



## How Mixed Must a Mixed System Be?

Ignazio Castellucci\*

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### 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,<sup>1</sup> 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’, which included 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.<sup>2</sup>

David did not create a partition labeled ‘mixed legal systems’; he rather described incidentally the existence of jurisdictions where the accidents of history produced a mixed situation between the two western legal traditions,<sup>3</sup> and also used the term ‘mixed’ with reference to western/non-western mixtures.<sup>4</sup> 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.<sup>5</sup>

The markedly euro-centric approach in classical comparative law works is proved both by the amount of pages allocated to western and non-western legal systems in western books on comparative legal systems, and by the fact that the ‘mixed’/‘hibrid’ adjectives, that David and

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\* University of Trento (Italy) and University of Macau (the People’s Republic of China).

<sup>1</sup> David, R (1964), *Les grands systèmes de droit contemporains*, Paris.

<sup>2</sup> 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 131-270 to the socialist countries, and pages 399-509 to the *autres 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], *Einführung in die Rechtsvergleichung*, J.C.B. Mohr, Tübingen.

<sup>3</sup> David, *I grandi sistemi*, supra, at 60-64.

<sup>4</sup> Id at 63 (Iran, Egypt, Syria, Iraq) and at 64 (Indonesia).

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

Zweigert and Kötz had used with its common and general meaning became eventually a classificatory label, the use of which was confined to western legal mixtures only. In fact, we do not have a solid tradition of addressing as ‘mixed’ those jurisdictions where, despite similar if not identical historic patterns of mixture, the stratification of legal experiences involved, for instance, western legal frameworks on Islamic, Hindu or customary laws.<sup>6</sup> On the other hand, it would not make sense to create a classificatory category (which was not in David’s or Zweigert and Kötz’s intentions, I dare say) of ‘mixed’ legal systems including Puerto Rico and China, as it has been pointed out.<sup>7</sup>

Only those jurisdictions that, due to the subsequent presence of different colonial powers, did inherit legal features from both Western families earned their ‘mixed’ label. The usual catalogue includes Quebec, Louisiana, Scotland, Israel, South Africa, the Philippines, Sri Lanka. That label used to indicate jurisdictions enjoying a high specificity within the Western legal tradition (WLT), which is not so high anymore. Those ‘mixed’ systems’ peculiar features are now becoming more and more identifiable in many other modern Western laws, including the EU one. 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 20<sup>th</sup> century. The two main western legal traditions seem to converge to a great extent towards similar outcomes; suffice it to say that the common law traditional elements identified by Palmer as characterizing the common law superimposition on civil tradition in classical mixed jurisdictions<sup>8</sup> have also been common features of all Western civil law countries for decades, at the very least; and this in addition to the more obvious considerations on the proliferation of statutory laws and codifications in common law areas and the now generally acknowledged importance of case law in civil law countries. 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 shifting or having shifted towards a mixed, eclectic model between the civil law and common law traditions.<sup>9</sup> Many other examples could be made, in the Western world as well as in the non-Western one. England, Italy, China, South Africa 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 Sudan? Do we need new labels? Do we need that old label anymore?

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<sup>6</sup> 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.

<sup>7</sup> Palmer, ‘Introduction to the Mixed Jurisdictions’, in *Mixed Jurisdictions*, supra, at 13.

<sup>8</sup> Palmer, VV, ‘Introduction’, supra, at 9-10; the list includes due process, judicial review, separation of powers, free speech, habeas corpus.

<sup>9</sup> 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.

## 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 closed group of items? If answers to this question is ‘yes’, then ‘mixed’ is no more than a label to indicate a given, well-known and immutable list of items. That would be fine, as far as we understand that we would be keeping that label to indicate those systems only, as a specific group of items with their specific features and as a *numerus clausus*. *That 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 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 belonging – be it the civil law one, the common law one or an environment affected by both – rather than to legal systems’ actual and continuously changing features and to the existence and influence of other non-western legal traditions. The label would have the only surviving function of a name tag for a fixed list of *items* (however variable their actual features might be in the future), rather than a category related to a fixed list 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 might still have a classificatory value. This implies that, according to changes in reality, new items could/would be admitted in the category, or old items could be moved from that category to another (e.g. to full civil law, common law or to a different category). Classifiers would thus have to identify the features of this particular grouping, and tell which legal systems are fit for the label and which aren’t, deciding how mixed must a mixed system be to qualify.

### *The Objective Elements of ‘Mixity’*

Professor V.V. Palmer developed a theory of mixed legal systems,<sup>10</sup> trying to give ‘classificatory label status’ to that term used by David in its general meaning of common language, and identified a few precise features<sup>11</sup> of the jurisdictions being part of the acknowledged group of ‘mixed’ legal systems worldwide. ‘Mixed’ is intended the ‘classical’ way in his book, where these systems are considered as candidates for what he suggests might be called ‘the third family’, including Scotland, Louisiana, the Philippines, South Africa, Israel and the usual few others.<sup>12</sup> Palmer of course recognises the many mixtures, pluralisms, layerisations in today’s world complex legal reality; still, he identifies the above mentioned, relatively short list of

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<sup>10</sup> Palmer, VV, ‘Introduction to Mixed Jurisdictions’ 3-16, and ‘A Descriptive and Comparative Overview’ 17-80, in *Mixed Jurisdictions*, supra at 6.

<sup>11</sup> Id., ‘Introduction’, at 8

<sup>12</sup> 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.

jurisdictions 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 or rather for any system showing the features he identified). Those basic common elements<sup>13</sup> are the coexistence of both the civil law and the common law traditions with their typical legal features, both 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, as 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 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.<sup>14</sup> 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 invader imposing its public laws and institutions on local private laws: would both instances fall within Palmer’s theory of mixed jurisdictions, or just the former one?<sup>15</sup>

Common law tradition features are obviously still being transplanted in many non-common-law legal environments, by choice of the receiving jurisdiction (other than the Israeli case: e.g. a law on trusts has been enacted in Panama and in China; a case-law-approach developed in the EU legal system); also, some forcibly imposed more general and complete transplants of the common law model cannot be completely ruled out in the future. However, the historic dynamics identified by Palmer that generated the ‘classical’ mixed legal 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 and legal conditions can be reproduced. Other mixtures are more likely to occur, at present and in the near future, some implying important elements of a different legal tradition being superimposed on a common law legal system. In addition to the example of Hong Kong, some degree of Islamisation of some common law jurisdictions is not unimaginable nowadays; if not by force, by an autonomous choice of the relevant jurisdiction.

### *The Subjective Element*

Another crucial feature of ‘classical’ mixed systems, as 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.<sup>16</sup> 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.

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<sup>13</sup> Id at 7-10.

<sup>14</sup> Id at 8 and 10, with the only exception of... Ruritania.

<sup>15</sup> The author concedes that a reverse allocation would not necessarily warrant a ‘fundamental reclassification of the system’.

<sup>16</sup> Palmer, VV, ‘Introduction’, in *Mixed Jurisdictions*, supra, at 8.

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 by the *Trento Manifesto*,<sup>17</sup> especially with its second<sup>18</sup> and fifth<sup>19</sup> theses.

The contradiction is probably more apparent than real: what Palmer calls ‘perception’ of the local jurist – the ‘subjective’ element – amounts, when objectively observed and identified, to an important part of the relevant jurisdiction’s ‘tradition’, to put it in Professor Patrick Glenn’s terms,<sup>20</sup> and to an important factor of identity,<sup>21</sup> in turn and objectively contributing to shape the identity and ‘style’<sup>22</sup> of a legal system.

### **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’. Circulation of legal models, convergence, a unified consideration of western legal systems as belonging to just one western legal tradition, the emerging of important non-western legal traditions, make the use of the ‘mixed’ label not appropriate or maybe senseless for a current classification of the world’s jurisdictions, all being to some extent ‘mixed’.

Main partitions for modern, current classifications of legal systems must be others: call them families, models, traditions or – say – streams, new actors are playing on the scene: Islamic, Hindu, Confucian legal traditions, as well as other non-Western native traditions now recognized as ‘legal’. Now that the classical mixture that justified the term ‘mixed’ became common everywhere in the West, efforts of frontline legal comparison could well be devoted to the study of the many, complex extant mixtures, and – why not – to identify one or more new concepts of ‘mixed system’, with their respective labels, groupings, etc.

An interesting metaphor seems to be the one<sup>23</sup> 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 intense circulation of legal models across the boundaries of the traditional

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<sup>17</sup> 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), ‘Legal Formants: a Dynamic Approach to Comparative Law’, in 39 *American Journal of Comparative Law*, 1-34 and 343-402.

<sup>18</sup> ‘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’

<sup>19</sup> ‘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.’

<sup>20</sup> Glenn, HP(2004), *Legal Traditions of the World*, 2<sup>nd</sup> ed.[2000], Oxford, chapters 1 and 2.

<sup>21</sup> *Id.*, at 33.

<sup>22</sup> In Zweigert, K, and Kötz’s sense; *Introduzione al diritto comparato*, *supra*, 84.

<sup>23</sup> Proposed by Professor Esin Oruçü in her presentation at the Second World Conference of the World Society of Mixed Jurisdictions Jurists, held in Edinburgh in June 2007.

classifications of legal systems 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 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 being dynamic and 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. A historic approach versus a dogmatic one, we might say.

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 Professor Esin Oruçü's metaphor; and it also seems clear to me 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 recognize, 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 customary mixed system (maybe Vietnam and North Korea), in addition to the Chinese legal system. We could also see some possible Islamic-common law legal system at the horizon, reversing some of the historic colonial patterns of 'mixity'. In these cases, descriptive value would mostly reside in the adjective words put before 'legal system', containing the 'genetic code' of the relevant legal system, so to speak. Many other mixtures can be identified in legal history, such as the Hindu-Buddhist mixtures of the Kingdoms of Lamma, Mon and, subsequently, Ayutthaya, in south-east Asia;<sup>24</sup> or such as the old legal system of Tibet, which resulted from a mix of Hindu, Buddhist and Chinese legal traditions.<sup>25</sup>

Considerations to be made are, on the one hand, that '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. The family tree approach can be very good as a descriptive model, but will be not so suitable as a classificatory one if we decide to describe each item to its smallest detail. We could be happy, for instance, of using classificatory labels such as 'Hindu-Buddhist', 'Anglo-Indian', 'Western-customary' or 'Sino-Western' to describe the world's major legal systems, without going further. And we could of course develop more refined, fine-tuned classifications to study specific legal traditions with more detail.

We can still classify, maybe we want to do it and maybe we have to; anyway, we should avoid turning classificatory labels into mere descriptions, that only apply to just one item in the group of items to be classified, or anyway too detailed with respect to the required level of generality of the analysis – the more accurate the descriptive value of a given label, the lesser the classificatory one.

Some balance is needed, for classifications to be useful at all. A classification which is too fine is not so useful, amounting to its extreme point to a list of categories corresponding to the number of items to be classified. A classification which is too coarse and general is not so

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<sup>24</sup> See, eg, Huxley, A (ed.) (1996), *Thai Law: Buddhist Law*, White Orchid Press, Bangkok.

<sup>25</sup> French, RR (2002)[1995], *The Golden Yoke – The Legal Cosmology of Buddhist Tibet*, Snow Lion, Ithaca, NY.

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 classificatory labels, providing both simplification and accurate information at the same time. Like in codifying the law, where rules must be not too abstract, not too detailed, for the codification to be both an efficient and an effective tool to substitute the previously existing state of the uncoded law.

## **A Possible (Mixed) Approach**

### *Family Pictures v. Forest/Family Trees – Some Remarks*

Both mentioned approaches lay on some fundamental truth; and families are not watertight compartments or bubbles isolated from their immediate environment. It must not by chance that in human life families and trees are associated in that very popular metaphor. Even in law, one of traditional main ‘families’, the Roman-Germanic one, has a name which is the classificatory ‘family name’ of each individual system in the family, but it also describes the main branches of the family tree.

Family origins and limits are fuzzy, subjective, often untraceable or difficult to demarcate; but every family, observed at a given point of its history, features a visible previous generations’ family tree, and a visible offspring of subsequent generations. To describe the life of a given subject, current information must be added to that old picture of the relevant subject as a child, next to his/her parent(s); to classify the trees of a forest at a given moment we have to create more or less artificial partitions, physical or ideal, in the middle of the forest, and label the resulting groupings. A combination of both methods is necessary to study families and forests, and their members, and to be able to convey the relevant information to others.

In the past, the colonial powers’ generated new jurisdictions stemming from their colonial activity, which would belong to this or that family (and just in few cases to both) once and forever, at least within the limits of human perception of most scholars; life was relatively easy then, for comparative lawyers wishing to classify.

When features of the classified items change relatively rapidly, you might stick to the family picture approach, thus having a classification related to the original features of the system; as an alternative, you might periodically re-assess a given classification and re-describe family trees according to current developments. This implies the possibility of having to move 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 with the tools available.

David’s descriptive and classificatory model has been brilliant in the 1950s and 1960s, but maybe we should not be discussing about recognising the existence of a ‘third family’ in the XXI century’s world’s legal systemology, unless we confine ourselves to a specialised study of *western* patterns of law only. It should be kept in mind that the specificity of ‘classical’ mixed jurisdictions is high *within the western jurisdictions* but it will not be so high if we also consider the non-western legal world: the legal systems of France, Quebec and England seem very similar to one another when compared with, say, the ones of Laos or Madagascar.

I also think we do not necessarily need to create a whole array of classificatory labels, for every legal system on the planet, pivoting around the ‘name tag’ given to that particular club, then defining and classifying in a linguistically-consistent fashion all other possible groups.

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 recognised increase in its 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 should common lawyers have difficulties/delays in recognizing and/or accepting the fact of their legal heritage being superimposed somewhere by others.<sup>26</sup> The same may also happen 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) and even with the jurisdictions of the ‘classical’ mixed group (e.g. South Africa, Sri Lanka or the Philippines).

We should definitely get used to the idea of Western traditions getting mixed with non-western ones. Still, considering a solid comparative lawyers’ tradition in the use of the term ‘mixed’, we might use terms other than ‘mixed’ (eg: mixtures, stratifications) for most non-Western situations, in order to avoid confusion (eg, saying that South Africa has a legal system which is a mixture between a ‘classical’ mixed one and customary laws), lest having to deal with conceptual difficulties, inconsistencies and inappropriate descriptions or, at the very least, with communication problems. Recourse could be made to more articulated labels (maybe including basic family tree information, such as Hindu-Buddhist, Moslem-civilian) to classify non-western mixtures, should there be the need to classify.

Things should be classified, if you really have to, according to their current (or unchanging, if you can get any) and important features. Having said that, we can all agree on addressing the ‘classical’ mixed systems with ‘mixed’, if we so like. It is not inappropriate to use general words, having a common sense in general language, in a more specific or even peculiar sense when making a technical discourse. It is also acceptable to give a word several different technical meanings which are well understood by specialists when put in the context, as it happens for instance with the very terms ‘civil’ and ‘common’, having several meanings both in general language and within the very legal dominion. India would then have a mixed legal system but not a ‘mixed’ one, where the former term is used in a generic language meaning and the latter in the agreed specific technical one.

‘Mixed’ in its strict ‘classical’ sense related to that *closed* group of items would not be a viable general classificatory label for today’s legal systems of the world. On the other hand, in the family tree metaphor, ‘mixed’ is just a generic adjective word like many others – eg like ‘legal’, with not much informative capacity.

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<sup>26</sup> 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 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’.

A possible and useful, current *classificatory* use of this very polysemic word, could be limited 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 then retain some current classificatory meaning, with a view to the developments in a few jurisdictions which are actually identifiable around the globe as candidates for official admission in the ‘mixed’ group. A western technical concept developed within the WLT might still be of use within the WLT as a classificatory tool, as far as we do not insist in using it for completely different realities, which would lead to confusion and dilution of the informative contents of the label.

### *The Objective Element – Superimpositions and Other Ways*

The kind of superimposition also identifiable in ‘classical’ mixed jurisdictions, of public law models on a previous layer of a different legal tradition, has occurred quite often in history, in relation to comparable political and institutional contexts. The Roman Empire, for instance, also 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.<sup>27</sup> The Moghul Empire superimposed its Islamic institutional architecture on the traditions of India, leaving private issues very much regulated by the Hindu legal tradition and local customs,<sup>28</sup> as it also occurred in the XV century when the Sultanate of Melaka had been established in South East Asia;<sup>29</sup> a process later reproduced in the same parts of the world by the British colonisers in the XVIII and XIX centuries (without any ‘mixed’ title awarded), and also occurred in many other places during the colonial expansion of all Western powers.

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 its immediate environment (persons, family and successions). Issues in the middle range, between the individual person and the general architecture of the polity, are sometimes regulated by middle layer(s), as it is the case of many colonial legislations still regulating contract or other issues related to the economy in countries with a strong customary substratum regulating the law of persons, marriage, inheritance, and having an upper-layer of post-colonial legislation reforming those newborn countries’ institutions. This one is, obviously, a generalization which can only have a rule-of-thumb value; however, it is the result of the careful observation of the African legal environment,<sup>30</sup> with an approach to pluralist, stratified legal realities which can, *mutatis mutandis*, apply to similar contexts and maybe contribute somehow to the theory of legal ‘mixity’.

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<sup>27</sup> For a first approach to the issue see Castellucci, I, ‘Il Diritto e la Legge; analisi storico-comparativa di una relazione critica’, in *Boletim da Faculdade de Direito da Universidade de Macau*, 16 (2004), 79. A Chinese version of the same article is also forthcoming (2008) in the same journal. An English version is available in *Global Jurist - Advances*, at [www.bepress.com/gj](http://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 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.

<sup>28</sup> Lingat, R (1967), *Les sources de droit dans le système traditionnel de l’Inde*, Paris, and the Italian translation made by Francavilla, D (2003), *La tradizione giuridica dell’India*, Giuffrè, Milano, at 366-368.

<sup>29</sup> Hickling, RH (2001), *Malaysian Law*, Pelanduk, Subang Jaya, especially at 105-114; Ahmad, SS (1999), *Malaysian Legal System*, Malayan Law Journal, at 3.

<sup>30</sup> Sacco, R and Guadagni, M (1996), *Il diritto africano*, UTET, Torino.

Still, ‘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;<sup>31</sup> a really curious mix of civil and Saxon laws which is the first ever, in historical terms, and not exactly fitting within the ‘classic’ mixed jurisdictions model description.

‘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 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 being, in my opinion, that the American lawyers have not made a clear decision or acknowledgment, and a consequent statement, about their jurisdiction being a mixed one – 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’, *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.

Finally, in addition to the well-known stratifications of common law jurisdictions over civil law legal systems, the legal landscape also shows some examples of ‘reversed allocation’ of areas of responsibility between common law and civil law or civil-law-influenced legal traditions. Some aspects of Chinese law (a legal tradition somehow influenced by the civil law one) are currently being superimposed, mostly in public and constitutional law and with respect to separation of powers, rule of law and role of the judiciary, in the formerly common law jurisdiction of Hong Kong (as well as in the formerly Portuguese territory of Macau),<sup>32</sup> and this could well be considered an instance – especially as the superimposition is occurring precisely in those areas that Palmer considers ‘critical’ for the mixing process.<sup>33</sup> Also, the common law provinces of bilingual, bijural Cameroon have long functioned within a national legal framework based on the French civil law tradition.<sup>34</sup>

Even within just the two Western main legal traditions, thus, the concrete instances and ways to reach ‘mixity’ might be several.

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<sup>31</sup> Caravale, *Ordinamenti giuridici*, supra at 24.

<sup>32</sup> 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.

<sup>33</sup> ‘Introduction’, supra, at 9-10.

<sup>34</sup> Sacco, R and Guadagni, M (1996), *Il diritto africano*, UTET, Torino, at 242-247.

### *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.<sup>35</sup>

‘Mixed’ system of the ‘third’ family are western systems more mixed than other western ones, mixed before and for longer time than others, or mixed in a more ‘official’ 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.<sup>36</sup> 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 they always take time.

Lawyers tend to be conservative, and 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’<sup>37</sup> 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 classified 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, or 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 increasing circulation 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?

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<sup>35</sup> ‘Introduction’, in *Mixed Jurisdictions*, supra, at 8.

<sup>36</sup> Again might be of some help to refer to the Fifth Trento thesis, supra.

<sup>37</sup> See, eg, Ajani, G (1996), *Il modello post-socialista*, UTET, Torino.

A very reasonable answer to the latter question could be ‘yes’, implying sometimes dissociated results if we classify according to objective tests (actual features of the system) or subjective ones (shared perception/tradition).<sup>38</sup> The relevance given to a subjective element should be accompanied by the warning that subjective perceptions basically imply some inertia in acknowledging objective changes. A very clear 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 energetically, dismissing most of them.<sup>39</sup> 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, eg. after rapid transitions, revolutions etc.<sup>40</sup>

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 reachable 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.<sup>41</sup> These two probably amount today to grey systems, one immersed in a black tradition and the other in a white one, so to speak; and this dissociation 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, are happening and have happened, indeed. Thus, we could consider using a wider, current classificatory category of ‘mixed’ civil law-common law legal systems, including all mixtures of (prevalingly) 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 of any legal heritage. This wider concept of ‘mixed’ legal system would then be related to a number of systems wider than the number of the ‘classical’ ones, still showing several relevant, current features also shared by the fewer items of the ‘classical’ sub-group.

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<sup>38</sup> 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 attempt.

<sup>39</sup> 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.

<sup>40</sup> 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, if not running faster than the objective elements, in Macau, with respect to the penetration of Chinese political-legal models (which, in turn, are being affected by the western ones, in a clear convergence process).

<sup>41</sup> 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 historic 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 ‘prevalence’ and of ‘mixed’ jurists’ perception or of their belonging to a very specific ‘mixed’ tradition.

What could be sometimes problematic would just be an excessive diversity of new meanings and uses of the term ‘mixed’, having been used so far in a world legal environment considered simpler than today’s, basically observed through and within the western legal traditions. Clarifying the basic terminology and adopting more refined analyses and agreeing on classificatory language will help the jurists’ community to avoid confusion. In accordance to a wide usage of comparative lawyers’ community, we could use common terms other than ‘mixed’ (eg: mixtures, stratifications) for ‘non-classic’ complex situations, that would need some additional labeling anyway to convey the desired amount of classificatory information.

### **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. Basic colours (blue, red, yellow), can be mixed to form a few more colours. Simple drawings can be classified according to their colour, as far as this element has some kind of essential importance. Still, when pictures become many and the art develops enough, almost every picture will be made with many colours, and different criteria are required, more adhering to what is really important in the items to be classified, with different meanings and contents of the classifying categories: landscapes, portraits... or even rational, romantic, abstract pictures; these classifications would be more significant, informative and accurate than the one based on the pictures’ (prevalent) colours.

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), and 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. It could be said that these are ‘mixed’ legal *corpora*, or environments; a more appropriate and current description, probably, would be to state that these laws and regulatory systems have been developed in a very advanced western legal environment.<sup>42</sup>

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<sup>42</sup> 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*

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; I am sure many more can be imagined. The following classification schemes would be based on the current features of the jurisdictions classified, that in today’s world would be more telling, more revealing than the traditional groupings based on *Stare Decisis v. Civil Code*.

*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 synergic mix, as clearly demonstrated by the fact that many or almost all of the Western legal tradition systems seem to more or less converge towards a similar mixed model. Many other complex legal environments feature instead more or less severe, more or less overt conflicts amongst their components, as it happens whenever a customary or religious law provides differently from the superimposed western layer of case law/legislation. The phenomenon is well known and normally analysed within the conceptual framework of legal pluralism.<sup>43</sup>

‘Classical’ mixed legal systems are no more than stratified legal systems. It is just that stratification in those systems normally works well, as new and old 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 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 synergic mixes and dissociated ones, or devise a measuring scale of (dys)functionality to grade them, so to speak.<sup>44</sup> Each group could of course have its internal partitions, determined according to the characteristics of the items belonging to the group, not necessarily replicating the internal classification patterns or partitions of other groups.

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*Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts* (3<sup>rd</sup> ed.), Transnational Publishers, Irvington, NY.

<sup>43</sup> 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.

<sup>44</sup> This is another interesting suggestion of Prof. Esin Oruçü, contained in her presentation at the 2<sup>nd</sup> Conference of the World Society of Mixed Jurisdictions Jurists, Edinburgh, June 2007.

### *A Classification According to the Prevalence of the Regulating Forces Identified*

Within this kind of classifications would surely lay the approach proposed by Professor Ugo Mattei,<sup>45</sup> with Chiba's works in the background,<sup>46</sup> based on analysing legal systems and 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 three 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, the items being located around 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. This introduces a new way to observe legal systems, considering their being characterized, in terms of prevalence, as traditional legal environments, environments governed by the rule of law and those regulated by politics as a main regulating circuit or factor; or to measure and grade the relative importance of these three basic societal factors in each classifiable item.

### *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.

Legal systems of greater China, for instance, irrespective of their originating from a socialist, Portuguese or English heritage, are now all convergent towards a new model of legal system, undoubtedly much more influenced by the political-legal system of Mainland China, and its related socialist-market-economy legal ideology and features,<sup>47</sup> rather than from old Europe legal philosophies. It seems to me that a new model of legal system is developing in China and that its public law framework will be or it is already being superimposed on Macau and Hong Kong laws, developed by their respective former colonial powers according to their legal traditions. A second group in the big former socialist macro-group could be identified with the Russian and Russian-related jurisdictions. The few remaining hardcore socialist countries could also be a small geo-legal group, if a maybe transient one, as they still have a thick stratum in common justifying their grouping.

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<sup>45</sup> 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*, Giuffr , Milano, at 775.

<sup>46</sup> Chiba, M (1989), *Legal Pluralism: Toward a General Theory through Japanese Legal Culture*, Tokai University Press, Tokyo.

<sup>47</sup> 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.

In terms of prevalence of components, quantitative approach, would we classify today's Macau legal environment together with Portugal, or rather with China? What about the psychological, subjective element? The importance of the geo-political context for the legal systems' features and responses will become more and more clear, so that this group of Chinese or Chinese-influenced legal systems (which could include the three systems of Greater China, Vietnam, maybe North Korea and maybe, some day, Taiwan) will undoubtedly, in the event if not already today, have its own underlying, specific, shared legal philosophy, irrespective of the diverse origins of the items classified in the group.

Just the same process occurred when the 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 has been to a great extent developed and shaped by geo-political dynamics. Thus, we really should not necessarily be focused, in today's world, only on technicalities such as the binding force of precedent or the style of legislative drafting, *vis-à-vis* much more influential and diversified developments and mixtures created by the superimposition of a layer of socialist ideology on two previously western legal systems, or the reversed process affecting several former socialist countries moving towards more Western (legal) ideologies.

In a 'geo-legal' approach Asia itself would of course 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. In one of the many possible groupings imaginable, 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* [a word of Arabic origin, meaning 'usage' or 'custom'], 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, featuring Japan and South Korea, heavily influenced by venerable Asian traditions, mostly from China, in the old times, then affected somehow by some transplants of European origin in the XIX-XX centuries, and subsequently affected by the legal models of North-American origin, since the end of the Second World War.

Other identifiable current legal macro-areas, each with its specific geo-legal features, would include the western one, of course; it would surely still be sub-divisible in civil, common, mixed jurisdictions; but it could also be very reasonably classifiable otherwise, e.g. EU legal systems v. non-EU ones, due to the presence of this new superimposed European legal framework to so many jurisdictions belonging to civil law, common law and to the mixed tradition. The Islamic group could represent another macro area, sub-divisible in some smaller ones. One or more pluralism-based groupings could be located in Africa. Public international law, and/or the so-called *lex mercatoria* or transnational law, could also represent geo-legal environments, if not physically identifiable with a geographic area or location, very specific and very relevant for comparative lawyers, being characterised by peculiar and important legal features and momentous developments. 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, form of government and public institutions, and its local traditions also very present in the Indian 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 maybe not so for other ones. Western legal systems could still be classified as common law/civil law/mixed, as far as this would be sensible, relevant, current.

### *In Conclusion*

The world's legal reality is very complex and we should not try and oversimplify it; when classifying it, what we find is that making recourse to the few simple categories of the past is not enough anymore. New classificatory labels will necessarily require more specific words than classic comparative law classifications, as the legal world is more complex than it used to be – or as so we now perceive it to be. Classification is an exercise which is well done and useful when you succeed in conveying information, effectively, accurately, without oversimplifying or even distorting it. Maybe we need more than one classification system, or a complex model based on a grid of several different classificatory criteria, including the 'classical' ones as far as they serve for the purpose of efficiently managing knowledge. David's partition based on the original tradition shaping (the western layer of) each classifiable legal system can co-exist with classifications made considering the other traditions also affecting the system, or considering the prevailing regulators characterizing it, or assessing the geo-legal collocation of the relevant jurisdiction within the appropriate macro area of the legal world. I am sure other ways can also be devised.

Each classification model reveals some of the features of classifiable items; all can be used, singularly or together, as complexity warrants complex tools.

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

We cannot but recognise that the 'classical' mixed systems shared some specific features, and still do, which are very interesting, even intriguing; and that these features are more and more becoming features of many other legal systems.

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 and mixed jurists have been very related for decades, 'mixed' and 'comparative' being of course two close concepts, both implying the existence of diversity, and of diversity being considered as source and/or as a resource for knowledge. Studying A and B, even A v. B, sometimes AB can be found (or BA maybe). Comparative lawyers have always admired 'mixed' lawyers and have been attracted 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 to them seemed to be a ‘dual’ knowledge, so to speak, to master the complexity.

However, comparative lawyers are naturally very curious. For them all mixtures are equal (whereas many ‘mixed’ lawyers, maybe, even when they recognise the existence of other mixtures, tend to consider their own mixture as being more equal than others). They nowadays study a much larger number and mixtures of legal environments, traditions, systems, ‘things’, than the original A and B, observing with amazement the resulting ABC, BCEF, FGH, or any of the possible permutations.

Comparative lawyers are still very curious with respect to those municipal lawyers able to work in such a greater diversity, dealing with its 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 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. But still, a ‘mixed system’ *mentality*, or approach, for world lawyers and comparative scholars has not lost an ounce of its potential for producing legal developments in an increasingly diverse legal world.

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