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Taxonomy of Law and Legal Mapping

Patterns and Limits of the Classification of Legal Systems

Abstract. Attempts from the 17th century onward anticipate the 20th-century mood of legal mapping. They classify legal arrangements by languages, races and genetic roots, then by their ideologies and technicalities. Later on they do so by separating the Western from the Soviet/socialist law, by their correspondence to underlying general cultures, as well as according to legal families. It is the insufficiency of resorting to dichotomy contrasting the Western “Us” to any differing Eastern “Others” that has recently resulted in typologising in terms of the dynamism and directions of legal development in the duality of professionalism and traditionalism or in the cross-reference of what is established/stable and unestablished/instable, and of what is drawn from Western and non-Western sources. Material taxonomy cannot be accomplished in law through genuine class-concepts. Characterisation through concepts of order can be achieved at most. In want of any meta-system, cultures formed to idealise and hypostasise ideas of order by independent principles can provide no common basis of division for law. Accordingly, only some division to major and minor sets and subsets can be achieved. The own arrangement will be better cognised by other schemes’ understanding. The gradual transcendence of rule-fetishism by identifying law with some specific culture may prevent the coming “clash of civilizations” from reaching aggressive self-assertion and care for the sustainability of the laws’ diversity.

Keywords: family resemblances, legal families, civil/common law, Western/Soviet law, characterisation/definition, comparative law theory, comparative judicial mind

1. Preliminaries

Applying a theatrical metaphor characteristic of the Baroque age, it is *Leibniz*’ ambition (1667) regarding the early recognition of the need to describe the “theatre of the legal world” that was transmitted to us, informing us that the more humanity’s intellectual world broadened throughout history, the more pressingly humanity felt the need to classify its diverse elements. For example, the English *Saint German* perceived the difference between

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| Roman | English |
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laws, while also presenting the correlation between their development, as early as in 1531, pointing out that what is *jus naturale* in case of the former recurs as *reason* in the latter.¹

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¹ Chr. Saint German: *Dialogus de fundamentis legum Anglie et de conscientia. The Dialoges in English between a Doctor of Diunity, and a Student in the lawes of England.* Londini, 1528. {Plucknett, T. F. T.–Barton, J. L. (eds): *St. Germain’s Doctor and Student.* London, 1974}, quoted–remarking that we remember now the moment underlying such development as the need of *reasonable man*–by Chloros, A. G.: Une interprétation de la nature et de la fonction de la philosophie juridique moderne. In: *Archives de Philosophie du Droit III.* Le rôle de la volonté dans le droit. Paris, 1958, 189.

Seventy years later, in 1602 *William Fulbeck* described a legal world rooted in three laws,² such as the

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| Anglo-Saxon | Continental | canon |
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ones; and a century later, in 1701 Lord *Holt* wrote that “the principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things”.³ This reflects Europe’s view of itself in the early modern age, which with respect to the worlds beyond the countries on the two sides of the Channel scarcely perceived anything more than the papacy’s somewhat comprehensive influence. Yet the above division is typologically correct and valid up to the present day.

Almost two centuries later, in 1880 *Glasson* proposed⁴ a tripartite classification derived from *historical origins* again, namely, laws developing

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| from barbarian customary law (English, Scandinavian, Russian) | from Roman law (Italian, Romanian, Portuguese, Greek, Spanish) | from the former two’s amalgamation (French, German, Swiss) |
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–, a grouping that, not being based primarily on extant and actually prevailing features, has remained worthy of being taught up to our day. In a typologically characteristic manner, *Glasson* perceives, when mapping Europe’s inner division, the particularity of the Nordic and the Russian Plateau. Remarkably, the classification also draws the English and the Scandinavian legal systems within a single category while putting the French and the German together, differentiating both from the actual Romanist heritage.

2. Proposals

Drawing up a legal map of the Earth—by classifying the various legal systems according to the lasting features of *family resemblance(s)* expressed by their basic mission, form, structure and mode of operation—would be a task for 20th century comparative law, matured enough to have become a genuine movement by then.

When we look at such attempts from closer quarters, some standing representatives of the laws’ variety will be conspicuous from the beginning, placed in the centre as constant members that launch our interest in mapping at all, by defining the typification’s entire contexture and final orientation. When the mapping is completed, further members will be attached mostly as additional items, exemplifying the law’s diversity, the effect of which is rather to testify to some loose interest in remote countries (by naming their species) than to cognise the world’s richness in actual depth and describe it exhaustively.

² Fulbeck, W.: *Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England. Parts I-II*. London, 1601–1602. Cf. also <http://en.wikipedia.org/wiki/William_Fulbecke>.

³ In: *Lane v. Cotton*, 12 Mod. 472, 482 (1701).

⁴ Glasson, E.-D. : *Le mariage civil et le divorce dans les principaux pays de l’Europe, précédé d’un aperçu sur les origines du droit civil moderne: Études de législation comparée*. Paris, 1879.

So, in the early 20th century *Esmein* (1905) thought, for instance, that *language* and *species* would constitute the most appropriate basis of the *divisio*⁵–

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|---|---|--|--------|--------|
| Romanist (French, Belgian, Italian, Spanish, Portuguese, Romanian, Central & South- American) | Germanic (Scandinavian, Austrian, Hungarian) | Anglo-Saxon (English, American, English-speaking colonies) | Slavic | Muslim |
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–, which, despite being rather influential for a while as an early attempt, proved to be too sketchy and limited in outlines. However, at the peak of European imperialism or politico-economic expansion, this analysis theoretically encompassed the world through the historical prism of Europe. Interestingly enough, it also involved Arabic culture—having in mind its presence in the Hispanic Peninsula for centuries in the Middle Ages—as a partner on an equal footing.⁶ We see here for the first time the Germans separated as a block from the Roman legal tradition, perhaps owing to the clashes with which the German Empire, with the Austro-Hungarian Monarchy in the background, confronted the rest of the world. At least, there can scarcely be any other explanation in that allusion was also made to Hungarian law.

In another attempt at grouping, *Sausser-Hall* (1913) accepted the exclusive criterion of *race* as the principle for classification, in a manner not alien to the dominant spirit of the age⁷–

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| Aryan, Indo-European • Hindu–Iranian (Persian, Armenian) • Celtic (Celtic, Gallic, Irish, Gaelic) • Greco–Latin (Greek, Roman, Canonic, neo-Swiss) • Germanic • Anglo-Saxon (English, Anglo–American, new Saxon) • Lithuanian-Slavic (Russian, Serbo–Croatian, Slovenian, Czech, Polish, ancient Prussian, Lithuanian, Ruthenian, Slovak, Bulgarian) | Semitic (Amir, Egyptian, Jewish, Arabic- Muslim) | Mongoloid • Chinese (Chinese, Indo-Chinese, Tibetan) • Japanese | barbarian customary (Negro, Melanesian, Indonesian, Australian, Polynesian, American & Hyperborean native) |
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⁵ Esmein, A.: Le droit comparé et l'enseignement du droit comparé. In: *Procès-verbaux des séances et documents I*. [Congrès international du droit comparé tenu à Paris du 31 juillet au 4 août 1900], Paris, 1905, 451 et seq.

⁶ Cf., e.g. Brague, R.: *Europe. La voie romaine*. Paris, 1992.

⁷ Sausser-Hall, G.: *Fonction et méthode du droit comparé*. Genève, 1913.

–, and his categorisation remains of a revealing force in several respects notwithstanding the fact that it keeps silence about the specific similarities and differences in the legal nature of the arrangements that he grouped so. Nevertheless, he undoubtedly provided a pioneer attempt at describing the known totality of legal regimes in both their historical development and actual diversity on the globe. Actually, he drew a comprehensive picture of the popular force that may have generated known cultures, inserting for the very first time a “closing category” of visibly “mixed” contents in his scheme. He was also pioneering in drawing a broad and overall framework, albeit he too had a start from his own regime (labelled as the historical performance of peoples, to be identified as “Western” in a cultural sense later on). In this endeavour, he may have been guided by a logically inspired “aesthetical” wish that the borders of his own legal regime should not be defined too narrowly in separating it from the rest of the world.

In the interwar period, *Lévy-Ullmann* (1922) was the first to divide laws, acknowledged as civilised, along the lines of their respective *development*⁸–

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| Continental [written law, with parliaments & codification in the background] | English-speaking [customary law, developing through legal practice] | Muslim [on a religious basis & with an almost absolute immobility] |
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–with a conciseness that may increase posterity’s suspicion that he (like so many before and after him) actually made the only distinction between his home arrangement, accepted in the natural course as serving as a starting point, on the one hand, and everything else separated from the former, on the other. Or, he proceeded as if for him anything else could be nothing but embellishment, decoration or flourish, with the sheer aim of aesthetic completeness. – From the vast three volumes of the historico-comparative tableau *Wigmore* (1928)⁹ drew for the American legal profession, one simply cannot ascertain whether or not the author indeed wished to classify or simply alluded to items by exemplification, when in an all-inclusive overview–

| | | | | |
|--|--------------|------------|----------|--------|
| Egyptian | Mesopotamian | Hebrew | Chinese | Hindu |
| Greek | Roman | Japanese | Muslim | Celtic |
| Slavic (Czech, Polish, Yugoslavian, Russian) | | German | marine | |
| Papal | | Romanesque | Anglican | |

–he presented the huge variety of past and contemporary legal systems.

⁸ Lévy-Ullmann, H.: Observations générales sur les communications relatives au droit privé dans les pays étrangers. In: *Les transformations du droit dans les principaux pays depuis cinquante ans (1869–1919)*. [Livres du cinquantenaire de la Société de législation comparée], Paris, 1922, 85–87.

⁹ Wigmore, J. H.: *A Panorama of the World’s Legal Systems I–III*. Chicago–Saint Paul, 1928.

Finally, *Martínez Paz* (1934) took alleged *genetic roots* (with a quite telling progressive gradation) as the basis for his division¹⁰–

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| barbarian customary (English, Swedish, Norwegian) | barbarian- Romanist (German, Italian, Austrian) | barbarian- Romanist-canonic (Spanish, Portuguese) | Romanist-canonic- democratic (Swiss, Latin American, Russian) |
|--|---|--|--|

–in a European developmental perspective, while any other arrangement remained simply unnamed.

In the historical sequence of classifications, the categorisation of Anglo-Saxon and Nordic developments as members of a single group emerges as a recurrent feature, while the separation of Latinic–German Central Europe from Western Europe proper within the Romanist coverage is a novel recognition.

The series of classifications produced during the half-century following World War II was opened by a magnificent theoretical conspectus, authored by a triad in France. As is well known, the primary aim of *Arminjon, Nolde and Wolff* (1950) was to lay the theoretical-methodological foundations of legal comparatism rather than to accomplish any description of the extent of the legal world. Accordingly, these authors excelled in elaborating private law as a group with criteria of categorisation given in a most promising manner. As an unavoidable by-product, however, they disregarded ideals of order (e.g. of the Far East) where any conceptualisation was abhorred. Eventually, they saw the historical evolution of private law in Europe as stemming from, and represented by, seven independent types. All in all, their classification¹¹–

| | | | | |
|---------|--------|--------------|---------|---------|
| French | German | Scandinavian | English | Russian |
| Islamic | | | Hindu | |

–has (with its separation of the Nordic region¹²) remained an exceptionally mature accomplishment for a long time.

David (1950), whose work in due course became the number one classic of the international comparative law movement, paved a somewhat different road. Although starting, too, with a dedication to civil law, he extended his research interests from the civil law technical instrumentality to entire legal arrangements as unities organised into a system, with various components gaining specific roles. In parallel with the rise of the Iron Curtain between East and West in Europe and the threat of nuclear devastation with the increased sense of danger through the menace of a Third World War, the *ideology* or *philosophical*

¹⁰ *Martínez Paz, E.: Introducción al estudio del derecho civil comparado. Córdoba, 1934, 154 et seq.*

¹¹ *Arminjon, P.–Nolde, B.–Wolff, M.: Traité de droit comparé I. Paris, 1950, 49.*

¹² “Regarding its origins and development, the Scandinavian law is neither Roman, nor French, nor German.” *Ibid.* 50.

worldview underlying the given legal regime became his primary concern for classification, only to be seconded with the *technique of law* in supplementation.¹³ His proposition—

| | | | | |
|--|---|----------------------------------|--|---------|
| Western • French • Anglo–American [based on the moral rules of Christianity, the political & social principles of liberal democracy & the economic order of capitalism] | Soviet [based on the Socialist economy & related political, social & moral principles] | Muslim [on a religious basis] | Hindu [on a specific philosophical basis] | Chinese |
|--|---|----------------------------------|--|---------|

—has exerted a long-standing influence through the basic polarisation implied, despite its elementary simplicity in structure. Or, it constituted a plain reflection of the Cold War ideology raging at the time, whose basics were defined by the opposition of the Western European and Atlantic world to the Third Rome, the Muscovite Empire. And again, as already seen elsewhere, the occasional reference to one or two remote cultures from faraway peripheries (which were starting to loom on the horizon) could only serve as sheer complementation. *David's* subsequent analysis (1961) did in fact alleviate the harshness of this categorical opposition. Following its own path—he admitted—the West might also be inclined to move towards Socialism; moreover, even Africa and Asia (without Christianity in their past) might commit themselves to the same direction.¹⁴ Ironically enough, the deadly menace by the Soviet superpower (accompanied by the West's growing slump into the pragmatism of *realpolitik*, having relinquished Hungary in the dramatic days of 1956) made Soviet ambitions respected worldwide, compelling the West to cowardly submission. Finally, the very cause of Socialism as a method of building a global system could obtain worldwide acknowledgment by granting its own typological locus to itself, while the Soviet terminology renamed its counter-pole, the “*Western*” law, as “bourgeois” one.

It is by no mere chance, therefore, that *Sola Cañizares* (1954) would propose a version resulting in minor corrections while exhibiting extreme simplification¹⁵—

¹³ David, R.: *Traité élémentaire de droit civil comparé. Introduction à l'étude des droits étrangers et à la méthode comparative*. Paris, 1950, 8, 214–226.

¹⁴ “By the way, the nations of the West are to different extents all committed to the road of socialism, moreover, I think they can make much progress on this way without having to renounce belonging to the system of Western law at the same time. After all, a number of non-Christian countries of Africa and Asia could adhere to the system of Western law without adherence to the principles of Christian morality.” David, R.: *Existe-t-il un droit occidental?* In: Nadelmann, K. H.–von Mehren, A. T.–Hazard, J. N. (eds): *XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema*. Leyden, 1961, 59.

¹⁵ de Sola Cañizares, F.: *Iniciación al derecho comparado*. Barcelona, 1954, quoted by Rodière, R.: *Introduction au droit comparé*. Strasbourg, 1963, 13.

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| Western [Christian but not authoritative] | Soviet [atheist & collectivist] | religious • derived from religious principles (canonic, Hindu, Muslim) • Chinese [with a pseudo-religious philosophy in which the law is ethically coloured] |
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–, almost reminiscent of the tripartite vision by *Lévy-Ullmann* during the earlier peace time in 1922.

It is by no mere chance, either, that the Romanist sociologist *Lévy-Bruhl* (1961) would come forward, with an outsider’s ambitions, to propose a new theoretical scheme–

| | | | | |
|---------|--------|--|--------|-----------|
| Western | Soviet | Theocratic • ancient Jewish • Muslim | feudal | primitive |
|---------|--------|--|--------|-----------|

–, applying his typological model in order to outline a legal sociological panorama with a historical approach in the background.¹⁶ Albeit being otherwise conservative as permeated by respect for traditional values, this typology may astonish us by presenting both the West and the anti-West, i.e. Bolshevism, with equal taxonomic weight, moreover, in a way mixed sublimely with arrangements originated in world religions that had in their time set our civilisational path for millennia. However, assessing the atmosphere of cosmic threats with expectations of a coming cataclysm, such western submissiveness still needs to be explained in terms of social psychology rather than in cool detachment with some apparent objectivity.

Yet, in the meantime the world opened itself up to the Western mind, and theoretically inspired attempts at a philosophical classification emerged. In a classical manner, *Northrop’s* typification (1959)¹⁷–based on an understanding of the specifically Far Eastern–discerned the following groups:

| | | |
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| “intuitive mediational” (CONFUCIAN, Buddhist, Taoist, non-Aryan Hindu) | accorded to natural history (classic China, MANU, ancient Indian Aryan conquerors, Islamic law codes, those preceding the Stoic Roman law) | abstract contractual |
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–, in terms of which, in the Far Eastern arrangement denominated as *intuitive mediational*,

¹⁶ Lévy-Bruhl, H.: *Sociologie du droit*. Paris, 1961, 116.

¹⁷ Northrop, F. S. C.: *The Complexity of Legal and Ethical Experience. Studies in the Methods of Normative Subjects*. Boston, 1959, 184.

“[t]he procedure [...] is to push legal codes into the background, preferably dispensing with them altogether, and to bring the disputants into a warm give-and-take relationship, usually by way of a mediator, so that previously made demands can be modified gracefully, and a unique solution taking all the exceptional circumstances of the case into account is spontaneously accepted by both disputants. Codes there may be, but they are to be used only as a last resort, and even then recourse to them brings shame upon the disputants. [...] Not only is there no resort to a legal rule; there is also no judge. Even the mediator refuses to give a decision. Instead, the dispute is properly settled when the disputants, using the mediator merely as an emissary, come to mutual agreement in the light of all the existential circumstances, past, present, and future. [...] Not the abstract universals of a legal code, but the existential particularity of the concrete problematic situation [...] is the criterion of the just and the good.”¹⁸

By contrast, in an arrangement developed in accordance with *natural history* in a naive realistic way—

“Its codes [...] are expressed in the syntactical grammar of the language of common-sense objects and relations [...]; the codes describe the biologically conceived patriarchal or matriarchal familial and tribal kinship norms of the inductively and sensuously given status quo.”

—, realistic universals are applied.¹⁹ Finally, in a law according to an *abstract contractual ideal*, there is some

“technical terminology [...] permitting the construction of legal and social entities and relations [...while...] its identification of the ethical and the socially legal with abstractly and imaginatively constructed [...] human norms and relations [...] makes possible ethical and legal reform.” Because “[b]efore this code all men are equal; they are instances of the same universals; their existential particularity is ethically irrelevant.” “Thereby [...] a contractually constructed norm cannot be regarded as ethical unless if it holds for any one individual it also holds for any other.”²⁰

At just about the same time a new upswing occurred also, due to reform initiatives addressed at classical comparative law. *Schnitzer*, as the pioneering first, claimed (1961)²¹—after having revised his earlier suggestion (1945)²²—that there were five great blocks of civilisation—

¹⁸ *Ibid.* 184–185. As he remarks on 186, all this is akin to the radical empiricism and nominalism of *Dewey*, *Kierkegaard*, and *Sartre* as well, as “behind this intuitive, mediational type of law in Asia there is a *Confucian*, *Buddhist* and *pre-Aryan Hindu* epistemology which affirms that full, direct and exact empirical knowledge of any individual, relation or event in nature reveals it to be unique”.

¹⁹ *Ibid.* 186.

²⁰ *Ibid.* 188, 188, 189.

²¹ Schnitzer, A. F.: *Vergleichende Rechtslehre I*. 2. Aufl., Basel, 1961, 133. et seq.

²² Schnitzer, A. F.: *Vergleichende Rechtslehre*. Basel, 1945, 86 et seq.

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|-------------------|---|---|---|------------------------------------|
| primitive peoples | antique cultural peoples (Egypt, Mesopotamia, Hellas, Rome) | European–American • Romanist • Germanic • Slavic • Anglo–American | religious • Jewish • Christian • Islamic | Afro–Asian • Asian • African |
|-------------------|---|---|---|------------------------------------|

–, within which each and every “great cultural circle” [*große Kulturkreise*] could generate a corresponding “circle of law” [*Rechtskreis*]. Accordingly, the respective cultures are to be separated historically in a way that encompasses the whole of legal development. Probably only this can explain, why the Nordic region was not differentiated within a Euro–Atlantic civilisation taken as a coherent block.

It is remarkable that the classification by *Zweigert*, published about the same time (1961), concentrating on the present when distinguishing variations in the middle-term of “circles of law”,²³ repeated almost word for word the scheme once formulated by *Arminjon*, *Nolde* and *Wolff* in 1950, while exclusively adding the Far-Eastern variant to it.²⁴ His division–

| | | | | |
|-------------------------|--------|---------|-------------|-----------|
| Romanist | German | Nordic | Anglo-Saxon | Communist |
| Eastern (non-Communist) | | Islamic | Hindu | |

–is not only conclusive but also justified, in as much as he clarifies his pre-suppositions. Avoiding unifactorality (but presuming that differing results will ensue depending on whether public law or private law has been taken into consideration), the *style* of the overall legal system is selected as the basis of classification, which is a compound of its (1) *historical origin* and (2) characteristic *mode of thinking*, as well as of its (3) *legal institutions* (especially in case of developed Western law) and (4) *sources of law*, taken together with their *interpretation* (especially in case of Islamic and Hindu laws), and, finally, also of the (5) *ideological attributes* underlying the ideal of the respective legal order (especially in case of laws with religious background or Socialist roots).²⁵

As already remarked once, the *Socialist* (or, in its original inspiration, the *Soviet*) law appeared as a separate type in the work of *DAVID*, the first author of the Cold War, as early as in 1950, and remained a recurrent component until the fall of the Socialist world system.

Moreover, the term would also be utilised–in addition to instances of over-ideologisation or over-politicisation–through theoretical generalisation. For example, *Kulcsár* (1961)²⁶ would suggest a dichotomic division from the outset–

²³ Zweigert, K.: Zur Lehre von den Rechtskreisen. In: *XXth Century Comparative and Conflicts Law. op. cit.* 48–54.

²⁴ *Ibid.* 55.

²⁵ Zweigert, K.–Kötz, H.: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts I*. Tübingen, 1971, 69, 74.

²⁶ Kulcsár, K.: *A jog nevelő szerepe a szocialista társadalomban* [The educative role of law in a socialist society]. Budapest, 1961, 9–12.

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|---|---|
| exploitative [protection of the <i>status quo</i> , affecting external behaviour only by setting limits to it] | Socialist [also building a new society with targeted education transforming the whole man] |
|---|---|

–, which would consolidate as precisely an expression of timely need.²⁷

Even if from some opposite starting point—based not on the futurism of forming man according to Socialist utopianism, but on exactly that which Socialism denies from the Western achievements of several millennia of civilisational development—, Western thinkers arrived at a similar result in a typological sense. Thus, according to the Indian *Bose* (1962), the only criterion of division cannot be but the nature and degree of “*adherence to the rule of law*”.²⁸ Accordingly, there are two opposing poles and various transitions distinguished—

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|---|---|-----------|
| Western [so solid that no change in foundations is conceivable] | transitions • West-related (India, Malaysia, Jordan, partly Africa) • partial (Burma, Pakistan, Turkey) • dictatorship behind a mere legal façade (Indonesia, Guinea) • total chaos (Congo) | Communist |
|---|---|-----------|

–, in which the dynamism of the intermediate sphere (with the value-orientation of the tendencies of development that may forecast recent directions) seems to be the most progressive element.

Gorla (1963) substantiated the world’s division into two, taken as the hegemony of one definite standard expected to be a force capable of suppressing anything else, while introducing in his typological foundation the concept that the opposition between the capitalist and the Socialist law overwhelms the one between the Civil Law and the Common Law. As he explicates by a lucid distinction—

²⁷ As a doubtlessly number one authority, *Szabó* remarks that “it is the discrepancy of characteristics that prevails over formal similarities” see Szabó, I.: Ellentmondások a különböző társadalmi rendszerek joga között [Contradictions between the laws belonging to different social systems]. *Állam- és Jogtudomány*, 6 (1963) 2, 160 {also see Szabó, I.: Des contradictions entre le droit des différents systèmes sociaux. *Dialectica* (Revue internationale de philosophie de la Connaissance), 18 (1964), 351–371}—, therefore “there is no basis for legal comparison between the two types of law that would theoretically »stand beyond« this extent of class determination”—and Szabó, I.: Az összehasonlító jogtudomány. In: Szabó, I. (ed.): *Kritikai tanulmányok a modern polgári jogelméletéről* [Critical studies about modern western legal theory]. Budapest, 1963, 72 {also as La science comparative du droit. *Annales Universitatis Budapestinensis de Rolando Eötvös nominatae Sectio juridical*, 5 (1964), 91–134}.

²⁸ *Bose*, V.: Legal Education as a Basis for the Rule of Law in Africa and Eastern Countries. *Columbia University Law Alumni Bulletin*, 7 (1962) 2.

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|-------------------|-------------|-------------------------|
| formal difference | | difference of substance |
| Continental | Anglo-Saxon | Socialist |

–, “The difference between »continental (or Romanist) law« and »common law« is certainly rather formal, i.e. drawn by a criterion that distinguishes and approaches forms (structures, techniques and concepts), rather than »substance«.”²⁹

The debate addressing the issue for a quarter of a century as to how much the distinctive features are expected to stem from a common basis and their ideological background—in addition to the separation of the distinctive ones from within a single entity—compelled the French master of post-war legal comparatism to change his stand definitely. Having left behind the community of ethos indicated by the category of “Western law”, David then proposed (1964) the introduction of two mutually supplementing criteria, namely “*legal technique*” (including vocabulary, concepts, hierarchy of the sources of law and juridical methods) as well as “*philosophical, political or economic principles desired to be implemented*”—only providing that “[t]he two criteria are to be used subsequently and not in isolation.”³⁰ Accordingly, he re-formulated his taxonomy, using the middle term of “legal family” [*famille de droit*] in the following way:

| | | | |
|---------------------|--|-----------------------------------|--|
| Romanist– German | Socialist • Soviet • peoples’ democracies | Anglo-Saxon • English • USA | religious or traditional • Muslim • Indian • Far-Eastern (Chinese, Japanese) • African & Madagascan |
|---------------------|--|-----------------------------------|--|

Albeit this separates what is obviously distinct from within the diverse formations (or Soviet deformations) of Western civilisation, yet in a scholarly indefensible manner it relegates everything non-Western into one single and improperly defined notional category. For indeed, any reference to “philosophical, religious or traditional”³¹ laws is hardly more in the final analysis than a mere pretext for separating what is “other” or “different”. Following such logic, any comparatist—from the Far East via the Muslims to the *Malagasy* and *Hova* tribes in Madagascar—might arrange a *cliché* to group Berlin, Paris, Rome, London and New York into the same category of esoterica alongside with Moscow and Tirana.

So it is not by chance that critical self-reflection had to continue. For instance, *Rodière* (1963) responded to the challenge by narrowing the circle of legal regimes to be classified.

²⁹ Gorla, G.: Intérêts et problèmes de la comparaison entre le droit continental et la Common Law. *Revue internationale de Droit comparé*, 15 (1963) 1, 9.

³⁰ David, R.: *Les grands systèmes de Droit contemporains*. Paris, 1964, 16.

³¹ *David* is also inconsequent in that his Table of contents indicates “*droits religieux et traditionnels*”, while the text relates to “*systèmes philosophiques ou religieux*” (*ibid.* 23.), albeit some justification will follow in his presentation, for “These systems, quite independent from each other, are not to qualify as genuine families. [...] Even the claim whether they are to mean law at all can be doubted.” *Ibid.*

He opined that as to the prospects of foreseeable future harmonisation, there is no common basis of comparison beyond the reach of *Christianity*.³² Accordingly, only a threefold partition—with the types of

| | | |
|--------|-------------|--------|
| French | Anglo-Saxon | Soviet |
|--------|-------------|--------|

—is suitable for comparison. Moreover, he even remarked that regarding terminology, it is French and Soviet laws, and regarding principles, French and Anglo-Saxon laws, that are genuinely comparable to one another. And he added: Soviet law seems to harmonise with western continental law in formal tradition with well-developed solutions and techniques defining a common direction; Anglo-Saxon law differs from the French one solely by its specified techniques; and the Soviet law sharply separates from the French and the Anglo-Saxon ones mostly by their guiding principles.³³

Following this line of thought, grouping in terms of the variations of a definite correlation amongst the above elements had by then become the standard pattern. The classification put forward by *Malmström* (1969), based principally upon *historical* characteristics with varying subdivisions³⁴—

| | | | |
|---|--|--------------------------|---|
| Western (European–American) <ul style="list-style-type: none"> • continental • Latin American <ul style="list-style-type: none"> • Nordic • Anglo-Saxon | Socialist (Communist) <ul style="list-style-type: none"> • Soviet • peoples' democracies • Chinese | Asian (non-Communist) | African <ul style="list-style-type: none"> • Anglophone • Francophone |
|---|--|--------------------------|---|

—proposed the most enlarged version since *David's* early attempt in 1950, as the very first to grant the laws of Latin America a named status, while he grouped distinct civilisations under one bland collective notion to typify regimes in Africa that have managed to survive as faint copies of their English or French colonisers' law. The other variation produced at that time was the typology improved by *Zweigert–Kötz* (1971)³⁵—

| | | | | |
|-------------|--------|----------------|--------|-----------|
| Romanist | German | Anglo–American | Nordic | Socialist |
| Far Eastern | | Islamic | Hindu | |

³² Rodière: *Introduction... op. cit.* 26–27.

³³ *Ibid.* 14–16.

³⁴ Malmström, A.: *The System of Legal Systems: Notes on a Problem of Classification in Comparative Law. Scandinavian Studies in Law*, 13 (1969), 127–149.

³⁵ Zweigert, K.–Kötz, H.: *Introduction to Comparative, Law I.* (trans. Weir, T.) Oxford, 1987. The first edition in German in 1971 (note 25, 74.) still emphasised that “Common historical sources which exist at the beginning of the evolution, lose their importance with regard to the »style« of the legal systems when later events exert a more determining influence on them”. A sharp and justified criticism of such a separation of Romanist and Germanic arrangements up to their roots is provided by Zajtay, I.: *Reflections on the Problem of Grouping the Families of Law [1973]* in his *Beiträge zur Rechtsvergleichung. Ausgewählte Schriften* (hrsg.: Kreuzer, K. F.). Tübingen, 1976, 70–73.

–, which in fact is a version of the proposition by *Zweigert* in 1961, scarcely modified but expressly worsened, as the Scandinavian law, put in-between the Anglo–American and the Socialist arrangements, is definitely cut from both its Romanist and Germanic roots.³⁶

The proliferation within a few decades of attempts bearing the marks of fashion may have discredited the undertaking itself and the merits of the whole enterprise; at least no new proposal could be heard about during the subsequent quarter of a century. *Eörsi*'s distinction with sensitivity to civil law (1973)³⁷ represented again a *Marxist historical perspective*, while adding to *Kulcsár*'s typology (“exploitative / Socialist”) framed a decade ago–

| | | |
|---------------------|---|-----------|
| natural communities | capitalist <ul style="list-style-type: none"> • English & Nordic <ul style="list-style-type: none"> • French • Germanic • Central & Southeast-European | Socialist |
|---------------------|---|-----------|

–, and excelling by the presentation of Anglo–American and Scandinavian laws in one common category as well as by the very naming of the Central and Southeast-European region.

The other comparatist endeavours at the time mostly contributed to the clarification of the fact that Common Law is a genuinely faithful heir of the richness of Roman law, nurturing exactly both from, and further on, its roots. (Ironically enough, this realisation coincided with the gradual relocation of the scholarly cultivation of Roman law from its one-time exclusivity in the Latin–Germanic region of Middle Europe to the English-speaking areas, calling for common law mentality as local sensitivity.) Accordingly, *Schlesinger* (1960) pointed out that “in spirit and method, and also in many particulars, classical Roman law is closer to the Common Law than to the modern civilian codes.” Or,

“in a common law system the case law, made binding by the doctrine of *stare decisis*, represents an element of stability, and [...] change is brought about mainly by statutory law. [...] In the civil law, on the other hand, the codes provide some certainty (at least verbal certainty) and structural stability, while judicial »interpretation«, unfettered by a formal rule of *stare decisis*, constitutes an element of flexibility.”³⁸

³⁶ It is not by chance that the British critic sees in such a grouping more of chaos than of systemic taxonomy. See Twining, W.: Globalization and Comparative Law. *Maastricht Journal of European and Comparative Law*, 6 (1999) 3, 232.

³⁷ Eörsi, Gy.: On the Problem of the Division of Legal Systems. In: Rotondi, M. (ed.): *Inchieste di diritto comparato II*. Padova–New York, 1973, 196.

³⁸ Schlesinger, R. B.: *Comparative Law. Cases–Text–Materials*. 2nd ed., London, 1960, 174, 187, note 2. Even if striking by its lucidity, probably all this is by far not new. Rabel, E. asserted as early as sixty-five years ago–Schriften aus dem Nachlaß: Vorträge – Unprinted Lectures. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 50 (1986) 1–2, 322–323–that

“English and Roman [...] analogies in their policies of building an empire, and also in basic qualities of their legal habits. Customary law is paramount; the case law method, progress from case decision to case decision, prevails; a cautious tradition forms crude beginnings into refined justice, supported by the dualism of customary strict law and equitable practice of magistrates–*jus civile* and

In the last decade of the second millennium, some faint attempts at providing at least some didactic indication amongst altered conditions eventually re-emerged. The Czech *Knapp* was among the first to dispense with Socialism (1991) and to acknowledge Western law had survived in its old dual form after the collapse of the Soviet empire–

| | | |
|-------------|----------------|---------|
| continental | Anglo–American | Islamic |
|-------------|----------------|---------|

–, remarking that Civil Law and Common Law, in company with the Islamic legal culture, are now the global systems developed enough to be worthy of dedicated jurisprudential analysis.³⁹ – At Lund, *Bogdan* (1994) was even more cautious and pragmatic, as if pondering: why talk about more than is worthy of introduction at a certain depth anyway? His specification and treatment in a Swedish textbook–

| | | | | |
|---------|----------|--------|---------|-----------|
| English | American | French | German | Socialist |
| Chinese | | | Islamic | |

–did not waste space with Nordic generalisation but saw Socialist law surviving in peripheries, and even proposed Chinese law for analysis.⁴⁰

Conceptions following in time were scarcely more than variations on traditions brought about by predecessors. Thus, for example, *Van Hoecke* and *Warrington* (1998) openly re-proposed the scheme dividing “us” from “others”⁴¹–

| | |
|---------|--------------------------------------|
| Western | other • Asian • Islamic • African |
|---------|--------------------------------------|

praetorium, common law and equity–and the entire doctrine is devoted to the question of what action or defense a party has in court; whereas we now ask with *Justinian*: what is a party’s right without any litigation?”

This is a basic truth according to which “The common law establishes its general principles by considering how a reasonable man would act in particular circumstances while the natural law method is to state general principles and then to assume that the reasonable man would act in accordance with them.” Goodhart, A. L.: *English Contributions to the Philosophy of Law*. New York, 1949, 35.

It is to be noted how much the characterisation building on the Anglo–American reconstruction of the Roman legal tradition is more sophisticated and alive, compared to continental approaches exhausted by inductivity contrasted to deductivity. For instance, *Pound’s* opinion that the “essential difference between the civil law and the common law is one not of substance but of method” was not interpreted simplistically by Lawson, F. H.: *A Common Lawyer Looks at the Civil Law*. Ann Arbor (MI), 1953, 46 (whereas “a code is not a necessary mark of a civil law system nor the absence of one a mark of a common law system”) but all this is to signify a difference in the “type of mind”, meaning that “a civil law system is favorable to codification”, a circumstance “more important than codes” themselves.

³⁹ Knapp, V.: *Základy srovnávací právní vědy* [Outlines of comparative jurisprudence]. Praha, 1991, 52–53, 58.

⁴⁰ Bogdan, M.: *Comparative Law*. Stockholm, 1994.

⁴¹ van Hoecke, M.–Warrington, M.: Legal Cultures, Legal Paradigms and Legal Dogmatics: Towards a New Model for Comparative Law. *International and Comparative Law Quarterly*, 47 (1998) 3, 495–536.

–, linking (without any originality of thought as simply identified by geographical areas) immensely diverse, vast cultures that have nothing in common beyond merely being “non-Western”, with the rest of human culture simply amalgamated. – Glenn’s grouping (2000)⁴² also met a call for practicality –

| | | | |
|------------|----------|--------------|---------|
| chthonic | Talmudic | of civil law | Islamic |
| common law | Hindu | Asian | |

–with the additional feature that, by referring to genuine traditions, (a) he intended to separate philosophically clearly identifiable historical patterns of thought, within the framework of which (b) he started with the *chthonic* (i.e. ancient, primitive, organic [*chthōn* = earth]) model of order, notwithstanding the fact that hardly any institutional law could have developed within it.

Approaching the new millennium, typological experiments re-appeared in a renewed guise that associated the dedication of legal mapping with the present, while including historical developmental overviews. At the same time, they enriched the static reflection of the past or present with an indication of the formation’s *dynamic motion* from somewhere to somewhere. All this may have been motivated by the realisation that everything momentarily prevailing can only be interpreted as the section given at a single moment of ceaseless formation. At the same time, there is a practical need to find comprehensively substantive categories expressing the directions and limits of globalising legal effects, both actual and potential. For instance, *Mattei*, the Italian comparatist active in the United States, made a proposition (1997) to amalgamate *politics, law, and philosophical and religious tradition* in one scheme of classification,⁴³ suitable to provoke passionate debates. In the final analysis, this scheme–

| | | |
|---|--|---|
| professional law (Western legal tradition) [separation of legal & political decision making, secularisation of law] <ul style="list-style-type: none"> • British & American • Roman & Germanic <ul style="list-style-type: none"> • Nordic • mixed | political law (law of development) [unstable] (ex-Socialist, Southeast European, Cuban, unestablished African & South American) | traditional law (oriental view) <ul style="list-style-type: none"> • Islamic • Indian and Hindu • other Asian / CONFUCIAN (Chinese {diverging towards the political} & Japanese {developing towards the professional},¹ post-Soviet- Asian, ex-Socialist Asian) |
|---|--|---|

⁴² Glenn, H. P.: *Legal Traditions of the World. Sustainable Diversity in Law*. Oxford, 2000. Cf. also Varga, Cs.: Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline. *Acta Juridica Hungarica*, 48 (2007) 2, 95–113 {and <<http://www.akademiai.com/content/gk485p7w8q5652x3/fulltext.pdf>>}.}

⁴³ Mattei, U.: Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems. *The American Journal of Comparative Law*, 45 (1997) 1, 19.

–contrasted the West to the East, that is, the law of secular autonomous *professionalism* to the law of *traditionalism*, rigidified in its past, both standing for permanence and stability as benchmarks of conceivable alignment, only in order to insert in-between that which is in flux, which is instable and dependent, dominated by mere *politics*, yet able to evolve in either of the above directions. In addition, *Mattei* did not even consider his scheme as a system of commensurable subjects but rather as a viewpoint or a recommendable notional approach for possible grouping. This is so because its components are seen to be in constant movement, as subjects that are not homogeneous entities but sets strained by inner conflicts, bound to diverge in various directions. For

“[t]he same system may belong to the rule of traditional law if we consider family law, while belonging to the rule of professional law as far as commercial law is concerned, and to the rule of political law when we look at its criminal justice system.”⁴⁴

In the ethos and drift of debates induced by *Mattei*, the Finnish *Husa* (2004) presented the available configurations in a cross-referential frame. His grouping of a double division⁴⁵–

| | Strengthening/established | Weakening/unestablished |
|-------------|---|--|
| Western | <ul style="list-style-type: none"> • civil law • common law | <ul style="list-style-type: none"> • Socialist |
| non-Western | <ul style="list-style-type: none"> • Islamic • Hindu | <ul style="list-style-type: none"> • African • Asian |
| Mixed | (Israeli, of Québec) | (Scottish, Louisianan) |

–polarised about the centrifugality of *becoming established* and the centripetality of *being unestablished*, and the substantiation through *Western* and *non-Western* models or impacts, at the same time. It treated Socialism as a transitional phase from the outset, an inherent product of the West, for “socialist law is culturally a European innovation [...] of European *Marxism*”, independently whether taken as generation or degeneration.⁴⁶ As to the Eastern tradition, only the Muslim and Hindu laws were specified as sufficiently established and worthy of analysis. Or, Korean, Chinese and/or Japanese *Confucianism* were portrayed as weakening and vanishing in law, therefore relegateable to a category with the uncertainties of Africa, and as left without doctrinal analysis. Finally, in his mixed category it is reassuringly realistic to encounter Scottish law as foreseen to change (certainly reviving again its Roman roots), Louisiana (presumably weakening in resistance to Americanisation), and Israel (as settled in multiculturalism).

⁴⁴ *Ibid.* 16.

⁴⁵ Husa, J.: Classification of Legal Families Today: Is It Time for a Memorial Hymn? *Revue internationale de Droit comparé*, 56 (2004) 1, 11–38.

⁴⁶ *Ibid.* 30.

3. Impossible Taxonomy, or the Moment of Practicality in Legal Mapping

While in theoretical legal thinking one may notice the progressive historical accumulation of philosophical-methodological foundations, legal comparatism needs, apparently as part of each step, to be restarted anew, although a major part of its literature has ever been engaged in resolving the riddle of what comparison may mean at all in law.

The expressive simile that the laws' classification still "finds itself in the condition of botany and zoology before *Linnaeus* and of anatomy before *Cuvier*"⁴⁷ highlights the unsettled nature of the preliminary issues of legal mapping. For natural objects exist as evolved timelessly and autonomously, with underlying structures forming the principle of sensible separation, describable by some physicality. In contrast, legal systems are historically forming objectivations. They evolve in various communities belonging to separate civilisations, contextualised by various cultural media, scarcely featuring anything in common. Their common denominator (or *genus proximum*) can only be the need for, and organisational force of, abstracting human conceptualisation on the social ideal of *ordo*. Or, from the variety of ways in which human organisations can be arranged with the help of various (religious, ethical, economic and political) means, that which our conventionality calls 'law' or phenomena 'embodying the law' will be selected—as *differentia specifica*—from the realisation that (a) the law is a global phenomenon by embracing the whole of society when (b) it settles (resolves) society's basic conflicts of interests (c) in its quality of serving as society's final regulatory and controlling force.⁴⁸ Consequently, being a heterogeneous set resisting any taxonomy, it is exclusively the practical human need that may, if at all, force it to be classified, in order that minor groups of components can be characterised as some kind of unity. Therefore, stating that grouping "[f]or some comparatist [...] may serve [...] a utility [...] similar to [...] taxonomies."⁴⁹ or that it is resorted to "above all, for taxonomic reasons"⁵⁰ can at most be a figurative expression. We get closer to a feasible answer by simply declaring that "classifications are made for the purpose of simplification",⁵¹ that is, that conglomerations will be dissected into minor units with the view of rendering their heterogeneous components more manageable in practice.

Literature is clear in realising that "it is impossible to establish a uniform system of classification which is ideal from every point of view and implies a clear distinction between »families« or groups".⁵² In conclusion, it is not our knowledge, or initiation into scholarship, that is insufficient—even if this was the case before *Carolus Linnaeus* or *Georges Cuvier*, or (in describing the set of elementary material components) *Dmitri Ivanovich Mendeleev*. What is at stake here is the brutal fact that our object can only be seen as a section of incidental sets, emerged from incidental processes with incidental components, that may, its being in constant formation notwithstanding, yet be projected notionally as a fixed block,

⁴⁷ Constantinesco, L.-J.: *Traité de droit comparé* 3. La science des droits comparés. Paris, 1983, 21, note 5.

⁴⁸ For further explication, see Varga, Cs.: *The Paradigms of Legal Thinking*. Budapest, 1999, para. 6.1, 204.

⁴⁹ Husa, J.: Legal Families in Comparative Law—are they of any Real Use? *Rettfærd* [Copenhagen], 24 (2001), 95, 18.

⁵⁰ Zweigert–Kötz: *Introduction to Comparative Law... op. cit.* 63.

⁵¹ Öricü, E.: Mixed and Mixing Systems: A Conceptual Search. In: Öricü, E.–Attwooll, E.–Coyle, S. (eds): *Studies in Legal Systems. Mixed and Mixing*. The Hague, 1996, 335.

⁵² Malmström: *The System... op. cit.* 138.

stable enough to be subjected to systematic investigation without, however, any self-closing theory being justified.

Whether the notional designation of a historical epoch, an artistic style, a group of legal systems or the implementation of any other artificial human ordering principle is at issue, this can only be the middle category of some comprehensive socio-cultural description, which is most suited for *characterisation* rather than for definition.⁵³ Any such notional designation is the conventionalised issue of classifying objects, a generation of human culture to project some sensible order. As to such designations, the dilemma whether they represent a real or an ideal type is not to be resolved by them. Likewise, it is not a *sine qua non* characteristic whether or not they have a reference in reality. In the sense of epistemological reflection (or correspondence), they are not necessarily either true or false, nor need they be without alternatives. Instead, they are suitable for purposes of comprehensive typological characterisation, thanks to the classification performed. Any such description is open-ending as “there can never be any final proof of what is »important« or »essential«”⁵⁴ in a grouping. Therefore, the obvious fact that all such operations “are generally embedded in local cultural and social systems, and serve various social functions”⁵⁵ is neither an auxiliary feature nor mere historical coincidence but the expression of their plain practicality.

Even though categories like “cultural and legal circles” with varying “styles” may seem somewhat rudimentary,⁵⁶ nevertheless all this embodies a decisive step departing from the false objectivity of rule fetishism⁵⁷ to arrive at the law’s inner understanding as a basically cultural phenomenon. This is an elementary conjecture of the recognition of law as culture, culture of thought, of ordering, etc., to foster also, among others, an interest in the *comparative judicial mind*.⁵⁸

In sum, in order to speak distinctively about past and present legal systems, as arranged in some groupings that may allow us to characterise their minor sets in a generalising way,

⁵³ For example Cassirer, E.: *The Logic of the Humanities* [Logik der Kulturwissenschaften]. (trans. Smith Howe, C.) New Haven, 1961. 140 separates the *culture-concepts* from the *nature-concepts* with reference to the pioneering groundwork of Wölfflin, H.: *Kunstgeschichtliche Grundbegriffe. Das Problem der Stilenentwicklung in der neueren Kunst*. München, 1915 {*Principles of Art History. The Problem of the Development of Style in Later Art*. (trans. Hottinger, E. D.) New York, 1950}, by stating that the former “characterize but [...] not determine; for the particulars which they comprehend cannot be deduced from them.” The same conclusion is reached in logic by distinguishing *concepts of order* (suited for characterisation exclusively) from *class-concepts* (which define inclusion in a conceptual extent), by Hempel, C. G.–Oppenheim, P.: *Der Typusbegriff im Licht der neuen Logik*. Leiden, 1936.

⁵⁴ Spiethoff, A.: Die Allgemeine Volkswirtschaftslehre als geschichtliche Theorie. In: Spiethoff, A. (hrsg.): Festgabe für Werner Sombart zur siebenzigsten Wiederkehr seines Geburtstages 19. Jänner 1933. München, 1933, 57. quoted by Zweigert–Kötz: *Introduction... op. cit.* 69.

⁵⁵ <<http://en.wikipedia.org/wiki/Taxonomy>>.

⁵⁶ Cf., e.g. by Constantinesco, L.-J.: Die Kulturkreise als Grundlage des Rechtskreise. *Zeitschrift für Rechtsvergleichung*, 22 (1981) 80, 161–178 and Über den Stil der »Stiltheorie« in der Rechtsvergleichung see *Zeitschrift für vergleichende Rechtswissenschaft*, 78 (1979), 154 et seq.

⁵⁷ This recognition as an intuition is hardly formulated expressly in comparatism yet. Even the harsh criticism by Hoecke–Warrington: *Legal Cultures... op. cit.* 502 stops at stating that “It is doubtful whether the traditional »law as rules« is able to offer sound basis for »legal family« classifications”.

⁵⁸ Cf., e.g. Varga, Cs. (ed.): *Comparative Legal Cultures*. Aldershot–New York, 1992, 331–447 and Gessner, V.–Hoeland, A.–Varga, Cs. (eds): *European Legal Cultures*. Aldershot, 1996, 87–166.

first we have to reckon what we are talking about at all. That is, we have to re-construct them within a typology set up for exactly such a purpose, that is, as subordinated to (quasi) class-concepts in a (quasi) logical form. This very form still will remain empty as, in want of any meta-culture suitable for derivation, there is no criterion or framework that could serve as a bridge between differing cultures. Consequently, the result of any classifying enterprise can only be some *characterisation* fluctuating in terms of *more or less*, in the course of which we commensurate independent phenomena by provoking them to respond to questions that are alien to their specifics—even if making sense from some practical point of view. Or, the criticism as to the necessary deficiency of classification is in the final analysis nothing but self-criticism of the presuppositions generated by the Western Utopia of rationalism, ready to logify everything within its one principled perspective. Eventually it tells less about its subject than about ourselves: the predominance of our thought by logifying rationalism and natural-science-patterned theoretical epistemology.

This is one of the cases of enchantment in scholarship. For, in the final analysis, we all live with some “us”-consciousness⁵⁹ and—using a double standard in classifications—we put “Western legal culture at the top of some implicit normative scale”.⁶⁰ By the same gesture, in fact, we deprive ourselves of the “critical potential”⁶¹ of any objective evaluation. Nevertheless, this very bias is not blameworthy. We are mapping legal systems precisely for the sake of perceiving them as contrasted to our familiar one, in the specific characteristics and direction that distinguish them as differing from the one we are accustomed to. Frankly speaking, it is neither a critical distance proposed by the objectivity of scientific description, nor an external observer’s position by which we approach such arrangements that we deem to be different. Quite to the contrary, we do so in order to cognise our own better, that is to say, to *compare* the latter with the former, upon the basis of our own culture. So we are neither neutral nor in want of sympathy but, contrariwise, we wish simply to cognise, for ourselves, on the basis of knowledge we have acquired so far. Consequently, in the meantime, in order to know the other, too, we have to act “against the natural tendency to use without reflection the ideals of one’s own system as the normative measure”.⁶²

Considering the extent to which the Soviet/Socialist law could come into focus during the Cold War epoch through also predominating the efforts to group legal arrangements during that period,⁶³ we can now regard it either as a historical accident or as a contingency of politico-scholarly considerations that almost no typology proposed that the laws of the Bolshevism, Fascism and National Socialism be recognised between the two World Wars, notwithstanding the fact that their expansion was spectacular, and their self-identity, rejecting and surpassing the Roman ideal of law, combative and firm. Maybe the torpidity

⁵⁹ Husa: Classification... *op. cit.* 17.

⁶⁰ Frankenberg, G.: Critical Comparisons: Re-thinking Comparative Law. *Harvard International Law Journal*, 26 (1985) 2, 422.

⁶¹ Peters, A.–Schwenke, H.: Comparative Law Beyond Post-modernism. *International and Comparative Law Quarterly*, 49 (2000) 4, 821.

⁶² Reitz, J. C.: How to Do Comparative Law. *The American Journal of Comparative Law*, 46 (1998) 4, 623.

⁶³ Cf., as a Hungarian case study by Varga, Cs.: A szocializmus marxizmusának jogelmélete [Legal philosophy of the Marxism of socialism]. *Világosság*, 45 (2004) 4, para. 1.3.d., 96–97. A Hungarian overview: Institutionalisation accompanied by relaxation (from the 1960’s: Comparatism on the international scene, the legitimisation of socialist law as a *sui generis* type and, in Hungary, the professionalisation (in rehabilitation) of law taken as a separate scholarly subject.

of comparatism's classifying inclination and the alarm generated by the interwar Bolshevik/Fascist/National Socialist experiments—or, in brief, *realpolitik* alone—can explain the selectivity in terms of which at given periods of time, certain phenomena may actually be filtered through conceptual generalisation to become a general category of classification, while others may perhaps not. Therefore, in social matters, the reason why certain features become conceptualised does not lie necessarily and exclusively *in se* and *per se* but, in part at least, also in our desire to make them be classified.

4. Diversity as a Fundamental Quality of Human Existence

Extremities such as the dichotomisation separating “us” from “them” (standing for what is different) may easily lead to subjection by the prevailing mainstream, which frequently changes, by the way. The very threat of World War Two might have let the world's diversity be seen as a potential danger itself, in which even the national particularisation of laws could seem irrational—

“the diversity of laws [...] is an obstacle to commerce and communications, created by misunderstandings of all kinds, which does not correspond to the economic and spiritual interdependence of the modern world”⁶⁴

—, while we today, after the liberally rooted dogma of humankind's unity and uniformity has broken up, easily tend to antagonise the different as enemy. As a result of this, even a simplifying conclusion drawn from the *clash of civilisations*⁶⁵ may potentially expose the legal map's variegation as foreshadowing some “clash of legal families”.⁶⁶ True, such fears and aversions may have indeed been supported by the Western law's rule-fetishism, forced to sense its own multiplication when it encountered the plurality of non-western laws.

However, once we recognise behind alienating reifications the strength of culture in law, and in the law's specificity the relative autonomy of how to find ways and paths to the order (re-)established,⁶⁷ we may come closer to understanding why it is necessary that the world's civilisational and cultural diversity be seen as a prerequisite of human existence, fundamental to survival.

⁶⁴ Schnitzer, A. F.: *De la diversité et de l'unification du droit. Aspects juridiques et sociologiques*. Bâle, 1946, 1.

⁶⁵ Huntington, S. P.: The Clash of Civilizations. *Foreign Affairs*, 72 (1993) 3, 22–28.

⁶⁶ Scholler, H.: Vorwort. In: Scholler, H.–Tellenbach, S. (hrsg.): *Die Bedeutung der Lehre vom Rechtskreis und der Rechtskultur*. Berlin, 2001, 7–11.

⁶⁷ Cf., e.g. Varga, Cs.: *Jogfilozófia az ezredfordulón. Minták, kényszerek – múltban, jelenben* [Philosophy of law at the millennial turn: Patterns and coercions in the past and present]. Budapest, 2004, 9–66.