‘Shaken but not Stirred’ Legal Systems: Some Rhapsodic Considerations on the Category of ‘Mixed Legal Systems’

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The idiomatic expression ‘new frontiers’ leaves me fairly in trouble.

Should the term ‘new frontiers’ imply the idea that previous limits have been over-reached and that new spaces have been conquered or discovered? Or should ‘new frontiers’ be understood to be like new *borders* imposed upon previously vacant spaces?

It might be said that the theme of the ‘new frontiers of comparative law’ intersects new fields and methodological approaches of the comparison of law by way of a more meditated and cutting-edge rethinking of the already-tracked paths of research.

In this latter sense, my modest purpose here is to meditate on the increasing consensus of the scientific community about the category of the ‘mixed jurisdictions’ as a sort of ‘*tertium genus*’ in the classificatory efforts that traditionally engage comparative lawyers by grouping worldwide legal systems into ‘families’ that share common and lingering features.

In particular, I wonder what are – if there are any – epistemological conditions regarding the justification, usefulness and fruitfulness of the family that we have named as the family of ‘mixed jurisdictions’.

PREMISES

Some premises are necessary for clarifying the coordinates of sense that define my reasoning.

The Didactic Purpose of Any Classificatory Efforts

Each legal classification has represented, and still represents, a pale, generalised attempt to manage the complexity of the reality: ‘families’ such as common law, civil law, Muslim law and so forth, tell us nothing more than what is often too generic, falsifiable and oversimplified information about the macro features of legal systems.[1]

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1 See A. Harding, (2002) ‘Global Doctrine and Local Knowledge: Law in South East Asia’, (51) *International and Comparative Law Quarterly*, 36; E. Örücü, What is a Mixed Legal System: Exclusion or Expansion?, Vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-15.pdf; E. Cashin Ritaine, S.P. Donland, M. Sychold, *Comparative law and hybrid legal traditions*,

All classi catory efforts are a result of the natural human response and inclination to compress the diversity of legal world and to make it understandable and transmissible: it is an attempt to get the point of the main differences and similarities between different cultures, contexts and historical experiences.

Having said that, in my opinion, didactic and explanatory purposes return the sole reasonable dimension of all legal classi catory attempts, that is, somehow providing the basis for a relatively uniform and international nomenclature.[2]

The Extreme Relativity of Outcomes of Any Classifications

Each legal classi cation is extremely fragile and deeply conditioned by external and internal elements. It should be noted that not only does the explanatory validity of a classi cation depend on a certain historical period in which a certain legal system is considered[3], but it also largely depends on the point of view of the observer.[4]

Lausanne 10–11September 2009, Schulthess, Zurich, 2010; F. Fiorentini, *Terium datur, le giurisdizioni 'miste' tra common law e civil law*, Riv. Crit. Dir. Priv., 2002, fasc. 3, pp. 449–459; V.V. Palmer, *Mixed Jurisdictions Worldwide*, Cambridge University Press, 2011; I. Castellucci, How Mixed Must a Mixed System Be?, vol. 12.1 *Electronic Journal Of Comparative Law (*May 2008), http://www.ejcl.org/121/art121-4.pdf, p. 17: 'The world's legal reality is very complex and we should not try and oversimplify it; when classifying it, what we nd is that making recourse to the few simple categories of the past is not enough anymore. New classi catory labels will necessarily require more speci c words than classic comparative law classi cations, as the legal world is more complex than it used to be – or as so we now perceive it to be'.

2 R. David, *Major legal systems in the world today*, Stevens, 1988, p. 21 (translation of the original French version *Les grands systèmes de droit contemporains*, Paris, 1964).

3 Just thirty years ago, Prof. Victor Li of Stanford University, entitled his book about Chinese law as '*Law without lawyers'*, in which he states that 'not having a substantial legacy of law and lawyers, contemporary Chinese society has assigned many functions which are handled by law in the United States to non legal organs'. Today the 'Nutshell' pocket book on the Chinese legal system states that 'although a western concept of the rule of law failed to take root in China, China's rulers did use law as an instrument of social control', and that 'China has made important progress in establishing rights of the individual as protection against the type of mindless persecution of innocent victims (...) China has also made particularly signi cant strides in enacting new laws in the area of commercial and business law, intellectual property, administrative litigation and reform of the judiciary'(see D.C.K. Chow, The Legal System of the People's Republic of China, *Nutshell*, 2009, pp. 64–65).

4 See K. Zweigert, H. Kõtz, *An introduction to comparative law*, Oxford, 1998, pp. 68: 'the following factors seem to us to be those which are crucial for the style of a legal system or legal family: (1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) especially distinctive institutions, (4) the kind of legal sources it acknowledges and the way it handles them, and (5) its ideology'; see also R. David, *Major legal systems in the world today*, (ibid), which uses the following as elements for setting up groups in distinguished legal families: the historical formation of the system; the structure of the law (divisions and concepts and concepts of the legal rule); the sources of law;

In his classi catory efforts, the observer may consider only the formal and express law, or he may also include informal, hidden and customary law; he could pay attention only to a general branch of law (private law or public law), or he could go deeply into detail with a speci c eld of law (family law or commercial law for example); he could deal with the classi catory matter using juristic methodology or address them using a sociological and anthropological approach.

Any decision of the observer, and to an extent, maybe even his mood or political inclination, remarkably in uences the outcome of his work.

The 'Geopolitical' Intent of Classifications

Generally speaking, any legal classi cation has to be considered as an expression of a certain 'political' (in a broader sense) and cultural idea as it pursues a hegemonic strategy, proposes a particular model as the 'best' and more ef cient and prestigious than the others.

The intent of scholars was, and maybe still is, to make their own legal system attractive in the global market of legal borrowings, imitations and transplants.

A recent work edited by John W. Head examined the civil law, the common law and the Chinese law legal systems and is eloquently entitled '*Great Legal Traditions*'.[5] Not only does the title reveal a certain shift towards a judgment of value about the 'greatness' of some legal traditions and not of others, but the Chinese legal system has also appeared to be among the 'greatest'. This is the same Chinese law that, just few years ago, was relegated in the more generic family of the 'law of the far east'.[6]

This, it seems to me, is the litmus test – if needed – of how legal classi cations mostly follow the geopolitical and economical changes in a certain historical moment.

The (De)Construction of the Concept of 'Mixing'

I do not want to plunge into details of different theories[7] that try to 'isolate' the family of 'mixed', 'composed', 'hybrid' legal systems from the rest of the legal

U. Mattei, (1997), 'Three Patterns of Law: Taxonomy and Change in the World Legal Systems', 45 *American Journal of Comparative Law* 5, which classi es legal systems according to the relative importance of the co-existing three fundamental types of social regulators: tradition, politics, and the law.

5 J.W. Head, *Great legal traditions*, Carolina Academic Press, 2011.

6 R. David, *Major legal systems in the world today*, Stevens, 1988, pp. 516 ss.; K. Zweigert, H. Kõtz, *An introduction to comparative law*, Oxford, 1998, pp. 286 ss.

7 For the 'classical theory' of mixed jurisdictions see V.V. Palmer, *Mixed jurisdictions worldwide: the third legal family*, Edinburgh, 2001, in which the author outlines three abstract characteristics that would distinguish mixed jurisdictions from others, p. 7: 'these systems are built upon dual foundations of common law and civil law materials (…) common law and civil law constitute the basic building blocks of the legal edi ce. (…) Psychologically speaking, actors and observers within such a system will be cognizant of and will acknowledge the dual character of the law. (…) in every case the civil law will be cordoned off within the eld of private law, thus creating the distinction between private continental law and public Anglo-American law. This structural *allocation of content* is invariable in the family'; V.V.

world; it is simply enough to verify that this 'new category' also appears as problematic and as largely dispute as the numerous classi catory efforts regarding 'pure' legal systems.

It is enough to observe that, similar to the traditional classi cations, the 'new' category of 'mixed jurisdictions' also does miss out on a common and undisputed theory and de nition.

Palmer, *Mixed jurisdictions compared – Private law in Louisiana and Scotland*, Edinburgh, 2009; K. Reid, The idea of mixed legal systems, (2003) 78 Tulane LR 5. See also Colin B. Picker, Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence To International Law and Beyond, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-18.pdf; W. Tetley, 'Mixed jurisdictions : common law *vs* civil law (codi ed and uncodi ed)', in http://www.cisg.law.pace.edu/cisg/biblio/tetley.html. For an economic analysis perspective of the matter of legal classi cations, see A Ogus, *The contribution of economic analysis of law to legal transplants*, in J.M. Smits (ed.), *The contribution of mixed systems to European private law*, Intersentia, 2001.

For a different point of view, see E. Örücü, What is a Mixed Legal System: Exclusion or Expansion?, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-15.pdf, p. 6: 'When legal systems are considered as overlaps, combinations, marriages and off-spring, terminology such as fertilisation, pollination, grafting, intertwining, osmosis and pruning can illuminate the processes of the birth of mixed systems', and p. 13: 'When looked through the lens of history, we see that many of the mixes of the past were formed by strong movements of transmigration of legal institutions and ideas, mostly in the form of impositions, and of divergent linguistic, communal or religious traditions. Legal systems, like cake mixes, are constantly mixing, blending, melting, and then solidifying into new shapes as they cool down, while transposition and tuning take their effect. Special attention must be paid to legalcultural convergence and non-convergence that may come about as a result of legal import, and to any ensuing sociocultural non-convergence. In this context, cultural pluralism, clash of diverse cultures, and the consequences for the importing legal system are of particular contemporary interest and legal pluralism is another signi cant concern. All can be examined within the context of "mixed systems".' See also E. Örücü, (2004) *Enigma of Comparative Law – Variations on a Theme for the Twenty-First Century* (Leiden, Martinus Nijhoff), Chapter 10:3; E. Örücü, A General View of Legal Families and of Mixing Systems, in E Örücü, D. Nelken (eds), *Comparative Law: A Handbook* (Oxford, Hart Publishing, 2007) Chapter 8, pp. 169 ss.; M.van Hoecke, M. Warrington, (1998) 'Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law', (47) *International and Comparative Law Quarterly*, 495.

A geo-legal perspective is outlined by I. Castellucci, *How Mixed Must a Mixed System Be?*, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-4.pdf, p. 15: 'Other current classi cations could also be devisable based on the belonging of the classi able jurisdictions to geo-political blocks, as far as this belonging affects their legal systems; a geo-legal approach, if we like'.

Different approaches to the matter necessitate a confrontation over the types of mixture[8] and also the degree of mixture that should be considered.[9]

From what has been exposed so far about the general conceptual uncertainty of classification in legal families, the reading of the important scientific efforts to cope with this constellation of the mixed, remixed, hybrid legal systems indicates that there is much more to be done to give shape to these new developments.

Good Questions for a Better Understanding

In my opinion, two questions deserve a clear answer: (1) whether comparative lawyers need to study those jurisdictions that present remarkable elements of cross-fertilisation and 'mixedness' and; (2) whether comparative lawyers really need a specific category called 'mixed jurisdictions'.

Comparative analysis would benefit very much from the study of those jurisdictions which, for example, have already experienced the accommodation of civil law and common law a single legal system.[10] It might be fruitful in the

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8 E. Örücü, What is a Mixed Legal System: Exclusion or Expansion?, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-15.pdf, p. 16: 'It is difficult to determine the exact level of hybridity in each legal system. However, what is clear is that combinations of disparate legal and social cultures do give birth to mixed systems. Overlap, cross-fertilisation, reciprocal influence, horizontal transfer, fusion, infusion, grafting and the like all contribute to the coming into being of mixed and mixing systems. All are forever in flux, as are all legal systems. The various degrees of hybridity arise from various degrees, levels and layers of encounters, crossing and intertwining'.

9 E. Örücü, A General View of Legal Families and of Mixing Systems, in E Örücü, D. Nelken (eds), *Comparative Law: A Handbook* (Oxford, Hart Publishing, 2007) Chapter 8, p. 177: 'When talking of – mixed legal systems – the importance of – ongoing mixing – of legal systems must also be considered. In ongoing states of – mix –, a wide knowledge is required to fully analyse this phenomenon, since many systems are shifting and in transition, and new types of mixes are constantly coming into being'.

10 R. McGonigle, *The Role of Precedents in Mixed Jurisdictions: A Comparative Analysis of Louisiana and the Philippines*, vol 6.2 *Electronic Journal Of Comparative Law*, (July 2002), http://www.ejcl.org/62/art62-1.html, p. 22: 'The experience of these mixed jurisdictions is immeasurable because of their innate ability to circumvent the weaknesses inherent in, and enhance the strengths of, both traditions. For proponents of the common law, mixed jurisdictions such as Louisiana and the Philippines, can serve as a guide to point out stumbling blocks in administering a system of codified law. For civilians, mixed jurisdictions can show the advantages of having a powerful judiciary and molding the civil law to fit the requirements of an ever-changing world. For both traditions, mixed jurisdictions offer a unique opportunity for closer contact – *vrai rapprochement* – because of their ability to walk through both systems with ease. It has been said, however, that the apparent is often elusive to perceive, and this might be the case with our two sample mixed jurisdictions'. See also A. Cooray, *Oriental and Occidental Laws in Harmonious Co-existence: The Case of Trusts in Sri Lanka*, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-5.pdf; M. Herbst, W. du Plessis, *Customary Law v Common Law Marriages: A Hybrid Approach in South Africa*, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-28.pdf.

perspective of a new European *ius commune*[11] or of a more uniformed international private law[12] or a more harmonised international law[13].

Furthermore, the study of legal systems where lawyers have had to deal with very diverse legal traditions (for example, Hinduism, Confucian, Islamic traditions, indigenous customs and praxis[14] that have overlapped and mixed with western legal traditions[15]), might represent not only fruitful knowledge for a better understanding of our multicultural societies, but also a bundle of legal instruments and ideas with which to address multicultural matters.

The same might not be said for the second question.

In a diachronic perspective, the art of classifying legal systems stemmed from a world where clear boundaries and fences existed to separate one nation from another. The identity of these nations has been traditionally built in a chauvinist and mythological way, for example, the centrality of the Civil Code, the insuperability of 'Our Lady the Common Law', the indispensability of the Written Constitution

11 J. Smith, *The contribution of mixed legal systems to European private law*, Intersentia, 2001; see also J. Smits, 'A European Private Law as a Mixed Legal System', 5 *Maastricht Journal of European and Comparative Law*, (1998), 328; Jan M. Smits, *Scotland as a Mixed Jurisdiction and the Development of European Private Law: Is There Something to Learn from Evolutionary Theory?*, vol. 7.5 *Electronic Journal Of Comparative Law*, (December 2003); Jan M. Smits, Mixed Jurisdictions: Lessons for European Harmonisation?, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-23.pdf.

12 A. Fiorini, *The Codi cation of Private International Law in Europe: Could the Community Learn from the Experience of Mixed Jurisdictions?,* vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-7.pdf, p. 13: 'It must be stressed that it is not impossible to organise or establish a system of private international law that successfully mixes common law and civil law features. The very experience of mixed legal systems con rms this view. Presenting the new Louisiana private international law codi cation, Symeonides concluded that this code did not aspire to resolve the perennial tension between the common law and civil law in uences but could reconcile the two traditions and provide for them a framework for an interactive and hopefully productive coexistence'.

13 C.B. Picker, *Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond*, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-18.pdf.

14 Fairly different from the opinion of V.V. Palmer, *Mixed jurisdictions worldwide: the third legal family*, Edinburgh, 2001, p. 4: '(…) indigenous law and custom may be simultaneously operating outside of the western European system and may be, by any real measure, a far more important source of legal control for the majority of the population. Yet as I see matters, despite these different external factors, the mixed legal systems (…) have profound generalizable resemblances (…)'.

15 See E.A. Black, G.F. Bell (ed*), Law and legal institutions of Asia*, Cambridge University Press, 2011; Poh-Ling Tan, *Asian legal systems*, Butterworths, 1997; M.B. Hooker, *Law and Chinese in Southeast Asia*, Singapore, 2002, p. 3: 'Not only they (European powers) supreme in politics, economics, and militarily but also intellectually, and this is particularly clear in law. European laws were imposed directly (as in imperial possessions) or indirectly (as in demands made through treaties of extra-territoriality). The result was more or less the same in both cases; it was the subjection of the Asian law to the European selection, validation, and indeed a new de nition of law'.

as the fundamental statute of the Nation, the extraordinary exibility of the '*stare decisis*' principle (binding precedent), and so forth.[16]

If we examine the history of the comparison of law in parallel, we could easily observe (I refer, for example, to the work of Gino Gorla in Italy[17]), that the efforts of the comparatists, on the one hand, were concentrated in nding differences rather than similarities amongst legal systems; and that on the other hand, comparative legal studies and legal classi cation were conditioned (often in a hidden and non-verbalised way) from the idea that only one kind of law exists, for example. law is only con ned to the statutes, judicial decisions, de nitions of legal doctrines given by scholars, and so on.

The combination of a legal political perspective that concentrates on the idea of the uniqueness and 'special identity' of the nation and a comparison of law that purports to nd differences (by marking legal territories, families and legal system with inelastic classi catory terms) has imposed, for example, the terms '*dichotomy*' and not that of '*dialogue*' in describing the idea of a relationship between common law and civil law.

Factors such as ostracism, ghettoisation, physical and 'intellectual' isolation of mixed jurisdictions[18] that are complained about by some scholars (Jaques du Plessis speaks of a 'classi catory limbo' and Professor Reid terms it 'the product of a failure of classi cation'), may provide an explanation to this rhetorical and euro-centric approach to the law and to the legal cultures.[19]

However, I observe that the present world has changed signi cantly and is more complicated and blurred in comparison with the world that produced those classi catory efforts. Modern elements to be considered include the crisis of the traditional division between public and private law, the disaggregation and reconstruction of the municipal scheme of the sources of law, a globalised economy and multicultural society; all of which put the traditional categories of law and deeply-rooted beliefs under stress.

Modern and extraordinarily powerful and re ned concealed forces push in the direction of hybridity, cross-fertilisation and reciprocal in uences in all legal systems.[20] The processes of global or macro-regional uniformation, uni cation and harmonisation (for example, European Union, WTO, OHADA, and so forth)

16 P. Grossi, *Mitologie giuridiche della modernità*, Milano, Giuffrè Editore, 2005.

17 G. Gorla, *Diritto comparato e diritto comune europeo*, Milano, Giuffrè, 1981.

18 V.V. Palmer, 'Two Rival Theories of Mixed Legal Systems', vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/121/art121-16.pdf, p. 2.

19 See V.V. Palmer, *Mixed jurisdictions worldwide: the third legal family*, Edinburgh, 2001, p. 13–14: '(…) the mixed jurisdictions became intellectual battlegrounds where passions, prejudices and considerable learning occasionally took to the barricades. Here, the uninitiated visitor is liable to hear of exotic gures called purists, pragmatists and pollutionists and may have the occasion to read a sometimes emotionally charged, self-regarding literature that has no exact parallel in other systems'.

20 See for a new approach to classi catory effort of legal families U. Mattei, (1997), 'Three Patterns of Law: Taxonomy and Change in the World Legal Systems', 45 *American Journal of Comparative Law* 5; M. Lupoi, *Sistemi giuridici comparati*, Napoli, 2001.

represent massive and impressive movements that not only push towards our territorial frontiers, but also, once established in a country and formed within a well-integrated community, also push towards our legal frontiers, thus reclaiming a legal recognition of collective identity speci cities and peculiarities (*droit a la difference!*).[21]; and nally, the growing process of a law without a State: law that is elaborated upon in big international law rms (outside the democratic law-making process), and spread and imposed upon in each legal system through multinational enterprise mechanisms.[22]

If we are seriously interested in exploring diacronical and sincronical phenomenon of hybridity, only the biunivocal perspective and lingering tension between global and local appears inevitable and fruitful.

CONCLUSION

In drawing conclusion from what has emerged so far, I confess my dif culty in understanding the necessity of a category of 'mixed jurisdictions', considering that every classi ed 'legal family' is the outcome of an assessment of the 'predominance' of one feature over the others.

It is a fact that no 'pure legal system' has existed or is in existence: the uniqueness and absolute originality of each legal system is more of a rhetoric assertion than a scienti c consideration. So the legal world should be seen as a world of 'contaminations' rather than a world split up into different families.

Rather than celebrating the birth of a new family, diversity and hybridity should simply be recognised as a paramount feature of each legal system.

I argue that, far from enhancing our understanding of complexity of legal system, the so called 'mixed legal system' category threatens to undermine, if not replace, the analytical function and epistemological standards of the research on the legal systems. Even if it is only to be understood in a historical perspective and only for didactic purposes to outline the main and general features of different legal traditions and cultures, it does not help. Quite to the contrary, addressing the historical ux of the countless variations of these main general features by using the category of mixed family not only could generate or strengthen (as has already happened) the wrong idea of a contraposition between pure and mixed jurisdictions, but it also runs the risk of hiding, simplifying and trivialising the complexity and ontological hybridity of the present legal reality.

21 See E. Jayme, *Identité culturelle et intégration: Le droit international privé postmoderne*, *RCADI*, 251(1996).

22 See Y. Dezalay, *Merchands de droit. Le restructuration de l'ordre juridique international par les multinationals du droit*, Paris, Fayard, 1992.