Taxonomies of Legal Orders in Comparative Law Scholarship: A Historical and Contemporary Analysis

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Introduction

Jurisprudence is the general study of law as a type of social practice that societies adopt and maintain.[1] Law is a complex practice to explain because laws

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[1] In England and other common law countries the term ‘jurisprudence’ is often used as synonymous to legal philosophy or legal theory. Continental European jurists draw a distinction between general theory of law and legal philosophy (in a narrow sense). The former focuses on the basic concepts, methods, classification schemes and instruments of the law; the latter examines the values that underpin legal systems, institutions and rules. As J.-L. Bergel remarks, “the general theory of law starts out from the observation of legal systems, from research into their permanent elements, from their intellectual articulations, so as to extract concepts, techniques, main intellectual constructions and so on; the philosophy of law, on the other hand, is more concerned with philosophy than law for it tends to strip law of its technical covering under the pretext of better reaching its essence so as to discover its meta-legal signification, the values that it has to pursue, its meaning in relation to an all-embracing

and legal systems exist both as sets of facts about what people do or have done in the past and also as a set of reasons that people take to direct how they should act. To legal practitioners the nature of legal reasoning, which concerns how we find the applicable law, may seem of more relevance than more abstract questions about the nature of law. However, one cannot fully understand and explain legal reasoning without grasping, in some sense at least, what it is for something to be a law or for a legal system to exist, as well as what purposes such a system serves. Jurisprudence works at the level of describing, explaining and justifying law and the practices of law. It examines the working of legal doctrine and connects law to other discourses of the world (philosophical, sociological, historical, anthropological, psychological etc). Three main schools of thought or traditions in jurisprudence can be discerned: (a) conceptual or analytical reasoning about law; (b) normative or value-based reasoning about law; and (c) historical, sociological or contextual analysis about law. These schools of thought differ from each other in terms of how they construct the subject-matter of jurisprudence but are not necessarily incompatible with each other. The principal aim of analytical jurisprudential inquiries is the clarification of the meaning of the term 'law' and of terms embodying fundamental legal concepts (e.g. right, duty, ownership, contract, tort, legal personality etc).[2] The demand of normative jurisprudence is to

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vision of humanity and the world." *Théorie générale du droit*, 2nd ed., (Paris 1989), 4. Furthermore, the term legal science (*scientia juris*) is used to denote positive law organized in such a way that it rationalizes, scientifically, law as an empirical object. See on this P. Orianne, *Apprendre le droit: Eléments pour une pédagogie juridique* (Paris 1990), 73 ff.

[2] In the English-speaking world, the systematic analysis of legal concepts was begun by the 18th century philosopher Jeremy Bentham (author of *The Principles of Morals and Legislation* (1789) and *The Limits of Jurisprudence Defined* (1782)) and was developed further by his student John Austin in his works *The Province of Jurisprudence Determined* (1832) and *Lectures on the Philosophy of Law* (1863). Modern forms of analytical jurisprudence have been developed by H.L.A. Hart, by the German jurist Hans Kelsen, author

provide an ethical measure with which to evaluate the practice of law in both its general and particular manifestations.[3] Finally, historical, sociological or contextual analyses of law view law as a system existing and appearing within specific social and historical contexts. Sociological theories of law, in particular, stress that legal norms cannot be properly understood unless they are examined in the light of social facts ― including the intentions, interests and evaluations of social agents.

A jurisprudential perspective is an integral part of comparative law as a scholarly discipline. The starting-point of comparative law is often the appearance of common social problems in different legal orders. The question is whether there are common features or, conversely, differences in their legal regulation within these diverse orders. How should these similarities or differences be explained? Legal comparatists today advocate broader approaches to the study of legal systems ― approaches that extend beyond the traditional 'law as rules' approach, which is concerned mainly with the description and ordering of statutory enactments and court decisions while ignoring all contexts that are not of a strictly legal nature. They recognize that law and the understanding of law involves much more than the description and analysis of statutory enactments and judicial decisions. Therefore, elucidating the relationship between legal systems, i.e. identifying and accounting for their shared elements and distinct differences, presupposes an examination of the factors that influence the structure,

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of the General Theory of Law and State, and by jurists influenced by the philosophy of language. Analytical jurisprudence is associated with legal positivism ― the theory that claims that there is no necessary connection between law and morality.

[3] Normative jurisprudence is primarily concerned with questions of 'ought', not just with questions of 'is'. In philosophy, questions of ought are sometimes called 'teleological' (from the Greek word *telos*, which means end), deontological (from the Greek word *deon*: ought to be done), ethical, or are grouped under theories of justice or theories about the purpose of law.

development and substantive content of legal norms. These interrelated factors pertain to historical circumstances, ideology, linguistic and philosophical tradition, religion, politics, economic structure and level of economic development, among other things. For a meaningful legal comparison to be carried out, laws and legal systems must be placed in a broad historical and socio-cultural context and, in this respect, concepts such as 'legal tradition', 'legal culture' and 'legal family' play a key part.

Legal Traditions and Legal Cultures

A legal tradition is not simply a body of rules governing social life; rather, it is an expression of "deeply rooted, historically conditioned attitudes about the nature of law … the role of law in … society and the polity, 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".[4] There are national legal traditions, each with its characteristic attitudes to law that according to their more general features may be classified into broader, transnational traditions or families, such as civil law, common law and Islamic law.

The theme of legal tradition invites consideration of an essential aspect of law, namely its traditionality. Law is traditional not simply in the sense that it comprises inherited forms and rituals. Whether one is examining a European legal system rooted in Romano-Germanic law, or a system that has its origins in English

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[4] J. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed., (Stanford Calif. 1985), 2.

common law, or the law of a country dominated by religion, analysis of the law presupposes an understanding of how the past has authority for the present. One might say that law embodies three elements that are central to its identity and functioning: *origins in the past, present authority and inter-generational transmission*.[5] The first element points to the fact that legal traditions cannot be created. It is only with the benefit of hindsight that one may be able to contemplate that a tradition has its origins in some event or emerged at a particular time and place. Similar to other complex social phenomena, a legal tradition embraces and sustains a vast body of attitudes, assumptions, practices and materials that have been accumulated over a very long period of time.[6] Of course, law is not in its entirety the product of past times and intergenerational transmission. Legislative bodies create a large number of new legal rules each year and much of the law that is applied by the courts is statutory law of relatively recent origin. Yet, even this newly created law is an extension or modification of the preceding body of law that has been built up over many years. Furthermore, when judges and jurists are construing a recently introduced statute, they read it with the help of the past by drawing on an interpretative tradition sometimes going back centuries.[7]

The second characteristic of a legal tradition is that it has present authority in the eyes of those individuals who participate in it. In law, the past is not simply relied on in order to understand the present. It is institutionalized. Nowhere is this more evident than in relation to legal reasoning: the process of justifying arguments for or against a particular legal position or result by reference to established interpretations of legal materials, especially statutory enactments and court decisions. Similar to religious traditions, in which authority rests on

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[5] See on this M. Krygier, “Law as Tradition”, (1986) 5 *Law and Philosophy*, 237 at 240–251.

[6] See Krygier, ibid at 241.

[7] Consider on this M. Krygier, “The Traditionality of Statutes”, (1988) 1 *Ratio Juris*, 20.

inherited sacred texts as interpreted by certain designated individuals, legal traditions ascribe authority to particular texts and have both long-established rules of interpretation and an authoritative community of interpretation.[8] The role of the past in the legal reasoning process is a complex one. Notwithstanding the emphasis laid on the requirement of continuity as a basis for justifying decisions in the present, law is in a perpetual state of evolution and transformation. Law responds to and is shaped by developments in the society of which it is an integral part. As society progresses the legal system must keep pace. Often change in the law is subtle with judges modifying or extending the relevant rules to adapt them to current needs while declaring that their decision stands in historic continuity with the past. Sometimes change occurs more abruptly. One might say that in the domain of law the past is a source of ongoing authority and guidance, but it is construed through the eyes of the present. History also involves a process of construing past events through the eyes of the present.[9] Yet, law differs from history in that it is concerned not with historical precision but with the meaning attached to the past by later generations. In law, what matters most is not what the law was in the past, but what it has been taken to be by authoritative interpreters, who might reinterpret the past to conform to the needs of the present. What has been said so far suggests that legal traditions are dynamic rather than static, for the continuities between past and present do not rule out progress and change. As Krygier has remarked, legal traditions are characterized by "a dialectical interplay between inherited layers which pervade and mould the present, and the constant renewals and reshaping of these inheritances, in which authorized interpreters and

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[8] For a comparative analysis of law and religion see H. Berman, *The Interaction of Law and Religion* (London 1974).

[9] See E. H. Carr, *What is History?* (Harmondsworth 1964), 29–30.

guardians of the tradition and lay participants indulge, and must indulge."[10]

The third element of a legal tradition is that it is transmitted through generations. It is a distinctive feature of a tradition that there is a strong pressure to conformity with certain values and standards of conduct. Acceptance in the higher echelons of the legal profession depends on adherence to the tradition's cultural norms, linguistic patterns, modes of reasoning, rituals and codes of conduct. In this way, the tradition is both maintained and transmitted to successive generations of acolytes. Legal traditions evolve in pursuance of efficiency, order and societal consensus and, as the values and circumstances of society change, a tradition's norms will tend to adapt accordingly. However, it is intrinsic to the nature of a tradition that the change is piecemeal: traditions evolve and progress occurs continually over generations, with each generation building on the heritage of its predecessors.[11] If fundamental values and standards are jettisoned and discontinuity with the past prevails, there will come a point at which the tradition itself withers away. If such a dramatic event occurs, it may be a very long time before a new legal tradition takes shape and becomes part of society's fabric. One may ask: why is there such a stress within the legal order on the authority of the past to determine the present? And why is a tradition maintained and defended jealously, so that younger generations of jurists feel a pressure to conform to it? The preservation of the tradition is essential for the legitimacy of the legal and political order. Legal rules gain legitimacy from their location within a body of rules which represent the cumulative achievement of many generations. It is the recognition that the law as a whole represents a multi-generational achievement that gives the law its authority. Even if citizens disapprove individual legal rules,

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[10] M. Krygier, "Thinking Like a Lawyer", in W. Sadurski (ed.), *Ethical Dimensions of Legal Theory* (Amsterdam 1991), 68.

[11] See H. Berman, *Law and Revolution* (Cambridge, Mass., 1983), 5.

or perceive injustice in particular cases, the traditionality of law is a factor giving the law a sufficient level of acceptance to operate as arbiter in conflicting claims. The shared acceptance of the legal tradition provides a focal point for unity in the face of the very conflicts which the law is relied on to resolve.

In today's globalized world legal traditions do not exist in isolation from one another but contribute to one another through the continuous exchange of information, ideas and models. The more intense and pervasive forms of communication today have engendered more permeable the boundaries of legal traditions than at any time in the past. Furthermore, while the legal traditions of the world are inevitably open to external influence, they should also be capable of accommodating internal diversity. Indeed, it is through reconciliation of considerable internal diversity that the major legal traditions have succeeded in expanding their influence around the world. The reconciliation of diversity and contradiction within the framework of each legal tradition is one of the most important tasks that traditions face, and all major traditions have developed doctrines for dealing with inner differences and conflicts.[12]

The term 'legal tradition' is sometimes used interchangeably with the term 'legal culture', although the two notions do not entirely overlap.[13] 'Legal culture'

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[12] For example, the Islamic tradition recognizes the doctrine of *ikhtilaf*, or diversity of doctrine ('the tree of many branches'). In the common law the terms Anglo-American law, Anglo-Canadian law, Anglo-Indian law and such are used to bridge national variations, and to remind lawyers and scholars working in the relevant systems that they participate in a larger enterprise. In the Civil law the same purpose is served by the notion of the Romano-Germanic legal tradition. Similarly, the Asian legal tradition is underpinned by the philosophical doctrine of the interconnection and interdependence of all things ― a doctrine fundamental to Buddhism and implicit in most Confucian thinking. See H. P. Glenn, "Are Legal Traditions Incommensurable?", (2001) 49 *American Journal of Comparative Law*, 133 at 142.

[13] According to J. H. Merryman, one can use the term 'legal culture' when referring to a specific legal system, and 'legal tradition' when referring to a historically related group of legal

is a multi-dimensional term, which is employed in sociological and anthropological studies of law. It is closely connected with the broader concept of culture, defined as "the set of distinctive spiritual, material, intellectual and emotional features of society or a social group." As such "it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[14] According to the influential anthropologist Edward B. Tylor, culture is "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."[15] Clifford Geertz, another important anthropologist, takes a symbolic view of culture. He states that "man is an animal suspended in webs of significance he himself has spun." He takes culture to be "those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning."[16] In Geertz's framework, culture provides unity and regularity to a society, allowing people to frame their thoughts and experiences in intelligible ways and to communicate with one another.[17] Manfred Steger's definition of culture brings some of the above-mentioned perspectives together. He asserts that the "cultural" refers to "the symbolic construction,

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systems (e.g. the civil law tradition). "Comparative Law Scholarship", (1998) 21 *Hastings International and Comparative Law Review* 771, 776. As previously noted, the term 'legal tradition' can also refer to a particular system of law (e.g. the Italian legal tradition).

[14] UNESCO Universal Declaration on Cultural Diversity 2002.

[15] *Primitive Culture* I (London 1871), 5–6.

[16] C. Geertz, *The Interpretation of Cultures* (New York 1973), 5.

[17] As Geertz points out "The concept of culture I espouse …is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning." Ibid. And see C. Geertz, "Local Knowledge: Fact and Law in Comparative Perspective", in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York 1983).

articulation, and dissemination of meaning." He then goes on to explain that "given that language, music, and images constitute the major forms of symbolic expression, they assume special significance in the sphere of culture."[18]

Although culture involves production, including the creation of things like music and art, it also involves constraint, in the sense that it establishes a set of limits within which social behaviour must be contained or a set of models to which individuals must conform. Malinowski's definition of culture should be mentioned in this connection. According to this author, culture is "an instrumental reality, an apparatus for the satisfaction of fundamental needs, that is, organic survival, environmental adaptation, and continuity in the biological sense."[19] Furthermore, Malinowski describes the normative function as an inherent characteristic of all cultures. He points out that the absence of institutionalized legal norms in early or primitive societies should not lead one to conclude that in such societies "types of debate and quarrel, mutual recrimination and readjustment by those in authority" do not correspond to the judicial process in more highly developed cultures, for "even in primitive communities norms can be classified into rules of law, into custom, into ethics and into manners."[20] Transgressing cultural norms may evoke disciplinary responses from society, the most extreme of which might include imprisonment and execution. However, social cues, such as glares, ridicule, or looks of pity, are a far more common way of encouraging adherence to cultural norms. We might conclude that culture is a system of symbolic meaning with features distinctive to a society or a social group, that forms the basic, common model for the beliefs, values and opinions held by its

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[18] M. Steger, *Globalization: A Very Short Introduction* (Oxford and New York 2003), 69.

[19] B. K. Malinowski, *The Dynamics of Culture Change: An Inquiry into Race Relations in Africa* (New Haven 1945), 44.

[20] See Malinowski, ibid at 44–45.

members. Each society, based on the historical experience of the people in question, chooses a set of meanings especially significant and fundamental for it and systematizes them, thus producing its culture. This symbolic system forms a basic framework for cognition and evaluation for the society's members, and is preserved and transmitted through the processes of socialization. Members of society internalize this framework and then gradually develop their own values, attitudes, beliefs and opinions based on it. In the sphere of law, culture manifests itself in the concept of law, and more generally in the notion of social order prevalent in a society.[21]

Law and legal systems are cultural products, like language, art and family arrangements. In the words of a commentator, "they form a structure of meaning that guides and organizes individuals and groups in everyday interactions and conflict situations. This structure is passed on through socially transmitted norms of conduct and rules of decisions that influence the construction of intentional systems, including cognitive processes and individual dispositions. The latter manifest themselves as attitudes, values, beliefs, and expectations."[22] Viewing law as culture implies that law is more than simply a body of rules or institutions; it is also a social practice within a legal community. It is this social practice that shapes the actual meaning of the rules and institutions, their relative weight, and the way they are implemented and operate in society. But law is not an isolated social practice; it is an aspect of the broader culture to which it belongs. Understanding law presupposes knowledge of the social practice of the legal community and this, in turn, implies familiarity with the general culture of the society in which the

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[21] See G. Jaeger and P. Selznick, "A Normative Theory of Culture", (1964) 29 *American Sociological Review*, 653.

[22] G. Bierbrauer, "Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese and Germans", (1994) 28 *Law and Society Review*, 243.

legal community is a part.[23] The relationship between law and culture is characterized by continual interaction and interdependence.[24] One might say that law is an element of the culture of a society that both impacts upon culture and is permeated by it.[25]

Several definitions of legal culture are found in the relevant literature.[26] Blankenburg and Bruinsma, for example, define legal culture in terms of the interplay of all four levels of legal phenomena: law in the books, comprising both substantive and procedural law; the institutional infrastructure (judicial system and legal profession); patterns of legally relevant behaviour (e.g. legal transactions); and legal consciousness.[27] John Bell defines legal culture as "a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts."[28] According to Lawrence Friedman, one of the first scholars to advocate the use of the term 'legal

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[23] See M. van Hoecke and M. Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", (1998) 47 *International and Comparative Law Quarterly* 495, 498.

[24] See on this M. E. Mayer, *Rechtsnormen und Kulturnormen* (Breslau 1903), 24; K. H. Fezer, *Teilhabe und Verantwortung* (Munich 1986), 22.

[25] As J. H. Merryman observes, "Law is, among other things, a cultural expression; ideas about law are a deeply rooted, historically conditioned component of the culture. Such ideas powerfully limit and direct thinking about what law is and about the proper composition and operation of the legal system. Legal culture can be thought of as the inner logic of the legal system." "Comparative Law Scholarship", (1998) 21 *Hastings International and Comparative Law Review* 771, 776. See also A. Visegrády, "Legal Cultures in the European Union", (2001) 42 *Acta Juridica Hungarica* 203, 204–205; H. W. Ehrmann, *Comparative Legal Cultures* (Englewood Cliffs, NJ, 1976), 6 ff.

[26] See J. L. Gibson & G. A. Caldeira, "The Legal Cultures of Europe", (1996) 30 *Law and Society* Review 55, 55 ff.

[27] E. Blankenburg and F. Bruinsma, *Dutch Legal Culture* (Deventer and Boston 1991), 8–9.

[28] J. Bell, "English Law and French Law ─ Not So Different?", (1995) 48 *Current Legal Problems*, 70.

culture', legal culture consists of the "attitudes, values and opinions held in society relating to legal system or legal processes".[29] Elsewhere Friedman refers to legal culture as the "ideas, values, expectations and attitudes towards law and legal institutions which some public or some part of the public holds."[30] He notes, further, that legal culture may be seen as embodying two aspects: an 'external' (lay) and an 'internal' (professional).[31] External legal culture embraces the opinions, judgments, conceptions and beliefs of the general population on the legal system and its actual rules and institutions. What he refers to as 'claims consciousness' pertains to the eagerness or reluctance of the general population to involve themselves in litigation. Internal legal culture, on the other hand, encompasses the ideology, principles, values, knowledge of legal terminology and interpretations of those members of society who perform specialized legal tasks, i.e. advocates, judges, legal scholars etc. Legal specialists perform a two-fold function: they are influenced by and reproduce the legal culture to which they belong and, at the same time, may give rise to new attitudes or values about law, thus creating legal culture. Legal culture, like societal culture in general, is a result of historical evolution. The current state of a legal culture is always between tradition and innovation. The study of legal culture should embrace not only formal legal rules and institutions, but also informal norms, insofar as the latter are observed by the general population or the legal professionals, or both.

Friedman connects external legal culture to the legal system by maintaining that legal culture converts the interests of influential social actors into demands, or it makes possible this conversion. Demands exert pressure on the legal system and

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[29] L. M. Friedman, *Law and Society: An Introduction* (Englewood Cliffs, N. J. 1977), 103. See also, L. M. Friedman, "Is There a Modern Legal Culture?", (1994) 7 *Ratio Juris* 117.

[30] "The Concept of Legal Culture: A Reply", in Nelken (ed.), *Comparing Legal Cultures* (Brookfield, Vt., 1997), 34.

[31] See Friedman, *Law and Society: An Introduction*, supra note 29, 76.

instigate the creation of new legal norms. To put it otherwise, the legal culture acts like a filter, which transforms interests into demands or makes this transformation possible. However, Friedman asserts that external legal culture can effect change on the legal system only if such change is compatible with the requirements of internal legal culture.[32] In describing the relationship between general social culture and the legal system, one might say that when social culture penetrates the legal system and influences its functions, it becomes legal culture. Atiyah and Summers refer to a "vision of law as a set of inarticulate and perhaps even unconscious beliefs held by the general public at large and, to some extent, also by politicians, judges and legal practitioners, as to the nature and function of law ─ how and by whom it should be made, interpreted and enforced."[33] This way of looking at law appears to largely coincide with Friedman's description of legal culture, but it is more inclusive since both external and internal legal culture are embraced by the term 'vision of law'.

Diverse legal cultures could coexist within the same society. The term 'legal pluralism' is used to describe this situation.[34] Friedman defines legal pluralism as "the existence of distinct legal systems or cultures within a single political community." He then goes on to distinguish between *horizontal* legal pluralism, when subcultures or subsystems have equal status and legitimacy (as, e.g., in a federal state), and *vertical* legal pluralism, when subcultures or subsystems are arranged in a hierarchical order (as, e.g. in colonial or imported legal systems).[35]

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[32] L. M. Friedman, *The Legal System: A Social Perspective* (New York 1975), 193–222.

[33] R.S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law, A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford 1987), 411.

[34] For a closer look at legal pluralism consider: M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford 1975); J. Griffiths, "What is Legal Pluralism?," (1986) 18 (24) *Journal of Legal Pluralism and Unofficial Law*, 1.

[35] L. M. Friedman, *The Legal System: A Social Perspective*, supra note 32, 196–197.

In the latter case, each socio-legal entity is engaged in an internal struggle to maintain and reshape its legal culture under an integrating national legal order.[36] If the existing socio-legal entities fail to assert themselves or retreat gradually until they vanish, then *legal acculturation* sets in.[37] If, on the other hand, the socio-legal entities succeed in adapting themselves to the new legal environment, they may coexist with the dominant legal order under the disguise of informal law or custom. They may even, under certain circumstances, prevail upon imported law, which might fall into disuse, or they may form a new legal culture together with the imported legal system.

The notion of legal culture has been subjected to the criticism that it lacks specificity and is therefore unreliable as a tool of comparative legal research.[38] In response to this criticism, Friedman maintains that general concepts, such as legal culture, legal system, legal doctrine, public opinion, standard of living etc. are widely used, serving as general categories under which more specific concepts are

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[36] Consider on this issue M. Chiba, "Legal Pluralism in and Across Legal Cultures", in *Monismus oder Pluralismus der Rechtskulturen? Anthropologische und ethnologische Grundlagen traditioneller und moderner Rechtssysteme/Monistic or Pluralistic Legal Culture? Anthropological and Ethnological Foundations of Traditional and Modern Legal Systems, Rechtstheorie: Zeitschrift* für *Logik, Methodenlehre, Kybernetik* und *Soziologie* des *Rechts*, edited by P. Sack, P. Carl Wellman and M. Yasaki, (Berlin 1991), Beiheft 12, 283–306.

[37] See on this matter D. Manai, "Acculturation", *Dictionnaire Encyclopédique de Théorie et de Sociologie du Droit*, edited by A.-J. Arnad, 2nd ed., (Paris 1993), 3. According to this author, acculturation is a dynamic and global process, which has two complementary aspects: the heterogeneousness of the cultures that come into contact with one another, and the prevalence of one of them over the others. Consider also M. Alliot, "L'acculturation juridique", in J. Poirier (ed.), *Encyclopédie de la Pléiade ― Ethnologie générale* (Paris 1968), 1181.

[38] Consider, e.g., R. Cotterrell, "The Concept of Legal Culture", in D. Nelken (ed.), *Comparing Legal Cultures* (Aldershot 1997), 13–32. Cotterrell asserts that the notion of legal culture is useless in comparative legal sociology and therefore could be substituted by the notion of 'legal ideology'.

subsumed. According to him, legal culture is an umbrella term that covers a range of observable and measurable (although not always measured) phenomena. Of course, people's ideas or values about the nature and functions of law may vary, but there are detectable patterns in the distribution of such ideas or values. Friedman remarks that "legal culture is a generic term for states of mind and ideas held by some public; these states of mind are affected by events, situations and the like in society as a whole, and they lead in turn to actions that have an impact to the legal system itself."[39]

As previously noted, Friedman defines external legal culture as the opinions, appreciations, conceptions and beliefs of the general population about the positive law rules of the actual legal system. This definition is very broad in scope embracing all positive law rules within a legal system. However, depending on the nature and scope of the study at hand, the notion of legal culture can be applied to a particular legal rule, institution or other aspect of the legal system under consideration. According to Friedman, internal legal culture embraces the ideas, conceptions and beliefs of legal specialists about the rules of positive law within a legal system. It is true that legal professionals, because of their specialised knowledge of the law and their everyday involvement with legal issues, acquire a different attitude towards the law than lay people. However, as legal experts live within and are part of the general population, their attitude towards law is to some extent influenced by common perceptions about law. In other words, there is an interaction between the internal and external aspects of legal culture. This interaction should be taken into account when one considers the meaning and function of a particular rule or institution of the legal system. Indeed, the notion of legal culture is most useful when one compares specific legal concepts, rules or

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[39] L. Friedman, "The Concept of Legal Culture: A Reply", in D. Nelken (ed.), *Comparing Legal Cultures* (Aldershot 1997), 33 at 35.

institutions found in two or more legal systems.

Grouping Legal Systems into Families of Law

Comparative law scholarship has an extensive tradition of categorizing systems of law into broader legal families of kinship and descent.[40] The classification of legal systems into families is primarily a pedagogical instrument, which is designed to facilitate the comparative study of laws by providing scholars with a general overview of the bewildering diversity of the world's legal systems. The starting-point of such classification is the observation that while national legal systems differ considerably with respect to the contents of specific rules and forms of procedure, their differences appear to diminish when examined from the perspective of their broader societal culture; historical origins and development; legal ideology; mental attitudes and modes of legal thinking; legal terminology; and the hierarchy and interpretation of legal sources.[41] The division of legal systems into families fosters the comparative study of law as it allows one to examine such systems from the viewpoint of their general characteristics, style or orientation. Apart from its practical importance, the division of legal systems into broader families has great value to legal theory, as it requires a more spherical or comprehensive knowledge of law as a social phenomenon. Not only is comparative law a method of legal research but it can also be regarded as an independent branch of legal science partly because it addresses broad theoretical

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[40] See G. Dannemann, "Comparative Law: Study of Similarities or Differences?", in M. Reimann & R. Zimmerman (eds), *The Oxford Handbook of Comparative Law*, 2nd ed., (Oxford 2019), 390, 393.

[41] See G. Winterton, "Comparative Law Teaching", (1975) 23 *American Journal of Comparative Law*, 69.

issues surrounding the categorization of the world's legal systems. The problem of classifying legal systems into families has been the subject of discussion and debate among scholars since the late nineteenth century. Although the proposed classifications were revised in light of developments in Russia and other Eastern European nations, the traditional conceptual framework of legal families remains relevant for describing legal reality in the world today.

Although some scholars sought to base the classification of legal systems on a single criterion (e.g. historical origins, political and economic ideology), most comparatists today recognize that a useful classification should involve several criteria.[42] According to Constantinesco, several 'determinant factors' should be used together when allocating legal systems to groups or families. Among these factors he includes the concept and role of law; the predominant ideology; socio-economic and political realities and their relation to legal norms; the concept and role of the state; the fundamental rights of the citizen; the sources of law and their hierarchy; attitudes to legal interpretation; the status and role of judges; and, finally, legal concepts and basic categories of law.[43] One should note that even when a single, broad criterion is proposed, such as a system's general 'style', this

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[42] A classification drawing on a single criterion, such as political and economic ideology, may be meaningful but is not particularly useful as it places within the same group legal systems that are markedly different in many respects. Thus, a classification relying on political and economic ideology as the decisive criterion would place in the same broader family both the Continental European civil law and the common law systems, despite the structural and other differences between the two.

[43] L. J. Constantinesco, *Rechtsvergleichung* I (Köln and Berlin 1971), 262–265. Constantinesco suggests, moreover, that several legal families can together form a broader family (*Rechtskreis*). The latter constitutes an expression of one of the cultural civilizations (*Kulturkreis*) in which human societies may be divided. Consider "Die Kulturkreise als Grundlage der Rechtskreise", (1981) *Zeitschrift für Rechtsvergleichung*, 161–178; "Über den Stil der 'Stiltheorie' in der Rechtsvergleichung", (1979) 78 *Zeitschrift für vergleichende Rechtswissenschaft*, 154–172.

criterion would usually require the consideration of many interrelated factors. Depending on the nature and purposes of the comparative inquiry, the relevant criteria may also include geography, language and other cultural characteristics determining the people's general attitude towards law.

An early attempt at the classification of legal systems can be detected in the work of Christopher Saint German (1460–1540), who drew a distinction between Roman and English laws noting that what was perceived as natural law (*ius naturale*) in the former, recurred as reason in the latter.[44] In 1602 William Fulbeck described a legal world built on three types of law: Anglo-Saxon, European Continental and Canon.[45] Later in the same period, the German philosopher Gottfried Wilhelm von Leibniz (1646–1716) proposed a plan for the creation of what he referred to as 'the theatre of the legal world' (*theatrum legale mundi*), where the legal systems of all nations at different times would be portrayed and compared ― though this idea was never realized.

In 1880, Ernest Glasson, drawing on historical sources and on the basis of common characteristics of their laws, classified legal systems into three main categories: (i) those that are strongly influenced by Roman law, such as the Italian, Spanish, Portuguese, Romanian and Greek legal systems; (ii) those that are largely immune from Roman law influence and have their origins in customary law, such as the English, Scandinavian and Russian systems; and (iii) those that combine Roman and Germanic (or Barbarian) influence, such as the French, German and Swiss legal systems.[46] The principal criterion for Glasson's classification was a

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[44] C. Saint German, *Dialogus de fundamentis legum Anglie et de conscientia* (The Dialogue in English between a Doctor of Divinity and a Student in the laws of England) (London1528).

[45] W. Fulbeck, *Parallele or Conference of the Civil Law, the Canon Law, and the Common Law of this Realme of England* Parts I–II (London 1601–1602).

[46] Ernest-Désiré Glasson, *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*

system's proximity to Roman law. Interestingly, the author treats the English, Russian and Scandinavian legal systems, each of which would have belonged to a separate legal family according to contemporary schemes, as belonging to the same group. Furthermore, the French and German systems are assigned to the same category, separate from that of the Spanish, Portuguese and Italian systems that are today considered to be part of the French branch of the civil law family.[47]

In 1884, the Japanese jurist Hozumi, taking as his starting-point the recognition of the importance of the classification of legal systems as a methodological tool in comparative law, divided legal systems into five broad families: (i) Indian, (ii) Chinese, (iii) Islamic, (iv) Anglo-Saxon, and (v) Roman.[48]

At the 1900 International Congress on Comparative Law in Paris the taxonomy of the world's legal systems attracted a great deal of attention and came to be regarded as a key element of the emerging science of comparative law. At that Congress, Gabriel Tarde, a professor of Modern Philosophy at the College of France, emphasized the importance of legal family classifications as one of the principal goals of comparative law. As he pointed out, "under this new viewpoint, the task of comparative law is less to indefinitely collect exhumed laws than to formulate a natural ― that is, rational ― classification of juridical types, of branches and families of law."[49] Tarde's approach to the taxonomy of legal

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(Paris 1879), cxli + 273. And see M. Pargendler, "The Rise and Decline of Legal Families", (2012) 60 *American Journal of Comparative Law* 1043, 1047–1049.

[47] According to Constantinesco, Glasson was probably the first scholar to seek the relationship between the European legal systems in the common historical origins and development instead of their racial relationships. *Rechtsvergleichung* III *Die rechtsvergleichende Wissenschaft* (Köln 1983), 96–97.

[48] Y. Noda, "Le développement du droit comparé depuis 1868 et la situation actuelle des études comparatives du droit au Japon", in *Livre du Centenaire de la Société de législation compare. Un siècle droit comparé en France (1869–1969)*, (1969), vol 2, 423.

[49] G. Tarde, "Le droit comparé et la sociologie", in *Congrès international de droit comparé tenu*

systems drew heavily on comparative linguistics and biology. It may be regarded as an early articulation of an approach that would come dominate twentieth-century comparative law thinking. Whilst earlier classifications were meant simply to facilitate the description of different countries' legal systems, the formulation of a proper taxonomy now became the primary goal of comparative law scholarship.

While Tarde himself did not put forward a criterion for the classification of legal systems, Adhémar Esmein, a professor of law at the University of Paris, addressed this issue in his own contribution to the Paris Congress. Relying on language and ethnicity as his principal classification criteria, he proposed a division of Western legal systems into five main groups: (i) the Latin group, embracing the legal systems of France, Belgium, Italy, Spain, Portugal, Romania, and Central and South American countries; (ii) the Germanic group, comprising the legal systems of Germany, Austria, Hungary and Scandinavian countries; (iii) the Anglo-Saxon group, encompassing the legal systems of England, the United States of America and the British colonies and dominions; (iv) the Slavic group; and (v) the Muslim group.[50] Although Esmein's scheme resembles in some important respects some widely used later classifications, it came under heavy criticism and was soon forgotten.

In the early 1910s, French comparatist Georges Sauser-Hall proposed a new,

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à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents, Librairie générale de droit de jurisprudence (Paris 1905), 439–40. And see M. Pargendler, "The Rise and Decline of Legal Families", (2012) 60 *American Journal of Comparative Law* 1043, 1049–1050.

[50] Adhémar Esmein, "Le droit comparé et l'enseignement du droit comparé" in *Congrès international du droit comparé tenu à Paris du 31 juillet au 4 août 1900, Procès-verbaux des séances et document*s, Librairie générale de droit de jurisprudence (Paris 1905), 445 ff. And see M. Pargendler, "The Rise and Decline of Legal Families", (2012) 60 *American Journal of Comparative Law* 1043, 1050–1052.

ethnological taxonomy of legal systems using race as his principal classification criterion. On this basis he identified four broad legal families: (i) Aryan/Indo-European, including Hindu, Celtic, Greco-Latin, Germanic, Anglo-Saxon and Slavic legal systems; (ii) Semitic, embracing Jewish and Arabic-Muslim systems; (iii) Mongoloid, comprising Chinese, Indo-Chinese and Japanese systems; and (iv) Barbarian customary, encompassing African, Melanesian, Indonesian, Australian, Polynesian, American and Hyperborean native systems.[51] Taking the apparently immutable criterion of race as the basis of his classification, Sauser-Hall was critical of early comparatists' universalist vision which, according to him, ignored profound differences across peoples. Many later comparatists criticized Sauser-Hall's theory as failing to establish any causal relationship between race and law[52] and thus his approach was not pursued by other scholars.

In the interwar period, Henry Lévy-Ullmann was the first scholar to propose a classification of legal systems according to their sources of law. On this basis, he divided the world's systems into three broad groups: (i) Continental, based on written sources of law; (ii) English-speaking, based on customary law and developing through legal practice; and (iii) Muslim, having a religious basis and characterized by immobility.[53] This was the first clear articulation by a leading

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[51] Georges Sauser-Hall, *Fonction et méthode du droit comparé,* Leçon inaugurale faite à l'Université de Neuchâtel le 23 octobre 1912, (Genève 1913), 113 ff. See also M. Pargendler, "The Rise and Decline of Legal Families", (2012) 60 A*merican Journal of Comparative Law* 1043, 1052.

[52] See, e.g., L. J. Constantinesco, *Rechtsvergleichung* III *Die rechtsvergleichende Wissenschaft* (Köln 1983), 93; R. David, *Traité élémentaire de droit civil comparé* (Paris 1950), 155–157.

[53] Henri Lévy-Ullmann, "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) (Livre du cinquantenaire de la Société de législation comparée) (Paris 1923). And see M. Pargendler, "The Rise and Decline of Legal Families", (2012) 60 *American Journal of Comparative Law* 1043, 1052–1053.

comparatist of the basic civil law-common law dichotomy that prevailed in comparative law in later years.

In the same period, John Henry Wigmore, drawing on an extensive historico-comparative study, proposed a comprehensive taxonomy of legal systems embracing the enormous variety of past and contemporary systems: Mesopotamian; Egyptian; Hebrew; Chinese; Hindu; Greek; Roman; Japanese; Muslim; Celtic; Slavic; German; marine; Papal; Romanesque; and Anglican.[54]

Reference should also be made here to the 'juristic-historical' classification theory proposed by the Argentinian jurist Enrique Martinez-Paz. Drawing on Glasson's earlier theory, this author took as his starting-point the assumption that initially all legal systems possessed a high degree of originality. He then proceeded to consider how far the development of each system had been influenced by other systems, such as Roman law and Canon law, as well as by more recent 'democratic ideas'. On this basis, he identified four broad groups (*genera*) of legal systems: (i) the Barbaric-customary group; (ii) the Barbaric-Roman group; (iii) the Barbaric-Roman-Canonical group; and (iv) the Roman-Canonical-democratic group. This classification is based on 'generic' criteria pertaining to barbaric, Roman, feudal, Canonical and democratic juristic elements.[55]

The first in a series of classifications proposed during the half-century following World War II was that of Pierre Arminjon, Boris Nolde and Martin Wolff. These authors sought to lay the theoretical-methodological foundations of comparative law as a science rather than to merely describe the contemporary legal world. In this respect, they argued that "the task of comparative law as an autonomous

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[54] J. H. Wigmore, *A Panorama of the World's Legal Systems* I–III (Chicago 1928).

[55] E. Martinez-Paz, *Introducción al estudio del derecho civil comparado* (Córdoba, Argentina, 1934), 149–160.

science should have as its starting point the classification of the large number of the world's legal systems."[56] According to their theory of classification, there exist in the world certain 'model' or 'parent tree' systems whose legal rules and institutional structures were transplanted (often through military conquest or colonization) or adopted (by virtue of their perceived quality and prestige) in many countries around the world.[57] The authors assert that the crucial criterion for the classification of legal systems is the substantive content of laws; and this requires attention to originality, derivation and common elements, rather than to external factors, such as race or geography. From this point of view, seven legal families are identified: (i) French, (ii) German, (iii) Scandinavian, (iv) English, (v) Russian, (vi) Islamic, and (vii) Hindu.[58] According to critics, the above approach suffers from some serious flaws. For example, Malmström argued that the legal systems of European origin have several common features which justify their classification into a Western (European-American) group, embracing, in addition to the Romanist and Germanic systems, the common law, Nordic and Latin-American systems. According to this author, the socialist legal systems, the non-communist Asian systems and the African systems fall into a distinct group.[59] Zweigert and Kötz recognized that Arminjon, Nolde and Wolff's scheme was the most convincing to date (especially in its rejection of external factors), but criticized the authors for not clearly articulating the common qualities upon which the relationship between systems is based.[60] Moreover, the general distinction

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[56] P. Arminjon, B. Nolde and M. Wolff, *Traité de droit comparé* I (Paris 1950), 42.

[57] Ibid., at 47 ff.

[58] Ibid., at 42–53. The authors point out, however, that their proposed classification pertains primarily to private law.

[59] See in general A. Malmström, "The System of Legal Systems, Notes on a Problem of Classification in Comparative Law", (1969) 13 *Scandinavian Studies in Law*, 127, 145–146.

[60] K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung*, Band I: *Grundlagen*, 2nd

between civil law and common systems has not been included in this scheme.

René David has offered another approach to the classification of legal systems into families. According to his theory, originally proposed in 1950, the decisive criterion for such classification is ideology or philosophical worldview, which he considered as a product of religion, philosophy, and political, social and economic structures. Ideology is complemented by legal technique, which David regarded as a secondary criterion pertaining to the way in which philosophical theories and conceptions of justice are realized in positive law.[61] On this basis, David proposed the division of the world's legal systems into five groups or families: (i) Western law, grounded on Christian religious doctrine, liberal political philosophy and capitalist economic theory; (ii) Socialist law, based on Marxist-Leninist political and economic theory and ideology; (iii) Islamic law, founded on the teachings of the Koran and the Muslim religious tradition; (iv) Hindu law, based on the religious, philosophical and social system of Hinduism; and (v) Chinese law, underpinned by the politico-religious and moral philosophy of Confucianism.[62] Moreover, David proposed a division of the systems of the Western family into two sub-groups: the French and the English. However, the distinction between Continental European and common law traditions is conspicuously absent from this scheme. It is important to note that, in his treatise, David draws attention to the "inevitably arbitrary" nature of legal taxonomies, illustrating his claim by

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ed., (Tübingen 1984), 59.

[61] R. David, *Traité élémentaire de droit civil comparé* (Paris 1950), 8 and 214–226.

[62] A similar approach to the classification of legal systems was adopted by Sola Cañizares, who identified the following legal families: (i) Western (Christian but not authoritative); (ii) Soviet (atheist and collectivist); (iii) religious (derived from religious principles and including canonical, Hindu and Muslim laws); and (iv) Chinese (grounded on a quasi-religious philosophy in which the law is ethically coloured). See F. de Sola Cañizares, *Iniciación al derecho comparado* (Barcelona 1954), 330.

citing earlier comparatists' attempts to construct adequate classifications.[63]

Particularly interesting is the classification of legal systems that was proposed by Northrop in 1959. This author, drawing on cultural and historical knowledge, proposed the division of the world's legal systems into three broad groups: (i) intuitive mediational, including Confucian, Buddhist, Taoist, non-Aryan Hindu; (ii) those developed according to natural history, such as classic Chinese and ancient Indian/Aryan; and (iii) abstract contractual.[64] In the Far Eastern systems, described as intuitive mediational,

> "[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

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[63] R. David, *Traité élémentaire de droit civil comparé* (Paris 1950), 223. However, the author expresses his dissatisfaction with what he describes as "the traditional opposition, affirmed by all authors, between the Roman law system and the common law system." Id. 225.

[64] F. S. C. Northrop, *The Complexity of Legal and Ethical Experience, Studies in the Methods of Normative Subjects* (Boston 1959), 184.

situation … is the criterion of the just and the good."[65]

By contrast, in systems developed in accordance with natural history realistic universals are applied. As the author observes, in such systems

> "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."[66]

Finally, in systems of law grounded upon an abstract contractual ideal, there is some

> "technical terminology … permitting the construction of legal and social entities and relations …while... [the] identification of the ethical and the socially legal with abstractly and imaginatively constructed … human norms and relations … makes possible ethical and legal reform. … Because [in such systems] 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."[67]

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[65] Ibid., at pp. 184–185. As the author remarks on p. 186, "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".

[66] Ibid., at p. 186.

[67] Ibid., at pp. 188–189. And see Csaba Varga, "*Theatrum legale mundi*: On Legal Systems Classified," in *Comparative Legal Cultures* (Budapest 2012), 57–58.

Another approach to the classification of legal systems, also based on a historico-cultural perspective, was proposed by Adolf Schnitzer in 1961. According to this scholar, five great blocks of civilization may be discerned: (i) primitive peoples; (ii) ancient cultured peoples (Egypt, Mesopotamia, Ancient Greece, Rome); (iii) European-American (including Romanist, Germanic, Slavic and Anglo-American); (iv) religious (Jewish, Christian, Islamic); and (v) Afro-Asian (Asian, African). Within these blocks, each and every 'great cultural circle' [*große Kulturkreise*] could generate a corresponding 'circle of law' [*Rechtskreis*].[68]

About the same time, Konrad Zweigert published his well-known theory of classification, which had a great deal in common with that formulated by Arminjon, Nolde and Wolff in the 1950s. Zweigert's proposed criterion for the grouping of legal systems into families is 'style' (*Rechtsstil*), a multi-faceted or multi-dimensional criterion shaped by the interaction of the following factors: a) the historical background and development of a system; b) its predominant and characteristic mode of legal thinking; c) its distinctive legal institutions; d) the hierarchy and interpretation of its legal sources; and e) the ideological background of the system. On this basis he divided the legal systems of the world into eight groups or families: (i) Romanistic, (ii) Germanic, (iii) Nordic (Scandinavian), (iv) Anglo-American, (v) socialist, (vi) Far Eastern, (vii) Islamic, and (viii) Hindu.[69] According to Zweigert, any taxonomy depends largely on the particular period of which one is speaking and that, therefore, the classification of the world's legal systems into families is susceptible to change as a result of legislative reform or

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[68] A. F. Schnitzer, *Vergleichende Rechtslehre* I, (Basel 1961), 133 ff.

[69] K. Zweigert, "Zur Lehre von den Rechtskreisen", *20th Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema* (Leyden 1961), 45 ff; see also K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 68–75. Consider also K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* I: Grundlagen (Tübingen 1971), 69 and 74.

other events.

At a time when the Cold War was at its height, Gorla argued that the distinction between capitalist and socialist law overshadowed that between civil law and common law. According to this author, the difference that existed between Continental and Anglo-Saxon legal systems was merely formal, whilst the difference between these and socialist systems was one of substance.[70]

In the early 1960s, David, without abandoning his original criteria, modified his earlier classification of legal systems in response to criticisms levelled at aspects of his theory, especially by German scholars objecting to his view that the German system should be included in the French sub-group. He reclassified the legal systems of the world into four broad families: (i) the Romano-Germanic (commonly referred to as the civil law family); (ii) the Anglo-American or common law; (iii) the socialist; and (iv) the family of legal systems based on religious and traditional grounds. Within the last group he included Islamic law, Hindu law and the indigenous legal systems of Eastern Asia and Africa.[71] As previously noted, David's taxonomy is based on two mutually supplementing classification criteria, namely legal technique (including vocabulary, concepts, hierarchy of the sources of law, and juridical methods) and philosophical, political or economic principles desired to be implemented. He points out that "[t]he two criteria are to be used subsequently and not in isolation."[72] In this respect, one is

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[70] As the author points out, "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." G. Gorla, 'Intérêts et problèmes de la comparaison entre le droit continental et la Common Law', (1963) 15 *Revue internationale de Droit comparé*, 5–18 at 9.

[71] R. David, *Les grands systèmes de droit contemporains* (Paris 1964). And see R. David and J. Brierley, Major Legal Systems in the World Today, 3rd ed., (London 1985), 22–31, 33 ff.

[72] R. David *Les grands systèmes de Droit contemporains* (Paris 1964), 16.

invited to consider whether a lawyer educated in a particular legal system should be able to work without great difficulty within another legal system. If the answer is affirmative, one should conclude that the two systems probably belong to the same broader family. According to David, legal technique is subordinate to the ideological criterion. Despite their similarities with respect to legal technique, two or more systems cannot be regarded as belonging to the same family if they are based on markedly different ideologies. Thus, while David recognizes the existence of considerable differences between civil law and common law systems, he argues that these differences exist at what is essentially a technical, not an ideological, level. He asserts that both systems reach essentially similar legal results by means of different technical methods.[73]

Reference should also be made here to the theory of classification put forward by Ake Malmström in 1969. Drawing largely on a historical perspective, this author distinguished between (i) Western legal systems, including Continental European, Latin American, Nordic and Anglo-Saxon, (ii) Socialist (or Communist) systems, including Soviet, people's democracies and Chinese, (iii) Asian (non-Communist), and (iv) African.[74] This was the most enlarged scheme since David's early attempt in 1950, and the first to clearly recognize the legal systems of Latin

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[73] As he notes in his earlier treatise, "the opposition between continental and common law cannot be scientifically placed at the same level as that between French and Chinese law; it permits no more than to establish a division, albeit fundamental, within a legal system whose unity is recognized and affirmed: the Western legal system. It is only by an error of perspective that Anglo-American law, and with even greater reason German law, was until now considered as constituting separate categories enjoying perfect autonomy in relation to French law." *Traité élémentaire de droit civil comparé* (Paris 1950), 225.

[74] A. Malmström, "The System of Legal Systems: Notes on a Problem of Classification in Comparative Law", (1969) 13 *Scandinavian Studies in Law*, 127–149. See also Csaba Varga, "*Theatrum legale mundi*: On Legal Systems Classified," in *Comparative Legal Cultures* (Budapest 2012), 63.

America as belonging to the Western legal family.

In the early 1990s, following the decline of socialism in Europe, the Czech comparatist Viktor Knapp argued that three legal families exist: (i) the Continental European or Civil law family; (ii) the Anglo-American or Common law family; and (iii) the Islamic family. According to him, the Eastern European legal systems belong to the Continental European group.[75]

Michael Bogdan argued that Socialist law did not entirely disappear but regarded Chinese law as a distinct system. According to his proposed scheme, one should distinguish between English, American, French, German, Socialist, Chinese and Islamic legal systems.[76]

Van Hoecke and Warrington proposed a classification of legal families into two very broad groups, namely Western and non-Western (Asian, Islamic and African).[77] This, rather simplistic, approach is of little use as it places in the same category immensely diverse systems that have very little in common beyond merely being 'non-Western'.[78]

A far more sophisticated scheme was proposed by Patrick Glenn who, by drawing on the concept of tradition, sought to distinguish between different philosophical and historical patterns of thought, starting with what he refers to as *chthonic* (i.e., ancient, primitive, organic (*chthōn* = earth) model of order. Thus, according to this author, a distinction should be made between Chthonic,

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[75] V. Knapp, *Základy srovnávací právni vedy* (Prague 1991), 52–53, 58.

[76] M. Bogdan, *Comparative Law* (Stockholm 1994), 245 pp.

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

[78] See Csaba Varga, "*Theatrum legale mundi*: On Legal Systems Classified", in *Comparative Legal Cultures* (Budapest 2012), 66–67.

Talmudic, Civil Law, Islamic, Common Law, Hindu and Asian systems.[79]

The Italian comparatist Ugo Mattei observes that the traditional classifications of legal families are primarily Eurocentric and tend to neglect other legal systems. He proceeds to propose three patterns, which are decisive for a new classification of legal systems: law in the Western sense, politics and philosophical and religious tradition. On this basis, he proposes a tripartite taxonomy of legal families. The first legal family, associated with the Western legal tradition, is characterized by the prevalence of *professional law* and is based on the separation of legal and political decision-making and the secularisation of law; the second is marked by the dominance of *political law* (law of development), a product of the interaction among law, public policy and administration, and politics ― this is described as 'unstable' and incudes former Socialist, Southern European, unestablished African and South American systems; and the third is characterized by the preponderance of *traditional law* and includes Islamic, Indian, Hindu and other Asian and Confucian systems.[80] The pattern that holds the dominant role within a legal system determines the legal family to which that system belongs. It should be noted that, according to Mattei, all three patterns may exist in any legal system, but only one is predominant. Thus, he talks of the Chinese system as belonging to the family characterized by the dominance of traditional law, but developing toward the political, whilst the Japanese system, which is also influenced by traditional law, is developing towards the professional.[81] Furthermore, Mattei

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[79] H. Patrick Glenn, *Legal Traditions of the World*: *Sustainable Diversity in Law* (Oxford 2000). Consider also H. Patrick Glenn, "Comparative Legal Families and Comparative Legal Traditions", in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law,* 2nd ed., (Oxford 2019), 423.

[80] See U. Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems", (1997) 45 (1) *The American Journal of Comparative Law*, 5.

[81] Ibid., at p. 40.

points out that legal systems are not internally homogenous and therefore "[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."[82] This author's approach to the classification of legal systems, useful though it may be for educational purposes, remains very schematic. In fact, it is not substantially different from some of the traditional classifications of legal systems mentioned earlier, even though legal families are renamed. For instance, it subsumes under the same category the Chinese and Japanese legal systems, since both have been influenced by Confucianism, although they have followed different paths as far as political development is concerned.[83]

It is submitted that the classifications of legal systems into families proposed by comparative law scholars cannot be regarded as strict or exhaustive.[84] Further, one cannot discern a single answer to the question as to which criterion (or criteria) ought to be used for grouping legal systems into families. As the classification of legal systems is primarily a tool designed to facilitate the comparative study of laws, much depends on the nature, scope and purpose of each particular study. For instance, if the comparative study aims to explore the influence of religious factors on law, one would focus on religion as the basic criterion for classification and thus may distinguish between Islamic, Hindu and Jewish law, on the one hand, and the law of the Western secular societies on the other. If the aim of the study is

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[82] Ibid., at p. 16.

[83] Csaba Varga, "*Theatrum legale mundi*: On Legal Systems Classified," in *Comparative Legal Cultures* (Budapest 2012), 67–68.

[84] As Malmström notes, "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." "The System of Legal Systems: Notes on a Problem of Classification in Comparative Law", (1969) 13 *Scandinavian Studies in Law*, 127 at 138.

to examine indigenous or native legal systems, it is useful to contrast the legal systems composed of customary or unwritten law with those that rely on written law. One must keep in mind, in other words, that the grouping of legal systems into families of law is not an end in itself. It is connected with a particular purpose or purposes and a classification that is suitable for one purpose may not be helpful in another connection.[85]

It should be mentioned, further, that the borderlines between the various sub-groups or sub-families identified by some scholars are ill-defined or vague, and thus it is often difficult to identify with certainty which sub-group a legal system belongs to. Special difficulties are presented by the so-called 'mixed' or 'hybrid' legal systems, that is systems whose development has been influenced by two or more legal families.[86] This category embodies, for example, the legal systems of Québec (French and English influence);[87] Louisiana (French and American

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[85] Consider on this matter M. Bogdan, *Comparative Law* (Stockholm 1994), 85; R. B. Schlesinger, *Comparative Law: Cases, Text, Materials*, 3rd ed., (Mineola, New York 1970), 252.

[86] A 'mixed' or 'hybrid' legal system is the result of an encounter of legal systems of diverse socio-legal cultures. For a detailed discussion of mixed legal systems see J. Du Plessis, "Comparative Law and the Study of Mixed Legal Systems", in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 2nd ed., (Oxford 2019), 474. And see V. V. Palmer, "Introduction to Mixed Jurisdictions", in V. V. Palmer (ed.) *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2nd ed., (Cambridge 2012), 3; J. McKnight, "Some Historical Observations on Mixed Systems of Law", (1977) 22 *Juridical Review*, 177; L. G. Baxter, "Pure Comparative Law and Legal Science in a Mixed Legal System", (1983) 16 *Comparative and International Law Journal of Southern Africa*, 84; E. Örücü, "Mixed and Mixing Systems: A Conceptual Search", in E. Örücü, E. Attwooll and S. Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (London 1996), 344.

[87] See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 121–122. Consider also D. Lemieux, "The Quebec Civil Law System in a Common Law World: The Seven Crises", (1989) 34 *Juridical Review*, 16.

influence);[88] and South Africa (Dutch and American influence).[89] Moreover, the legal systems of many countries in Asia and Africa constitute a mixture of traditional local law, religious elements and the law imported from European countries during the colonial period or in more recent times.[90] Interesting classification problems arise also in connection with legal systems in a process of transition, such as those of Eastern European countries in the period following the demise of socialism. These considerations suggest that the members of any legal family are themselves subject to evolution, a fact that is not always contemplated by the various approaches to the notion of legal family offered by scholars. The methods of classification proposed do not lead to unanimous results and consigning a legal system to a particular legal family can lead to serious misconceptions. The classification of East Asian legal systems may be referred to in this connection.

David, Zweigert and Kötz list the People's Republic of China, Japan, Korea and Indo-China as members of the 'Far Eastern legal Family'.[91] They argue that the old Chinese doctrines of Confucius (551–479 BC),[92] which emphasise social,

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[88] Zweigert and Kötz, ibid., at 119–121. And see C. Osakwe, "Louisiana Legal System: A Confluence of Two Legal Traditions", (1986) 34 *American Journal of Comparative Law*, 29.

[89] Zweigert and Kötz, ibid., at 240–244. Consider also R. Zimmermann & D. Visser, "Introduction: South African Law as a Mixed Legal System", in R. Zimmermann & D. Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Oxford 1996), 1.

[90] Consider F. Reyntjens, "Note sur l'utilité d'introduire un système juridique 'pluraliste' dans la macro-comparison des droits", (1991) 68 *Revue de Droit Internationale et Droit Comparé*, 41–50.

[91] The term "Far Eastern" is said to be problematic since it implies a Eurocentric perspective. A purely geographic notion, such as "East Asian" would be more neutral and therefore preferable.

[92] Confucianism is a complex system of moral, social, political, philosophical, and quasi-religious thought that has had tremendous influence on the culture and history of East Asia. The basic teachings of Confucianism stress the importance of education for moral

group or community harmony rather than individual interests, have been very influential in all these societies, with the consequence that individuals tend to avoid litigation in favour of compromise and conciliation. Their classification of the East Asian legal systems into the same legal family is thus based on what they regard as a common culture. One might argue, however, that it is simplistic to emphasize culture at the expense of political and economic factors as the principal classification criterion. Consider Japanese law, for instance. The Japanese legal system has been variously classified as part of the 'Far Eastern' legal family, described as a 'civil law' system based on German law, and treated as a 'unique hybrid of different legal systems'. These different approaches to the classification of the Japanese legal system suggest that the classification process is more arbitrary, subjective and open to manipulation than traditional comparatists are prepared to recognize. One should keep in mind, moreover, that as the proposed classifications concern national systems in their entirety, they do not always coincide with classifications referring to specific branches of law, or classifications attempted in the framework of micro-comparative legal studies. For example, if one ventures a classification from the viewpoint of constitutional law, one may distinguish between federal systems, such as the United States, Germany, Australia and Switzerland, and unitary systems, such as France, Japan, Egypt and New Zealand. Furthermore, one may place the American, Italian and German systems into the same group on the basis that all these systems recognize the judicial review of the constitutionality of legislative enactments. As the above examples indicate, with respect to a particular branch of public or private law, a

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development of the individual so that the state can be governed by moral virtue rather than by coercive laws. Relationships are central to Confucianism, as particular duties arise from one's situation in relation to others. Social harmony, the ultimate goal of Confucianism, results from every individual knowing his or her place in the social order and playing his or her part well.

system may be allocated to one group or 'family' in a narrow sense and allocated to another with respect to a different branch.

Concluding Remarks

Concepts such as legal tradition and legal culture are flexible tools that can be applied to all areas of legal research. In the field of comparative law, the study of legal culture seems necessary when it comes to defining the object of comparison, especially in cases where strict comparison of legal texts appears inadequate. In the age of globalization, when the traditional classifications of legal systems into families of law have lost much of their earlier appeal, the notion of legal culture has grown in importance.[93] In general, the notion of legal family is relied upon when formal laws and legal institutions are compared. However, this notion cannot adequately explain the attitudes, perceptions and forms of behaviour associated with law as a socio-cultural phenomenon.[94] The study of legal culture can more surely reveal fundamental similarities and differences among legal

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[93] The study of legal culture shows that the divergence even within the same legal family is considerable. See, e.g., E. Blankenburg, "The Infrastructure of Avoiding Civil Litigation-Comparing Culture of Legal Behaviour in the Netherlands and West Germany", (1994) 28 *Law and Society Review*, 789. On the notion of global culture consider R. Robertson, *Globalization: Social Theory and Global Culture* (London 1992). Consider also M. Ancel, "Le comparatiste devant les systèmes (ou familles) de droit", in *Festschrift fur Konrad Zweigert*, eds. H. Bernstein, U. Drobnig and H. Kötz (Tübingen 1981), 355. And see C. Varga, "Comparative Legal Cultures?", (2007) 48 (2) *Acta Juridica Hungarica*, 95.

[94] As Lawrence Friedman remarks, the traditional classifications of legal systems may be useful in many ways, but without a knowledge and understanding of legal culture their structures and substance are merely 'lifeless artefacts'. *Law and Society* (Englewood Cliffs, N.J., 1977), 76.

systems, including systems that belong to the same legal family.

Contemporary comparatists have embraced the view that the basic methodological principle of comparative law is functionality, according to which only legal rules and institutions that fulfil the same function can fruitfully be compared. As Zweigert and Kötz remark, the legal system of every society has to solve essentially the same problems. The means by which these problems are addressed in each legal system may be quite different, but the results are often very similar.[95] This approach to the matter seems to overlook the decisive role that legal culture can play with respect to the results arrived at. Two legal rules that supposedly fulfil the same function in two different cultural settings may very well lead to diverse results, due to the fact that in each cultural setting the relevant rules are understood and applied differently. This observation has prompted some comparatists to argue that comparison among legal families should be substituted by a thorough study of different legal cultures.[96] The study of legal culture, it is noted, would be particularly fruitful in relation to the study of those branches of law, such a family law, that are more closely connected to or influenced by social, political and especially cultural factors. As Otto Kahn-Freund has pointed out, "the use of the comparative method requires a knowledge not only of the foreign law, but also of its social, and above all its political context. The use of comparative law for practical purposes becomes an abuse only if it is performed by a legalistic spirit which ignores this context of the law."[97] Zweigert and Kötz recognize that as far as the comparison of legal systems and not just legal rules is concerned, it is of

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[95] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 31.

[96] Consider, e.g. M. van Hoecke and M. Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", 1998 (47) *International and Comparative Law Quarterly*, 495.

[97] O. Kahn-Freund, "On Uses and Misuses of Comparative Law", 1974 (37) *Modern Law Review*, 1 at 27.

great importance for the comparatist to grasp the ‘style’ of the legal systems under consideration. As previously noted, according to these authors, the following factors are crucial for determining the style of a legal system: “(1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) its distinctive institutions, (4) the kind of legal sources it acknowledges and the way it handles them, and (5) its ideology.”[98] In this connection, one may ask: wouldn’t the style of a legal system be dependent on cultural factors as well? At the very least, the historical background, the predominant and characteristic mode of legal thinking and the system’s ideological background are all related to the cultural context. The relevance of concepts such as legal tradition and *mentalité* is also drawn attention to by some authors.[99]

As the above discussion suggests, for a legal comparison to be meaningful one should go further than a mere juxtaposition of formal laws. Additional elements should be examined, such as what is meant by the language of a legal text, how people perceive the function of a particular legal rule or institution and how they use it in practice. In order to compare, one should try to feel the pulse of the outside world, the ideas, beliefs and habits of the general population relating to law or, in Friedman’s words, the external legal culture.[100] This makes it necessary

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[98] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 68–69.

[99] See, e.g., M. Krygier, “Law as Tradition”, (1986) 5 *Law and Philosophy*, 237; J. Bell, “Comparative Law and Legal Theory”, in W. Krawietz, N. MacCormick and G. H. von Wright (eds.), *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Berlin 1995), 19–31; P. Legrand, “Uniformity, Legal Traditions and Law’s Limits”, (1996–97) 2 no. 306 *Juridisk Tidskrift*, 316–318. And see the discussion of the notion of legal tradition above.

[100] As V. Grosswald Curran remarks, such “cultural immersion requires immersion into the political, historical, economic and linguistic contexts that molded the legal system, and in

for a legal comparatist to transcend the boundaries of what he or she has been trained to understand as law, of his or her own legal culture.[101] However, surpassing one's own legal culture in order to gain an insight into another culture is not an easy task; it is like trying to get out of one's own self, since our culture defines to a great extent who we are. Nevertheless, this intellectual and psychological effort is necessary in any kind of comparative study, insofar as the principal objective of such study is to learn from the 'other'.

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which the legal system operates. It requires an explanation of various cultural mentalities." "Cultural Immersion, Difference and Categories in U.S. Comparative Law", (1998) 46 *American Journal of Comparative Law* 43, 51. See also V. Grosswald Curran, "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives", (1998) 46 *American Journal of Comparative Law*, 657, 659, 661.

[101] K. Zweigert and H. Kötz describe this need to eradicate all preconditions of one's own legal system when carrying out a comparative study as the negative aspect of functionality. *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 31–32.