DIFFERENCES BETWEEN CIVIL PROCEDURE IN THE CIVIL LAW AND COMMON LAW SYSTEM AND FIRST STEPS FOR THEIR HARMONIZATION

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ABSTRACT

Each state creates its own civil procedural law, in accordance with the principle of national procedural autonomy. Although in principle this is so, if we analyze the civil procedures of the national legal systems on a macro level, it is undeniable that there are great differences between the civil procedure of the civil law system and the civil procedure of the common law system. Precisely because of this, the subject of analysis of this paper are the basic differences between the civil procedure of the civil law system and in the common law system.

By observing the civil procedures at the macro level, the authors of this paper aim to prove that despite the differences there is a need and possibility for their harmonization. The real proof of this is the joint project of the European Law Institute, the American Law Institute and UNIDROIT for the harmonization of civil procedures through the creation of transnational principles and rules for civil procedures.

Keywords: civil procedure, civil law system, common law system, differences, harmonization.

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Declaration of interest: The authors reported no conflict of interest related to this article.

INTRODUCTION

Civil procedural law will arise as a national branch of law (Couture E. 1958, 5). The reason for this is the triumph of national law over Roman law at the time of the creation of the first national states (XIX century) (René D. 2010, 214-215).

Father of Civil procedural law is Prof. Oskar Bilov with his book "Learning about procedural objections and procedural assumptions", from 1868 (Јаневски А. & Зороска-Камиловска Т. 2009, 1-5). With these book the focus of the study of scientific law (the pandect school and the school of scientific proceduralism) and the legislator will be aimed at the goals, function, structure and principles of the national civil procedure (Ѓорѓиева Д. 2019, 73). So, the civil procedure will arise as a procedure for the protection of civil subjective rights in a situation where subjective rights are violated. Initially, the focus will be on civil-legal relations and disputes that arise in civil-legal relations without a foreign element (Zuleta Puceiro E. 1977, 63).

The national focus on the development of civil procedural law will change in the XX-ty century due to the increasing number of disputes in civil-law relations with a foreign element. With this will start:

- a new awakening of Roman law and the idea of creating an open legal system in the world;

- collapse of national civil procedural law in disputes with a foreign element;

- the need to study foreign law and procedure;

- study of the civil procedure at the macro level in the large civil process systems (civil law and common law system) (Gottwald P. 2005).

1. CIVIL PROCEDURE IN THE WORLD OF COMPARATIVE CIVIL PROCEDURE LAW

If we analyze the national civil procedures in the world on a macro level, a difference can be made between the civil procedure of the civil law system and the civil procedure of the common law system (Cappelletti M. 1987, 1-2). The purpose of comparative civil procedural law is not to determine which civil procedure is best or to favor one civil procedure over another. The aim of comparative civil procedural law is to identify

the differences between civil procedures at the macro level and to create an opportunity for their harmonization.

Basic differences between civil procedure of the civil law system and the civil procedure of the common law system are:

- differences in time of origin and legal schools
- differences in terms of the codification of the civil procedure
- differences in terms of the function of the civil procedure
- differences in the aspect of the organization of the judiciary and the participation of the jury
- differences in terms of the right to legal protection
- differences in terms of sources of law (Chase, O. G. & Walker J. 2010).

1.1. Differences in time of origin and legal schools

The civil procedure in the civil law system will be created by the fusion of the Roman procedure, the old Germanic procedure and the canonical procedure in the moment when they will be merged into the Roman-canonical procedure (Bülow O.V. 1964, 3). Other crutial factors that will have the influence in the creating of comparative civil procedure in the civil law system are:

- reception of the Roman-canonical procedure in the national legislations;
- influence of two dominant European legal schools: the French school of legal proceduralism and the German pandect school (Foces, E. & Sáinz, J.M. 1996, 174-180).

The civil procedure in the common law system will arise as a mechanism that fights against injustice (Martin A. 1905, 2). Roman law will have no influence on its creation. The civil procedure of the common law system is a creation of judicial practice. The foundations of this procedure are found in the royal settlement of individual disputes. This procedure will be result of the fusion of the judicial procedures of common law courts and equity law courts in XIX century.

1.2. Differences in terms of the codification of the civil procedure

Civil procedural law in the civil law system is regulated in the national laws of the states. In some countries it has been codified, in some it is in the process of codification (Coing H. 1995, 169-182). This means that exsist special laws for civil procedure. Legal and historical basis of this begins with Institutional systematization of Roman law from the II-nd century which will divide the entire law into law that applies to persons, law that applies to things and law that applies to lawsuits (actions). In the XIX century this idea will revived in the Pandectic systematization of the law an will reopen possibility for the creation of a single European civil procedure code (dream since the time of Napoleon Bonaparta).

Civil procedural law in the common law system is not regulated in the national laws of the states. It is not codified in any country. The reason for this are: non-existence of laws but practical rules for conducting court proceedings, weakness of the legislative authority vis-à-vis power of the judicial authority and the minimal influence of legal schools in the shaping of laws (René D. 2010, 220).

1.3. Differences in terms of the function of the civil procedure

The civil procedure in the civil law system is a mechanism that is activated if there is a violation of the substantive civil law violation of a civil subjective right or violation of legal interest. In the civil law system first is material civil law and after that is procedural civil law. If there is a violation of subjective right or material norm in this situation you go to the court and seek legal protection of the state. Civil procedure have a function to protect material law in situation if it is violeted from the another person (Јаневски А. & Зороска-Камиловска Т. 2009, 1-2).

Civil procedure in the common law system is a mechanism that is activated if there is a writ (actio) that protects a specific wrong. At the beginning of development of common law there were the forms through which protection is given before courts. So hire did not exsist the concept of subjective right and interest that exsist bigore the civil procedure. In the procedural culture in common law system must be a civil wrong – wrong and not violeted subjective right or interes (Blackstone W. 2016).

1.4. Differences in the aspect of the organization of the judiciary and the participation of the jury

The judiciary in Europe is organized in a pyramidal fashion (Flores, Á. & Elvia L. 220-222). The inspiration is canon law and the organization of ecclesiastical authority. In the most of the countries that follow civil law tradiotion there are basic, appellate and supreme courts. The organisation of the court in civil law system have an impact of the structure of civil procedure. So there are civil procedure in first instance, civil procedure in the second instance and, civil procedure in the third instance.

Jury trial in civil matters does not exist in countries that belong of civil law system. This means that a judge decides both factual and legal issues in the case.

The Judiciary in the Anglo-American States will initially be horizontally arranged. At the beginnings only the royal Westminster courts existed and there were minimum number of appeals of first instance decisions (Robinson E. N. 1951, 30-31).

A jury trial is common in civil procedure in the common law system. The jury decides on the factual issues with werdict, and the judge on the legal issues with decision.

1.5.Differences in terms of the right to legal protection

In the civil law system, the law precedes the action (lawsuit). The ratio for this is the system of subjective rights that will be created in the liberal state (Savigny F.K.v. 1879, 9-10). In the civil law system first is the right – after that is violation of the right and in the end is action (lawsuit). This is so because substantive civil law creates the procedural civil law and because the procedural law protects a specific area of the substantive law.

In the common law system, the lawsuit precedes the law - a system of actions (lawsuits). In the common law system first is the action (writ) and after that is the law. In the common law system procedural law will create the substantive law (Pérez Ragone A.J. 2007, 333 – 356).

1.6. Differences in terms of sources of law

In the legal culture of the civil law the system of law is closed. Legal system is created by the legislator with help of proffesors law. For that reason the court decision is not formal source of law. The court decision is only factical source of law (Eslami P. 243-265).

In the common law system, the court decision is the formal source of law. Law is not a closed system, but a dynamic system that is constantly changing judicial practice (case law).

2. HARMONIZATION OF CIVIL PROCEDURE IN THE BIG LEGAL SYSTEMS

Harmonisation can be result of national law reform, result of competition between procedural systems and harmonisation as a result of international harmonisation projects (Van Rhee, 2011, 39-63). When we are speaking about harmonization result of competition between procedural systems we are in the fild of comparative civil procedural law. Starting points of this harmonization have to be:

- fusion of the positions of the scientific law, the legislator and the judicial practice for the function of the civil procedure;

- creation of written rules for civil procedure in common law;

- understanding the meaning of civil procedural law and its function to protect substantive law;

- abandonment of the jury in civil proceedings;

- trial by a single judge in first instance civil disputes;

- need to consider the right to legal protection from a material aspect and from a formal aspect;

- understanding the need for the court decision to be a formal source of law in Europe as well (for example, the case law of the European Court of Human Rights).

As we can see, comparative civil procedural law is a scientific discipline in its infancy that should be approached critically. This is because comparative studies of civil procedure and law at the macro level can potentially label reciprocal differences between "us" and "them", the

European-continental (civil law) and the Anglo-American (common law) system, the center and the periphery of civil procedural law, the East and the West, which is unacceptable (Gottwald P. 2005, 227). Hence, the goal of comparative civil procedural law should not be the selection of a superior best (national) civil procedural procedure or a competition between civil procedure (analyzed at the macro level) of one legal system versus another, but rather the perception of the differences between civil procedures in large civil legal systems at the macro level in order to seek opportunities for their harmonization.

The harmonization of civil procedures and law (analyzed at the macro level) should lead to diffusionalism by finding the best procedural solutions. With this, the science of comparative civil procedural law would gain not only theoretical but also practical significance, i.e. from a purely ideological mechanism it would turn into a detector of dysfunctional procedural solutions and problems of judicial practice. This alone would ultimately lead to the improvement of national civil procedural systems for the protection of civil subjective rights and interests (in the civil law system) or national judicial systems for protection against wrongdoing (in the common law system).

CONCLUSION

The science of comparative civil procedural law, like the École de la Vérité and a new intellectual challenge to the great schools of law, has the ambition to bring traditional civil procedure into the modern etherization of the legal order. All this is because civil procedure, which is not open to ideas beyond national borders, fails to follow modern comparative-national and international trends.

In this context, comparative studies of civil procedure pro futuro are expected to serve as a means of transnationalizing procedural law, and thus of law in general.

By observing the differences that exist between the civil law and the common law system, comparative civil procedural law teaches how these differences can be most easily overcome and where reform processes should begin in accordance with the needs of practice of the courts.

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