

# INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW

UNDER THE AUSPICES OF THE  
INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE

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## VOLUME II

### THE LEGAL SYSTEMS OF THE WORLD THEIR COMPARISON AND UNIFICATION

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#### *Chapter 1*

#### *The Different Conceptions of the Law*

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Chapter I

# THE DIFFERENT CONCEPTIONS OF THE LAW

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Chapter I

# THE DIFFERENT CONCEPTIONS OF THE LAW

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## I. INTRODUCTION\*

René David\*\*

1. *Purpose of this introduction.* – A work such as the International Encyclopedia of Comparative Law must necessarily begin by specifying what is meant by law, and what part it plays in the various societies.

First of all, what is meant by law? As we know, the question is extremely difficult. Multifarious definitions of law have been proposed, but have merely served to keep alive a seemingly endless dispute: the lawyers have never been able to agree on any one of them. It is true to say that when one is dealing with a single national system of law the resulting inconvenience is minimal. It is easy to see that one author has adopted one conception of law and another has made a different choice. However the question of the definition of law is of major importance in a work aiming at the comparison of several different legal systems. Such a task is meaningless unless the word law has the same meaning in the systems to be compared; at the very least the problem should be stated and the different meanings of law ascertained.

Agreement on the meaning of the word law is not enough. It is also important to take account of the role of the law in the various societies. This, too, needs explanation. Law is but one of the possible methods of organizing a society. Its position in this context must be clarified, and its relations with other factors of social organization must be stated, if it is desired to have an accurate idea of the real scope of rules of law.

2. *Definition of law.* – Some examples will assist in understanding this double problem. In the UNITED STATES there is a celebrated definition of law, according to which it is nothing but the reasonable prediction of what the Courts of Justice may decide in a particular case if it is submitted to them.<sup>1</sup> But the law as it was taught in the European universities until the nineteenth century was something quite different. Before the nineteenth century the universities did not teach

the customary law in force in a particular region, and they were concerned neither with the ordinances of princes nor with the decisions of courts. They taught an ideal law, based on ROMAN law, which they offered as a model to the sovereigns and judges of the various nations. The law taught in the universities was clearly quite different from the law which interested *Holmes*. It is indeed possible to compare the one with the other, but it is essential to realize that the two types of law being compared are different in nature.

Or we can look at the MOSLEM countries. MOSLEM law (*shari'*) is composed of those semi-religious precepts which Moslems must observe for their eternal salvation. *Holmes* is thinking in purely temporal terms, and concentration on matters which may give rise to litigation, whereas in MOSLEM eyes the law has an essentially spiritual content, and is completely independent of what the judges in fact decide in different countries. Moreover, it only governs the relations of the Moslems among themselves, and another system has to be used if it is necessary to regulate relations between Moslems and non-Moslems. Law as defined by *Holmes* and MOSLEM law are two very different things.

3. *Function of law.* – Let us now turn to our second problem, the function of the law as a regulator of relationships in society. The examples given above show great differences, but it is above all the striking contrast between WESTERN and FAR EASTERN ideas on this subject which must be emphasized. In FRANCE, ENGLAND, GERMANY, ITALY and the UNITED STATES OF AMERICA, is it desired that society be as completely as possible subject to the law; this is the GERMAN ideal of *Rechtsstaat*, the ENGLISH ideal of rule of law; law is the symbol of justice, and the citizens are invited to fight to secure its supremacy. In the FAR EAST, on the contrary, traditional philosophy sees the law as a makeshift technique good only for disciplining "barbarians". The honest citizen

\* English translation by Jane Bristow of the Middle Temple, Barrister-at-Law, Docteur en droit (Paris University). Miss Bristow has translated in this volume subchapters I and VI of chapter 1, subchapter I of chapter 2, and all of chapter 5 on the International Unification of Private Law.

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<sup>1</sup> *Holmes*, *The Path of the Law*: 10 Harv.L.Rev. 457 (1897): "The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law".

is not concerned with the law; he keeps away from the courts; he takes no notice of the law, but lives according to the ancestral rules of morality, propriety, and etiquette, which are imposed on him by his sense of belonging to a particular community. Here again one must agree that it is difficult to compare the two sorts of law: that which represents an ideal of justice and that which it is hoped will be used as little as possible.

This fundamental difference in ideas of the function of law entails vastly significant consequences on the practical level: the idea of subjective rights, and even the concept of a legal rule (*règle de droit*), both fundamental to modern WESTERN legal thought, are rejected in the FAR EAST.

Consequently there is a risk that a comparison between two systems of law can be distorted from the beginning by differences in terminology, the word *law* in fact meaning quite different things in the systems of law under consideration. Comparative lawyers are familiar with this problem. Faced with the variety of senses in which the word law is used, and the different ideas prevailing as to the function of law, they have repeatedly considered the question of the limits to be placed on their task. Two particularly controversial questions at the present time are whether it is possible to compare the legal systems of the SOCIALIST (Marxist-Leninist) world with those of the bourgeois world, and whether AFRICAN customs can be regarded as law.

4. *Solution adopted, and plan.* – The Editorial Committee of the International Encyclopedia of Comparative Law was obliged to consider this question. The desire to produce a truly international work, which could be used in particular by the developing countries and in the creation of a uniform system of law for international relations, overcame any scruples about excessive widening of the field of comparison. Therefore all systems of law have been included, as and when appropriate, in the comparisons performed by the Encyclopedia's collaborators. However, having reached this decision, it appeared necessary to put the reader "on his guard" to some degree. This is the purpose of the first three chapters, and particularly the first chapter, of this volume of the International Encyclopedia. In this chapter six articles by eminent authors present a general view of the conceptions of law and social order accepted in the WESTERN world, in the SOCIALIST countries, in the MOSLEM countries, in INDIA, in the FAR EAST, and in AFRICA. The task of each author being to present a particular conception of law, it is the purpose of this Introduction to make

certain observations inspired by reading their articles, with a view to synthesis.

The differences and even antitheses to be observed between the different conceptions of law and of social order can be reduced to three types. In some societies the function of the law is extolled, in others the accent is on conciliation and peace. Some see law as an ideal system of rules and an example to be followed, others as a system for resolving conflicts. Some seek in the law a system of rules, others regard it merely as a method of regulating various problems which arise in social relations. The comparative lawyer, considering the legal systems of the modern world, is tempted to consider these fundamental differences in geographical terms, contrasting in these respects the conception accepted in one country with that accepted in another. However, if he consents to become a historian, a philosopher of law, or a sociologist, he will modify this attitude, realizing that these different conceptions of law may have predominated, as a matter of history, in different countries, and that it is rare for a particular conception to reign exclusively; conceptions other than that which is apparently totally accepted often play a certain part, more or less openly.

#### A. THE LAW – AN IDEAL OR A MAKESHIFT?

5. *The rule of law, the ideal in some societies.* – To the twentieth century WESTERN lawyer it seems self-evident that a well organized society must be based on the law. *Ubi societas ibi jus*: the very idea of a society is inseparable from that of law. If a dispute arises, the normal way to settle it is to have recourse to the courts, which will provide an answer. Similarly, if a crime is committed, it is for the courts to pronounce the sanction for that crime according to the law. Even the administration is subject to the law: the courts consider its behaviour, annul its acts, declare its liabilities. It is the civic duty of each individual to take part in the struggle to ensure the supremacy of the law. The most perfect society is the one where the law reigns most completely, embracing the greatest possible number of social relationships, where even the administration and the rulers behave according to the law.

This attitude is found above all in communities where the law is of a sacred or religious character. This is the case of the MOSLEM and HINDU communities. It is true that MOSLEM law is largely the work of jurisconsults who built it up during the second and third centuries of the Hegira (*hidjra*) after the advent of the Abbasides, very few of

its rules rely directly on the revealed words of God.<sup>2</sup> Nonetheless there reigns among the Moslems the sentiment that it is bound up with the religion of Islam, and that to question its principles or doubt its wisdom is apostasy. The *dharmaśāstras* in INDIA are not attributed to any revelation, but it is nevertheless considered that the *dharma* is the manifestation of all that is just, connected with brahminist beliefs, and that behaviour contrary to *dharma* is authorized by considerations other than justice (*artha, kama*).

MOSLEM *fiqh* and HINDU *dharma* are models of justice, not open to discussion, according to which it is hoped that all members of the community will behave at all times. A similar conception of the law is entertained in the WESTERN countries, although their law has not the same stability and sacred character: law is an essential cog in the orderly functioning of society, and a prominent part is assigned to it.

6. *Flexibility of this synopsis.* – This is undoubtedly a rather theoretical synopsis. It is well known that in no society does the law rule without restriction. There are other rules of behaviour besides legal rules: religious rules, rules of morality, of propriety. Even on the level of principles, theory sometimes teaches that politics are above the law. In the MARXIST-LENINIST countries it is considered that the supreme organ of government is not and must not be bound by the law; it is the supremacy of socialist legality which is to be established, rather than the rule of law.

Besides, it is uncontroversial that rules of law are not always observed. Justice is not always up to its task; the administration does not always place itself at the service of the law as it should; the powerful oppress the weak, whose opportunities of resorting to the courts are in fact limited; the meek are the victims of the arrogant; peaceable people do not go to law. The rule of law is far from completely assured. In spite of this the WESTERN world is to a large extent in agreement: law has an essential part to play in society; it is natural, desirable, and just that disputes be resolved, criminals judged, and the administration controlled by courts or other bodies which will in each case propose, and impose, a legal solution for social relations. A man is a good citizen, one of the "just", if he lives according to the law. The magistrate who deals out justice seems even more "just", with the suggestion of austerity inherent in the word; as the servant of justice he exercises an

especially honoured function; if justice is not respected in a country, it is a sign of underdevelopment or decadence.

7. *The Far Eastern ideal of social harmony.* – This whole attitude which prevails in the WEST is not only strange, but absurd and shocking in the eyes of a very large part of humanity. The FAR EAST and BLACK AFRICA reject the idea of law as a principle. For the people of these countries it is sadly necessary in some cases to pronounce a sentence, to impose a solution on someone who has not respected the rules in use in society, but the delivery of a judgment providing a sanction cannot be regarded as normal; still less does it deserve to be advocated as a desirable means of settlement in human relationships. Disputes and crimes are looked on as sicknesses disturbing the proper functioning of the social "body". These accidents should be treated as such; they do not call for authoritarian solutions; conflicts, when they occur, must be not resolved, but "dissolved" by conciliation procedures. In all circumstances the essential is to restore harmony, for harmony among men, linked to the harmony of the cosmos, is something which must be ensured if it is desired that the world live in peace according to the natural order. At the end of a lawsuit there must be neither victor nor vanquished. A solution cannot be really good if it is imposed.

Thus an ideal of social peace and harmony is opposed to the ideal of the rule of law which dominates WESTERN (and MOSLEM) thought. The broad and generous vision of AFRICA and the EAST sees in the foreground not the rights and interests of individuals, but their obligations and the needs of both sides, and many factors are taken into consideration to make both sides accept a solution, whose merit lies in its "just", not in its "legal" nature. Justice requires that the incident which has occurred be liquidated fully and finally, so that peace and harmony may be restored.

8. *Scorn for the law.* – The law only looks at part of the problem. Seeing that it leaves aside this essential concern with the harmony of the body social, it cannot be considered as good. In the WEST and in ISLAM it is the object of study and veneration, but it is looked on with scorn in CHINA, JAPAN, and KOREA. Traditionally, neither lawyers nor schools of law are to be found in these countries. The courts are deserted; honest men do not resort to them; for them it is shame-

<sup>2</sup> *Chehata, Etudes de droit musulman* (Paris 1971) 12: "The construction of the Moslem corpus juris

owes almost nothing to scriptural sources... Moslem law is neither a religious nor a canonical system".

ful to enter, even as witnesses. Everything must be settled outside, by conciliation.<sup>3</sup> "They have no love for law in Japan" is the heading of a chapter in a recent work written by a Japanese professor of law.<sup>4</sup> Even arbitration is rejected; nobody wants a procedure resulting in a sentence which is imposed on the parties without their acceptance.

In fact, the justice of the courts is only for the incorrigibles, for those who have banished themselves from society; for the CHINESE and the JAPANESE the symbol of justice is a prison. Any judgment which is not accepted by the loser of the suit is regarded as a conviction, resulting in infamy. The winner is no better off than the loser; by resorting to the courts, the plaintiff has alienated public opinion; by requiring execution of the decision given, he is acting as a bad citizen.

9. *The African conception.* – The same idea reigns in BLACK AFRICA and in MADAGASCAR. In these countries, likewise, people do not understand how, except in the case of certain crimes, there can be a solution to litigation without the acceptance of those concerned. The AFRICAN traditional courts are conciliation bodies; a case is never finally closed, and can always be reopened so long as those concerned have not agreed to the solution proposed. The President of the Supreme Court of Senegal tells of the Africans' total incomprehension "faced with the justice of European inspiration whose decisions, to them, always appear repressive even in civil matters, because they are not conciliatory".<sup>5</sup> The MADAGASCAN Minister of Justice confirms also that in traditional Malagasy society the law, in the ROMAN sense, is of secondary importance only.<sup>6</sup>

10. *Popular feeling and Christian tradition.* – There seems to be complete antithesis between the WESTERN idea on the one hand, and the FAR EASTERN and AFRICAN idea on the other. Is this really so, and must the idea of finding a compromise between the two be given up? History shows that at certain periods there were powerful movements in favour of the FAR EASTERN conception in EUROPE; even in our time the idea that

society must be governed by the law is not accepted without reservation, and on this question the WESTERN nations present a less united front than their lawyers and their general theory of law would lead one to suppose.

Throughout the WESTERN countries there is a popular proverb which declares that "a bad settlement is better than a good lawsuit". Lawyers are often tempted to explain this by pointing to the trouble and expense inevitably resulting from a lawsuit; it is worth giving up some of one's rights to avoid the inconvenience. According to them, however, this is a cowardice which compromises the good order of society. *Ihering* denounced this attitude with vigour, seeing it as a resignation; honest men must not leave the way free for bad ones, to assert one's rights is to fight for the cause of justice.<sup>7</sup>

The meaning thus attributed to the popular saying and the reactions it provokes are characteristic of the thought patterns of the nineteenth century. However, the idea that a bad settlement is better than a good lawsuit is not uniquely dependent on the worries and inconveniences of all sorts inherent in legal process. Its roots go much deeper. "Blessed are the peacemakers, for they shall be called the children of God".<sup>8</sup> For the first thousand years A. D. Christianity advocated renunciation of worldly goods, conciliation, and peace.<sup>9</sup> Even in the thirteenth century, while the law was no longer regarded as detestable, the feeling remained that there was a preferable way of resolving disputes: that of *amiable composition*, which aims primarily at reconciling the adversaries.<sup>10</sup> In the fifteenth century there was still a GERMAN maxim saying "*Juristen, böse Christen*". It was sought to see in this formula a condemnation by the people of the ROMAN law, which the jurists were trying to make predominant at the expense of the good traditional customs. In reality, the adage appears as a condemnation of the law as it is understood in our time, of the individualism which impregnates it, and its strictness. Conciliation procedures are to be preferred to the law.

<sup>3</sup> *Henderson, Conciliation and Japanese Law.* Tokugawa and Modern (Seattle 1965).

<sup>4</sup> *Noda, Introduction au droit japonais* (1966) title IV ch. 1 p. 175.

<sup>5</sup> *M'Baye, Le droit africain, ses vices et ses vertus.* Rev. sénég. dr. 1970, 5-24.

<sup>6</sup> *Ramangasoavina, Rapport sur l'état des personnes, fait à la suite d'une enquête sur les coutumes à Madagascar:* Recueil des lois civiles (Tananarive 1964) I 7-76.

<sup>7</sup> *von Ihering, Der Kampf ums Recht* (ed. 3 Vienna

1873).

<sup>8</sup> Matt. V, 9.

<sup>9</sup> Saint Paul, First Epistle to the Corinthians VI, 7 and also XV, 56: the law is the sign of sin.

<sup>10</sup> *Wenger, Zum obligationenrechtlichen Schiedsverfahren im schweizerischen Recht. Eine rechtsvergleichende und historische Studie zur Unterscheidung zwischen Schiedsrichter und Schiedsgutachter unter besonderer Berücksichtigung des "arbitrato libero" des italienischen Rechts* (Basel 1968) 107 ss.

11. *Equity is favoured.* – The idea that law generates injustice, and that it is in some way immoral, is still alive in the WEST even now. It is classic to establish a contrast between equity and strict law, the former being considered necessary to remedy the latter. In periods of crisis we go further and announce the imminent disappearance of the law; in a regenerated society, under the sign of human solidarity and fraternity, the evangelic ideal will be attainable. “Justices of the peace” will conduct conciliations; state and law will disappear. Going further even than the French Revolution of 1789, Marxism does not aspire only to replace unjust law by just law, considering that there is no really just law. It is the very idea of a society ruled by law which must be rejected; Leninism preserves it only provisionally, until man has been regenerated by a new education in a new type of society.

12. *Conclusion. Variety of situations.* – These views seem chimerical to minds attached to nineteenth century EUROPEAN attitudes, which have every opportunity of emphasizing that the rule of law, in the WEST, has had and has great advantages. It has certainly contributed, on the material level, to the progress of riches and well-being; on the moral level, it has affirmed the dignity of the individual and combatted despotism in its various forms. Great and incessant efforts are undoubtedly necessary to place the law at the service of justice, but Westerners cannot, without denying a past which is dear to them, consider the law as a symbol of injustice. Even Marxism-Leninism has had to resign itself to giving the law considerable importance, and there is as yet nothing to indicate the end of this stage, which is said to be provisional.

It is, however, permissible to wonder whether we in the WEST have not made too great sacrifices in the desire for security and efficiency, and whether the law has not come to occupy too big a place in our countries, being applied to sorts of relationships better suited to conciliation and peace.

The conflicts born of human relations do not all present themselves in the same way. Some can be appropriately entrusted to judges for solution, justice and peace being satisfied with an *imposed* solution. But in other cases no solution which is not *accepted* by those whose relations are to be governed by it can be regarded as satisfactory. The law is appropriate when it is of primary importance to put an end to conflict, but not when the essential problem is to organize the co-existence of the parties.

Speaking more generally, a solution must not be imposed in relations between members of a

community if it is considered important that the community survive. This is especially true of relations between states. Public international law can establish standards of behaviour for states, but insofar as it provides for solutions to be imposed on the parties it is unsuited to the regulation of conflicts. Such solutions will always be precarious, for the state condemned will always see them as an expression of the will of the strongest. Similarly, an imposed solution is never a good one in relations between members of a family; the law enters into such relations only to destroy the family, even if it does not formally pronounce its dissolution (divorce). An imposed solution is inappropriate for dealing with conflicts within an enterprise, for here again what matters is a conciliation solution, looking to the future.

In none of these cases is it enough to try and temper the rigours of the law by letting in considerations of equity. The truth is that law should not be mentioned in this context and that one needs a quite different conception of justice, for what matters is peace, harmony, concord, the conditions for necessary future coexistence; the law, looking too much to the past, too concerned with respecting rules, too full of respect for the *status quo* and too concerned with the “rights” of each individual, is not appropriate for the “just” solution of these disputes.

It is not easy to draw the line between cases belonging to the law and cases where the primary concern must be to arrange for coexistence. Neither is it invariable. However, the criterion is clear: is it above all important to preserve relations between parties who are in conflict today, or can it be accepted? Is it conceivable that the parties will separate once the conflict is settled? In the latter case the WESTERN idea is acceptable: the law can deal with the conflict. In the former, the FAR EASTERN and AFRICAN idea is required: it is necessary to eliminate the conflict by the use of conciliation procedures, without any imposed solution. It is a mistake to accept one only of these ideas: both have their place in our world.

13. *The law can be a mere façade.* – The purpose of this chapter has not been forgotten among the philosophical considerations above. They were designed to show that in many of the fields of law dealt with in the International Encyclopedia one has to remember that law does not mean the same to everyone and that its practical value therefore varies.

In many countries numerous branches of the law are regarded as offering just solutions; it is therefore generally obeyed and nobody has any scruples about resorting to it. In other countries this attitude does not prevail, or is not as firmly

rooted, and in these cases the formal law is very likely to be a mere façade, behind which people regulate their behaviour according to other standards, guided by ethics and traditional beliefs.<sup>11</sup>

#### B. THE LAW – A BODY OF RULES OR A SET OF REMEDIES?

14. *Rules of justice or system of constraint.* – Some civilizations reject the idea of law in favour of the idea of conciliation, while others, without excluding conciliation, favour the idea of law, considering that it alone can provide a firm basis for society. As we have seen, the antithesis between these two attitudes is perhaps less absolute than one is generally given to believe, for nowhere is there complete denial of the merits of conciliation or the necessity of law, and sometimes practice, seeking the golden mean, diverges from theory.

Moreover, the aversion for law exhibited in civilizations where the fundamental value is social harmony, is essentially directed at a particular idea of law which emphasizes its element of constraint, but which, however, is far from being unanimously accepted in the WEST. This brings us to a second category of contrasts between conceptions of law.

Even in those civilizations where it has an important place the law is not always looked at in the same way, nor does it always cover the same fields. Some emphasize the organizational nature of the law, closely associated in their minds with justice and social morality, others for whom it is closely associated with the ideas of authority and constraint, emphasize its penal character.

Some see the law as a system of rules showing its subjects how to behave, others as a means of resolving conflicts. In other words, for some the law is the way of organizing a truly just society, whilst others who look at it only from the point of view of the remedies which it provides, see it as a means of constraint intended to impose certain behaviour.

15. *Justice and administration. Moslem and Hindu law.* – The former attitude is found in societies where the law is of a religious nature, or closely linked with morality. It is essentially the ISLAMIC, HINDU, JEWISH conception. The law tells the just man how to behave in his relations with his

peers. It sets up standards of behaviour in conformity with morality and social utility, and thus imposes obligations on individuals rather than according them rights. Whether the civil authorities of a particular place enforce these obligations is of secondary importance. In INDIA the science of government (*artha*) is not unconnected with the science of justice (*dharma*), the latter imposing duties on rulers as on other men, but the two are fundamentally different, for the natural sanction for human behaviour, and the only one which really counts, is to be found in inner contentment and in the after-life. ISLAM draws a careful distinction between the way which the just must follow (*shar'*) and the administration of justice. The former, which is the subject of the science of the *fikh*, comes from Koran-based teaching undergone by all Moslems. The administration of justice is the business of the rulers, who carry out their task in different ways from era to era and country to country. Rulers do not always respect the orthodox principles; sometimes they act contrary to the law, in which case they are blameworthy, but the law is unchanged.

Thus in ISLAM, as in INDIA, the ideal system by which justice requires men to regulate their behaviour is kept separate from the empiric rules laid down by rulers and applied by courts, which vary from place to place. In MOSLEM and HINDU eyes only the former represents justice, and only the former is really law. It is this which is generally called HINDU law, or MOSLEM law. However, this law has never been applied in its entirety in any country. In practice its authority, even when it is recognized in principle, is everywhere limited by custom, or by regulations which sometimes contravene it, or which, more often, modify and sometimes paralyse its application. Courts everywhere deliver judgments which take into account elements other than those taken into consideration by the theoretically just law. However, measures of expedience taken by rulers, deviations allowed by customary law, and court decisions are considered by Moslems and Hindus to have nothing to do with justice; in their eyes these are questions of custom and administration, not really of law.

16. *The European jus commune.* – Modern WESTERN thought tends nowadays on the contrary to concentrate principally, if not exclusively, on "positive" law, the rules of which are laid down by the legislature, observed in practice, and applied by the courts. However, this attitude is

<sup>11</sup> Escarra remarked on this in connection with the CHINESE codes, which he had helped to draft. And similarly present-day authorities consider that the

"modern law" and its rules are unknown to 90 per cent of the population of BLACK AFRICA and MADAGASCAR.

quite recent. For centuries the WESTERN outlook was similar to that of Hindus and Moslems. Until the nineteenth century what was taught in all the universities under the name of *law* was a collection of rules which were not applied in their entirety in any country, but which the lawyers considered to be the perfect expression of a well thought-out social order. This model law, offered to all nations, was known as the *jus commune*. Besides this, however, each nation or region had its own customary law, legislation, and case law, and nobody had any scruples about treating these national, regional, and local rules as law: this was acceptable because the *jus commune* was not of sacred character.<sup>12</sup> Thus a dualist conception of law prevailed: the word *law* was used in both senses, for the law "of reason" taught in the universities as well as for the law applied in individual countries. Besides, the *jus commune*, based on human reason, was considered to be fully independent of religion and morality, although it was strongly influenced by both of them in various respects.

17. *Modern conception in the Romano-Germanic countries.* – In the nineteenth century there was a revolution. As a result of codification the historically conditioned local and empiric character of "national" laws was lost to view, and it came to be considered that the most rational order of things was that governed by legislation, an essentially national phenomenon. The *jus commune* was no longer taught, and the science of law was reduced to the study of local law which alone deserved to be called law in positivist eyes. This went so far that foreign law appeared to be mere fact: outside the country where they were laid down the rules lose their legal character; law is no longer law.

In the ROMANO-GERMANIC countries, however, this evolution did not go as far as it might have done. The idea of a *jus commune*, of a law with pretensions to universality, was rejected, but the law, now considered at national level, was still presented as a model of social organization. It did not come to be considered in terms either of litigation or compulsion. The law still has its old function, that of telling citizens, administrators, and even rulers, how they should behave; in the eyes of the lawyers it is still an organizational discipline, connected with the ideas of social and

political morality rather than with those of punishment and compulsion.

In both these respects the ROMANO-GERMANIC conception differs from that of the COMMON LAW countries, although at the present time there are signs that the two may be coming closer together. It also differs from that accepted in the MARXIST-LENINIST countries.

18. *Common Law countries.* – In the COMMON LAW countries it has always been declared that the law is based on "reason", and that it is not to be identified with the will of those in power. The "judicial power" has always been regarded as being independent of the executive and rightly so. On the other hand, there has been a great temptation to see the judges as living oracles of the law, and to consider that their decisions in fact constitute the law. The principal reason for this is that in those countries lawyers have not, as in CONTINENTAL EUROPE, been trained in universities – such a training would have been of little use to them thanks to the formalism of the procedures used. ENGLISH lawyers, learning their trade through practice alone, inevitably came to look at the law from a professional angle, and not to think of it otherwise than in terms of its litigious aspect. This tendency was supported by the pragmatism of the ENGLISH mind, by its aversion for *formulae* and general principles, and by the way in which the Common Law had been formed: through casuistry and decided cases. The attitude is neatly expressed in *Holmes'* definition of law quoted above.

The traditional attitude is gradually being modified and brought closer to the CONTINENTAL attitude by the increasing importance of legislation in modern times and by the development of ENGLISH legal science, which was somewhat anaemic prior to the nineteenth century.<sup>13</sup> This development is particularly marked in the UNITED STATES OF AMERICA, where the sociological school has fought valiantly against the isolation of the law, and has highlighted its connections with the other social sciences.<sup>14</sup> The sentiment of community which unites the English speaking peoples, and more particularly the desire to harmonize the development of the COMMON LAW in the various states and territories of the UNITED STATES, have contributed in causing the abandonment of the idea that the law

<sup>12</sup> Some legal writers held it nevertheless as fully inappropriate to apply the word *law* to customary rules which were inordinate and antiquated. "*Non est proprie ius, sed lex!*" declares one of them in the Middle Ages in GERMANY.

<sup>13</sup> *Lawson*, The Oxford Law School 1850-1965

(Oxford 1968); *Fifoot*, Judge and Jurist in the Reign of Victoria (London 1959).

<sup>14</sup> For a contrary view in ENGLAND see *Smith*, J. C., The Statement of Minimum Library Holdings for Law Libraries in England and Wales: XI J.of S.P.T.L. (n.s.) 90-103 (1970).

is to be identified with past or future decisions of the courts of justice. In the UNITED STATES, as in the ROMANO-GERMANIC countries, the judges at least, now see the law as the expression of a policy aimed at establishing a better social order in the interests of justice. Something nonetheless remains of the attitudes of past times: in COMMON LAW countries the law has a more circumscribed field in its relation with political and administrative science than in ROMANO-GERMANIC countries. The difference shows particularly clearly in the fact that in ROMANO-GERMANIC countries it is considered desirable or even essential for administrators, diplomats, and even businessmen to have had legal training, whereas this view is not accepted to anything like the same extent in the COMMON LAW countries.

19. *Marxist-Leninist countries.* – Marxist-Leninist theory has remained faithful to tradition insofar as the law is still regarded as a model of social organization applicable beyond the limits of possible litigation. However, it differs markedly from ROMANIST theory in denying that this model is capable of reflecting the idea of justice. According to Marxist-Leninist theory such an idea is nothing but ideology, designed to serve the interests of the exploiting classes, and without objective reality. Since justice is but a vain word, it is necessary, according to the Marxists, to be realistic and recognize that the model of social organization which is the law is nothing other than the expression of the will of the rulers. In the final analysis it is always a bad thing, because its existence bears witness to the fact that compulsion is still necessary; however, it is relatively just in a society which has banished the exploitation of men by other men through collective ownership of the means of production, and it is this which justifies the principle of socialist legality proclaimed in MARXIST-LENINIST countries.

20. *Conclusion.* – The observations above lead to two conclusions. The first and more important of these is that it is necessary to agree upon what is being compared: the law which particular societies consider as being just, or the rules which are in fact enforced. The comparative lawyer is tempted to abandon the former to legal philosophy and to concentrate on the latter, and this is what has been done in the International Encyclopedia. This is legitimate, but it should be noted that in pursuing this course elements are taken into consideration which some, in particular the ISLAMIC jurists and the HINDU thinkers, do not consider to be really law.

The second conclusion is that in many cases the task of comparison is likely to be made difficult, or even falsified to some degree, by the fact

that the lawyers do not see the law as having the same functions in all countries. Some will think that there are *lacunae* in the International Encyclopedia, because lawyers in some countries will have envisaged only problems which can be submitted to the courts, and those same lawyers may be surprised and baffled by certain expositions which in their eyes have no place in a legal encyclopedia. The risk is not really very great as between the WESTERN legal systems, given that the Encyclopedia is not concerned with public law, but it should not be neglected as in all likelihood the volumes dealing with labour law, procedure, and economic law will be particularly exposed to it. Moreover, the risk is much greater when the legal systems of DEVELOPING countries, or even of SOCIALIST countries, are being dealt with; in these cases it will be necessary to decide if particular rules of conduct are to be considered as being of a legal nature, and this decision implies choosing a definition of law.

#### C. THE LAW – COLLECTION OF RULES OR METHOD OF RESOLVING CONFLICTS?

21. *A choice: procedural or substantive rules.* – In one view the law can be considered as a body of rules, of principles, showing men how to behave if they desire to act in accordance with justice, but another view calls by the name of law those rules which are applied by force in a particular country under the control of courts of justice.

If we accept the latter view, taking a positivist attitude despite the reservations to which it gives rise, there is another difference to be remarked.

Even in connection with positive law two opposing views can prevail. The first regards the law essentially as a matter of procedure, or procedures, enabling a decision to be reached. Only at the end of the procedure will it be known what the decision is to be, and at the beginning one is not principally concerned with this question. All that the lawyer can do, on the general level, is to perfect a method: rules concerning the choice of judge, the behaviour of the litigants, the admissibility and taking of evidence, so that the decision shall be taken in conditions which ensure, so far as is possible, that it will be just. To say in advance what the decision will be is neither possible nor desirable; a truly just decision can only be made in function of a whole collection of elements, which essentially vary from case to case, and which are not sufficiently clear until the procedure has taken place.

In contrast to this attitude, with its emphasis on procedure, there is another, which seeks to

show the judge, from the beginning, how he is to decide on the substance of the case. Justice and social order are not content with rules of procedure, and the certainty of legal relations requires it to be sufficiently clearly known, in advance, what solution will be given in the event of conflict. What is important is foreseeability of solutions, which is the only real guarantee of individual liberty, and which alone enables individuals to conduct activities beneficial to society. A well-organized procedure for settling disputes is certainly necessary, but procedure is after all only the servant of the law, which must consist essentially of substantive rules informing people of their rights and obligations, and of how they should behave.

The obstacle which the difference between these attitudes places in the way of comparison is clear to see. It is undoubtedly possible to compare the different procedures, since both systems have procedural rules, but it is to be expected that the rules dealing with the administration of justice will be much more developed in the system where procedure is the heart of the law than in the system where it is merely at the service of the law – and this different degree of development can make comparison difficult. On the other hand, and above all, it becomes practically impossible to compare the substantive rules of law in force in the two systems, since in an extreme case the law consists solely of procedural rules, with no substantive rules.

22. *Are these two stages of the evolution of the law?* – In the last century it may have appeared that the difference between these two attitudes corresponded with the degree of development attained by the society in question. At first all that could be done was to provide a means of resolving disputes, but at a later stage efforts were made to be more precise, and to tell people how they ought to behave. Even today many people still hold this view, whether consciously or not. But the question is much more complicated than that.

The difference between the two attitudes under consideration here corresponds with the differences previously pointed out. Those who emphasize the ideas of conciliation and peace are obviously very tempted to provide nothing but procedures: for them, the very idea of a pre-established rule is to be rejected. On the other hand those who see the law as a model of social organization, quite apart from litigation, are disposed to consider the law from the angle of substantive rules, rather than procedures for the settlement of disputes. Thus what we have to deal with is not two stages in the evolution of the law, but really a choice, involving basic conceptions of social order.

It would seem to be true that, in some circumstances, progress has been made by setting out the rights and obligations of individuals instead of simply saying how possible disputes are to be resolved. Sometimes justice requires that there should be certainties, and that “the equity of the *Parlements*”, too often open to the suspicion of arbitrariness, should be banished insofar as possible. Codification, in the countries where it occurred, sought to satisfy the desire for certainty. In ENGLAND also, the strictness of the system of precedents in the nineteenth century shows that the same concern was experienced. Until then ENGLISH law had been dominated by the principle *Remedies precede rights*: there were procedures which enabled disputes to be resolved, but the substance of the law often remained very uncertain, quite apart from the element of instability contributed in each case by the often unforeseeable verdict of the jury.

23. *Present-day tendencies.* – Thus in the WESTERN countries concern for the certainty in legal relations was predominant in the nineteenth century. However, this phenomenon is connected with conditions then prevailing in those countries, and should not be taken as being of a general or universal character. In our time a reaction can be observed: certainty in legal relations is indeed very important, but to ensure it is not the only function of justice and law. Other factors must be considered; equity has a part to play; in some fields or in some cases it may be desirable that the law should provide procedures only, not saying what their results should be.

The administration and the judges are given more and more latitude. The administration has certain discretionary powers, the judge has powers in equity; the legal rule subsists, but loses some of its strictness: it becomes a mere model, or it is confined to setting out the maximum and minimum limits between which the most just solution is to be sought.

It even appears that in some fields there has been a complete return to the idea, yesterday discredited, that it is not possible to provide anything except procedures. This idea is undoubtedly latent in the prospective withering away of the law envisaged by Marxist-Leninist theory. The popularity of arbitration is also connected with this idea. Even if lawyers like to present it differently, arbitration is in fact nothing more than a technique for resolving litigious disputes, at the end of which the arbitrators have a very great latitude for providing what they consider to be the just solution. This is obvious when, as is usual in some countries, the arbitrators are empowered to proceed and decide as “*amiables*”

*compositeurs*". The same situation, although not so frankly recognized, is found in countries where the "*amiable composition*" clause is unknown, but where the decision can only very exceptionally be annulled for error of law. The wide discretionary powers of arbitrators appear again in the formula used in the 1961 European Convention on International Commercial Arbitration; according to that Convention arbitrators are to decide according to the system of law indicated by the system of conflict of laws rules which they consider to be most appropriate in the case, and they can modify that law, relying on international commercial customs.<sup>15</sup>

As to the justice of the courts themselves, the pendulum has swung, and today it is more and more willingly recognized that the law is merely a framework within which the judges must be left to decide what solution is the most just. The idea formerly in favour, that the law is merely a collection of rules, is attacked from many sides today; the most overt partisans of positive law recognize the undeniable and important part which the courts have to play, not only in the interpretation of legal rules, but even in the creation of new rules. Here one is very close to the attitude according to which the law is a method for the discovery and affirmation of just solutions, rather than a collection of rules.

24. *Decline of the idea of subjective rights?* – The present-day tendency which we have just observed is clearly connected with the current of legal philosophy which is turning away from the idea of subjective rights, or at least tending to transform it.

In the nineteenth century it seemed self-evident in the WESTERN countries that the law was made for men, and that its essential function was to guarantee the subjective rights which belong to each "person" by the very nature of thing. In our time there is a reaction against this idea. Many people consider that the law should not be centered on man considered as an individual,<sup>16</sup> but on relationships between men, and that its function is to organize these according to a "distributive" justice.

In FRANCE, *Villey* affirms that his basic idea

follows the true tradition of *Aristotle* and *Saint Thomas*, of ROMAN law and of the classic "natural law".<sup>17</sup> For him, the concept of a subjective right is a false and dangerous idea which subsequently came to dominate legal theory, under the combined influence of Franciscan thought and Voluntarist philosophy, with the Natural Law school in the eighteenth century. Real justice cannot be attained on the basis of this idea, which only serves to consecrate individual egoism at the expense of the interests of others and of society.

At the present time, indeed, the idea of subjective rights is undergoing a crisis. There is a general tendency to think not in terms of rights but rather, following *Ihering*, in terms of mere "legally protected interests",<sup>18</sup> and to endow rights with limits, with "relative" character,<sup>19</sup> with "functions",<sup>20</sup> thus modifying profoundly not only their content but their very nature. According to this new theory the mission of the law no longer appears as the protection of the egoistic interests constituted by absolute prerogatives belonging to men, considered as subjects of rights, because they are men. The function of the law becomes more the balancing of conflicting interests:<sup>21</sup> it seems doubtful whether it is possible to indicate *a priori* the precise solutions which are to be applied in seeking such a balance. The role of those who administer justice is rather to weigh up in each case, by "free scientific research",<sup>22</sup> the interests involved; legal activity becomes a method – *Roscoe Pound's* "social engineering", with the result that legal relations certainly enjoy less certainty but are marked, or so it is hoped, with more justice. In the eyes of some this is a "decline of the law",<sup>23</sup> but in other eyes it is progress.

It is uncertain whether this development is a return to ancient WESTERN tradition: this interpretation of history is disputed. It does, however, seem certain that a link is thereby established with the attitudes outside the WEST which refuse to base law and social order on the idea of subjective rights.

25. *Final observation.* – These remarks have a necessary place in this Introduction to the volumes of the International Encyclopedia of Com-

<sup>15</sup> *David*, L'obligation pour les arbitres de statuer en droit dans les arbitrages du commerce international: *Mélanges Louis Baudouin* (in the press).

<sup>16</sup> *Villey*, L'humanisme et le droit: *idem*, *Seize essais de philosophie du droit dont un sur la crise universitaire* (Paris 1969) 60-72.

<sup>17</sup> *Idem*, *Leçons d'histoire de la philosophie du droit* (ed. 2 Paris 1962 ss.).

<sup>18</sup> *von Ihering*, *Der Zweck im Recht* (Leipzig 1878).

<sup>19</sup> *Josserand*, *De l'esprit des droits et de leur relativité* (Paris 1927).

<sup>20</sup> *Duguit*, *Traité de droit constitutionnel* I (ed. 3 Paris 1927).

<sup>21</sup> *Interessenjurisprudenz* as opposed to *Begriffsjurisprudenz*.

<sup>22</sup> *Gény*, *Méthode d'interprétation et sources en droit privé positif* (Paris 1899).

<sup>23</sup> *Ripert*, *Le déclin du droit* (Paris 1949).

parative Law. They are calculated to emphasize the limitations which may apply to the comparison of the legal systems of certain countries, or in respect of certain subjects. Comparison would be relatively easy if the law was everywhere made up of fairly rigid rules, it becomes more difficult to the extent that the rules are merely models leaving a degree of latitude to those concerned,

and it becomes impossible at a strictly legal level if the idea of rules is rejected and the judges are free to decide what is just in a particular concrete case – in such a case, comparison can only be contemplated at the sociological level.

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## II. THE WESTERN CONCEPTION OF LAW

Geoffrey Sawer\*

### A. WESTERN LAW

26. *Introduction.* – Legal systems are among the enduring features of human society; not only the idea of law, but particular types of legal systems – substantive principles and rules, methods of classification or characterisation of problems, the organisation of courts and other features of legal administration, procedural methods, and the organisation and technique of the legal profession – may remain relatively constant for long periods, notwithstanding substantial changes in the political organisation of the society in question, and in its economics. This has been particularly true of WESTERN EUROPE and BRITAIN, so that in this essay, while we may wish to restrict the discussion to contemporary societies, we are compelled to pay considerable attention to history. Indeed, on one view, the “spirit” of Western law is its history.

27. *Geographical spread.* – A purely external or behaviourist description of the legal systems of the countries usually included in the expression “Western” would show innumerable differences in all the features of legal system mentioned above. Even at a broad level of comparison, they include two major sub-systems – those derived from the ROMANO-GERMAN codes of CONTINENTAL EUROPE, and those derived from the ENGLISH COMMON LAW; many comparative lawyers consider that these sub-systems are so different in so many important features that notwithstanding linking factors in origin, content and present operation they ought to be treated separately. So far as the classifications of this Encyclopedia are based on convenience, the inclusion of the ROMANIST and ENGLISH systems under the one head of “Western law” need cause no difficulty, but when considering the more fundamental scientific implications of a taxonomical scheme, regard must be paid to the vagueness of the word “Western”. The nations which without too much dispute can be treated as “Western” in this context are GREECE, ITALY, SPAIN, PORTUGAL, FRANCE, AUSTRIA, SWITZERLAND, WEST GERMANY, BELGIUM, HOLLAND, LUXEMBOURG, DENMARK, FINLAND, SWEDEN, NORWAY, ICELAND, THE

UNITED KINGDOM, IRELAND, all the nations of NORTH, CENTRAL and SOUTH AMERICA and the adjacent islands (except CUBA), AUSTRALIA, NEW ZEALAND and SOUTH AFRICA. This list includes only countries in which the “Western idea” can be regarded as having originated, or where it has been carried or imposed by colonisation or conquest, or deliberately adopted, without major competition from other sources of legal culture. If one were to consider as well the countries where the Western idea in its various forms has been combined with important indigenous legal ideas, then it would be necessary to add large parts of ASIA and AFRICA and their contiguous islands; this is not desired in the present work, but the difficulty of demarcation draws attention to a danger which exists in several forms for a writer on “Western” law – namely that of seeming to engage in a sort of cultural imperialism.

28. *The importance of history.* – It is a historical fact that in the uneven development of social organisation and of human knowledge in various parts of the world, especially significant advances on many fronts were made in classical GREECE and ROME; after the EUROPEAN Dark Ages, a further series of advances occurred, especially from the sixteenth century on, and especially in ITALY, FRANCE, SPAIN, PORTUGAL, the LOW COUNTRIES, the HOLY ROMAN EMPIRE and BRITAIN, and these had a close historical connection with the GRAECO-ROMAN heritage. It is this history which has produced some of the most important features of the modern world, not only in law, but in scientific knowledge, technology, economic and social organisation and government. From what we know of ancient cultural developments on many continents, the “cultural explosion” which actually occurred in WESTERN EUROPE and BRITAIN could conceivably have occurred in almost any part of the globe, and only a complex convergence of events having many fortuitous elements caused it to happen where it did in greater measure than anywhere else. What demands explanation is not why Western law came to occupy such a prominent part in the social history of mankind, but why Western culture in

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