moreover, Comparative Law is not just a method, even if, in it, we study the proper methods of comparison. A common criticism of many university dissertations around the world is that *"what you are presenting is not Comparative Law, it is an exposition of foreign laws!"* so, much caution is needed to master the proper and appropriate methods and techniques of comparative law.

Thus, the experts in specific branches of legal science, as experts in Banking Law, Criminal Law or Civil Procedure Law, for example, can resort to comparing legal systems and, as long as they do it with rigor and within the canons that Comparative Law postulates, that is, as long as they do it in a scientific way, they also "do" Comparative Law, although in the scope of a complex process, in which they also aim at the dogmatic of the branches and fields in which they work.

And, as LEONE NIGLIA insists, criticizing the more orthodox methods, *«Comparative Law is not about analytical reasoning, but also about engaging with the world: about acknowledgment of law-in-action and law-in-context; about intelligence and interest in the myriad forms and possibilities of reality»*[40], calling to all the legal comparatists to embrace the "real world" inside all legal analysis.

Finally, it can be argued that Comparative Law is a fundamental autonomous branch of the legal science. According to MOURA VICENTE, Comparative Law is the *«the branch of legal science whose object is the Law in its plurality and diversity of cultural expressions and proceeds to the comparative study of these expressions. It might be better to call it Comparison of Rights, as the Germans»*[41], which would also make it clear that we are not dealing with a branch of Law, but the expression "Comparative Law" is rooted in the Portuguese legal language (as in the Italian, French or English ones). It may also be noted, as SANTOS JÚNIOR reiterated, following ZWEIGERT and KÖTZ[42], that Comparative Law translates an intellectual activity which has the Law as its object and comparison as its procedure

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[39] On this topic, see GEOFFREY SAMUEL, *An Introduction to Comparative Law Theory and Method*, Oregon: Hart Publishing, 2014, a work in which the author tries to focus exclusively in comparative law methodology.

[40] Cfr. LEONE NIGLIA, *"Taking Comparative...* p. 426.

[41] See DÁRIO MOURA VICENTE, *Direito Comparado...*, p. 18.

[42] For their approach on the functions and aims of Comparative Law, see KONRAD ZWEIGERT and HEIN KÖTZ, *An Introduction to Comparative Law* (translated by Tony Weir), 3rd ed, Oxford: Clarendon Press, 1998, pp. 13-31.

or method, Comparative Law is a juscientific discipline, devoted to the methodical comparison of the law systems of different states (macrocomparation) or legal institutions of different systems or legal orders (microcomparison), both needed to understand and develop the Law, both nationally and globally.

And so, trying to answer the question which initially inspired this paper, posed in a special issue of the journal *"Comparazione e diritto civile"* – "Who needs comparative law?" – I have to answer, almost naively: everyone.

We all need Comparative Law. Every citizen, as a user, beneficiary, taxpayer, contractor or being sanctioned by laws; but mainly every lawyer who wants to interpret and enforce the law properly. In today's world, I cannot imagine lawyers who are not also comparative lawyers.

Everyone who wants to travel or work abroad, who wants to welcome or help migrants or refugees, who wants to be a legislator, a judge or simply a lawyer who applies the law in an increasingly globalized world. Everyone who likes to understand the world he lives in and think "out of the box", in new, original, creative ways. Those who want to understand the great legal systems, legal families or legal traditions (or whatever you prefer to call them!), Civil Law or Common Law, Islamic Law, Hindu Law, African Law or Chinese Law or even just to those who want to better comprehend their own legal orders, from those that influenced them the most.

In a world affected by migrations and getting smaller by all the transnational contacts that are increasingly facilitated and allowed by technology, what we need more and more is Comparative Law, sweet Comparative Law, almost as the *Supremes* sang in 1968[43]. Comparative Law is likewise a thing that there's just too little of, not just for some, but for everyone. Today we can climb mountains and hillsides to a greater extent, cross oceans and rivers, as if there were no lack of time, but we need to understand each other to better live together and one of the most powerful tools is, and will always be, Comparative Law. So, I call all lawyers to sing together this song: what the world needs now is law, sweet law, no, not just for some, oh but just for everyone. What the world needs now is Comparative Law, sweet Comparative Law.

April 2017

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[43] Cfr. HAL DAVID (lyrics) and BURT BACHARACH (music), "What the World Needs Now Is Love", 1965 popular song, first recorded and made popular by JACKIE DESHANNON. The version by the *Supremes* is vailable online at https://www.youtube.com/watch?v=ibdpD82-V34.