THE SYSTEM OF LEGAL SYSTEMS

Notes on a Problem of Classification in Comparative Law

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I

In general works on comparative law, attempts are made to organize the various legal systems of the world into "groups", "categories", or "families", in fact to arrive at what could be called a system of legal systems. These attempts at classification are usually based upon the history of the legal systems concerned, but other facts are also taken into account to a greater or lesser extent.

In an earlier study,[1] the present writer has dealt with the question whether it is worth while to make such attempts at systematization. As pointed out in that paper, it is obviously impossible to create an ideal system of classification comparable to the "families", "classes" and *genera* of zoologists or botanists. It is indeed easy to criticize the attempts previously made, but it is difficult to find something acceptable to take their place. At the same time, I have underlined the necessity of some kind of classification for the purpose of general surveys; it should be strongly emphasized, however that any classification must necessarily be imperfect and is to be considered merely as a provisional means of facilitating the description and comparison of existing legal systems. Subject to such reservations, classifications must be permitted; what matters is that they shall be as correct as possible.

In the present paper, I propose to discuss in some detail certain methods of classification adopted in international legal writing, a matter which has so far attracted but little attention in Scandinavia.[2] I shall not attempt an exhaustive analysis of the principles of classification put forward in comparative writing, but will confine myself to discussing a few examples chosen because they seem reasonably typical. It will appear from what has already

[1] In the article "Jämförande rättsvetenskap" ("Comparative Law") in *Festskrift tillägnad Halvar Sundberg*, Uppsala 1959, p. 285. The paper is cited below as "Compar. Law".

[2] In Danish legal writing, mention should be made of a paper by O. Lando, "Om de store europæiske retssystemer og om inddelningen af retssystemerne i familier", in *Juristen* 1965, pp. 37–49.

been said that no single system of classification can be regarded as the correct one. One method may be the best for one purpose, another for a different purpose. Where the aim is to find a general classification for the purposes of a "legal map of the world",[3] more than one of the possible systems may be of equal value. We are not in the presence of a theoretical problem to which a definite solution can be given after due examination. On the other hand, it is quite obvious that classifications may vary in their suitability. An extreme example will make this clear: to organize English and North American law into one group and the Scandinavian legal systems into another is clearly more reasonable than, on the strength of some isolated criterion, to put Danish, Norwegian and English law into one "family" and American and Swedish law into another. The answer to the question which method is "better" or "worse" must be based, in the first place, upon the degree of correctness of the analysis of each legal system; it need hardly be said that comparative lawyers face great difficulties on this point.[4] To some extent it also seems possible—given proper caution—to use the judgments "better" and "worse" in respect of the criteria that are chosen for the purpose of classification: some criteria are superficial and temporary, others permanent and deep-rooted. Such criticism does not take us very far, however; we soon arrive at a juncture where the differences between different attempts at classification depend upon discretionary judgments: one writer puts special emphasis upon one criterion, another stresses something else, and it is impossible to claim that one approach is more "correct" than the other.

The implied conclusion is that it is not advisable to organize legal systems according to a strictly logical pattern on the strength of a single criterion, whatever that may be (except for special cases or where special purposes are pursued). Such a method facilitates neither description nor the teaching of the subject. In other words, more than one criterion must be used.

It should not be forgotten, moreover, that the subject matter

[3] It should be recalled that the philosopher Leibniz wanted to make a *Theatrum legale mundi*. See "Compar. Law", p. 281.

[4] In the preface of his *Les grands systèmes de droit contemporains* (1964), Professor René David says (at p. 2): "J'ai beaucoup voyagé, beaucoup lu, beaucoup réfléchi pour écrire ce livre. Le sujet cependant étant inépuisable, je me rends bien compte de toutes les insuffisances et imperfections qui demeurent. Me trouvera-t-on une justification dans ce qu'écrit Rica à son ami Rhédi: 'Il ne faut pas beaucoup d'esprit pour montrer ce qu'on sait, mais il en faut infiniment pour enseigner ce qu'on ignore'?" (quotation from Montesquieu, *Lettres persanes*).

which is to be classified is subject to continuous change. At the end of the 17th century, when Leibniz interested himself in a comparative study of law,[5] a "legal map of the world", even one which had been established with modern analytical methods, would not have had the same features as a corresponding map describing the situation prevailing, say, in the middle of the 19th century. Between the two epochs there occurred the French Revolution and shortly after that, under Napoleon, France acquired her *cinq codes*. The most important of these, *Le code civil,* soon came to exercise a profound influence in other countries. A classification referring to the middle of the 19th century would in its turn differ from one based upon the world situation in 1914; and the latter, finally, would be completely different from one which claimed to reflect the legal situation in our days, where the Socialist legal systems (Soviet law and the law of other Socialist countries) make an easily discernible new group[6] and where work on legal regeneration or reconstruction is being performed in the countries formerly under European colonial rule, etc.

II

To the drafter of the Royal letter of confirmation of the "Law of Upland"—a Swedish provincial code promulgated in 1296—it was natural to take into account only two systems beside those of the Scandinavian provinces: "Ecclesiastical Law" and "Imperial Law".[7] Likewise, early English lawyers found it necessary—when looking beyond "the Common Law of the Realm of England", a system the independence of which they readily defended—to mention only two other systems as worthy of attention: "civil law", i.e. the Continental legal systems built upon Roman foundations, and "canon law".[8] This simplified pattern, supplemented only by

[5] Leibniz, *Nova methodus discendae docendaeque jurisprudentiae,* 1667; *Theatrum legale,* 1675. Cf. A. F. Schnitzer, *Vergleichende Rechtslehre,* 2. erweiterte u. neubearbeitete Aufl., vol. 1, Basle 1961, p. 10; H. C. Gutteridge, *Comparative Law. An Introduction to the Comparative Method of Legal Study and Research,* Cambridge 1946, p. 12.

[6] On the term "Socialist states", cf. my paper "Några anmärkningar om civilrättens problematik i de s.k. socialistiska länderna", in *Festskrift till O. A. Borum,* Copenhagen 1964, pp. 291 f.

[7] *Svenska landskapslagar tolkade och förklarade för nutidens svenskar* av Å. Holmbäck och E. Wessén, vol. 1, Uppsala 1933, Upplandslagen, p. 5.

[8] Cf. the title of a work published by Fulbecke in 1602: *A Parallele or Conference of the Civil Law, the Canon Law, and the Common Law of the Realm of England.*

the vague collective term "Oriental law", seems to have been retained for a long time in English writing. As late as 1946, Professor Gutteridge reacted against "the usual classification of law into common law, civil law, canon law and Oriental law".[9] It goes without saying that such simple classifications are unsatisfactory today, but what system can be considered more suitable from a modern point of view? With the object of shedding some light upon the question, some representative attempts at classification taken from modern general works on comparative law will be discussed in what follows.

In his great work *Vergleichende Rechtslehre* (2nd ed. 1961) Professor Schnitzer aims at a system which reflects the historical development and takes earlier legal systems into account. In his opinion, the following five groups of legal systems should be adopted:[1]

(1) Das Recht der primitiven Völker im weitesten Sinne
(2) Das Recht der antiken Kulturvölker des Mittelmeerbeckens im weitesten Sinne
(3) Der euro-amerikanische Rechtskreis (Europa, Amerika und Australien)
(4) Die religiösen Rechte
(5) Der Rechtskreis der afro-asiatischen Völker

When elaborating this system, which determines the order in which the different parts of the subject matter are treated in the historical analysis, Professor Schnitzer arrives, after a general survey of the legal development of Europe, at the following classification of the systems falling under the third group:

Romanisches Gebiet
(1) Frankreich
(2) Italien
(3) Ibero-amerikanisches Recht
(4) Benelux-Staaten
(5) Anhang: Griechenland

Germanisches Gebiet
(1) Deutschland
(2) Alpenländer
(3) Rezeption deutschen, schweizerischen und österreichischen Rechts
(4) Nordische Staaten
(5) Anhang: Baltische Länder

[9] Gutteridge, *op. cit.*, p. 74.
[1] Schnitzer, *op. cit.* The reasons for covering earlier legal systems, also, are set out on p. 137. The system is developed on pp. 139 ff.

Slawische Gebiete
(1) Sowjetunion
(2) Polen
(3) Tschechoslowakei
(4) Jugoslawien
(5) Albanien
(6) Rumänien
(7) Anhang: Ungarn

Anglo-amerikanisches Recht
(1) Grossbritannien und Commonwealth
(2) Vereinigte Staaten von Amerika

With regard to the other groups, it need only be mentioned that within the fourth category—"Religiöse Rechte"—Professor Schnitzer deals with Jewish, Christian and Islamic law, whereas Asian systems on religious basis are discussed under the fifth category.

Professor Schnitzer's purpose is thus not simply to classify actually existing legal orders, but rather to give a historical and genetic survey of earlier and present legal systems; within that framework not only genetic criteria but also facts relating to the general patterns of civilization, to language and even, to some extent, to geography are taken into account. It seems justifiable to state that the system of classification—which has not been examined in detail here—suffers to a certain extent from its twofold purpose: the combination of historical points of view and of criteria based upon the substantive differences of contents between modern legal systems (the "dogmatic" approach, to use a German term) has not escaped criticism.[2] It is true that in his analysis of the most important category—the third—Professor Schnitzer stresses that the distinction between "Roman" and "Germanic" is somewhat obsolete and that all systems within this group are really "mixed Roman and Germanic systems".[3] As pointed out above, however, the author, when proceeding to the actual study of the legal systems concerned, applies a distinction between a "Roman area", a "Germanic area" and "Slavic areas"; although the historical explanation of this distinction is clear enough and although it probably makes the description easier to handle, it hardly seems fortunate once it has been admitted that

[2] K. Zweigert, "Zur Lehre von den Rechtskreisen", in *XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema*, Leyden 1961, pp. 45 f.
[3] Schnitzer, *op. cit.*, p. 139.

the legal systems are "mixed". Since the study is carried up to the present day, it should further be recalled not only that the Austrian Civil Code exercised a profound influence in "Slavic areas" in the 19th century and well into our own times but also that ideological facts which are not connected with or dependent upon any "Slavic" element have had such an impact upon modern Socialist (Communist) states that these states must be brought together under one common heading (see below).

It should be added that Professor Schnitzer goes on to analyse the modern legal situation in an "institutional" part of his work, which is organized according to a different principle: the headings are those of the principal branches of legal science. Like many authors of general comparative surveys, he confines himself, on this point, to certain legal problems of a general scope (the theory of sources of law, etc.) and to private, including commercial, law. The order adopted for the "institutional" part is as follows:

(1) Allgemeine Probleme
(2) Personenrecht
(3) Familienrecht
(4) Erbrecht
(5) Sachenrecht
(6) Obligationenrecht
(7) Handelsrecht

It would go beyond the scope of the present article to discuss this "institutional" order in detail. The method adopted is easy to explain in the light of Continental legal systematics, but it gives rise to certain difficulties, e.g. if it is attempted to draw a general line of distinction between "Sachenrecht" (the law of property or proprietary rights) and "Obligationenrecht" (the law of contracts and torts); the application of the pattern to Communist legal systems also raises certain problems.

If we leave Professor Schnitzer's system and proceed to other modern studies of a general scope, we find that these reflect more clearly the wish to draw up the outlines of a classification of the legal systems now in force. In the well-known work of MM. Arminjon, Nolde and Wolff,[4] there is proposed a classification which embraces seven modern "groupes ou familles":

[4] P. Arminjon, B. Nolde, M. Wolff. *Traité de droit comparé*, vols. 1–3, Paris 1950–52. The reasons for the classification are set out at pp. 49 ff.

(1) français
(2) germanique
(3) scandinave
(4) anglais
(5) russe
(6) islamique
(7) hindou

It should be noted that Canon law is not taken into account as a specific group (whereas other religious systems appear under nos. 6 and 7). It is also of some interest that Scandinavian law has been given a place of its own within the system.[5,6]

The German comparative lawyer, Professor Konrad Zweigert, has recently given his support, at least in principle, to the systematics of MM. Arminjon, Nolde and Wolff in a paper called "Zur Lehre von den Rechtskreisen". We shall return below to the reasons set forth by Professor Zweigert. Modifying on some points the categories of the three writers, he arrives at the following classification:

(1) Romanischer Rechtskreis
(2) Deutscher Rechtskreis
(3) Nordischer Rechtskreis
(4) Angelsächsischer Rechtskreis

[5] As for the reasons for this treatment of Scandinavian law, see *op. cit.*, pp. 50 f.

[6] In the text, I have not discussed some earlier attempts at classification which seem today clearly unsatisfactory and even have some rather bizarre features. A number of these are mentioned by MM. Arminjon, Nolde and Wolff at pp. 42 ff. Thus Sauser-Hall (1913) proposed a systematics based upon a vague concept of race and including the following main groups: (1) the law of Aryan or Indo-European peoples; (2) the law of Semitic peoples; (3) the law of Mongolic peoples, Chinese and Japanese law being the principal families within this group; (4) "les droits des peuples barbares", i.e. the customary law of Negroes, Melanesian peoples, etc. This classification was intended to cover extinct as well as existing legal systems. However, Sauser-Hall has abandoned his own system (in a paper of 1954, quoted by Zweigert, *op. cit.*, p. 43, note 4; I have not had access to Sauser-Hall's paper). Martinez Paz (1934) proposed four main groups for the Occidental world: (a) "groupe coutumier-barbare" ("costume-barbaro"), including, *inter alia,* England, Sweden and Norway; (b) "groupe barbaro-romain" (covering Germany, Italy, Austria); (c) "groupe barbaro-romano-canonique" (Spain and Portugal); and finally (d) "groupe romano-canonico-démocratique" (where the learned writer manages to find place for the Latin American states, Switzerland and Russia). The underlying idea seems to be that the legal systems concerned are organized according to the relative importance of four different elements: the Germanic ("barbarian"; cf. the term *Leges barbarorum*), the Roman, the canonic and the modern, democratic element. The way in which the principle is carried into effect is somewhat surprising, however. I do not intend to discuss it here. Several other examples of earlier classifications could, of course, be quoted.

(5) Kommunistischer Rechtskreis
(6) Fernöstlicher (nichtkommunistischer) Rechtskreis
(7) Islamischer Rechtskreis
(8) Rechtskreis des Hindu-Rechts[7]

In his *Traité élémentaire de droit civil comparé,*[8] Professor René David adopts the following classification of legal systems:

(1) Système du droit occidental
  (a) groupe français
  (b) groupe anglo-américain
(2) Système du droit soviétique
(3) Système du droit musulman
(4) Système du droit hindou
(5) Système du droit chinois

It is noteworthy that the "groupe français" covers not only the legal systems of all non-Communist countries in Europe—thus both "droits des pays latins" and "droits des pays germaniques", including Scandinavian law—but also the systems of Latin America. Professor David admits that there are considerable variations within this group but holds that there is nevertheless a profound unity. Above all, he objects—rightly, in my opinion—to the attempts made to draw a sharp line between "le système de droit germanique" and "le système de droit français". There are, in my view, strong reasons for placing this distinction on a lower level than that where it has often been used. I shall return to this question below. Here it is enough to add that a reader who is not a Frenchman feels immediately inclined to criticize the term "groupe français".

The classification now referred to is not Professor David's last word on the topic, however. He returns to the question of classification in his book *Les grands systèmes de droit contemporains* (1964).[9] As the outcome of a discussion of methods of classification, the learned writer proposes a somewhat simplified division into "familles de droit du monde contemporain":

[7] Zweigert, *op. cit.*, p. 55.
[8] R. David, *Traité élémentaire de droit civil comparé. Introduction à l'étude des droits étrangers et à la méthode comparative,* Paris 1950.
[9] R. David, *Les grands systèmes de droit contemporains (droit comparé)*, 1st ed. Paris 1964, 2nd ed. Paris 1967. German edition: David-Grasmann, *Einführung in die grossen Rechtssysteme der Gegenwart,* Munich and Berlin 1966. English edition: David-Brierly, *Major Legal Systems in the World Today,* London 1968.

(1) la famille romano-germanique
(2) la famille de common law
(3) la famille des droits socialistes
(4) systèmes philosophiques ou religieux

The renaming of the first "family"—"romano-germanique" instead of "français"—seems to be a step forward, as is also the introduction of the "famille des droits socialistes" instead of the "système du droit soviétique". The groups "droit musulman", "droit hindou" and "droit chinois", which previously had independent places of their own, have disappeared. The particular legal systems to which the three terms referred now recur in Professor David's new fourth group, however; in the actual study of the contents of the systems concerned, that group has been given the somewhat modified title "droits religieux et traditionnels"; it embraces "le droit musulman", "le droit de l'Inde", "le droit de l'Extrême-Orient" and "le droit de l'Afrique et de Madagascar". However, in the survey of traditional and religious systems, the author also adds some information about such legal phenomena as have been introduced into the legal systems concerned from Occidental countries or have been created recently. It should be pointed out that Professor David emphasizes that these "systèmes philosophiques ou religieux" do not constitute "families" in the proper sense (still less *one* family). "Ils sont entièrement indépendants les uns des autres", he says, "et aucun d'eux ne groupe une pluralité de droits nationaux. On peut douter même qu'ils constituent des droits; le mot droit ne leur est appliqué que faute d'un meilleur vocable pour les désigner."[1] It is obvious that these bodies of rules, or the legal systems in those countries where they are of some importance, give rise to considerable difficulties of classification. Traditional and religious elements appear as inherited components in the modern law of these states together with principles and institutions which have been imported from the Occidental world and are today of great—sometimes even decisive—importance. From this point of view, the legal systems of the states concerned are connected partly with Professor David's first family (the author deals with them in that context under the heading "Les droits extraeuropéens") and partly with his second group (as is the case with India, into which English law was imported to a considerable extent during the period of British rule); modern Chinese law

[1] David, *Les grands systèmes*, p. 23.

would rather seem to belong to the third family or at least be closely connected with it. It must not be forgotten, of course, that in many states, elements of Occidental law have been introduced into sociological and economic surroundings completely different from those of the countries of origin and that the "living law" is necessarily affected by this. Generally speaking, difficult problems of classification arise in this context.

III

I have now mentioned a few attempts at classification which may be considered as typical of modern comparative law. This survey would seem to have produced some evidence to support my statement 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. On the basis of the examples thus furnished, it seems to be of some interest to discuss and compare the possible criteria of classification.

One pertinent question is *for whom* the analysis is intended. Are the prospective readers a group of experienced comparative lawyers with a vast knowledge of different legal systems, are they lawyers within a closed cultural *milieu* or even within one country, e.g. Sweden, or is the study written for the particular purpose of serving as a first, pedagogically simplified survey intended for the elementary stages of academic legal training in this or that country? To some extent at least, these different purposes must have an impact upon the way in which the subject matter is presented. Thus in a study intended for the last-mentioned purpose it may be justifiable to touch only lightly upon, and to put into one common group, such legal systems as are geographically distant and completely foreign to the law of the students' own country; in a strictly scientific study, these systems must be allotted distinct places of their own and be given more space. With regard to strictly scientific methods of classification, it must be admitted that at the present stage of development of the science of comparative law, it seems difficult for any individual writer to realize unreservedly that ideal of complete independence from his own general cultural background which would allow him to write for a—necessarily fictitious—suprana-

tional and universal group of readers. The whole study, including the systematics, will almost inevitably be coloured by the author's own starting position, by his personal point of vantage. In other words, it is necessarily of some significance whether the comparative writer is, e.g., a Continental lawyer, an Englishman or an American, a Soviet legal scholar, an expert from Communist China or a citizen of one of the new African states. It would indeed be a pertinent task for historians of general and legal theories and ideas to examine the different attempts at classification which have been made so far in the course of the history of comparative law, and to investigate their relationship to the national and ideological backgrounds of their authors.

On a different level, the problem of purpose has another aspect: is the writer to try to create a general system of classification, into which he fits whole legal systems as such, or is he to aim primarily at special branches of the law, such as public law, criminal law, procedure, or private law? It is obvious that a system of classification specially intended for public law in the narrow sense (constitutional and administrative law) must differ, at least in part, from a system specially intended for, say, criminal or procedural law. Likewise, a method of classification invented for the purpose of private law must be expected to differ on some points from the systems just referred to. In this sense, Professor Zweigert is right when he says that the theory of legal families is subject to the "Grundsatz der materiebezogenen Relativität" (the principle under which the correctness of methods of classification is only relative and is confined to a given subject matter).[2] This does not necessarily mean, however, that the question of a general classification should be completely set aside. The very necessity of general descriptions calls for a classification which draws attention to a number of salient features. It would seem to be this need, and this purpose, which have been determinative in attempts at classification of the kind exemplified above. It seems justifiable to say that they are influenced by the somewhat exag-

[2] Zweigert, *op. cit.*, p. 45. As pointed out by Professor Zweigert, the private law of one legal system may belong to one family, the constitutional law to another. If it may be stated as certain that German private law belongs to the German family, it may well be that in the field of constitutional law, e.g., the existence or non-existence of judicial control over the constitutionality of legislation must be granted such decisive importance as an element making up the "style" of a legal system that, in comparative constitutional law, it is necessary to recognize a "family" comprising legal systems which possess the institution of judicial control and to give the U.S.A., Italy and Germany, but not England and France, a place in that family.

gerated role attributed to *private law* aspects. It cannot be denied that comparative law—with the exception of the historical and ethnological elements of this branch of legal science—has been studied chiefly by private lawyers and that these have held a predominant position in the discussion of "groups" or "families" of legal systems (cf. the remarks on Schnitzer above).[3] The predominance of private law has not been complete, however. To a considerable extent, general legal technique (codified or customary law, the importance of precedents, etc.) has been decisive, and so has the general policy outlook (the prevailing ideology). If a classification of general scope is to be attempted, it is obviously unsatisfactory to allow private law to dominate it. At present, however, it is perhaps advisable not to push one's ambitions further than to a classification based in the first place partly upon general legal technique and ideology and partly upon what may be called judicial law ("the lawyer's law"); within that framework attention should be paid, if possible, to the relationship between private and administrative law and to certain general characteristics of administrative law (cf. the position of Communist states in this respect).

Should the proposed system aim at an historical ("vertical") or an actual ("horizontal", "dogmatic") classification, or should both aims be pursued at the same time? As already pointed out, the subject matter of the classification is constantly changing. Principles of systematization intended to organize legal systems as they stand at a given date into groups, "families", or categories must be adapted to the situation at the chosen time. To denote this obvious requirement, Professor Zweigert's term—"the principle of temporal relativity"—may be adopted.[4] Is it utterly impossible to adopt, as it were, a level above that where these variable groups belong (changes, after all, are usually slow) and achieve a classification which satisfies both the needs of comparative legal history and—without aiming at absolute precision—those of the actual situation? In fact, the example of Professor Schnitzer shows that it is not impossible, but that such a classification will inevitably suffer from certain defects. In my view, it is therefore advisable to maintain a distinction between the two aspects at least in the sense that the principles applicable to the classification of the present situation are not subjected to the requirements of the universal history of legal systems.

[3] The fact is also stressed by Professor Zweigert, *op. cit.*, pp. 44 f.
[4] Zweigert, *op. cit.*, p. 45.

This does not necessarily mean, however, that the historical background should be completely set aside as immaterial for the classification of modern legal systems. Historical bases are important in so far as central features of modern law can only be understood in the light of earlier development. Thus the classification is based on present facts interpreted in the light of history. It is only in this perspective that certain elements which would not otherwise attract much attention appear to be important and to embody permanent features of a legal system. Generally speaking, an outlook based upon history makes it possible to discern specific traditional elements in different legal systems which are often difficult to visualize but are nevertheless profoundly characteristic. Such elements are not only found in particular rules or institutions but appear also in legislative technique, habits of construction, etc.; they often contribute to what may be called the "style" of a legal system (cf., e.g., the common-law family). In other words, history opens our eyes to those elements which must be considered as determinative for a given "legal style".[5]

The questions of "technique" and of "ideology" have often been mentioned in this paper. Where similar basic ideological features can be found in a number of legal systems, as is the case today with the law of the Communist states, this is undoubtedly a circumstance of such importance that it must be accorded considerable weight for the purpose of classification. It is true that ideological similarities are sometimes very general, vague, and difficult to define—as is the case in what is called, in political discussion, the Western world—but this does not mean that the existence of such similarities should be denied. Together with the question of basic ideological attitudes—a question which must be treated with caution and an avoidance of generalizing and unreserved statements—it seems appropriate to discuss those numerous, and not necessarily uniform, traditions of legislative policy, method and technique which exercise an important influence in highly developed legal systems; they have been referred to above, in connection with the historical outlook.[6] An eloquent advocate

[5] I shall return below to the notion of "style" as introduced by Professor Zweigert.

[6] Some readers may find the connection between ideology in a narrow sense and legislative technique, etc., somewhat loose. However, there are close ties between the prevailing general ideology and the methods of legislation, construction of statutes, judicial lawmaking (free "Rechtsfindung" in the German terminology) and, on a more general level, the recognition in a given legal system of fundamental evaluations, "general principles of law".

of these "ideological" elements in the widest sense as decisive criteria of classification is Professor David.[7] He points out—rightly, in my view—that these elements are guarantees of continuity; even these are subject to change, but generally speaking (apart from isolated violent revolutions) they change slowly. Legal education is based very largely upon such elements of continuity—a fact which, in its turn, obviously serves to strengthen their effect as guarantees of unbroken development.[8]

Zweigert has criticized David for stressing too heavily (in his book of 1950) a single criterion, that of ideology. According to Zweigert, such thinking in terms of "one dimension" ("Eindimensionalität") is inacceptable. Instead Zweigert proposes the notion of "style":

> "What is decisive is rather the following elements. Individual legal systems and whole groups of systems each have their particular style. Comparative research must endeavour to grasp these 'legal styles' and to accord to the element of style, the facts which make up a specific style, a decisive importance both for the establishment of groups of legal systems and for the attribution of single systems to such groups" (the present writer's translation).[9]

On the basis of the programme thus set out, Professor Zweigert proceeds to analyse the facts which constitute a specific style. In his view the following elements should be taken into account: (1) historical origin; (2) a specific habit of legal thinking; (3) particularly characteristic legal institutions; (4) the nature of

[7] *Vide* David, *Traité élémentaire,* pp. 222 ff., where the specifically ideological element is more emphatically stressed, and *Les grands systèmes,* pp. 12 ff.

[8] The following statement in David, *Les grands systèmes,* p. 15, is likely to meet with a smile of recognition among many teachers of law: "Notre conception même de l'enseignement du droit s'appuie sur ces considérations. L'essentiel dans cet enseignement n'est pas de présenter les normes juridiques actuelles, c'est de familiariser l'étudiant avec la structure, les catégories et les concepts d'un droit donné, en lui enseignant le *vocabulaire* de ce droit; c'est de lui apprendre les *méthodes,* à l'aide desquelles il pourra trouver les règles appropriées à la solution d'un problème donné; c'est de développer chez lui une certaine *sensibilité,* qui lui permettra de 'sentir' cette solution, conformément aux standards, souvent imprécis et parfois illogiques, qui sont acceptés dans une civilisation donnée. Pour cette raison il n'est pas nécessaire que l'enseignement du droit soit donné sur la base des matières apparaissant comme les plus 'pratiques'; il paraît de façon générale préférable de se concentrer sur des matières ayant fait l'objet d'une élaboration plus poussée et d'une étude plus approfondie, dans lesquelles on peut, avec plus de sûreté qu'en des matières plus mouvantes, s'initier aux concepts, aux méthodes, et à l'esprit du droit envisagé."

[9] Zweigert, *op. cit.,* p. 46.

sources of law and their interpretation; (5) ideological elements.[1]

It should first be pointed out, by way of comment, that the reproach of "one-dimensional thinking" is hardly applicable to Professor David's analysis of 1964 (which, however, appeared after Zweigert's study had been published). In his discussion of "éléments variables et éléments constants dans le droit" and in stressing that it is not enough to adopt one criterion of classification[2] but that the same emphasis must be laid upon "la technique juridique" (in a broad sense)[3] and "les principes d'ordre philosophique, politique ou économique" in different legal systems, David seems to come fairly close to Zweigert's concept of "style".[4]

It can further be said about the notion of "style" that it does not add anything really new to the principle, which today seems to be well established, that the classification must be based upon a combination of several criteria. The concept of "style" would appear to add little more than a heading, or label, applicable to this method of combining elements of definition. Such a label undoubtedly presents certain advantages; on the other hand, there may be some reason to fear that the somewhat vague notion of "style" may lead to dubious and unscientific generalizations.[5] Sub-

[1] Zweigert, *op. cit.*, p. 48.

[2] "Il est vain de vouloir s'attacher, pour reconnaître l'existence de familles entre les droits, à un critérium unique" (*Les grands systèmes,* p. 16).

[3] "Du point de vue de la technique juridique, il convient de se demander si celui qui a reçu sa formation de juriste dans l'étude et la pratique d'un droit donné est par là même préparé, sans difficulté majeure, à se tirer d'affaire dans un autre droit donné. Si la réponse est négative, on doit en conclure que les deux droits n'appartiennent pas à la même famille; il peut en être ainsi parce que le vocabulaire des deux droits est différent (il n'exprime pas les mêmes concepts), ou parce que la hiérarchie des sources du droit et les méthodes des juristes diffèrent dans les deux droits de façon considérable" (*Les grands systèmes,* p. 16).

[4] This becomes even more obvious if, instead of the detached phrases quoted here, the whole analysis in *Les grands systèmes,* pp. 12 ff., is read in its context.

[5] An example illustrates the statement. It is true to some extent, that the common law has features which may be characterized by such terms as "empirical" or "inductive" reasoning, whereas Continental, e.g. French, law is more attracted by abstract principles. But such characteristics must be used *cum grano salis,* and it may well be asked whether Professor Zweigert (*op. cit.*, pp. 49 f.) does not indulge in dangerous generalizations of a kind permissible in literary essays but not in scientific reasoning when he refers, to corroborate his statements, to the different types of man in England and on the Continent: "Continental man is inclined to plan, to lay down rules beforehand and thus, in the realm of law, to formulate abstract norms and build systems. He meets life with *a priori* ideas and has largely deductive habits of thought. The Englishman improvises. He makes up his mind only when life calls on him to make an immediate decision" (the present writer's translation). It is true that

ject to this reservation, it should be admitted that in his enumeration of "style" elements, Professor Zweigert has indicated the principal facts to be taken into account. It might possibly be an improvement if they were regrouped in the following order: (1) historical background; (2) general ideological features; (3) the nature and use of sources of law; (4) specific legal methods and habits of thought; (5) particularly characteristic legal institutions. In the light of what has been said above about the historical background, it is perhaps doubtful whether element (1) should be treated as distinct and independent or should rather be mentioned as a circumstance to be taken into consideration when the remaining four elements are interpreted. However, this question is one of form rather than of substance. Elements (2)–(5) are closely connected with one another and have already been discussed to some extent. Attention must be given to each of them if a general classification of the kind referred to above as possible and desirable is to be achieved.[6]

Should geographical elements be taken into account in any way? There is a strong temptation to yield to the argument of MM. Arminjon, Nolde and Wolff: "pour pouvoir rationnellement classer les systèmes juridiques modernes il faut les étudier en eux-mêmes, indépendamment des facteurs extérieurs géographiques, raciaux ou autres auxquels s'attachent, nous l'avons vu, de nombreux auteurs". Instead, it is contended, the classification should "se faire en tenant compte de l'originalité, des rapports de dérivation et des ressemblances",[7] an idea which may in fact be regarded as a kind of shorthand description of a concept of "style". If this approach is resorted to, what Professor Zweigert calls "all superficial and insufficiently refined criteria" are avoided.[8] In the present paper, the "internal" criteria have held a leading place. Nevertheless, even though most scholars tend to rank these first in order of importance, the question remains whether geographical facts can be wholly set aside, particularly when it is attempted to find a method of classification which covers not only the legal systems of those countries which reached

such characteristics point to certain differences in general intellectual traditions, but there is a great risk of over-simplification in general statements about "Continental man" and "the Englishman". There are serious endeavours to plan and much interest in theoretical thinking even in England. And nobody knows how permanent are the supposed general attitudes.

[6] Cf. Lando, *op. cit.*, pp. 48 f.

[7] Arminjon-Nolde-Wolff, vol. 1, pp. 47 f.

[8] Zweigert, *op. cit.*, p. 44.

a high development long ago, but also the laws of the developing countries in Asia and Africa. These are mostly territories which gained independence recently and possess legal systems that are of a mixed character and very difficult to classify from the points of view of "style" and historical growth. It is possible that in the absence of better methods, certain categories based upon geographical facts must be admitted for the purposes of a rough preliminary classification.[9] Within these categories, the use of a more sophisticated system and a closer analysis of the different components of the elements thus retained may help the student to escape from the drawbacks of "superficial and insufficiently refined criteria".

IV

Several of the classifications discussed above must be recognized as acceptable for their purposes. Among them is the system of Arminjon, Nolde and Wolff as amended by Professor Zweigert. It should be observed, however, that the first four "families" according to this system (Roman, German, Nordic and Anglo-American law) present common ideological and other features which distinguish them from each of the other four groups (Communist, Far East, Islamic and Hindu law). The strong connecting links between the first four systems were stressed in Professor David's classification of 1950, where they all belonged to one "système du droit occidental". In his latest system (1964), however, David has abandoned this common heading and substituted the two independent groups "la famille romano-germanique" and "la famille de common law" for the larger category. In Professor Schnitzer's classification, on the other hand, one comprehensive category of legal systems (the third one) is called the Euro-American group and comprises Europe, America and Australia; it is so comprehensive, in fact, that it also embraces the Soviet Union and other Socialist (Communist) states. In my view, strong arguments may be invoked in favour of Professor David's system of 1950. Another feature of the system of MM. Arminjon, Nolde, Wolff as amended by Professor Zweigert which seems to call for reconsideration is the fact that in it the distinction between the Latin

[9] It would obviously be possible to establish a strictly geographical "legal map of the world" and to take affinities and influences into account in the course of the closer analysis carried out within the framework of the groups determined by geographical and political facts. Such a system, however, seems rather unattractive.

and the German group is treated as a primary one. On this point I am inclined to share Professor David's critical attitude (cf. II above).

Would it be possible, then, to establish a modified system on the basis of these remarks, a system where the objections now put forward were taken into account? The classification which will now be proposed is submitted in full awareness of the fact that, like all attempts to reform systematics, it suffers from drawbacks and weaknesses and should therefore be considered only as a contribution to a debate which will continue.

The proposal is based on the idea that it is necessary first to make a rough division into large *groups of legal systems,* within each of which there will be a more refined division into "*families*" with a greater number of common features. If this principle is adopted, it seems reasonable to establish a *first* group which comprises Occidental law (the legal systems of Europe and America, of which Australian law is a branch). This category would correspond to the "système de droit occidental" recognized by Professor David in 1950 but would differ from Professor Schnitzer's third group in excluding the law of Communist states (although Schnitzer's term "Euro-American" could still be used). A *second* clear category is the Socialist (Communist) group. For several reasons, I think it is difficult, for the rest of the legal systems, to adopt the notion of "groups"—which after all indicates, however vaguely, some measure of uniformity. If the more neutral concept of "categories" may be used in this context, the legal systems of non-Communist Asiatic states would make a *third* category, and those of the African states the *fourth* and last category. These two categories would thus include legal systems where one finds both old and traditional elements (corresponding to Professor David's "systèmes philosophiques ou religieux") and very important elements taken over from the Occidental group. It does not seem justifiable, however, to split these legal systems, as it were, and assign their Occidental elements to the first group and the traditional indigenous components to the third and fourth categories.[1] The different elements must work together in

[1] A fact which may be invoked, to some extent, against the creation of an independent category of "droits religieux et traditionnels" is pointed out by MM. Arminjon, Nolde and Wolff (vol. 1, p. 47): that these systems have no dynamic power of development. This would seem to be true at least with regard to these bodies of rules considered as independent entities—a circumstance which by no means prevents them from exercising influence upon the evolution of the legal systems of the states concerned.

these states, and it is likely that in the course of time they will influence each other mutually. Of course, certain states are marginal cases which make the drawing of limits difficult. Is it justifiable, in our days, to classify Japan unreservedly among the members of the Occidental group? What is the place of South Africa, etc.?

If a first division into four groups (categories) were thus adopted, the choice of subdivisions, which is not always easy, would remain to be considered. I propose to give a sketch of such subdivisions only with regard to the first two groups, and the question of systematics will be discussed at somewhat greater length in respect of the first of these. This limitation of the analysis does not imply that the corresponding questions would be easier or less interesting in the case of the third and fourth categories. On the contrary, these categories are complicated and call for intensive study and consideration which I have not been able to undertake in this context. They include several "hybrids" and systems difficult to assign to a definite place. As far as the fourth category is concerned, however, it should be remarked that one important subdivision is that between those legal systems which have undergone English influence and those upon which French law has had an impact.

To summarize the foregoing remarks, a preliminary classification could be performed according to the following pattern:

I. The Occidental (Euro-American) group
   (1) The family of (European) Continental legal systems
   (2) The Latin American family of legal systems
   (3) The Nordic (Scandinavian) family of legal systems
   (4) The Common-law family
II. The Socialist (Communist) group
   (1) Soviet law
   (2) The legal systems of the People's Democracies
   (3) The law of the Chinese People's Republic
III. The category of Asian Non-Communist legal systems
   (No subdivisions proposed)
IV. The category of African states
   (No subdivisions proposed)

It is, of course, possible to arrange the subdivisions of the Euro-American group according to many different patterns. The classification proposed above is based, *inter alia,* upon the idea that the difference between French and German law justifies only a further subdivision of the Continental family; *within* that family,

it is possible to make a distinction between a German (Germany, Switzerland, Austria) and a Latin sub-family (including France as the principal legal system, Belgium, Holland, Italy, Spain, etc.). The place of Greece is doubtful.[2] At a first glance, the proposed classification seems to suffer from weakness on a special point: it contains no immediate expression of the manifest connecting links between the Latin subdivision of the Continental family on the one hand and the Latin American family on the other hand. It should also be pointed out that it is difficult to find a place for certain hybrid systems which are connected both with the Continental and the Common-law families, such as Scottish law and the law of Louisiana.

If particular attention is to be given to private law, the "family connections" within the Euro-American group could be illustrated in a different and more striking way than by mere classification. The method would involve organizing the principal legal systems belonging to this group according to some sort of scale. As pointed out by Professor Schnitzer, all these systems are mixtures of Roman and Germanic law (he further states that the whole group has developed "out of a mixed Roman and Germanic civilization imbued with Christianity"); he adds that the different systems could be placed into a colour scale according to the relative importance of Roman or Germanic elements.[3] Without putting too much emphasis upon the concepts "Roman" and "Germanic" (terms which imply very considerable simplifications), I propose to borrow the idea of a scale in order to visualize one method of assigning their respective places to the legal systems. I have partly modified and completed Professor Schnitzer's scale and added names of groups in order to illustrate the fact that some legal systems have connections in more than one direction. This modified scale, which—like the system of classification proposed above—must of course be considered merely as a sketch intended to provoke further discussion, would be as follows:

		Central Continental group		
Common law (England, U.S.A., etc.)	Scandinavia	Germany Switzerland Austria	France Belgium Luxemburg Holland	Italy Spain Latin America
			Latin group	

[2] It is equally doubtful under which heading Israel and Turkey, which are both closely connected with the Euro-American group, should be placed.
[3] Schnitzer, *op. cit.*, p. 139.

It would certainly be possible to use similar scales in order to illustrate the connections between legal systems within other groups than the Euro-American. However that may be, a scale of the kind outlined above would seem to be a useful pedagogical device with regard to that large group of legal systems to which Scandinavian law, among other systems, belongs.