

# OLD AND NEW LEGAL TYPOLOGIES

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## **Abstract**

*The existence of legal constants does not preclude the process of legal change, of its permanent evolution. Thus, the legal doctrine emphasizes that there is no legislation valid for all times, the legal progress mentioned by Turgot being ubiquitous. Multiple forces drive to diversification or to approach the national legal systems. Analysing the history of law, we distinguish the existence of overlapping legal systems, fact that raises the question of legal typologies. Different criteria and different names have been proposed by the legal comparatists. In the present study, we shall address some of the most important and famous criteria, with emphasis on a new legal typology that has arisen - the European Union law.*

*The present study is part of a more complex research on this theme and it is meant to approach certain important points of my Ph.D. thesis.*

**Keywords:** *comparative law, diversification, European Union, legal systems, typology.*

## **I. Introduction**

Conceived as a multidisciplinary study combining elements of general theory of law, with elements of comparative law and European Union law, this paper aims to answer the questions: what are the legal typologies and is the EU law a new type of law, with specific qualitative determinations?

We are currently witnessing exciting challenges concerning the European Union – there are discussions about the integration in a legal order above the Member States legal order, about connecting supranational interests, about the reconfiguration of sovereignty, about the intertwining of national values with the European Union and about the harmonization of legislation.

Thus, we ask ourselves if the European Union law, characterized by *multilingualism* and *multijuridism*, can be considered a new type of law, emerged in the panorama of the world's legal systems? We believe that, just as far as the EU is based on an autonomous legal will and on principles and values that are within the eternal law, “unity in diversity” is possible and so the existence of a new legal family.

In law, because the legislator cannot exhaust all legal situations that may arise in society and that have to be regulated, he selects certain current *types* out of the diversity of possible relationships, excluding the others. Using simplification methods, the legislator chooses sometimes typification, and other times classification.

The typological or typological-classificatory method is used from ancient times by legal sciences (*e.g.* from Roman law we find out about the type of *pater familias*). In general, legal typologies are used in law by considering the real elements and relationships in legal life in order to know more precisely what mechanisms or structural relationships have been established in a range of legal issues<sup>1</sup>.

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We consider that typologies involve the analysis of typical features between different types of objects, phenomena, processes and people. However, any typology face a particular problem – the *selection of the criteria* underlying the classification of the phenomena studied. Because the typology represents a *partial synthesis*, the social sciences use very often the typological method, providing valuable results.

## II. Paper Content

Humans are social beings, but they are also juridical beings - *homo juridicus*, who, wishing to regulate and develop the human society, understood that it is necessary to create the law. Equipped with consciousness and will, humans act in order to meet their needs and interests, whether by respecting their values protected by law, whether by breaking them.

Law is conditioned by time and space, and its history is lost in the mist of time. Thus, using the historical method of legal phenomenon research, we find out that law appeared in the Ancient East. We note here the *cosmogenetic conception* that encompasses several philosophical ideas crystallized in China and Ancient Greece, ideas which constitute the basis of law.

An impressive feature of the entire universe is *diversity*. Like there are not two snowflakes alike, two leaves alike, two trees alike, two people alike, two souls alike, there are not two legal systems alike. But having no unity around us, can we dream of knowing the law of other societies?

Law is connected to the social environment, being influenced by various legal and extra-legal factors. Because of this connection, the law evolves with the society, and as Ihering said, law is not always and everywhere the same. But people do not live isolated. Since ancient times, they felt the need to gather in communities. Today more than ever, in this globalized world, people come in contact with each other. This requires an understanding of the rules governing legal systems. It requires a common understanding of people's rights and obligations. This thirst for knowledge is *watered* by the science of comparative law, which explains the institutions and legal concepts in the context in which it occurs, in their dynamics, analysing the concrete social conditions in which they arise.

The existence of legal constants changes law, its permanent evolution. Thus, there can be no legislation which would be valid for all times, because in the natural process of becoming law the legal progress, that Turgot was mentioning about, intervenes.

Multiple forces drive diversification or the closeness of the national rights. Some of these forces are not legal (*e.g.* geography of the respective states, religion, politics, economics, language). Others are legal because even the law can be “an accelerator of its own diversity”. The comparatists do not just try to establish the existence of these forces, but they try to group them into systems.

Analysing the history of law, we distinguish the existence of overlapping legal systems, fact that raises the question of legal typologies. As I have underlined above, the typological method is widely used in the social sciences (especially in law), and it supposes “not considering individual differences insignificant for the given goal, since any typology is subject to some research purposes, especially in terms of establishing uniformity and explanatory value”<sup>2</sup>.

In order to group the national legal systems, task of the comparative law, different criteria were used and different names were proposed.

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<sup>1</sup> Nicolae Popa, *Teoria generală a dreptului*, 4<sup>th</sup> edition, C.H. Beck Publishing House, Bucharest, 2012, p. 58.

<sup>2</sup> Nicolae Popa, *op. cit.*, p. 57.

The first legal classifications were based on the genetic criteria: natural-ethnological, cultural, legislative, legal-genetic. These genetic criteria fell into two streams: genetic-racial and genetic-historical.

From the *genetic-racial stream*, we mention the legal orders typologies by Adh mar Esmein and James Bryce. At the beginning of the last century, Adh mar Esmein proposed, with great accuracy, the need to classify the laws of different nations “by reducing them to a small number of families and groups, each of them representing an original legal system”<sup>3</sup>: the Latin group (France, Belgium, Italy, Spain, Portugal, Romania and the Latin Republics of Central and Southern America), the German group (the Scandinavian nations, Austria, Cisleithania<sup>4</sup>, Hungary), the Anglo-Saxon group (England, the United States of America and the English-speaking colonies), the Slavic group, the Muslim law group.

As regards the typology of legal orders proposed by James Bryce, we emphasize that he was discussing about the Teutonic, Roman, Hindu, Mohammedan legal orders.

For a long time, the racial-genetic stream has been vexed because this criterion was doomed to failure, the concept of race being uncertain and imperceptible.

As regards the *genetic-historical stream*, we note that some comparatists noticed the importance of history in determining the legal orders. Before 1880, Ernest Glasson classified the legal systems from this point of view, revealing three types of legislation: one in which the Roman law prevails (Romania, Portugal, Italy, Spain, Greece), one in which the customary law prevails (England, Russia, Scandinavia) and one in which the Roman element merged with the barbaric element (France, Switzerland, Germany).

This classification has been criticized for incompleteness and inaccuracy, its author only making a micro-comparative study at Europe’s level. The classifications of Nobushige Hozumi, Bevilaqua and Martinez-Paz come also under this category. Enrique Martinez-Paz’s classification is interesting because it improves Glasson’s classification, distinguishing: the customary-barbaric group (English law, Swedish law, Norwegian law), the barbaric-Roman group (German law, French law, Austrian law), the barbaric-Roman-canonical group (Portuguese law, Spanish law) and the Roman-canonical-democratic group (Latin American countries law, Switzerland, Russia). This work is also criticized for the same reasons as Glasson’s theory especially that classifying the Russian law as democratic in 1934 is unbelievable.

At the end of the genetic stream, classifications designed by L vy-Ullmann and Sarfatti appear, which focus on the encoded, religious or customary character of legal systems. Although superficial, these classifications *predict* the typological method.

There were also modern attempts to classify, as Leontin-Jean Constantinesco called them, among which: the *Arminjon-Nolde-Wolfe* classification (distinguishing seven families of legal systems: French, German, Scandinavian, English, Islamic, Hindu, Soviet), Grisolia’s classification contesting Arminjon-Nolde-Wolfe classification (distinguishing five legal systems: the codified, the Anglo-American, the religious, the socialist), the Spanish doctrine

<sup>3</sup> Leontin-Jean Constantinesco, *Tratat de drept comparat*, vol. III – *Știința dreptului comparat*, All Publishing House, Bucharest, 2001, p. 83 (*op. cit.*).

<sup>4</sup> According to wikipedia.org, *Cisleithania* was a common yet unofficial denotation of the northern and western part of Austria-Hungary, the Dual Monarchy created in the Compromise of 1867 - as distinguished from Transleithania, *i.e.* the Hungarian Lands of the Crown of Saint Stephen east of (“beyond”) the Leitha River.

The Cisleithanian capital was Vienna, the residence of the Austrian emperor. The territory had a population of 28,571,900 in 1910, it reached from Vorarlberg in the west to the Kingdom of Galicia and Lodomeria and the Duchy of Bukovina (today part of Poland, Ukraine and Romania) in the east, as well as from the Kingdom of Bohemia in the north to the Kingdom of Dalmatia (today part of Croatia) in the south. It comprised the current States of Austria (except for Burgenland), as well as most of the territories of the Czech Republic and Slovenia (except for Prekmurje), and parts of Italy (Trieste, Gorizia and Trentino-Alto Adige/S dtirol), Croatia (Istria, Dalmatia) and Montenegro (Kotor Bay). Information [on line] available at <http://en.wikipedia.org/wiki/Cisleithania>

classifications (Sola Canizares's classification, Eichler's classification, and José Maria Castan Vazquez's classification).

After the Second World War, the comparatists abandoned the historical criteria and search criteria among the *typological elements*. It is interesting what Leontin-Jean Constantinesco underlines as being characteristic at the beginnings of the typological classification: "the classification proposed by an author is rejected by the objections of another author"<sup>5</sup>, without any scientific dialogue. "The merit of the comparatists who were part of this new stream is to have grouped legal orders in systems, not because they were genetically, genealogically or historically related, but because they presented common typological structures"<sup>6</sup>.

The best known comparatist falling under this stream is René David, who noted that, like religions, legal systems can be reduced to a few fundamental types. He used two criteria in order to determine the affinity or the typological mismatch: the ideological point of view and the technical point of view.

As regards the ideological point of view, David said that "legal systems oppose each other because they express different conceptions about justice, which relate, of course, with all factors organizing the respective society; legal systems distinguish between them because the communities to which they apply maintain different religious or philosophical beliefs or because they have different political, economic or social structures (...) the legal systems oppose each other, even when they reflect the same conception of what is just, by the technique developed by their lawyers and that they use to make this conception triumph"<sup>7</sup>. It is evident that even this typology can be criticized.

The panoramic analysis of legal systems did not stop at René David, existing other classifications according to the style theory (Konrad Zweigert) based on cultural and ideological element (Silva Pereira's classification, Castan Tobenas's classification), according to the Marxist doctrine (although a general reluctance of Soviet lawyers towards the comparison can be observed).

Thus, in time, lawyers have attempted to classify these types of law, taking into account the law content and the specific features of the means of expression of this content, but also some criteria such as the dependency of social organization systems typology (criterion proposed by Poirier) or the affiliation to a legal civilization pool (criterion proposed by David). It is interesting that the terminology used to represent the group result of national legal systems is: *great legal systems, legal families, legal types*.

All the classifications mentioned above show that the legal systems typology is not entirely solved. Why? As Leontin-Jean Constantinesco pointed out, "[t]he first thing that hits you when you deal with this problem is the dilettantism, superficial analysis or even the absence of any scientific examination of the matter. Comparatists who addressed this matter seem rather keen to demonstrate the flaws criteria proposed by other authors, being eager to propose their own classification, which does not really worth more"<sup>8</sup>.

There are several reasons we mention here: the lack of a serious examination of the issue regarding the legal systems classification, the fields examined in order to make groups were not determining, any partial and unfounded classification is necessarily false, the spread of civil codes in the world cannot represent a classification criterion, the heterogeneity of the proposed criteria. One of the most important reasons is the inability to provide the criteria necessary to the micro-comparison classification (eventually only micro-results could be obtained!), the macro-comparison being necessary.

<sup>5</sup> Leontin-Jean Constantinesco, *op. cit.*, p. 105.

<sup>6</sup> Leontin-Jean Constantinesco, *op. cit.*, p. 105.

<sup>7</sup> René David, *Traité élémentaire de droit civil comparé*, Paris, 1950, p. 223.

<sup>8</sup> Leontin-Jean Constantinesco, *op. cit.*, p. 141.

Over time, there have been various attempts to define and classify legal systems, with existing various criteria, out of which the most important: the dependence on systems of social organization, the affiliation to a legal civilization pool, the role of law as means of social organization. We shall further length these three criteria.

The colourful words of Leontin-Jean Constantinesco come back to our mind: “[t]o develop legal systems means to know and to have conscience of the exact position of the legal systems in the legal universe. This means, simultaneously, to exit the legal national *ghetto* and to understand that national legal systems, linked by their determined elements derived of other legal systems, form larger assemblies”<sup>9</sup>.

### **A. The legal typology based on the dependence of social organization systems (Poirier)**

Using the typological method and this criterion, the famous analyst Jean Poirier ascertains the historically overlapping legal systems (historical legal types): slave law, feudal law, bourgeois law, socialist law.

It is interesting to note that although these types of law present specific features in the content of fundamental institutions, legal constructions or in share of sources, “such typology does not cancel the specific differences of the various individual systems coexisting in the same historic space”<sup>10</sup>.

The *slave law* had as major objectives “to defend the property of the slave owners and the exclusion of slaves from the category of the persons and their location in the one of things”<sup>11</sup>. Roman law is part of this category. But there were also differences, such as the province of Dacia which received the Roman law, and where there were observed features of the acquisition of property, marriage and kinship.

The *feudal law* defended the land ownership, its legal rules being designed to prevent the division of large estates, the primogeniture rule playing an important role.

The *bourgeois law* proclaimed human rights (*e.g.* freedom of the individual, equality of citizens).

The *socialist law* arose through reception of the Soviet law in states with a political system like the Union of Soviet Socialist Republics (USSR). Based on dialectical and historical materialism, such legal system considered the entire legal order as public law. In the countries that had adopted this legal system, the economy was centralized, the commercial law being virtually non-existent, and the purpose of law being distorted, because politics could ever taint the law application by calling frequently “to the law and regulation, especially in critical situations of social system functionality, forcing the law to be what it cannot be - a panacea”<sup>12</sup>.

However, “[t]he events occurred in 1989 in the countries of Eastern Europe, which left the Soviet model of development, the collapse of the totalitarian system, drove to the atomization of the «great socialist legal system» to powder, the reminded states turning back to their traditional principles, attached to the great Romano-Germanic legal system”<sup>13</sup>.

<sup>9</sup> Leontin-Jean Constantinesco, *Tratat de drept comparat*, vol. I – *Introducere în dreptul comparat*, All Publishing House, Bucharest, 1997, p. 43.

<sup>10</sup> Nicolae Popa, *op. cit.*, p. 58.

<sup>11</sup> Luminița Gheorghiu, *Evoluția sistemelor juridice contemporane. Privire specială asupra tipologiei dreptului comunitar*, Universul juridic Publishing House, Bucharest, 2004, p. 23.

<sup>12</sup> Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, p. 73.

<sup>13</sup> Ion Craiovan, *op. cit.*, p. 73.

### B. The legal typology based on the affiliation to a legal civilization pool (David)

In the legal doctrine, René David is considered as being “certainly the comparatist who has devoted the greater part of his work to the description of the legal systems and, thus to the classification of legal systems”<sup>14</sup>, his analysis being the most comprehensive.

The criterion of law affiliation to a legal civilisation pool determined the comparatists to acknowledge the existence of *legal families*, which differentiate through legal language, legal concepts, legal institutions and philosophical features; therefore, René David retains the following legal families (which represent the major contemporary legal systems): Roman-Germanic, Anglo-Saxon, socialist, Muslim, Hindu, Chinese, Japanese (the Far East) and black Africa and Madagascar.

The development of legal systems in Europe and in the British Isles took place in parallel for several centuries, creating two different legal environments.

*The Roman-Germanic family or legal system* (the civil law) is the result of reception of Roman law in the XIV-XV centuries; it integrates the Italian legal system, the French legal system and the related national systems (Romanian, Spanish, Portuguese, Belgian, Latin America), as well as the German legal system. This system is opposed to the *common law* system.

Although some authors believe that in this legal system there are two distinct groups [(a) the Latin group represented by Romania, Spain, Italy, Portugal, and (b) the Germanic group represented by Germany, Austria, Scandinavia, Switzerland), we agree with those who argue that, in fact, the systems “left from the same background, and they evolved differently depending on their previous customs, religion, culture”<sup>15</sup>, namely the common legal background sprang from the reception of the Roman law.

The name is conventional, “because a large number of national legal systems included in this area, can not find its origin in any of these two systems (*i.e.* Roman law and German law), but it represents the result of the legislation export practiced by states that once held colonial empires, like France, Spain, Portugal and, to a lesser extent, Italy”<sup>16</sup>.

This legal family is characterized by the following features: it is a written law, based on a hierarchical system of sources of law, is codified and, knows a great division into public and private law, which determines the structure of its branches and institutions.

By origin and characteristics, it is clear that Romanian law is part of the Roman-Germanic law.

This system has been criticized in the *Doing Business* reports published by the World Bank on the grounds that it would be less economically efficient than common law. In the 2004, 2005, 2006 reports, the economists concluded that French law, and generally the countries that are part of the civil law system are economically counterproductive, unlike common law. Of course that there were many reactions and counterreactions from the civil law lawyers.

The *common law* family, the second largest legal system of our times, is originally from England and is opposed to the civil law system. While “Europe was separated from the British Isles by a slap of water, the legal communication was almost non-existent”<sup>17</sup>, two legal systems developing in parallel and creating two different legal pools. Currently, this system is found in England, Ireland, USA (except Louisiana), Canada (except Quebec), Australia, New Zealand.

<sup>14</sup> Leontin-Jean Constantinesco, *op. cit.*, p. 105.

<sup>15</sup> For more details, please see Philippe Malinvaud, *Introduction à l'étude du droit*, 13<sup>th</sup> edition, LexisNexis Publishing House, Paris, 2011, p. 13.

<sup>16</sup> Victor Dan Zlătescu, *Panorama marilor sisteme contemporane de drept*, Continent XXI Publishing House, Bucharest, 1994, p. 28-138.

<sup>17</sup> Mihail Albici, *Despre drept și știința dreptului*, All Beck Publishing House, Bucharest, 2005, p. 54.

This system consists of three components: *common law* (judicial precedents), *equity* (rules of law given before the unification of the English courts by special courts, to mitigate the asperities of the common law rules) and *statutory law* (rules of law created by statutes). Equity represents a “corrective background brought to the common law, in so far as this law based on precedents loses ground, becoming unreceptive to social impulses. Given that *equity* became a parallel legal system concurrently with the *common law* and not infrequently in conflict with it, in 1873, it was established by a special statute that if a conflict between *equity* and *common law* arises, the former will prevail”<sup>18</sup>.

Among its features, we underline the following: written law has more *lex specialis* character, special structure, legal sources system, legal conceptualization and legal language are different from those of other families, legal branches are not structured due to the lack of division in public law and private law, law creation is not necessarily the result of the work of the legislator based on the legislative technique principles. In the “jurisprudence’s thicket”<sup>19</sup>, the statute is a secondary source of law and its provisions are incorporated in the legal system of judicial precedents.

The differences between these two legal families are well established in the legal doctrine. Even the concepts are different (*e.g.* the concept of fraud).

It is interesting that English law does not recognize the implied repeal and the desuetude, therefore many statutes which have been abolished, last for centuries. Thus, in order to facilitate knowledge of the statutes, over time, collections of statutes have been compiled.

Nowadays, we discover that many common law contractual techniques (*e.g.* know-how contracts, factoring, leasing, franchising) penetrated the entire international law, which leads us to support the idea that in the near future “elements of interference between the two major legal systems will increase”<sup>20</sup>.

The “socialist” great system was born as a result of receiving more or less massive Soviet law in states with a political system like the Soviet Union<sup>21</sup>. This system should be investigated especially because there are countries that have not abandoned the socialist political and economical system, although there is a trend towards the market economy. The ideology of the dialectical and historical materialism is the foundation of the “socialist” law. This historic law inspired by the Marxist ideology, has disappeared with the end of communism and it was found especially in the eastern countries (*e.g.* the USSR and its satellites). Opposed to the capitalist law, the socialist law meant socialization of all means of production, their owner being the State or the political party, except for goods of personal use. Since the fall of communism and the USSR breakup, the socialist states adopted the Roman-Germanic legal system, with all the legal implications arising from this fact.

The “*religious and traditional legal systems*, although the product of past eras, adjusting sometimes with great difficulty to the modern social relations, govern hundreds of millions in the contemporary era”<sup>22</sup>. The religious origin of certain systems (Hindu, Islamic or Jewish) must not lead us to the conclusion that all legal norms are religious. Moreover, there is a tendency to modernize the traditional legal systems, although in the beginning, it was organically integrated in the religious doctrine of Islam, such as China, Japan and Turkey which have adopted fully modern legislation<sup>23</sup>.

In the category of religious and traditional legal systems, the *Muslim law* has wide application in all Arab countries (*e.g.* Pakistan, Bangladesh, Iran, Afghanistan, Indonesia). In

<sup>18</sup> Victor Dan Zlătescu, *op. cit.*, p. 153.

<sup>19</sup> Ion Craiovan, *op. cit.*, p. 153.

<sup>20</sup> Mihail Albici, *op. cit.*, p. 58.

<sup>21</sup> René David, *Grands systèmes de droit contemporains*, Dalloz Publishing House, Paris, 1978, pp. 155-313 (*op. cit.*).

<sup>22</sup> René David, *op. cit.*, p. 163.

<sup>23</sup> Ion Craiovan, *op. cit.*, p. 164.

the concept of Islam, the Muslim law is the fruit of the divine revelation, as a result of its rules revelation by God to the Prophet Muhammad, through the archangel Gabriel”<sup>24</sup>.

Muslim law has several sources. The *Qur'an* is the holy book of Islam, comprising 6,342 verses, 500 referring to law. *Sunna* is all that is attributed by tradition to the Prophet Muhammad. *Idjima* records the consensus of legal counsels on legal matters, *idjihad* representing the jurisprudence. *Sharia of Islam* are fundamental principles of Muslim law enshrining the right solutions for law branches.

Specialists in Islamic law emphasize that today, it is subject to reforms, being modernized; this change is “a natural step, dictated by a rapidly changing world”<sup>25</sup>, some countries resorting to codification, procedure or judicial organization.

Hence the problem of adapting people moving from a Muslim country or in a Muslim country because that person may feel subject to inconsistent rights, *Sharia* and the civil law of the other country.

*Hindu law* is a preservative law, not representing the Indian law, but the law of the community that adheres to Hinduism. It is based on the caste system, based on the four castes: Brahmins, Satria, Vaisala and Sudra. Therefore, in theory, India is also called “melting pot of legal systems”<sup>26</sup>.

*Traditional Japanese law* still has importance, because some principles and rules have been kept by the Japanese legislator in modern legislation adopted (*e.g.* the matter of persons and family relations) or provided to other countries. This legal system was inspired by Chinese Confucianism, one of the sources of *Shinto*. Although for many centuries, Japanese regulations regarded the division of rice fields by the number of each family members (*ritsu-ryo* regulations) and the formation of Japanese feud proved as inviolable areas (*shó* regulations), we notice that with the blossoming of the samurai military caste (the twelfth century – to its members being applicable the customary law), the *ritsu-ryo* and *sho* rules have been abandoned. Like in China, “[i]nstea of the legal rules, in the society *giri* was acting, behaviour rules similar to the Chinese rites”<sup>27</sup>, because ideas about law and justice were considered to disturb the social peace. Subsequently, Japan went through the *Meiji era* (roughly 1868-1912), when European legislation was received and the first legal codes were drafted, thus entering into the Roman-Germanic legal system.

The African customary law has been described as a peasant law by the colonial powers who colonized Africa<sup>28</sup>. We can not speak only about one system of law, because each ethnic community had its own customs. The African law was dominated by the tribal religion, with many agrarian rites, according to which the earth is divine property entrusted to their ancestors, humans being only simple holders. This system of law was based on orality. It is interesting that orality was also applicable to the community head edicts, age castes or of the various associations that could legislate under an empowerment from the king or chief<sup>29</sup>. This system of law was enriched by the colonial metropolis rules, therefore we find now in Africa, the common law or the civil law system.

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<sup>24</sup> Ion Craiovan, *op. cit.*, p. 164.

<sup>25</sup> Mihaile Albici, *op. cit.*, p. 61.

<sup>26</sup> Mario Losano, *Marile sisteme juridice. Introducere în dreptul european și extraeuropean*, All Beck Publishing House, Bucharest, 2005, p. 421.

<sup>27</sup> Victor Dan Zlătescu, *op. cit.*, p. 233.

<sup>28</sup> Ion Craiovan, *op. cit.*, p. 166.

<sup>29</sup> Ion Craiovan, *op. cit.*, p. 167.



### C. The legal typology based on the law role as a social organization mean (Mattei)

An interesting analysis in comparative law was made recently by the Italian researcher Ugo Mattei. Although Mattei entitled his study *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, we believe it is a new conception of legal typology. Motivating his study on the need of transferring knowledge between different legal systems, he argues that a global taxonomy that would “allow legal systems to learn from each other”<sup>30</sup>. In a world where right is exported and imported, this kind of typologies is needed.

The author stresses out that René David's legal typology should be revised because the world map is different nowadays. The first major difference is the fall of communism in Central and Eastern Europe, which questions the socialist legal family. The second difference is the “success” of the same political system in China and thus “the increased importance of legal sinology among comparative disciplines”<sup>31</sup>. The third difference is the increased importance and progress of Japanese law in the last decades. The fourth difference is related to the increasing consciousness in the Islamic world about cultural and legal particularities. The fifth difference is related to the independence of the states from the African continent.

Thus Mattei proposes a new legal typology based on the role of law as a means of social organization in the Weberian sense, using the assumption that the most primitive social structure is a legal structure so that the existence of a legal order is independent of the presence of the legislator, magistrates and lawyers. The basic idea is that “in all societies there are three main sources of social norms or social incentives which affect an individual's behavior: politics, law and philosophical or religious tradition”<sup>32</sup>. According to these sources, Mattei provides a tripartite scheme. He points out that every legal system assumes a plurality of legal patterns. Moreover, he stresses out that the legal systems are “the result of a layered complexity that stems from the accidents of legal history and from legal transplants”<sup>33</sup> - an interesting example being the Latin American countries where public law is based on common law, while private law on the continental law. These ideas lead to the idea, according to Mattei, that “the legal systems never *are*. They always *become*. And what determines the becoming is the variable role of different patterns within legal systems. Hence the difference between a pattern and a system of law”<sup>34</sup>.

The truth is that all three legal patterns are found in all legal systems of the world, the only difference being their share. This leads to the “hegemony” of one of the two remaining - of course they do not disappear, but they have a more blurred role. It is very interesting the example of Italy<sup>35</sup> offered by Mattei, which is a legal system classified by him as a professional one.

On August 1<sup>st</sup>, 1996, Italy was rocked by the acquittal of a Nazi criminal, Eric Priebke, by a court of Rome, and later acquittal, the Minister of Justice (an eminent professor of criminal law, professor Flick) ordered the police to arrest Priebke in order to stop people's revolt. Clearly illegal under the umbrella of the theory of rule of law, that decision was justified on the grounds of the extradition request made by Germany, being proved later that the request was filled after the Minister's order. Even arguing that he was aware of the intentions of the German authorities, his order was illegal because Article 716 of the Italian Code of Criminal Procedure only attributed this right to prosecutors, who, in Italy, are

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<sup>30</sup> Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, The American Journal of Comparative Law, no. 1/1997, vol. 45, p. 6, available at [http://works.bepress.com/ugo\\_mattei/19/](http://works.bepress.com/ugo_mattei/19/) (15.03.2014).

<sup>31</sup> Ugo Mattei, *op.cit.*, p. 10.

<sup>32</sup> Ugo Mattei, *op.cit.*, p. 12.

<sup>33</sup> Ugo Mattei, *op.cit.*, p. 14.

<sup>34</sup> Ugo Mattei, *op.cit.*, p. 14.

<sup>35</sup> Ugo Mattei, *op.cit.*, p. 14-15.

independent of the Ministry of Justice. In this case, it is an obvious example that politics had an advantage over the law, even if the political decision was contrary to the Italian court verdict.

According to Mattei's typology, national systems may belong to professional rule of law, political rule of law and traditional rule of law.

Of course that this division is dynamic because legal transplants can change the direction of a national system, because of the influence of a predominantly legal pattern. The author does not deny the possibility that a legal system be part of two categories at once (*e.g.* family law related to traditional, while commercial law to professional and criminal law to politics). He stresses out that this division "in three major families of law allows considerable flexibility and recognizes clearly that classifying legal families is a means to better understand and not an end in itself"<sup>36</sup>.

Legal systems that fall within the *rule of professional law* entrusts major decisions (*i.e.* political decisions) to the political world (which must, however, comply with the law) and the decisions less important to the legal world. Legal systems that fall into this category are: United Kingdom of Great Britain, United States of America, Oceania, Western Europe, Scandinavia national systems, some "mixed" systems (Louisiana, Quebec, Scotland, South Africa). The author doubts whether Israel and India should be placed here. Basically, there are states where the legal process is not very influenced by alternative social structures. Currently, this category is legitimized by democracy.

The *rule of political law* requires that all political systems in this class cannot separate the legal process of the political process, since they are not autonomous. Political relations are crucial in these systems, being very important "who's who" in the political world. From the need to preserve stability and power, governments in these countries do not respect the law. It is interesting to note that "when men rather than law govern, people usually find it more prudent to seek a powerful human protector than to stand on legal rights against the State"<sup>37</sup>. In this category, the important and less important decisions are taken by the political power. This includes the vast majority of socialist law states except certain states ("maybe" Poland, Hungary and the Czech Republic), the least developed countries in Africa and Latin America, with the exception of the Islamic states in northern Africa, as well as Cuba. The author excludes from the list of socialist states China, Mongolia, Vietnam, Laos and North Korea, the former Soviet republics in Asia.

The *rule of traditional law* is found in systems where law and religious or philosophical tradition are not clearly delineated. In this category would fall the Islamic states, states that are governed by the Indian or Hindu law, other countries in Asia governed by Confucianism conceptions of law (*e.g.* China, Japan).

#### **D. The appearance of a new legal typology – the European Union law**

The analysis of the European Union law leads to the conclusion that we are in the presence of a *particular type of law*, different from the national law of the Member States and from the international legal system.

Due to the sovereignty of the Member States, each State is entitled to determine the applicable law, with the feeling that this law must be designed at national level, as well as the national and social policy of the country.

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<sup>36</sup> Ugo Mattei, *op.cit.*, p. 17.

<sup>37</sup> Ugo Mattei, *op.cit.*, p. 29.

EU law is a law under construction, evolving, not being “the incarnation of an eternal and metaphysical idea”<sup>38</sup>. Certainly, the European Union is a progressive realization of a political project without precedent.

The recognition of its own legal order means that EU legal norms form a complex structure of legal norms which have a well-defined set of legal sources, while the EU institutions have well-established procedures to apprehend and punish violations and deviations.

Moreover, the existence of the institutional law, substantive law and procedural law of the European Union confirms the existence of a new legal typology – the type of EU law.

We also stress out that the procedural law of the European Union is not suspended, because the substantive law of the European Union exists, and although it is somewhat disparate, it is not (yet) codified.

Codification is a topic increasingly discussed, existing a growing concern regarding the contractual side. The realities of the past century have led to a desire to unify private law, like this being born the European contract law. The efforts of the doctrine “codification” were supported by the EU institutions (*e.g.* the rules of harmonization from the directives on consumer protection, the uniform rules on cross-border contracts under Regulations Brussels I and Rome I, the resolutions of the European Parliament on European contract law, the Common Frame of Reference).

But we must not be tempted to believe that the desire to “codify” would only occur in private law, because we find first steps in criminal law (*e.g.* such as the European arrest warrant, the convention on drugs, the convention on trafficking in persons, the fight against money laundering, aspects regarding the use of European funds).

Moreover, EU’s legal order is inherent, being independent of the international legal order and relatively independent of the national legal order of the Member States.

Moreover, the EU legal order is integrated to the legal system of the Member States and it is imposed to their courts due to the direct, immediate and priority applicability of EU law.

But which are the features that should meet European Union law in order to be considered a new legal typology?

According to the legal doctrine, in order to discuss about a new typology in terms of legal theory, we should establish the existence of:

1. autonomous will to control the legal decision making;
2. fundamental principles steering the essential directions of erecting and developing the respective legal order.

### **1. Autonomous will of the European Union**

EU’s legal will represents the very essence of the EU law. This autonomous will, which controls the legal decision making, should not be seen as the simple arithmetic sum of the individual wills of the Member States, but as a separate legal will. Precisely because of this, Nicolae Popa points out that the “European Union combines, in a specific dialectic, the supranational with national in an order with new qualitative determinations”<sup>39</sup>, stressing that it is less important “the reference to classical types of social-state organization”. Therefore, the European Union is not just a sum representing the number of the Member States, but a whole having a stable structure and presenting distinct features in relation to the characteristics of its parts. This is normal, because we are talking about an Union, so the problem is the typical features, even if there are peculiarities.

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<sup>38</sup> Mario Losano, *op. cit.*, p. 25.

<sup>39</sup> Nicolae Popa, *op. cit.*, p. 63.

According to the legal doctrine, the EU law is composed mainly of two types of legal sources: *primary law* and *secondary law*. The primary law includes the legal rules comprised in the founding treaties of the European Communities, as well as the conventions and protocols attached to the founding treaties, the amending treaties. The secondary law comprises the rules contained in the acts adopted by the EU institutions. However, there are also other specific sources of law, such as the unwritten legal rules applicable in the EU legal order: the general principles of law common to the legal systems of the Member States, the case law of the Court of Justice of the European Union, the rules resulting from the EU's external commitments or the complementary rules arising from conventional acts concluded by Member States in implementing the treaties.

To this list of legal sources, Ion Craiovan adds another one - the national law, which sometimes, can be a source of the EU law by reference either express or implied.

The European Union has a functioning legal status which allows it to fulfil its mission and to achieve its goals. In this sense, it is endowed with legal personality, enjoys privileges and immunities, and its decision making is very complex and well developed.

Regarding the legal personality of the European Union, it is well known that before the entry into force of the Lisbon Treaty, only the European Communities had legal personality (Article 281 TEC, Article 184 of the Euratom Treaty). Since then, the Union replaced and remained the successor of the European Communities [Article 1(3) TEU], the full legal personality being recognized (Article 47 TEU). It is a limited functional legal personality, which exists only to help to achieve the objectives of the Union. This aspect is confirmed by Declaration no. 24/2007 on the legal personality of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Lisbon Treaty.

The Conference confirms the fact that if the European Union has legal personality will not in any way authorize the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.

The legal personality of the European Union is *domestic* and *international*.

Based on the text of Article 47 of TEU which explicitly recognises the legal personality of the European Union and of Article 335 TFEU (“[i]n each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission”), we notice that the European Union is thus treated as a legal person of public law, having its own legal personality, distinct from that of the Member States. We find interesting the recognition of the internal legal personality of the Union, and not only of its institutions (even if the Commission is authorized by the above mentioned Article), because this recognition allows it to perform all acts necessary for its operation in each Member State (*e.g.* acquisition or alienation of assets, conclusion of contracts, court appearances). Other institutions and bodies of the Union still enjoy a legal personality distinct from that of the Union (*e.g.* European Investment Bank or the European Central Bank - Articles 308 and 282 TFEU).

However, like the European Community, the European Union has an international legal personality, even in the absence of any express mentioning in the treaties. The Court of Justice upheld in the A.E.T.R. judgment that independent of the powers expressly provided in the TFEU, the European Community (therefore, nowadays the Union!) is competent, even in the absence of express provision, to conclude external agreements in all areas in which the Community is competent to meet a specific objective according to the Treaty and in which the adoption of an international commitment appears to be necessary for achieving that objective.

Thus, we can conclude that the EU is a subject of international law, having the right of representation in third countries or around the international organizations, with an active and

passive right of legation, being able to stand alone in court, with the possibility of entailing the international liability and concluding international agreements, as well as adopting economic sanctions or becoming member in international organizations.

Just because it has a special legal status, the European Union shall enjoy in the territory of the Member States such privileges and immunities necessary for performing its mission.

Union shall enjoy in the territories of the Member States such privileges and immunities necessary for the performance of its duties, according to the conditions laid down in the Protocol concluded on April 8<sup>th</sup>, 1965 on the privileges and immunities of the European Union. The same regime applies in the case of the European Central Bank and the European Investment Bank.

These privileges and immunities profits the members of the Union institutions and their staff, being fixed by the Protocol no. 7 on the privileges and immunities of the European Union, annexed to the Treaties. Among the privileges and immunities enjoyed by the Union we mention: inviolability of premises, buildings, archives and official communications, immunity execution, tax exemptions, customs exemptions.

Unfortunately, not all consequences were drawn from the recognition of the legal personality of the European Union by the Treaty of Lisbon.

## 2. Principles of the EU law

The legal principles represent those guiding ideas, fundamental precepts that orientate the development and implementation of legal rules, either at the level of the whole legal system, or at the level of a law branch. The doctrine emphasizes that they are a factor of stability, adaptation and integration in the legal order, filling the legislative gaps, correcting excesses and anomalies in the moment of accomplishing the law.

In legal theory, the principles of law are not addressed in terms of each state, such as the principles of the Romanian law, the principles of the Indonesian law, the principles of the Polynesian law, but about the principles of law, of any kind of law, regardless of space or time.

In the complex process of development and enforcement of the EU law, the general principles of law occupy a very important place. The plurality of general principles of law is not enshrined in the EU law, but in some cases we find references in the treaties. The reference to these principles can only be made when the EU law is incomplete, because, if there are provisions in this regard, their application is mandatory.

If in the settlement of any case, the Court of Justice must send or apply general principles of law derived from the national legal order of the Member States or from the international legal order, the reference or the application may be made only if those principles “are compatible with the principles of the Community and with the specific of the legal order arisen from the Community texts”.

As the general principles of the EU can make the object of a future extended research, we will not insist on their analysis in the present study.

We shall only mention that the number of these principles is not agreed in the doctrine, since the European construction is in a continuous process of evolution, and that they can be divided into four main groups:

- ✓ the public international law and its general principles inherent in any organized legal system (*e.g.* principle of legal certainty, general principles derived from procedural rights);
- ✓ the domestic law of the Member States by identifying the general principles common to the Member States (*e.g.* principle of equality before the economic regulations,

- principle of access to legal procedures, principle of confidentiality between lawyer and its client);
- ✓ the EU law by deducting the general principles derived from the EU nature (*e.g.* principle of direct effect, principle of priority of EU law, principle of representative democracy);
- ✓ the fundamental human rights (*e.g.* property right, freedom of speech and religion, principle of fair trial).

### III. Conclusions

We have started our research from defining the term “typology”. We have also tried to emphasize the difference between “typology” and “classification”, with which is often confused. Summarizing the above said in this regard, the classification is used when the distinction between elements can be achieved by a *single criterion*, while the typology occurs when using multiple criteria, typologies being a *particular form of systematization*. Furthermore, the classification is complementary to division.

Regarding the typologies, it is interesting that they have in common the fact that they fail to comprise all the variety of types. We cannot find the “pure type” in any typological system, especially that the idea of type is abstract, it is a mental construction that meets our logical desire to “order” natural phenomena which, by their nature, are not “ordered”. Thus, we will never find the perfect typologies. In order to achieve a real typology, it takes *a lot of work synthesis*.

Moreover, Twining noted that today, “in a globalized, cosmopolitan world, even the general studies on law science and those of comparative law should become cosmopolitan, as a pre-condition for a revival of the general theory of law and a reconsideration *in extenso* of comparative law”<sup>40</sup>.

By using the typological method, we notice that a legal family or a legal system “represent the grouping of national legal systems, in relation to certain common features of them”<sup>41</sup>. Thus, each legal system knows the combination of typical general features with intrinsic ones. Of course that these have been marked by the social, economic and cultural conditions from each historical period.

As previously mentioned, analysing the history of law, we distinguish the existence of overlapping systems of law, which raises the question of their typology.

Unfortunately, all the classifications mentioned in this study show that the legal systems typology is not entirely solved. As pointed out Leontin-Jean Constantinesco, “[t]he first thing that hits you when you deal with this problem is the dilettantism, superficial analysis or even the absence of any scientific examination of the matter. Comparatists who addressed this matter seem rather keen to demonstrate the flaws criteria proposed by other authors<sup>42</sup>, being eager to propose their own classification, which does not really worth more”.

There are several reasons we mention here: the lack of a serious examination of the issue regarding the legal systems classification, the fields examined in order to make groups were not determining, any partial and unfounded classification is necessarily false, the spread of civil codes in the world cannot represent a classification criterion, the heterogeneity of the proposed criteria. One of the most important reasons is the inability to provide the criteria necessary to the micro-comparison classification (being able eventually to obtain only micro-results), macro-comparison being necessary.

<sup>40</sup> Nicolae Popa, *op. cit.*, p. 11 apud W. Twining, *Globalization and Comparative Law*, apud M.-F. Popa, *Sistemul juridic englez. Tendințe actuale de evoluție*, PhD thesis, 2008, p. 60.

<sup>41</sup> Luminița Gheorghiu, *op. cit.*, p. 30.

<sup>42</sup> Leontin-Jean Constantinesco, *op. cit.*, p. 105.

Currently, we are witnessing a mutual forthcoming and influence of legal systems from all over the world, this fact being obvious right from the existence of the European Union, which gave rise to a new type of law - *European Union law*.

Compared by Jacques Delors to an “unidentified political object”, the European Union is largely a *sui generis* construction, borrowing from different models of institutions.

No matter how we perceive typologies, we note that, currently, they are widely used and appreciated together with classifications, regardless of the science. Moreover, some authors consider that typologies are a simplification. As a shaping or a theory, it is false by definition, modelling or theorizing, it is false by definition, using the contradiction.

As A.-E. Bottoms stated, in the conclusion of a report presented to the Council of Europe, “we must recognize that a classification, whatever it may be, shall not necessarily entail all the richness of human individuality and there might be a risk very easily to create a distorted image of human overall and of his life in the community. Our classification work required to improve our knowledge will result in a failure if, in our effort to understand, we lose sight of these truths”<sup>43</sup>.

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