LIÇÕES

CONVERGENCE OF CIVIL LAW AND COMMON LAW MODELS OF LEGAL SYSTEM

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In recent years' scholarly debate an increased attention has been devoted to observe the increasing similarities, rather than the differences, between the *civil law* and the *common law* models of legal system.

The term most frequently used to indicate this increase in similarity between the models is the one of *convergence*.

A *model* of legal system is a theoretical structure of it, so to speak. Comparative lawyers prefer now to use this term instead of making recourse to the term "family" (of *civil law*, *common law*, etc.), as the circulation and interchange of legal models makes more and more difficult to find an actual legal system which is purely *common law*, or a purely *civil law* one, as it used to be the case, say, 50 years ago.

Thus, it is now preferred to use as a reference the abstract model of a *common law* legal system (normally intended as corresponding to the traditional English legal system) and of a *civil law* legal system (corresponding to French and/or German legal systems as they developed after their respective codifications).

These models are intended as *abstract structures*, each reconstructed with

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the peculiar features of the historical legal systems which typically they are identified with.

This *convergence*, so widely talked about:

is real, as features of the two models are increasingly undergoing changes, towards similar outcomes; and/or as features of both models are being interchanged between different legal systems originally belonging to one or to the other family (that is, systems having been founded at their origin on one of the two historical models of legal system).

Is also apparent, as we are now seeing better into the two families and the underlying models, discovering now original or very old similarities which had so far gone unnoticed.

Is, finally, becoming more apparent as we are now seeing the two models in comparison with others, too, from a much wider perspective.

We'll look into each of these issues. It is impossible, of course, to carry out an in-depth analysis of the subject within the scope of this writing, which is intended to provide just a sketchy view of current developments, and to indicate some of the areas or topics where these developments are remarkably visible.

1. The convergence is real

The classical and main distinction between the *common law* and the *civil law* legal systems, the one which historically has been the main test for classification of one given legal systems into one or the other of the two "families" – if a little old-fashioned and largely inaccurate today – is the one emphasizing the foundation of the former on the absence of a comprehensive, general and abstract body of rules, and on the *stare decisis* principle, that is, the binding force of judicial precedents; and of the latter on the presence of abstract and general rules that the court shall apply to the cases concretely dealt with – the precedent judicial decisions in similar cases being theoretically irrelevant.

Concretely, in this traditional partition the English legal system is seen as a system with comparatively few statutes and legislative acts, restrictively construed and applied by the courts, like islands floating on a sea of case law constituting the main body of the legal system. On the other side, *civil law* legal systems specificity is seen in the presence of codes (civil, commercial, civil procedure codes, and so on), along with other special statutes for specific areas or subject; codes and statutes rafted with general and more abstract provisions, which in principle the courts are supposed to apply to their cases without any creativity, just acting as *la bouche de la loi*, merely declaring what the law in the codes and statutes provided in relation to any specific case they dealt with.

In the course of the twentieth century, especially in the second part of it, this very simple scheme started showing some inadequacies.

England itself is nowadays a country with a very busy parliament, and thousands of legislative acts in force, covering all aspects of life.

Moreover, a progressively increasing penetration of some continental legal models is evident in English legislation, with the final result of legislative acts becoming more general, wide and abstract in contents.

This evolution can be observed comparing, for instance, the 1893 *Sale of Goods Act* – an act already covering a wide area of law and posing general rules, if punctual enough in drafting – to the *Sale of Goods Act* of 1979, much closer, if still decidedly English-tasting, to the general provisions style which can be found on the European continent.

Another example of this trend is set by the entry into force in England, on 2 October 2000, of the Human Rights Act of 1998, enacted due to the United Kingdom's obligation under the European Union Treaties, with the effect of directly enforcing in England the European Convention on Human Rights signed in Rome in 1950. This European Convention is characterized by a typical, continental "style" of individuation of the protected rights, and related remedies; this Act has now force of law in the United Kingdom. The English courts will have to apply it as the general law in the subject matter, thus having to deal with abstract and general provisions and having to develop and construe them with a different attitude, compared to their traditional way of interpreting statutes.

Another recent and important development in this convergence of the English legal system towards continental models are the English new Civil Procedure Rules of 1998, effective since 1999, enacted following extensive debates and a couple of very well-known State-commissioned reports by Lord Woolf [1], on the shortcomings of the old *common law* procedure. The Parliament eventually adopted, following Lord Woolf's indications, a model of civil trial clearly belonging to the *civil law* tradition, especially because of the "revolutionary" adoption of the principle of "case management by the court". According to this principle the development of cases is subtracted from the parties, as it was in a most typical *common law* feature of the rules of litigation, shifting towards the continental approach and making the court responsible for the management of the case – basically charging the court with the functions of the continental *juge d'instruction* (*juiz instrutor, giudice istruttore*).

In the United States of America, even clearer is the distance of the system from the classic model constituted by the historical English *common law* system: fundamental features of the *common law* system are of course present in the US legal system, as it can be said of the *stare decisis* principle; yet, it is undisputable that that system, today, is also characterized by elements that (also) belong to the *civil law* model and traditions.

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1 Lord WOOLF, *Access to Justice, Interim Report*, London, 1995; and *Access to Justice, Final Report*, London, 1996.

These elements are not few and not unimportant: we think of course of the existence of a written Constitution, with general and wide precepts, much similar to many continental Constitutions, with a considerable amount of case law developing the constitutional law based on that all-important, yet very short and simple, legislative document.

We also consider the existence in the U.S. of three different levels of written legislation, covering, at the different constitutional, federal and state levels, all areas of law, with a huge mass of legislative acts to be applied by the courts often made of general and abstract rules, especially at the constitutional and federal levels.

Also part of the US legislation are the civil codes of dozens of States of the Union, including important ones like California. These codes are exactly "ordinary" civil codes in appearance and contents, even if they are considered more declaratory in character than generally innovative of the law, as it happens in civil law countries: this means that they have no more authority or binding force than precedents, and can even be superseded by contrary judicial decisions, which then becomes case law. Anyway, these codes exist, and the American lawyer is getting used to deal with them, as increases his attitude towards legal reasoning based on general and abstract rules.

Another peculiar feature of the US legal system, which makes it somewhat distant from the English legal system, is the importance of the Faculties of Law, and their core role in both developing a doctrinal, "non-statual", so to speak, US national law, and in making academic doctrines, legal research and scholarly writing very influential – far more than in England, anyway – in the legal system.

American faculties, in competition among them, concerned with enabling their graduates to practice anywhere in the U.S. in order to avoid being characterized as "localized" institutions, and to be able to attract the best students nationwide, have developed a very peculiar method for teaching the U.S. law, which is taught, with respect to non-constitutional, non-federal – related areas of law, as a "national" law, instead of being referred to any of the different State laws.

This "national" law is basically a system of principles and rules more or less general, applicable in all or in the majority of the different U.S. State jurisdictions, which is extrapolated by the 51 different jurisdictions and which cannot avoid being characterized by some degree of abstraction. Against this "national" principles the different State laws and rules are then confronted, to see how they fit in the more general picture, or how they are at odds with it – it is easy to suggest some possible analogy with the relation that existed in the European *ius commune* vs. *ius proprium* dichotomy [2], in the middle ages and early modern era.

2 On this distinction see further.

This very importance of academic factor, which has *de facto* produced a remarkable body of valid legal principles of American law, of academic origin, which influences the concrete outcomes of the positive rules, makes the American model very different from his historical ancestor, the English *common law.*

U.S. legal scholars also do develop, more and more, in addition to general legal principles, specific doctrines for many areas of the law, as it is evident, for instance, with the existence of the *Restatements of Law*. These are doctrinal expositions of rules, systemized in a coherent and organic fashion, as extrapolated from case law; they have been compiled since as early as the first half of the twentieth century by the American Law Institute, a private institution of scholars.

The *Restatements* are somewhat similar to "codes" of the different subjects they deal with (there are *Restatements* on Contracts, Torts, Trust, Agency, Conflicts of Law, Property, Judgment, Foreign Relations; some of them have been revised and published in more recent times, and are known as *the 2nd Restatement on Contracts*, *on Agency*, and so on); they are widely used in practice, for study and reference as well as invoked in the courts by the lawyers and mentioned in judicial decisions.

To sum up, the legal system of the U.S. is more and more described by comparative legal scholars as a system that, notwithstanding the fact of having been originated in the *common law* tradition, has shifted towards a *mixed model*, between the two classical ones of *common law* and *civil law*.

It is finally to be pointed out that a high degree of "statutorisation", with statutes covering wider and wider areas and written rules of law becoming increasingly wide in scope, general and abstract in their formulation, is clearly visible in all *common law* tradition countries, like, say, Canada, New Zealand or Australia: in the latter case[3], for instance, the whole property law is "codified" by statutes, as is the whole body of administrative law; even in contract law, some general and abstract statutory rules have become pivotal in the courts, like the ones establishing general principles of good faith, fair dealing, or disciplining the *culpa in contrahendo*; rules which obviously need to be interpreted with conceptual tools that are traditionally part of the civil lawyer's background.

On the other side, in *civil law* tradition countries, increased importance is laid upon the study of case law, even in the academic speculation, with an attention to the decision of the courts which is today no smaller than it is in any *common law* country.

If such an attention has always existed among practitioners (lawyers and judges), in the last part of the twentieth century even the academic communities of *civil law* countries have taken notice of the importance of case law. Studies,

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3 The examples about the Australian trend are taken from P.FINN, *The Common Law in the World: the Australian Experience*, Rome, 2001.

books and journals flourished in relation with case law, and academic teaching has moved from the traditional usage of doctrinal handbooks and monographs to the additional usage of case law materials.

Moreover: with social and economic changes developing faster and faster, the very importance of dogmatism – which allowed the developing of written law by the exclusive means of logical, abstract reasoning based on the legal texts – has sharply decreased, in favor of a greater adherence to the diverse necessities of the society, by means of different methods of legal development.

These new methods include: the comparative approach to extrapolate legal doctrines from foreign legal systems; the construction of specific doctrines based on the necessities of specific sectors of law, which are more appropriated than the ones descending from a purely dogmatic analysis; the consolidation of existing case law into legal doctrines.

These phenomena brought about a fragmentation of the law (an Italian scholar spoke of "de-codification" [4]), moving the *civil law* model of legal system away from its monolithic, dogmatic traditions somewhat towards its *common law* counterpart. Additional momentum to fragmentation is given by the augmented degree of specificity of many statutes, narrower and narrower in scope and more and more specialized in contents.

In the recent developments of *civil law* cannot be forgotten the example set by the recent Dutch Civil Code of 1992: this code is characterized by "open" rules, implying "open-ended" solutions, for further developments of the law by the activity of the Courts. Also remarkable in it, is the absence of a preset hierarchy of the different sources of law (written legislation, customs, equitable solutions). The comparative research behind it is proved by its reception of institutions typically belonging to *common law* tradition (e.g., in contract law, anticipatory breach, misrepresentation and undue influence) and even to transnational uniform law (the 1964 and 1980 Conventions on the International Sales of Goods have influenced not only the discipline of sale, but the very general principles of contract law, with respect to the formation of contract and to non-performance). The novelties are so many and such that some scholars have claimed the new Dutch legal system to have moved to a new position, between *civil law* and *common law* models.

To sum up, we have noticed that the most recent among the continental Europe civil codes and the most influential among the *common law* tradition legal systems are both being described by comparative lawyers as representatives of an intermediate, eclectic model, positioned between the two well-known historical ones; they could be added to the catalog of the so-called "mixed systems", which traditionally includes countries like Louisiana, Quebec, Israel,

4 N. IRTI, *L'età della decodificazione*, Milan, 1979 (2nd ed. 1999).

the Philippines, South Africa, and some others.

In the long term, even the two abstract models of *civil law* and *common law* might and probably will be revised, when the two old ones become out of practical significance other than for historical purposes; in that case, new models will be developed in order to have appropriate conceptual tools to describe the reality.

The evolution of western legal systems along converging paths will undoubtedly be facilitated by a number of factors, the first being, of course, the social and economic homogeneity of the majority of the Countries representing the two different models of legal systems.

One other very important factor will be the presence of the European Union, of which the U.K. is a member State, with its common, supranational legislature, creating rules that are binding for the States of the Union, and more and more frequently directly applicable in all the member States; with its institutions involved in the development of a European legislation (which have gone as far as having established a commission for the preparation of a European civil code); and with its judicature, issuing decisions directly enforceable in the different jurisdictions.

Finally, even legal ideas and doctrines are now freely circulating and being accepted regardless of their municipal origin: scholars have expanded their horizons far beyond their national boundaries; the western legal theories are becoming more and more integrated and also, in an increasing number of cases, accepted by different jurisdictions' courts.

This strong intellectual affinity of the scholarly communities within all western countries brings about as a result a wide circulation of legal ideas and models, for all areas of law, regardless of their being originated in *civil* or *common law* jurisdiction.

Just very few examples of this phenomenon, among the many possible ones, could be:

- The new Italian criminal procedure code, enacted in 1988, which reproduces an accusatory model of trial which is derived from the *common law* tradition;
- the reverse process occurred in the UK with respect to the civil procedure.

The wide spreading of legislation on *trusts*, due its flexibility and usefulness in modern business transactions, in civil law countries, like in several Latin-American ones (where is possible to find a wide number countries having legal institution with at least some of the features of the common law trust, ranging from more basic and old legislations to the more sophisticated, *common law*-like recent *trust* laws of Venezuela, Panama or Ecuador), Cyprus, Israel, and others.

Moreover, even in Countries where *trusts* are not part of the local law and tradition, some international agreements of private international law give recognizance to foreign law *trusts*; this happens, for instance, in Italy, according to the Hague Convention on the Law Applicable to Trusts of 1985. A *trusts* can now be freely established in Italy, with the peculiarity that a foreign applicable law disciplining it needs to be found for its validity – but even the mere decision of the parties on the applicability of a given law will suffice. This recognizance given to *trusts* will of course improve the practical circulation of the model, and spread it in jurisdictions were it would have been unthinkable to see it at work as little as 30 years ago.

The penetration in *common law* countries of continental principles and the very idea of Administrative Law, with its fundamental concepts (of French and Italian origin) of *legitimate interest* as opposed to *subjective right*, and of a different, specialized set of courts and procedures, at the base of the administrative law system[5].

The creation of trans or supra-national principles for some areas of law, where the principles are extrapolated by different legal traditions and harmonically merged together, aimed at fostering the convergence between the different legal systems and/or at unifying them. Are examples of this attitude the *Principles of European Contract Law*[6], individuated by the comparison of the different contract laws of EU countries; or the many research and study initiatives for the creation of a EU civil code and/or for the unification of several areas of European private law, or for the recognition of the common features of it[7], some of which are patronized or supported by the EU. Another example of such a trend are the UNIDROIT *Principles of International Commercial Contracts*[8], the aims of which range from being a tool for the interpretation of

5 For more details see, for English law: Lord DIPLOCK, *Judicial Control of Government*, in *Malayan Law Journal*, 1979, 1; P.P.CRAIG, *Administrative Law*, London, 1983; J.BELL, *Droit public et droit privé: une nouvelle distinction en droit anglais (l'arret O'Reilly and Mackman: un arret Blanco?)*, in *Revue française de droit administratif*, 1985, 3, 399. For the U.S. law: R. B.STEWART, *The Reformation of American Administrative Law*, in *Harvard Law Review*, 1975, 88, 1670; L.ROUBAN, *La réforme des* administrative law judges *aux Etats-Unis: vers la constitution d'un grand corps?*, in *Revue du droit public*, 1985, 4, 1075.

6 Often referred to as "the Lando principles", after the name of the Danish Professor Ole Lando, who led the commission that elaborated them.

7 Like the ongoing research project *The Common Core of European Private Law*, conducted in the University of Trento, Italy, under the editorship of Ugo Mattei and Mauro Bussani, which has been involving scholars from all western world since 1995.

8 The elaboration of the UNIDROIT Principles has been completed in 1994 by a commission of scholars originating in more than 20 countries, representing all the different legal traditions, whose work has been directed and coordinated by Prof. M.J.Bonell.

international conventions to being adopted as the applicable law for international commercial contracts, and more[9].

The developing of new areas of law, unknown at the origins of both models, which are being developed along common lines in countries belonging to both traditions, like human rights law, antitrust law, environmental law, and so on.

The "statutorisation" and the high sophistication of law *in all western countries*, be them *civil law*, *common law* or mixed system countries, and the circulation of legal doctrines make the original differences less and less significant, when compared to the increasing recent similarities in principles and rules, and in the concrete outcomes of their application.

2. The convergence appears as the observation gets more accurate and complete

This aspect of the convergence is undeniable, as long as we observe the two traditions more detachedly – especially the *civil law* one.

In the historical model of continental law (the *ius commune* legal system), before the codifications took place since the end of the 18th – beginning of 19th century, no codes existed, at least in the modern sense. The law used to be developed by the scholars, often only nominally departing from the ancient doctrines collected in the Justinian's *Digest*.

In that medieval legal system the law issued by the territorial, political authority (*ius proprium*) could only be special law, against a legal landscape of general *ius commune* which was considered to be somehow immanent in the reality of the legal world.

Research conducted during the second half of the twentieth century, especially by the Italian scholar Gino Gorla[10], showed that, in addition to the circulation of legal doctrines due to scholarly writings, scholarly doctrines and case law also circulated among the several supreme courts of many different States of pre-unity Italy and Europe; and that precedent decisions of the supreme courts of different States, applying the *ius commune* as well as the local municipal laws, were *de facto* considered not differently from how the case law is still considered in *common law* countries tradition; in practice, Gorla discovered that the *convergence* was already there at the dawn of modern age.

The continental phenomenon of the codification of civil law, at the

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9 For more, see M.J.BONELL, *An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts,* New York, 2nd ed. 1997.

10 See, for instance, his several essays collected in G.GORLA, *Diritto Comparato e Diritto Comune Europeo*, Milan, 1981, and especially from chapter 20 on (pages 540 and following ones).

beginning of the nineteenth century, changed the *civil law* scenario dramatically.

The legal theories and ideologies come with the Enlightenment age, sweepingly imposed with the French revolution and consolidated under Napoleon I, affirmed the dogma of comprehensivity of State law, and of the code as its supreme and general expression, subject to interpretation and application according to national criteria.

The codifications of Europe brought along the abrogation – theorized, and sometimes clearly expressed in a black-letter rule – of the preexisting law, and the formal mortification of the importance of scholars, judges, cases and case law in the development of the system.

This fundamental turn in continental legal ideology is still influencing the *civil law* world; comparative law studies, which started in the late nineteenth century and flourished in the twentieth, were essentially focused on the differences between *civil* an *common law* systems, stressing the existence of codes as the main feature of civil law – disregarding the fact that *civil law* did exist long before the codification phenomenon.

This attitude made for long time forget the remarkable similarities, and *ante litteram* convergences, between the *common law* and the *ius commune* models; similarities which used to be addressed to, by the scholars of some decades ago, with just some quick remark – often more out of academic amusement than in an attempt to further develop the topic – to the similarities between the classic Roman law and the origins of *common law* tradition, or between the English *equity* and Canon law and procedure, as can easily be found in many comparative law books of the twentieth century.

Of course it could be objected that *civil law*, by definition and/or by its very nature, *is* exactly the model of legal system that is necessarily based on a codification; and it could be considered that the preceding continental legal system of the *ius commune* represented a completely different model. In this case, we have to consider the model of code-based continental law as a sharp "deviation", as one scholar put it [11], of continental legal systems from their previous path of smoother, continuous and surely more *converging* (towards *common law*) evolution.

As the "deviation" seems to aim towards the descending curve of its living cycle, we are now facilitated in noticing similarities between *common* and *civil law*.

It is certain that the two main western legal traditions have some very noticeable diversities, due to their different historical development. Yet, some fundamental features related to the way law is created, developed and

11 J.H.MERRYMAN, "*The French Deviation*", in *Scritti in Onore di Rodolfo Sacco*, Milano, 1995; the title of the article is, in turn, a quotation from P.DAWSON, *The Oracles of Law*, 1968, Ch. IV.

administered are similar. This is becoming more and more evident, as the dogmas of comprehensivity of the codified national law and of the necessary nationality of its interpretation slowly lose their grip within the comparative lawyers' community.

Nowadays, the mass of cases constituting the *common law* is being studied, systematized and developed into legal doctrines, extrapolated from the case law by common lawyers and scholars; against this landscape a more and more imposing body of statutory law tends to cover all aspects of life and law: not very differently from *civil law* contexts, after all; except that the *civil law* landscape is formed mainly by general and abstract principles, of which the codes are one peculiar expression, made clear in specific cases by the decision of the courts, and continuously developed by lawyers and scholars.

With respect to the historic similarities between the two traditions before the codification age, it is also interesting to remark, as a different hint to help seeing the *convergence*, that in Latin America there has long been a more open conception of the legal system, and that the above mentioned dogma of the comprehensivity of the codified law has never been deeply rooted – or, at least, it did not prevail in the same overwhelming way as it happened in Europe.

There are comparative lawyers who identify a specific "family" of legal systems in the Latin American or Ibero-American area, founded precisely on this existence of a common background for all the municipal legal systems and on the common and unrestricted circulation of legal doctrines within all the continent's countries; all based on the common heritage of Roman law and medieval *ius commune* which, according to some, *still forms the basic layer of the legal system*. This movement of thought existing in Latin America, especially in Brazil and Argentina, as well as in Italy and Spain, describes the law of Latin American countries as integrated in just one legal system of *derecho/direito común latinoamericano* – thus denying one of the axioms of modern post-codification *civil law*.

It is even affirmed, with considerable research undergoing to support this view, that the system is no other one than the very same legal system which, based on the Roman law consolidated by Justinian, developed in the middle ages into the historical system of the European *ius commune*, still living today in Latin America.

As we find, with respect to an entire continent belonging to the *civil law* world, that the conception of the legal system as based on the codes and written laws only is challenged, in favor of ideas much closer to the model of the *ius commune*, we re-discover, so to speak, more similarities between the two traditions of *civil* and *common law*.

Remembering how much closer and converging *ius commune* and *common law* have been to each other in the centuries immediately preceding the codification age, this Latin-American legal doctrines contribute to consolidate

the idea of the "French deviation", and to relativise the idea of comprehensivity of the code as being not fundamental for *civil law*, in an historical perspective. This also implies a re-assessment of the abstract model of *civil law* legal system, which will converge to some extent towards the *common law* one; maybe until, in perspective, both models possibly merge into the one "western" model, which would probably resemble to some extent to the one already experimented for decades, or centuries, in places like South Africa, Louisiana, Israel and others.

However, and to sum up, be the principles in a code, in legal doctrines, or in the mass of precedent cases' decisions, it is undeniable that the principles are getting closer in the different western legal systems; as are getting closer the specific (and many) rules of statutory law; as are also getting closer the outcomes of the rules and principles through the judicial process. The importance of case law and scholarly debate are also being equalized, in the two traditions, in spite of the historical differences in the origins.

3. Convergence appears as we observe from further away and/or from a wider perspective

In the 50's, René David classified the legal systems of the world in four "families": *civil law*, *common law*, socialist countries, *others*.

That author, whose work is rightly considered a milestone in comparative law, shared the western, euro-centric vision of the world of his times: the only law in a "true" sense was the western one, subdivided in the two well-known families of *civil law* and *common law*; the socialist countries were a reality he could not possibly overlook, due to their homogeneity, their proximity to the western world and their having been being part of it before becoming socialist countries, and their political importance.

In the fourth family fell all the legal systems that could not fit into any of the other three, then putting together Islamic, Indian, Chinese, Japanese Law, African cultures (especially the latter, not even considered as "legal systems"). Still in 1992, in their world-famous comparative law handbook, Zweigert and Koetz kept the basic classification roughly similar.

The euro-centric perspective that affected comparative law studies until very few years ago is now gradually being abandoned. The world has changed, as new demographic, political and economic powers are on the scene; the increased interest in comparative law research and studies has also disseminated and improved the knowledge of different legal traditions, even of minor political realities. The classifications of legal systems into families is not of much interest anymore, to many comparative lawyers; their main field of study and research is now the circulation of legal models (of entire legal systems as well as of small portions of them) among the different jurisdictions.

Legal comparison moved from the David "families" to more modern conceptions and classifications, giving more attention to the different legal traditions and systems of different parts of the world, so completely different from the ones that European, euro-centric lawyers used to deal with.

Peculiarities that might even change the very basic conceptions of law as it is meant in western tradition, and that make western legal systems, be *civil law* or *common law* their origin, seem much more similar to one another rather than different – when compared with the different legal conceptions lying behind the legal traditions of, for instance, China, Japan, India, Islam, East Asia, the many African peoples, and so forth.

If we compare western legal systems to other experiences, we can notice that common features of western law, unmatched elsewhere, are: – the importance of law as the main way of preventing or resolving conflicts and creating social order, with preference to political, social or other mechanisms; – the presence of a body of rules at least theoretically independent and autonomous from other systems producing rules of behavior (like religious, moral, philosophical, social or political ones); – the presence of public bodies having the task of providing the legal rules, different from the persons and bodies in charge of their application; – the presence of a community of technicians that studies and develops the rules according only to legal criteria; – the generality and anteriority of the rules, with respect to the actual, specific cases they shall discipline; – the administration of the law rules by means of a complex machinery, also founded on an autonomous set of rules, manned by specialized technicians (judges and lawyers) who receive a technical formation in order to be able to the task; – the nature of third party that the judge shall have with respect to the parties.

All these features, together with the basic homogeneity of the societies were they apply, and the similarities in legal principles, rules and outcomes, make the western legal systems very similar among them, besides the existing differences in traditions; thus making these systems rightly considerable as one homogeneous group under the common label of the western legal tradition.

All other experiences (we have to extend the meaning of "legal system", to include any system of rules that concretely disciplines the social order) miss one or more of the above features, and have of course others; giving, for instance, relevance to different factors like politics and policy (as in China and other socialist countries), or to religious principles (as it happens with Islamic and Hebrew laws), or to traditional mechanisms, rules and institutions for providing rules of behavior and solutions to conflicts (as it happens in many African or Asian cultures, including Japan; and, largely, as it happened in China before 1949 – with the preeminence of the social rules of behavior, derived from Confucian philosophy, expressed by the term *li*, which were preeminent even with respect to the *fa*, the written laws of the State).

It has been proposed [12] to focus, in cataloguing the different legal systems of the world, on the different importance that in every single system is given to the three different mentioned factors, of the rule of law (as a synthesis of what has been said about the features of the western legal tradition), of the preeminence of politics and policy, and/or, finally, of the preeminence of the rule of tradition (also including in this term religious and philosophical influences).

It is obvious that a system belonging completely and solely to the rule of law, or to the rule of tradition, or to the rule of politics, probably does not exist. In the concrete functioning of every legal system in the world probably all the three mentioned factors play some role; the differences will be appreciated in "measuring", so to speak, and comparing the different influences of the mentioned principles in the different legal systems, in order to find similarities and create classifications.

Of course this method is just one of the many possible ones, for cataloguing the legal systems; every possible alternative method can of course be a tool of analysis for understanding reality, and prove effective if it is appropriately conceived.

But, if we keep on using the old classifications of René David, we may conclude that the social order in France and, say, Ethiopia are similar, as the latter too has a codified *civil law* system inspired in the *Code Napoléon*; or that the society in Berlin is organized in the same way as in Tokyo, because Germany and Japan share the same civil code; or that life in England is similar to life in Belize, as they are both ruled by the *common law*. All these assumptions are obviously wrong; yet, this is what we get if we think it proper to look at the diverse legal realities of the world with a strict euro-centric approach, disregarding all the diverse factors that influence the reality of life and law (in the broad sense of rules of the social order) in different contexts.

The above suggested method can be validated, as it gives some insight into aspects that have so far generally been overlooked, in comparative law studies. It can be used along with other classifications and tools for analysis; the use of this additional tool will probably be more useful than merely focusing on the presence or absence of a *civil code* or of the principle of *stare decisis*.

This method of analysis has the merit of giving relevance to the different ways of creating a social organization that have been developed around the (non-western) world; and makes clearer the substantial homogeneity – *convergence*, if we like – of the two main western models of legal system.

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12 U.MATTEI, *Verso una tripartizione non eurocentrica dei sistemi giuridici*, in *Scintillae Iuris*, studi in memoria di Gino Gorla, Milano, 1994, 775.