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Towards a Different Understanding of Legal Traditions
Comparative Law Insights[1]

Abstract
In the legal field, the definition of the term 'tradition' suffers from heterogeneous understandings. These epistemological difficulties hint at one of the determinants of the definition of 'legal tradition', namely, an appeal to predominantly endogenous cultural aspects and not purely legal forms of legitimacy in the narrow sense. 'Tradition' and 'legal tradition' are not two autonomous semantic fields, but rather different attempts for conceptualising experience. Methodologically, the 'seeds' of the concept of 'legal tradition' are scattered within the manuals of the last century, but classifications of legal traditions expose a relativistic attitude. Considering the legal experiences to date most prevalent, this contribution aims to propose a tripartition of legal traditions into (1) supernatural eschatological transcendent (Talmudic and Islamic legal forms); (2) supernatural cosmogonic immanent (Chthonic, Hindu, Confucian, Buddhist legal forms); and (3) Western/North Atlantic (civil law, common law, and their variants).

Keywords: Legal Families; Legal Traditions; Legal Formants; Constitutionalism; Rationalism; Comparative Law.

[1] This article is a translated and revised version of the book chapter "*Tradizione giuridica*", in Bagni *et al.* (eds.) (forthcoming). Although it recalls several different aspects already addressed within the book chapter, this article is a novel attempt to provide the definition of legal tradition(s). As far as the contributions are concerned, par. 1 and par. 3 have been authored by Viola, P., par. 2 by Parrilli, A., par. 4 by Andreoli, E.

1. Proposing Taxonomies

Comparative law literature, both national and international, only recently started to use the term 'tradition' in reference to its technical and specific meaning, mainly for taxonomic and methodological purposes, with the aim of complying with an interdisciplinary attitude.

The definition of 'tradition' whitin legal scholarship suffers heterogeneous uses in different and distant fields, e.g., in reference to British constitutionalism, Western liberal-democratic constitutionalism, as the genesis of a founding myth, the recognition of a 'supernatural' legality[2], the specific arrangement of territorial organisation[3], the 'traditional' forms of conciliation and alternative dispute resolution systems[4]. The examples just mentioned are not exhaustive, but rather evocative of a complex and transversal epistemological issue. However, these difficulties do point to what will be one of the crucial elements of the very definition of 'legal tradition' in relation to complex social systems: an often-explicit reference to predominantly endogenous and not purely legal forms of legitimation in the strict sense.

Even though based on Western practice, John Merryman's definition of 'tradition' – as Antonio Gambaro and Rodolfo Sacco point out[5] – still may be considered as one of the most persuasive, at least as far as its meaning in legal studies is concerned[6]:

> [A] legal tradition, as the term itself implies, does not consist of a set of legal norms relating to specific institutions, although in a certain sense the legal apparatus is almost always a reflection of them. Rather, it presents itself as a complex of deeply rooted, historically conditioned attitudes about the nature of law, the role of law in a society and the political order, the organisation and functioning of a legal system, and the way in which law is or should be made, applied, studied, refined and taught. The legal tradition relates the legal system to the culture of which it is a partial expression, placing it in a cultural perspective.

If, on the one hand, a tradition exposes the legal system to the cultural perspective, on the other hand, the 'legalisation' of tradition takes place through forms of 'technical adaptation' of the human experience in general. In other words, 'tradition' or 'legal tradition' are not two completely autonomous semantic fields, but different – partial in the case of 'legal' tradition – declinations of human experience. Within the extra-legal field, 'tradition' is partly a form of legitimation; to this end, as Lucio Pegoraro

[2] Gambaro, A. and Sacco, R. (2016). To this end, see, for instance, the Preamble of the Constitution of Bhutan: "WE, the people of Bhutan: blessed by the Triple Gem, the protection of our guardian deities, the wisdom of our leaders, the everlasting fortunes of the Pelden Drukpa and the guidance of His Majesty the Druk Gyalpo Jigme Khesar Namgyel Wangchuck".

[3] As in the case of the Indian basic structure (or features), which defines an eternity clause for the 'spirit of the Constitution'. See Thiruvengadam (2017); Roznai (2017); Delaney, R. Dixon (2018); Amirante (2019); Viola (2020).

[4] Ajani et al. (2007); Matsui (2010); Zhang (2012); Pegoraro, Rinella (2017); Rinella (2021).

[5] Gambaro, Sacco (2016: 32 ff.).

[6] Merryman (1969; 1973). As John Merryman points out, during the Seventies legal scholarship considered European, Anglo-American, and socialist traditions as the most prominent ones. The first one, according to the Author, has been considered as the most ancient and disseminated amongst others (p. 1).

and Angelo Rinella state, "doing as the fathers have always done"[7] is indeed a form of obedience's justification, efficacy, and even effectiveness (as in the case of Gross National Happiness in Bhutan or Ubuntu in South Africa)[8], while in theocratic systems, one goes far beyond the living experience towards the supernatural[9]. This approach may seem to distance the semantic field of 'tradition' from the legal space, but it results in an overlap that merges traditional law as customary law. In fact, 'traditional/consuetudinary law' is the basis of a "theoretical scheme [that] allows the evaluation of reforms by questioning the concepts of tradition and legal pluralism" (p. 2)[10]. Subaltern cosmopolitan law or the law of the oppressed is a cultural, political, and social project with a legal element".

'Tradition' (as traditional law) and 'custom' (as customary law) represent familiar and, in some cases, overlapping semantic realms. And this is also the case in systems based on legal-rational forms of legitimation, where dogmatics has led to the theorisation of customary law because of *opinio juris ac necessitatis* and *usus*, with the associated prevalence of the law. The latter assumption offers a clear example, since if we consider that "in modern state systems, however, the law prevails (with rare exceptions) over custom, in deference to a well-established legal positivist conception"[11], this led to the assumption that the attribute of positivity is itself customary, and represents an example of legal tradition's impact (therefore, also tradition in general terms): in other words, it is customary that law prevails over custom. On this point, reference can also be made to what Rodolfo Sacco wrote in terms of the factual approach:

> [i]n civil law countries, law is traditionally explained by saying that the legislature enacts a statute, scholars discover its meaning, and judges, assisted by their conclusions, give the statute a precise application through their decisions. We have seen the unrealism of this view. Can we therefore conclude that this view is wholly fallacious? Can we say that a statute or the reasons given by a court are legal flowers without stem or root, irrelevant to the actual law in force? When the question is asked in that way, it is clear that the answer is "no".[12]

Following the same metaphor proposed by Sacco, regarding methodology, the "seeds" of the concept 'legal tradition' have been disseminated throughout the manuals of the last century. A first hypothesis is that 'tradition' occupied the theoretical space left by the failure of legal ethnology, as Léontin-Jean Constantinesco pointed out[13], to claim a space for extra-legal factors through the so-called determinant elements, thus paving the way for principles and values[14]. In fact, according to Constantinesco, the

[7] Along with this form of legitimation, Pegoraro, Rinella (2017) also consider three basic forms of legislation: 1) "obbedisci a Dio" in reference to theocratic systems, 2) "Segui la ragione", e.g., jurisprudence, 3) "Rispetta la volontà del capo politico", in reference to tribal leader, dictators and ideological law. See also Manfredi (2009). About the phenomenon of a super-imposed and Western constitution: Pegoraro (2021), pointing out that "in altre aree del globo [ossia non occidentali] alla base della giurisprudenza dei dotti non sta quasi mai la ragione, il che spiega la resistenza frapposta a questo criterio legittimativo e la sopravvivenza o la palingenesi di altri criteri (la tradizione, la divinità, il consenso, la volontà politica)". See Pegoraro (2020).
[8] Bagni (2015).
[9] Along the argumentative pattern, the word 'supernatural' has been employed to define the divine and/or those understandings, beliefs and phenomena that go beyond the ordinary perception and the limits of material experience.
[10] de Sousa Santos (2009); Carducci (2012); Pegoraro, Rinella (2017).
[11] Teubner (1996); Bobbio (2011); Pegoraro, Rinella (2017).
[12] Sacco (1991: 27).
[13] Constantinesco (1996: 121).
[14] Ibid.: 124.

groups of determining elements "appear to be the 'conception' and the 'role' of the law within the system under consideration. They can be "official, visible, explicit and rigorous", but also "unofficial, hidden, implicit and uncertain". They are actors of the "relations of uncertainty that exist between the 'given' and the 'constructed'"[15].

Konrad Zweigert and Heinz Kötz approach the notion of tradition referring to typical and atypical elements, as well as to the distinction between legal ethnology – in the historical-universalist meaning – and the study of "primitive peoples", the latter still considered to lack a sufficient level of civilisation[16]. The typical and atypical elements are reminiscent of Constantinesco's determining elements but are significantly different from them in that they concern an evolutionary perspective on the stages of legal systems' qualitative development. This approach fosters the mixing of the ideal legal system with that of human experience and refers to what Norbert Rouland theorised as "tending towards unity through differentiation and associating the visible with the invisible in the order of the real"[17]. In this synthesis between the ideal and the real[18], formalism and technicism of the ideal law leaves space, in the name of harmony, to real elements (also through a form of totemism).

In *Les grands systèmes de droit contemporains*, René David and Camille Jauffret-Spinosi recall tradition when, in describing the Roman-Germanic family, they note its affinities with the private, commercial, and criminal law of China, Japan and Indonesia. At the same time, however, they reject the inclusion of these legal systems under the taxonomic heading mentioned above[19]. Indeed, according to David and Spinosi, when distinguishing comparative law from sociology, law might not appear only through its formal sources, because considering only formalistic aspects offers a distorted view on social relations and on what law represents. From this perspective, the task of comparison is to enlighten the meaning of law under a functionalist approach, thus considering the diversity of structures, beliefs, and customs for setting a dialogue with other "way of life", methodologies and reasonings. Moving from these assumptions, the result of the comparison is that there are constant elements and variable elements. In a nutshell, the variable elements are those subject to the legislator's arbitrariness and can be described as 'fluid'[20]. The constant elements, on the other hand, are those "linked to our civilisation and mentality. The legislator has no more influence over them than over our language or our way of thinking"[21].

In the past, without ever referring to the term 'tradition', comparative methodology has stated that legal tradition cannot be reduced to an active and dynamic formant, since it precedes the formants themselves and shapes the law in action. This is even clearer regarding the features of comparative constitutional law:

> [t]he first feature that is objectively relevant is that the norms of constitutional rank most often express a fundamental choice of the system to which they belong; they express characteristics that determine the identity of a system. For example, the form of the state and the bill of rights, the division of powers and the form of government, the decentralisation or centralisation of political power are all questions that are

[15] For the concept of determining elements: Knapp (1978).
[16] Zweigert, Kötz (1992).
[17] Rouland (1992: 177). See also Murungi (2013).
[18] Rouland (1992: 177 and 184).
[19] David, Jauffret-Spinosi (1996; 2016).
[20] Ibid.: 16.
[21] Ibid. and ff., Italian edition, 1996; Pound (1958: 241 ff.).

> answered in the constitution in legal terms that express a fundamental political choice. This is not a legal solution based on criteria of efficiency and effectiveness, but a solution that responds to a precise scale of civil and political values in which the social group – the political community – recognises the matrix of its identity and the reasons for its unity"[22].

How, then, can we trace the coordinates of a tradition within a specific social group and asset? By means of an inductive analysis on the determining elements. But this is not possible (or only partially) because these elements are determined by tradition. In other words, they live in symbiosis: the change of one follows the change of the other and vice versa.

From a subjective and dynamic point of view, the 'real' refers to the experience that impacts on the related tradition. Whether it is tradition that is the link between the legal system and culture, or culture that is the link between the legal system and tradition, is a relevant issue. The choice of one way or the other has a major impact on the use of 'legal tradition' for taxonomic purposes. According to Mathias Siems, "geographers are primarily interested in the spatial dimension, lawyers in the institutional dimension. But by combining these taxonomies, it may be possible to say whether legal traditions are conditioned by spatial or other non-legal circumstances"[23]. Moreover, there are systems based on traditional law that do not distinguish between law and religious or philosophical traditions. Following this theoretical perspective, semantically the terms 'traditional' and 'customary' partially overlap.

The lack of a distinction between legal and philosophical tradition, apart from the religious factor (to be defined as worship, practice, etc.), fosters the reduction of differences between other traditions, considering that every choice or phenomenon would be a direct effect of philosophical roots and pragmatic attitudes within a social group[24]. However, as Raimond Panikkar suggests, if we believe that all living cultures create tradition, and that every tradition likewise constitutes the culture in which people live, there is room for the hypothesis of a tradition that is identified not by its eidetic content, but by being itself communication – fostering an idea of culture that links the legal system to the corresponding tradition, while the space in which these two concepts overlap belongs to the 'legal tradition'. When 'legal tradition' occupies the formal law's space, the legal system absorbs tradition through forms of legalisation and/or customisation.

This theoretical step is reminiscent of one of the closest approximations to Patrick Glenn's definition of legal tradition: "a representation of reality based on a set of previously learned data"[25], thus the rethinking of the concept of time, both in theoretical and practical terms, since it implies an "extension" of the past towards the present[26]. Moreover, Glenn's reference to Karl Popper and the fact that Popper, in his *Towards a Rational Theory of Tradition*, emphasises the approximation to a theory

[22] Pegoraro, A. Rinella (2013: 17).
[23] Siems (2022: 87) and tab. 4.1 at p. 89; Nicolini (2022); Ragone, Smorto (2023).
[24] Mattei (1997).
[25] Glenn (2004: 5 ff.); Pegoraro, Rinella (2017:164).
[26] Glenn (2004: 12). In the fourth edition of the book, Glenn adds: "we must be cautious in thinking about time". Affirming that tradition is a perpetually present-oriented transmission means to look at an incremental and dynamic past, considering the present an in-finite and quasi-past moment.

using the word 'towards'[27] is not unintentional. Not a theory, but a method for opening to an understanding of diversity and for recognising – even through classifications – the vitality, strength, and dynamism of tradition itself.

According to the aforementioned assumptions, 'tradition' – including 'legal tradition' – could be the object of experienced, it can be explained through intuition and awareness, but not ultimately defined. However, in a prescriptive sense aimed at satisfying communicative needs, legal tradition can be considered as a stratification of non-quantifiable data that directly affects the determining and constant elements of legal systems[28]. Thus, even classifications of legal traditions unveil a relativistic (even prescriptive and/or conventional) attitude[29]. In the light of the most common legal experiences to date, it is possible to propose a tripartite division of legal traditions into 1) supernatural eschatological transcendent (Talmudic and Islamic legal forms); 2) supernatural cosmogonic immanent (Chthonic, Hindu, Confucian, Buddhist legal forms); 3) Western/North Atlantic (civil law and common law legal forms, as well as their variants)[30].

2. The Supernatural Eschatological Transcendent (Legal) Tradition

The Talmudic tradition is one of the oldest living legal traditions in the world.[31] Rooted in the revelation from God to Moses in the thirteenth century BC,[32] the tradition continued to develop during the nomadic era and the first Jewish settlements in *Eretz Israel.*[33] After the destruction of both the First Temple (586 BC) and the Second Temple (70 CE), Jews in Diaspora kept studying and

[27] Popper (2002: 161): "In the title of this talk the emphasis should be put on the word 'towards': I do not intend to put forward anything like a full theory. I want to explain to you and to illustrate the kind of question which a theory of tradition would have to answer, and to give in outline some ideas which may be useful for constructing it. By way of introduction I intend to say how I came to be interested in the subject, and why I think it is important; and I also intend to refer to some possible attitudes towards it".

[28] Consider Santi Romano's plurality and Werner Menski's concept of 'plurality of pluralities'. Romano (1946); Menski (2009); Loughlin (2017); Croce (2017).

[29] Glenn (2004: 584 f.). The scholarly reference to classifications of legal traditions is provided by Glenn, who classifies legal traditions into Chthonic, Talmudic, civil law, Islamic, common law, Hindu, and Confucian. Legal traditions respond to a multivalent logic, are interdependent, transversal and they refer not only to transmission, but also to persuasiveness to survive through times (584f.). Glenn also makes it clear that legal families can be regarded as variants on traditions, but these two concepts – i.e., tradition and family – can be traced back to very different methodologies and objectives, as «[f]amilies are distinct biological entities, inviting taxonomic determination of their members. A tradition is ongoing normative information, inviting compliance and not classification (least of all of itself). These underlying differences may be a consequence for the relations of the laws of the world, and our understanding of them» (ibid.: 426).

[30] A clarification seems necessary before proceeding with the introduction of legal traditions because of the proposed classification. It is impossible to provide an analytical account of all the defining elements of each legal tradition, both in terms of content and quantity. To use a metaphor, the effort would be equivalent to that of a biographer who wants to write down, moment by moment, the entire life of a person, not only focusing on the decisive events of his/her existence, but also on his/her experience and on the almost infinite variables that condition it. To achieve this, after introducing the legal traditions, the various sections, without claiming to be exhaustive, mention legal experiences – i.e., forms – that can be traced back to them.

[31] Glenn (2007: 93).

[32] Margolis (1947: 15).

[33] Filoramo (2007).

applying their religious law, together with the law of the lands in which the diasporic communities lived. Following the establishment of the State of Israel in 1948, Jewish law was incorporated into the Israeli legal system.[34] Over this span of time, the letter of the religious law remained virtually unchanged, yet Talmudic law adapted through time in response to social changes, as well as scientific and technological developments[35].

The primary sources of Talmudic law are the *torah*, the *mishna* and the *talmud*[36].

The *torah* (the 'Teaching') is contained in the *chumash*, namely the first five books of the Bible, known in Greek and Christian tradition as the Pentateuch[37]. From these books stems the *halachah* ('the Way to Behave'); that is, the set of *mitzvòt* ('precepts') whose interpretation by the jurists is needed to concretely implement the religious rules and the Jewish idea of justice (*tzèdek*) in the contemporary world. Interpretation plays a pivotal role in Jewish law. The Bible is considered a divine text, devoid of contradictions; however, its correct application requires the correct interpretation of the sacred text according to the Oral Law, given by God to Moses on Mount Sinai alongside the Written Law[38].

The *mishnah* (the 'Repetition' or 'Review') is considered the first 'codification' of *halachic* law[39]. It is composed of the commentaries transmitted by the *tannaìm* ('teachers') who collected the oral law and the written law delivered by God to Moses, alongside with minority opinions by the Jewish jurists. The latter serve as interpretive tools, so that future courts might rely on them when deciding the *halakha*[40]. The massive compilation of the *mishnah* began in the aftermath of the destruction of the Second Temple and it was completed around 200 CE. The *mishnah* consists of 6 orders and 60 treatises; it discusses specific cases in Jewish law.[41] According to the majority of Jewish scholars, the opinions collected in the *mishnah* are normative in nature[42].

The third source of Jewish law is the *talmud*. It consists of the collection and commentaries of the *mishnah*. It is considered authentic and binding material, and the starting point for deciding any *halakhic* matters whatsoever[43]. The *talmud* has two forms: the Jerusalem *talmud*, which represents the first attempt to collect the commentaries on the oral and the written *torah*; and the Babylonian *talmud*. Both forms are regarded as the basic books of the Jewish legal tradition;[44] however, the Babylonia *talmud* is taken as the most authoritative text by the majority of Jewish communities.

The Talmudic tradition also relies on the *responsa* issued by religious authorities[45], i.e., juristic opinions designed to provide solutions to individual instances through the interpretation of the written

[34] See, among others, Shetreet, W. Homolka (2021).
[35] Lucrezi (2015: 20, 28, 30-33) defines Jewish law a "a tendentially timeless law" (our translation).
[36] On Jewish law, Elon (1975); Horowitz (1953). On Biblical law and the *torah*, Daube (1947); Castiglioni (1962); Falk (1964); E. Urbach (1971: 93 ff.). On the *mishnà*, Elon (1975: 122 ff.). On the *talmud*, Silberg (1973); Stemberger (1989); Steinsaltz (2004).
[37] Rabello (2011: 531).
[38] Rabello (2012: 2)
[39] Elon (1975: 122-123)
[40] *Mishnà*, *Eduyot*, 1, 5 (translated in Italian by Castiglioni 1911: 1905 ff.).
[41] Elon (1975: 124).
[42] Rabello (2002: 2 ff.). On the notion of revealed and codified law Ginzburg (1955: 153-184).
[43] Elon (1975: 5); Glenn (2004).
[44] Glenn (2007: 97).
[45] Rabbinic Responsa are sometimes subject to parallelism with the common law system. However, the *responsa* in the Jewish tradition are only binding for those who directly asked the question or those who spontaneously chose to accept the solution

sources of biblical law or, more commonly, the *talmud*. The *responsa* in Jewish law are very similar to the *responsa prudentium* in Roman law from the time of Emperor Augustus on. This is because Talmudic tradition interacted with the Roman legal tradition for a long time[46]. However, the most interesting similarity is to the *fatwa* in Islamic law, i.e., the legal opinion issued by the *faqih* (expert in Islamic law)[47]. The institute of the *responsum*, in both Jewish and Islamic law, plays a major role in jurists' efforts in interpreting the religious sources to accommodate the needs of contemporary communities, without questioning the divine origin of law.

Finally, Jewish law also resort to the *Tradition*. Despite the lack of normative force, the rabbinic tradition is understood as part of the *torah,* and it inspires individuals to follow the 'right path' in life[48]. In this respect, the rabbinic tradition serves as both a guiding tool and a limit to the interpretation of the Law.

The Jewish legal system lacks substantive differences between the rules pertaining to the relations between a man and God (prayer, Sabbath, and feast observance) and those pertaining to the relations between a man and his neighbour (for instance, the rules for buying and selling goods, the rules on good faith in commercial relations, as well as marriage, divorce, criminal law): both are taken as legal rules'[49]. In other words, in the Talmudic tradition, law and religion intersect, as do – at least in principle - the moral and legal rules[50].

Similarly to Talmudic law, Islamic law has divine origins. The foundation of Islamic law is to be found in the revelation from God to the Prophet Muhammad on the Mount Hira' (610 CE).

In Islam, the *shari'a* (the 'Way of God and the pathway of goodness') governs all aspects of human existence and individuals' behavior[51]. According to Islamic legal theory, the ultimate goal of *shari'a* law is "to serve the well-being or achieve the welfare of the people"[52]. The revealed law is sacred, (formally) immutable and eternal.

Most Muslim scholars distinguish between *shari'a* and *fiqh*. The latter is the Islamic jurisprudence that describes and interprets the *shari'a.*[53] It constitutes the normative framework resulting from the interpretation of the Islamic sources of law by jurists, and it was developed by different legal schools (*madhahib*)[54].

proposed by the religious authorities in a specific case. Menachem (1994: 1454); Elon (1994: 1454-1528). Among the most important collections of *responsa* in English, Golinkin (1997); Golinkin (2000).

[46] Menachem (1994: 1454).

[47] Goitein (1980: 61–77).

[48] Elon (1975: 124).

[49] Some authors make a distinction between the theological teaching (*haggadah*) and the *halachah*. The latter is the normative part of Talmudic tradition. However, the boundaries between the theological and the normative parts remains porous. The *torah* must be read as a unified text. Consequently, the *haggadah* and the *halachah* both rule human behavior. See Glenn (2011: 187-193).

[50] Lucrezi (2014: 554) suggests the existence of a separation between religious rule and legal rule.

[51] The term *shar'ia* can be subject to different interpretations and translations. See Papa, Ascanio (2014)

[52] *Mahmasany* (1961: 172-5).

[53] See Ferrari (2007: 174).

[54] Castro (1989).

The legal sources (or roots) of Islamic law (*usul al-fiqh*) are the *qur'an*, the *sunnah*, the *ijma*, and the *qiyas*[55].

The *qur'an* (the 'Recitation') was revealed by God to the Prophet Muhammad, starting from 610 CE over more than two decades. The holy book consists of one hundred and fourteen chapters (*suwar*), ordered from the longest to shortest, with the exception of the opening *sura (al-fatiha*). Each *sura* is divided into verses (*ayat*).

With regard to the legal content of the *qur'an*, according to Muslim scholars only 500 *ayat* out of the 6200 included in the *qur'an* are normative in nature. Among this 500 normative *ayat*, there are about 400 verses regulating worship practices and religious rites (*ibadat*)[56]. It follows that the verses of the *qur'an* strictly pertaining to legal matters are about 100.

The second root of Islamic law is the *sunnah* of the Prophet (*sunnat al-nabi*); that is, the collection of teachings, sayings, actions, and silences attributed to the Prophet, as well as episodes of his life. The *sunnah* contains *ahadith* ('talks') which have normative force. According to the Islamic tradition, the Prophet's actions were directly inspired by God;[57] thus, his life represents a model for Muslims to follow. For this reason, the *sunnah* serves as an important interpretative tool to infer the legal rules from the *qu'ran*.

Alongside written sources, the oral (or rational) sources of Islamic law are the *ijma* ('consensus') and the *qiyas* ('analogical reasoning').

The *ijma* is the consensus among the Muslim community (*ijma al-umma*) on religious, ethical, and legal matters. It is considered the 'truth' from which the believer must not deviate[58]. According to the Muslim jurist Muhammad al-Shafi'i, the *ijma* is infallible and it is itself part of the *sunnah*[59]. Due to the complexity of inferring the legal implications of the narrations and teachings contained in the *qu'ran* and the *sunnah*, the *ijma* is the consensus among the Muslim jurists. They possess the knowledge and authority to interpret Islamic law and they act as representatives of the Muslim community in a given place and time in history[60].

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[55] The categorization of the sources of Islamic law is based on the scheme proposed, among others, by Salim R. Baz, considered one of the most authoritative commentators of the Majallah. Other authors, however, make a distinction between revealed sources (the *qur'an* and the *sunnah*), non-revealed sources (the customs and traditions, consensus, and the opinions of the Prophet's disciples) and rational sources. The latter are essentially interpretive criteria of the revealed sources, including the analogical reasoning (*qiyas*), the presumption of continuity (*istishab*) and principle of legal preference/discretion (*istihsan*). Other classifications also include the principle of rational interpretation (*ijtihad*). Although different categorizations of the Islamic sources of law exit, all Muslim jurists agree on the superiority of the *qur'an*. On the classifications of Islamic roots of law, in English and Italian languages, see Schacht, in Khadduri, Liebesny (1955); Rahman (1962: 1-36); Faruki (1962); Castro (2007: 3-24).

[56] The *ibadat* (ritual rules) are the daily prayers, ritual fasting, dietary rules and the practice of ritual slaughter, pilgrimage, purification rituals, rules on the dress code, hunting, vows, oaths, and funerals. The Islamic fiqh is portrayed as a tree. The *ibadat* - together with the *mu'amalat* (*negotia*) - form part of the *furu al fiqh* ('branches of law'), i.e., the legal institutes that, together with the *usul al-fiqh* (roots of law) are part of the Islamic *fiqh*. Castro (2007: 10).

[57] Castro (1987: 410-412).

[58] Santillana (1926: 33 ff.).

[59] There are innumerable positions within Sunni doctrine regarding the admissibility of the *ijma in inferring the legal implication of the qur'an and the sunnah*; as well as the possibility to rely only on the agreement among the Prophet's direct disciples or, at most, to the first three Muslim generations of scholars. The Shiites categorically refuse to rely to the *ijma* as a source of Islamic law. Ahmad (1956).

[60] See Donini, Scolart (2015).

The second rational source of Islamic law is the *qiyas* (the 'analogical reasoning'). The term refers to the use of the deductive reasoning to solve a new legal question through the application of a solution adopted in a similar case contained in the *qu'ran* and the *sunna* (or previously agreed upon by jurists)[61]. However, Muslim scholars belonging to different schools of law disagree on the legitimacy of the *qiyas*, as well as the mode and scope of application of this exegetical tool[62].

Finally, customs and traditions (*'urf or 'ada*) intervene to further mediate the rigidities of the divine revelation[63]. Although they are not listed among the primary sources/roots of Islamic law, the resort to these subsidiary sources is widely accepted by Islamic legal scholars.

As with the Talmudic tradition, when dealing with Islamic law some considerations are necessary on the boundaries and intersections between the divine law and the secular law[64]. Despite being often depicted as an immutable monolith, incompatible with the 'modern world', Islamic law has shown remarkable resilience and adaptive skills to the point that, it has been incorporated in the legal system of numerous African and Asian countries mostly with regard to matters of personal status (but also commercial law, financial law and criminal law).[65] Moreover, Islamic law and traditions continue to govern the daily behaviour of Muslim believers all over the world[66].

Finally, in the Islamic tradition, the political and the legal spheres share the same theological foundation, and they are strongly interconnected.[67] Consequently, there is no clear distinction between *din* (religion), *dunya* (society) and *dawla* (politics)[68]. The State legal system is grounded on the Islamic ethical and moral principles and the secular/political authority governs in accordance with Islamic law (*siyasa shar'iyya*). The distinction between the public and private spheres exists; however, it is not as rigorous as theorised in the Western/North Atlantic legal tradition[69].

3. The Supernatural Cosmogonic Immanent (Legal) Tradition

The 'supernatural cosmogonic immanent (legal) tradition' encompasses those legal systems whose determining and constant elements operate a synthesis between three spaces: 1) the one that transcends the human (not necessarily divine and timeless), 2) the one which seeks a final fulfilment (of the human or universal, always in a future perspective), and 3) the one which is perceived and felt through the senses and experience. It seems possible to highlight four legal forms within this set: Chthonic, Hindu, Confucian, Buddhist[70].

[61] Castro (2007: 18); Abu-Sahlieh (2009: 131-136).
[62] Abu-Sahlieh (2009: 131-136)
[63] On the role of customary law in the Islamic tradition, Coulson (1956: 211-226); Coulson (1959: 13-24); Hassan (1982: 65-75); Vercellin (1996: 288-290); Milliot, Blanc (2001: 137-149).
[64] Mattei, Monateri (1959: 13-24)
[65] On the *incorporation of sharia*-based rules in the national *legal systems of Islamic countries see, among others,* Donini, Scolart (2015).
[66] Pacini (2010: 2).
[67] Sbailò (2012: 1-38).
[68] Lapidus (1975: 363-385).
[69] Bucci (2005: 72-91).
[70] Although the divine element remains a fundamental part of the set of rules for the Catholic Church of the Latin Rite, following codification in the early 20th century, the legal form of canon law can be traced back to the Western/North Atlantic legal tradition.

The defining features of (broadly speaking) chthonic legal forms is their orality. This stems from the need to systematise the understanding and awareness acquired through experience. This legal form has become increasingly complex and, contrary to what Bennett and Glenn claim[71], it resembles not merely a repertory, but a system. Even within contemporary constitutional systems, which appear to be legitimated on a legal-rational basis, the existence of chthonic forms makes it necessary to think in terms of legal pluralism. At least one of these systems embraces criteria exclusively arising from human experience. For instance, the Constitution of Ecuador, which mentions the Sumak Kawsay and Pachamama, is a clear example of such an attitude at the constitutional level. The latter can be identified as Mother Earth, while the concept of Sumak Kawsay is a Quechua heritage belonging to the Andean cosmovision, and can be translated as "living well", an element that Silvia Bagni has taken up for the dogmatic construction of the caring state[72]. Specifically, the Andean 'living well' consists in an exhortation to live in harmony against the background of pacha (as a real, but at the same time immaterial, existence). As Carolina Silva Portero explains[73], the concept of pacha encompasses three existential dimensions: 1) *hanaq pacha* (the world above), 2) *kay pacha* (this world), 3) *ukhu/uray pacha* (the world below); the three dimensions are a whole that is balanced by the *sumak kawsay*[74]. As further example, the Bolivian constitution emphasises indigenous ethical and moral concepts: *ama qhilla*, *ama llulla*, *ama suwa* (do not be lazy, do not be a liar or a thief), *suma qamaña* (live well), *ñandereko* (live harmoniously), *teko kavi* (good life), *ivi maraei* (land without evil) and *qhapaj ñan* (noble path)[75].

The interpretation of cosmogonic elements can play a more important role than experience in the systematisation of rules. This is the case of Hindu law, which can be geographically limited to the South Asian context (particularly India and Nepal). As Domenico Amirante points out, it must be stressed that this way of understanding law is religiously inspired, not consequential to it, based on countless interpretative contributions, mostly imposed by the shared recognition of the authority of the interpreter[76]. In Hindu cosmogony, one of the pivotal concepts that takes on legal implications is *dharma*, which can be briefly defined as a set of rules addressed to the individual in order to nurture harmony with the cosmic order[77]. The meaning of *dharma* can be further deduced from the content of the Vedas (Rigveda, Samaveda, Yajurveda, Arthaveda) and the Smrti texts. I should highlight, however, that this is a severe synthesis of very complex concepts and massive literature. Law as we understand it today, with its own colonial matrix and legal-rational legitimacy, does not exclude references to what was defined and established through the Hindu legal form. Traces of this approach can be found in the recognition of personal laws or in the references to castes within the Indian Constitution. As Werner Menski points out,

> postmodern Indian law [is...] portrayed as an intricate combination of old and new, questioning and abandoning blind belief in modernist legal axioms and linear progress [...] Legal uniformity per se is no longer seen as desirable in India (if indeed it ever was, across the board) [. Indian ...] legal realism, theoretically

[71] Glenn (2004: 122) defines chtonic tradition, while this article aims at highlighting the existence of a chtonic legal form that precedes the chthonic legal system.
[72] Bagni (2013).
[73] Silva Portero (2008).
[74] Palacios (2008); Altmann (2017).
[75] Art. 8, Constitution of the Plurinational State of Bolivia. See Baldin, Viola (2020).
[76] Menski (2008); Amirante (2009).
[77] Amirante (2009: 98).

> still at embryo stage, has managed to cultivate the customary plurality of Hindu family law, but by listening to 'tradition' it has not given up on reformist agenda[78].

In reference to these aspects, also the constitution of Nepal, which attempted to secularise the legal system after the transition from a Hindu constitutional monarchy to a secular democratic republic[79], recalls countless autochthonous factors linked to the religious sphere (e.g., the flower, the colour, and the animal that have been declared as national symbols)[80].

In other cases, cosmogonic elements prevail over living experience, but the systematisation of the rules takes place along two vectors: 1) internal, i.e., as a journey into the depths of the individual (Buddhist form of law); 2) external, as the individual dilutes itself into the social group (Confucian form of law and Taoist practice). Both cases obviously share a fuzzy logic, since total introspection would exclude the relationship (which is the basis for the existence of law and rules), while radical externalisation would even dissolve the singular will (another fundamental element of law and rules).

Regarding the Buddhist legal form, a recent volume edited by Tom Ginsburg and Benjamin Schonthal has highlighted the importance – also in quantitative terms – and the impact of this philosophical doctrine on the constitutional systems of Asian countries[81]. To sum up, about half a billion people share the precepts of Buddhism, in some countries representing the majority of the citizens (Bhutan, Mongolia and, taking into account the diaspora, Tibet)[82], in others a number of them representing the majority of the citizens, in others a significant number (Sri Lanka, Myanmar, Thailand, Laos, Cambodia, Vietnam, China[83], Japan[84], Taiwan, South Korea). It seems impossible to fully summarise the Buddhist "moral universe"[85], although some of the core elements are "transmigration and rebirth (*saṃsāra*), intentional action and its consequences (*karma*), cosmic truth and righteous teachings (*dharma*), spiritual awakening and those who have achieved it (*buddhas* and *bodhisattvas*)"[86].

The constitutions of Bhutan, Cambodia, Myanmar, Sri Lanka, and Thailand provide examples of the constitutionalisation of Buddhism, as per Article 3 of the Bhutanese Constitution, which states that "Buddhism is the spiritual heritage of Bhutan which promotes the principles and values of peace, non-violence, compassion and tolerance", immediately revealing the reference to pre- and extra-legal factors. Within the above-mentioned constitutions, even when Buddhism is declared the state religion or is given a prominent position in relation to others, references to specific doctrines and schools of

[78] Menski (2006: 273).
[79] Viola (2020).
[80] Art. 9, par. 3, Constitution of Nepal: "The Rhododendron Arboreum shall be the national flower, Crimson Colour shall be the national colour, Cow shall be the national animal and Lophophorus shall be the national bird of Nepal".
[81] Ginsburg, Schonthal (2023).
[82] Ibid.
[83] As Ginsburg and Schonthal point out, "[a]s China has been stymied in acquiring a leadership role in global Buddhist organizations, it has launched its own World Buddhist Forum, in part to accomplish diplomatic goals of bringing Taiwan back into the national fold. This Buddhist diplomacy reflects the seemingly complete subservience of Buddhist institutions to national goals as defined by the Leninist Party-State. Viewed through the prism of contemporary Vietnamese and Chinese laws, then, the modern Buddhist–constitutional complex can be seen not only as touching discourses and imagery that moralise state power, but also those that seemed to routinize, regularize, and reform monastic power" (Ibid.: 22).
[84] On the impact of the Soka Gakkai and of the Komeito party on the Japanese constitutional arrangement: McLaughlin (2023).
[85] Walton (2023; 2016).
[86] Ginsburg, Schonthal (2023: 3); Watts (1957); Panikkar (2019).

thought demonstrate the pre-existence of determinant and constant elements that 'anticipate' state law: Vajrayana and Mahayana (Bhutan), Mahayana and Theravada (Cambodia), the general reference to the Buddha Sasana (Sri Lanka), Theravada (Thailand).

The Confucian legal form can be considered as an example of legal forms related to the individual self-diluting into the social group[87]. This legal form characterises the Chinese legal system through a strong continuity of legal structures, evidencing the 'secondary role' of law[88]. It should also be noted that *fa* (a generic term for written laws) and *lu* (a technical term for specific legal sources) have been developed over two millennia, while the term *xian fa*, which can be translated as 'constitutional law', stands for "the power/charisma of personal example rather than the power of legal institutions backed by the power of the state"[89]. Moreover, as Shiping Hua points out, these philosophical approaches underline the "relative unimportance" of law, or rather the secondary role in relation to a set of elements derived from the natural order of the universe (within this natural order, the Tao occupies a leading space)[90]. In reference to Southeast Asian experiences, Bui Ngoc Son argues that Confucianism plays a pivotal role in defining a 'possible and desirable' model of constitutionalism that could integrate autochthonous ethical-political factors and axiological patterns with those arising from the Western liberal tradition[91].

4. The Western/North Atlantic Legal Tradition

In the traditional narrative about the birth of 'Western' law, legal consciousness is historically rooted on the inheritance proper to Roman law[92]. The latter, assessed as "one of the finest creations of the human spirit"[93], is often considered the foundation of the entire legal tradition of the Western world. From this perspective, the importance attributed to the role played by Roman law in the creation of an autonomous legal tradition intended as a guide for all modern law in the civil law and common law legal families[94].

Modern legal comparison has long explored the opposition between the latter two families[95]. Most of the countries of the so-called Western world, indeed, now lie within one of the two main legal families above mentioned[96].

[87] Bui (2017).
[88] From a historical perspective, we refer to dynasties Qin (221-206 a.C.), Tang (618-907 d.C), Qing (1644-1911 d.C). Levenson (2005); Head (2009); Hua (2019: 16 ff.); Chang (2019).
[89] Hua (2019: 17).
[90] The impact of Taoism and Confucianism should be intended as a unitary process within which one subject does not exclude the other.
[91] Bui (2017: 155). Examples of this tradition could be traced back within the Southeast Asian legal systems. In reference to duties and the concept of self-cultivation within a Confucian perspective, on the withdraw of the Mandate of Heaven and, in general, on Asian values and the law see Ghai (1998); Cauquelin et al. (1998). Ghai emphasises the Westernisation of the law in Japan, South Korea, and Taiwan, while underlining the convergence and westernisation of other Asian legal systems (comprising China as well). On this aspect see Nguyen, Viola (2022).
[92] Watson (1995).
[93] Schulz (1946).
[94] Stein (1992: 86).
[95] Chase, Walker (eds.) (2010); Siems (2022: 41-70).
[96] Berman (1983); Gambaro (1998: 687); Glenn (2010); Bussani (2010); Barsotti, Varano (2021).

The common-law family was established in medieval England and then found application in the various British colonies (e.g., Canada, Australia, and New Zealand), until it achieved a peculiar successive development in its U.S. variant[97].

The formation process of this legal family is gradual. After the Norman Conquest, William the Conqueror sees himself as the successor of the last Anglo-Saxon king, Edward the Confessor. He declares that he wants to keep Anglo-Saxon law in force, bringing the idea of a strong, centralized power to England for the first time. The institutions sought by the King are all buddings of the *curia regis*, that is, the centralized body of government that administers the affairs of state (what we would today call legislative, executive, and judicial powers). Soon these institutions became emancipated, and the first ones to break free were the courts[98]. This prevents local customs from asserting themselves and prevailing, as they did over mainland Europe in the same period. In fact, a common law of jurisprudential production is formed, representative of the traditions of the Kingdom. It is the common law of the realm (law of the land), created by the courts upon the traditions of the Kingdom.

Since the common law is a law formed from customs interpreted by courts that gradually became separate from the *curia regis*, it eventually also becomes enfranchised from the King himself, who also becomes subject to the law of the land. No specific law is created, as on the Continent, for the relations between citizens and public powers: public powers are also subject to the common law of the realm.

The common law system is completed between the 14th and 15th centuries. As much as the courts endeavoured to adapt the system to provide solutions that conformed to justice, the inability to protect all legal situations deserving of protection under common law becomes apparent. The alternative is found in 'direct' recourse to the King: thus, from about 1400 there is an increasing turn to the Chancery Division (direct emanation of the King), a court administering canonical equity. This court begins to apply its own equity law, not bound by the rigid forms of action of the common law.

At the beginning of the 17th century, the contrast between common law and equity mirrors that between Parliament, courts, and the King over the ability to create law[99]. The compromise, a prelude to the end of the absolute power of the Crown, is found, in 1616, in the coexistence of the two jurisdictions. Thus, we see the gradual 'normativity' of equity, which abandons its 'equitable' nature to develop procedural rules analogous to those of common law, until the final affirmation (1676) of the principle "equity follows the law": the equity judge must decide not on moral/equitable rules, but on legal grounds. In 1873-1875 the Judicature Acts finally formally abolished any procedural distinction between common law and equity.

Said of the peculiar historical evolution, it is important to point out that among the various orders belonging to the common law family there may be considerable differences, but certain factors confer a certain homogeneity. Among them, it is worth mentioning the following: the presence of the Judicial Committee of the Privy Council[100], a supranational court established for the entire Commonwealth; the jurisprudential nature of the orders and thus their character of 'open systems'; the absence of codifications with a national character; linguistic commonality.

[97] Horwitz (1977); Allison (1996); Glenn (2006); Ariano, Mattei (2018).
[98] Three courts later emerged from the *Curia Regis*: Court of Common Pleas (with generalized jurisdiction), Exchequer (with accounting and budgetary jurisdiction), King's bench (with jurisdiction over public affairs).
[99] Klerman, Manoney (2007: 279 ff.).
[100] Lord Haldane (1922); Fraser (1938); Rankin (1939); Bagni, Nicolini (2021: 82-86).

Finally, the common law legal family also has peculiarities regarding the sources of law. First, as seen from historical development, the peculiar status given to so-called case law, that is, the law of jurisprudential production[101]. Second, the concept of a constitution. In modern constitutionalism, in fact, the English case is an exception in that it does not present a constitution understood as a written document of higher rank than ordinary law[102]. It departs radically from this approach the other leading legal system of the common law legal family (United States of America), which places a written constitution at the top of the legal sources ("Supreme Law of the Land"[103]). The presence of a written constitution has consequently 'familiarized' the U.S. legal system with positive law: for this reason, we see here the presence of examples of codification unknown to English law, such as the Uniform Commercial Code, first published in 1952.

The civil law legal tradition developed in the medieval period in continental Europe, the area in which it found its greatest application, and then spread over time even to systems geographically located in different parts of the world[104]. This is a tradition that sees in the positivist rationality of law[105], as well as in the dogmatic and technical-scientific approach in approaching the same, a peculiar characteristic of it. Indeed, norms are politically formed: we witness the centrality of the code and the law as the formant of the legal system[106].

Codification is, however, one of the last stages in which the evolution of the civil law family is articulated. The roots of the legal family lie in the millennia-long tradition of Roman law, culminating in the Justinian compilation, when the Eastern Roman emperor Justinian (527-565 CE) initiated the monumental work of compiling the writings of the classical Roman jurists, the *Corpus Iuris Civilis*.

As the Western Roman Empire disappeared, so did a centralized power in legal production. In the early Middle Ages (5th-11th centuries CE), the Justinian compilation becomes inaccessible in the 'Western' world, and codifications of Roman law desired by barbarian rulers circulate (*Lex romana Wisigothorum*, *Lex Romana Burgundiorum*, ecc.). At this stage, each of the various *nationes* settled in the old territory of the Empire considers itself as subject to the law of its own lineage, according to the concept of the personality of law. Only the Roman Church retains its own unity and central power of normative production. Once the various Germanic *nationes* become settled and convert to Christianity, compilations no longer based on the personality of law but intended for all subjects of a Romano-Germanic kingdom begin to form.

The rediscovery of the Justinian compilation goes back to the 12th-13th centuries CE: universities are born, and Roman law studies flourished again. It is formed a law with a substratum of Roman law resulting from the Justinian compilation, to which, however, new contributions were added: canonical law; Germanic law; local rights, customs, and feudal law. The phase from the rediscovery of Roman law to the French Revolution is the phase of the establishment of the *ius commune*. It originally had a merely supplementary character, finding application where feudal law, statutes, and local ordinances do not provide for. This phase is not characterized by the presence of a unified public power for the entire continent; on the contrary, it is precisely the weakness of imperial institutions that allows us to witness

[101] Stone (1985); Antoniolli Deflorian (1993: 133 ff.).
[102] Bagehot (2001).
[103] Art. VI, U.S. Constitution.
[104] Watson (1981); Monateri, Somma (2016).
[105] Oakeshott (1962); Nelson (ed.) (2005).
[106] Tarello (1976).

the emergence of national monarchies. The *ius commune* goes into crisis between the 16th and 17th centuries[107]: the religious unity is lost with the Protestant Reformation[108]; nation-states are established, through which a state conception of law takes root.

It was during this historical phase that the movement for codification and rationalization of law developed[109], which originated from the Enlightenment and legal rationalism. But while directing its efforts toward overcoming those rules that were an expression of the feudal order, the main reference always remained those of Justinian's *Institutiones*[110].

The subsequent historical phase of the French Revolution represents a 'trauma' for the civil law legal family, causing radical institutional transformations and innovations in the system of sources of law. The law of Parliament, representing the will of the sovereign people, becomes the primary source of creation of legal rules; the state assumes the monopoly of the production of law; doctrine is relegated to the function of commentary and exegesis of the normative text; the judge is limited to being *bouche de la loi*.

The moment of caesura, resulting in the transition to the current form of the civil law legal family, is given by the process of codification[111]. The nineteenth-century code represents an articulation that overwhelms legal particularism in two respects[112]: on the one hand, overcoming regulatory pluralism within the canon of territorial integrity; on the other hand, through the elimination of different subjective situations and the exaltation of the principle of equality.

1804 is the year in which the French Civil Code, which combined Romanist categories with the liberal principles of the French Revolution, came into force. Through the Napoleonic occupation (1804-1812) and the subsequent reorganization of conquered territories, it became law in force in Belgium, Luxembourg, the Netherlands, Italy, Geneva, Bern, and parts of Germany. The fall of Napoleon did not implicate the rejection of the French model, not least because France rose to colonial power and spread the code to Africa and Asia. Germany would wait until 1896-1900 to give itself a code independent of the French model, drafted because of the elaboration of 19th-century German Romanist legal science.

The civil law tradition is thus less compact than the common law one, so much so that the doctrine suggests its further subdivision into various forms: a Latin tradition, a Germanic tradition, a Nordic tradition, a post-socialist tradition, and a Latin American tradition. Among the latter, the most problematic case of logical framing for the occidental/north Atlantic legal tradition is the set of Scandinavian/Nordic legal systems, i.e., Sweden, Finland, Denmark, Norway, and Iceland[113]. Taxonomically, the Nordic countries share with the common law the high degree of historical continuity; with the civil law tradition, on the other hand, the Nordic countries share the drafting of unified normative texts for each of the kingdoms.

[107] Grossi (1995).
[108] Berman (2006).
[109] Monateri, Somma (2016: 78-79).
[110] The best-known intellectual operation of justification on a rational basis of the medieval idea of balance of powers was that of Montesquieu: in this sense, Monateri, Somma (2016: 78).
[111] Ehrmann (1976: 26).
[112] Monateri, Somma (2016: 81). Tarello (1976: 28 ss.).
[113] Mattilla (1990: 152); Bernitz (2007: 13-29); Simoni, Valguarnera (2008).

The various Western legal traditions are nonetheless presented as part of a common tradition that shares distinctive values and a common representation of cultural, social, philosophical, and political concepts[114].

A direct expression of this commonality of values is the impact of constitutionalism on Western/North Atlantic legal tradition, alluded to earlier in the examination of the common-law legal family. This expression is used to refer to the set of principles that characterize at first the liberal form of state and more fully – since the second half of the 20th century – the democratic-representative form of state. The definite development of constitutionalism occurs with the 19th century: its ideological assumptions are found in the British tradition and in the thought of Montesquieu[115]. Modern constitutionalism was then established in the United States of America with the Constitution of 1776, until it reached full maturity in France during the Revolution and through the liberal constitutions of the 19th century. Modern Western constitutionalism, which has gone through extensive phases of renewal following the world wars of the twentieth century, is structured around four defining elements: a written constitution as the fundamental norm of the legal system; the maximum protection of the fundamental rights and freedoms of the individual, usually by means of a special listing of these rights and freedoms directly in the constitutional text; the principle of separation of powers (executive, legislative, judicial) and the principle of legality; and the constitutionality review of laws, usually exercised by a body impartial with respect to the political power.

In examining the Western/North Atlantic legal tradition, mention should lastly be made of that current of thought that recognizes its increasing harmonization[116]. Several comparatists now describe this progressive convergence. Among them, James Gordley points out that the distinction between common law and civil law is now obsolete[117] and how, in fact, since the time of William Blackstone large portions of the common law have been reconstructed based on civil law structures[118]. Similarly, Rudolf Schlesinger argued as early as the 1980s how the differences between common law and civil law were nothing more than a reflection of political and social circumstances of past centuries, no longer finding a reflection in today's reality[119].

The idea of the gradual process of convergence between the two major legal families of the Western legal world constitutes a clear example of what was stated above, namely, that classifications cannot be regarded as immovable realities and are 'historically conditioned'[120]. In this sense, it cannot be denied that the common law legal family has never been founded exclusively on jurisprudential sources of law; similarly, the description of civil law systems as founded on the role of formal law as an almost exclusive source of law has suffered numerous deviations from the ideal type[121].

Convergence among the traditional families of Western law is not the only indication of the imperfect and relative nature of taxonomies. A further example is provided by the so-called mixed legal systems[122]. These are systems that display characteristics belonging to more than one legal form and are

[114] Mayali (1995: 1469); Gurevich (1995). See also Vogenauer (2006: 868-898).
[115] Tocqueville (1856); See also Ackerman (2010: 128-133).
[116] Pejovic (2001: 817 ff.); Markesinis (2000); Sacco, Gambaro (cit.: 36).
[117] Gordley (1994).
[118] Id., (2000: 1875 ff.).
[119] Schlesinger (2009).
[120] See Ramseyer (2009: 1701-1712).
[121] Pegoraro (2014: 141).
[122] Kim (2010); Palmer (2012).

therefore difficult to frame within the traditional classificatory dichotomy of the Western legal world. There are some examples in the legal tradition under consideration: the Scottish system, the Canadian province of Québec, or the state of Louisiana. To avoid the flattening of mixed legal systems to the dichotomous taxonomy described above, part of the doctrine has argued that such systems can be considered as a typology in their own right[123]. Other authors, on the other hand, have argued that the creation of a new category cannot solve the classification problem, since mixed systems have characteristics that are often different to one another[124]: according to this approach, there are no 'pure' legal systems and all of them should be considered mixed systems, having varying degrees of heterogeneity. This reflection on the inherently mixed nature of all legal systems makes it even clearer why the attempt to enclose individual legal systems in predefined categories can only provide a simplified and reductive picture of today's Western/North Atlantic legal world.

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