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HOW MIXED MUST A MIXED SYSTEM BE?

Abstract

The paper deals with the notion of 'mixed' legal systems, especially with respect to the idea that 'mixed' legal systems could constitute a third legal family in comparative law taxonomies. It is submitted that this classificatory scheme is not viable, due to the complexity of present legal world, certainly featuring more than two accepted legal families. New ways to classify legal systems for comparative lawyers are explored in this paper. The 'family tree' approach is discussed, and the author observes that both 'families' and 'family trees' approaches are based on different aspects of some fundamental truth, one that could be lost by disregarding one of the mentioned approaches in favour of the other.

The complexity of present legal world is such that, while the 'mixed legal systems' in the classical sense may still be a usable label to describe phenomena belonging to the western legal tradition, many other classifications can be devised, based on different elements such as the functionality of multi-traditional legal environments, the identification of the driving societal forces affecting the legal mechanisms and their outcomes, or the geopolitical collocation of jurisdictions to be classified.

The author's conclusion is that viable, satisfactory classifications for today's comparative lawyer can only hail, probably, from a complex grid of different classificatory schemes, each one revealing some part of the truth.

Introduction

'Mixed Systems': a definition based on the perception of the legal world as described by René David with his 'legal families' in the 1960s[1], to a large extent laying on the implication that *real* law, and a *proper* legal system could only be conceived according to one of the two western traditions of civil law and common law. David's world legal map was mostly covered by these two western traditions. It was then completed with the socialist legal systems, hard to miss or disregard in cold-war Europe, and with the heterogeneous family of 'the others' – including all those human realities that had not been lucky enough to experience, if not marginally, the 'real law' as it had happened in the Western world with its two legal families[2].

[1] David, R (1964), *Les grands systèmes de droit contemporains*, Paris.

[2] David's table of contents in the Italian translation of the 7th edition (1978), translated by Sacco, R (1980), *I grandi sistemi giuridici contemporanei*, Cedam, Padova, is revealing: pages 27-130 are devoted to the civil law tradition, pages 271-398 to the common law one, pages

David did not create a partition in his classification labeled 'mixed legal systems'; he rather mentioned incidentally those jurisdictions where the accidents of history produced a mixed situation, between the two western legal traditions[3]; and also used the term 'mixed' with reference to western/non-western mixtures[4]. A similar use has been made by Zweigert and Kötz of the term 'hybrid', to indicate those jurisdictions not falling precisely and exclusively within one of the groups they identified[5].

The markedly euro-centric approach in classical comparative law is proved by the amount of pages allocated to western and non-western legal systems in western books of comparative law; and also by the fact that the 'mixed'/'hybrid' adjectives, used by David and Zweigert and Kötz with their common, general meaning, became eventually a classificatory label used for mixtures of Western traditions only[6]. The usual catalogue includes Quebec, Louisiana, Scotland, South Africa, the Philippines, Sri Lanka. Besides, it would not make sense to create a classificatory category of 'mixed' legal systems (which was not in David's or Zweigert and Kötz's intentions, I dare say) including together Puerto Rico and China, as it has been pointed out.[7]

That label used to indicate jurisdictions enjoying a high specificity within the Western legal tradition (WLT), which is not so high anymore.

Many jurisdictions are becoming more and more 'mixed', in David's general sense, due to the intense circulation of legal models. Especially since the second half of the 20th century the two main western legal traditions seem to converge towards similar outcomes, beyond the original facts, now being increasingly recognised, of a common-law-style approach in the works of several continental high courts before the codification era,[8] and of the importance of Roman/civil and Canon laws as components of the original English common law tradition.[9]

It is also to be considered that the most prominent of the common law countries (the US) and one of the civil law jurisdictions most advanced in legal terms (the Netherlands, especially after the 1992 Civil Code) are already considered by some as

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131-270 to the socialist countries, and pages 399-509 to the *autre systèmes*, including Islamic Law, Hindu and Indian law, Chinese and Japanese laws, laws of Africa and Madagascar. A similar subdivision, with a much smaller relevance given to socialist countries, was still the basis of the second edition of Zweigert, K, and Kötz, H (1984) [1971], *Einfürung in die Rechtsvergleichung*, J.C.B. Mohr, Tübingen.

[3] David, *I grandi sistemi*, supra, at 60-64.

[4] Id at 63 (Iran, Egypt, Syria, Iraq) and at 64 (Indonesia).

[5] *Einfürung*, supra at 2; I am referring to the Italian translation of the 2nd edition by Di Majo, A, Gambaro, A, and Pozzo, B (1991), *Introduzione al diritto comparato*, Giuffré, Milano, at 90.

[6] This western-centric background also seems to be implied in Vernon Palmer's book on mixed jurisdictions' subtitle, expressly referring to the 'third' family. See Palmer, VV (ed.) (2001), *Mixed Jurisdictions Worldwide – the Third Legal Family*, Cambridge.

[7] Palmer, 'Introduction to the Mixed Jurisdictions', in *Mixed Jurisdictions*, supra, at 13.

[8] See, for instance, the several essays collected in Gorla, G *Diritto Comparato e Diritto Comune Europeo*, Milan, 1981, especially from chapter 20 on (pages 540 and following ones).

[9] *See*, for instance, Donlan, SP*'Our laws are as mixed as our language': Commentaries on the Laws of England and Ireland, 1704-1804*, vol. 12.1 Electronic Journal of Comparative Law (May 2008), at <http://www.ejcl.org/121/art121-6.pdf>.

shifting or having shifted towards a mixed, eclectic model between the civil law and common law traditions.[10]

Those common law traditional elements identified by Palmer as characterising the superimposition of common law on local civil law tradition in 'classical' mixed jurisdictions[11] are since decades common features of all Western civil law countries.

England, Italy, China, South Africa, all have legal systems featuring combinations of models stemming from different traditions. They, too, are 'mixed', not to mention Japan or Indonesia. Is Quebec more or less mixed than, say, Sudan?

The 'Classical' Theory

The first possible meaning (let's call it the 'classical theory') of 'mixed legal systems' is related to a given, precise, well-known historical group of western or western-related legal systems affected by both the civil law tradition and the common law one.

This quite popular approach poses several, ramified questions and issues: is the currently accepted list of mixed legal systems a numerus clausus? If answers to this question is 'yes', then 'mixed' is not a classificatory label. The label would then cease to have most of its actual scientific, classificatory value – having lost its previous capacity of conveying information on the labeled items which are at the same time accurate and not applicable/relevant for other items which do not belong to the same labeled pigeon hole. All legal systems would thus be forever frozen in the 'family pictures' taken by René David in the 1960s, and related to their traditionally perceived realm of origin, or western tradition of original belonging – be it the civil law one, the common law one or an environment affected by both.

Classification would not be related, then, to legal systems' actual and continuously changing features, and to the existence and influence of other non-western legal traditions. The 'mixed' label would have the only surviving function of a collective name tag for a fixed, immutable list of *items* (however variable their actual features might be in the future), rather than an abstract category related to a number of *features* characterizing a (variable) number of items.

In a different approach, 'mixed legal systems' might still be used to indicate a category, in scientific terms, and have a current classificatory value as far as, according to changes in reality, new items could be admitted in the category, or old items could be removed from that category and put into another (full civil law, common law, or a different one). Classifiers would thus have to identify the features of this particular 'mixed' grouping, and tell which legal systems are fit for the label and which aren't – determining how mixed must a mixed system be to qualify.

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[10] For the US legal developments see, eg, von Mehren, AT (1998), *Law in the United States: a General Comparative View*, Deventer/Boston; von Mehren, AT (2000), *The U.S. Legal System: Between the Common Law and Civil Law Legal Traditions*, Rome. For the Dutch legal system's transition towards an eclectic model, see Hartkamp, AS (1992), *Judicial Discretion under the New Civil Code of the Netherlands*, Rome.

[11] Palmer, VV 'Introduction', supra, at 9-10; the list includes due process, judicial review, separation of powers, free speech, habeas corpus.

The Objective Elements of 'Mixity'

Palmer developed a theory of mixed legal systems[12], trying to give 'classificatory label status' to that term, used by David in its general meaning of common language. Palmer identified a few precise features[13] common to the jurisdictions being part of the group of generally acknowledged 'mixed' legal systems worldwide. 'Mixed' is intended the 'classical' way in his book, and those systems are considered as candidates for what he calls 'the third family', including the usual few.[14]

Palmer of course recognises the many mixtures, pluralisms, layerisations in today's world complex legal reality. However, he identifies the relatively few jurisdictions in his list as having in common something making them very peculiar, and proposes the use of the 'mixed' term for them only (it is not clear to me whether he is proposing it for that precise list of jurisdictions described in his book or rather for any system showing the features he identified). Those basic common elements[15] are the coexistence of both civil law and common law traditions, with their typical legal features, identifiable in the system in an obviously relevant amount; and the historic superimposition of a common law framework on a pre-existing layer of civil law. This superimposition, Palmer observed, having occurred especially in relation to the role, structure and functioning of the judiciary and value of case law; and, in general, in relation with the area of public law. Conversely, and in principle, having left the older civil law rules standing for the regulation of private matters.

This superimposition of common law schemes on a previous layer of civil law, according to Palmer, has been a constant element in all 'classical' mixed jurisdictions, whereas no reversed examples (civil law on common law) would be available according to this author.[16] One could then try and imagine what would happen should New Zealand invade Switzerland, and, conversely, what if Switzerland invaded New Zealand – in both cases the imposing their public laws and institutions on local private laws: would both cases fall within Palmer's theory, or just the former?[17] Also, one could wonder whether the common law provinces existing within the civil law general framework of bijural Cameroon[18] would fulfill Palmer's test on mixity.

Common law tradition's features are obviously still being transplanted in many non-common-law legal environments, by choice of the receiving jurisdiction. Also, some forcibly imposed transplants of common law models in jurisdictions with

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[12] Palmer, VV 'Introduction to Mixed Jurisdictions' 3-16, and 'A Descriptive and Comparative Overview' 17-80, in *Mixed Jurisdictions*, supra at 6.

[13] Id., 'Introduction', at 8

[14] Id, at 1, the 'third family' would involve less than 20 jurisdictions and about 150 million people. Palmer's list includes (Id at 4, footnote 3) Quebec, Louisiana, Scotland, South Africa, Sri Lanka, the Philippines, Israel, Puerto Rico, Namibia, Botswana, Zimbabwe, Lesotho, Swaziland, Mauritius, Seychelles, Saint Lucia.

[15] Id at 7-10.

[16] Id at 8 and 10, with the only exception of… Ruritania.

[17] The author concedes that a reverse allocation would not necessarily warrant a 'fundamental reclassification of the system'.

[18] Sacco, R and Guadagni, M (1996), *Il diritto africano*, UTET, Torino, at 242-247.

different traditions cannot be completely ruled out in the future. However, the dynamics identified by Palmer, that generated the 'classical' mixed systems, with the superimposition of a common law architecture of the legal system on preexisting laws, are over or not so overwhelming anymore. The common law model might actually have lost some of the force, prestige and expansive drive that have been associated with the colonial expansion of the two Anglo-Saxon powers in the XVIII-XX centuries, being reasonably unlikely that the same historical, political and legal conditions can be reproduced nowadays.

Other mixtures are more likely to occur, at present and in the near future; some even implying important elements of a different legal tradition being superimposed on a common law legal system, producing examples of a reversed allocation of areas of responsibility between common law and other legal traditions. Some aspects of Chinese law (a legal tradition somehow influenced, in turn, by the civil law one) are currently being superimposed to the previous legal tradition of the common law jurisdiction of Hong Kong (as well as in the formerly Portuguese territory of Macau)[19]. The process is occurring mostly in public/constitutional law and with respect to separation of powers, rule of law and role of the judiciary – precisely those areas that Palmer considers critical for the mixing process.[20]

In addition to the example of Hong Kong, a degree of Islamisation of some common-law-based legal systems is not unimaginable nowadays; if not by an external force, possibly by an autonomous choice of the relevant jurisdiction.

The Subjective Element

Another crucial feature of 'classical' mixed systems, righteously identified by Palmer after having observed that all systems are objectively mixed to some extent, is that those jurisdictions defining themselves as 'mixed' so do as local jurists do perceive themselves as being immersed in a mixed jurisdiction.[21] A key element is then the opinion or perception of each jurisdiction's jurists: if they think/feel they are mixed, so be them; and vice versa, of course, if they don't feel so.

This approach might seem at a first glance to go against the fundamentals of a historical-critical approach based on observation of reality: jurisdictions, we may say, are 'mixed' if they so *are*, irrespective of what locals *think* – according to the philosophy of comparative legal research expressed for instance in the *Trento Manifesto*[22], especially with its second[23] and fifth[24] theses.

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[19] Castellucci, I (2007), paragraph *Macao, Hong Kong and Other Special Zones of China as Legal Laboratories* of the essay 'Rule of Law with Chinese Characteristics', in 13 *Annual Survey of International and Comparative Law* 35, 75-82.

[20] 'Introduction', supra, at 9-10.

[21] Palmer, VV 'Introduction', in *Mixed Jurisdictions*, supra, at 8.

[22] In 1987 a new Faculty of Law had just been launched in the northern Italian city of Trento, with a view to developing legal teaching and research based on a wide use of comparative perspectives and methodologies. To celebrate the birth of the Faculty of Law its founding father Rodolfo Sacco and other prominent Italian comparative scholars drafted the *Manifesto*, five theses describing the essential features of comparative law and legal research, later reviewed in 2001. An English translation of the Trento theses is available in Sacco, R (1991),

The contradiction, however, is probably more apparent than real: what Palmer calls 'perception' of local jurists –the 'subjective' element– amounts, when objectively observed and identified, to an important part of the relevant jurisdiction's 'tradition', to put it in Glenn's terms.[25] 'Tradition' being different from 'history', due to the subjective feelings and visions of the relevant peoples, capable of transforming a long series of historical events into heritage, tradition; in so doing, becoming an important factor of identity[26] –objectively contributing, in turn, to 'form'[27] a legal system, shaping its identity and 'style'.[28]

The 'Mixtures' Theory

A second possible meaning (let's call it the 'mixtures' theory) to be given to the term 'mixed' as referred to a legal system hails from recognising that other systems not belonging to that 'classical' group are also 'mixed'. Now that the classical mixture that justified the term 'mixed' became more common in the West, efforts of frontline legal comparison could well be devoted to the study of the many other families, models, traditions or – say – streams, and their related complex mixtures; and – why not – to identify one or more new concepts of 'mixed system'.

An interesting metaphor seems to be the one[29] according to which each legal system has its specific family tree, rather than just belonging to one of the few families of the comparative law tradition. The circulation of legal models across the boundaries of traditional classifications makes it very difficult to use old, simple categories to define many present times' legal systems of the world. Each jurisdiction's family tree would then represent a sort of a genetic mapping of the relevant legal system, making it similar maybe but never identical to any of the trees nearby. The world legal systems' description would then resemble a forest, with branches and foliage of each tree

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'Legal Formants: a Dynamic Approach to Comparative Law', in 39 *American Journal of Comparative Law*, 1-34 and 343-402.

[23] 'Comparative law studies various phenomena of legal life operating in the past or the present, considers legal propositions as historical facts including those formulated by legislators, judges and scholars, and so verifies what genuinely occurred. In this sense, comparative law is an historical science'

[24] 'Understanding a legal system is not a monopoly of the jurists who belong to that system. On the contrary, the jurist belonging to a given system, though, on the one hand, advantaged by an abundance of information, is, on the other hand, disadvantaged more than any other jurist by the assumption that the theoretical formulations present in his system are completely coherent with the operational rules of that system.'

[25] Glenn, HP (2004), Legal Traditions of the World, 2nd ed.[2000], Oxford, chapters 1 and 2.

[26] Id, at 33.

[27] Sacco, R, 'Legal Formants', supra at fn 22.

[28] In Zweigert and Kötz's sense; *Introduzione al diritto comparato,* supra, 84.

[29] Proposed by Professor Esin Orüçü in her presentation at the Second World Conference of the World Society of Mixed Jurisdictions Jurists, Edinburgh, June 2007 – the paper is available online: Örücü, E 'What is a Mixed Legal System: Exclusion or Expansion?', vol. 12.1 Electronic Journal of Comparative Law (May 2008), <http://www.ejcl.org/121/art121-15.pdf>.

intertwining with others, new trees sprouting, old ones dying or being abated; a living thing, very much contrasting the frozen, family-picture-style of David's classification.

The forest approach is dynamic, based on *current items* and on the description of their *ancestry*; whereas the family picture approach is static, based on *ancestors* and on the original belonging of children-items to their parent's family – no matter what they did and who they married or mingled with, officially or unofficially, when they grew up. In terms of descriptive models we have a case here of *Family Pictures v. Forest/Family Trees*, to refer again to Palmer's approach and to Orüçü's metaphor.

A historic approach versus a dogmatic one, we might say.

It seems clear that the family tree approach provides a more appropriate descriptive model, whereas the 'family picture approach' is closer to a classificatory one. In a family-tree approach, we could recognise, for instance, the existence of a Chinese-civil law mixed system such as Macau (China's legal system itself hailing from a mix of socialist and civil law); a Chinese-common law mixed system (such as Hong Kong); a Chinese-local mixed system (such as in Vietnam and, in a different way, in North Korea). We could also see some possible Islamic-common law legal system at the horizon, reversing the historic colonial patterns of superimposition and 'mixity'. Many other mixtures can be identified in present world and in legal history, such as the Hindu-Buddhist mixtures of the Kingdoms of Lamma, Mon and, then, Ayutthaya, in south-east Asia[30]; or such as the old legal system of Tibet, which resulted from a mix of Hindu, Buddhist and Chinese legal traditions[31].

In all these cases, descriptive value would mostly reside in the adjective words put before 'mixed system', e.g. 'Hindu-Buddhist', containing the 'genetic code' or family tree of the relevant system, so to speak. On one hand, 'mixed' is per se a useless word in classificatory terms, in relation to the current legal world. On the other hand, with the family-tree-approach we will describe each single item quite specifically, but we will not be able to classify items unless we make some simplifications.

Some balance is needed, for classifications to be useful at all. One which is too fine is not so useful, amounting to its extreme point to a list of too many categories, corresponding to the number of items to be classified; the more accurate the descriptive value of a given label, the lesser will be its classificatory one. Conversely, a classification which is too coarse and general is not so useful either, as its categories will be broader than appropriate to convey the desirable amount of information.

When using classifications for transferring knowledge we need an appropriate level of synthesis in creating labels, providing both simplification and accurate information at the same time. Just like in codifying the law, where rules must be not too abstract, not too detailed, for the codification to be an effective tool to conveniently substitute the previously existing state of the uncodified law.

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[30] See, eg, Huxley, A (ed.) (1996), *Thai Law: Buddhist Law*, White Orchid Press, Bangkok.

[31] French, RR (2002)[1995], *The Golden Yoke – The Legal Cosmology of Buddhist Tibet*, Snow Lion, Ithaca, NY.

A Possible (Mixed) Approach

Family Pictures v. Forest/Family Trees – some Remarks

Both mentioned theories lay on some fundamental truth; and families are not watertight compartments or bubbles, isolated from their immediate environment. It mustn't be by chance that in common human life families and trees are associated in that very popular metaphor. Even in comparative law, one of traditional main 'families', the Roman-Germanic one, has a label that indicates the family and also contains the description of the family tree's main branches. A combination of both methods is necessary to study families, forests, their members, and to be able to convey the relevant information to others. In the past, the colonial powers' generated new jurisdictions worldwide which would belong to this or that family (in few cases to both) once and forever, within the limits of human perception or capacity to foresee of most scholars. Life was relatively easy then, for comparative lawyers wishing to classify.

In present world the features of the classified items change relatively rapidly; the comparatists might then stick to the family picture approach, thus having a classification related to the systems' origins; or might classify and describe family trees according to their current developments. The latter option implies the possibility of moving items around one's classification scheme with relative frequency; and, also, of having to re-design the ordering categories, should those relocations become too frequent or difficult to explain.

Maybe we should not be discussing about recognising the existence of a 'third family' in the XXI century's world's legal systemology – the legal world already featuring more than two accepted ones – unless we confine ourselves to a specialised study of *western* patterns of law only. Some distant similar occurrence in their legal traditions' western law stratum does not make New Orleans, Yaoundé or Colombo similar places; the legal environments of France, Quebec and England seem instead very similar to one another when compared with, say, the ones of Laos or Madagascar.

South Africa, for instance, is clearly recognised by all as a jurisdiction where not only common law and civil law traditions are relevant, due to the importance of non-western local traditional laws – the same could be said, *mutatis mutandis*, for Sri Lanka or the Philippines. Has the South African legal system lost its 'mixity' due to the recent recognition of its much higher complexity? Is it more 'mixed' than other 'mixed' legal systems? Or does the 'mixed' label just refer to the western part of its complex legal environment? Can we recognise a mixture of a 'mixed' jurisdiction and a customary legal environment? This is not just playing games of words; or, maybe, it is a dignified game, as taxonomy problems sometimes tend to be.

World has changed, and now and in the future it is well possible that common law legal systems would partially be islamised, sinicised; civilised perhaps. These would all be, objectively, new mixtures of legal traditions – even if some common lawyers could have difficulties/delays in recognizing and/or accepting the fact of their legal heritage being superimposed somewhere by others.[32] The same may also happen

[32] That is again a case for the importance of the 'subjective' test: they would probably prefer to speak about decay, corruption of the law, rather than recognise a basic change in a given legal

with civil law jurisdictions (Macao is the exact equivalent of Hong Kong, with respect to the superimposition of a Chinese framework; Indonesia is Malaysia's one in relation to a possible superimposition of a layer of Islamic law) or with other jurisdictions of the 'classical' mixed group (e.g. South Africa, Sri Lanka or the Philippines).

We can all agree on addressing the 'classical' mixed systems with 'mixed', if we so like; and we do not necessarily need, then, to create a whole array of classificatory labels, for every legal system on the planet, in a linguistically-consistent fashion pivoting around the 'name tag' given to that particular club. It is perfectly acceptable to give a word several different technical meanings, agreed upon and well understood by specialists when put in the context, as it happens e.g. with the very terms 'civil' and 'common', having several meanings in general language and in the legal one. India would then have a mixed legal system, but not a 'mixed' one, where the former term is used in a generic sense and the latter in the agreed technical one.

A possible and useful, current *classificatory* use of this very polysemic word, could be confined to the realm of prevalently western legal systems, in relation to any mixture of common law and civil law as the dominant element in a given legal system. That use would retain some current classificatory meaning, e.g. to describe the developments of a few jurisdictions which are nowadays identifiable around the globe as candidates for admission in the 'mixed' group (e.g. the US and the Netherlands). A western technical concept developed within the WLT might still be of use within the WLT as a classificatory tool, as far as we are able to avoid confusion, and dilution of its informative contents. The 'mixed' one could be, perhaps, a third *western* family.

Recourse could be made, then, to more articulated labels to classify non-western mixtures, maybe including basic 'family tree' information, using 'Hindu-Buddhist', 'Moslem-civilian', 'Western-customary', 'Sino-Western' and other similar adjective terms to classify/describe the world's legal systems. And we could of course develop more refined, fine-tuned classifications to study specific or regional legal traditions with more detail.

The Objective Element – Superimpositions and Other Ways

The kind of superimposition identifiable in 'classical' mixed jurisdictions, of public law models on a previous layer of a different legal tradition, has occurred quite often in history, within comparable political and institutional contexts. The Roman Empire superimposed its public laws, style of legal system and legal ways of dealing with sensitive or complex issues to the local legal systems and customary rules, which still survived along with the Imperial rule.[33] The Moghul Empire superimposed its Islamic

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environment. When in the past common lawyers arrived in new places and superimposed their structures, they often had the clear conscience of being changing the legal framework, superimposing a new model to the old one – funnily enough, calling the whole process 'civilisation'.

[33] For a first approach to the issue see Castellucci,I, 'Il Diritto e la Legge; analisi storico-comparativa di una relazione critica', in *Boletím da Faculdade de Direito da Universidade de Macau*, 16 (2004), 79 (in English and Chinese); an English version is also available in *Global Jurist - Advances*, at www.bepress.com/gj. Also *see* Caravale, M (1994), *Ordinamenti giuridici dell'Europa medievale*, Il Mulino, Bologna, 25-65*;* Stein, P (1999), *Roman Law in European*

institutional architecture on the traditions of India, leaving private issues very much regulated by the Hindu legal tradition and local customs[34], as it also occurred in the XV century when the Sultanate of Melaka had been established in South East Asia[35]; a process later reproduced in the same parts of the world by the British colonizers, in the XVIII and XIX centuries (without any 'mixed' title awarded); and also occurred in many other places during the colonial expansion of Western powers.

However, 'mixing' patterns different from the prevailing one just mentioned can also be found in history, now and then: barbarian nations penetrating the Western Roman Empire kept much of the Roman institutional framework and law, both to structure and rule their new kingdoms and for general civil relations, and only used their nations' laws as personal laws;[36] a really curious *ante litteram* mix of civil and Saxon laws, the first ever in historical terms, not exactly fitting within the 'classic' mixed jurisdictions model description.

The Yuan and Qing Dynasties of the Chinese empire were non-Chinese rulers (Mongols and Manchu, respectively) whose leaders took over the previous Chinese rulers, but decided to sinicise themselves, leaving the socio-political-legal structure of the Empire unchanged, rather than superimposing their ethnic ways upon it.

'Mixedness', or 'mixity', can also be reached by means different than colonial waves or political conquests, as it happened with Israel: Israel imported the common law model and superimposed it on its previous civil law environment (but, more recently, a civil code is being enacted) by a pure act of internal will, and still it is considered as being one of the 'classical' mixed jurisdictions.

What about the USA, then? I do not see anything more 'civilian' than enacting a civil code, and there are many civil codes enacted, in the US – in addition to the UCC, to a written Constitution made of general and broad concepts interpreted by the courts, to a very rich legislative production both at the federal and at the state level, to the Restatements, to the role played in the system by the academic formant, etc. The only difference with the process occurred in Israel is, in my opinion, that the American lawyers have not made a clear decision/acknowledgment, and a consequent statement, about their jurisdiction being 'mixed' – again Palmer's subjective test proves crucial.

Moreover, both in terms of 'superimposition of common law on civil law' or vice versa, and in terms of superimposition occurred 'by external force' or 'by autonomous decision to import', *the EU system definitely represents a third pattern of mixity in the Western legal tradition*, having directly been generated and developed consensually and in a relatively short time as a 'mixed' one, affected by both major European legal traditions. Even within just the two Western main legal traditions, thus, the concrete instances and ways to reach 'mixity' might be several.

History, Cambridge, 24-29. Significant elements of what has been submitted can also be found in Lamma, P (1968), 'Oriente e occidente nell'opera storica di Agazia', in Lamma, P, *Oriente e occidente nell'alto medioevo*, Padova, 96-112.

[34] Lingat, R (1967), *Les sources de droit dans le système traditionnel de l'Inde*, Paris ; Italian translation by Francavilla, D (2003), *La tradizione giuridica dell'India*, Milano, at 366-368.

[35] Hickling, RH (2001), *Malaysian Law*, Pelanduk, Subang Jaya, especially at 105-114; Ahmad, SS (1999), *Malaysian Legal System*, Malayan Law Journal, at 3.

[36] Caravale, *Ordinamenti giuridici*, supra at 24.

The Subjective Test

Of course the quantitative as well as the psychological aspects – local lawyers feeling they belong to this or that tradition – must be considered, as Palmer points out.[37]

'Mixed' systems of the 'third' family are western systems more mixed than other western ones, mixed before and for longer than others, or mixed in a more 'officially acknowledged' way than others. The outcomes of present trends of Western legal convergence will tell whether it still makes sense to keep that label for that small group of jurisdictions as a significant one, and determine when it will stop to make sense. During the transition, understandably local jurists' perceptions might miss some of the changing reality, or identify changes with some delay.[38] Families do mingle, old family names disappear as new ones emerge; the relevant processes are always grey transitions and a mix of physical, memorial, irrational elements, both for human families and for the legal ones; and these processes always take time.

Traditions generated or changed instantaneously can hardly be imagined.

Heritage elements do matter, and they do affect legal systems. The former 'socialist' legal family identified by David, for instance, has almost disappeared from the map. Still, a 'post-socialist'[39] tag is commonly used nowadays, and is a clear expression of a 'family tree' approach, mentioning a relation of those systems with a model not current anymore in its original form. It will only be descriptive and accurate for a while, until the socialist heritage (both objectively extant and subjectively perceived) keeps those jurisdiction inter-related more than how subsequent developments of each will part them. Some formerly socialist jurisdictions could soon be classifiable as plain civil law ones, or maybe as just 'western' ones, due to their belonging to the EU and to their entry into western world, as soon as they are so recognized and as so they'll feel. Meanwhile, some of the central Asian former USSR Republics could at least in theory become Islamised jurisdictions, or shift towards different, possibly Russian-led, models of legal development.

Certainly the 'subjective' element, as a crucial part of *tradition*, has a role in defining what is 'mixed'. Present days actual legal *systems*, almost everywhere in the world, are objectively mixed. What are *not* mixed – or not yet – in many cases, are these countries' legal *traditions*. However, traditions too, when seen looking backwards, in maybe 50 or 250 years, will probably look mixed, if not altogether blurry or merged, due to the cross-pollination of legal models across old David's family boundaries, which contributes to shape the systems and also, in a longer term projection, the legal traditions of individual countries and areas of the world.

Going back to the initial question: do Western lawyers feel that 'mixed' jurisdictions can only be the 'classical' ones? Does the answer given to the objective question match the one given to the one put in subjective terms? Or, could there be any dissociation between factual realities and local jurists' perceptions/traditions? A very reasonable answer to the latter question could be 'yes', implying sometimes dissociated

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[37] 'Introduction', in *Mixed Jurisdictions*, supra, at 8.

[38] Again might be of some help to refer to the Fifth Trento thesis, supra.

[39] See, eg, Ajani, G (1996), *Il modello post-socialista*, UTET, Torino.

results if we classify according to objective tests (actual features of the system) or to subjective ones (shared perception/tradition).[40]

The relevance given to the subjective element should be accompanied by the warning that subjective perceptions basically imply some inertia in acknowledging objective changes in reality. An interesting example of inertia in the system has been the case in the People's Republic of China after 1949, when the newborn communist state had to deal for some years with lawyers educated under the previous regime, who continued to apply their more westernized approach to the law, until the government solved the problem quite energetically, dismissing most of them[41]. In less dramatic changes, injections of new features in the system might be slower and/or more subtle, and inertia might of course last much longer. However, it is not impossible to imagine instances where the 'subjective' element changes more rapidly than the actual objective features of the legal system, e.g. after rapid transitions, revolutions etc.[42]

Nowadays, there might be legal systems already featuring a mixture of civil law and common law elements to a sufficient amount to fulfill Palmer's quantitative test, with a community of lawyers not having acknowledged change yet, as it could (soon) be the case for the US. A 'covert belonging' of the US, or of many of its state jurisdictions, to the 'mixed family' cannot be ruled out at present, or considered as unreachable in the near future, from an external observer's point of view. The US case could soon amount to a new entry in the 'mixed' club, following a 'reversed superimposition' of civil law models over the common law one, not due to external imposition; another newcomer in the club could (soon) be the Netherlands.[43] These two probably amounting today to grey systems, one immersed in a black tradition and the other in a white one, so to speak; and these dissociations may survive for a while.

To Sum up

Processes of mixing civil and common laws different from the one developed in the 'classical' jurisdictions (common law superimposed on civil law, forcibly in most cases) are possible and have happened or are happening, indeed. Thus, we could consider using a wider, current classificatory category of 'mixed' civil law-common law legal systems, including all mixtures of (prevailingly) civil law and common law, whatever the pattern of their development. We might also use it as a significant classificatory word within the western part or stratum of any legal heritage.

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[40] Obviously the distinction between system and tradition can be considered arbitrary to some extent. It is just one possible way to see things and classify them; some kind of simplifying complex issues and drawing lines in fuzzy areas is implied in many classification attempts.

[41] They amounted to around 22% of total court staff in the early and mid-1950s, before the Government removed them from their positions; see Xin Chunying (2004), *Chinese Courts History and Transition*, Law Press China, Beijing, at 15-16.

[42] It is my personal opinion, for instance, that the 'subjective' element is lagging behind the 'objectively' changing reality of the legal system in Hong Kong; whereas it is not so slow, and maybe running faster than the objective elements, in Macau, with respect to the penetration of Chinese political-legal models (in turn affected by western ones, with clear converging paths).

[43] von Mehren, AT *Law in the United States*; Id, *The U.S. Legal System*; Hartkamp, AS *Judicial Discretion under the New Civil Code of the Netherlands*; supra at 9.

The historical specificity of the fewer 'classical' mixed jurisdictions, however, would probably not cease to affect their respective legal systems and set them apart to some extent from most other Western ones in the short/medium term, both in terms of objective elements and of 'mixed' jurists' perception of their belonging to a very specific (western)'mixed' tradition.

Looking for Viable Classificatory Models for the World's Legal Systems

Classification should make reference, to be useful, to real, substantial elements of the items to be ordered; comparative lawyers' divisions and subdivisions should be based on the really important elements that characterise today's legal systems. The belonging of a given jurisdiction to the common law or to the civil law tradition is not the only crucial element, for its description, in the wider context of current legal world.

Moreover, an increasingly important amount of law in the world is being developed in environments such as the general international law, the international human rights law (affecting heavily public law and even private law in the European jurisdictions, by the way), the *lex mercatoria* and the transnational laws of economic and commercial transactions, whatever these expressions might mean. Those are environments where some of the common law/civil law pertinence tests cannot even be imagined as applicable, due to the absence of state institutions (e.g. separation of powers, judicial review), while substantial elements in the applicable rules are identifiable indicating both traditions as shaping the law – the UNIDROIT Principles being an obvious example of that.[44]

A sensible method to identify viable categories for comparative law can still consist in looking for the objective prevalence of important elements, and the 'subjective' perception of locals contributing to shape legal traditions. I will mention a few possible approaches that in today's world could be more revealing than the traditional *stare decisis v. civil code.* I am sure many more can be imagined.

Functionalities. Mixed v. Pluralist Legal Environments

The mix of civil law and common law identifiable in 'classical' mixed systems works reasonably well, in principle, as basic ideas about law are shared in both of its components; it has often proved a very synergetic mix, as clearly demonstrated by the fact that many or almost all of the Western legal tradition systems seem to converge to some extent towards a similar mixed model.

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[44] On the UNIDROIT Principles I am just making a statement based on prevalence, and I do not mean that other traditions did not concur, too, to their development. One of the much appreciated features of the UNIDROIT Principles, as a matter of fact, is perceived to be their suitability for developing countries' environment, having also taken into consideration their specific conditions. In fact, the Principles have been drafted and reviewed by a working group, chaired by Michael Joachim Bonell, composed by scholars stemming from all main legal traditions of the world and from diversified jurisdictions, including developing countries'. See Bonell, MJ (2005), *An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts* (3rd ed.), Transnational Publishers, Irvington, NY.

Many other complex legal environments feature instead more or less severe, overt conflicts amongst their components, e.g. whenever a customary or religious law provides differently from the superimposed western layer of case law/legislation. Stratifications of legal traditions very often feature top layers as related with the political power, dictating the institutional architecture, and lower layers more involved with issues related to the individual and his immediate environment (persons, family, successions). Issues in the middle between the individual person and the general architecture of the polity, like contracts, obligations and other issues related to private commerce and economy are sometimes regulated by middle legal layer(s), e.g. by layers of colonial law surviving in the architecture of post-colonial jurisdictions.[45]

These different legal layers quite often tend to work independently and to produce rules which may be conflicting, each layer producing its solutions irrespective of what other layers have to say on a specific situation. The phenomenon is well known and normally analysed within the conceptual framework of legal pluralism[46].

'Classical' mixed legal systems are no more than stratified legal systems. It is just that *stratification between the two western layers in those systems normally works in a synergetic fashion, as the layers have somehow been coordinated*; which does not exclude fuzzy areas and the occasional dysfunction. It does not exclude, either, that a mixed system can be immersed in or in contact with a wider pluralist environment.

A possible classification scheme can then be devised according to stratifications of legal systems, with their different levels of complexity, and according to their inner consistency. Items would thus be classified ranging from monolith, single-tradition legal systems (eg, those like Portugal, a solid civil law jurisdiction), through mixed experiences (including the 'classical' ones), to pluralist ones. Additionally, we could consider the (dys)functionalities due to the (in)compatibility of the systems' components, and differentiate between synergetic mixes and dissociated ones; or, maybe, devise a measuring scale of (dys)functionality to grade them[47].

A Classification According to the Prevalence of the Regulating Forces Identified.
Within this kind of classifications would surely lay the approach proposed by Mattei,[48] with Chiba's works in the background,[49] based on analysing legal systems and

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[45] This is a rule-of-thumb which is the result of the careful observation of the African legal environment; *see*, e.g., Sacco, R and Guadagni, M (1996), *Il diritto africano*, UTET, Torino.

[46] On legal pluralism, e.g., see Guadagni, M (1998), '*Legal Pluralism*', in Newman, P (ed.)(1998), *The New Palgrave Dictionary of Economics and the Law* 542; Griffiths, J(1986), 'What is Legal Pluralism?', in 24 *Journal of Legal Pluralism & Unofficial Law* 1; Merry, SE (1988), 'Legal Pluralism', 22 *Law & Society Review* 869.

[47] Another interesting suggestion of Prof. E.Orüçü, in her presentation at the 2nd Conference of the World Society of Mixed Jurisdiction Jurists, Edinburgh, June 2007; cited supra.

[48] Mattei, U (1997), 'Three Patterns of Law: Taxonomy and Change in the World Legal Systems', 45 *American Journal of Comparative Law* 5. Previously published in Italian (1994), 'Verso una tripartizione non eurocentrica dei sistemi giuridici', in *Studi in memoria di Gino Gorla*, Giuffré, Milano, at 775.

[49] Chiba, M (1989), *Legal Pluralism: Toward a General Theory through Japanese Legal Culture*, Tokai University Press, Tokyo.

classifying them according to the relative importance attributed in each system to three fundamental, and normally co-existing, types of social regulators: tradition, politics, and the law. In this approach, every system is described in terms of proximity to, or relative influence of, these three poles, so to speak; the descriptive model is imagined as a triangle with the tree vertexes indicating the absolute rule of law, the absolute rule of politics and the absolute rule of tradition (including legal elements of religious origins); each legal system is located within the triangle, according to the proximity they show with each of the three abstract models identified as the vertexes.

This tool of analysis takes into consideration a wider horizon than the mere realm of official law on which only David's classification was based, bringing instead 'Law and Society' issues into the legal taxonomies' discourse, measuring and grading the relative importance of those three basic societal factors in each classifiable item.

One additional dimension should probably be added to this descriptive model, to make it up-to-date: it is what we may call the 'rule of economics' fourth pole, due to the role discharged nowadays by the forces of world/global economy, doubtlessly able to affect and shape laws and legal systems largely. The descriptive model depicted by Mattei should now be represented by a three-dimensional object like a tetrahedron.

A 'Geo-Legal' Approach:

Other current classifications could also be devisable, based on the belonging of the classifiable jurisdictions to geo-political blocks, as far as this belonging affects their legal systems; a geo-legal approach, if we like.

A macro-group of 'former socialist' countries could be identified as including the Russian Federation and other former USSR jurisdictions. The few remaining hardcore socialist countries could also be identified as a small geo-legal group, if a maybe transient one, their thick socialist stratum in common justifying their grouping.

A second group in the big 'former socialist' macro-group could be identified with the legal systems of greater China –irrespective of their originating from a socialist, Portuguese, English heritage – now all convergent towards a new model of legal system (a model which could be shared by the three systems of Greater China, Vietnam, and maybe, in the medium term, by North Korea and Taiwan).

A model much more influenced by the political-legal system of Mainland China and its related socialist-market-economy ideology and legal features (some of which, in turn, borrowed from western experiences)[50], rather than by old Europe's legal philosophies or technicalities such as the binding force of precedent or the style of legislative drafting. The originally diverse origins of the items classified in the same group would becoming irrelevant in the event: just the same process occurred when the

[50] Castellucci, I, paragraph *Macao, Hong Kong and Other Special Zones of China as Legal Laboratories*, in 'Rule of Law with Chinese Characteristics', supra at 30, 75-82. Also see Castellucci, I (2006), national report 'Macao Special Administrative Region – China', in Hondius, E (ed.)(2007), *Precedent and the Law*, Bruylant, Brussels, containing all national reports and the general report of Prof. E.Hondius on the topic 'Precedent and the Law' presented at the XVIII Conference of the International Academy of Comparative Law, held in Utrecht in July 2006.

Anglo-Normans created a unified legal environment in England and Wales, irrespective of previous local Celtic, Saxon or other laws applicable around Britain before 1066. Even the traditional common law/civil law partition of the legal world during the XX century has been to a great extent been developed and shaped by geo-political dynamics, after all.

In a 'geo-legal' approach Asia itself would be an enormous legal macro area, sub-divisible, in historical terms, into at least two very large areas historically influenced by Indian (by and large, Indian peninsula, Sri Lanka and South-East Asia) and Chinese legal models (China, Korea, Japan, Singapore, Vietnam). In current terms several Asian groups or legal macro-areas could be identified in addition to the modern Chinese-led one. One group could include South-East Asian nations, in turn divisible in a continental one, more Buddhist-influenced, and an insular-peninsular one, characterised by a high level of pluralism and diversity, with stratifications of local *adat*, pockets of Hindu and Buddhist cultures and laws, as well as the Islamic law, Western colonial rule, and post-colonial laws and institutions. One Northern Asian group could also be identified, with Japan and South Korea, heavily influenced by venerable Asian traditions, then affected by some transplants of European origin in the XIX-XX centuries, and subsequently affected by legal models of North-American origin after the end of the Second World War.

The Islamic group could represent another Asian-African macro area, sub-divisible in smaller ones. One or more pluralism-based groupings can be located in Asia and Africa, as well as, maybe, in Latin America (see, e.g., the recent Constitutions of Ecuador and Bolivia, making explicit references to pluralism).

Other identifiable current legal macro-areas, each with specific geo-legal features, would include the WLT of course, surely still sub-divisible in civil, common, mixed jurisdictions as far as this would be sensible, relevant, current. But it could also be very reasonably sub-divisible otherwise, e.g. EU v. non-EU legal systems, due to the superimposition of the EU framework in so many jurisdictions, hailing from the civil law, common law and 'mixed' traditions as well as from the post-socialist one.

Public international law and/or the so-called *lex mercatoria* or transnational law are also produced by very specific geo-legal environments, if not physically identifiable with a geographic area or location; they are very relevant for comparative lawyers, with their peculiar, important legal features and impact on real world.

Some jurisdictions would still result as odd, or as showing a 'mixed' belonging amongst the new groupings: India could maybe be one, at present, both on the objective and on the subjective point of view, with its westernised common law legal system, and with its local traditions also very present in law, institutions and society.

Within each macro-area, classifications could be made according to the most appropriate criteria for that area, not necessarily similar to other macro areas' ones – even the sub-division elements being based, after all, on geo-political and geo-legal events that are relevant for that given macro-area and could be not applicable to others.

In Conclusion:

Classification is an exercise which is well done and useful when you succeed in conveying information, effectively, accurately, without oversimplifying or distorting it.

Maybe we need more than one classification tool, or a complex, multi-dimensional model based on a grid of several different basic ones –including the 'classical' one– in order to efficiently manage knowledge. Each classification model reveals some features of classifiable items. All can be used, singularly or together; complexity warrants complex tools.

Mixed Jurists and Comparative Lawyers:
How Comparative Must a Comparative Lawyer Be?

Lawyers, scholars, courts working in 'classical' mixed jurisdictions, as well as the scholars devoted to the comparative study of those mixed systems have been to some extent – knowingly or not – an avant-garde of comparative law, and of Western law in general. They have at least played a role in developing a civil law/common law dual legal language for the western world. Most of all, they have been involved in dynamics now clearly identifiable in many or all legal systems belonging to the WLT: soon every western lawyer might have to learn to reason as 'classical' mixed jurists do.

Comparative lawyers have always admired 'mixed' lawyers and have been intrigued for long by their peculiar legal environment. The former normally studied and compared the two 'things', assuming they were different, and then found inspiration observing the latter operating the two very same 'things' together, in those few, distant, even exotic 'mixed' places – using what seemed to them to be a 'dual' knowledge, so to speak, to master the complexity.

Comparative lawyers are nowadays very curious with respect to those municipal lawyers able to work in an even greater diversity, dealing with several elements ranging from formal case law, legislative and regulatory elements to customary elements, religious, political and administrative ones… all in a complex mix and/or stratification of legal traditions, systems, formants. These local lawyers and jurists – the new masters of the complexity – operate their respective systems, day-to-day, using what to a western observer might seem to be a 'multiple' knowledge. They can, knowingly or not, provide comparative lawyers with the potential and the inspiration for keeping alive the same curious, fresh, eclectic approach to law they used to have towards the 'classical' mixed jurisdictions; now, using it to go beyond Western tradition(s) and to observe and research the new 'mixtures' which are likely to spread throughout the world in the decades to come.

A comparative lawyer still needs to be comparative, and to compare things which are different. Classical 'mixed' jurisdictions used to be bizarre animals; not so much anymore, especially as more bizarre animals appeared in the landscape. The expression 'mixed systems', in its classical sense, might actually lose some day its scientific, classificatory value; still, a 'mixed system' *mentality*, or approach, for world lawyers and comparative scholars has not lost an ounce of its potential for studying and producing legal developments in an increasingly diverse legal world.