Comparative Law Review

VOLUME 12/1 – 2021

ISSN: 2038-8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE LAW REVIEW

VOL. 12 /1

THE MEDITERRANEAN AND LEGAL PLURALISM

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I. INTRODUCTION

Engaged in the construction of the "Fortress Europe" – where fundamental values are forged, preserved, and armed – the European Union institutions and the European *intelligentsias* appear to ignore some ethnological and historical differences within the vast territories it covers.

Some attention has been devoted to the contrasts between Western European countries and Central/Eastern European ones. However, these have been reduced to the fact that the latter part of the continent has received a democratic system only three decades ago. This diagnosis is extremely superficial and could be challenged as an example of typical *histoire événementielle* (in this case the fall of the Soviet Union) which ignores *la longue durée* which is much more revealing[1].

This cleavage, however, will not be examined here, but a different one which I will, provocatively, define a "clash of cultures", that between the Southern European countries and those that are placed north of them.

To simplify – with all the inevitable risks inherent in any simplification – the distinction is between Mediterranean countries, and non-Mediterranean countries.

For well over a century the Mediterranean as a subject of scientific and academic research has been delved through a multiplicity of methods and for an equal number of aims: geographical, historical, economical, linguistical, religious, ethnological, demographical. The list is countless[2]. The results are rich, fascinating and – as in any extremely important and broad issue – highly debated. Not only each contribution reflects prior researches and the times in which they were written, but it is inevitable that the background of the author

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* This article has, as its starting point, the seminal works of Rodolfo Sacco devoted to legal anthropology and condensed in his *Antropologia giuridica. Contributo ad una macrostoria del diritto*, Il Mulino, 2009. It therefore wishes to be, a few months after his demise, a small expression of gratitude for his endless and long-lasting lessons on comparative law as a multifaceted discipline. I wish to thank Guido Alpa, Maria Rosaria Ferrarese, and Giorgio Resta for their critical comments on a first draft of the article.

[1] The imprinting, clearly, is that of F. Braudel, *La Méditerranée et le monde méditerranéen à l'époque de Philippe II*, second edition, Colin 1966.

[2] Post-Braudelian works, in continuity or in opposition, in the last decades are endless. I will refer only to a few recent books, which, although significantly differing in their approaches and conclusions, contain a wealth of further information and readings, impossible to register in this footnote: P. Horden, N. Purcell, *The Corrupting Sea. A Study of Mediterranean History*, Wiley, 2000; D. Abulafia, *The Great Sea. A Human History of the Mediterranean*, Oxford U.P. 2011; the rich and diverse essays collected in W.V. Harris, *Rethinking the Mediterranean*, Oxford U.P. 2005. It is easy to lose oneself in the ocean of writings. The author of these pages tends to express a preference towards the approach laid out in his first chapter by P. Matvejevic, *Mediteranski brevijar*, Graficki zavod Hrvatske, 1987 (English translation: *Mediterranean. A Cultural Landscape*, U. California Press, 1999): the Mediterranean is not merely geography, it is not merely history, it is not merely national cultures, it is not merely belonging. The Mediterranean is inseparable from its discourse.

and his or her view-point are extremely relevant in guiding towards certain results. It is quite obvious that the Mediterranean as an economic world is analysed differently when looking at the history of religions and the extraordinary evolution from polytheism to the three revealed monotheistic faiths.

Clearly this short article cannot in any way compete with analysis that often have engaged a lifetime and have been presented in hundreds, if not thousands, of pages. Nor can it challenge the many scholarly writings which have, over the last three decades, criticized the idea of a "unity" of the Mediterranean[3].

Much more humbly it wishes to point out a somewhat neglected aspect in these contemporary times, *i.e.* how the Mediterranean – in the sense that will be defined – influences and shapes a certain distinctive idea and practice of the law.

Quite obviously a legal system reflects a multiplicity of other surrounding and osmotic factors, but a lawyer will inevitably focus on certain aspects in a dialogue with other lawyers, and with no intent of trespassing in the wide, profound and mind-provoking realms of other scholars. The method is that of pointing at how what is "outside" (geography, history, language, religion, etc.) allows a lawyer to see more clearly what is "inside" his or her field[4].

The simplification of the notion of "Mediterranean" is in the first place geographical, because it includes countries which are not touched by that sea (Portugal) or which only in part are touched by it (France)[5].

The reference to the Mediterranean Sea is not metaphorical. I would suggest that just like in some Islamic medieval maps we give a bright colour to the sea and a light one to the surrounding lands[6].

For 5000 years the Mediterranean has been and must be seen as an open space inhabited by millions of people of the most diverse races, languages, religions. Its waters are themselves a continent. Those countries which border it surely influence it, but at the end of the day to a much higher degree they are influenced by it. This continent, through the millennia, has shaped common ways of living, economic relations, and most importantly – if one can import anachronistically a seductive German expression – a distinctive *weltanschauung*[7].

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[3] One can refer to the very long list of readings at fn. 199 of A.C. Hagedorn, *Institutions and Social Life in Ancient Israel*, in M.*Sæbø (ed.)*, *Hebrew Bible – Old Testament. The History of Its Interpretation*, vol. III, Vandenhoeck & Ruprecht, 2015 (at p. 87)

[4] From this point of view this article differs from the well-known work by P. G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 *Hastings L.J.* 479 (2000) which aims at pointing out the external (Greek, African and Semitic) roots of Roman law and in downplaying its role as cornerstone of the "Western Legal Tradition" ("From the standpoint of law-in-history this paper shows that Roman Law has no claim to supremacy in the ancient world", at p. 554). I will focus, instead, not on specific institutes of the law (contract, State, dispute settlement, legal elites) and their roots and development, but on how the law, as we consider it today, is perceived differently in contemporary Southern European societies.

[5] See A.M. Medici, M. Neve (eds.) *La Méditerranée-planète. Pour un nouvel atlas d'histoire mondiale*, Mimesis, 2022.

[6] See M. Pinna, *Il Mediterraneo e la Sardegna nella cartografia musulmana*, Istituto Superiore Regionale Etnografico: in particular at Tables 18/24 (p.60 ff.), the maps attributed to al Istahri from his "Book of Routes and of Realms"; or to al Gayhani (table 25). They are clearly meant for nautical purposes, but this is one of the essences of the Mediterranean. On how maps reveal much more than geography see J. Brotton, *A History of the World in Twelve Maps*, Allen Lane, 2012 (and in particular Ch. 2, devoted to exchange in the Mediterranean and the surrounding lands).

[7] "Its boundaries are drawn in neither space nor time. There is in fact no way of drawing them: they are neither ethnic nor historical, state nor national; they are like a chalk circle that is constantly traced and erased, that the winds and waves, that obligations and inspirations expand or reduce" (P. Matvejevic, *Mediterranean. A Cultural Landscape,* cited at fn. 2, p. 10).

The "clash of cultures" which I have provocatively mentioned is due to the fact that for non-Mediterraneans, that Sea is simply a vacationland (like the Caribbean or the Seychelles) where they can find sun, beaches, good food, or to put it in the poetical words of one our Giants "the land where the lemons blossom".

This is what is commonly called – borrowing the expression from Edouard Said[8] – "Mediterraneanism" *i.e.* a postcard idea of this vast continent (2.5 million square kms; 3000 km from east to west, 1400 km from south to north)[9].

At the same time, those who live in European Mediterranean countries, especially their *élites,* do not appear to understand the roots of these differences, or when they do, they often give the impression that they are the result of some social and economic underdevelopment compared to North-European countries. An inferiority complex which consolidates the well-rooted *clichés* of the North. Commonly Mediterraneans are "amusing", "charming" and sometimes may be "very cultivated". Laudatory expressions which understate the absence of other qualities.

But what I wish to focus on are not stereotypes (which abound in any part of the world, and, at any rate, should not be despised because they play an important role in human understanding), but to point out certain fundamental differences which can explain numerous misunderstandings within the EU, and possibly could avoid certain – surely involuntary – arrogant approaches by its institutions and by those who represent them.

The spirit of the Mediterranean continent starts being solidly shaped in third millennium B.C. through two main cultural rivers, one originating from Mesopotamia; the second from Egypt. Both of them develop the steppingstones of power: Sovereignty, trade, science. But most importantly writing and religion. The former is an essential tool of government (also at those times information was key[10]); the latter was constantly interwoven in the (short) life of their inhabitants. The Mediterranean is the melting pot of these various flows. It will take time – practically 2000 years – before this evolution consolidates marking forever the traits of this continent of water. This result is not casual. The sea – in this case a relatively closed sea (and not an ocean) – is *par excellence* the platform for an incredibly complex network of communication, whether cabotage or long distance. Vessels carry not only goods and warriors, but also ideas, ways of living, languages. Ports are the hubs of inevitably multicultural, multi-ethnic, multi-religious communities. This does not mean a loss of identity, but more simply an attitude towards differences and adapting to them. While on a continent, mountains, rivers, swamps, forests, deserts isolate and divide communities, living on the Mediterranean – or in its hinterland – develops an anthropological habit for ex-change[11].

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[8] E.W. Said, *Orientalism*, Pantheon Books, 1978.

[9] M. Herzfeld, *Anthropology through the looking-glass. Critical ethnography in the margins of Europe*, Cambridge U.P., 1987: "'Mediterraneanism' is a term that I quite deliberately offer on the model of historicism, positivism, and Said's (1978) equally ironic coinage of 'Orientalism'. Both terms suggest reification of a zone of cultural difference through the ideologically motivated representation of otherness" (at p. 64).

[10] See e.g. the tablets made available in two open-access repositories : the Open Richly Annotated Cuneiform Corpus [http://oracc.museum.upenn.edu], or the Database of Neo-Sumerian Texts [http://bdtns.filol.csic.es/].

[11] "Mediterranean social order (…) is those institutions, customs and practices which result from the conversation and commerce of thousands of years, the creation of very different peoples who have come into contacts round the mediterranean shores" (J. Davis, *People of the Mediterranean. An essay in comparative social anthropology,* Routledge, 1977, p.13.

II. THE REFERENCE TEXTS: THE BIBLE AND THE ODYSSEY

The epitome I will use is represented not by monuments or historical events, or urban settlements, or by technical novelties, but by two literary works that are and can only be Mediterranean and that have shaped since then the entire Western world. The Bible – whose various books date from around the 8th century B.C. onwards – puts together all the culture of those times, in the first place in its transcendent dimension, but also in any aspect of mankind, noble or perverted, inspiring or damning, individual or collective.

It would be simplistic to state that the Bible is the product of (only) the twelve tiny – even for those times – nomadic tribes, believers in the true God. The power of the Bible and its pervasive influence is in the fact that it manages to synthetize multiple trends and its stylistic eclecticism reflects the diversity of the many traditions that grew in that vast area that from the Fertile Crescent stretches to Phoenicia and to the banks of the Nile.

From a religious history perspective, the Bible is the monument of the Jewish people. From an ethnological perspective it photographs the Mediterranean, its men, its women, its society, its values[12]. Those Kings and Prophets could have lived in any country overlooking the watery continent and are an archetype for centuries and centuries[13].

The other work – which is even more revealing and represents the Mediterranean man, yesterday, today and tomorrow – is the Odyssey.

Ulysses is the individual who will defy his Foes, the Gods, Nature, Fate to regain his throne, his woman, what he believes belongs to him. Once he has lost all his brothers in arms, the sole group which he will refer to are his family, his father, his wife, his son, his nurturer, his dog. And his vengeance against those who have betrayed his hospitality and have tried to steal everything from him will be without mercy. But in his odyssey, he will not deny himself the pleasures of the flesh (Calypso) or of the mind (the lotus eaters); he will be deceitful with the Trojans, with Polyphemus, with the suitors; shrewd with Circe; pious towards the dead which he visits in Ades; bashful with Nausicaa. Ulysses is much more than a hero; he is a man to which every other man in the Mediterranean can look at and find something that resembles them[14]. But most importantly he is not a dead hero,

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[12] S. Schwartz, *Were the Jews a Mediterranean Society? Reciprocity and Solidarity in Ancient Judaism,* Princeton U. P. 2010 appears to be more concerned on whether Jews were or were not assimilated in the Hellenistic and Roman world. And in a subsequent writing (*Globalization or Culture. The Ancient Jews and the Mediterranean*, in M.B. Lehmann, J.M. Marglin, *Jews and the Mediterranean*, Indiana U.P. 2020, at p. 31) the same author states that "we cannot think of Jews as meaningful participants in an ancient Mediterranean economy of whatever scale" (at p. 36), somehow presenting the idea of a Jewish "exceptionalism" in the Mediterranean world. J. Ray, *The New Melting Pot? Mediterraneanism and the Study of Jewish History* (*ibidem,* at p. 51) attempts to bridge this gap: "What are we to make of a people who, for most of their history, were translocal, mobile, and culturally hybrid – that is, quintessentially 'Mediterranean' – and yet also members of a notoriously bounded, even clannish society?". If a comment may be made on this last sentence, the two aspects do not appear to be in antithesis and are present among most Mediterranean people.

[13] What is extraordinary is that more or less three centuries before the great triad of Greek historians (Herodotus, Thucydides and Xenophon), a small people of the Mediterranean found in the narration of their history the tool to forge their identity. In this sense the Bible is the archetype of a literary construction, transmission and perpetuation of certain models: *viz.* (hi)story-telling. For an analysis of these aspects see P.F. Eslet, *Sex, Wives, Warriors: Reading Old Testament Narrative with its Ancient Audience*, James Clarke, 2012. See also J. Assmann, *Moses the Egyptian. The Memory of Egypt in Western Monotheism*, Harvard U. P., 1998 ("Moses is a figure of memory but not of history, while Akhenaten is a figure of history but not of memory. Since memory is all that counts in the sphere of cultural distinctions and constructions, we are justified in speaking not of Akhenaton's distinction, but of the Mosaic distinction", at p. 2).

[14] See *e.g.* M.I. Finley, *The world of Odysseus*, rev. ed., Viking Press, 1978; C. Dougherty, *The Raft of Odysseus. The Ethnographic Imagination of Homer's* Odyssey, Oxford U.P., 2001. Clearly one can alternatively use as instruments for an engaging and fruitful cultural history approach the classical readings on twenty key topics

like Achilles, Hector or the other warriors of the Iliad; he is not seeking a glorious end; he fights to survive, and he will survive thanks to his character, his willpower, his shrewdness[15].

In the following paragraphs I will attempt to outline some traits that appear to be deeply embedded in the Mediterranean culture, and which are relevant for the purposes of this paper:

a) The conflictual relationship with authority
b) The primacy of blood over institutions
c) The flexibility of rules and their quibblesome interpretation
d) The existence of various spheres of social order, each with its own order
e) The pervasive role of sex in all human relations.

All these factors, which I will try to present very summarily, have a direct impact on the way law is shaped, applied, seen.

The argument is that if one must speak of legal pluralism[16], probably the point of departure, which appears to have been forgotten by so many, is the idea of a "Mediterranean law" whose characteristic is that of being an open system, with a low level of compliance and of enforcement.

III. SPECIFIC ASPECTS OF "MEDITERRANEAN LAW"

a) The conflictual relationship with authority.

The first point that must be made is the relationship of a community with those who have the authority to rule it. The embedded notion – which is ethnological and not rational – is that those who hold power are only temporarily in that place. Soon someone else will take their seat, change formally the rules, assert through external symbols their might. This is the troubled history of the Mediterranean, where lands, towns, islands change hands innumerous times during the centuries. Authority, just like the sea, has its peaceful and rough times, and there is no way of escaping from it. One must adapt, avoiding entering in direct conflict with it and building flexible social habits that reduce its impact. Hardly ever the law is seen as a factor of social order. It pursues different objectives that are considered important by those who issue the rules, mostly in their own interest but not by the vast majority of the community. When possible, one will try to extract from the law – as from the sea – all the possible benefit, and one will stay away from it during legal storms. Relationship with authority, which is seen as fragmented, local, mundane is on a personal basis, beyond the rituals which surround it. Those who hold power have – and need – servants, purveyors, workers. They have wives, sons, relatives who have the same needs. Their lives are only apparently – and for very, very few – secluded. It is those who hold authority that need the community, and not vice-versa. There is no Hobbesian contract between the Leviathan and his subjects, but simply a social convention that will be flexibly followed according to conveniences. Authority passes, the community remains, and the newcomer will have to adapt to "*la coutume du pays*".

Rarely one shall defy Authority, and even less so for reasons of principle or for noble and high values. More commonly one shall elude its orders, through simulation, deceit or more

(but significantly none of direct legal relevance) suggested by Z. A. Crook (ed.), *The Ancient Mediterranean Social World. A Sourcebook*, Eerdmans Pub., 2020

15 See S. L. Schein (ed.), *Reading the* Odyssey, Princeton U.P. 1996, p. 8 ff.

16 I will start from the classical notion: "The presence in a social field of more than one legal order" (J. Griffiths, *What Is Legal Pluralism ?,* 24 J. *Legal Pluralism & Unofficial L.* 1 (1986). R. Sacco, *Antropologia giuridica*, cited in the opening footnote, devotes the entire fourth chapter to the connection between anthropology and legal pluralism.

simply apathy. The best example is that of taxes, to whose avoidance one will devote the simplest or the most elaborate schemes[17]. In paying them no "public duty" is felt and those who do so receive no praise, but commiseration reserved to ill-fated individuals[18].
To outwit the Authorities becomes a sport and a reason of pride, something to boast about as if one were a Lilliputian Ulysses. There is no perception of dishonesty, and even less, of crime, but very simply the idea that the duties imposed on the individual and on members of a community are others and are normally complied with. Being a miser is a hundred times more shameful than evading taxes.

b) The primacy of blood over institutions.
In the hierarchy of sources, the Mediterranean legal pyramid is set upside-down. At the bottom one finds Authority, occupying a small, unstable, irksome cusp. At the centre, the community to which one belongs to. On the top, and foremost, one's blood relations. In this order there is nothing abnormal. As a matter of fact, it is the most common hierarchy in mankind and its opposite (Authority, community, family) is minoritarian.
Clearly this has a profound influence on a legal system, and inevitably if one builds a system on the assumption of the latter hierarchy, the clash with the former is inevitable.
The present dominant approach has its deep and appealing roots in Enlightenment and all its wonderful intellectual and scientific fruits. However, as one knows, it was followed by an age of mistrust for universal principles. But if one delves less superficially, the plurality of legal and institutional systems was vividly outlined in Montesquieu's masterpiece "*L'Esprit des Lois*"[19].
When one places family relations – meant in their patriarchal structure – at the pinnacle of the system the duties and rights which are felt as binding are significantly different. The most obvious influence is on the patrimonial obligations that are born by each member of the family towards the others, both in life and in death. In life parents feel obliged to

[17] On tax evasion in ancient Athens see C. Hampus Lyttkens, *Effects of the Taxation of Wealth in Athens in the Fourth Century B. C.*, 40 *Scandinavian Economic History Review*, vol.2, 3 (1992); and chapter 1 of K. Schönhärl, G. Hürlimann, D. Rohde (eds.), *Histories of Tax Evasion, Avoidance and Resistance*, Routledge, 2022.
[18] One can connect this attitude to the weak influence of the Hobbesian theory of a contract between the sovereign and his subjects in many Southern European countries: see H. Gribnau, C. Dijkstra, *Contractualism and Tax Governance: Hobbes and Hume*, and J. Frecknall-Hughes, *Jeremy Bentham – Developing Ideas About Taxation and Law*, both in P. Harris, D. de Cogan (eds.), *Studies in the History of Tax Law*, vol. 9, Hart 2019 (at pp. 17 and 1). Which brings us to a rather important question in the development of European law and political culture: Why did the Magna Charta, with all its everlasting "constitutional" principles, come to life in 1215 in apparently less developed England, only a century and half after the Norman conquest, and not in the very lively – economically, politically and intellectually – Italy where the "Comuni" were claiming their independence from the Sacred Roman Empire? The reply, probably, is in equally important ethnological differences between Mediterranean and non-Mediterranean people.
[19] See Ch. III, Des loix positives: "Elles doivent être relatives au physique du pays, au climat glacé, brûlant ou tempéré; à la qualité du terrein, à sa situation, à sa grandeur; au genre de vie des peuples, laboureurs, chasseurs, ou pasteurs : elles doivent se rapporter au degré de liberté, que la constitution peut souffrir ; à la religion des habitans, à leurs inclinations, à leurs richesses, à leur nombre, à leur commerce, à leurs moeurs, à leurs manieres. Enfin, elles ont des rapports entr'elles ; elles en ont avec leur origine, avec l'objet du législateur, avec l'ordre des choses sur lesquelles elles sont établies. C'est dans toutes ces vues qu'il faut les considérer." This approach is shared by a champion of the anti-enlightenment movement. F.C. von Savigny states as a premise of his still inspiring "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft" that "The law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution" (English translation by A. Hayward "Of the vocation of our age for legislation and jurisprudence", Littlewood, 1831). One should keep in mind, however, the caveats of P. Bourdieu, *Le Nord et le Midi: Contribution à une analyse de l'effet Montesquieu*, 35 *Actes recherche sciences sociales* 21 (1980) ("À l'age de la science, la pulsion inconsciente porte à donner à un problème socialement important une réponse unitaire et totale").

endow their children, as happened with themselves and for generations before them. In death with the rules of succession.
It would be mistaken to believe that succession laws in the Mediterranean have shaped the *mores*. To the contrary the laws have simply formalized what was the common usage, and the best evidence of this is the overwhelming percentage, in the past and still nowadays, of intestate successions. Individuals feel no need to dispose differently from what has been the habit over the centuries.
The family ends up being the main economic subject, and only the constrictions of modern societies and the need for external legal certainty, bring an individualistic fragmentation of legal relationships of what really is seen as a commonality[20].
The blood-bonds do not affect only patrimonial relations. Primarily, individual allegiance is not towards Authority or the community but towards one's next of kin, even *contra legem*. The most egregious example is Antigone's *pietas* towards her brother's corpse. But more generally it lives in the role of vengeance, seen not as some primitive and irrational action, but as a duty imposed on the member of the family to cleanse the offense and re-establish its honour[21].
Since biblical and Homeric times, when vengeance had its formalities and rituals, the power has gradually passed in the hands of the authorities, and criminal law and sanctions are imposed *ut cives ad arma non veniant.*
Yet this has not removed the basic idea that blood binds individuals much more than the law and that the law is only a weak surrogate for the protection of the family.
Social studies will easily compare the birth, development, and disruption of a Mediterranean family with that of a Western non-Mediterranean one, the former kept together for better and for worse, by love and by hate between its members; the latter very soon dispersed as soon as the offspring come of age and are driven from their nest.
This bondage is parallel to the one the land of one's origins exerts on its natives, like a force of gravity that will keep them in its orbit, when it is not idealized as a promised land or everyman's Ithaca. And in this ethnological approach one needs to consider two further very distinctive factors, which clearly one finds in other parts of the world but which in the Mediterranean are considered as overriding values, namely the duties of hospitality[22] and of gift[23]. Their influence is relevant when one tries to understand differences in the

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[20] The idea of a "Mediterranean family" is presented by P. Laslett, *Family and household as work group and kin group: areas of traditional Europe compared*, in R. Wall, J. Robin, P. Laslett (eds.), *Family forms in historic Europe*, Cambridge U.P., 1983, 513. Although S.R. Huebner, G.S. Nathan (eds.), *Mediterranean Families in Antiquity: Households, Extended Families, and Domestic Space*, Wiley, 2017 in their *Introduction* and *Conclusion* negate the existence of a "Mediterranean family", the question is whether those traits can be found consistently throughout the ages in other European societies. And in fact, see the very nuanced contribution to the volume by M. Manfredini, *Later Family Forms in the Mediterranean*: "Family systems in Mediterranean European countries were without doubt different from those in Central and Northern Europe" (at p. 310).

[21] See E.Cantarella, *Norma e sanzione in Omero. Contributo alla protostoria del diritto greco*, Inshibboleth, 2021, p. 304 ff. (new edition of her 1979 classic). As a matter of fact, the abstention from vengeance is seen as shameful.

[22] "Guest-friend and guest-friendship were far more than sentimental terms of human affection. In the world of Odysseus they were technical names for very concrete relationships, as formal and as evocative of rights and duties as marriage" (M. I. Finley, *The World of Odysseus*, cited at fn. 14, p.100).

[23] The first reference is to the classical work by M. Mauss, *Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques* originally published in *L'Année Sociologique* 1923-1924 (for an English edition of the later expanded version see *The Gift*, U. of Chicago Press, 2016). "No single detail in the life of the heroes receives so much attention in the *Iliad* and the *Odyssey* as gift-giving, and always there is frank reference to adequacy, appropriateness, recompense" (M. I. Finley, *The World of Odysseus*,cited at fn. 14, p.65). See also in a contemporary and comparative perspective G. Resta, *Gratuità e solidarietà: fondamenti emotivi e irrazionali, in Rivista Critica Diritto Privato 2014, 25.*

performance of patrimonial law and, even more, when one tries to apply neo-classical economic theory to legal relations between individuals.
Seen with contemporary eyes this inverted hierarchy implies that those institutional and formalized rules which do not appear to be coherent with the blood primacy will receive little outer compliance and even less inner respect.

c) The flexibility of rules and their quibblesome interpretation.
If the law rarely is placed at the summit of individual obligations, it is inevitable that its application tends to be adaptable. If one were to apply kelsenian systemology in a broader social (and not only legal) context, one would say that the only coherent and legitimate interpretation of the law lies in conformity with higher placed principles issued by family or community *mores*. Quite contrary to the Latin maxim *dura lex sed lex* (which is simply a rhetorical short-cut to avoid discussions on a decision that has already been taken), Mediterranean law is intrinsically, to use Jean Carbonnier's expression, a "*flexible droit*"[24].
To express the idea through a metaphor, far from the Mediterranean the foot must adapt to the boot, no matter how tight and painful it is. In the Mediterranean, it is the boot that must adapt itself to the foot (or rather, to millions of feet) and if it does not it will be discarded.
The reasons for such a structure lie deep into the humus from which law has developed. The law is, must be, expressed in words, and these are written, whether on a stele, like Hammurabi's "Code", or on stone tables, like the Ten Commandments. But words need to be interpreted in order to understand their complete and inner meaning. Interpreting the law is one of the many, indispensable, intellectual operations that fall in the vast discipline of philosophy. Mankind has been endowed with intelligence to understand the universe, itself, the world in which it exists. And there is not – there cannot be – one and only one interpretation. Sometimes they aim at excluding one another, with a stale-mate result, but most commonly they concur and supplement each other[25]. Semiology will transform into an academic discipline what we have known for millennia, *i.e.* that a text has as many meanings as its readers. The law therefore not only is flexible and adaptable, but it is essentially negotiable.
Nothing transfers better the sense of this "transactional" approach to the law than the dialogue between Abraham and the Lord who has resolved to destroy Sodom for its abominable sins.
<< *Then Abraham approached* [the Lord] *and said: "Will you sweep away the righteous with the wicked? What if there are fifty righteous people in the city? Will you really sweep it away and not spare the place for the sake of the fifty righteous people in it? Far be it from you to do such a thing—to kill the righteous with the wicked, treating the righteous and the wicked alike. Far be it from you! Will not the Judge of all the earth do right?"*
The Lord said, "If I find fifty righteous people in the city of Sodom, I will spare the whole place for their sake."
Then Abraham spoke up again: "Now that I have been so bold as to speak to the Lord, though I am nothing but dust and ashes, what if the number of the righteous is five less than fifty? Will you destroy the whole city for lack of five people?"
"If I find forty-five there," he said, "I will not destroy it."
Once again he spoke to him, "What if only forty are found there?"

[24] J. Carbonnier, *Flexible droit. Pour une sociologie du droit sans rigueur*, LGDJ 2001.
[25] The Ten Commandments are the paradise of interpretation and of interpreters: short, assertive, sentences which can fuel – and have fuelled – debate and controversy for over two thousand years. See M. Sicker, *The Ten Commandments: Background, Meaning, and Implications from a Judaic Perspective*, iUniverse, 2008. One can easily imagine the fireworks when theological interpretation mixes, overlaps, and clashes with legal interpretation.

He said, "For the sake of forty, I will not do it."
Then he said, "May the Lord not be angry, but let me speak. What if only thirty can be found there?"
He answered, "I will not do it if I find thirty there."
Abraham said, "Now that I have been so bold as to speak to the Lord, what if only twenty can be found there?"
He said, "For the sake of twenty, I will not destroy it."
Then he said, "May the Lord not be angry, but let me speak just once more. What if only ten can be found there?"
He answered, "For the sake of ten, I will not destroy it."
When the Lord had finished speaking with Abraham, he left, and Abraham returned home. >>[26]

The message that is conveyed is that if even the Lord's command can be bargained, any earthlier rule can be the object of a similar negotiation, whatever the circumstances. Two egregious examples which epitomize this approach can be given.

When Paul the Apostle is apprehended by the authorities for his Christian proselytism, he undoubtedly prays his Saviour, but at the same time claims "*Civis Romanus sum*", and as a Roman subject he is entitled to – we would call it now – due process of law. Therefore, in the first place, he challenges the jurisdiction of the Sanhedrin, and ultimately appeals to the Emperor. All his legal manoeuvres, which lasted several years, would probably have succeeded if Nero, having outlawed Christians and wishing to find a scapegoat for the Great Fire, had not sentenced him to death by decapitation around 64-65 A. D., together with Peter (who not being a Roman citizen, was crucified)[27].

As one can see even matters of State security were open to legal scrutiny and far from a coarse and brutal interpretation.

The second example, which refers to the tragic events of the last century, enables us to compare the Mediterranean approach with the non-Mediterranean one.

When, starting in 1935, Nazi Germany introduced more and more oppressive laws and regulations against its citizens qualified as Jews[28], the judicial and administrative application was unequivocally rigorous and *in malam partem.*

The Courts, inspired by the *Reine Deutsches Volksgeist*, even broadened their interpretation in order to close any loophole that the – innately cunning and deceitful – Jews could come up with[29].

When in 1938 Fascist Italy, aping Germany, introduced similar provisions, the courts were flooded by cases in which many members of the affluent and resourceful Jewish community (which by and large had supported the consolidation of fascism) claimed, on the basis of elaborated distinguishing interpretations, that the laws and regulations did not

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[26] Incidentally, as is well known, the deal he struck with the Lord was of no avail. Not only it was impossible to find ten righteous people, but the Sodomites pressed hard on Lot to deliver to them the two angels so as they could "know them". And in afterthought, Lot's daughters belonged to the same stock.

[27] See for an extremely detailed analysis of all the stages of the judicial procedure through the lenses of Roman law A. M. Mandas, *Il processo contro Paolo di Tarso. Una lettura giuridica degli Atti degli Apostoli (21.27 – 28.31)*, Jovene, 2017.

[28] See the Reich Citizenship Law of September 15, 1935 and the Law for the Protection of German Blood and Honor of September 15, 1935 (English translation at this webpage: https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/nuremberg-race-laws-defining-the-nation/documents).

[29] See *e.g.* the Reichsgericht's decision of December 9, 1936 on the notion of "sexual relation" between Jews and "Aryans" (English translation at this webpage: https://encyclopedia.ushmm.org/content/en/article/supreme-court-decision-on-the-nuremberg-race-laws). In general, on the dramatic circulation of racist legal models see J.Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law,* Princeton U.P., 2017. See also F. Caestecker, D. Fraser, *The Extraterritorial Application of the Nuremberg Laws. Rassenschande and Mixed Marriages in European Liberal Democracies*, 10 *J. Hist. Int'l L.* 35 (2008).

apply to them. In many cases, especially in front of the State Council and of the *ad hoc* administrative body, the "Tribunale della Razza", they succeeded[30], and at any rate forestalled the decision until 1943, when the Nazis took control of Italy, and the puppet Fascist regime declared all Jews enemies of the State[31].
Obviously, this example in no way is meant to indicate a more "humane" approach of one dictatorship in respect to another[32]. It points out that even in extreme situations (the destruction of two towns, conspiracy against the State, extermination) the idea is that whatever the source of the rule may be, its enforcement is debatable and may be discussed.
Bringing this remark to a much more down-to-earth context, a millennial experience tells Mediterraneans that any rule can be challenged, and that it is wise to challenge it because the outcome is far from certain, and may depend on a multitude of unpredictable factors, among which the human one is the most relevant. This does not necessarily imply mistrust in the law, but more simplistically its vision as a constant rule-of-thumb system, whether we are considering a traffic-light offense or a serious crime.

d) The existence of various spheres of social order, each with its own rules
Lawyers tend to see very clearly the world in which they live in and in which they constantly operate. But if one takes a step back and looks at things from a distance one easily realizes that putting at the centre of society the legal citadel is self-assuring, but very far from reality.
In the first place there are natural phenomena which are beyond human control; illnesses, whether individual or collective; human actions which, for better or for worse, shape the course of history. Legal systems, beyond the hubris of lawyers, cover very little of all this.
Again, there are two Western conflicting visions. The first, presently dominant especially in the EU, is that the law, in its multiple expressions, should cover everything and is a sort of panacea that can steer, direct, repair, heal, avoid, impose.
A world shaped by laws, which dictate who, what, why, when and how something may, or may not, be done is the way towards a more orderly, just, compassionate society. A society where everyone, institutions, natural or legal persons, is instructed on their duties, prerogatives, rights, with a constant balancing of the different interest by those on whom government has been bestowed. In short: the Rule of the Law.
The Mediterranean view is much more sceptical and disenchanted. It looks at the past and wonders if all the boisterous legal prophecies have really led us to the promised land. It doubts that the multiplications of norms will actually benefit humans and, rather, fears it will turn into Goethe's *Zauberlehrling* nightmare. One broom will do the job, thousands of them will only create havoc[33]. In this different world, legal norms co-exist with others which, as we have seen, often occupy a higher seat. The various spheres will be

[30] One example will suffice: The second most important Italian insurance company, Riunione Adriatica di Sicurtà, had, in 1938, as its chairman Arnoldo Frigessi di Rattalma, son of one of the founders of the company and of Hungarian Jewish descent and active member of the Jewish community. Thanks to his very strong influences he managed, through a decision by the "Tribunale della Razza", to avoid being ousted from the company and remained, until 1943, as its managing director. Something that would have been quite impossible in Nazi Germany.
[31] S. Falconieri, La legge della razza. Strategie e luoghi del discorso giuridico fascista, Il Mulino, 2011.
[32] The other side of the coin, equally shameful, is that after the fall of the Fascist regime those who were engaged in enforcing the anti-Jewish legislation suffered very little. And as a matter of fact, had a brilliant career. Of the four members of the "Tribunale della Razza" three of them became members of the democratic Constitutional Court, and its chairman, Gaetano Azzariti, was even elected its president (see M. Boni, *"In questi tempi di fervore e di gloria". Vita di Gaetano Azzariti, magistrato senza toga, capo del Tribunale della razza, presidente della Corte costituzionale*, Bollati Boringhieri, 2022).
[33] I have tried to develop the issue in A Normative Metastasis?, 7 European Journal of Comparative Law and Governance, 43 (2020).

coordinated not though some legislative *fiat* but by social trial-and-error processes in which the role of the authorities is successful only if it is persuasive.
And while any administration finds its *raison d'être* in rules (which justify its relentless rulemaking), the Mediterranean individual is hardly persuaded that the multiplication of norms will be beneficial and will not collide with the different order that has been created over the centuries. To this one should add the widely shared belief that rules, at the end of the day, are only to the economic and selfish profit of those who issue and administer them. Inobservance is not the expression of political revolt, but simply reaction to what is perceived as a profiteering exploitation of authority. A form of self-defence historically and psychologically justified.

e) The pervasive role of sex in all human relations.
Among the spheres which have dominated the Mediterranean and have, since the most ancient times, directed the actions of individuals there is the sexual element. At the origin of Creation, cause of wars, snare and shame for even the most powerful, sex is everywhere. Greek mythology – but not only – ridicules and belittles Sigmund Freud's psychoanalysis. It represents through a transcendent narration how individuals – whether male or female – are in search of physical pleasure and this desire will drive them to life or to death[34]. The perfect matching between myth and reality is offered by the thousands of images, on potteries[35], on frescoes[36], in tombs[37], which depict all forms of sex, rapturous, violent, homosexual, heterosexual, in group, paedophile, zoophile, hermaphrodite, incestuous[38]. The Bible will oppose to such care-free approach a stricter one, but its enumeration of sexual sins (Amnon and Tamar, Susan and the elders, Sodom and Gomorrah, the daughters of Lot, David and Betsheba, Onan and his sister-in-law, etc.) simply arouses that mainspring of sex which is transgression.
If one adds the pervasive role of sex to the primacy of the family one realizes that by and large – despite all the institutional signals to the contrary – Mediterranean societies have been and still are largely matriarchal, women being the dispensers of sex and the evidence, through maternity, of a man's virility[39]. The hiatus (*i.e.,* discrimination) between man and woman is clearly in the norms. But outside this sphere relationships are much more complex. The role of sex and desire in shaping Mediterranean culture tells us a lot about the past, but also explains why certain non-Mediterranean fashions (dressed in "politically correct" garments) appear, at their best, childish in the first place in the eyes of Southern European women. Inequality – which is a typical legal notion – is substituted by diversity, which in certain spheres in no way implies that women are subdued[40]. From this

[34] C. Calame, *L'Éros dans la Grèce Antique*, Belin, 1996
[35] *Ex multis* C. Isler-Kerenyi, *Dionysos nella Grecia arcaica. Il contributo delle immagini*, Istituti Editoriali e Poligrafici, 2001 (English trans. *Dyonisos in Archaic Greece: An Understanding Through Images*, Brill, 2007).
[36] See the recent exhibition of erotic art discovered in daily-life Pompei: M-L. Catoni, G. Zuchtriegel (eds.), *Arte e sensualità nelle case di Pompei*, Artem, 2022.
[37] For a remarkable Etruscan example see A. Serpilli, *Il mistero della Tomba dei Tori dell'etrusca Tarquinia*, Sellerio, 1990.
[38] See C. Johns, *Sex or Symbol?: Erotic Images of Greece and Rome*, Routledge, 1982.
[39] Even more so in the Jewish tradition, where it is the mother that determines the transmission of the status: see S.J.D. Cohen, The Origins of the Matrilineal Principle in Rabbinic Law, 10 AJS Review 19 (1985); R. Di Segni, Il padre assente. La trasmissione matrilineare dell'appartenenza all'ebraismo, 24 Quaderni storici 143 (1989.)
[40] "The position of women in the tradition of the Mediterranean has, for all its variations, at least this constant (…) the wife is mistress within [the house], the husband without. The moral division of labour of sexes relates, then, to their inverse roles within or without the house. The social order is founded upon this distinction" (J. Pitt-Rivers, *Women and Sanctuary in the Mediterranean*, in J. Pouillon, P. Maranda (eds.), *Mèlanges offerts à Claude Lévi-Strauss à l'occasione de son 60ème anniversaire*, Mouton, 1970, at p. 868). For a critique of the

perspective many legal interventions – enacted with the praiseworthy intent of reducing gender disadvantages – appear to be highly ideological, in the sense that remain on a declamatory and paternalistic level, without many chances of changing social realities.

IV. A BROADER NOTION OF "LEGAL PLURALISM"

One has started by representing the Mediterranean as a unifying natural element which has allowed so many cultures to blend and has shed its bright lights (and with them dark shadows) on the lands which overlook it. In no way this is an attempt to create a novel Frankenstein's legal family and add it to the scores of existing props that many scholars feel their duty to set up. Rather, it wishes to point out that the notion of "legal pluralism" does not include only contexts where two or more "legal orders" co-exist, but also where the interpretation and enforcement of a legal order is influenced significantly by other social factors.

Although it is easy – at least for those who are familiar with the vast region – to detect commonalities from Constantinople to Gibraltar, from Alexandria to Marseille (all the Mediterranean port towns resemble each other[41]), the purpose of this work is pointing out why, within the Western legal tradition, one needs to understand the materials which compose its fabric. Among them it is impossible to ignore the factual circumstance that in the Mediterranean society, economy, culture have reached a very high level of development at least fifteen centuries before other parts of Europe[42]. Older does not mean "better" or "wiser". It means that certain ways of thinking and individual and social behaviour have had much more time to sediment, and it becomes quite impossible to eradicate them, least of all enacting thousands of pieces of legislation, as if they were some sort of magic wand and pronouncing hocus-pocus formulas meant to chase away an evil, retrograde, spell[43].

To place this significant time-gap in the evolution Mediterranean societies and non-Mediterranean societies on a systematic basis, one can usefully compare the relatively recent emergence in Anglo-Saxon legal scholarship of the notion of "social norms", and their governance role in groups and societies[44]. Obviously social norms have always

"equality" paradigm, in favour of diversity between men and women, see E. Poddighe, *Comunicazione e "dignità della donna". Uno studio di genere*, Roma Tre-Press, 2018.

41 See P. Matvejevic, *Mediterranean, A Cultural Landscape,* cited at fn. 2, p. 14 ff.

42 A litmus test are the deep and inspiring two volumes by H. J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard U.P. 1983) and *Law and Revolution. The Impact of the Protestant Reformation on the Western Legal Tradition* (Belknap Press, 2003), which place the origins of the WLT after the first millennium A.D.

43 A good contemporary example is the flourish of macro and micro-prudential measures adopted by the EU after the 2008 financial crisis. One of its tenets was that Southern European countries (disparagingly named as PIGS: Portugal, Italy, Greece, Spain) were living above their means and at the expense of "thrifty" and "frugal" non-Mediterranean EU countries. Clearly behind the slogans driving these measures ("moral hazard", "creditworthiness") is an axiology which maybe is shared in the latter countries and probably not in the former: see N. Vardi, *Creditworthiness and "Responsible Credit"*, Brill 2022 (p. 3 ff.).

44 For the best and most detailed presentation see E. A. Posner, *Law and Social Norms*, Harvard U.P., 2002. This work opens a whole series of further problems. If mutual understanding is difficult between Mediterranean and non-Mediterranean countries, it is practically impossible between European and US legal scholars. While the former generally do their best to study and try to understand the "American exceptionalism", the latter - even among the most cultivated (such as the author cited in this fn.) – seem to be entirely oblivious of the fact that there is intellectual and legal life beyond the East and West coast. Although *Law and Social Norms* has declaredly a law & economics approach to the issue, a European remains somewhat dismayed in finding in the 16 pages long list of references not one citation of the works of Emile Durkheim and of Max Weber, who have built the conceptual framework for social norms and their governance role.

existed, but in the Mediterranean world they prevail over formalized rules, and, paraphrasing Monsieur Jourdain, have been unwittingly practiced, every day, for thousands of years[45].

These differences often may appear simple variations in shades, but if one applies a less positivistic and "chemical" approach to law and one looks at it as a novel, a painting, a piece of music one understands that shades are practically everything, especially because they represent the relentless social erosion of the legal monolith. Shades that common lawyers would prefer to call "careful distinguishing", but that in scholarly legal research have much more to do with the constant tension between the system and the infinite cases that fall within it, between certainty and doubt, between transcendent Justice and human fallacy[46].

To avoid any pointless misunderstandings, the few preceding pages in no way attempt to express a "superiority" of a Mediterranean legal model. Comparative law is distant thousands of miles from the amateurish (and rigged, as one has seen) "rankings" of the World Bank. Comparative law is an epistemological endeavour based on similarities and differences in time and space. The great feat achieved by the European Community and its illustrious Founding Fathers risks being undermined by a one-size-fits-all approach which ignores that Europe is borne out of many histories and cultures that represent a source of endless intellectual and economic wealth provided one does not ignore the differences and one does not overly insist on a legalist approach to problems. A spoonful of legal pluralism might, maybe, help understand that there are more things in heaven and earth, Ursula, than are dreamt of in your regulations and directives.

[45] The idea is clearly put forward by R. Sacco, *Antropologia giuridica*, cited in the opening footnote, where (Ch. 5, para. 8; Ch. 8, para.2 ff) he analyses what he calls "mute law", *i.e.* non-explicit informal norms (see also R. Sacco, '*Mute Law*', 43 *American Journal of Comparative Law* 455 (1995).

[46] One can quote here one of most "Mediterranean" writers of the 20th century, Albert Camus: "Nous luttons justement pour des nuances, mais des nuances qui ont l'importance de l'homme même. Nous luttons pour cette nuance qui sépare le sacrifice de la mystique, l'énergie de la violence, la force de la cruauté, pour cette plus faible nuance encore qui sépare le faux du vrai et l'homme que nous espérons des dieux lâches que vous révérez" (*Lettre à un ami allemand*, 1943).