

History and Project

In Memoriam: Professor J.H. Merryman

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This section of 'The Italian Law Journal' ends on a sad note.

John Henry Merryman, a long time Professor at the Stanford law faculty, an internationally renowned figure in comparative law, a path-breaking scholar in that he was, *inter alia*, the first common law trained lawyer to explore our legal system, passed away at the age of 95, on 3 August 2015.

Native of Portland, Oregon, Merryman joined the Stanford law faculty in 1953, became full Professor in 1960, and was named the Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law in 1971. Despite officially retiring in 1986, he continued teaching as a Professor emeritus until spring 2015.

Recipient of several honours throughout his career, including the American Society of Comparative Law's Lifetime Achievement Award, Merryman will be remembered for being, above all, a truly cosmopolitan scholar,¹ teaching in different countries, learning and writing about their laws.²

Throughout more than six decades of devotion to scholarship, he always seemed inspired by a tireless curiosity. More specifically, Merryman had a fascination with what he modestly called, in a thought-provoking essay entitled 'The Loneliness of the Comparative

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¹ While Merryman's view on 'why we should compare laws' is reflected in a certain number of statements throughout his work, the following is especially significant: 'Lawyers are professionally parochial, limited by their national legal system that stop at the border. Comparative law is our effort to be cosmopolitan'. Cf J.H. Merryman, 'The Loneliness of the Comparative Lawyer', in Id, *The Loneliness of the Comparative Lawyer And Other Essays in Foreign and Comparative Law* (The Hague-London-Boston: Kluwer Law International, 1999), 10.

² A list of his visiting professorships and honorary degrees would include an impressive number of countries, such as Austria, Chile, France, Germany, Greece, Mexico, and Italy.

Lawyer', an 'enfeebling introspection'.³ Many comparativists would argue that asking himself difficult questions was actually one of his biggest strengths.⁴ Not only, indeed, is there an obvious merit in venturing into the unexplored depths of the self – and more generally, there is a healthy tendency in formulating difficult questions in explicit terms – but the empathy with which Merryman approached his many questions was never in detriment of the rigor which always animated his scientific endeavours.

Thus, to say Merryman had a gift for self-reflection and critical interrogation would be an understatement. Truly his scholarly contribution is outstanding, as evidenced by his impressive publications record and the innumerable times his work is quoted in the comparative law literature.

Merryman's keen interest in our legal system, the major product of which is the widely known series of three articles on 'The Italian Style' (with the subtitles 'Doctrine', 'Law', 'Interpretation')⁵ that eventually became part, in modified form, of an 'Introduction' to 'the Italian Legal System',⁶ is a defining feature of his early work.

As a member of that first generation of comparative lawyers who 'starved for scholarly companionship and, like the Ancient Mariner, wander[ed] the earth looking for a listener',⁷ he came to the

³ J.H. Merryman, 'The Loneliness of the Comparative Lawyer' n 1 above, 12.

⁴ Professor Legrand underlines this fact quite persuasively during a well-known interview with Merryman himself: 'Who are our comparatists? Since the instrument of the comparison is the comparatist himself, it seems important that information about the comparatist should be accessible to those interested in evaluating his results. In fact, I argue that a meaningful apprehension of any significant comparative discourse must involve an assessment of the gaze of the comparatist on the law and the law-world which he purports to re-present and, therefore, an appreciation of the referential framework which sustains that gaze. It follows that there is a merit in making explicit the basic assumptions that underlie a comparatist's choice in formulating his questions and identifying the evidence he regards as relevant to answer them.' Cf P. Legrand, 'John Henry Merryman and Comparative Legal Studies: A Dialogue' 47 *American Journal of Comparative Law*, 3-66 (1999).

⁵ J.H. Merryman, 'The Italian Style' 18 *Stanford Law Review*, 39, 396, 583 (1965-66). These articles were translated into Italian and appeared almost simultaneously in the *Rivista trimestrale di diritto e procedura civile*.

⁶ J.H. Merryman, M. Cappelletti and J.M. Perillo, *The Italian Legal System: An Introduction* (Stanford: Stanford University Press, 1967).

⁷ J.H. Merryman, 'The Loneliness of the Comparative Lawyer' n 1 above, 11.

University of Rome during the academic year 1963-64. Those months in daily contact with Gino Gorla, together with his prior meeting with Mauro Cappelletti, at the University of Florence, in the spring of 1962, were critical for the direction Merryman's career was to take, for a sort of natural link between his 'vocation' as a comparative law specialist, and the endeavour in studying an until-then-neglected legal system, emerged. Merryman himself renders it like this: 'When I set out to become a comparative lawyer' – he wrote – 'I made Italian law my center of interest'.⁸

One might argue that such commitment, for which he was awarded with the title of '*Cavaliere della Repubblica*', was the outcome of various associated factors.

First of all, there was a re-evaluation of the contribution by such countries as France and Germany to the evolution of the civil law tradition. This Merryman expressed, in unforgettable terms, in a brief introductory note to his trilogy on 'The Italian style': 'To study French and German law to learn about the Civil law seemed like studying American law to learn about the Common law. I chose Italy because for civil lawyers it was the *fonte* and archetype, just as for common lawyers English law is the source and the model'.⁹

This will to broaden the study of the civil law tradition was rooted in a more general, and completely new, appreciation of the relationship between its 'center' and its 'periphery', which was indeed so substantial as to justify the argument that the importance of the Italian legal scholarship was far from being limited to the Middle Ages and the Renaissance. A further, crucial, suggestion made by Merryman is indeed that 'Italy is perhaps the only one of the major civil law nations to have received and rationalised the two principal, and quite different, influences on European law in the nineteenth century: the French style of codification and the German style of scholarship'.¹⁰

Along these premises, it comes as no surprise that Merryman's focus on the Italian legal system is remarkably broad in that it is

⁸ Ibid.

⁹ J.H. Merryman, 'Note on the Italian Style', in Id, *The Loneliness of the Comparative Lawyer* n 1 above, 175.

¹⁰ J.H. Merryman, M. Cappelletti and J.M. Perillo, n 6 above, 165-166.

concerned with all discourses involved in the activity of creating law, covering a wide historical period. Especially the law-making power of the judiciary turns out to be a central ground for constructing what could be fairly defined as an ‘American realism based’ overview of the Italian law, for a second likely explanation for Merryman’s move towards our legal system is his intention to make patent ‘the tension between folklore and practice’¹¹ in the legal interpretation realm, and to do so by challenging the widespread dogma that under a codified legal system, ‘only the legislature can make law’.¹²

We shall not delve into the details here; rather, we wish to underlie the fact that this critical glance ultimately aimed at reconsidering the cleavage between the experiences of civil law and common law.¹³

For this purpose, Merryman’s analysis does not limit itself to debunking the idea that what distinguishes civil law jurisdictions from common law jurisdictions is the different degree of reliance on statute law and case law. His belief is that the main root of convergence is rather established by the democratic transitions that occurred in Italy and in the European continent after World War II. In this respect, what specially matters for him is the significance of some major legal changes such as the adoption of a rigid Constitution and the establishment of the judicial review of legislation, as the following passage makes clear: ‘The Constitution, with its programmatic provisions, is not addressed solely to the legislature to transform into statutes. It is also addressed directly to the judiciary so that, through the openings provided by general principles and evolutive interpretation, it can bring the new social demands that the Constitution embodies and consecrates into effect in its decisions without waiting for the legislature’.¹⁴

By making one of the earliest move toward the successful development of a ‘Western legal culture’ discourse in comparative literature, Merryman was hugely influential in shaping the way the

¹¹ Ibid 251.

¹² Ibid 246.

¹³ Cf on this point M. de S.-O.-l’E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford: Oxford University Press, 2004), 177-179.

¹⁴ J.H. Merryman, M. Cappelletti and J.M. Perillo, n 6 above, 268.

similarities between the experiences of civil law and common law are described and understood.

This view was further elaborated upon in 1978, in a well-known essay entitled 'On the Convergence (and Divergence) of Civil Law and Common Law'.¹⁵

Here, like in the Introduction to the Italian Legal System, the approach is rooted in the propitious intersection between the institutional and the cultural perspective. There is however a more distinct flavour of functionalism in the argument upon which Merryman ultimately relies: 'the increasing emphasis on legal protection of human rights and the increasingly sensitive legal recognition of particular regional and social interests within legal systems in both families indicate that the Common Law and the Civil Law are moving along parallel roads, towards the same destination'.¹⁶ In the same direction an even more clear step was taken in the late nineties: 'Of course there are many subtle substantive differences between Common Law and Civil Law, and their separate legal histories have produced distinct conceptual structures, institutions and procedures. Still, as a rule one can expect the two groups of legal systems to produce similar results in like cases'.¹⁷

Interestingly enough, one potential difficulty with Merryman's work is that it 'flirted' with the principle of functionality in several occasions, in one form or another.¹⁸ Of particular relevance, for

¹⁵ J.H. Merryman, 'On the Convergence (and Divergence) of Civil Law and Common Law', in M. Cappelletti ed, *New Perspectives for a Common Law of Europe* (Leiden-London-Boston: Sythoff; Stuttgart: Klett-Cotta; Brussels: Bruylant; Firenze: Le Monnier, 1978), 195-233.

¹⁶ *Ibid* 233.

¹⁷ J.H. Merryman, 'The Loneliness of the Comparative Lawyer' n 1 above, 8-9.

¹⁸ In the above-mentioned interview granted in 1997 by Merryman to Pierre Legrand, the former described this way how his co-authored study of law in 'radically different cultures' (J.H. Barton, J.L. Gibbs, V.H. Li and J.H. Merryman, *Law in Radically Different Cultures* (St. Paul, MN: West Publishing Co., 1983)) was set out: 'We developed four typical social problems of the kind that are bound to arise in any society and examined how each of these problems was perceived and resolved in each of the four cultures.' Interestingly enough, he was then asked by Legrand whether he was 'confident... that [he] could formulate the questions in non-ethnocentric terms.' That was, remarkably, his answer: 'Yes, we thought we were able to do that. The idea was that we would see how each problem was treated in each of the four cultures.' Cf P. Legrand, n 4 above, 27.

instance, is the following definition of legal system, which he provided in a 1974 essay entitled 'Comparative law and Scientific Explanation': 'a legal system is a sub-system of society whose principal social function is to respond to a certain range of social demands'.¹⁹ One might even go so far as to say that Merryman's careful agnosticism about the similarity/difference²⁰ dilemma was not as sharp as he seems to maintain in a short passage from a conversation with Pierre Legrand, where he asks to the latter: 'As to your suggested choice between difference and similarity, why must one choose? Most of us find that we do both while working on a single instance'.²¹

Having said this, Merryman's approach is far too sophisticated to be labelled categorically. He never lets the larger picture – that is, the 'legal culture' – out of sight, as we shall indicate in a moment. He often invites the reader to face many cautionary warnings against making simple generalization and always leaves open the possibility of drawing on different definitions of law for different purposes.

All in all, if there is a common theme in his comparative work, it is the danger – encountered differently in each legal system – presented by the apparatus of substantive rules and their justificatory arguments routinely used by parochial lawyers. Merryman constantly reminds us of the difficulty in casting off such apparatus, and how indispensable that considerable effort is if a meaningful understanding is to be achieved.

Moving back to the Introduction to the Italian Legal System, it is clear that the concern, referred to above, with the lawmaking power of the Italian judiciary accurately reflects such preoccupation.

In this respect, another factor that should be pointed out is Merryman's intellectual affinity with Mauro Cappelletti and Gino Gorla. This was no doubt a particularly fruitful source of inspiration, both for his attempt to put a finger on the legal formalism that has

¹⁹ J.H. Merryman, 'Comparative Law and Scientific Explanation', in Id, *The Loneliness of the Comparative Lawyer* n 1 above, 486. This essay was originally published in J.N. Hazard and W.J. Wagner eds, *Law in the USA in Social and Technological Revolution* (Bruxelles: Bruylant, 1974), 81-104.

²⁰ And his related bias in favour of comparative law as scientific explanation, untouched by political objectives: cf *inter alia* J.H. Merryman, 'Comparative Law and Scientific Explanation' n 19 above.

²¹ P. Legrand, n 4 above, 42.

traditionally dominated the Italian legal style, and for his effort to gain access to other important legal discourses, offering other ways of conceptualizing the daily work of our legal system. Truly one of the attractions of this study is in the way it develops along the longstanding paradigm of civil law/common law comparison established in American legal scholarship, that is the formalism/realism difference, while at same time showing that some form of reflective criticism is also an important part of the Italian tradition of academic law.

In 1990, Cappelletti summarised his affinity with Merryman as follows: 'My youthful fury against [the legal formalism] prevailing in the «legal academe» of Italy – but also, to a large extent, of other countries of Continental Europe and Latin America, that is of the civil law world – met a sympathetic reception from that Stanford professor in his early forties, imbued with American realism. He lent legitimacy to my reaction; also, and most importantly, he gave to it a dialectic expression and a cultural background'.²²

Not surprisingly, Merryman's unconventional account of the Italian law and, through it, of the civil law system, encountered a strong support and enthusiasm also from Gino Gorla, oriented as the latter was towards an utterly original comparison between the traditions of the civil and the common law. This was the case to such an extent that, in an article published in 1994 and dedicated to the memory of Gorla, taking up the well-know saying that 'a man can be judged by his friend', Merryman states he 'would like to be judged by the warm and enduring affection [he] received from [his] beloved teacher and friend, Gino Gorla'.²³

Several issues that Merryman raised in the late sixties have gained an unprecedented weight in the current comparative discourse, facing as it is important questions about the adequacy of much of its established frameworks. It is also true that some of his stances sit uneasily with the substantial changes in Italian law and society in the past five decades – one only need to mention the

²² M. Cappelletti, 'In Honor of John Henry Merryman', in D.S. Clark ed, *Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Berlin: Duncker & Humblot, 1990), 2.

²³ J.H. Merryman, 'Ricordo di Gino Gorla', in VVAA, *Scintillae iuris – Studi in memoria di Gino Gorla*, I (Milano: Giuffrè, 1994), 23.

impact of the europeanization and globalization process. It is therefore timely that a new second edition of 'The Italian Legal System' has just been published.²⁴

Certainly Merryman's work on Italian law is not the only lasting contribution to be studied by future generations of comparative lawyers. His book devoted to 'The Civil Law Tradition'²⁵ is, in absolute terms, probably the most notable in the field of comparative law. First published in 1969 (that is, only two years after the 'Introduction to the Italian legal system'), and now in its third edition, it had a huge impact on the discipline, because of its broader focus, of course, but also because it clearly took a step further away from the rule-based comparison.

While a certain number of statements throughout this work suggest that a change of perspective was needed, especially insightful is the very notion, advanced and developed by Merryman, of 'legal tradition', for it plays a crucial role in bringing a significant additional dimension to comparative analysis: 'a legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective'.²⁶

Speaking of this book, David S. Clark, who knows Merryman's work very well for having co-authored four books with him,²⁷ said

²⁴ M.A. Livingston, P.G. Monateri and F. Parisi, *The Italian Legal System – An Introduction* (Stanford: Stanford University Press, 2nd ed, 2015).

²⁵ J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 2nd ed, 1985).

²⁶ *Ibid* 2.

²⁷ J.H. Merryman, D.S. Clark and J. Haley, *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia* (New Providence: LexisNexis, 2010); *Id*, *The Civil Law Tradition: Europe, Latin America, and East Asia* (New Providence-Charlottesville, VA: LexisNexis and

that it 'has achieved that rare combination for books about law: to be both a commercial and a scholarly success'.²⁸

This is not the place for an in-depth examination of the increasing emphasis on legal traditions that over the last years replaced – in the mainstream comparative law – the previous tendency to organise the understanding around the notions of 'legal system' and 'legal families'.²⁹ It is worth underscoring, in this regard, that the above-quoted definition of legal tradition is by far the most frequently cited in the foreign and comparative law literature. This is to say that as far as the scholarly success of 'The Civil Law Tradition' is concerned, Clark's assessment could be further developed by arguing that this is one of those rare books about law that come to be seen by their successors as establishing a new paradigm.

One should add that despite the controversy raised by Merryman's insistence on the argument that French and German law should be considered as local deviations of the civil law tradition,³⁰ the book also succeeded in propelling the study of the civil law tradition in new directions. Its focus on regional areas such as Mediterranean Europe and Latin America did not suggest disregard for the contribution by France and Germany to the evolution of the civil law tradition, but it did propose to extend the scope of inquiry well beyond the more conventional path undertaken by other leading comparative textbooks, such as David's *'Les grands systèmes de droit contemporains'* and Zweigert and Kötz's *'Einführung in die Rechtsvergleichung'*.

Apart from the study of the civil law tradition and its

Michie, 1994); J.H. Merryman, D.S. Clark and L.M. Friedman, *Law and Social Change in Mediterranean Europe and Latin America – A Handbook of Legal and Social Indicators for Comparative Study* (Stanford: Stanford University Press, 1979); J.H. Merryman, D.S. Clark and M. Cappelletti, *Comparative Law: Western European and Latin American Legal Systems: Cases and Materials* (Indianapolis, New York and Charlottesville: Bobbs-Merrill, 1978).

²⁸ D.S. Clark, 'The Idea of the Civil law Tradition', in D.S. Clark ed, *Essays* n 22 above, 11.

²⁹ See on this point G. Marini, 'Diritto e politica. La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione' *Pòlemos*, 31-76 (2010).

³⁰ Cf specially R. David, 'Book Review' 44 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 360 (1970).

components, another field in which Merryman gained worldwide recognition is 'law and development'.

It should be pointed out that when his interest in 'law and development' first arose, sometime in the sixties, there was no substantial body of scholarship, since the state of the American legal doctrine was – as Merryman put it himself in a 1977 article – 'strongly action-oriented'.³¹ Furthermore, very few scholars were trained in both the law and social sciences, and data were rather limited.

Merryman developed his own approach to law reform, claiming that 'Comparative law and social change' was 'a favorable rubric under which to revive the sort of inquiry and the efforts at *theory-building* that characterized the best aspects of the law and development movement'.³² It was on this premise that during the seventies, under a grant from the Ford Foundation, he carried out 'Slade (Studies in Law and Development)', an extensive empirical research project aimed at tracing the transformations experienced by the legal systems of the Latin American and Latin European zone. In 1979 this led to a publication with David S. Clark and Lawrence Friedman.³³

Merryman was thus an early proponent of the critical reformulation of the law and development movement, and this should be kept in mind if the scale of his contribution to the field is to be fairly assessed.³⁴ Regardless of whether the movement actually benefitted from Merryman's input or not, his emphasis on 'the action-inquiry dichotomy'³⁵ of the movement, his keen concern with theoretical issues,³⁶ as well as his bias in favour of a quantitative

³¹ J.H. Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement' 25 *American Journal of Comparative Law*, 457-491, 473 (1977).

³² *Ibid* 483.

³³ J.H. Merryman, D.S. Clark and L.M. Friedman, n 27 above.

³⁴ This is the case to such an extent that the Slade project, which was ultimately a disappointing episode in Merryman's academic life, became eventually the focus of a book in his honor: L. Friedman and R. Perez-Perdomo eds, *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (Stanford: Stanford University Press, 2003).

³⁵ J.H. Merryman, 'Comparative Law' n 31 above, 473.

³⁶ Merryman's belief that 'until we have tested, reliable theory (ie tested and reliable vis-a`-vis the target society), we will be more responsible and productive if we limit ourselves to third world law and development inquiry' is key to understanding

approach to the description and discussion of the target reality,³⁷ resonate still.

Finally, and very significantly, his role of pioneer also hold true for a field to which Merryman devoted his later career: 'art and the law'. Beside being the first Law Professor to teach a course aimed at discussing the most relevant problems that arose or might be expected to arise in the art world,³⁸ Merryman truly established the framework for the successful development of 'art and the law' as a new field of scholarship. First published in 1979, his groundbreaking book 'Law, Ethics and the Visual Arts', is now in its fifth edition.³⁹

It is reported that the origins of Merryman's studies relating to art and cultural property lie in his multiples travels around the world, during which he began collecting art pieces.⁴⁰

Merryman died after a long life, during which he also built and kept a network of friends and academic colleagues. In Italy his death will be felt keenly, particularly by all those who had the chance to experience his old-world charm as well as his dedication to the diffusion of our legal scholarship in the English-speaking world.⁴¹

his core assertion that 'the law and development movement has declined because it was, for the most part, an attempt to impose U.S. ideas and attitudes on the third world'. Cf J.H. Merryman, 'Comparative Law' n 31 above, 481, 483.

³⁷ J.H. Merryman, 'Comparative Law' n 31 above, 473.

³⁸ This happened in the autumn semester of 1972. Cf J.H. Merryman, 'A Course in Art and the Law' 26 *Journal of Legal Education*, 551-555 (1973-74). Merryman taught his last class, 'Stolen Art', only a couple of months before his death.

³⁹ J.H. Merryman, S.K. Urice and A.E. Elsen, *Law, Ethics and the Visual Arts* (London, The Hague and New York: Kluwer Law International, 2007).

⁴⁰ S. Whiting, 'John Henry Merryman, law professor and art collector' *SFGate*, 19 August 2015, available at <http://www.sfgate.com/art/article/Obituary-John-Henry-Merryman-law-professor-and-6453580.php> (last visited 7 October 2015).

⁴¹ Many of them even benefitted from his tutelage at Stanford. As Mauro Cappelletti points out in 1990, 'a stream of young scholars and students who now hold leading academic, professional, and judicial positions has spent time at Stanford as pupils or collaborators of Professor Merryman; for example, to name only those now holding chairs in distinguished schools: Cassese, Crespi-Reghizzi, Rodotà, Corapi, De Vita, Scaparone, Trocker, Varano, Vigoriti – not to mention that leading figure of Italian comparative law, Gino Gorla. As for myself, I owe primarily to John a major turn in my academic career, starting with my first regular teaching at Stanford Law School in 1968.' Cf M. Cappelletti, 'In Honor of John Henry Merryman' n 22 above, 5.