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Introduction to comparative legal cultures: the civil law and the common law on evidence and judgment (oral presentation of the book by Antoine Garapon & Ioannis Papadopoulos, Juger en Amerique et en France : Culture judiciaire française et common law

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This book is the fruit of a basic idea, namely that comparative law is meaningless if it is regarded as the sole study of juxtaposed legal systems, regardless of their *cultural* dimension. The book's main aim is to identify and analyze the basic cultural differences between the two great legal traditions of the West, the Continental and the Anglo-American one, through a thorough examination of the trial, and of judicial institutions more widely, as these are organized in France and the United States. For that purpose, after an introduction to the concept of legal culture and the basic notions of the common law legal tradition, we have written a series of chapters: access to justice, the trial, evidence, the judge, the jury, judgment, litigation, and sentencing.

After years spent studying and teaching American law and legal theory, I understood at some point that Europeans and Americans *think* we are speaking of the same things when we talk, for example, about the trial and *le procès*, or the judicial opinion and *le jugement*, but in fact we're not: the cultural matrix of the words we're using is so different that we're often misunderstanding each other. This book is a modest effort of bringing the cultural presuppositions of each legal and judicial tradition to light, so that we fully understand not only our differences, but also our common references as parts of the Western world. To that effect, we mobilized legal knowledge, of course, but also anthropology, religion, political philosophy, and sociology.

I would like to give a bird's-eye view of some of the topics that are treated in the book, before I conclude by some more general comparative remarks on the common law and the Romanist legal systems.

Let me start by a topic that usually excites much academic passion and debate whenever we speak to our Anglophone friends, namely **evidence (**in French ***la preuve*** = proof**)**. This, of course, is a central point in every legal system, since it has to do with its conception and research of *truth*. Evidence is situated in the articulation between law and fact, in the frontiers of a legal order, where abstract legal rules have to apprehend life

itself, to give it form and meaning. No doubt that is why the cultural differences between us manifest themselves so clearly in this area of the law. To put it schematically in one phrase, the Romanist legal culture seeks the *substance* of truth by trying to establish an official narrative through the rendering of a judgment by a judge who is seen as a "minister of truth", whereas the common law legal culture is more interested in *procedure*; it organizes the public confrontation of two versions of the truth in order to make the most truthful narrative triumph. In the book, we try to show that these two different conceptions of truth-seeking (and, we could add, of error-minimizing) that we call, rather imaginatively, "inquisition" (for France) and "proceduralization" (for the US), have to do with the differences in the management of truth between Catholicism and Protestantism.

Let us consider one – but very important and rarely developed in the Continental legal literature – illustration of this by mentioning the example of the *standards of proof*. As is well-known, there is, in the common law context, a variation of the regimes of truth between basically three standards of proof, whereas in the Continent, there is a unique standard for ascertaining judicial truth (in the French context, this takes the name of *intime conviction* = intimate conviction of the judge). In the US, legal practices model the truth according to the pragmatic context of its enunciation and the different functions assumed by justice. Thus, we can observe a highly proceduralized administration of proof in order to fairly allocate the risks stemming from judicial action and to adapt the procedural tools of the legal system to the complexity of real life, by taking also into account the political morality underlying the different legal domains (that is obvious, for example, in the insistence on the "beyond a reasonable doubt" standard in the specific criminal law context). The result, as we can see from the famous O.J. Simpson case (who was acquitted in criminal court but found liable in civil court), is sometimes the variation of judicial truth according to the context – civil or criminal – inside which it is sought.

This is intellectual heresy for France. Of course, the *ideal* of truth remains the same in both legal cultures, but the *means of producing truth* (which we believe is one of the two main attributes of a legal culture, together with the ways of organizing the political sphere) are very different. In the Roman-Catholic tradition, the truth cannot but be *unique*, one and indivisible. Even if the judicial truth can be established by all means

and free evaluation or, on the contrary, is the fruit of legal presumptions, even if the legal consequences of the ascertainment of a fact vary in different procedural contexts, truth still is one and only one. By analogy, truth is conceived of in the same way as the medieval scholastic philosophers like Thomas Aquinas, who thought that truth is the *adequatio intellectus et rei* (the concordance between intellect and thing). The judge in the Continental context has assumed the sacerdotal function of the "minister of truth" after the abolition of the ordeal (role which is assumed by the jury in the common law world); he needs to establish, at a certain point, the unique and uncontestable truth by a shortcut such as his "intimate conviction", that serves to put a halt on the concrete evaluation and balancing of the antagonistic interests and of the risks of error at stake. One of the conclusions of this book is that the common law legal culture insists a lot on the importance of *procedure*, of "axiological fidelity" to regular ways of behavior by legal practitioners, which are seen as a warranty for "truth". That is, of course, an idea developed by one great American legal philosopher, the late Professor Lon Fuller, and systematized by one of his disciples, Professor Robert Summers.

Now let us consider a second example, that of the **judgment (**in French, ***le jugement*****)**. It suffices a naked-eye comparison of, say, a decision by the US Supreme Court with a judgment by the Cour de cassation, the French supreme civil and criminal court, to see the enormous differences separating them. These two legal texts have almost nothing in common: not the same speaker, not the same length, not the same form, and finally, not the same function. To put it in a few words, a typical French judgment takes the form of a *syllogism*, a deductive or even mechanical reasoning written in an impersonal *per curiam* way, that limits itself to subsuming the facts of the case under a legal rule in order to infer a conclusion. The famous "*arrêt à phrase unique*" (judgment in one unique phrase) of the Cour de cassation is not just a matter of style: the concision – one could even say the hermetic character – of the French judgment reflects its intermediate position between the statute, sole source of the law, and the parties. This style of judicial writing undoubtedly expresses the belief that it is the statute that breeds, in a quasi-mathematical way, *the* necessary judicial solution. Professor Mitchell Lasser has written extensively on the peculiarities of the French judicial style. The image of justice that transpires from this type of judgment is, of course, that of a univocal text, a

sort of scriptural reflection of the written and codified law's sovereignty. Because the supremacy of written and rationally structured law suffers no criticism, the logical chain going from the legislative dispositions to the decision that resolves the dispute must not be interrupted. That is how the written law will shine in all its brilliance in the four corners of the territory. Thus, the writing of judgments expresses what we can call a "political geometry": the judgment in one unique phrase is the linear figuration linking directly the apex of the normative pyramid (the statute) to the basis (the controversy). In fact, the French judge does not speak: he brings together the facts of a judicial species with the normative statement contained *in nuce* in the statute.

On the contrary, the common law judge writes *opinions*, not syllogistic reasonings. In his legal culture, he is not a mathematician, but a narrator of the law. The prestige he enjoys in his professional milieu imposes to him to fully and openly assume his own interpretation of the law and to render it in an argumentation written in the first person of the plural (when he writes for the majority) or of the singular (when he writes for the minority). For that purpose, he signs generally long and fully reasoned and documented opinions (aided by his clerks, who do not exist in France). Thus, instead of a hierarchical image of the law, a pyramid inside which the judge enters only to make transparent the intention of the legislator, the common law creates a *horizontal* linguistic community, that of the "peers" who read and use opinions, and of course constantly put them to the test of criticism. The difference does not reside in the form or the length itself of judicial decisions; it resides in their different *discursive status*. To resume in one phrase, I find that the common law judicial opinion is a narrative and an *agon* (Greek word meaning the competition of public speech).

I think – and try to show extensively in the book – that two are the main reasons justifying this exhaustive and ambitious judicial reasoning in the Anglo-American context: the duality between judge and jury, and the existence, as an immanent feature of the judgment, of the dissenting opinion (both inexistent in the French context). It is because the great weight of fact-finding and the verdict is assumed not by the judge but by the jury in a non-reasoned way (in that sense, the jury is the "black box" of the law) that the judge has to compensate by making a very elaborate reasoning and addressing it to the public opinion. In other words, we can observe a sort of equilibrium between the

enlightened reasoning of the judge and the intuitive decisionism of the jury. Inside the judgment itself, the quest of *transparency* and *accountability* – both structural features of the Anglo-American political liberalism –, but also the respect for the *dissent*, the opposition to the power of the state, from the inception of the common law that I find in the famous *Prohibitions del Roy* formulated by Lord Coke in 1612, result in the intrinsic importance of the dissenting opinions.

We might now proceed to some concluding remarks. Each legal culture has some parameters that all together form its cultural matrix, a sort of grammar of the legal system that gives to legal practitioners more a manner of conceiving problems and doing things than a substantial content itself. On p. 308 of the book we have tried to formalize this basic grammar of each of the two great western legal cultures, civil law and common law thus:

Civil law	*Common law*
Law coming upwards	Law coming bottom-up
Centrality	Decentralization
Verticality	Horizontality
Unique character of the truth	Competition between narratives
Integration from the inside	Division
Distrust towards persons	Confidence in actors
Passivity of the parties	Autonomy and action of the parties
Substantive law	Procedure
Preexisting law	Preexisting social relations
Commandment by the law	Social regularity
Unconditioned power	Conditioned power
Institution	Autonomy of the society vis-à-vis the law

As previously mentioned, one is not to deduce the *content* of the law from these basic cultural parameters, but to measure instead the *fundamental attitudes* that these parameters determine behind the legal discourse and practice, without necessarily the legal actors' being conscious or articulate about it. So let us resume some of the main cultural differences between the two great legal cultures.

The common law is a legal culture that, in order to produce truth, spontaneously organizes a competition of narratives in the form of adversarial battles between lawyers. Instead of attacking head-on the problem of "truth", the common law culture prefers to evacuate, to turn around the substantive moral problems by constantly proceduralizing them. This is obvious, for example, in the context of the death penalty in the United States. It is a culture of "one step at a time", of a gradual and prudent progression towards a "truth" that can be cognizable and acceptable by the community of jurists. Of course, this means an extraordinary spending of energy in motions, pleadings, and other procedural devices that can become counterproductive. On the contrary, the French legal culture is characterized by an intensely republican political philosophy since the French Revolution; according to the revolutionary project, the formalization of the truth is made through the structuring *ab initio* of an official narrative by the investigating magistrate, aided in his task by experts, and by integrating this narrative into a *public* discourse, a legal discourse that constantly and obsessively refers to the public interest. No doubt that is the case because the French legal culture is a profoundly *political* one. That is why the truly legitimate legal actors are, in the Anglo-American system, the individuals themselves, whereas in the French system, the State.

Besides, the French legal culture is "legicentric" (centered around statutes and, more generally, the supremacy of written law), whereas for the common law legal culture, the law can ideally be found in the regularity of social practices. Anglo-American judicial practices are to a large extent *reflexive*: as is shown by the rule of *stare decisis*, the law is an *interpretative practice* that unfolds itself around the axis of practitioners' arguments. The American judicial truth presents itself at the same time as a response to questions asked from the *inside* of a social practice, and as a great narrative transcending the closed world of the law by addressing the citizens themselves, by celebrating the political morality of the American people and reminding from time to time the basic constitutional values everyone adheres to.

Another feature that is extremely interesting to us Continentals is that the common law legal culture seems to be stimulated by *divisions* of all sorts. Historical tension between the rules of common law and equity, tension – arising sometimes even to secession – between the majority and the minority judicial opinions, shared roles between

the judge and the jury, and so on. It seems that this constant tension is the resort of the extraordinary vitality of the common law, the reason for the stimulation of its creativity and of its profound dynamism. The French legal culture, on the other hand, is very afraid of anything that resembles division, so it generally chooses *functional doubling* by concentrating in the same persons two different – or even contradictory – legal tasks. That is why the French *Conseil d'Etat* (Council of State = the supreme administrative court) is at the same time counsel *and* judge of the government, the *juge d'instruction* (investigating magistrate) is at the same time investigator *and* decisionmaker, and the *juge pour enfants* (juvenile judge) takes at the same time protective *and* repressive measures. Finally, to give one last illustration of the basic cultural differences that has to do with legal globalization, the French tend to conceive of universality as a direct address to the world, by transposing purely and simply the abstract and idealistic language of human rights to the international legal fora. The American judicial culture, on the other hand, depends largely on a capricious, erratic, and above all, *local* institution, namely the jury, to regulate even international transactions: thus, the decision of a Houston, Texas jury in 2002 signed the warrant of one of the world's biggest multinational firms, Arthur Andersen.