Vincenzo Zeno-Zencovich is professor of Comparative Law in the University of Roma Tre and Chairman of the Italian Association of Comparative Law (AIDC).

In this short presentation Western legal systems are seen in a holistic perspective as complex systems in which each traditional partition is constantly in relation with (and influenced by) the other parts. At the same time all legal systems are placed in a global context with which they are in osmosis.

The volume is aimed at introductory courses to Comparative Law and Comparative Legal Systems and is subdivided in eight chapters devoted to: 1. Democratic Systems ~ 2. Values ~ 3. Government ~ 4. The Economic Dimension ~ 5. The 'Welfare State' ~ 6. Repression of Crimes ~ 7. Judges and Jurisdiction ~ 8. Models for a Globalized World.

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COMPARATIVE LEGAL SYSTEMS

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L'unità del diritto
Collana del Dipartimento di Giurisprudenza

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A Short Introduction

RomaTrE-Press
2017

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Con questa Collana si intende condividere e sostenere scientificamente il progetto editoriale di Roma Tr*E-Press,* che si propone di promuovere la cultura giuridica incentivando la ricerca e diffondendo la conoscenza mediante l'uso del formato digitale ad accesso aperto.

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Prof. Giovanni Serges
Direttore del Dipartimento di Giurisprudenza
Università Roma Tre

Saepe nega
Concede parum
Distingue frequenter

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Introduction

Lawyers, like other scholars, love to classify. It is a way to put order into one's mind and into the chaos of the world outside. It gives the writer and the reader the illusion that things are, or can be, clear and neat.

Well before the rationalist revolution of René Descartes, Greek and Roman writers were intent on putting order into ideas, morals, nature, history and geography. Julius Caesar's opening words of his *De bello gallico* are unforgettable: "*Gallia est omnis divisa in partes tres*" ("Gaul, as a whole, is divided in three parts").

Therefore, there is nothing new in classifying legal systems. And while in "hard" sciences we find dramatic turning points (for example, quantum physics), in social studies changes are slow and are based on incremental developments that slowly, very slowly, steer the cumbersome steamship of knowledge in a different direction.

Legal systems have been studied and described for millennia. Most of the time this is not the explicit scope of the writer, but clearly when Tacitus describes the mores of ancient German tribes he is providing us with a view of their society and the rules which govern it. The classifying intent becomes explicit with the Enlightenment and after the fundamental event of codification in France and most of continental Europe.

At this point the scholarly construction of a legal system coincides with the birth of comparative law as a specific discipline of legal knowledge.

Two centuries of research and thoughtful writing have brought us a long way ahead in the comprehension of legal phenomena and in forging the intellectual tools to classify them.

One cannot however help noticing that the traditional ways used for classifying legal systems do not any longer appear satisfactory for reasons that do not pertain to their intrinsic value, but are related to the inescapable fact that the times, and the world with them, have changed. The map, mostly drawn at the beginning of the 20th century, has completely changed, noticeably in the last 30 years. The problem is not only the loss of strength in the Euro-centric (or Western-centric) model, but also the profound changes that Western legal systems have undergone. In particular, if one looks outside the box of acquired classifications, one realizes that contemporary legal systems are of an incredible complexity, unparalleled in the past and covering in detail aspects that a few decades ago were, at best, sketchy.

The following pages were born out of an intellectual dissatisfaction

with some traditional partitions dominant in the classification of legal systems that tend to ignore a certain number of aspects which, instead, appear of decisive importance in characterizing a legal system.

First, there is the staunch resistance of a private law/public law divide which is untenable if one believes that a system is a system and therefore must be seen as a whole and not artificially subdivided into many non-communicating parts.

If this first statement is acknowledged, the necessary consequence is that one should look at the main components of a legal system and understand how they interact.

The basic idea is that each element has a continuous influence on the others, with the result that legal systems are dynamic and diverse owing to the multiplicity of factors on which they are founded. Metaphorically it is possible to isolate in a laboratory and study the various particles of the system (*e.g.* marriage, dissolution of Parliament, capital punishment, income tax, termination of employment) but when we take a look at how they operate in the "natural" world and how they fit into the broader picture, the result is different.

The paradoxical conclusion might be that it is impossible to classify legal systems without creating some rather elaborated and abstract formula (two atoms of Government, one of Parliament, five of rule of law etc.) which would end up looking like a sort of legal alchemy.

More usefully one should focus on why organizing legal systems is still important in the 21st century. The purpose is simple and related to the function of comparative law: one studies systems different from one's own because by studying differences one understands similarities, by studying others one understands oneself. This is not peculiar to legal studies. In many other branches of human knowledge comparison and comparative methods are used to increase and broaden understanding of that field: from zoology to literature; from linguistics to political thought, and many others.

Focusing on the main components of a system and on their inter-relation requires at all times a holistic view, even when the object of the research may appear to be very small. Micro-comparison requires macro-comparison.

A few preliminary caveats are necessary. These pages will be devoted to legal systems of Western democracies. By "Western" I mean those parts of the world which for historical reasons have been forged by the unique combination of Judeo-Christian religious beliefs and institutions and by Greek and Roman philosophy. Clearly non-Western systems and different notions of "democracy" are widespread and play a very important

role in the present-day globalized world. However, if one does not dispel obsolete partitions in Western taxonomy is it unlikely that one will be able to understand different models. In the second place the approach is explicitly legal realistic, *i.e.* looking at things as they are, and not as they are proclaimed to be in legal texts and in the books. This inevitably means discarding a certain number of labels which albeit venerable – such as the civil law/common law distinction – do not appear any longer to reflect the core features of the system.

This Introduction is directed at students of comparative law and comparative legal systems. It does not purport to be a doctrinal work, and only in the last chapter are some, perhaps novel, ideas presented. It wishes to convey notions and ideas which may aid better understanding of the complexities of any legal system, starting from one's own.

Therefore, a broad brush has been used that will often fail to reveal details and shades which are also important. This will be a task for whoever may find it appropriate to go further along the pathway that one is attempting to open up here.

Chapter One

Democratic Models

The terms "democracy" and "democratic" are the object of thousands of profound writings spanning more than two centuries. After World War II the term was even used as a safe-conduct for brutal dictatorships (how can one forget the so-called "German Democratic Republic" which in the heart of Europe perpetuated Nazi dictatorship under the cloak of rigorous Stalinist doctrine?).

Setting aside such outrageous examples what we are interested in is classifying how the *demos* can actually exert the power (*kratos*) which is bestowed upon it by democratic political theory.

The limited scope of this work does not allow for putting the process into a historical perspective. Suffice it to say that in the last two centuries the subjective and objective nature of democracy has expanded considerably: not only have voting rights been granted to all citizens of age, whatever their sex, income, faith or race, but, to a limited extent, they have been extended to non-citizens. Most importantly the list of political rights attached to the power "naturally" bestowed on all citizens has increased considerably, going well beyond voting: control over elected officials, participation in public decision-making procedures, judicial remedies are common to all Western legal systems and such differences as inevitably exist do not distinguish and qualify one system from another.

What does qualify is the way in which voters can express their power through their vote. Here we have two models, equally venerable and firmly settled: the US presidential model and British parliamentary model.

Incidentally one should note the fact that both these models were born and developed in the Anglo-Saxon world. This shows the limited relevance in the fundamental field of democratic government of the traditional civil law/common law divide.

1.1. *US presidentialism*

Albeit with many limitations, the US Constitution of 1787 (and its

connected Bill of Rights of 1791) is the first authentic and lasting example of a democratic system constitution. It is characterized by a rather simple principle: "We the people" (the opening words of the Constitution) express their will by electing both the President and Congress, whose prerogatives are very clearly Stated in Articles 1 and 2 of the Constitution, the first non-ephemeral Constitution of the Western world. We shall analyse further the fact that the US is (also) a federal State in which powers are apportioned between central (Federal) authorities and local (State) authorities. The first and most distinctive feature is that the powers of both the legislative branch (Congress) and the executive branch (the President) are vested in the electoral process and therefore are on an equal footing from a democratic point of view. And while in the other great model, British parliamentarism, government is grounded on a parliamentary investiture, in the presidential model the executive branch, by receiving its legitimacy directly from the voting body, can act with considerable independence, although it is not backed by Parliament. Clearly the possibility of opposite political orientations of the executive and of Parliament can bring things to a standstill – not uncommon in US history – but this appears to be the result not of some inexperienced mis-judgment by the "Framers" of the US Constitution, but of a deliberate design to separate powers and avoid their concentration in one political body. The presidential model, therefore, is characterized not only by the high level of legitimacy of the head of the executive branch (one person, and only one, chosen by the whole nation), but also by the independence of the two powers and their constant dialectic.

In a rather simplistic way one might say that the presidential model is "more democratic" than the parliamentary one because voters are given the opportunity to decide not only on who should represent them in Parliament, but also who should lead the executive without needing to receive a vote of confidence from Parliament. In fact, in the US relations between the two branches are more nuanced and are generally aimed at encouraging cooperation rather than conflict. However, the general perception is that in a presidential system voters have much more of a say and on some occasions a handful of individual votes may tilt the balance in favour of one candidate and against the other. In the emotional presidential election of 2000 the republican candidate George W. Bush won Florida – and therefore the presidency – over democrat Al Gore by a mere 537 votes.

The US system is noteable for many other factors that will be presented and juxtaposed to those of other systems. The first is that it should

be considered that the presidential model was devised not for a centralized State, but for a federal State. The checks-and-balances, therefore, are not only between legislative and executive powers, but also between centralized (federal) powers and local (State) powers.

Secondly one must point out the fact that presidentialism appears to be a model difficult to export. One finds it, on paper, in many other countries, especially in Latin America, but it is stretching the comparison too far to state that the version they implement has some resemblance to the original. The poor external performance of the presidential model introduces us to a basic principle in comparative law, that of "legal transplants", when legal institutions, processes and solutions are reproduced in a different context. Quite often the result is a rejection because they are not compatible with the body into which they are inserted. The reasons for a legal model being successful in one country and unsuccessful in another were clearly set out over two centuries ago by one of the most eminent scholars of modern legal thought. In 1814, Friedrich von Savigny rejected the idea of transplanting to Germany the highly successful French civil code. The law, Savigny stated, and the statement stands true 200 years later, is a social product. If society is different – for historical, political, geographical reasons – the law is too and should be different. The US presidential model very well reflects some characteristics which were and still are typical of US society that are not found in the rest of the Western world. US scholars are well aware of this phenomenon which goes under the definition of "American exceptionalism".

1.2. *The parliamentary model*

Rooted in the medieval tradition of the House of Commons, the British model of parliamentary government emerges – like many English legal institutions – more from chance rather than deliberate design. The distance of the Crown from the government in the first half of the 18th Century is related, according to many historians, to the lack of knowledge of English of the first two Georges; and to the lunacy, in his later years, of George III. This strengthened the role of the King's ministers, Robert Walpole first and William Pitt after him.

Thus, a system was gradually set in place by which two parties (at that time the Whigs and the Tories) fought in the election to win a majority in the House of Commons (the House of Lords was for life and hereditary). The leader of the victorious party led the government, receiving the formal

title of His or Her Majesty's Prime Minister. In this process, there is very little that could be vaguely qualified as "democratic". There is no equivalent of the US founding documents, and the number of voters was until the 19th century less than five percent of the adult population (men who owned a certain amount of land). One had to wait until the end of WWI for universal suffrage to be granted first to all adult men, and then to women.

But what is important is that the British model puts Parliament at the centre of the constitutional process. Not only has it the power to vote in laws but the fate of government depends on it. The direct legitimacy we find with the US President is lacking in the British Prime Minister, and there are several cases in which the head of government has never received any, albeit indirect, electoral investiture, as in the cases in which the leader of the majority party dies or steps down from office and his or her place is taken by the new leader of the party.

From a comparative perspective, the central point is that, well beyond the specificity of the original British experience, the parliamentary model (also known as "Westminster" model) has been widely transplanted to other nations and actually is the dominant model among Western countries in which, therefore, voters elect Parliament, where a majority is formed that votes in a government. This means that if the government no longer has a majority – because it has been denied a vote of confidence; because one or more parliamentary groups have announced that they are withdrawing their support – it falls. In some cases, it is replaced by a new government which obtains a vote of confidence; or new elections are called. From a functional point of view, it is easy to understand that in many cases – especially in that of coalition governments – government is highly dependent on Parliament and cannot impose its legislative agenda without the risk of losing its majority.

The success of the British parliamentary model abroad can be attributed mainly to two factors. When it was "exported" to continental Europe there was still scarce attraction towards the US democratic model. Most European countries, which were kingdoms with a very long tradition, were slowly exiting absolutist forms of government in which all the power was bestowed on the Sovereign. The parliamentary model, especially its very small and selective number of voters, was more reassuring. In the second place, British parliamentarism was hybridised with one of the ideological pillars of the French Revolution *i.e.* that voters, who held an individual sovereign right, transferred it, by voting, to Parliament, which was the expression of – and expressed – the people's will. This has

brought – and still brings – a very strong rhetoric to Parliament and its powers: only Parliament can make laws, which are the expression of the general will. This means that Government – inasmuch as it depends on a parliamentary majority – is in a subordinate position, with the main aim of implementing the people's will which is manifested by Parliament. In this sense, the notion of "executive branch" is meant in a literal way: government executes the will of Parliament.

One should note, however, that the widespread adoption of the parliamentary model in most European countries in no way means that there is complete uniformity. In some countries, it has brought considerable stability, especially if there is a two-party system with government holding the upper hand over Parliament. In others, governments have been in the hands of various parliamentary majorities, giving them limited decision-making ability.

This brings us back to the remark that laws – especially at such a fundamental level – do not shape society and institutions, but are shaped by them.

1.3. *Semi-presidential models*

Understandably, each country, following its traditions, but also because of historical contingencies, shapes its own model of government. Among the many varieties, the semi-presidential model is frequently singled out: the head of State (generally called the President of the Republic) is elected directly by the citizens, who also elect Parliament, from which the government is issued. Therefore, there are elements of the presidential model – the head of State is elected by his or her citizens – and of the parliamentary model, in which government relies on a parliamentary majority.

The central issue is the relation between the head of State and government. While in the US model there is no doubt that the President appoints and dismisses the members of the (of his) cabinet, in a semi-presidential model Parliament plays a fundamental role. It is therefore necessary to investigate, case by case, the powers and the role of President. In most cases one notices, at law and in fact, that the President, despite being the expression of a direct and general will of the voters, has limited powers (*e.g.* Austria).

The more relevant example is that of France, where a semi-presidential system was introduced in 1958, departing from traditional parliamentarism. The President of the Republic retains a number of important and effectively actioned powers, such as designating the Prime Minister, dissolving Parliament, establishing when it is necessary to impose a state of emergency, representing the nation vis-à-vis other countries, being

commander-in-chief of the armed forces. The remaining executive powers are conferred upon a typical parliamentary government, which must hold a majority at least in the National Assembly and receive a vote of confidence. The autonomy of President and Prime Minister, and the different sources of their legitimacy, have been made evident in the last 30 years in the various cases of so-called "co-habitation", in which a President of one party must co-exist with a parliamentary majority and a Prime Minister of the opposite party or coalition.

The French example is particularly notable because of the very strong ideological importance that is traditionally conferred in that country upon the notion of "popular sovereignty" embodied by the National Assembly.

1.4. *Concentration of legislative and executive powers*

To a certain extent, the three models we have examined (presidential, parliamentary and semi-presidential) are the enactment of one of the fundamental principles of the political science of the age of Enlightenment: separation of powers is best expressed in Montesquieu's masterpiece "*L' Esprit des Lois"* (1763).

This is most evident in the US Constitution, but law making is also an essential prerogative of Parliament in the other models. In the parliamentary model, the executive branch acts within the boundaries that have been drawn by the legislative branch.

All three models aim at ensuring effectiveness of government action, but also a degree of vicinity with voters who, in a democratic system, are the ultimate holders of sovereignty.

To this general thrust, there is however a noticeable exception represented by the European Union. Founded in 1957 as a supranational organization aimed at the economic reconstruction and development of post-war Europe, and with a limited membership (Belgium, France, Germany, Italy, Luxemburg and the Netherlands), in sixty years not only has it multiplied its members (28 States with a population of over 500 million) but it has considerably widened its competencies, passing from a free-trade zone to practically all areas traditionally the reserve of State sovereignty, including several aspects of foreign policy and of common external security.

The powers of the EU are extremely wide and cannot be presented in detail. What must be summarized here is the unique model it has put into place since its beginning (the Rome Treaty of 1957) and substantially

confirmed fifty years later in the Lisbon Treaty of 2007.

Although the system appears to stand on three legs (the Council, the Commission, and the European Parliament), *de iure* and *de facto* both legislative and executive powers are in the hands of the first two institutions, while Parliament plays an ancillary role.

This is made clear by Article 14 of the Lisbon Treaty according to which "*the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions*".

The complex mechanisms of this shared legislative responsibility are set down in Articles 293 ff of the Treaty on the Functioning of the European Union (TFEU), with the aim of avoiding a stale-mate between the two institutions.

If one compares this model with the three outlined in the previous paragraphs (presidential, parliamentary, semi-presidential), the differences are striking. Not only is the legislative power shared between Parliament and Council – something that would be scarcely compatible with the other models – but the sources of legitimacy of the two institutions are quite different: the Parliament is elected by the European citizens (albeit by each country according to its own laws). The Council, instead, "*shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote*". Therefore, it is representative at a second level: the citizens of each Member State elect their national Parliament, whose majority grants confidence to a Government. The members of the national government are subsequently designated, according to the specific issue, to represent it in the Council. This dominant role of the Council and of the Commission – only the President receives investiture by the European Parliament – has repeatedly attracted widespread criticism as a "democratic deficit" of the EU institutions.

The issue, although theoretically appealing, leaves open the question of whether traditional models of governance based entirely on voters' sovereignty would be functional in a vast geo-political area such as Europe in which historical, demographical, political and socio-economic differences are so stark.

1.5 *Electoral systems*

In contemporary democratic systems, the most common form of expression of the people's sovereignty is the vote.

In some cases, voting results in some immediate legal, and legislative, effect. This is the case of referenda when voters, on a national or on a local basis, are called to express themselves, in a mandatory way, on the approval or on the repeal of a law. Most post-WWII constitutions contain a provision by which any constitutional change must be ratified by a referendum. In one important case – that of Switzerland – constitutional changes are submitted directly to voters. This is the reason why the Swiss Constitution of 1999 appears, in less than two decades, so full of amendments, and is brought as an example – for some to be followed, for others to be avoided – of "direct democracy".

Generally, however, voting is the usual procedure through which the members of the legislative bodies and of the executive are chosen. Electoral systems are extremely important when examining the features of a legal system at its political and administrative level. They clearly play a double role: on the one hand, they are the expression of the system in which they operate; on the other hand, they contribute towards shaping that system.

One can operate two very broad, and diverse, distinctions: the majoritarian system, which is common to the UK, the USA and Canada; and the proportional system, which, in many forms, is common to most of continental Europe and Latin America.

The majoritarian system is based on the principle that the candidate who is elected is the one that has received the most votes. This is commonly called "first-past-the post" (FPTP).

The proportional system, instead, is based on the principle that the electoral competition is between political lists. Representation reflects, in its most radical expression, exactly the proportion between the number of votes received and the number of seats at stake.

While the majoritarian system has remained mostly unchanged over the last two centuries, the proportional system is highly diversified and variable, with its pendulum swinging, according to the political ages, from "pure proportionalism" to "corrected proportionalism".

In both systems, the geographical size of the constituency is essential. If the constituency for the election of, say, the head of State is national the winner will be the candidate who has received the highest number of votes. But if, in the same kind of election, the result depends on how

many constituencies have been won on a majoritarian basis, it can happen, and has happened quite often in the US, that the winner is a candidate who has received a lower number of votes but has distributed them better among the various constituencies, winning more of them.

This has happened repeatedly in US presidential elections: to mention only a few recent cases, in 2000, George W. Bush and in 2016, Donald Trump. This can also happen in general elections, such as in the 1951 UK election, in which the Conservatives, led by Winston Churchill, prevailed over the Labour party, led by Clement Attlee, even though they had received 250,000 fewer votes.

This is the reason why the size and the demographics of constituencies are so important in a FPTP system and justifies recurrent denunciations. In the early 19th century the scandal was that of the so-called "rotten boroughs" where the Member of Parliament was elected by a few dozen votes, while huge industrial towns were left practically empty-handed. In recent times, especially in the US, the challenge is to so-called "gerrymandering", when the size of the constituency is drawn in such a way as to allow a minority not to be affected by a nearby majority (typically, mainly white districts clearly separated from mainly black districts).

If these are the problems of majoritarian systems, those of proportional systems are much greater, and much more complex. Although proportionality ensures, theoretically, representation of a wide plurality of political opinions, and of ethnic, linguistic and religious groups, it is strongly criticized because it brings fragmentation and instability to governments that need to rest on solid majorities. Attempts to convert proportional voting systems to a majoritarian result are countless, rarely successful and frequently volatile.

There are at least four ways - that are not necessarily alternative to each other - to avoid an excessive fragmentation of political representation.

The first is to reduce the size of constituencies, which implies that only those lists which receive the most votes will win a seat in the national or local government.

The second is to set an entry barrier, expressed in a minimum percentage of votes received, to be able to participate in the partition of the seats (a 3%, 5%, 8% quota), with the consequence that those lists that do not go above that floor will not be represented).

The third is to grant a bonus to the list which receives the most votes and goes beyond a certain percentage. The bonus allows a majority of seats even if, clearly, the list has not received the majority of votes. However, the

other lists have their representation, albeit in a reduced number.

The fourth is two-round voting: in the first round voters choose freely among many lists. If one of them receives the majority of votes it wins an ample majority of seats. If not, a second round is called among the most popular lists (generally the first two) of the first round. This system is commonly used in France. In such a way, proportional and majoritarian systems are mixed.

Can a legal system be classified simply by comparing the voting systems? Clearly not. The US presidential model and the British parliamentary model, which are, as we have seen, the leading models in Western democracies both adopt majoritarian systems. Proportional systems have guaranteed, on the whole, stable majorities in Germany and in Scandinavian countries. The same has not happened in other European and in Latin American countries.

One could provide a self-explanatory picture: electoral laws are set in the Constitution or voted in by Parliament. If the political system is stable there will be a natural tendency to perpetuate a stable electoral system which is in its substance majoritarian.

If the political system is unstable there will be a constant push towards electoral systems that ensure a very short period of stability, returning rapidly towards fragmentation, short-lived governments and frequent dissolution of Parliament.

However, the fact that legal systems cannot be classified in accordance with their voting systems does not mean that the latter are not extremely revealing. The balance between political representation of diversity and stable government is also a criterion that goes to the roots of the system and expresses different notions of democracy and to what extent the individual vote counts.

Chapter Two

Values

In the Western tradition democracy is imbued with values that have been gradually shaped by history and trial-and-error processes.

These values, on which Western institutions are based, represent, from a comparative point of view, an essential feature. It is quite pointless to compare legal systems looking at the words of the law without taking into account the context.

2.1. *Constitutionalism*

The first element a lawyer notices in the structure of different States is the existence, the nature and the structure of a constitution.

Not only are constitutions and constitutionalism a relatively recent feature of Western law, but they have evolved considerably and present significant differences.

The first constitution, which marks a turning point and is henceforth considered essential to the structure of the State and the relationship between citizens and the institutions which hold the various powers, is the Constitution of the United States of America (1787). The basic idea is that there must be a legal text which sets the nature and the powers of each institution; what is the basis for their legitimacy; how they should function. In the American case this is expressed in only seven, albeit quite lengthy, articles. The conciseness is even more remarkable considering that the USA, as we shall analyse further on, is a federal State and therefore powers are apportioned not only on a functional basis, but also on a geographical one.

The term "constitution" is not in itself novel, nor is the idea of establishing the powers granted to each institution, but what is revolutionary is the source of this text ("*We the People*") and therefore its very strong democratic legitimacy, while in the past constitutions were mostly an act of concession by the Sovereign. Further elements are the enunciation in the preamble of the values and aims of the constitution ("*in order to form*

a more perfect Union, establish justice, insure domestic tranquillity, provide for common defence, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity"); and the "rigid" nature of the text, in the sense that changes to it must follow an extremely complex and lengthy procedure. This last point is clarified in the decision of the US Supreme Court *Marbury vs Madison* (1803) which marks the birth of constitutional adjudication conferred upon the highest judicial institution.

All these elements confer upon a constitution a very strong political and symbolic role, also in the sense that radical changes in the State (from Monarchy to Republic; from dictatorship to democracy; from parliamentarism to presidentialism etc.) require setting aside the "old" constitution and approving a new one.

Furthermore, constitutionalism expresses a hierarchy of legal sources and the requirement that legal texts that are different from the constitution should not contradict it.

This concept has profound effects not only on the procedure of approval of laws voted by Parliament, but also on their implementation and interpretation.

These aspects, a common feature in modern Western States, encounter one very important exception and several variations. The exception is the United Kingdom. Again, one should note that the striking difference comes from a country which has common roots with the US.

It is often said – also among British scholars – that the UK does not have a Constitution. This is incorrect in the sense that the English (and subsequently the UK) constitution does not present the formal structure of the US Constitution (a single text clearly distinguishable, placed at the pinnacle of legal hierarchy), but is a multitude of various legal instruments, starting from the Magna Carta (1215), the Bill of Rights (1689), the Act of Settlement (1705, which sets the relationship with Scotland), and much more recent texts held together by tradition and what are commonly called "constitutional conventions". Although a positivist lawyer (especially from continental Europe) may be disoriented by the apparent lack of a comprehensive constitutional text, a legal realist approach tells us – also in comparison with other experiences – that a constitution is what is perceived as such, and is followed in a similar way, in the sense that departing from those rules – whether written or sedimented in practice – would be considered a fracture in the constitutional system.

The British case is enlightening from a comparative legal systems perspective because it shows what we mean by the term "constitution" and the different forms and structures it can take, even among countries

with similar traditions. One should add that the notion of constitution as a bundle of fundamental legal texts held together by constitutional traditions can also be found in Scandinavian countries.

The variations in respect of the US model are the result of historical evolution.

On the European continent, the first significant examples are the constitutions of the first German Republic (1919) and of the first Austrian Republic (1920). They were both voted in after the collapse of the two empires to try to give some order to the completely new structure of the State. They were both extremely long texts (181 Articles the first, 149 Articles the second). And they were both extremely short-lived, and were carried away by the upsurge of dictatorships which characterized most of Europe between the two world wars.

They left however a lasting influence on constitutional theory, presenting several noticeable peculiarities which are now common in most contemporary constitutions.

The length of the text – the Italian Constitution of 1948 is composed of 139 Articles; the German Constitution of 1978 of 169 Articles; the Polish Constitution of 1997 (to mention only one among many Eastern European examples) is 243 Articles long – is due not only to a very strong normativist ideology (everything should be regulated by the law, and no legal voids should be left), but also to the dramatic increase in the role of the State over the last two centuries. Surely the US founding fathers – sons of the Enlightenment and of its *concinnitas* – had the gift of verbal synthesis, but the system of institutional relations that they had to draw was still at a very simplified level: a small number of citizens; even fewer voters; public functions limited to armed forces, taxation, foreign relations. In mass societies, with universal suffrage, increasingly common welfare concerns (work, health, education, environment etc.), it is felt that the Constitution should cover all the various facets which are considered essential. Constitutions are considered "inclusive" texts which set the terms of the social contract between all the citizens and the institutions that are meant to govern them.

This tendency reflects a general attitude in many European countries to rely mostly on written texts which should clearly settle rights, duties, functions, limits, controls. However, this, far from simplifying, increases the legislative production aimed at implementing constitutional principles.

Three models have been identified here: "short" constitutions; "long" constitutions and multi-text/conventional constitutions. Each of them reveals the nature of the legal system and shapes its distinctive features.

2.2. *Bill of rights, fundamental rights, human rights*

The structure of the constitution – one single comprehensive text; or several texts to which constitutional value is given, supplemented by traditional, unwritten conventions – is one aspect that has a profound influence on some of the distinctive features of a State, especially in moments of change (from monarchy to republic; from a unitary structure to a federalist structure; in the apportionment of powers etc.).

Again, the starting point is the US experience. In 1787, the Constitution was voted in: its seven articles contain the fundamental structure of the new State and the apportionment of powers. Very little is said of citizens, except, indirectly, about their voting rights. This is what may be called the "first leg" of modern constitutionalism. The "second leg" was enacted four years later, in 1791, with the first ten amendments to the Constitution, commonly known as "Bill of Rights".

First of all one should notice that, in fact, the Bill of Rights is not really an "amendment" to the US Constitution, in the sense that it does not change any of its provisions, but actually it is an addition to the existing text.

The second element that one should consider is that – on the topic of fundamental rights – we already (*i.e.* at the end of the 18th Century) find a circulation of, and comparison between models. The relationship between the 1789 "*Déclaration des droits de l'homme et du citoyen",* which was the legal manifesto of the French Revolution, and the 1791 "Bill of Rights" is well known and profoundly analysed. In comparing the two texts we can already see different approaches to the same issues on either side of the Atlantic that are the result of ideological orientations and of history, and are the cause of significant divarication in constitutionalism.

On the merits, the US Bill of Rights presents a list of constitutional rights which can be subdivided into two main groups: individual liberties such as freedom of speech, religion, assembly and petition. And procedural rights which consist, mainly, of limitations to police and judicial power: protection from unreasonable searches and seizures; defence of non-self-incrimination; principle of *ne bis in idem* ("double jeopardy"), due process in deprivations to life, limb and property; compensation for takings; fair trial, trial by jury; no excessive fines, or "cruel and unusual" punishments.

It is interesting to note that the first group is condensed into only one article (the "First Amendment", a cornerstone – also rhetorical – of the US Constitution), while the others are stated in a much more detailed way in five articles. This should not be seen as an anomaly: the freedoms stated in

the First Amendment were dawning and had yet to be put in practice. For procedural rights, instead there was a very long tradition that went back to Magna Carta (1215) and in the *Habeas Corpus* writs which span over four centuries before being formalized, at the end of the English civil war in the *Habeas Corpus Act* of 1679 and included in the 1689 Bill of Rights which was sworn by the new King, William of Orange-Nassau.

This attention to procedural guarantees is one of the main distinguishing features – on all grounds – between what may be called the Anglo-American approach and the continental European approach.

If one compares the US Bill of Rights with the nearly contemporary French "*Déclaration des droits de l'homme*" the substance is significantly different.

In its 17 articles one finds the first part – articles one to six – which deals with political rights: equality, sovereignty, freedom, rule of law and law making. The second part is devoted to fundamental rights – indicated in liberty, property, safety and right of resistance which are classified as "natural and inalienable" rights.

And although fundamental rights, both substantive (freedom of expression and religion) and procedural (certainty in criminal sanctions, presumption of innocence, legality in prosecution) are clearly stated, the focus is much more on the exercise of public powers: taxation, police, accountability of civil servants.

The difference is not only in content. While the French "*Déclaration*" contains many constitutional principles, it was not, and still is not, part of a formal and comprehensive constitutional text; the US Bill of Rights is however part of the US Constitution.

This is because – as already said – in continental Europe we encounter only after WWII solid and lasting constitutions whose structure is more or less similar: the basic principles of the State, fundamental rights, partition and organization of powers, constitutional adjudication and revision.

The issue of fundamental rights is a further criterion for distinguishing legal systems, especially in the last 70 years.

Since the horrors of WWII and the crimes perpetrated by totalitarian regimes, there has been a flourish of international instruments intended to state in a solemn form rights that cannot, and should not, be curtailed or suppressed. The most important is the "Universal Declaration of Fundamental Rights" of 1948, which is the basis of the United Nations Organization, from which many similar "regional" instruments followed. The best known is the European Convention on Human Rights (ECHR) of 1950.

To what extent do these charters become part of a national legal system,

and what is their hierarchical level? The answer to this question depends on the "openness" of the legal system to external sources. Traditionally there are two models: the "dualistic" model by which ratification of an international treaty creates only rights and obligations for the State in the international sphere and therefore towards other States and entities which possess international legal capacity. In order that those international instruments may be enforceable in the relation between the State and its citizens (as typically is the case for fundamental rights) a further and explicit legal act (generally from Parliament) is required.

In the monistic model, instead, the international obligations of the State may be enforced in the domestic arena, unless some explicit reservation has been made. Clearly the two models have significant effects on the "rigidity" or "flexibility" of the catalogue of fundamental rights, progressively increasing it – in the latter case –, even without formal changes to the national constitutional text.

This can be done through general clauses contained in the constitution guaranteeing the protection of non-enumerated "fundamental rights", or the respect of international treaties.

This process is far from merely theoretical. Over the last two centuries "first generation" fundamental rights (substantially those enshrined in the Bill of Rights) have moved on to "third generation" fundamental rights which include new personal rights (*e.g.* control over one's body and one's data); a considerable expansion of the notions of equality and non-discrimination (*e.g.* sexual orientation); many "social rights" (in education, in employment, in family relations); and creation of statuses (minors, elderly, disabled).

The move has therefore been from so-called 'negative freedoms', which impose upon public authorities the duty not to interfere with the individual exercise of such liberties, to 'affirmative freedoms' which engage public authorities in positive actions – often of an economic significance – in order to ensure and protect such rights. The obvious example is that of the venerable freedom of expression, which until recently was intended as a duty not to interfere (or to interfere the least possible) in individual speech. Now, with the development of telecommunication networks, it is meant also in the sense that public authorities should enable everybody to access the medium not only to express their opinion, but also to search and receive the opinions of others.

One should also notice that in "open" legal systems the tendency has been to recognize a quasi-constitutional status to fundamental rights even if not expressly enshrined in the constitutional text.

This has a considerable weight in comparing legal systems because fundamental rights – which generally are individual – tend to prevail, especially in adjudication processes, over general or "non-fundamental" (*i.e*. economic) rights.

From a comparative perspective one should also note that even in the Western world the catalogue of fundamental and of human rights is far from entirely shared. It is sufficient to examine the First (absolute freedom of the press) and Second (absolute right to bear arms) Amendments to the US Constitution and note that elsewhere the first freedom is greatly mitigated by countervailing interests and the second simply does not exist. The list of examples could be much longer. What must be pointed out is that, contrary to the truism of universality of fundamental and of human rights, these are, just as any other part of the legal system, the product of a well determined tradition and culture. Very clearly this cleavage increases considerably if one looks outside the Western legal tradition and renders highly debatable the whole issue of compliance with (Western) human rights standards.

2.3. *Constitutional adjudication*

A further great change brought about by the US Constitution which has shaped modern legal systems is what we now call "constitutional adjudication", in the sense that controversies having a constitutional relevance are decided by a designated court, through decisions that cannot be appealed or modified and are therefore at the summit of the legal system.

Originally this intent was not expressed in the 1787 US Constitution which simply established the US Supreme Court as the highest federal court. By its *Marbury v. Madison* (1803) decision this was clearly stated. The opinion of Chief Justice Marshall, more than two centuries later, is still a foundation stone of modern constitutionalism, thanks to its simple but extremely logical reasoning which remains unchallenged.

a) The Constitution of the US is a "rigid" constitution, in the sense that in order to modify it very complex procedures must be followed, requiring special majorities.

b) An Act of Congress, or any other legal order, must comply with the Constitution; if by chance it did not comply and it were validated there would be an indirect modification of the constitutional rules without following the prescribed procedures.

c) It is up to the US Supreme Court, in last instance, to decide whether or not a law, an order or a judicial decision complies with the Constitution.

Although it has taken nearly one and a half centuries to implement these principles in the rest of Western democracies we now consider that constitutional adjudication is an essential feature of the system. Even those countries which did not follow the post-WWII mainstream eventually ended up adopting a similar process: *de facto* in the UK through its Supreme Court, especially since its establishment in the century-old building of the House of Lords (2009). In particular, it has been greatly involved in the apportionment of powers between the various parts of the United Kingdom to whom much autonomy has been devolved (typically Scotland); and in the painstaking process of deciding who (Government or Parliament) should start the exit from the European Union (so-called Brexit).

In France, too, there was strong resistance to a fully-fledged constitutional court because it was considered that it would impinge on the sovereign powers of Parliament. Eventually in 2010 the *Conseil constitutionnel* was empowered to hear and decide cases the same as the equivalent courts in the rest of Europe.

Why is constitutional adjudication so important and what are the main differences?

In the first place a realist approach tells us – by simply looking at historical facts – that a rigid constitution such as that of the US and most other Western constitutions requires extremely complex procedures, which sometimes take years, to be amended. In the meantime, things change, new circumstances present themselves, and new conflicts arise. Constitutional adjudication is the safety valve for tackling these situations.

By doing so, however, it is very clear that the constitution is no longer its naked text, but it is its text with the meaning and scope that has been given to it through constitutional case-law, which in the US is two centuries old and in Europe many decades old. Therefore, if a constitution has a voice, it is that of a multitude of decisions, not always coherent and often expansive in their scope.

The first difference between the models lies in how the constitutional court (or its equivalent) is seized. In the original US model one generally reaches the Supreme Court by appealing a decision of a lower federal court or of the highest state court. The Supreme Court therefore decides the merits of that case on the basis of constitutional principles.

In the continental European model, although there are various procedures to seize the court, the most common is that of an incidental issue of constitutionality.

The judge who must decide a case on the basis of an existing law or

legal provision doubts that the norm is compliant with the constitution and therefore puts the question to the court. In these cases, therefore, the court decides not that specific case but all the cases in which the contested norm is applicable.

A further difference lies in who may seize the constitutional court: the definition of 'judge' is extremely varied, and it includes not only ordinary judges but also tax courts, arbitral tribunals, justices of the peace, etc. In some systems, the individual citizen who considers that his or her constitutional rights have been violated can raise a single claim (this is the so-called *recurso de amparo,* common in Spain and some Latin American countries).

One then has to examine the effect of the decision. The results are quite similar when a specific norm is declared as violating the constitution and is therefore struck out. But in many – most? – cases, the answers are not so straightforward. In some cases, no norm is challenged but the principle which is set is not unambiguous, especially when – as in the US – there may be a plurality of opinions of the Supreme Court Justices, who concur on a certain result but with different constitutional arguments.

In other cases – common in continental Europe – the court does not strike the impugned norm but provides a "constitutionally oriented" interpretation of it.

At the end of the day, one must acknowledge that constitutional adjudication – together with ratification of international treaties (which will be seen in a following paragraph) – is the most common procedure through which a constitution is modified, sometimes imperceptibly but very gradually, without intervention of Parliament or citizens. The constitution is what the constitutional court says the constitution is.

2.4. *Rule of law*

In recent decades, the notion of "rule of law" has become central to international legal discourse, and has been used to rank countries according to their adherence to what is considered to be orthodox "rule of law" theory. From a comparatist's point of view these classifications are, at the very least, naïf and betray a considerable lack of comprehension of the complexity of legal systems, which, instead, are imagined (with a great deal of simplification) to be all of the same kind.

In the first place one should note that the term "rule of law" is, in itself, a formula devoid of any element which can provide it with a univocal sense. And the same can be said of similar expressions which one

finds in other legal traditions such as "*État de droit*", or "*Rechtsstaat*", or "principle of legality". "Rule of law" is a short-hand expression for many different aspects, all very important, of Western legal systems.

The term, in the essential meaning that it has acquired over time, stands for a system in which:

a) Legal decisions are taken by those bodies that have been vested with the power to take such decisions as fall within the scope of that body.

b) Those decisions are taken in accordance with certain substantive and procedural rules which have been previously set.

c) There is the possibility of verifying, through a third party (commonly a judge), that conditions a) and b) have been complied with.

In this sense, it is clear that all Western systems by and large comply with such rules, and the exceptional cases in which they do not comply are, as said, exceptional and are, or can be, stigmatized in international fora.

One must add however that a formalistic notion of the "rule of law" principle ends up by ratifying even the most atrocious behaviours of the State, provided, obviously, that conditions a), b) and c) are complied with.

It is therefore necessary to fill the "rule of law" notion with substantive values, such as, typically, fundamental rights, in the sense that legal decisions, even when taken abiding by rules a), b) and c), violate the rule of law if they lead to the denial of fundamental rights, even if they are not explicitly asserted by written law.

The risk that the notion – highly variable, as one has seen – of rule of law as shaped in the Anglo-American tradition may be transposed without appropriate reflection and distinction in different legal systems, is actual.

A typical example of misunderstanding can be found – as will be analysed in the specific chapter – in criminal law: in most continental European countries, the principle *nullum crimen sine lege* is strictly interpreted in the sense that the "law" is not any legal instrument but must be a formal Act of Parliament. Analogical extension of the criminal law is not allowed. Retroactivity *in malam partem* is equally forbidden. If one were to apply these principles to Anglo-American criminal law systems, in many cases they would not comply with a substantive interpretation of point a), in the sense that most of criminal sanctions set by administrative authorities, or framed by law in extremely broad (and therefore vague) terms would not comply with the basic principle of legality.

On the other hand, focusing exclusively on respect for procedural norms in no way vouchsafes that the substantive principles have been respected.

One can therefore conclude that Western legal systems differ not in

an unfathomable degree of compliance with a very general principle such as that of the rule of law, but in the different (substantive/procedural; formal/axiological) notions that are applied, whatever the label that is used (rule of law, *Rechtsstaat*, principle of legality).

2.5. *Universalism vs Relativism*

Legal systems can also be characterized by their attitude towards offering a universal legal response or, instead, a more flexible and variable approach.

Clearly behind these tendencies there are political ideologies and geopolitical factors.

One first element should be highlighted. The notion of law and of legal systems is almost entirely a creation of Western civilization, developed over two and a half millennia. The widespread idea is that legal systems may differ but by and large they fall within a Western taxonomy.

This approach, inasmuch as the law and legal systems are a social construction can be easily justified. But it contains, in itself, its own limits because of the theoretical and practical obstacles one encounters when transposing Western models to non-Western societies.

The question is: to what extent a legal system is open to influences of other systems and tends to adapt itself to external changes?

The first answer lies in the "monistic" or "dualistic" approach we have already encountered in examining the role of fundamental rights. The former is functionally more open to external influences, which come from international law and are related to a multiplicity of important legal aspects: not only human rights, but also – to list only a few – environmental protection, trade, development, and in general, international cooperation.

There are also other factors that influence the openness of a system, such as the willingness of the judicial system to adopt solutions coming from the courts of a different system; or the acceptance of uniform laws. The typical example is that of the European Union, which sees in the approximation and harmonization of law the political goal of fostering what is perceived as the most efficient model to promote economic activity and social welfare. But one can find other examples, such as the "Nordic Council" which has played an important role in promoting uniform law throughout the Scandinavian countries.

The flexibility of a legal system can obviously be seen from two opposite perspectives: on the one hand, it may alter what may be perceived as a constitutional identity, which is decided by the institutions (Parliament,

Government, Courts) to which citizens have expressly and enumeratedly conferred the power to shape the law. On the other hand, one finds a much more functional approach for which most of the legal system – *i.e.* excepting a certain number of basic principles – is built to achieve certain results and therefore can and should be rapidly adapted to changes in priorities and objectives, through a matter-of-fact operation of borrowing and adapting foreign models. In this functional approach one can also perceive very practical concerns, such as the cost of having to elaborate an entirely domestic legal response, while others, already tested, are freely available. Hybrid models are therefore extremely useful in order to verify if certain legal institutions can easily and effectively be transplanted outside the originating system.

2.6. *The religious factor*

Contemporary Western societies, since the American and the French revolutions, have been increasingly secularized, with a growing separation, among their citizens and in the law, between the religious sphere and the civil sphere. Freedom of religious expression is guaranteed, which implies religious pluralism and respect towards non-believers. However, it would be extremely short-sighted to think that the religious factor – meaning a number of transcendent beliefs organized in communities and made public through rites, places of worship, festivities, clothing and apparel – is irrelevant in characterizing legal systems and distinguishing them.

This is extremely obvious in the open conflict between the Western world and the Islamic world which is based – whether one likes it or not – on the opposing views on the role of religion in shaping society and the law.

But even remaining within the Western world one can outline three models:

a) The State-religion models: in these cases, the relationship between one religion and the State is explicit, formalized and structured. It is sufficient to look at the UK were the Queen (or the King) is the head of the Church of England. Or those monarchies whose dynastic rules impose that the Sovereign belong to a certain confession (*e.g.* Sweden: evangelical; Spain: Roman Catholic). Or constitutions which expressly indicate one confession above others (Roman Catholic in Malta; Greek-orthodox in Greece). This does not mean that freedom of other religious beliefs is not guaranteed, but puts one religion, *de iure* and *de facto*, in a privileged position in its relations with the State.

b) On the opposite side of the spectrum we find States – and the most noticeable examples are the US and France – in which separation between State and Church (meaning an organized community of believers) is imperative. This is far from saying that the State is atheist: in one of the US State seals one reads "*In God we trust*". It means that the State does not have relations with religious confessions, and if any it must put all on an equal footing. One should consider that the two leading countries with a separatist approach have ideological and historical reasons behind their choice. In France, it is due to the fierce contrast between both the Enlightenment, and the revolutionary forces, and the Roman Catholic Church, seen as a source of superstition and bigotry and of continuous papal interference in French internal matters. In the US, the Enlightenment ideology was mostly superseded by the fact that the colonies – and the newly established States afterwards – were the refuge for religious minorities escaping from persecutions in their homeland, starting with the "Pilgrims" who arrived in Massachusetts with the *Mayflower*, and expanding to many others: Quakers, Mennonites, and Jews. In order to preserve these minorities, it was necessary to ensure that no new religious absolutism was established.

c) Mid-way one finds the concordat model, *i.e.* a legal agreement between the State and the Church which sets rights and obligations of the parties. Widely implemented in continental Europe, concordats are extremely complex legal texts inasmuch as they confer a special status on ministers of religion and on their acts (typically, marriage), grant them certain privileges, restrict access by public authorities to places of worship and provide financial support, not only to the clergy but also to religious education.

The most important aspect of concordats is that they imply that religious communities (churches, congregations) are legal entities which are not only recognized by law, but can also reach agreement with the State on an equal footing. It is not the State, through its administrative power, that grants rights and privileges to a religion, but these are the result of a public contractual agreement.

Whatever the model adopted, the religious factor poses complex issues in multicultural (and therefore multi-religious) societies such as are most contemporary Western societies. Religious communities tend to self-organize, creating – even if only *de facto* – a legal order within the State. Can this be accepted? How does one establish who is a member of that community? Can one abandon it, refusing to be subject to its rules?

Should the authorities recognize and eventually enforce decisions taken within that community? One does not have to go too far to encounter such problems. It is sufficient to give a cursory look at the amount of controversy surrounding Jewish law courts in the US.

Chapter Three

Government

3.1. *Central and local Government*

When presenting the different democratic systems, particularly the US system, one has so far set aside the issue of centralized or decentralized government. This is a very relevant aspect of Western legal traditions. The structure of a federalist State, *i.e.* a State which is a federation of various States, is quite a common feature of Western countries and offers a variety of solutions differing in the degree of autonomy of the single members of the federation, or, to see the other side of the coin, in the degree of powers conferred upon the central institution.

a) For once the most ancient, and successful, model is not the US but comes from small Switzerland. Originally a military defence pact among small cantons to protect each other from the expansionist thrusts of their strong neighbouring powers (the Habsburg Empire, the French kings) it gradually provided a stronger and more stable alliance. What should be noted is that Switzerland – together with Venice – is the only European non-monarchical State to have survived the formation of absolutist States in the 16th century. And although the official birth of the Helvetic Confederation came only after the French Revolution and the attempt by Napoleon to annex it to his empire, the idea and structure of a State in which sovereignty is basically conferred upon its citizens and is locally distributed is bound up with the Swiss experience. The lengthy Swiss constitution of 1999 (nearly 200 articles) still maintains this dual structure establishing the competencies of the Federal Assembly, which has law-making powers in the areas that are enumerated, and the competencies of the twenty-four cantons. It also establishes how the two levels must cooperate and coordinate their efforts and roles.

b) However, the best known and – by choice or by force – most imitated model of the federal State is that set out by the founders of the United States of America. What are its distinctive features? The federation – in its various branches: legislative, executive, judiciary – holds only the

> powers that the Constitution expressly bestows upon it. This apportionment is stated very clearly in the 10th Amendment to the Constitution (1791): "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States* [e.g. by Section 10 of Article 1], *are reserved to the States respectively, or to the people*".

Therefore, all the competencies of the federation, originally and intentionally clearly outlined and enumerated, point towards a strong, and prevailing, role for the States. But things have turned out differently: since the conflict between the supporters of this view – the "confederates" – and those holding the view of the prevalence of the federal State – the "unionists", was settled in the bloodbath of the civil war (1861-1865), with the victory of the latter, the system has been characterized by very strong federal institutions and ample decentralized decision-making (in all three branches) at a local State level. This is due also to the increasing international role of the US which, after the expansion and occupation of all the Western territories, moved into the world arena at the end of the 19th century, and reached the status of super-power after WWII.

These historical facts are important for understanding that a legal system may substantially change, while remaining unmodified in its fundamental texts, owing to external constraints and factors.

Looking at the developments over the last two centuries, one is no longer faced with two opposing models, represented at one end of the scale by the US federal system and at the other by the Napoleonic centralized model, which saw all powers concentrated at the summit of the institutions and with extremely limited local powers strictly superintended by the representative of the government (the Prefect).

The first element that should be pointed out is that the US model is "federalist" not only because of the apportionment of powers between the Federal institutions (Congress, President, and the judiciary) and the States, but also because the latter have a strong saying in the Federal legislative process. The Senate is composed of two members for each State, whatever their size (*i.e.* two senators for California with its nearly 40 million inhabitants, and two senators for Wyoming with its population of barely 500.000). If one looks at the French *Senat* one sees that its members are elected by the representatives (mostly town councillors) of the local governments. And in Germany the *Bundesrat* represents the 16 regions (*Länder*) in which the republic is subdivided. The members are designated through local elections but once elected they must respect the indications of the majority in that region. The functions of the *Bundesrat* are particularly important in several

fields, including, obviously, regional affairs.

A comparative and realistic view shows that each system presents different degrees of de-centralization, whether this is called federalism, devolution, or regional autonomy.

The main markers are:

- The areas of competence of central and of local institutions;
- The areas, if any, of shared competence between central and local levels;
- The existence, and under what conditions, of local law-making institutions and the control over their legislative production;
- The possibility – and to what extent – for local institutions to entertain foreign relations;
- If and how local institutions participate in the formation of central institutions;
- If and in what form local institutions retain not only legislative and administrative powers, but also have their own judicial order;
- Taxation and public spending powers of local institutions.

These elements – or a mix of them – can be found in most Western countries, and it is quite irrelevant that they bear in their official denomination the term "federal" (*e.g.* Federal Republic of Germany). Similar forms of decentralization can be found in the UK, Spain, Italy, Canada, Australia, and in many other smaller countries.

This has happened in part because of the growing remits of public institutions – especially in fundamental public services such as health, education, transport – that can be more effectively fulfilled at a local basis; in part because of strong political movements battling for increased autonomy which sometimes borders on secession.

3.2. *Administration*

Although comparative lawyers tend to focus their attention mostly on Government meant as the highest level of the executive branch (the President, the Prime Minister, the Secretaries, the Cabinet, the Ministries etc.), in order to understand the basic differences between the various levels it appears to be more rewarding to concentrate on other aspects, apparently at a lower hierarchical level:

a) The scope of the powers conferred upon the administration and the apportionment of competences between its various branches. This analysis is fundamental especially when one looks at what remedies are granted

to those towards whom the action of the administration is directed.

b) The recruitment of a civil service and of its highest officials. A fundamental difference exists between systems which select officers on the basis of competitive procedures who cannot be dismissed except for serious misconduct; and those in which there is a very high level of discretion both in hiring and in dismissing. This aspect is extremely important inasmuch as the stability of the personnel engaged in the administration gives rise to an "*esprit de corps*" (thoroughly analysed already in the 19th century by the great German sociologist Max Weber) which confers stability on the administrative branch notwithstanding the changes at a political level (parliamentary majorities; orientation of government). It is notable that the typical US "spoil system" (by which the newly elected President has the power to designate most of the top officials in the administration) has been imported to other legal systems as a response to the rigidity of civil servants as a powerful social group, with the aim of better coordinating the functioning of the administrative structure with the political goals of Government.

c) To what extent – and in what way – can citizens participate in the administrative decision-making process? Originally forged in Scandinavian countries as a corollary of a democratic system, it is now considered a common feature of any administrative decision having a general (and not simply individual) impact. In some cases, it may be only a formal requisite for the validity of the decision. In other cases, the enactment of the decision requires a public vote by the community (*e.g.* via a referendum), which may be binding or have simply an orientative and political function.

d) Ancillary to participation in administrative procedures is the (greater or lesser) open-ness of the relevant documents to the parties interested directly in the decision, or third party, public-interest, groups. Again, we find here the illustrious precedent of the so-called 1966 US "Freedom of Information Act" (FOIA) which has been widely copied and adapted in other countries. From a systematic point of view this can increase considerably the political import of administrative decisions which originally were considered as "politically neutral".

e) In the ideal "separation of powers" model, on which the US and continental European models were built in the 18th and 19th century, there is a very clear distinction between legislation, administration and adjudication. It is very clear, by now, that these boundaries are extremely blurred and administration often plays – or has to play – all three roles. From a theoretical point of view the distinction between a Law

or an Act enacted by Parliament or Congress, and a regulation set by an administrative authority is clear. The latter must comply with the former, but especially when broadly described powers are conferred upon the administration, or there are new and unforeseen occurrences, the administration is often quick in occupying what appears to be an empty space. Quite obviously, this administrative activism can be curtailed by the legislature or by the courts. What we are interested in is how much freedom is granted to the administrative power in its ordinary course of business. Looking at things realistically the main differences are those between systems with a very strict judicial control over the acts of government, especially under the historical French form of "*excès de pouvoir*". And those systems in which this control is much less pervasive because the administration has been granted wide, and to a large extent discretionary, power to fill in the gaps left by primary legislation.

f) If the administration invades the field of law-makers, it also increasingly occupies that of the judiciary. Administration has always had internal procedures for revision and redress of its decisions. The fact that they are – quite correctly – not qualified as judicial, cannot remove the fact that they are of a contentious and quasi-judicial nature, with an increasing role of substantial and procedural guarantees. By now, in many systems, administrative adjudication covers a vast area which is akin to traditional judicial adjudication, and is rarely challenged or appealed in front of the latter. While it is surely extremely fragmented – sector by sector – what should be looked at is if this quasi-judicial empowerment is a general and widely practiced feature of administration or a limited exception.

g) Last but not least, one must consider the nature and the extent of judicial control over administration. The distinctive elements are:

i. Competence: is it given to the ordinary judges (in civil and criminal matters) or to specialized judges? For a long time, it remained unchallenged (albeit unsupported) that the former model was that of common law jurisdictions (UK and US), while the latter was typical of the French model. A more factual approach has amply proved that in all Western systems control over administration is extremely varied depending on the nature of the claim (*e.g.* setting aside an administrative order; asking for damages arising from illegitimate administrative decisions; bringing an action against a specific civil servant for activity brought about in the performance of his or her duties). At any rate the principle that the "King [and his servants] can do no wrong" (and its European corresponding immunities) has been swept away and is

mostly a relic of the past.

ii. Areas of judicial control. With the dramatic growth in administrative powers, judicial scrutiny has increased. Rather than enumerate what is included it is more fruitful to list which areas are exempt from judicial control (foreign policy; military and security decisions; financial stability measures). This analysis draws the always fuzzy boundaries between administrative and political decisions.

iii. Remedies. One should also look at the remedies which the courts (of whatever nature, "ordinary" or "administrative") can grant. The typical form is the voiding of the contested decision, but gradually other remedies have been granted, such as damages and specific performance. This last point is extremely important. At the beginning of the 19th century it was already clear that "*Juger l'administration c'est encore administrer*" ["To judge the administration is like doing administration"]. It is quite common for the courts to not only void an administrative decision, but also to substitute it with their own, ordering that the decision be implemented. The process therefore goes in the opposite direction to that highlighted in letter f) *supra*: administration by adjudication.

3.3. *"Independent agencies"*

Another characteristic feature of US federal administration is the so-called "independent administrative agencies", which were introduced, formally, in the 1930s (starting with the Federal Communications Commission, FCC, and the Securities and Exchange Commission, SEC) and transplanted to Europe towards the end of the century. One generally stresses the "independence" of such agencies, which was, and largely still is, meant to immunize such entities from direct hierarchical control by the executive branch, and, in the US, from the spoil system (members of these agencies are designated for five years or more, and therefore are meant to survive the President to whom they owe their post). Furthermore, their members may not be removed from office – except for serious misconduct – and therefore are granted considerable freedom of judgement and action.

These features have been widely replicated and are seen as common in most Western countries. The differences are in the role these "agencies" play in the administration. The main point is their specialization in extremely complex fields which require a very high knowledge of technical (*e.g.* engineering, economic) aspects. The move therefore is from general branches of

government (foreign affairs, labour, finance, armed forces, etc.) to specialized niches which it is thought should be removed from political fluctuations.

However – and here lies the difference – one has to examine whether these "niches", albeit important, remain so, or the model of "independent administrative agencies" becomes diffused and covers a considerable amount of administrative activities. This appears to be the case of the European Union where they have multiplied and been granted strong regulatory powers together with quasi-judicial functions in areas such as competition, financial markets, communications, transport, data protection, and many others.

As these agencies are mandated by EU law one might consider that they are the way through which the EU governs, in a decentralized way, regulated markets in each Member State.

Clearly this is directly related to the dominant European economic governance model which will be analysed in the next chapter.

One point should be made which is particularly appropriate when examining independent administrative agencies: the nature of the norms, their structure, and their enforcement is directly related to the features of the entity that sets those rules. A norm set by Parliament, by a Ministry, or by an independent agency is different not so much because of their hierarchical position, but for intrinsic reasons. Administrative regulations are set by an administration, which is also empowered to implement them.

In the case of independent agencies, they also enforce them via their quasi-judicial powers, which include very strong and dissuasive sanctions. Furthermore, one should consider that while in traditional ministerial structures there is generally a considerable informational asymmetry in favour of those to whom their action is addressed, with a strong tendency to 'capture' the regulator, with independent agencies the unbalance, generally, is in the opposite direction in favour of these agencies.

Chapter Four

The Economic Dimension

All Western democracies are characterized – and this is no coincidence – by a highly developed capitalistic economy. Capitalist in the proper sense of the term and devoid of ideological innuendo: economic development requires a very intensive flow of capital which is essential for all the aspects of activity: labour, equipment, plants, research, production, distribution; the way through which capital is accumulated, distributed, dispersed, is the object of economic history, theory and of political decisions.

All these are inextricably inter-twined with the law in a continuous interplay: the legal system is influenced by the economic model. And the economic model is influenced by the rules which are meant to govern it.

To study a legal system requires, therefore, an attentive study of the economy. Only a rather naïf approach to legal systems – quite common in certain international institutions – can support the idea that one can change the economic system simply by adopting legal norms that are used in a different system. And, conversely, that economic models applied in one country can be used elsewhere to verify the degree of efficiency of another legal system.

Clearly there are correlations between the economic and the legal context, but changes are generally slow and due to exogenous factors, rather than to well-designed and planned "reforms".

4.1. *Private autonomy*

A capitalist economy is founded – at its elementary level – on free economic enterprise, which, from a legal point of view, is expressed as private autonomy.

This has very strong philosophical and political roots which were first framed in a comprehensive system by the fathers of modern natural law, the most prominent of whom is the 17th Century lawyer Hugo De Groot (known as Grotius). The foundation stones of Grotius' system – which was further developed in the following century – are equality, meaning

that all men were created equal and endowed with two natural rights, property and freedom.

If one sets Grotius' vast and extremely rich writings (to which modern constitutionalism and international law, in particular freedom of the seas, are indebted) against the historical background of the small Netherlands, fighting for its freedom from external powers, and creating its wealth through global (East and West Indies, Far East, Africa) commerce, one can easily place at the centre of its legal system contract – as the means to ensure and secure bargains – and property, intended as exclusive ownership over the traded goods and the relevant profits.

The natural law stance – which was (and still is) clearly of a political nature – becomes an orderly system when it meets the 17th century rationalist philosophical revolution, set out by the French philosopher René Descartes. The best expression of this union is in the work of one of the leading French lawyers, Jean Domat, "*Le lois civiles dans leur ordre naturel*" ("The civil laws in their natural order") (1689) in which traditional legal institutions founded on Roman law but disordered by over a thousand years of piecemeal approach are given a logical structure with an economic heart and become a goal for the blossoming bourgeois class whose wealth comes from trade and whose aim is to become the owners of land and of buildings, the expression and source of the primary economy of the time.

Property and contract are at the centre of the legal system. The former is meant in its Roman law sense: absolute ownership *ab inferis usque ad sidera* ("from the bowels of the earth to the stars"), perpetual with no or very limited encumbrances.

Again, one must underline the political soul of this construction, which is antagonistic – and with the French Revolution will become the winner – to the feudal notion of property, limited in time and in usage.

Contract is the legal instrument through which goods are bought, sold and exchanged, creating the wealth which is consolidated in property and in immovables; contract is at the base of the first commercial companies. Contract – freedom of contract – is the flag of those classes whose wealth is the result not of hereditary accumulation protected by crown privileges, but comes from the sweat of the brow and therefore is morally, and politically, justified.

Needless to say, the economic viewpoint is not the only one that explains the success of the model that, once established in France with the French Revolution, is immediately reproduced in the rest of continental Europe and in distant Latin America.

However, it helps to explain the rise of *laissez-faire* policies and the

transfer of power from the nobility to the *bourgeoisie*, throughout the 19th century, and its gradual decline in the 20th century, especially after WWII.

The relativity of legal constructions, and their versatility, in reaching common goals is evident if one crosses the Channel and looks at the cradle of industrial revolution, *viz.* 18th century England. In a land which – at least in this area – is alien to Roman law and to philosophical and systematic approaches, one sees that an extremely fragmented notion of property, typically feudal in its essence, and a rather primitive notion of contract are no obstacle to the extraordinary economic development which is the cause and the result of the establishment of the British Empire, and its world-wide sovereignty.

This is due to fact that the role that in France is played by legal doctrine and the legislature, in England is taken by the courts and by the legal profession, which on every occasion nurture freedom of contract and of trade. There is substantially very little difference between the declamatory statement of article 1134 of the *Code Napoléon* ("*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*"["Agreements legally reached are the law which binds those who made them"]), and the scores of English decisions which exalt the "sanctity of contract" and invoke at all times the Latin maxim that "*pacta sunt servanda*".

Therefore, we see common economic policies, with different legal instruments to foster them. If one further considers the functionality of these instruments one is compelled to recognize that while the theoretically solid notion of property as derived from the Roman law tradition was perfectly adherent and functional to the economic system (that of the 18th century and until the mid-19th century) in which the main source of wealth came from exploitation of the land, the apparently awkward feudal structure of fragmented and highly abstract ownership rights is much more appropriate for contemporary economic systems in which wealth has moved from tangible objects to intangible assets: credits, intellectual property, knowledge, future expectations.

One can present the topic from a different perspective: economic wealth requires the assistance of the law to be recognized in the community and protected (by the courts and all their auxiliaries). The value one gives to economic wealth depends therefore on how and to what extent the protection of the law is granted.

Beyond nominalism (ownership, entitlements, credit, right etc.) and traditional partitions (*e.g.* absolute rights, relative rights) one can subdivide systems on the basis of other, apparently ancillary, features, such as

proof of ownership; limits to the valid transfer of property *a non domino*; securities and guarantees; forfeiture proceedings; burden of proof; *quantum* of damages; etc.

From this perspective systems cannot be classified on the basis of *a priori* qualifications. One needs to place them on a Cartesian axis to understand where and under what circumstances, for example, creditors are protected more or less than debtors; or legal, but absentee or careless, owners are more or less protected than good-faith and interested buyers.

Equally misleading may be partitioning the law into traditional boxes that often correspond to a *forma mentis* built by university curricula. A typical example is that of separating (real) property, contract and tort and then comparing each subject as if it could live – and actually does live – without the others. The fallacy of such an approach is shown by the osmosis between contractual and extra-contractual remedies (the more limited the former, the wider the latter, and vice-versa); or by the continuous interplay between insurance and tortious liability.

Again, one should note that the origin of certain classifications was coherent in an economic system that was moving from the primary sector (based on land and agriculture) into the secondary sector (industrial mass production of goods) and still saw at a distance the tertiary sector (provision of services). But in a world in which the latter has become dominant (one just has to think of the role of finance and financial services) and production and exchange are increasingly de-materialized through what is commonly called the digital economy, different approaches are called upon.

The question therefore is: to what extent are systems capable of coping – *i.e.* ensuring legal certainty – with new phenomena which do not fall squarely within consolidated frames (*e.g.* what is, from a legal point of view, computer capacity? Is there a difference between buying data and using a research algorithm?).

4.2. *Legal entities*

In the Western world, the most important change in the relation between economic activity and the law takes place in the Middle Ages with the development of the "*compagnie*" (a term which is the etymological ancestor of the English "company") to share risks and profits in the growing trade between Italy and the rest of Europe and the East. This proto-capitalist structure was meant to create – under the protection of the law – a legal entity which could operate rapidly, flexibly, and with

reduced costs and risks in the vast markets that were opening up.

The development of the "*compagnia*" [literally bread-sharer] is contemporary to other essential legal institutions: banking (the Medicis), letters of credit, promissory notes, which are the first blocks of what are now the sky-scrapers of finance.

One has to wait, however, four centuries before the creation, in the year 1600, of the East India Company, the prototype of the modern limited liability shareholder company, whose stock was commonly traded, favouring the flow of investment capitals towards profitable and innovative businesses.

One should note that there is not much novelty in the creation of legal entities operating as actors in the patrimonial and economic arena: they were well defined already in Roman law (*e.g.* temples and their assets). And even more so in the Middle Ages through the hundreds of religious orders and charitable institutions which owned immense lands, inherited estates, sold their products and paid labourers.

The change of paradigm is that of the separation of the estate of the legal entity from that of its owners. Although this is only one of the many pervasive legal fictions, one should underline the fact that it was introduced by creating an exception to what was considered a private law dogma: each person is unlimitedly liable for all the debts in which he (and now also she) has incurred. Clearly the existing and traditional legal instruments for the separation of estates (trust and other fiduciary schemes) were not considered appropriate for an economic activity which required the continuous flow of fresh capital from investors to investment.

But once limited liability companies have become the absolute protagonist of the economy under whatever sky, one must point out that behind this label there are profound differences which show how legal institutions, apparently very similar in their formal elements, can present realities which are not easily comparable.

It is well known that for over a century there have been two main models of limited liability company. The first, and original, model which develops in England and afterwards in the US, is that of a business activity – engaged in production, trade, or services – which, in order to obtain the capital for its activity, "goes public", in the sense that it addresses a community which disposes of an income or of savings proposing an investment in the form of shares or bonds. Companies are therefore, in the majority, public companies which entertain a highly complex relationship – based significantly on individual trust – with their shareholders. In the US they will become, gradually, completely anonymous companies in which

ownership is related very indirectly to the founders of the company and is greatly dependent on its management. As a consequence, this requires a very attentive regulation of the stock-market, which is the quintessence of an informational market. The value of shares depends entirely on the information one has as to the past performance of a company, its present – day per day, or at least on a quarterly basis – activity, its future outcome. The economic circle is, apparently, very clear: a business makes profits, these profits are shared with the shareholders who in part spend them, increasing consumption and production; in part they become new savings to be invested. Whatever the, quite to-the-point, criticism of this model and its recurrent failures (the great 1929 Wall Street crash; the "Internet bubble" of 2001) one can hardly say that it has not been successful.

How limited liability companies have developed in continental Europe is quite different. Here one sees what is called the "Rhine model" (because it found its foremost expression in capitalist development in south-western Germany). The system is founded on the creation of powerful intermediaries, banking institutions, which collect savings from depositors, pay a small interest rate, and lend those monies to the businesses in need of capital, obviously at a higher interest rate. The relationship, therefore, is between business and bank, the latter becoming substantially and often formally (*e.g.* when the shares of the company are pledged to guarantee the loan) the controllers of the business itself.

There is recourse to the shareholder market, but when this is the case only a limited amount of stock is sold, in order to ensure that control over the company is firmly in the hands of the founders. Often these shares are bought by investment funds – controlled by banking institutions – which therefore again mediate between individual investors and businesses, increasing their power over the latter. In this scenario, the crucial aspect is not the regulation of the stock-market, but rather of the banking system, setting limits to its ownership or control of enterprises, to so-called interlocking directorates (executive officers of a bank are on the board of a company), to the evaluation of the merits of the credit granted. Crisis in the real economy (production of goods, provision of services) immediately becomes a banking crisis with systemic effects.

In order to compare the functionality and effectiveness of the legal system which establishes and regulates limited liability companies it is necessary to look at the very wide background in which they are set, at its historical development and at its present state. This is particularly important when innovations or transplants are proposed, considering

them equally feasible and bringing equivalent results, without taking into account the context – which is economic, social and legal – in which they operate. And when one refers to legal differences, one is not pointing only at company law but at much more decisive aspects – which will be seen in a moment – such as regulation, taxation and employment legislation. In a nutshell: when comparing legal institutions which are functional to the economic system one must first compare the economic systems, taking into account the variety of capitalistic models which are not always mutually exclusive, and which inevitably also shape the legal instruments that protect them and enable them to operate on a day-to-day basis. Once more it is necessary to point out that transplanting – as often happens – company law rules from one capitalist model to another without considering the context, or under the assumption that it will result in changing the system, is rarely successful.

4.3. *Insolvency*

One of the most important intersections from which one may observe how the different systems attempt to solve economic conflicts balancing the multiple interests at stake is that of insolvency law.

A common rule in all Western systems is that obligations taken on by a business (therefore setting aside the ever-growing consumer protection legislation) should be strictly interpreted and enforced.

There is generally a balance in *favor creditoris*, with little indulgence towards the subjective conditions of the debtor.

But when the unfulfilled obligation is not singular, the attitude changes, or rather it has changed considerably in recent decades. No example could be more illustrative them that of Daniel Defoe who in 1692 was declared bankrupt and jailed because only a few of his creditors refused a settlement. This experience made of the great novelist a fervid and successful advocate of the 1705 law reform.

What are the competing interests? In the first place are those of the creditors. However, these are extremely diverse: not only providers of goods and services, but also employees, banks, tax authorities, social security funds etc.

But there is a more general interest of the whole economy: if an undertaking goes insolvent it has systemic consequences both for the financial system (loans that are no longer repaid) and the welfare system (unemployment, which may require public subsidies).

All these different aspects must find a comprehensive settlement in a

very complex piece of legislation which is both substantial and procedural.

a) Once upon a time there was only the *dura lex* of bankruptcy. Now there is a multitude of procedures which are meant to deal with insolvency, mostly with the aim of saving the undertaking and bringing it out of the crisis. These procedures show a preference towards a general economic interest rather than that of single creditors. Under what conditions and to what extent one may have access to such alternative solutions is, clearly, a question of policy which may vary from system to system;

b) Who is in charge of supervising the insolvency procedure? Is it a specialized court? How deep is the control over the insolvent undertaking and on the possible agreement that may be found with the creditors? Do public authorities – the Ministry of Labour, of Industry and Trade – have a say or is their role purely political?

c) Insolvency law is inextricably tied up with the system of securities, in their multiple forms: mortgages, pledges, guarantees that can be made good at the first signal of insolvency and before this is declared. Further, the order in which creditors must be satisfied in the liquidation process expresses very clearly policy choices: tax authorities, employees, privileged creditors, etc.

d) Quite commonly an undertaking is part of a group of companies together with a holding, subsidiaries and affiliate companies. Does the insolvency of one company reflect on the others or is there complete separation between them? From this point of view insolvency law has the upper hand on company law, in the sense that the latter must necessarily take into account the liabilities attached to control of, or by, another company and these aspects are attentively studied when choosing how to build a corporate group and under which law it should fall.

4.4. *Regulation*

The policies that underlie insolvency law bring us to one of the most important aspects in the relation between economic activity and the law, which is regulation.

By regulation one means the enactment by public authorities of rules which tend to establish who can operate in a specific market, under what standards, with what limits. Such regulation has always existed and has been thoroughly studied by scholars of the Roman Empire.

In medieval economy, mirroring the feudal structure of power, professional guilds were created and some proudly exhibit their century-old royal patents. Even the revolutionary process which swept France and

neighbouring countries at the end of the 18th century introduced a general form of regulation of business entities through "commercial codes". The reason for such long-lasting success in public control over economic activities cannot be simplistically tied to an expression of power that those who hold government exert on their subjects, but rather in a constant *quid-pro-quo* between the regulator and the regulated sector. The latter is far from opposing any form of regulation, and instead sees it as a way to restrict market access to new competitors, and obtain a political investiture which enables it to negotiate with the administration a certain number of rules which are seen favourably by the business community.

Also for these reasons, although the slogan "The business of government is not the government of business" has been a very successful quote, it is undeniable that any advanced economic system cannot do without regulation, and even in countries were the claim is of "zero regulation" this is rather a lip-service than the reality.

The differences, which are not slight, lie in the extent of regulation and on its aims, in the very strong connection with the subject of the next chapter, the "welfare state".

Why is regulation so important in a system and therefore in comparing them? Because regulation in its essence is pervasive; it goes deeply in the most minute details of the production process (*e.g.* the thousands of forbidden chemical substances in the food and cosmetics industry; the hundreds of requirements for a safety belt); it has a measurable, and often very high, cost for industrial and administrative compliance, which is then passed down to the final consumers.

Regulation is surely a legal instrument but it is in the first place an economic theory put into place through norms. In a similar way its opposite, classical *laissez-faire* economic theory, implies, for its implementation, the least level of normative intervention because the "laws of the market" are considered more efficient and maximise individual and common welfare.

Which are the most relevant differences?

a) Who sets the rules? Is it a legislative body which lays down the general framework which is then filled by government through its administration, in the ordinary course of its business? In these cases, although there is a delegation to an administrative body its role is very clearly defined by the law and an eventual over-flow of regulation into fields not contemplated will be challenged, mostly successfully, in front of the courts. The most pervasive form of regulation is when a public authority is granted general regulatory powers over an entire sector. The most common

example is that of independent regulatory agencies, which we have already analysed in the previous chapter. Their competence increases with the development of the sector, also covering new technical and economic areas. Their *raison-d'être* is to regulate and they measure their performance on the number of norms they produce. Their regulatory power is enhanced by their quasi-jurisdictional role in settling disputes within the sector. It is therefore necessary to investigate to what extent the various economic sectors are under the regulatory power of such entities. One also encounters cases of so-called co-regulation, in which the public authorities and the private sector contribute to setting out the relevant regulatory norms, or the self-regulatory proposal of an industry is sanctioned by a public authority.

b) Ex ante and *ex post* regulation: a false alternative.

It is quite common to distinguish between forms of regulation in *ex ante* regulation and in *ex post* regulation. Looking at reality rather than theorizing, the divide does not pass muster. *Ex ante* regulation – which is the ordinary model in the European Union – establishes who can produce or provide and when, where and how. Whoever enters the market – or wants to enter it – is supposed to know in advance what rules to comply with. This is an essential form of know-how which, in itself, constitutes a barrier because it entails high entry costs.

Ex post regulation – so it is said – operates after the enterprise has entered the market and only when there has been some damage to competitors, to consumers, or to the correct functioning of the market. The typical examples which are given are competition rules and judicial intervention. However, it is easy to see that what is perceived, in a single case, as an *ex post* intervention is considered by all the other businesses operating in that market as a precedent which dictates what conduct should be followed in order to avoid sanctions. No rationally run enterprise, in whatever system, would risk falling under administrative or judicial scrutiny without having thoroughly analysed not only existing rules and regulations but also precedents. Quite appropriately, then, one qualifies this situation as regulation by adjudication. Therefore, what changes is not the moment in which regulatory powers are exerted, but who decides what can be lawfully done and how: an administrative body or the judiciary. One might venture the view that although traditional *ex ante* regulation is extremely cumbersome and pervasive, it is issued looking at the whole picture and, generally, all the stake-holders may have a say in the proceedings. This is not the case in regulation by adjudication, where

the view is limited to the facts of the case, and the court does not usually have all the information – and enough time – to take a decision without unintended consequences within the market.

c) The aim of regulation. Making a substantial difference in regulatory systems are the purposes pursued by regulating economic activity. Declamatory statements are made that public authorities intervene in the public interest, balancing egoistic interests. But it is necessary to make explicit such interests and verify if they are actually best served by regulation. The first, quite common, argument, is that an orderly organization of the market is beneficial to all those who operate in it – a view, as we have seen, generally shared by most undertakings, which are naturally risk-adverse. The second, related, argument is that of legal certainty: regulation generally guarantees immunity from future claims of damage, both contractual and tortious. Compliance with rules set by a public authority is an extremely persuasive justification. Beside these are other interests which are debatable or, at any rate, extremely variable. The first are consumer interests, such as safety, value-for-money, fair contractual terms and conditions. To what extent must such protection be pursued? Must one reduce to practically zero the risk of negative consequences for the health of the consumer? This can be activated by regulating every detail of the production process and informing the consumer of the risk he or she has decided to run (*e.g.* warnings on cigarette packets). As to the economic interests of consumers, there is a noticeable clash between classical competition theory and the regulatory approach. According to the former, competition reduces prices and, assuming equal and perfect information resources, allows the best choice to be made by combining price with quality. The regulatory approach instead supposes informational asymmetry, which does not allow a rational choice by consumers and therefore the gap must be filled by the visible hand of the regulator, imposing minimum levels of quality, standardising contractual terms and conditions. A further justification for regulation is the protection of general interests which fall under the public remit. Typical examples are environmental protection and financial markets' stability. If they are explicitly pursued this requires more and deeper regulation. At the end of the day one might suggest that the difference in regulatory systems is equal to the difference in cost, by percentage, of regulation.

d) The many faces of regulation. It would be formalistic to qualify as regulation only those rules that intervene on access to the market,

phases of production and distribution of goods or rendering services. This very important aspect cannot be separated from two of the most pervasive forms of regulation of economic activity: taxation and labour law, which will be analysed in the next chapter. Suffice it here to note that in a holistic (and realistic) approach these aspects are inextricably related and any firm will take them into account at the same time as managing the present and making plans for the future.

4.5. *State aid*

Through their many forms of regulation public authorities impose costs – comparatively high or low – on economic activity. But from a systemic point of view one cannot ignore that at the same time economic activity receives more or less powerful support through what is commonly called State aid, which is aid granted by the State or through State resources to a certain undertaking thereby creating a selective advantage that may distort competition and trade There is a general consensus that the notion of "aid" is extremely wide and includes – for its legal consequences – direct State grants or subsidies, such as 'rescue' aid; tax or other social security exemptions; loans at preferential interest rates; guarantees or indemnities on favourable terms; preferential grants or loans; disposal of land or buildings at less than full market value; debt write-offs; waiving of profits or other returns on public funds; export assistance; public direct or indirect subsidies to attract foreign investments.

State aid is an object of intensive study and controversy in the theory and practice of competition law and of international trade law.

From a comparative legal systems perspective, what should be noted is that all systems – whatever their proclaimed economic ideology – amply resort to State aid in its multifaceted expression. This however does not make all systems equal.

What should be looked into are the areas to which the aid is directed (agriculture or technologies?). Is it aimed at sustaining the domestic consumption of national products? Is it meant to protect domestic industries from foreign take-overs? To allow them to cross-subsidize their foreign investments? The mix of these various elements and the prevalence of some of them colours the system.

But what is most important is that State aid, just like regulation, is a pervasive form of intervention in economic activity and, just like regulation, it is done through normative provisions. Whatever the motive

– which is always presented in positive terms – public authorities who provide the aid exert a strong hold on businesses which find themselves with an invisible, but extremely influential, shareholder.

Their choices are directed in order to acquire and prolong the aid. Investments and production (what, where, when) are decided by taking into account incentives, deductions, rebates etc.

To sum everything up, what is the balance between what is taken by regulation and what is given under the form of aid? What, if any, are the redistributive effects among the various sectors? If ever one should wish to make classifications one should be able to detect those systems which, through State aid, are maintaining the economic *status quo*; those which are promoting its evolution in certain directions; and those in which State aid is simply the result of the pressure of multiple economic and social constituencies.

Chapter Five

The "Welfare State"

5.1. *Taxation*

It is impossible to define a system – a political, economic, social, and therefore legal, system – without considering its public finance model. A comprehensive view is essential. There may be countries, a considerable amount of whose public revenue comes from the exploitation of natural resources, typically energy, which may reduce significantly the level of taxation. And there are other countries whose aim is "small government", which entails comparatively lower public expenditure. The first case is clearly dependent on casual geographical factors. The second instead depends on political choices.

Historically, taxation is the first form of public control over economic factors, not only production, trade and consumption, but also (and especially) wealth. It soon acquires an eminently political dimension. It becomes a bilateral relationship between the State and the tax-payers; it confers a status, being the price to belong to a certain class; it enables the exercise of political rights (voting and being elected). In democratic systems taxation goes to the roots of the social contract between the State and its citizens.

What is the content of this contract? Are, and where are, its "terms and conditions" written down? Or is it simply an informal agreement which is implied in the voting process?

One can assume that taxation is not meant – as it was in feudal ages – for the private profit of the ruling class. It is strictly controlled both when it is established, but especially when the revenues are spent. The first aspect one should look into to detect differences is therefore the State (in all its articulations) budget on the side of expenditure. More for defence or for education? More for infrastructure or for health? More for public employees or for incentives to businesses?

This is not "simply" an issue of State accounting but clearly draws from some of the most distinctive features of each system. Again, one must assume that these expenses meet the approval of Parliament – which

votes on both the provisional budget and the final budget – and therefore reflects the combined will of multiple constituencies.

While Constitutions and laws are voted on once and are supposed to last for a long time, the budget session, which is renewed every year, is the most penetrating expression not only of legislative powers but of popular (albeit indirect) sovereignty. It is meant to produce immediate effects, with financial resources that are taken away and given back, sometimes with a very specific price tag on each item of expenditure.

The fact that it is annual allows an immediate comparison with the past and makes it possible to detect permanent features and temporary ones. Often numbers are much more revealing than words, which can easily be misinterpreted or twisted. One might say that the budget is the living portrait of a system, keeping together most of its elements, and with direct consequences on the economy, on individual choices, on standards of living, attractiveness to foreign citizens and enterprises. This last aspect reminds us that in competing legal models, what an enterprise looks at are not extremely important (for a lawyer) constitutional issues, but the taxation system and its convenience. Setting aside any evaluation of the merits, this demonstrates that systems are different and are perceived as such.

This is especially true when looking at revenue, where it comes from and how it is collected. The mix of the two highlights preferences which are immediately seen as economically and socially more or less desirable by certain groups (business vs. consumers; professionals vs. pensioners).

Even if the imagination of tax finance ministers is extremely fervid in creating new forms of taxes, what is relevant, from a systemic point of view, is which are the most important sources of revenue.

The second distinctive feature is the tax rate, and how it is distributed among the different economic agents. For direct taxes, it is generally a flat rate (*e.g.* value added tax, VAT), but it can vary according to the nature of the economic activity or who the economic agent is. For indirect taxes the two models are progressive rates or flat rates. But again, this may depend on the status of the tax-payer and/or his/her activity. Clearly this may make it more or less convenient to do business or to own property as an individual or as a legal entity. And obviously to decide where to establish one's seat of business. Fiscal competition is exactly about this, with a to-the-cent evaluation of the relative convenience of different tax systems, and the frequent use – as we have seen in the previous chapter – of fiscal incentives to attract investment.

The influence of tax law spreads to other, important, sectors: it is not

wise to compare contract law ignoring what its taxation regime is or could be. And company law is empty if it is not coupled with tax law which may frustrate even the most carefully drafted equilibrium between shareholders, managers and company assets.

If these might be considered micro-economic effects of tax law, one must not forget that public finance also has constitutional and macro-economic implications.

The first is the existence – or non-existence – of a balanced budget constitutional obligation. Such a provision implies that any public expenditure must be backed by corresponding revenue and limits the possibility – generally amply pursued – of public debt through treasury bonds or other forms of public loan.

The balanced budget provisions have – or are meant to have – multiple effects, the most important of which is the value of the national currency, which is a function (mostly) of GDP (gross domestic production), reserves and public debt. The implications are mostly macro-economic, such as the balance of payments between imports and exports, and the incentive for domestic producers to look at foreign markets. But the strength or the weakness of a currency, or its stability, is also an important factor in business transactions when establishing the price, and inserting provisions meant to sterilize fluctuations.

Public debt has a further macro-economic consequence on the reliability of a country as a borrower on the international financial markets. The risk of default – from nil to very high – is one of the main factors determining the interest rate, which is passed from the State to its financial institutions and, finally, to the ultimate borrower.

High risk of default brings with it prudential financial policies which are generally short-handed as "credit crunch". In order to obtain support for investments from a financial institution enterprises must provide very strong guarantees (shares, buildings, machinery, personal property of shareholders), with a direct impact on company law.

The best example of how fiscal policies are at the centre of all the most important aspects of a modern system is that offered by the European Union. Its choice of a common currency – the Euro – is surely instrumental to the efficient functioning of a common market, thus avoiding all the costs and uncertainties of different and fluctuating currencies. But a currency's value is given by the economic condition of a country and by its public finance policies. Taxation policies, which incentivise – or disincentivise – certain activities, by redistributing wealth, and determining

the need for more (or less) public spending, should be in common, or at least coordinated. This however raises serious constitutional (and therefore political) issues: fiscal policies are seen by citizens as one of their core political rights which are expressed through voting. Removing such rights to external decision-makers raises acute controversy and is considered a move away from democracy. At the same time, States see in the power to determine their own fiscal policies the last, and non-renounceable, aspect of sovereignty and therefore resist attempts by the EU to occupy the field of taxation. The result is that without common fiscal policies the Union is lame; but without fiscal sovereignty States and citizen are and feel deprived of their role and rights.

These aspects have been clarified in a landmark decision ("*Lissabonvertrag*") by the German constitutional court (the *Bundesversfassungsgericht*) which – in reference to financial decisions by the EU following the enactment of the Lisbon Treaties which inevitably had consequences on Germany's public finance – stated in unequivocal terms that such a choice could be made only with the consent and approval of the German Parliament (the *Bundestag*).

5.2. *Social services*

In the early stages of contemporary States (*i.e.* the first half of the 19th century) public finance had to cover a limited amount of areas: armed forces, police, justice, some infrastructures, central and local government personnel, and basic education and health services. In the last century and a half, the headings have multiplied in number and cost.

Not all countries have followed the same direction, or reached the same point. How systems place themselves with regards to services provided to their citizens is one of their distinctive features and largely determines public finance choices. It is no doubt the most important and striking difference between the US and the European models.

The constitutional convention which binds together citizens, makes them feel part of a political community and justifies the payment of taxes depends by and large on the expectations of these citizens being fulfilled. Dissatisfaction may lead not only to different voting choices, but also, in extreme cases, to separatism, or even upheaval.

If this is the living constitution of a country, similarities and differences should be drawn along these lines. There are three distinctive areas: education, health and social security. One should note that the term "welfare state" was carved out in England between the two world wars, and then

put into practice after WWII.

Behind it there is the certain influence of social theories, often an antidote to those socialist movements which had led to the Russian Revolution, which challenged traditional liberal policies, and were generally not very concerned with what were considered the "lower classes". Together with this ideological imprint one finds a clear prosecution of paternalistic public policies, which were first set out in the so-called "enlightened monarchies" of the 18th century (Austrian Empire, Prussia, and Tuscany): an educated and healthy population is in the interest of the State which, therefore, is richer and more powerful.

To put such policies in action a complex legal and administrative structure is required, together with considerable expenses, paid by the tax-payer: compulsory basic education, vaccinations, school buildings, hospitals, equipment, teachers, doctors, paramedic personnel. Vast areas, until then left to private practice or business, fell under administrative law which establishes the conditions under which such services should be provided, the beneficiaries and the cost (if any).

Citizens' constitutional public rights are no longer merely the right to vote, to assembly, to petition, to access the courts, but have gradually come to include social rights of increasing dimension and depth.

Education and health services are completed by what is generally called "social security", a broad expression including, in the first place, old-age pensions, insurance for workplace accidents, sick leave, maternity leave, unemployment benefits etc. The relation with working relations is obvious, and will be analysed in the next paragraph. What should be noted is that, originally, at the end of the 19th Century, these forms of welfare were organized as mutual assistance among workers or as co-insurance between workers and employers in the case of accidents.

In Europe, this task has been taken over, and widened, by the State. In the US it has, in many aspects, remained unchanged. One can easily therefore draw the list of actual and concrete fundamental rights which are granted on one side of Atlantic and not granted on the other.

This significant difference, however, cannot be seen – especially from European eyes – as a lack of social responsibility in the US. The model is different and needs to be analysed from a comparative perspective.

In the European "welfare state" model there is a clear redistributive intent and effect. Social services are paid for through public finance mechanisms, mostly tax revenues. As the have-nots (or "have-littles") are a significant part of the population this means that they receive services

paid for by the other part, and which they would not be able to afford.

The provision of these services increases considerably the number of those employed by a public authority (teachers, doctors, etc.). This has collateral welfare effects (the State is providing jobs) but also puts the State – like any employer – in the hands of its employees (the typical case is a strike by public transport workers).

In the US model, many of these services are provided – and can only be provided – by private providers: private schools, private universities, private hospitals, and private insurance and pension funds. This should, on the one hand, reduce fiscal pressure, because the State does not have to cover such expenses. On the other hand, these services should be less expensive and of higher quality because there is considerable competition between providers. Not only does it stimulate the private sector but it also enhances the desire for economic self-improvement, in order to escape the condition of dire poverty.

To what extent the two models fulfil their promises and are economically more or less sufficient is the object of politological and economical studies.

From a comparative legal perspective, the two models are extremely interesting under two profiles. The first interests mostly lawyers and is the development, in Europe, of an impressive amount of sectorial legislation and regulation, the creation of specific branches of the law (labour law, trade-union law, social security law), and collateral litigation.

In the US one can find a host of contractual instruments which enable the private sector to operate, and a strong, connected financial and insurance market which provides the resources to pay for education and health services, and retirement allowances. To make a clear example of how identical services can be provided within a completely different legal framework, one can mention higher education and university degrees.

The second profile is much broader: the two models reflect different views of a democratic State and its rules: nobody prevents US citizens from voting for and enacting a "welfare State" policy. But this does not happen and, in the long run and setting aside electoral controversies and promises, there is little oscillation between the opposite administrations.

In Europe, very little prevents middle class constituencies, tired of high fiscal pressure and redistributive policies, voting for and enacting a significant downsize of the public sector. If this is not realized it is not only because of the big numbers of those who are directly or indirectly employed by the State. Welfare State benefits are seen as an essential aspect of the economic constitution which can be subject to limited variations, but cannot be suppressed.

5.3. *Labour relations and legislation*

Legal systems differ in – or have in common – the way labour relations are regulated and what is the content of the related legislation. The first difference stands here: in a system with a prevailing free-market of labour, contracts for man (and woman) power should more appropriately be considered among the economic factors of the production whose acquisition is generally regulated by contracts largely left to individual or collective bargaining.

In a welfare State, labour relations – even before they begin and after their conclusion – are the object of intensive mandatory regulations which set most of the conditions, leaving little room for private autonomy. All this is with the aim of ensuring certain working and economic conditions to the workers, who are seen as the weak part of the bargain.

Again, in Europe this is the result of explicit social policies strongly influenced by ideology. But having taken note of this political streak, what interests a comparative lawyer are the distinctive features of the system and their relationship with other sectors.

The first difference concerns whether the standard form of employment is on a restricted or unlimited time basis, the latter being the European model. This clearly affects workers' mobility in the market. Employees, once they have found a permanent post, have few incentives to change job.

The opposite happens when the horizon of employment is limited. Directly related to this aspect is the legal regulation of termination of employment. The solutions range from extremely limited cases, in which an individual contract cannot be terminated except on disciplinary grounds, to the "hire-and-fire" model, which in certain sectors can be effective overnight without any notice.

The two models can be compared not only from a legal point of view but also for their respective economic cost. The first burdens enterprises with higher costs and less flexibility. In moments of crisis redundancy procedures are complex and are often challenged as discriminatory. In moments of expansion the undertaking is wary to hire new personnel because it does not know for how long it will need them. One must however consider that permanent working positions are a factor of social stability, and provide a guarantee to households especially if there is only one bread-winner.

This guarantee is lacking in the opposite model. Seen from a purely economic model this means that greater flexibility in human capital should reduce production costs with benefits for consumers. In periods of economic growth there should be a nearly proportional growth in employed

persons. The drawbacks are however very clear: uncertainty creates fear of unemployment, which may be an incentive for some people, seen as impersonal and abstract individuals; but it may have extremely negative effects on others. One might challenge the conclusion that there is effective consumer welfare, while instead only shareholders make a profit out of it.

A further distinctive element that should be considered is the role of trade unions.

Born in the 19th century to protect over-exploited industrial workers and obtain better working and pay conditions, trade unions have developed in very different ways in various countries. One should consider, first of all, that they are unevenly present in the various work sectors.

This strength is historically very strong in labour intensive industries in which workers are grouped in factories. This traditional "Fordist" model (after Henry Ford, the founder of the homonymous automobile producer) is gradually disappearing: production is delocalized for each component of the product and the only significant moment is the assembly line in which, often, humans are replaced by robots.

One should add that not only have the numbers of blue collar workers in the industry dwindled but this sector has gradually lost economic and therefore political importance, being replaced by service workers which may occupy strategic positions (*e.g.* transport).

But differences are not only in the social and political role of trade unions. There are significant legal variations on their representativity, especially if and when they can reach collective bargaining agreements which are binding for all workers (and conversely the industry association binds all its members). To what extent and by whom are collective agreements enforced? What is the relation between collective agreements and legislation, especially in the field of social security (selection of workers, sick and maternity leave, holidays, minimum wage, retirement age etc.)?

Again, it must be said that in democratic developed countries, where the majority of adult citizens are employed, the collective bargaining process with its various levels of rigidity or flexibility represents a distinctive feature of that model which is immediately perceived by those (workers and enterprises) belonging to that system and from the outside.

Further one should consider how conflicts between the parties of a contract of employment are resolved: judicially, through special industrial courts, or through arbitration/mediation? The nature of the adjudicator is far from irrelevant; especially when the ordinary courts are invested in the process this implies that a significant part of labour legislation is judge-made

(rather than party-made).

Finally one should consider that the conflicting European and US models are far from being isolated. It has been very clear – since the English economist David Ricardo theorized it at the beginning of the 19th century – that one of the main elements of the so-called comparative advantage is the cost of human capital.

Labour intensive production has always been delocalized to countries where – owing to economic conditions, social traditions and legal relaxation – production was and is cheaper. This brings about a clear paradox: in countries where workers' protection is very high undertakings tend to produce abroad to reduce their costs. This delocalizing is challenged by trade unions which see a reduction of their membership and therefore ask for protectionist measures against foreign produced products. These measures, if implemented, would result in the loss of jobs in disadvantaged parts of the world, for the benefit of the developed world.

Chapter Six

Repression of Crimes

Quite surprisingly most handbooks on comparative legal systems ignore the vast and ancient world of criminal law and procedure.

This is even more surprising if one considers that criminal law – in the sense of generally vary harsh sanctions imposed by public authorities and applied by them for the violation of rules against the security of the State or life, limb and property of its subjects – is one of the basic elements on which a State – starting from the Fertile Crescent around 2000 BC – is founded.

Criminal law, in its millenary development, expresses all the characteristics of a legal system, together with its anthropological roots, and as a matter of fact could probably be a more effective medium for the study of comparative law than private law, on which most of the scholarly reflection has been centred in the last two centuries.

If one looks at the ideas that lie behind a criminal trial one can never forget its rituals, which sink deep into ages in which supra-natural beliefs widely governed society and adjudication.

With this preliminary acknowledgement one can focus on some of the main elements which, in a comparative legal systems perspective, are more important.

6.1. *Substantive law vs Procedural law*

The first striking divide one finds in the Western legal tradition is between criminal law systems which are centred on substantive aspects (*i.e.* defining what a crime is, and what the related sanctions are) and criminal law systems which are centred on the procedures through which a person accused of a crime is held guilty or innocent.

One point should be made clear: both perspectives find their origin in the Enlightenment's intellectual and political revolt against the abuse of power by absolutist regimes, in which any subject could be arbitrarily deprived of his liberty and estate.

The reason why in England, and in the Anglo-Saxon world, the turn was – and at large still is – mostly procedural is clearly historical: one has already recalled the medieval writ of *Habeas Corpus* and the 1679 *Habeas Corpus* Act.

Especially after the 17th century revolutionary period in England which led the judiciary to take sides with Parliament against the absolutism of the Stuarts, the courts with their procedures were seen as the best guarantee to protect individuals from whatever restrictive orders, and on whatever grounds. This approach is clearly reflected in the US "Bill of Rights" in which the rights in the field of criminal law (five articles out of ten) are mostly of a procedural nature. Therefore a clear path-dependency is still dominant. To this one should add the quite obvious remark that if, as in 19th century England, one rejects the idea of a penal code in which crimes and sanctions are clearly set out by an Act of Parliament, the protection of individual freedom from arbitrary restrictions rests inevitably on judicial control of the legitimate exercise of power by public authorities, when evidence can be used against the accused, on the equal arms of prosecution and of defence.

The reasons why the continental European system took the turn towards substantive guarantees are more complex. If one reads the fundamental (in the old and in the new world) work by the Italian reformer Cesare Beccaria, "*Dei delitti e delle pene*" (1764) one finds both elements (substantive and procedural) attentively examined and clear solutions proposed. In the "*Déclaration des droits de l'homme*" of 1789 which we have already examined, both aspects are considered too.

The most reliable explanation is that once, with the French Revolution, the primacy of Parliament was sanctioned, and only Parliament could enact a law, the principle of strict legality "*Nullum crimen sine lege poenale*" [no crime without a penal law] appeared to be the strongest guarantee against arbitrary arrests, detentions and seizures. This approach was clearly stated in Article 7 of the 1789 *Déclaration des Droits de l'Homme et du Citoyen* according to which "Nobody can be accused, arrested or detained outside the cases established by Law and according to the procedures it establishes". The most important text in which the principle is enshrined is the Bavarian criminal code of 1813, subsequently imitated throughout continental Europe.

It would take nearly a century and a half before procedural guarantees were set out in constitutional texts and properly enforced. One cannot say the inverse with regards to Anglo-American systems, in which the principle

of strict legality is widely unknown or misapplied.

At any rate it is clear that substantive guarantees and procedural guarantees are two sides of the same coin, and there is little sense in looking at only one. This warning is not rhetorical: one finds dozen of books, from both traditions, which totally ignore the inextricable nexus between substantive and procedural aspects. Analysing crimes without attempting to understand how norms are interpreted and enforced is as fruitless as investigating "criminal justice" while ignoring what is going on in the paramount legislative domain. Comparatively one can conclude that in some systems – mostly Anglo-Saxon – more trust is placed in the judiciary; while in other systems – mostly continental European – there is more trust in the legislature.

6.2. *What is a crime?*

The substantive/procedural divide profoundly influences the whole criminal law system, in the first place in establishing what should be considered a criminal offence.

A preliminary remark should be made: it is not altogether clear – and comparison usefully highlights the confusion – what exactly is a crime. Clearly there are certain areas which are common to all systems, but even when there appears to be a common ground – *e.g.* taking another person's life – there are significant differences when the act is committed not intentionally but by fault (*e.g.* when a patient dies after negligent surgery).

Nor is the nature of the sanction a sufficient criterion of selection, because when it comes to deprivation of property or imposing pecuniary sanctions there may be very little difference between what is ordinarily considered "criminal", "administrative" or "civil" sanction. At the end of the day a realist approach cannot be more precise than stating that a crime is an offence whose ascertainment is conferred upon a criminal judge according to the rules of criminal procedure. This self-explanatory conclusion, however, does little to help comparison between criminal law systems.

One is therefore forced to suggest a broader view: comparison is not so much about "criminal law" but the power of sanctioning certain conducts.

Sanctions therefore are not clearly divided into "criminal", "administrative" or "civil", but are all placed on a continuum. Authorities – and not only judges – may select the ones that fall within their competence and feel more appropriate. This selection, as we shall see, can be rather creative.

6.3. *Who establishes crimes?*

An approach to comparative criminal law based on sanctions and who imposes them shows that distinctions cannot be based on the quality of the authority which establishes that a certain conduct is a crime. This view – which is clearly related to the principle of strict legality (only Parliament can set criminal laws) – belongs typically to continental Europe.

It is not however shared in other systems where a number of authorities have the power to enact penal norms and enforce criminal sanctions: States belonging to a federal State; regional or municipal authorities; environmental protection authorities, banking authorities etc.).

A further element should be considered. In continental Europe, in order to avoid circumvention of the principle of strict legality, not only must criminal laws be set by Parliament but they must be strictly worded, leaving little room for creative interpretation.

Especially in post-WWII constitutions, exhaustiveness of penal norms is considered a fundamental principle which prohibits not only analogy but also overbroad description of the conduct which is left to the discretion of the judge. A step further is that of establishing in a very rigorous way how, when and to what extent an administrative act may contribute to complete the various material elements of the crime (*e.g.* the list of substances qualified as narcotics; the levels of pollution which require criminal action to be taken, etc.).

If this process of external integration of the criminal conduct is not strictly controlled the result is similar to that of systems in which there is a multiplicity of authorities empowered to enact penal norms.

A further element should be considered. In certain jurisdictions there is a widespread trend – both scholarly and in constitutional adjudication – towards what is called "penal minimalism", *i.e.* that criminal law should be only an *extrema ratio*, a last resort in the intervention against anti-social and damaging conducts.

At the same time one can notice an opposite trend towards what is called pan-criminalization with a multiplication of petty offences which are dealt with by penal norms: traffic violations, copyright infringement, unruly conduct, non-compliance with contractual obligations.

Systems can therefore be classified according to the direction in which they are moving: reducing or enlarging the area of penal intervention. At the same time one should take into account that de-criminalization brings with it the migration of quasi-criminal sanctions to forms of adjudication where

traditional substantive or procedural guarantees are absent or significantly reduced.

6.4. *Sanctions*

As one has seen it is extremely difficult to establish what – beyond capital punishment and detention – actually is a criminal sanction. In recent decades, the panoply has greatly increased, both subjectively and objectively.

a) Subjective extension. An age-old maxim was that *societas delinquere non potest* (*i.e.* legal entities are not the subjects of criminal sanctions). This is no longer true. Increasingly enterprises – and not only their designated officers – are held liable for crimes related to their activity: environmental violations, omission of precautions in workplace safety, corrupt practices, breaches in data protection measures, unlawful access to credit, unfaithful balance sheets etc. Sanctions are tailored for legal entities: fines, prohibition from contractual relations with public authorities, suspension or withdrawal of licences, court designated managers, liquidation.

b) Objective extension. In origin and for millennia criminal sanctions were aimed at the life, liberty or estate of the person accused and/or found guilty. While all Western jurisdictions, except for some States of the US, have explicitly abandoned capital punishment (though it took two centuries from Cesare Beccaria's invocation), now they have expanded sanctions beyond imagination, adapting them to the specificity of the crime and the personality of the perpetrator. In particular, what deserves to be noted is how and which systems have developed forms of specific reparation (*e.g.* socially useful activity, polluted land reclamation, disgorgement of illicit profits), in addition or as a substitute to traditional sanctions, which are no longer the only aspect to be considered.

c) Sentencing. Systems also vary in the amount (extreme or nil) discretion given to the judge or the court when determining the actual sanction to be imposed on the person condemned. Sometimes – always in the continental European system – this is set by the specific penal norm, in accordance with the maxim *nulla poena sine lege penalis* (no criminal sanction without a criminal norm). This means that there is generally a minimum and maximum penalty within which the judge can move according to objective (*e.g.* seriousness of the damage, modes of conduct) or subjective *(e.g.* intent, mere accessory to the crime) elements increasing

or diminishing the sanction. In other systems – typically the US, but not only – sentencing is a separate moment of the trial, different from the verdict in which the court decides the measure of the sanction quite autonomously or even on the basis of predetermined algorithms.

d) Anticipatory sanctions. Some crimes – especially those committed by criminal organizations – require swift answers, which cannot wait for the lengthy process of a trial. Anticipatory penal measures have always existed (with the oddity, for continental European systems, that they are generally provided for in the code of criminal procedure, rather than in the substantive penal code). What one sees presently is a very fast circulation of new measures between various legal systems in order to contrast serious crimes, especially when there are international connections. Anticipatory sanctions are therefore tailored to counteract organized crime effectively and immediately, in particular by freezing assets, draining profit reservoirs, and making money-laundering extremely difficult or onerous.

There is another aspect of anticipatory sanctions related to the interaction of judicial proceedings with mass media and digital communication networks. The basic notion behind this tendency is that "naming is shaming", and therefore in reputational markets (professionals, business managers, firms, politicians, high level civil servants) it is sufficient to disseminate the news of a criminal enquiry to impose a very severe sanction, that will remain even if the enquiry does not lead to any incrimination, or if the person is acquitted in a trial.

Systems therefore can also be compared on the basis of the greater or lesser degree of secrecy in criminal investigations, and if the publication of news related to such investigation is or can be considered a serious offence against the administration of justice and a smear on the presumption of innocence.

6.5. *Investigation, prosecution, trial*

More than in any other field of the law the features of the penal system depend on the interaction of different public authorities upon which extremely penetrating powers are conferred. This directly influences the outcome of any criminal charge and therefore the effectivity of the whole system. The first aspect which needs to be analysed is the greater or lesser degree of investigative autonomy of police authorities (meaning by this a

very wide range of bodies). Can they operate *motu proprio*? Must they be directed by some superior authority (typically a public prosecutor)? What techniques may they legitimately use to discover crimes, secure evidence, arrest suspects? One should consider that this aspect goes to the roots of penal guarantees, and the *Habeas Corpus* writ shows the century-old tension between abuse of police powers and protection of individual liberty. The second aspect is the relationship between the prosecutor and the judge. At one end of the spectrum one finds a complete – at least from an institutional point of view – separation between the two (and this is the US model). At the other end one finds (in many continental European countries) a very strong contiguity. They both form part of the judiciary, and in some cases prosecutors are entirely autonomous from any other authority (*e.g.* the Minister of Justice) and operate under no political or hierarchical constraint. The lack of alterity between prosecutors and trial judges is often seen as a severe limitation on the independence of the latter. These differences have a significant impact on the balance of powers within the trial (prosecution v. defendant) and on the role of the judge. The models have been widely examined from a comparative perspective.

On the one side one finds the so-called adversarial system, which is typical of the US, and strengthened by the role of the jury, which is the fact-finder. On the other side one finds continental European models where, despite lip-service to equality of arms between the parties, the public prosecutor has the upper hand and considerable influence on his colleague sitting on the bench.

In the highly complex technical rules on admissible, and inadmissible, evidence the most striking difference is in how scientific evidence (forensic, medical, and in any technical and technological field) is allowed to enter into the trial. In the Anglo-American tradition, this is mostly the field of party-appointed expert witnesses who challenge each other in court. In the continental European tradition, instead, this kind of evidence, with a heavy authoritative weight on final outcome, is conferred upon court-appointed experts, who are considered as auxiliaries of the judge.

There is a further, significant, difference in the appeals system: in continental Europe, the three levels (first instance, appeal, supreme court) are considered, in criminal matters, as a basic constitutional right. The appeal trial re-examines *ex novo* the facts of the case and its decision therefore can overturn, in one sense or the other, the first decision. The third level of judgment – which formally should be devoted only to errors in law – quite often, and surreptitiously, becomes a way to challenge the reasoning of the

previous judges and the way they have handled evidence. This is not the case in the US model were fact-finding is, as said, conferred upon the jury, which one finds only in the first instance.

6.6. *Offenders and victims*

After Cesare Beccaria, among the most noticeable intellectual products of Italian scholarly theory in the field of criminal law are the works of the founders of modern criminology, Cesare Lombroso, and of modern victimology, Enrico Ferri and Raffaele Garofalo. Although Lombroso's methodology is now considered outdated, one must take into account the fact that in the second half of the 19th century psychiatry was still taking its first steps, psychology was still unknown, and the use of drugs to cure mental illnesses experimental. By putting the personality of the offender at the centre of crime scene, Lombroso intended to focus on a basic element in criminal theory – under whatever system – *i.e. mens rea*, using scientific methods.

Investigating the soundness of mind of the accused aimed at understanding if there had been actual intent; if he or she was able to make a conscious choice between good and evil. This meant humanising criminal law and relating retribution to the individuality of the offender.

The legacy of a century and a half of criminology is a different attitude of the various penal systems in reacting to the personality of the offender, especially in establishing mental competence, and the type of sanctions that should be imposed upon the specific person. It further prompts preventive social measures not only to curb traditional crimes, but also in the field of so-called white collar crimes.

Ferri and Garofalo focused a considerable part of their work on victims. In some case victims are casual; but in other case they are psychologically prone to fall victim to criminals.

The typical example is that of elderly persons who are easily the prey of swindlers and of other criminal frauds. The role of criminal law is to protect society and to reach this goal effectively one must look not only at criminals and how they operate, but also at the most vulnerable elements in a community. This requires preventive measures (*e.g.* education of potential victims) but also reparative sanctions which can somehow make for the loss. Here the legacy is the different attitude that systems have towards victims that will never be able to obtain judicial redress because the offender is unknown, is dead or is completely impecunious. Public

compensation schemes for very serious crimes (typically, terrorist attacks) are the most obvious example. But along this line one can find schemes aimed at compensating single victims of violent crimes (typically, rape).

In a legal system, the role of criminal law and procedure is essential because it is formally and substantially the ultimate level of compliance. When all other procedures have failed, penal law is the last resort. Metaphorically, therefore, it is the keystone upon which the stability of the legal building rests. Lack or loss of deterrent effect or of effective enforcement determines mistrust in the other provisions, which are left without the protection of a repressive system armed with all the might of the law.

Chapter Seven

Judges and Jurisdiction

The role of judges in a legal system has always been considered as one if its main features. The traditional common law/civil law divide is based a great deal on the historical fact that the former is a judge-made system, very different from that of civil law, not only because judges have gradually built the systems through their decisions, but also because of the procedures through which judges are selected and appointed. This distinction continues to be important and it is necessary to go deeper.

7.1. *Status of judges*

The first element that must be considered is the very long standing – centuries old – difference in the selection and appointment of judges.

In continental Europe, historically judges were appointed by the monarch, and therefore necessarily well accepted by the latter. When in the 18th century, beginning with Prussia, the judiciary starts being organized under specific rules and as a separate branch of the administration in which one is admitted only after a public competition, judges become high level civil servants, with a typical hierarchy which progresses from the lower courts towards the higher; from the peripheral courts towards the capital. It is a lifetime employment in which the ordinary form of progression of career is the length of service. There is little space for individualism and even though there may not be a specific rule of subordination, deference towards elder members of the judiciary is quite normal.

Only after WWII, with contemporary constitutions, independence of judges and of the judiciary becomes a fundamental element of the system. However, the status of judges and their modes of selection do not change. What changes is the creation of institutions for the self-government of the judiciary, severing every tie with the Ministry of Justice.

This system is completely different from the English one, which in the Middle Ages is already characterized by the fact that judges, although formally appointed by the monarch, are selected among the legal profession (barristers)

and chosen by their peers. This determines a completely different status, marked by distance from the Crown and lack of a typically administrative and bureaucratic organization. It is therefore not surprising that the judiciary, in the most tumultuous period of English history, the 17th century, sides with Parliament against the Crown.

Independence of the judiciary, therefore, is not a recent guarantee but a historical fact which is part of the British unwritten constitutional conventions.

A further fundamental distinction is the fact that in continental Europe, at least since the 18th century, the organization of the judiciary follows the administrative partitions of the State (regions, provinces, main towns). Since well into the 20th century, English courts, and judges, have been concentrated in London, creating a very strong cohesion within a relatively small *élite*.

7.2. *Judicial organization*

A further element that must be considered is judicial organization. In the continental European model the judiciary, historically, is part of public administration and only rather recently did it receive specific and constitutional guarantees of independence. By judiciary one means in this context not only judges who hear and decide cases but also public prosecutors whose main – but not exclusive – task is to pursue crimes, and to present the accused persons to the judge for trial. In some countries, the public prosecutor is still, formally, under the control of government (*i.e.* the Ministry of Justice), but in other countries public prosecutors are considered part of the judiciary with all the ensuing guarantees and considerable mobility between the two roles (public prosecutor/judge). This model is not present in the Anglo-American systems, not only because of the historical independence of judges, but also because this implies that if one is part of a trial – as the public prosecutor is – one can in no way be considered a judge. Consequently, the procedures for the selection of public prosecutors are completely different and, in the US, it is often an elective office, which strengthens the notion that the judicial system has a strong lien with democratic decisions.

This is in line with the strong procedural guarantees we have already seen in criminal law systems. The control of the courts on decisions concerning individual freedom is much more penetrating inasmuch as the public prosecutor is not a "colleague" with whom, perhaps, one has shared a considerable part of one's career and will probably continue to do so in

the future, but an external impersonal office, which is, from a procedural point of view, at the same level as the defence.

There is a further issue that must be raised because it is of great importance in distinguishing legal systems. One has spoken of "judges" imagining ordinary judges deciding criminal, civil and, sometimes, administrative cases. Reality tells us that this 19th and 20th century model has been widely surpassed by a proliferation of judicial instances whose competence goes from petty consumer controversies to million-dollar claims in front of international investment tribunals. This is the result of a growing demand for adjudication in extremely specialized fields and the creation of special courts which must be fitted into the framework of the jurisdictional system.

7.3. *Rules of procedure*

Any judicial system stands on procedural rules, and without procedural rules it cannot exist. Slight differences may have a significant impact, not only in comparing different systems, but within the same system, where they may differ in front of ordinary courts according to the subject matter of the controversy (contract, divorce, company law, patents, industrial relations etc.), the kind of remedy asked for, and the importance of the case.

If substantive law is only one side of the coin and is in constant interrelation with procedural law, the obvious consequence is that any system is an inextricable mix of both substantive and procedural norms.

One must therefore attempt to detect which rules make a significant difference and which have a systemic impact.

a) The first point is that of access to justice in civil and administrative cases. In some systems, judicial costs are extremely high, and to these one must add legal expenses. The latter depend also on the organization of the legal profession: if only a limited number of professionals can stand in court, their fees are considerably higher; the financial disincentive favours out-of-court settlements and alternative methods of dispute resolution.

b) In criminal cases the main difference is between systems in which any *notitia criminis* opens a procedure which must follow its own course ending up being set aside or brought to trial; and systems in which there is ample discretion in the selection of cases which are considered meritorious; also in criminal policy orientations; and in closing cases before trial (*e.g.* plea-bargaining).

c) A further element to consider is right to appeal or if the possibility to appeal must be granted to the party on the basis of specific reasons. Clearly if the parties have a constitutional right to challenge the decision of the lower courts not only is the number of cases much greater, but this requires more judges and a different approach to the case. Here one finds further procedural differences: does the appeal judge re-examine the whole case, or must – and can – he/she only verify if there have been procedural mistakes or incorrect application of the law? This is the ordinary limitation one finds in the highest courts in continental Europe (*Cour de Cassation* in France, *Bundesgerichtshof* in Germany, and equivalents in other countries) but often it is also applied in courts of appeal.

d) Within the trial an essential element is the combination of burden of proof on the parties; the possibility that they will activate discovery and disclosure of evidence and *ex officio* powers of the judge. One finds systems – such as the US – in which pre-trial discovery is the main battlefield, metaphorically a trench war meant to drain financial resources from the other side. And in other systems finding of evidence is extremely complex and very little help comes from the rules of procedure and the role of the judge.

e) Who should bear the costs of litigation? Does each party bear his own, or must the loser pay the other party's? Is there the possibility to receive public financial aid if one does not have the means?

f) Last but not least is the form of the judicial decision. In the continental European tradition, the decision tends to be impersonal and the heading one generally finds is "In the name of the People", following a post-revolutionary French tradition. Although the names of the judges are indicated it is not known if all of them have agreed with the decision. In the Anglo-American system, instead, the decision is the result of multiple separate opinions which may also express dissent from the outcome indicated by the majority. Judicial dissent – which has gradually been "exported" to other jurisdictions – is a significant indicator of judicial independence and of the relativity of judicial decisions.

7.4. *Judicial power*

In the original model on which Western democracies are based, jurisdiction is placed on a clearly distinct position, which not only must not be confused with the legislature and government, but is the balancing power

between the two and is meant to protect individual rights if the other two powers infringe them.

This idea of the judiciary as a "neutral" power is, and has always been, highly theoretical. In democratic systems, the judiciary has played an important political role dressed in different robes.

a) The preeminent example of judiciary political power is the US Supreme Court. There is no important page of American political history that is not marked by a decision – or by a series of decisions – of the Supreme Court: the end of slavery and the civil war, social protection of workers, civil liberties, desegregation, war on terrorism etc. And Supreme Court decisions, seeping down to the lower courts, both Federal and State, have shaped a considerable part of US society, and not simply its law.

b) But even if one looks at the judicial self-restraint which is a distinctive feature of the British model, the age-old formula must also be seen in reverse, in the sense that in the constitutional convention both Parliament and Government recognize that certain areas are left almost entirely up to the judiciary to decide, not just in individual cases but where rules are created to be applied in a generality of cases.

c) Moving on to continental Europe, where it has been said since the 18th century that judges should be no more than the "mouth of the law" (*la bouche de la loi*), this is clearly no longer the situation and the judiciary has acquired a growing importance, not only in the interpretation of the law but also in its making, by filling gaps or changing rules that are subsequently ratified by an Act of Parliament.

One can therefore list some apparently hybrid (but by now quite ordinary) roles of the judiciary.

a) The judiciary as legislator. This is the history of the English courts in the areas of their competence. But also, and expressly the role of constitutional courts, whatever their name (US or UK Supreme Courts; EU Court of Justice, etc.): when striking a law because it is contrary to constitution, or providing a binding interpretation of the law, they are setting norms of a general application. This is also the case when the courts set and consistently follow a line that goes beyond (or beside) the law (*praeter legem*).

b) The judiciary as government. Analysing the main features of government, one has already quoted the early 19th century dictum "*Juger l'administration c'est encore administrer*". The relationship between the judiciary and the ordinary course of government is very clear in the evolution of the French *Conseil d'Etat.* Born out of the ashes of feudal

Parliaments, consultative bodies designated by the monarch to provide advice on administrative and legal issues (and imitated in other European countries), it became, in the second half of the 19th century, the judge of the legality of administrative provisions which have been challenged by natural persons and legal entities. This dual nature – advisor to the Government, but also its judge – has always been contested in theory but has never been seriously eliminated, at least in the systems which follow the continental European model. With post-WWII constitutions administrative judges are also covered by the constitutional guarantees of independence and self-government. They properly belong to the judiciary and at the same time, especially when their decisions fall on the validity of general administrative provisions, they partake actively in the administration of society.

c) Regulation by adjudication. The judiciary intervenes specifically in the regulation of economic activities in two ways: directly when they void entire regulations, or parts of them, issued by government or by independent agencies, and even when specific economic provisions of government – such as the conferral of exclusive rights on an enterprise – are voided. Indirectly, when a decision in a specific case has a general-preventive effect on the whole sector interested by the decision. The first case is typical in the continental European model. The second is a typical example of *ex post* regulation by the courts in the US model. In this case undertakings will be induced to comply not with norms set out by government, but with the many – and not always clear – principles contained in a decision.

7.5. *Legal education*

Judges are not the product of some weird genetic or social experiment. They represent very well the system in which they operate. A sociology (and a psychology) of judges reveals most of the distinctive features of the system and allows us to understand what is more important, and what is less.

In the first place, and not only in the systems (such as the British one) where judges are often former practising lawyers, one should not imagine there is a clear-cut distinction between judges and the lawyers who, on a daily basis, interact with them.

They both have a common background, which is the legal education they have received. Universities shape their minds, their idea of the law, the values they express in their work.

The term "legal mentality" commonly used among comparative scholars captures these differences which are not apparent through a simple analysis of norms.

a) The length of legal education is not a secondary aspect: in Europe, it generally spans over five years (sometimes four). In the US three years. The difference is not in "how much" students learn, but rather what is the overall view they receive of the system. Very practically, the table of contents which is set out in this "Introduction" reflects what, generally, a European law student should have collected – albeit in a fragmented way – during his or her career. It is not so in the US where law school curricula are, for very good reasons, highly concentrated on the fundamental courses with a highly pragmatic objective, that of "delivering" to the market of legal services;

b) Historically, the continental European law faculty model has forged the most diverse personalities: from Nicolò Macchiavelli to Pierre Corneille; from René Descartes to Wilhelm Leibniz; from Robert Schumann to Vassilj Kandinsky; from Friedrich von Hayek to Fidel Castro. A law degree is perceived as opening a multiplicity of possible careers: in public administration, in enterprises, in international organizations; or, very simply, as an occasion to have a view of the world through higher education. This has been the traditional role of law faculties, and still is, in the sense that universities are aware of the fact that students with a law degree will take many diverse paths. This very broad approach is significantly different from that which has developed in the US law schools, especially from the second half of the 19th century, whose main aim is that of preparing practising lawyers who can, almost immediately, be employed in law firms. This goal is pursued with great energy and effort, providing students not only with knowledge of the foundations of the system, but also with those practical skills (research, writing, pleading, negotiation) which are essential in the legal profession;

c) One could therefore divide the models – as it has been aptly noticed – between 'system-builders' and 'problem-solvers'. Clearly this is meant in the sense of a prevalence/preference in one direction which has lasting effects on the legal community, especially when this practice is rooted in centuries of tradition. On no account can one state that one system is superior to the other: each is tailored to the exigencies of that society, at least as it is perceived by lawyers. A systematic formation is often broader, but gives the impression that one need not move out of the walled citadel of the law. A professional approach is rather narrow, but,

because it is incomplete, it is open to the influence of other areas of knowledge: economics, sociology, finance, cultural studies;

d) A legal education therefore, by and large, creates a "legal identity" in which most lawyers feel reflected. Judges, practising lawyers, the many anonymous hands that are behind administrative procedures and decisions, in-house lawyers drafting contracts and other agreements are part of this identity which is such an important aspect of a legal system.

7.6. *Judges and/as literature*

One might believe that looking at legal systems through the eyes of novelists and film-makers is inappropriate. With regards to the role of judges and courts it surely is not.

Over the last forty years there has been a torrential flow of publications which fall under the vast heading of "Law and literature" and which aim at analysing, in the first place, how legal aspects are represented in literary works, and not only as a source of legal materials (*e.g.* the Iliad as a source of proto-Greek law). This trend, from the US, has spread throughout the world and has taken many side-roads.

Why is outlining the different judicial models so important?

In the first place because the literary and artistic depiction of judicial cases is common in all Western cultures: from Balzac's "*Comédie Humaine*" in which practically every novel turns around an instance of the *Code Civil* or the *Code de commerce* and its judicial performance; to Franz Kafka's "*Trial*", to the hundreds of "legal thrillers" and Hollywood films which have at their centre a case, a court, a jury.

These elements might still appear too distant to justify a comparative approach. However, one should consider that among the many facets of a legal system that are part of the daily life and daily concerns of most citizens, the judicial process in the one best known, not because of legal studies but through literary and audio-visual works. If one believes that a legal system is not only how it appears in thorough legal research which looks at the law both in the books and in action, but also how norms and legal institutions are perceived by ordinary individuals, one can easily understand why these works are so important inasmuch as they convey an idea of the judicial system which becomes common wisdom and knowledge. Here one must also note an impressive phenomenon of circulation of models: hundreds of millions of people in the Western world, who are not American and do not live in the US, know, through films, TV series, novels,

much more of the US legal system than of their own. This on the one hand suggests continuous – albeit non-professional – comparisons between different systems, and on the other hand creates social stereotypes to a point that one might ask oneself if it is the dramatic depiction which is faithfully representing real life, or if the real protagonists of the judicial life are acting imagining they are on a set they have seen hundreds of times on the screen.

Clearly what is most interesting is not so much how judicial events are presented in fictional works – which has to do more with comparative literature – but to what extent the judicial system is part of the collective imagination of a community, and outside that community. The identity and identification of a system, including that offered in these pages, is influenced by such forms of pre-comprehension.

Chapter Eight

Models for a Globalized World

Legal systems are the result of the evolution of society, and societies – fortunately – are not confined within the boundaries of national States. Even at the height of legal nationalism, during the 19th century and most of the 20th, many cracks could be found in the wall of State legislative monopoly.

The two historical events that have produced the present-day phenomenon we call "globalization" are the fall of communist regimes in Eastern Europe in 1989 and the gradual opening to foreign trade and investments of the People's Republic of China, which started in the early 80s of the last century and was sanctioned by the PRC's adhesion to the World Trade Organization in 2001.

All this has at least two important effects on legal systemology. The first, already seen in the first chapter, is the openness of legal systems to external influences which are of various natures: economic, social, cultural, strictly normative.

The second, which will be examined here, is the continuous co-existence of non-national legal systems with traditional systems and the interplay between them. Systems can no longer be considered on a two-dimensional scale; it is necessary to take into account the supranational dimension which often acts as an umbrella.

8.1. *International conventions*

A popular aphorism describes commercial legal entities as a "bundle (or a nexus) of contracts". One might apply the same metaphor to legal systems which are a "bundle (or a nexus) of international conventions". That is to say whatever the choice of the system (monistic, with the direct enforcement of the convention in the internal forum; or dualistic, requiring a separate act of implementation) international conventions are part and parcel of systems and cannot be seen as something purely external, if not exotic. Generally, these conventions are examined individually in relation to their specific sector. If one groups them together and organizes them in accordance with a systematic order one can easily verify to what extent the result overlaps the domestic system.

The interesting aspects of this match are:

a) To what extent external conventions cover areas which otherwise would not be considered by domestic law (*e.g.* outer space, tropical animal species). This enlarges – or may enlarge – considerably the scope of legal regulation. As one knows, lawyers – and with them governments – have a profound *horror vacui* towards unregulated aspects of social or economic relations. By these means, they attempt to seize phenomena that are difficult to grasp and exert their control on them.

b) International conventions reflect the complexity of relations with systems other than one's own. They prove that isolationism is not possible, at least in mature democracies of developed countries. Put together they reflect a legal brokerage (middle-of-the-way rules) and the extent to which each system agrees with another and indicate what the irreconcilable differences are. To express this idea in a sentence: legal systems are different for whatever they cannot agree upon through international conventions.

c) The international arena forges values, models, structures which are in a constant relationship with domestic systems, well beyond the merely normativistic approach which is the essence of the monistic/dualistic principle. How do we organize this system? Do we follow the common distinctions (private/public, substantial/procedural) or must we imagine a profoundly different organization of the law? The obvious example is that of the so-called multi-level system of protection of fundamental rights which is considered the appropriate way of ordering this part of the law. If one imagines the whole of international conventions as a map, it is possible to see the "legal lands" where States can travel to, meeting other States, other systems, other hierarchies.

8.2. *Uniform laws*

The systematic impact of globalization cannot be seen exclusively from a normative perspective, *i.e.* which international agreements are binding, and to what extent, for nations. There is a very wide range of legal instruments which should be placed on a continuum moving from mere good-will declarations to engagements that are rarely broken (*e.g.* diplomatic immunity).

Among the non-binding instruments we find so-called uniform laws, drafted in international fora, which States decide to adopt or adapt to their needs. As this is an entirely voluntary decision the reasons are mainly

utilitarian: reducing costs in legislative drafting and in legal transactions. Uniform laws can be seen as technical-legal standards which satisfy internal stake-holders (administration, courts, lawyers, business community) and favour import/export of legal products (mostly contracts, but not only).

When a system encompasses uniform laws, it creates, at the basic stage of legal relationships, a level playing field which reduces the differences from other systems. This brings to mind the utopian ideas which circulated towards the end of the 19th century and the beginning of the 20th, that the whole civilized world – which at that time was very small – could be unified through the adoption of common rules. The utopia rested on the positivist attitude – quite common at that time – that it was sufficient to have the same or very similar legal texts. It has been amply demonstrated that the aim remains still as distant as the quest for perennial peace.

However, if one considers uniform laws not in their content, but in their functioning, as small pieces of a much larger, and far from complete, machine one is prompted to focus on issues such as legal efficiency, "best regulation", costs of implementation and enforcement.

8.3. *Lex Mercatoria*

Since the Middle Ages merchants in Europe had created many autonomous and transnational substantive and procedural rules, which received direct or indirect approval from the established authorities.

One must point out that this unity suffered a significant bifurcation at the beginning of the 19th Century when the Napoleonic *Code de Commerce* was enacted and rapidly copied or imitated throughout continental Europe and in Latin America. From an economic perspective, commercial codes represented a very powerful move towards legal efficiency which was particularly noticeable in the practice of contractual drafting. As the rich texture of the code operated as a default rule, the parties could limit their contractual texts to the specific object of the bargain and to the variations in respect of the code, which could be used as the general legal reference.

In systems without a code the parties had to engage in extremely complex and lengthy drafting, establishing each time all the terms and conditions, in order not to fall under the unpredictable, case by case, interpretation of the courts. In the long run, however, the comfort zone of the commercial codes dampened legal creativity in continental European business practice, while in the Anglo-American world it was an indispensable quality, needed to survive in always changing economic contexts.

Globalization has boosted the latter approach. Inasmuch as international business contracts operate, generally, without a specific national substantive law as reference, the parties must, out of necessity, agree on extremely complex and complete texts which, by themselves, should be able to govern the whole transaction without having to use others' legal norms.

And as the parties mistrust national courts which are inevitably tied to certain normative or jurisprudential frames of mind, the common solution in case of controversy is arbitration. The result is a very sophisticated legal system whose actors are almost exclusively private parties of very large dimensions: medium to big undertakings, multinational companies, international law firms, and private arbitration institutions. As much as possible this system tries to be self-sufficient, in the sense that it does not require the intervention of public authorities and of national laws.

Even with regards to enforcement of arbitration awards this is guaranteed by appropriate contractual agreements with financial institutions (performance bonds, guarantees on first demand, etc.). The role of financial institutions is increased even more by the gradual shift from the secondary sector (production and exchange of goods, works) to the tertiary sector, where most of today's economic wealth resides. Although financial markets are strictly controlled through national and international regulations, the agreements between financial institutions are almost entirely of a voluntary nature and follow self-imposed rules whose compliance is ensured first of all through reputational sanctions.

This system, which is of an impressive economic magnitude, has several distinctive features. Contrary to the tendency of the last two centuries the rules that govern it are significantly opaque. Quite naturally the contracts are confidential and therefore it is difficult to establish with certainty the state of the law.

Even more confidential – bordering secrecy – are the arbitration procedures, from the briefs of the parties to the final award. Even the outcome is often shrouded in mist and emerges only in its essential aspects in the reports a listed company must necessarily provide to the financial market.

A further distinctive feature is that this system purports to be autarchic, in the sense that it does not need external inputs to function, and is isolated from the rest of the system, both national and international.

This attitude – which is related to the size of the actors, often much more powerful in terms of resources, not just financial, than many States – has been vigorously challenged, mostly on an ideological basis, as contrary to democratic control and social and judicial accountability.

Clearly this is not the context in which to examine these critiques. From a comparative legal systems approach, it would appear that global *Lex Mercatoria* is an attempt to escape from the complexity of contemporary legal systems, which are subject, as we have seen, to countless variables, and therefore are extremely uncertain.

A closed system aims – quite rationally from an undertaking's point of view – at reducing risks, or being able to foresee them and absorb them (mostly thorough insurance).

One therefore faces an opposition between two models scarcely communicating between themselves.

In a rather coarse appraisal one should try to establish how much of global economic activity is moving towards this external and self-sufficient system, and how much is still tied to traditional state control.

8.4. *International institutions*

If *Lex Mercatoria* is an attempt to create a separate and self-sufficient legal system, international political and economic relations have given birth to a host of institutions which are part of a broader system that not only overlaps national systems but imposes itself upon them.

The extraordinary growth in number and role of international institutions over the last seventy years is the result of an unprecedented long period of relative peace. The first half of the 20th Century was devastated by the two world wars. Since the end of the second (1945) there have been numerous regional conflicts with many casualties and much destruction, but none that has stopped the development of the economy and of international relations.

If would be impossible to list all the international organizations, some with a global scope, others geographically more limited. The aim is that of indicating how they influence legal systems and are themselves a legal system.

One must limit the illustration to the most noticeable examples.

a) The global organization *par excellence* is the United Nations Organization (1945) of which practically all nations of the world are part. Its forms part of a complex system which includes numerous other specific organizations (*e.g.* FAO, food and agriculture; WHO, health; UNESCO, education and culture, etc.).

b) The UN system represents very clearly the limits of supposedly universal legal principles. It most eminent and founding text, the Universal

Declaration of Human Rights (1948), whose acceptance is a condition for membership, is substantially ignored by more than half of its members. This shows the immense cleavage between proclamation and effectivity. A distance which one can find repeatedly, over the last seventy years, in its hundreds of peace-keeping Resolutions, mostly ignored by the parties to whom they are addressed. Where instead one finds considerable impact on legal orders and its paramount principle, that of sovereignty and self-determination in internal affairs of member States, is the growing intervention of the highest body of the UN, its Security Council. From economic embargoes, to blockades, to direct military interventions one can find countless cases in which the existence or non-existence of a nation and its powers depend on decisions, legally binding and effectively enforced, of an international institution. From a systematic point of view this shows the extrinsic fragility of legal systems, which require acceptance by the international community. Admittedly most Western countries are beyond such risk, which however is actual with regards to some Latin American countries in some moments of their recent history. But if one sees things from a different perspective, the powers bestowed upon the UN allow some countries, albeit in conjunction with others, to impose their order – legal, economic, political, and military – on others.

c) Again, in the context of the creation of a new order after WWII are other two international institutions which have a decisive role – especially in the contemporary world – in shaping legal systems. We are speaking of the International Monetary Fund (IMF) and of the International Bank for Reconstruction and Development (also known as the World Bank, WB) (both founded in 1944). What is most important is that these institutions operate having in mind a global economic system whose components (raw materials, production of goods, and provision of services, consumption, financial markets, money and monetary policies) constantly interact and depend on one another. To what extent does this system give life to a legal system, different from the one we have being presenting until now? Here, the level of effectivity is extremely high. The IMF grants loans, generally on a short-term basis, to face monetary difficulties (significant imbalance of payments, banking crisis, dramatic devaluation, impossibility of compliance with international obligations). These loans are backed not only by formal obligations of the recipient State, but also require specific commitments to modify public spending policies and domestic legislation especially in the fields of taxation,

welfare expenditure, regulation of economic activities, labour law. Although the basic ideas behind such *quid-pro-quo* are rather coarse and in many aspects fallacious, what should be noted is that international economic policies shape, through binding constraints, legal systems. Circulation of models is imposed as a condition to receive financial aid. Clearly there is a strong resistance to this process, which is challenged as anti-democratic and violating State sovereignty. The issue here however is not the "poverty of nations", but to what extent a legal system can be independent from a set of economic rules and can autonomously choose its own ways without suffering external impositions. A strong legal system requires, in the contemporary global context, a strong economic system. The two aspects are inter-related both internally (efficient rules bring prosperity) and externally (no need to import rules from abroad).

d) The World Trade Organization (WTO), a development of the 1944 General Agreement on Trade and Tariffs (GATT), has the specific aim of favouring international trade through the elimination or reduction of barriers. These are of many kinds: custom duties, quotas on imports or exports, subsidies to domestic industries, discrimination against foreign products which have legally entered the market, technical specifications which protect domestic producers, limitations to foreign investments. Despite widespread criticism and little progress in certain areas (typically, agriculture) the development of global trade in the last quarter of a century has been greatly enhanced by the existence of a general, albeit not completely detailed, set of rules. The most significant result is the dramatic reduction of custom duties (presently around an average 3% on manufactured goods) in respect of percentages ten times higher of the past. This has been possible thanks to the obvious economic advantages that international trade brings to each country that can present some kind of competitive advantage: its resources, its manpower, its skills, its financial wealth, its geo-political position. The relation between this system and national or regional systems is quite evident in many fields: competition, state aid, regulatory discriminations, technical standards, and one can easily verify a constant osmosis between the two.

8.5. *Comparative international law*

If international agreements and institutions are so important in shaping legal systems one should take into account that international law, as we have known it for the last the centuries, is a typical product of Western legal culture.

It is not surprising that one of the greatest jurists of all times, the Dutch Hugo De Groot (generally known with his Latin *nom de plume* Grotius) is one of the founders not only of contemporary natural law, but also of constitutional law and of international law (especially the law of the sea).

International law, as it was developed in the 19th and 20th centuries, clearly reflected the balance among the competing great world powers of those times – Britain, France and the US – and the need to set rules to ensure stable relations, among themselves and with the rest of the world. It is not surprising that in this context one of the customary sources of international law was (and still is) indicated in "the general principles of law recognized by civilized nations".

Despite their proclaimed "international" value, such principles are, inevitably, the expression of both geo-political factors and national legal traditions. Territorially small countries that place much of their interest in international trade (such as England and the Netherlands) will be naturally brought to favour freedom of the sea and free access to ports. Vast empires (in a-technical sense) such as the US or Russia, without colonial outlets, concentrate on territorial integrity and ideological tenets (such as self-determination).

Traditionally international law is structured according to a typical continental European model: persons, *i.e.* the subjects of international relations, nations; things, *i.e.* the territory on which nations exert their sovereignty; and actions, *i.e.* the international agreements which are considered akin to contracts.

Globalization, bringing to the forefront new, non-Western, great players, such as China and India, whose interests do not necessarily coincide with those of the past, allows us to highlight further specific features of legal systems:

a) International law is a part of a legal system and cannot be seen as external to it. It partakes in and influences many features of that system.

b) The different ages of international law reveal the shifts in interests and in priorities, which are not merely transnational, and the ways and the procedures through which they are met through legal instruments.

c) The expansion of international protection of human rights exports models of entitlement, remedies and adjudication, conferring upon individuals and communities rights which are recognized in domestic and international fora. From a comparative perspective one is interested in understanding to what extent individuals have a legal standing (not only for individual freedoms, but also for patrimonial rights) whose source is mostly in international law.

The boundaries between international law and economic interests, of the States and of private entities, have always been blurred. Following a

trend similar to that of human rights, in the present day they have been almost completely erased. In many cases international law instruments directly empower private entities to bring actions against nations, until recently considered covered by State immunity. This is the case of so-called BITs (Bilateral Investment Treaties) which generally contain a compulsory arbitration clause and proceedings in front of the International Centre for the Settlement of Investment Disputes (ICSID), an institution annexed to the World Bank.

Chapter Nine

Some Conclusions: Graveyards and New Paths

Legal ideas, just like scientific theories or philosophical constructions or ideologies, are born in a certain context; they develop and, eventually, die. Some are completely forgotten except by specialists. Many do not entirely disappear but become a stepping stone towards more evolved ideas and/or are historicized, in the sense that they belong to the past, a past which is studied and revered, but is behind us.

A lawyer's world is full of graveyards with richly decorated chapels and magnificent funerary monuments in which we admire the glories of the past. The time has come to put at rest some ideas which, over the last two centuries, have played a very important role in the development of comparative law, but which are no longer of use, and, as a matter of fact, tend to be misleading in the sense that they transfer an idea of legal systems which no longer corresponds to reality. This in no way should be seen as an iconoclastic exercise. Eternity is a privilege reserved to few ideas. And the fact that some ideas are dead does not mean that those who have toiled over them wasted their time. To the contrary, they contributed to their splendour. When we admire the impressive tombs of *le droit subjectif* or of *das Rechtsgeschäft* we admire those scholars who devoted their lifetime to making them so important.

9.1. *The distinction between civil law and common law systems*

Most readers, even if not very accustomed to comparative legal systems, will have noticed that in the previous pages hardly any reference has been made to a notion which is, commonly, considered fundamental, *i.e.* the distinction between "civil law systems" and "common law systems". The former, one is taught, are based on Roman law; on the central role of universities and law faculties which forged, through the powerful minds of professorship, generation after generation of jurists; on the primacy of the law meant as a general and abstract command set

by a public authority which, after the French Revolution, is Parliament. The latter – the common law –, instead has no Roman law heritage; was forged by professionals trained in the daily toil of their legal practice with no systematic aspiration or interest; and consolidated by the gradual sediment of decisions taken by courts in which judges were selected by colleagues in the legal profession who considered them more apt for a judicial function. There are several reasons why this age-old distinction has been greatly down-played.

a) In the first place the distinction civil law/common law makes very little sense outside the private law context. Clearly it is of no use in comparing constitutional models, administrative law, and welfare issues.

b) The civil law/common law distinction was founded when private law was at the heart of the legal system. Thoughtful investigations into the difference between *propriété* and property; between *cause* and consideration; between *faute* and negligence and so on, which have produced hundreds of books and thousands of articles, do not appear to be any longer of great import once the centre of gravity has moved from private autonomy to regulated economic activities under constant scrutiny (both *ex ante* and *ex post*) of public authorities.

The distinction is surely of great importance but, by now, mostly of a historical nature. And it is time to cut the ropes which bind us with noble and fascinating constructions which are, however, of little use in contemporary, global, legal settings.

9.2. *Codes*

A corollary of the distinction between civil law systems and common law systems was that civil law was organized into codes, intending by such a comprehensive and exhaustive legal text with a general and very wide scope, and they were purportedly self-sufficient. No doubt this was the intention of the 18th century legal and political theorists engaged in the fundamental battle against fragmentation, disorder and uncertainty in the legal order. But things have changed profoundly: on this side of the Atlantic "codes" have multiplied: from the original five enacted by Napoleon (civil, commercial, penal, civil procedure, criminal procedure) we find the expression applied in the most diverse cases: labour law, consumer protection, bankruptcy, family, road traffic, etc.

Furthermore, the original 19th century codes have disintegrated under

the pressure of groups demanding special – *i.e.* outside the code – legislation. One therefore finds hundreds of laws which regulate the matter and prevail over the code under the *lex specialis* principle.

On the other side of the Atlantic the term "code" has been eagerly replicated in a multiplicity of areas (the most important being the Uniform Commercial Code – UCC). These texts cannot be compared with continental European codes, but this is due to significantly different legislative drafting techniques. At any rate, it is difficult to sustain the idea that differences between systems can be grounded on the existence, or non-existence, of codes, whatever one means by such term.

The time has also come to set aside the largely shared – across the Atlantic – and rather primitive idea that a code is some sort of computer programme which judges use pressing some numbers (those of the corresponding articles of the codes) and receiving an invariable and certain response. Even in their apex (the 19th century) the provisions contained in a code had to be interpreted by judges and applied to the most diverse facts of the case. The result is that each legal provision has produced a rich fabric of decisions which are – much more than the naked words of the text – the actual law of the land.

9.3. *Legal families*

Again, the educated reader will have been surprised not to find any reference to and use of so-called "legal families". Over the last century many classifications have been suggested (common law, civil law, socialist, religious, professional, mixed, and many more). These classifications generally take into account only one aspect of a legal system *i.e.* that of private law. But they are quite improper when extended to other parts of the system: what do US presidentialism and constitutionalism have to do with UK parliamentarism and unwritten constitutional practices? Should they be kept together because they are both "common law" jurisdictions? And do the US and Brazil belong to the same legal family because they are both "federal States"? If one must insist on the (by now rather lame) metaphor of "families" one is forced to admit that legal families have disintegrated just as natural families have, with second or third marriages, same sex marriages, co-habitation agreements, in-vitro fertilization, surrogate motherhood, multiplicity of step-fathers, mothers, brothers, sisters and so on. What keeps them together, except, perhaps, inheritance taxes? Classifications should be used if they are of some use, whether theoretical

or practical. In the case of legal systems it would appear that legal families are a Procrustes bed on which each author stretches or shortens reality.

9.4. *Non-Western legal systems*

This 'Introduction' has explicitly focused on what is called the Western legal tradition, which despite its very broad notion, clearly defines something that is not, and cannot, be found elsewhere: Judeo-Christian moral principles; Greek and Roman philosophy; the basic role of law and justice in terms which are mostly unknown outside the Western world; individualism which leads to the declaration of fundamental rights; the separation of law from religion. These differences are clear and enable us to distinguish what is Western and what is not, and highlight the fallacy of trying to compare what is incomparable, especially if one suggests a holistic approach to legal systems. To move outside the Western tradition requires in first place piercing the thick veil of *clichés* (*e.g.* orientalism) or of ideology (*e.g.* rule of law; universality of human rights) which still shrouds an authentic comparison that cannot limit itself to verifying to what extent, and with what variations, non-Western countries have adapted to Western legal models. In short: one can (and should!) surely study in width and in depth non-Western legal systems. It is doubtful however if focusing only on one, albeit important, aspect, ignoring the overall setting in which it is placed allows a fruitful comparison with Western systems. One is tempted to suggest that in most cases, to the contrary of its methodological tenets, comparison is used simply as a way to super-impose one's own mentality, blurring the substantial differences that exist instead of understanding them.

9.5. *Alternative criteria for grouping legal systems*

If the "civil law/common law" distinction and the "legal families" classification are of little use, must one give up any attempt to put some order into the fragmentation of national States, each with its own legal system? Surely one cannot be content simply to take part in their funeral if there is no substitute for those ideas. Some suggestions will be made here but they are mostly based on non-legal factors.

a) First of all, history is a powerful mould of countries and of legal systems, sometimes uniting territories, other times dividing countries and

people. This applies not only to the formation of national States and to the dismemberment of empires, but also to significant movements of migrants (*e.g.* to colonies between the 16th and the 19th century) or to the rise and fall of political ideologies which have forged a multitude of States (*e.g.* fascism and communism). One generally quotes the aphorism "Comparison involves history" which is surely still true, but once again one can never cease remembering Savigny's lesson on how history and historical events shape the law.

b) Among the most important results of history is the use of a common language within a community which can grow, encompassing millions and millions of people. One should insist on the fact that the law is, basically, a linguistic convention on which, by and large, a community agrees. The law is generally expressed though words, which are combined, interpreted and put into action through other words. Sometimes these are mere enunciations that require a fact to ensue (a promissory note is nothing if the debtor does not pay the creditor) but often they are performative (*e.g.* "I pronounce you husband and wife"). Because words are so important in the law, which cannot suffer ambiguities and contradictory senses, a common language is essential. Applying these notions to legal systems one can say that the so-called common law systems are kept together not by a distant relationship with medieval Inns-of-court, writs and forms of action, but by the fact that in the UK, in North-America, in Australia and New Zealand the common language allows a constant – and now immediate – circulation of ideas, concepts, cases, arguments, solutions. The connections between Madrid, Tijuana (in southern California) and Ushuaia (in Patagonia) are not based on the remnants of an empire which collapsed nearly two centuries ago, but on the strength of Spanish as by far the most commonly spoken mother-tongue language in the Western world. And if – notwithstanding all the immense differences between the two worlds – we can look at the Indian legal system, and be looked at back (*e.g.* by its Supreme Court), it is not because of the despised British colonial rule in the sub-continent, but because English is the language of the law that unites a country which otherwise would be fragmented, and not only from a legal point of view. One finds further evidence of the use of language to group legal systems in the establishment of English as the contemporary legal (and not only legal) *lingua franca*. This had already happened in the 19th century with French, and for at least one thousand years with Latin. One might even venture to say that if Latin

had not been the *lingua franca* in the Middle Ages and at least until the 17th century, Roman law would have remained buried with the monuments of its empire.

c) If the law is surely the product of history, social development and language it is also an intellectual product. Legislators, scholars, judges, practitioners make up a small social élite which is influenced by the dominant philosophical trends and ideologies. One has seen how much natural law theories and political thought have contributed to shape legal systems. One can also classify systems by tracing their philosophical ancestry: idealism and positivism in continental Europe; realism across the Atlantic. Clearly there are no clear-cut distinctions between philosophical theories, and the law is influenced by a great number of other factors. What deserves to be pointed out is that many of the differences between legal systems are related to general epistemological approaches which not only determine how norms are set, but especially directs the minds of those who are in charge of drafting, interpreting and implementing them. Looking at the past is it only a coincidence that Hume, J.S. Mill, Peirce and Dewey have had a very limited impact in continental Europe? While Hegel and his progeny (which includes Heidegger) are considered obscure and incomprehensible across the Channel and the Atlantic? *Tout se tient :* the law is part of a complex mental construction in which knowledge, scientific theory, economic models and ideology contribute to what German philosophers called – and after them we still call – a *Weltanschauung*, a vision of the world.

d) One of the most practical – and therefore relevant – of these visions is social compliance with legal norms, *i.e.* norms set by a public authority. One is talking not only of compliance with typical criminal law rules which criminologists carefully measure through deviancy rates. What appears to be more important is compliance with private law (payment of debts; relations between neighbours; professional negligence, etc.) and with administrative law (traffic rules, construction permits, waste disposal etc.). At the end of the day what one might be more interested in is not differences in structure and content of the systems and of their rules, but to what extent a legal system is effective, *i.e.* if the majority of citizens abide by the laws that have been set. Keeping in mind variations in reliability of statistical data (what is collected and how), one might discover that different rules in the same field are complied with equally in most countries. Or that the same rules (*e.g.* traffic lights or no-parking signs) bear a very different rate of compliance. Clearly this investigation

is more of a sociological nature; however it cannot be ignored by comparative scholars who wish to detect what is substantial and what instead is a superstructure. From this perspective one should consider a further aspect of what comparatists call "legal mentality" which is not only how judges, practitioners and scholars perceive the law, but also how a community interprets the law, meant as an order or an obligation or a set of rules of conduct laid out by a public authority. One could group systems in which norms are seen as an essential element of the good functioning of society. Without norms, there is social disorder which borders anarchy. And on the opposite side of the spectrum we find communities in which there is deep scepticism in the usefulness of such norms which are seen as an obstacle to individual freedom. Again, this is a sociological conclusion, but who, if not comparatists, should question the sense of legal norms and challenge the trend towards hyper-normativism? Comparative lawyers have always attempted to point out that formalized norms were (and are) only a small part of a much broader picture. Societies are governed not only through commands that come from established authorities, but – especially in daily life – through what are called 'social norms' which keep a community together, avoiding clashes among its members and asserting rights which are set in the black-letters of the law. There is, therefore, a continuous interplay between legal norms and social norms and the prevailing of the former over the latter (or vice-versa) colours the system. Often social norms ignore State boundaries and create similarities and ties which are much stronger than any international convention.

9.6. *A holistic view, and beyond*

Jurists – especially from continental Europe – have an innate tendency to build systems, whether actual or simply theoretical. The "legal systems" that have been compared in these pages are meant to be seen in their multiple aspects which are all inter-dependent, with continuous overlappings and cross references. For these reasons, to compare legal systems effectively and not nominalistically is often unrewarding because even when one has the impression of having clearly defined similarities and differences, some other feature escapes from the neat frame, as if one were trying to nail a jelly-fish. Micro-comparison (*e.g.* conclusion of contract, VAT, petty offences) to which much meritorious effort is devoted leaves one with the doubt on the exact nature of the wall in which that specific brick is placed.

And macro-comparison appears to be generic. If one wants to go into detail the risk is, like in Borges' short story on the mapping of the empire, that the only way to provide an accurate description, preliminary to any comparison, is a life-size photograph of the system in every single detail.

A new path could be suggested, which comprises four, related, aspects:

a) The functional comparative method still remains unsurpassed: legal institutions should be compared by looking at their social function, and not on the basis of nominal qualifications or dogmatic setting. To establish what the functions of a legal institution are requires attention to its substance, its inner structure, its common use. One can therefore look for functional equivalents and compare them;

b) This method however needs to be – one might say, necessarily – supplemented by the systemic approach one has attempted to lay out in the previous chapters. A legal institution lives in constant osmosis with the other parts of the system. The fact that they belong to different partitions of the law (taxation law, administrative law, labour law etc.) is no excuse for ignoring them. If the system covers all, so must the inquisitive lawyer, *i.e.* the comparatist;

c) There is a huge amount of reflection on the methods of comparative law. Most of the lessons that come from such writings must be taken. What is suggested here is that the effectiveness of those methods depends on *who* is comparing (an academic scholar, a legislator, or a judge?); on *what* one is comparing (a legal text, case-law, ideas and ideologies?); and *which aspect* is the purpose of the comparison (theoretical, practical, didactical?). Although it is extremely difficult to establish what is "true" in legal research, it is however easier to detect what surely is far from reality and misleading;

d) Although it is not his or her main profession a comparative lawyer is forced to look at numbers, at statistics, at appraisals. There is not much use in coming to the conclusion that there is little difference in the purpose of apparently different legal institutions if one discovers that the performances are quite different. Who, if not a comparatist, should point out that the "law in action" is not a label that one only applies to case-law research, and that the latter, although necessary, gives us only a limited insight? Who, if not a comparatist, should make it clear that comparisons are pointless, if not futile, if one does not look at some fundamental aspects: how much time, on average, does a civil trial last? How many days (months, years) are necessary to obtain an ordinary trade licence? What is the size of labour law litigation? Is public procurement awarded through the ordinary procedures, or are the courts the ultimate

tender commission? Do culprits for the same crimes receive the same sentence? And do they actually serve it in detention centres?

A holistic view, therefore, can in no way be a static description of a system. It is necessary to constantly try to understand the interactions between the various elements, even when they may appear to be very distant: between devolution and company law; between family law and purchase/sale of houses; between criminal law and regulation of business; between labour law and international trade; and so on for the hundreds of possible relations.

This analysis is obviously beyond the scope of this book, but students should be immediately made aware of the constant interplay that is very similar, to draw a parallel, to what we find in a living organism.

Clearly this requires setting aside, for a moment, *pointilliste* investigations and embarking on interdisciplinary research. A task not many jurists appreciate.

Comparing systems therefore implies necessarily cutting across sectors which, from an academic point of view, have been built as walled gardens (only experts in criminal procedure can understand and present criminal procedure issues; only constitutional experts can appropriately comment on constitutional court decisions, etc.).

A comparative enquiry is essential for this approach: it can point out some constant features of systems (if you change A this will affect B) but also unveil truisms.

This in no way means that legal science – just like any branch of human knowledge – can do without specialists, whose contribution remains invaluable. But, precisely because legal systems have become so incredibly complex, it is necessary to devote intellectual effort to understanding their functioning.

There is a further challenge: scholarly lawyers have been brought up to believe that the law is nearly everything or to see things in a hierarchical perspective – that the law governs nearly everything except, maybe, the tide, earthquakes and the solar system.

A less conceited view is that the law has always – by this, meaning for the last 2500 years – been related not only, as obvious, to society and its economy, but also to events which are so much bigger that they may have been overlooked: geographical discoveries; technological development; prodigious advances in medicine.

While a lawyer must remain a lawyer – if he or she does not want to lose a role in society and abdicate in favour of uneducated apprentice sorcerers ("wannabee lawyers") – he or she must be constantly aware of the immense eco-system in which the law is immersed.

In this much more complex, but real, context the role of comparative law is not to provide correct answers but, much more engagingly, to ask the appropriate questions.

Afterword

A lawyer – like any scholar – must never forget his or her roots. This is particularly necessary in comparative law because it clearly indicates what the point of view is, with its potentialities and its limits.

These pages are therefore deeply in debt to the works of great Italian scholars in comparative law whose names still resound throughout the world: Gino Gorla, Mauro Cappelletti, Rodolfo Sacco. Their ideas have contributed to creating a special attitude in Italy towards comparative legal studies. Comparative law is a compulsory subject in all law degree curricula; there are over two hundred tenured professors of comparative law; scores of handbooks on comparative legal systems, and on private and public comparative law.

All this clearly influences whoever in Italy writes about comparative law and even departing from acquired wisdom would have not been possible without measuring one's critical approach with such a wealth of legal thought, and making it more engaging.

But the real challenge has been that of teaching, year after year, hundreds of students and asking oneself if one's lessons will actually provide lawyers, who will have to reason and work in such a different world, with useful tools to understand it. Without such daily doubts this book would never have been written.

Reading List

It would be impossible to provide an exhaustive list of readings on the many topics presented in this Introduction. *What follows are simply some suggestions, the end of an Ariadne's thread, where one will find a much more complete bibliography concerning each paragraph. For this reason, I have generally indicated more recent publications, rather than classical works, because the list of references is more up to date.*

Chapter One

1.1/1.4. Practically all the topics summarily presented in this chapter can be found, presented in a broader context and by scholars with the most diverse backgrounds, in the 1300-page volume edited by M. Rosenfeld and A. Sajó, *The Oxford Handbook of Comparative Constitutional Law*, OUP 2012. Above all, see the inspiring chapter by P. Zumbansen, *Carving Out Typologies and Accounting for Differences Across Systems: Towards a Methodology of Transnational Constitutionalism*, at p. 75. See also A.W. Heringa, *Constitutions Compared. An Introduction to Comparative Constitutional Law* (IV ed.), Intersentia 2016; D. Arter (ed.), *Comparing and Classifying Legislatures*, Routledge, 2007.

1.5. D.M. Farrell, *Electoral Systems: A Comparative Introduction* (II ed.), Palgrave Macmillan, 2011.

Chapter Two

2.1. M. Adams, A. Meuwese, E. Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*; CUP, 2017; D. Grimm, *Constitutionalism: Past, Present, and Future*, OUP, 2016.

2.2. J. Church, C. Schulze, H. Strydom, *Human Rights from a Comparative and International Law Perspective*, Unisa Press 2007.

2.3. A. Jakab, A. Dyevre, G. Itzcovich (eds.), *Comparative Constitutional Reasoning*, CUP, 2017; R. Rogowski,T. Gawron (ed.), *Constitutional Courts in Comparison: The US Supreme Court and the German Constitutional Court* (II ed.), CUP. 2016.

2.4. J. J. Heckman, R. L. Nelson, L. Cabatingan (eds.), *Global Perspectives on the Rule of Law*, Routledge, 2010*;* M. J. Trebilcock, R. J. Daniels, *Rule of Law Reform and Development. Charting the Fragile Path of Progress*, Elgar 2008; D. M. Trubek, A. Santos, *The New Law and Economic Development: A Critical Appraisal,* CUP, 2006. S. Morano-Foadi, L. Vickers (eds.), *Fundamental Rights in the EU: A Matter for Two Courts*, Bloomsbury, 2015

2.5. M. Kanetake, A. Nollkaempe, *The Rule of Law at the National and International Levels: Contestations and Deference*, Bloomsbury, 2016.

2.6. For an overview by one of the leading experts in ecclesiastical law (and editor of a multiplicity of other works on the subject) see S. Ferrari (ed.), *Routledge Handbook of Law and Religion*, Routledge 2015. See also N. Doe, *Law and Religion in Europe. A Comparative Introduction*, OUP, 2011.

Chapter Three

3.1. Y. Ghai, S. Woodman (eds.), *Practising Self-Government: A Comparative Study of Autonomous Regions*, CUP 2013.

3.2. S. Rose-Ackerman, P.L. Lindseth, O. S. Ioffe (eds.), *Comparative Administrative Law*, Elgar, 2011.

3.3. See R. Caranta, M. Andenas, D. Fairgrieve, *Independent Administrative Authorities*, BIICL, 2004; and the chapters by J.M. Ackerman, *Understanding Independent Accountability Agencies*; D. Custos, *Independent Administrative Authorities in France: Structural and Procedural Change at the Intersection of Americanization, Europeanization and Gallicization*; and M. Shapiro, *A Comparison of US and European Independent Agencies*, in S. Rose-Ackerman, P.L. Lindseth, O. S. Ioffe (eds.), *Comparative Administrative Law*, Elgar, 2011.

3.4. J-B. Auby (ed.), *Codification of Administrative Procedure*, Bruylant, 2013; J. Mendes, *Participation in EU Rule-making: A Rights-Based Approach*, OUP, 2011.

3.5. J. Beckett, H. O. Koenig (eds.), *Public Administration and Law*, Routledge, 2015; M. Bovens, R.E. Goodin, T. Schillemans (eds.), *The Oxford Handbook of Public Accountability*, OUP, 2014.

Chapter Four

4.1. K. Zweigert, H. Kötz, *An Introduction to Comparative Law* (III ed.), OUP 1999 is still unsurpassed for a critical and in-depth approach to private law.

4.2. The literature on the different models in company law is immense. Without any pretence of completeness see R. Kraakman *et al.*, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (III ed.), OUP 2017; M. Ventoruzzo (ed.), *Corporations: A Comparative Perspective*, West Academic 2017; M.Andenas, F. Wooldridge, *European Comparative Company Law*, CUP 2009.

4.3. I. Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe*, Bloomsbury, 2017; for an analysis of

company rescue schemes in some jurisdictions (US, UK, France, Germany and the Netherlands) see B. Xie, *Comparative Insolvency Law. The Pre-pack Approach in Corporate Rescue*, Elgar 2016.

4.4. On regulation see F. Bignami, D. Zaring (eds.), *Comparative Law and Regulation. Understanding the Global Regulatory Process*, Elgar 2016; from a political science perspective R.D. Kelemen, *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Harvard UP, 2011.

4.5. J. Drexl, V. Bagnoli (eds.), *State-Initiated Restraints of Competition*, Elgar, 2015

Chapter Five

5.1. On taxation law see V. Thuronyi, K. Brooks, B. Kolozs, *Comparative Tax Law* (II ed.), Wolters Kluwer 2016. The way income (as distinguished from wealth or other assets) is taxed provides a fair insight into the political and legal relation between the State and productive activities: see for an analysis of eight Western systems (plus Japan) H.J.Ault, B.J.Arnold (eds.), *Comparative Income Taxation. A Structural Analysis* (III ed.), Wolter Kluwer 2010; C. Sacchetto, M. Barassi, *Introduction to Comparative Tax Law*, Rubbettino, 2008.

5.2. For an overview of the legal limitations on government deficit and debt and its impact on the ability of nations (US and nine European countries) to provide services to their citizens, see F.L. Morrison (ed.), *The Fiscal Rules - Limits on Governmental Deficits and Debt*, Springer 2016. Necessarily from a policy perspective M. Cousins, *European Welfare States: Comparative Perspectives*, Sage 2005.

5.3. The wealth and variety of approaches to what is meant by "labour law" is clear in M.W.Finkin, G. Mundlak, *Comparative Labor Law*, Elgar 2015; and in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolter Kluwers, 2010.

Chapter Six

6.1. There are countless books which qualify themselves as "comparative" and consider only one side of the coin (only substantive, or, more commonly, only procedural aspects) of penal law. For a more complete approach J. Pradel, *Droit penal comparé* (IV ed.), Dalloz, 2016.

6.2. M. D. Dubber, T. Hörnle, *The Oxford Handbook of Criminal Law*, OUP, 2014.

6.3. K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law,* CUP, 2009.

6.4. J. Q. Whitman, *Harsh Justice. Criminal Punishment and the Widening Divide between America and Europe*, OUP, 2005.

6.5. J.E. Ross, S.C. Thaman, *Comparative Criminal Procedure*, Elgar, 2016; J. Jackson, M. Langer, *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaska*, Hart, 2008. On public prosecution see G. Gilliéron, *Public Prosecutors in the United States and Europe. A Comparative Analysis with Special Focus on Switzerland, France, and Germany*, Springer 2014.

6.6. M. Pifferi, *Reinventing Punishment. A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries,* OUP 2016. For an update on the importance of victimology, especially in the international arena, see T. Kirchengast, *Victimology and Victim Rights: International Comparative Perspectives*, Routledge 2017.

Chapter Seven

7.1. An expanded presentation of the various aspects (analysing UK, France, Germany, Spain and Sweden) can be found already in the long *Introduction* of J. Bell, *Judiciaries within Europe: A Comparative Review*, CUP 2006; C. Guarnieri, *Judges, their Careers, and Independence*, in D. S. Clark, *Comparative Law and Society*, Elgar, 2012; G. Canivet, M. Andenæs, D. Fairgrieve (eds.), *Independence, accountability, and the judiciary*, BIICL, 2006.

7.2. M. R. Damaska, *The Faces of Justice and State Authority A Comparative Approach to the Legal Process*, Yale UP, 1991.

7.3. O. Chase, H. Hershkoff, L. Silberman, V. Varano, *Civil Litigation in Comparative Contex*t, Thomson, 2007.

7.4. L. Pereira Coutinho, M. La Torre, S.D. Smith, (Eds.), *Judicial Activism. An Interdisciplinary Approach to the American and European Experience*s, Springer 2015; C. Guarnieri, L. Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy*, OUP, 2002.

7.5. D.S. Clark, *Legal Education*, in D. S. Clark, *Comparative Law and Society*, Elgar, 2012.

7.6. M. Aristodemou, F.Macmillan, P. Tuitt (eds.), *Crime Fiction and the Law*, Birkbeck, 2017; P. Robson, J. L. Schulz (eds.), *A Transnational Study of Law and Justice on TV*, Hart, 2016.

Chapter Eight

8.1. M. Neves, *Transconstitutionalism*, Hart, 2013.

8.2. S. Picciotto, *Regulating Global Corporate Capitalism*, CUP, 2011.

8.3. S. Fazio, *The Harmonization of International Commercial Law*, Kluwer, 2007.

8.4. On the GATT/WTO system M.J. Trebilcock, *Advanced Introduction to International Trade Law*, Elgar, 2015. The literature on what is now called 'Global Administrative Law' (GAL) is immense: for the founding writings see S. Cassese et al. (eds.), *Global Administrative Law: The Casebook* (III ed.), IRPA, 2012 (downloadable at http://www.irpa.eu/gal-section/global-administrative-law-the-casebook-2/); and B. Kingsbury, N. Krisch, R. B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law & Contemporary Problems* 15 (2005); B. Lomfeld, A. Somma, P. Zumbansen (eds.), *Reshaping Markets: Economic Governance, the Global Financial Crisis and Liberal Utopia*, CUP, 2016.

8.5. See already W.E. Butler (ed.), *International Law in Comparative Perspective*, Sijthoff-Noordhoff 1980. More recently B.N.Mamlyuk, U. Mattei, *Comparative International Law*, 36 *Brooklyn J. Int'l Law* 385 (2011).

Chapter Nine

The suggested starting point for a fresh and open view of comparative law and comparative legal systems is M. Siems, *Comparative Law*, CUP, 2014 where one can find, *inter alia*, an eighty-page list of references, which covers most of the topics presented in this booklet. Following the innovative trend see also J. Husa, *A New Introduction to Comparative Law*, Hart, 2015.

9.1. The focus on private law is found also in books that although qualifying themselves as "encyclopaedias" devote very little space to the endless topics of public law: J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (II ed.), Elgar 2012. Not very dissimilar in approach M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, OUP, 2008. For a much broader view see M. Bussani, U.Mattei (eds.), *The Cambridge Companion to Comparative Law*, CUP, 2012.

9.2. J.C. Rivera (ed.), *The Scope and Structure of Civil Codes*, Springer, 2016.

9.3. O.G. Chase, J, Walker (eds.), *Common Law, Civil Law and the Future of Categories*, LexisNexis 2010; P. H. Glenn, *Comparative Legal Families and Comparative Legal Traditions*, OUP, 2006.

9.4. Critical views on the traditional comparative approach to non-Western legal systems are expressed W.F. Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (II ed.), CUP 2006.

9.5. The researches on the languages of the law are countless: for the most recent work of one of the leading experts see H.E.S. Mattila, *Comparative Legal Linguistics: Language of Law, Latin and Modern Lingua Francas* (II ed.), Routledge 2016.

9.6. For a few, quite diverging, views on purpose, aims, methods, and directions of comparative law see: M. Adams, J. Bomhoff (eds.), *Practice and Theory in Comparative Law*, CUP, 2012; A. Bakardjieva Engelbrekt, J. Nergelius (eds.), *New Directions in Comparative Law*, Elgar, 2009; from a Russian perspective W. E. Butler, O. V. Kresin, I. S. Shemshuchenko (eds.), *Foundations of Comparative Law: Methods and Typologies*, Wildy, 2011; R. David, M. Goré, C. Jauffret Spinosi, *Les grands systémes de droit contemporains* (XII ed.), Dalloz 2016; M. A. Glendon, P.G. Carozza, C.B. Picker, *Comparative Legal Traditions in a Nutshell* (IV ed.)., West, 2016; P. H. Glenn, *Legal Traditions of the World* (IV ed.), OUP, 2010; P. Legrand, *Le droit comparé* (V ed.), PUF, 2016; P.Legrand, R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, CUP, 2003; J. H. Merryman, D. S. Clark, J. O. Haley (eds.), *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia*, Lexis Nexis 2010; P.G. Monateri (ed.), *Methods of Comparative Law*, Elgar 2012; D. Nelken (ed.), *Comparing Legal Cultures*, Routledge, 2007; D. Nelken, E. Örücü (eds), *Comparative Law: A Handbook*, Hart 2007; M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Hart, 2004.

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The short notations in the Afterword *are justified by an unparalleled wealth of books and handbooks on comparative law and on comparative legal systems by Italian scholars (the following list is only a sample):*

- The '*Trattato di diritto comparato*' under the direction of R. Sacco has published with UTET the following volumes: R.Sacco, *Introduzione al diritto comparato* (1992); A. Gambaro, R.Sacco, *Sistemi giuridici comparati* (II ed.) (2002); U. Mattei, *Common law. Il diritto anglo-americano* (1992); G. Ajani, *Diritto dell'Europa orientale* (1996); R. Sacco, M. Guadagni, R. Aluffi, L, Castellani, *Il diritto africano* (1995); G. Ajani, A. Serafino, M. Timoteo, *Diritto dell'Asia orientale* (2007);
- The "*Sistemi giuridici comparati*" Series under the direction of A. Procida Mirabelli di Lauro has published with Giappichelli: U. Mattei, *Il modello di Common Law* (IV ed.) (2014); P.G. Monateri, A. Somma, *Il modello di Civil Law* (IV ed.) (2016); G. Ajani, *Il modello post-socialista* (III ed.) (2008); M. Guadagni, *Il modello pluralista* (1996); F. Castro, G.M. Piccinelli (eds.) *Il modello islamico* (II ed.) (2007);
- G. Ajani, *Sistemi giuridici comparati. Lezioni e materiali*, Giappichelli, 2005;
- G. Alpa, M.J.Bonell, D. Corapi, L. Moccia, V. Zeno-Zencovich, A.

Zoppini, *Diritto privato comparato. Istituti e problemi*, Laterza 2012;
- G. Autorino, A.Saturno, S. Sica, P. Stanzione, V. Zambrano, *Sistemi giuridici comparati: ipotesi applicative*, Gentile 1997;
- P. Carrozza, A. Di Giovine, G.F. Ferrari (eds.), *Diritto costituzionale comparato*, Laterza 2014;
- G. Crespi Reghizzi (ed.), *Sistemi giuridici nel mondo*, Giappichelli 2010;
- G. de Vergottini, *Diritto costituzionale comparato* (IX ed.), Cedam 2013;
- F. Galgano (ed.), *Atlante di diritto privato comparato* (V ed.), Zanichelli, 2011;
- A. Guarneri, *Lineamenti di diritto comparato* (V ed.), Cedam, 2012;
- M. G. Losano, *I grandi sistemi giuridici. Introduzione ai diritti europei ed extraeuropei*, Laterza, 2000;
- M. Lupoi, *Sistemi giuridici comparati*, ESI, 2001;
- L. Moccia, *Comparazione giuridica e diritto europeo*, Giuffrè, 2005;
- G. Morbidelli, L. Pegoraro, A. Rinella, M. Volpi (eds.), *Diritto pubblico comparato* (V ed.), Giappichelli 2016;
- G. Napolitano (ed.), *Diritto amministrativo comparato*, Giuffré 2007;
- L. Pegoraro, A. Rinella, *Diritto costituzionale comparato*, Cedam, 2013;
- A. Pizzorusso, *Sistemi giuridici comparati*, Giuffrè, 1995;
- A. Somma, *Introduzione al diritto comparato*, Laterza 2014;
- R. Tarchi, *Corso di diritto comparato*, Giuffré, 1999;
- V. Varano, V. Barsotti, *La tradizione giuridica occidentale* (V ed.), Giappichelli 2015.