

BALÁZS FEKETE

V. Varano–V. Barsotti: La tradizione giuridica occidentale. Vol. I. Testo e materiali per un confronto civil law common law. G. Giappichelli Editore, Torino, 4th ed., 2010. 596 p.

1. Writing a comparative law course book is certainly not one of the easiest tasks. The future authors have to face various difficulties. Firstly, they should decide about the scope of the book. Should it encompass all the main legal systems including, for instance, China or India, or is it enough to focus on the law of European countries? Secondly, the width of the manual is also very problematic. How detailed discussion of the chosen legal systems is needed for the goals of university teaching? If it is short, the risk to become too vague is real. If the chapters are longish and detailed, the students may find the whole subject boring and unpromising. Lastly, the methodological bases can also raise serious concerns, since they are not as unambiguous as they may seem at the very first glance. Is it still adequate to follow the traditional path—paved by such classics as Renè David or Konrad Zweigert—of presenting legal families or groups, or should it better approach legal systems as unique legal cultures? This line of questions can easily be continued: is the discussion of supranational legal orders, e.g. EU Law, needed in such a manual?, should the historical method be widely applied in the presentation?, are the effects of globalization worthy of consideration?—these points are perfectly enough to illustrate the difficulty of this task. Thus, authors should really make proper choices at the very beginning and keep in mind that these choices will deeply determine both the outcome and the academic reception of their work.

The first edition of this Italian volume was published in 2002. Originally, it was a course book written by professors and researchers of the University of Florence for basic comparative law studies (*“Sistemi giuridici comparati”*). The fourth edition in 2010, however, underwent some serious changes; both its scope and content have been extended. The most important novelty is that the volume has a lot of new content. For instance there is an almost twenty pages long section in Chapter Two which elaborates on the special features of East European legal systems. Furthermore, the sections about the legal systems of Latin-America, China, Japan, India and Islamic Countries are also entirely new parts. Additionally, several parts of the book has been rewritten or considerably expanded. So, it has already changed a lot compared to the earlier editions, therefore, it is worthy of a detailed presentation. The lessons arising from this brief study may even be interesting for the broader academic circles.

2. The structure of the book can be summarized as follows. Chapter One deals with certain introductory questions. It briefly touches upon some points of the history of comparative law, and also discusses its nature, functions and aims. Moreover, it also analyzes how certain scholars tried to classify the legal systems of the world. The various approaches of Arminjon-Nolde-Wolff, David, Zweigert-Kötz and Mattei are discussed in detail.

Chapter Two is dedicated to the tradition of civil law. The first two sections are based on a historical approach. Section One discusses the formation of continental civil law prior to the codifications of the 19th century. Besides the impact of Roman law it focuses on the role of universities in legal development—emphasizing the prominent place of the University of Bologna—and presents the different legal schools (*Glossatori, Canonisti, Commentatori*

and *Umanisti*) contributing to this development. The features of modern codes—*Code civil* (1804), *Allgemeines Landrecht* (1794), *Bürgerliches Gesetzbuch* (1900), *Zivilgesetzbuch* (1912)—are the main issues of the next section. Many questions related to these codes are examined, including their historical context, structure and influence on other legal systems. Section Three surveys the system of legal sources in civil law. It stresses that legal rule in these systems mainly means the rules expressed in codes or acts, and it also analyzes the typical hierarchy of norms in civil law. Furthermore, such questions as the organization of the judicial system as well as the role of courts in legal development are also examined. The last section of this chapter is devoted to the legal systems of Eastern Europe, and after a detailed historical introduction describing both the Socialist period and the democratic transition; it presents the main peculiarities of the region. The role of constitutional courts as “creatures and creators” of democratic transitions is well explained.

Common Law tradition is presented in Chapter Three which is comprised of four sections. The structure of this chapter resembles the earlier one and this editorial solution considerably emphasizes the similarities of the two legal traditions. The first section contains a general introduction to common law, and explains it from a predominantly historical perspective, focusing on the formation and the main features of the system of writs and on the nature of Equity. The 19th century and recent history of English court system is the topic of Section Two. It presents the main provisions of the Judicature Acts of 1873–1875 as well as the newest changes in the last twenty years. Section Three analyzes the sources of common law and mostly focuses on the functioning of the doctrine of binding precedent and on problems related to statutory interpretation. The main features of the legal system of the United States are the topic of Section Four. It mainly discusses the separation of powers provided by the Constitution, the judiciary, the unification of law and the role of different legal sources in U.S. law. As for constitutional justice the section also analyzes the famous case of *Marbury v. Madison* in detail.

The last two chapters deal with the legal systems of the Scandinavian countries and the legal systems outside of the Western world. The chapter about Scandinavian law surveys every important question including historical development, Nordic legal cooperation and the place of *travaux préparatoires* in the system of legal sources. Chapter Five—Encounters of the Western legal tradition—could perhaps be regarded as the most unconventional part of the whole book. It tries to briefly describe certain important, non-European legal systems in order to make the panorama of the book more complete, but the authors mostly focus on the influence of Western law, not on the entirety of these systems. Every section of the chapter drafts the main lines of a given legal system and discusses the influence of the Western legal tradition. For instance in the section devoted to India, one can read about the influence of common law legal culture including Bentham’s idea on codification, as well as the effect of US constitutional law in modern Indian law. Latin-America, China, Japan, India and Islamic countries are analyzed through same lenses.

3. As a first remark, it should be mentioned that this book is really suitable for university teaching. It is rich in information and data; thanks to the several appendixes attached to each chapter. These appendixes are parts of important legal documents (such as the index of the *Code civil* or the preamble of the Chinese constitution), case excerpts, and some pages of important scholarly papers. So, law students can really get acquainted with the major legal systems of the world from this manual.

An overview of our introductory questions might also be useful and interesting. However, here, we have to start with the problem of methodology since methodological

choices always comprehensively determine the practical content. As the underlying concept it is obvious that the volume's approach is strongly linked to the premises of post-World War II comparative law. It is apparent at many points. For instance, as the title shows it, the authors share the view of René David that civil law and common law—even though there are unambiguous differences between these two European legal traditions—can be unified in a more comprehensive legal unit due to many, mostly philosophical reasons. For David this was the so-called *droit occidental*,¹ for the authors this is the *tradizione giuridica occidentale*. It should also be mentioned that this approach implies two premises at least. On the one hand it expects that these legal traditions converge since a longer period, on the other hand it also presupposes that the main task of comparative law is the study of similarities.

This is a well-developed starting point but some new trends in comparative law should also be taken into consideration. A wave of cultural comparative law² has begun in the mid-nineties—for example the works of Pierre Legrand or David Nelken can be mentioned here—and this new approach questions the very basics of this “classic” way of thinking. These scholars doubt the neutrality of the traditional functional approach developed by Zweigert and widely applied by comparatists, and they also advocate the research of differences of legal systems.³ For instance, the so-called “convergence thesis”—supposing the gradual convergence of civil and common law—was explicitly rejected by Legrand, who argued that due to many reasons—for instance the different conceptions of legal rule and the divergence of legal thinking—it is simply impossible, even under the scope of European integration.⁴

Obviously, the emergence of cultural approach in comparative law does not mean that course books and comparative law readers should completely be rewritten. It is unnecessary since these cultural theses are also hot issues and they are questioned and debated from many points in the international comparative law scholarship. For instance a Finnish scholar advocates the preservation of a moderate version of functionalism contrary to all post-modern critics, that is, the use of this method without relying on Zweigert's famous presumption of similarity.⁵ However, the integration of certain insights of culturalism—the sensitivity toward differences, the approach of law as a cultural phenomenon, or the research of various attitudes in legal cultures—into the book's conceptual background can surely be an important point.

Each chapter contains a comprehensive discussion of its subject matter. From this aspect, the volume seems to be balanced, only the parts on non-Western legal systems are slightly shorter. This difference reflects that the main aim of the book is the presentation of Western Law in the broadest sense. It is certainly a good choice, since the very detailed

¹ David, R.: Existe-t-il un droit occidental? In: *XXth Century Comparative and Conflicts Law Legal Essays in Honor of Hessel E. Yntema* (eds. K. H. Nadelmann—A. T. von Meheren—J. Hazard). A. W. Sythoff, Leiden, 1961. 56–64.

² For a detailed analysis see: Whitman, J. Q.: The Neo-Romantic Turn. In: *Comparative Legal Studies. Traditions and Transitions* (ed. by P. Legrand and R. Munday). Cambridge University Press, Cambridge, 2003. 312–344.

³ For the origins of this approach see: Frankenberg, G.: Critical Comparisons: Re-thinking Comparative Law. *Harvard International Law Journal*, 1985/2. 411–456.

⁴ Legrand, P.: European Legal Systems are not Converging. *The International and Comparative Law Quarterly*, 1996/1. 52–81.

⁵ Husa, J.: Farewell to Functionalism or Methodological Tolerance. *Rabbes Zeitschrift für ausländisches und internationales Privatrecht*, 2003/3. 419–447.

discussion of non-Western systems could raise difficult problems. First of all, due to the linguistic deficiencies, it is very hard to find adequate information on the everyday functioning of these legal cultures. In Western languages, except for a few basic articles,⁶ real knowledge on the socio-legal reality of these systems is hardly accessible. However, without this information the comparatist risks to fall into the trap of dilettantism. It is perfectly enough to recall how broad the gap between the written norms and their application was in the Socialist law. Thus, the avoidance of a detailed discussion of non-Western legal systems seems to be a legitimate decision in a course book.

Lastly, the volume also successfully avoids the dangers of Eurocentrism, even though it mostly focuses on the Western Legal Tradition. It presents each important non-Western legal culture to a certain degree—perhaps the world of traditional African legal cultures⁷ is the only missing link. The approach of these chapters focusing on the historical Western influence is also justifiable, since the reception of Western legal patterns is, perhaps, the most interesting point for European law students, and on the other hand, Western researchers are also more or less familiar with this issue. All in all, from the point of view of its scope the volume reflects good editorial decisions.

The main advantage of this manual, however, lies in a slightly different point. This volume of Varano and Barsotti has a certainly innovative character as a course book, which is why it is really able to raise concerns on the future of both comparative law course book writing and, moreover, comparative law in general. The discussion is more than needed since one thing should be obvious for all comparatists: research and teaching of comparative law cannot be effectively continued without taking into account how the world has changed in the last twenty years due to the fundamental transformation of the political and economic relations.

⁶ Cf. for instance: Kim, C.—Lawson, C. M.: The Law of the Subtle Mind: the Traditional Japanese Conception of Law. *The American Journal of Comparative Law*, 1972/2. 491–513.

⁷ For a different approach see for instance: Gambaro, A.—Sacco, R.—Vogel, L.: *Le droit de l'Occident et d'ailleurs*. LGDJ, Paris, 2011. 415–443.