

MAPPING LAW

THE MACDERMOTT LECTURE

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“He is no true town planner, but at best a too simple engineer, who sees only the similarity of cities.” (Patrick Geddes).

“Only the name of the airport changes.” (Italo Calvino).

Returning to Queen’s is always a pleasure. It is a special pleasure and a privilege to give this particular lecture. Whilst I was here, Lord MacDermott was a towering figure who seemed at once formidable, courteous and friendly. He took a great interest in the Law Faculty; he respected our autonomy, but he was always a reference point when we had important decisions to make. I was much impressed by his willingness to spare the time to come to Faculty events, not only public lectures and Law Society dinners, but also many less public functions. I particularly remember meetings of the Legal Advisory Committee where Lord MacDermott, Professors Sheridan and Newark, the University’s solicitor, and George Cowie, the Secretary to the University, argued learnedly and at length over the details of trust documents as if we were in the House of Lords. I stayed silent, but over time I became an expert in some of the more arcane points of the doctrine of cy-pres - a branch of learning which I have not since then had occasion to put to any practical use. I also had time to calculate the number of billable hours of high-powered free legal advice that the University was gaining from these lengthy seminars. It is worth remembering that from 1931-35 John MacDermott taught Jurisprudence at Queen’s an experience which probably contributed to his own legal education as well as to that of his students.¹ My subject today is jurisprudential: indeed it is close to the centre of legal theory. What is involved in picturing law in general and in depicting and understanding a single legal order?

This lecture is part of a series of explorations about the implications of globalisation for the discipline of law and for jurisprudence or legal theory as its general part.² My project is to explore the idea of, and possible

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¹ I have recently had the privilege of reading Lord MacDermott’s privately published memoirs *An Enriching Life* (1979) which unfortunately only go up to 1936, before his appointment to the Bench.

² Earlier essays in the sequence are “Reading Bentham” (1989) LXXV Procs. British Academy 97, esp. 129-38; “General and Particular Jurisprudence: Three Chapters in a Story” in *Law in Context: Enlarging a Discipline* (1997) Ch. 8 (hereafter *LIC*); “Globalization and Legal Theory: Some Local Implications” 49

agendas for, a revived general jurisprudence in a world characterised by conflicting tendencies of globalisation and fragmentation; of homogenisation and of emphasis on cultural diversity; of bureaucratic rationalism, on the one hand, and post-modern indeterminacy and other kinds of pluralism on the other.

The central question that I shall address is just one part of that agenda: what is involved in depicting law in the world as a whole, or single legal orders, or specific legal phenomena? This may be interpreted as one way of rephrasing the central question of traditional jurisprudence: what is law? I propose to approach this from the perspective of a rooted cosmopolitan,³ using the idea of mapping as a theme. I shall speak first of geographical maps, and then figuratively of mental maps and of mapping as a metaphor for one way of depicting that is interpreting, describing, evoking and explaining a subject-matter of study. The central thread of my argument will be drawn from Italo Calvino's wonderful fable *Invisible Cities*.⁴ This takes the form of an imaginary dialogue between the ageing Emperor Kublai Khan and his ambassador, the young Marco Polo. Kublai feels that he can only recover the ability to rule his empire if he can understand, and thus grasp, its underlying pattern; Marco Polo tries to assist by evoking cities he has visited. His accounts can be interpreted either as depictions of fifty-five different cities or fifty-five depictions of one city, Venice.⁵ Here, I shall lean towards the second interpretation.

The flavour of the work and the possibility of suggestive analogies between depictions of cities and legal orders can be illustrated by Marco Polo's account of Esmeralda:

"In Esmeralda, city of water, a network of canals and a network of streets span and intersect each other. To go from one place to another you have always the choice between land and boat: and since the shortest distance between two points in Esmeralda is not a straight line but a zigzag that ramifies in tortuous optional routes, the ways that open to each passerby are never two, but many, and they increase further for those who alternate a stretch by boat with one on dry land.

And so Esmeralda's inhabitants are spared the boredom of following the same streets every day. And that is not all: the network of routes is not arranged on one level, but follows instead an up-and-down course of steps, landings, cambered bridges, hanging streets. Combining segments of the various routes, elevated or on ground level, each inhabitant can enjoy

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Current Legal Problems, II 1 (M. Freeman (ed.), 1996) (hereafter GLT); "Comparative Law and Legal Theory", Lecture SOAS, November 1997, (forthcoming hereafter CLLT); "Other People's Power, The Bad Man and Legal Positivism, 1897-97" 63 Brooklyn L. Rev. 189 (1997) (hereafter OPP).

³ GLT 1-2.

⁴ Italo Calvino, *Invisible Cities* (tr.. W. Weaver, 1974) (hereafter *IC*).

⁵ There is a third, more plausible, possibility that Marco Polo was using Venice as an implicit point of reference, almost as an ideal type, against which other cities are compared and contrasted:

"There is still one of which you never speak."

Marco Polo bowed his head.

"Venice," the Khan said.

Marco Polo smiled. "What else do you believe I have been telling you about?" Later he adds: "To distinguish other cities' qualities, I must speak of a first city that remains implicit. For me it is Venice." (*IC* 86).

every day the pleasure of a new itinerary to reach the same places. The most fixed and calm lives in Esmeralda are spent without any repetition.

Secret and adventurous lives, here as elsewhere, are subject to greater restrictions. Esmeralda's cats, thieves, illicit lovers move along higher, discontinuous ways, dropping from a rooftop to a balcony, following gutterings with acrobats' steps. Below, the rats run in the darkness of the sewers, one behind the other's tail, along with conspirators and smugglers: they peep out of manholes and drainpipes, they slip through double bottoms and ditches, from one hiding-place to another they drag crusts of cheese, contraband goods, kegs of gunpowder, crossing the city's compactness pierced by the spokes of underground passages.

A map of Esmeralda should include, marked in different coloured inks, all these routes, solid and liquid, evident and hidden. It is more difficult to fix on the map the routes of swallows, who cut the air over the roofs, dropping long invisible parabolas with their still wings, darting to gulp a mosquito, spiraling upward, grazing a pinnacle, dominating from every point of their airy paths all the points of the city."⁶

Does not this look like an account of a users' perspective on a legal system?⁷

I have chosen today's topic for two particular reasons. The first is pure nostalgia. Thirty years ago, when I was at Queen's I toyed with the idea of mapping law in the world, but I was left quite dissatisfied with my efforts. So for me this is unfinished business. Second, it is often said that it is easier to see a legal order as a whole in a small jurisdiction than in a large one. Northern Ireland illustrates very clearly that this is a half-truth. The last thirty years have made all the complexities of human relations and local legal ordering more visible than in most places; this jurisdiction is also a clear example of legal pluralism. No legally interested person whether law student, practitioner, law teacher, judge, law-maker, Vice-Chancellor, or citizen can understand law in Northern Ireland by focusing only on Northern Ireland municipal law. Multiple legal orders are part of the local legal situation. Like it or not, United Kingdom law, the law of the Republic of Ireland, European Union Law, Public International Law, Human Rights Law, and developments in the common law world all bear directly on interpreting local legal issues. So too do different kinds of "non-state law", a contested idea which is open to several different interpretations. One consequence of globalisation is a tendency to loosen the association of the ideas of law, state, and nation and so to make more salient the multiplicity of legal orderings.⁸

For the purposes of this lecture, I shall assume rather than argue that law is concerned with relations between agents or persons (human, legal, unincorporated and otherwise) at a variety of levels, not just relations within a single nation state or society. One way of characterising such levels is essentially geographical:

⁶ IC 88-89.

⁷ OPP 208-13.

⁸ This is a central theme of Boaventura de Sousa Santos, *Toward a New Common Sense* (1995); see also, John Griffiths, "What is Legal Pluralism?" [1986] Jo. Legal Pluralism 24.

- global (as with some environmental issues, a possible *ius humanitatis* e.g. mineral rights on the moon and, by extension, intergalactic or space law);
- international (in the classic sense of relations between sovereign states and more broadly relations governed, for example, by human rights or refugee law);
- regional (for example, the European Union, European Convention on Human Rights, and the Organisation of Africa Unity);
- transnational (for example, Islamic, Hindu, Jewish law, Gypsy law, transnational arbitration, a putative *lex mercatoria*, INTERNET law, and, more controversially, the internal governance of multi-national corporations, the Catholic Church, or institutions of organised crime);
- inter-communal (as in relations between religious communities, or Christian Churches, or different ethnic groups);
- territorial state (including the legal systems of nation states, and sub-national jurisdictions, such as Florida, Greenland, Quebec, and Northern Ireland);
- sub-state (e.g. subordinate legislation, such as bye-laws of the Borough of Camden) or religious law officially recognized for limited purposes in a plural legal system; and
- non-state (including laws of subordinated peoples, such as native North Americans, or Maoris, or gypsies⁹) or illegal legal orders such as Santos's Pasagarda law, the Southern People's Liberation Army's legal regime in Southern Sudan,¹⁰ and the "common law movement" of militias in the United States¹¹.

I shall not discuss in detail which regimes or orders or traditions one might include in a map of world law,¹² but I shall assume that any conception of law that is restricted to the municipal law of nation states and classical public international law is extremely narrow and probably misleading. Insofar as the primary role of the institutionalised discipline of law is advancing and disseminating understanding of the phenomena of law, one needs a conception of these phenomena that is reasonably inclusive. This categorisation of levels into global, regional, international, transnational, municipal and local is admittedly crude, but it will serve for present purposes. These different levels of relations with which law has to deal are not neatly nested in a single vertical hierarchy. So even this simple categorisation hints at the complexities of mapping law.

⁹ Recent studies of Gypsy law have been pioneered by Walter Weyrauch. See especially, Weyrauch and Bell, "Autonomous Lawmaking: The Case of the Gypsies" 103 Yale L. J. 323 (1993) and Symposium on Gypsy Law (Romaniya) 45 Am. Jo. Comp. L No. 2 (Spring, 1997).

¹⁰ The Southern Peoples' Liberation Army has operated a system of courts dealing with both civil and criminal cases in areas which they occupy in the civil war in the Southern Sudan. Monyluak Alor Kuol, *Administration of Justice in the (SPLA/M) Liberated Areas: Court Cases in War-Torn Southern Sudan* (Oxford, Refugee Studies Programme, 1997).

¹¹ Susan Koniak, "When Law Risks Madness" 8 Cardozo Stud. in Law and Literature 65 (1996), "The Chosen People in our Wilderness" 95 Michigan L. Rev. 1761 (1997).

¹² On borderline candidates for the designation "legal orders" see n.131 below.

In order to proceed briskly to mapping, let me advance two further sets of assumptions by way of assertion. Both are controversial, but I have made the case for them elsewhere.

First, I consider jurisprudence to be the general part of law as a discipline.¹³ Jurisprudence can be viewed as a heritage, an ideology, and as the activity of theorising, that is posing, reposing, answering and arguing about general questions relating to the subject-matters of law as a discipline. As an activity, within the discipline of law theorising has several functions to perform: synthesising or constructing whole views or total pictures; constructing and refining concepts; developing middle order hypotheses and general working theories for participants; intellectual history; and, perhaps most important, critically examining the underlying assumptions of different kinds of discourse of and about law. Here we are mainly concerned with mapping as part of the synthesising function, but, as we shall see, all of the other tasks are relevant.

In this context, particular jurisprudence focuses on the general aspects of a single legal system or order and its constituent phenomena; general jurisprudence focuses on legal phenomena in more than one jurisdiction i.e. several, many or all legal systems or orders. Generality is a relative matter; general jurisprudence stretches from the relatively local (two or more orders within one region) to the fairly broad (e.g. the common law world or state legal systems in industrialised societies) to the universality claimed by classical natural law theory, Bentham's universal science of legislation, Kelsen's general theory of law and state, Llewellyn's law jobs theory, or macro-theoretical social theories of law. As these last examples illustrate, general jurisprudence can address empirical, analytical, normative and other questions or combinations of them. This is in short a pluralistic vision of legal theorising which includes a variety of perspectives and a multiplicity of levels of generality.

The second assumption that I shall make is that in an era of globalisation, there is a need for a rethinking of the nature and possible agendas of general jurisprudence.¹⁴ Asking basic questions about laws in general Bentham's phrase seems to have gone out of fashion in recent times.¹⁵ It is now commonplace to talk of American, Scandinavian, English or Anglo-American jurisprudence without distinguishing clearly between provenance, audience, focus, sources, perspectives and significance.¹⁶ This is curiously inappropriate at a point in history when talk of "globalisation" is intensely fashionable in the media, in the world of affairs and in many disciplines. We do not need to enter here into the debates between strong globalisers, such as Benjamin Barber, Boaventura de Sousa Santos, and Anthony Giddens¹⁷ and sceptics who, like Paul†Hirst, claim that

¹³ See especially, William Twining, "Some Jobs for Jurisprudence" (1974) 1 Brit. Jo. Law and Society 149; *LIC* 110-14.

¹⁴ *LIC* Ch. 8.

¹⁵ J. Bentham, *Of Laws in General*, ed. H. L. A. Hart (*Collected Works*, 1970). For a critique of Herbert Hart's flawed attempt in the Postscript to *The Concept of Law* (1994) to revive the distinction between general and particular jurisprudence as a means of reconciling his position with that of Ronald Dworkin, see *LIC* 169-77.

¹⁶ OPP at pp. 215-17.

¹⁷ Benjamin R. Barber, *Jihad vs. McWorld: How the Planet is Both Falling Apart and Coming Together and What This Means for Democracy* (1995); Santos (1995), *op. cit.*; on the much more complex views on globalisation of Giddens,

“globalising rhetoric” can be dangerously overblown.¹⁸ We can surely agree that the world is increasingly interdependent, that the significance of national boundaries and of nation states is changing rapidly, and that one cannot understand even local law by adopting a purely parochial perspective. Talk of a single global economy, a global communications system, or the global environment is now established, though contested, but the phrase “global jurisprudence” still sounds grandiose, naive and dubiously trendy. I think that there are good reasons for being cautious, but if law deals with the ordering of relations at local, national, regional, transnational, international and global levels, understanding law involves considering legal relations at all of these levels. In short, in an era of globalisation the time is ripe for a strong revival of general jurisprudence.

MAPPING¹⁹

A standard geographer’s definition of a “map” is “A representation, usually on a plane surface, of all or part of the earth or some other body showing a group of features in terms of their relative size or position”.²⁰ The idea of a map is also applied metaphorically to “the mental conception of the arrangement of something.”²¹ I shall be concerned here with both geographical and mental maps.

In considering physical maps one needs to bear in mind some elementary points: what constitutes a good map depends on its purposes, such as navigation or depicting spatial relations and distributions. Maps can serve ideological functions, as exemplified by Peter’s Projection²² or the exaggeration of the size of communist countries in some American maps during the Cold War period. Small scale maps depict vast areas using limited information highly selectively; large scale maps, such as local ordnance survey maps, contain more detailed information for smaller areas. Maps cannot be exact representations of reality. Indeed, as Santos puts it, they are “organised misreadings of territories that create credible illusions of correspondence.”²³ This is illustrated by Borges’ parable of the Emperor who futilely demanded an exact life-size map of his domains;²⁴ similarly, Harry Beck’s classic map of the London underground which

— see David Held and John B. Thompson (eds.) *Social theory of modern societies : Anthony Giddens and his critics* (1989).

¹⁸ Paul Hirst and Grahame Thompson, *Globalization in Question* (1996), cf. “Globalisation: Ten Frequently Asked Questions and Some Surprising Answers”, 4 Soundings 47 (Issue on The Public Good, 1996).

¹⁹ On cartography in general I have found the following particularly helpful: J.S. Keates, *Understanding Maps* (2nd ed., 1996), Norman J. W. Thrower, *Maps and Civilization* (1996); and Peter Whitfield, *The Image of the World: 20 Centuries of World Maps* (1994). By far the best discussion of legal cartography is Santos’ essay “Law A Map of Misreading...” reprinted in Santos op. cit., (1995) Ch. 7. Santos is mainly concerned with laws *as* mental maps; I am here concerned with mapping *of* law, both territorially and figuratively. However, Santos produces one chart of law in the world, id. at p. 275.

²⁰ Thrower (1996) op. cit. at p. 254.

²¹ The OED (2nd. edn., 1989) treats this as a “nonce use”, but the metaphor is almost a cliché in legal discourse.

²² In 1973 Arno Peters “reinvented” a form of cylindrical projection to counterbalance Eurocentric projections of Third World countries. For a critique see Thrower at p. 224.

²³ Santos (1995), at p. 458.

²⁴ Jorge Luis Borges, *Obras Completas* (1974).

deliberately involved distortion to help users of the system, but was nonetheless both accurate and reliable for its purposes. Modern technology has greatly increased the sophistication and possibilities of cartography, witness for example animated weather maps on television. But maps also have distinct limitations: space is privileged over time; geographical maps are concerned more with physical than social or other kinds of relations; and there are other, often better means of pictorially presenting complex data. It is widely assumed that law is one of the subjects least amenable to pictorial representation, perhaps because it is concerned with largely invisible ideas and social relations. Algorithms, flow charts, logical trees, vidoes, Wigmore charts and other devices have found their way into law and legal education, but in a televisual and computer-driven era we can expect huge advances in the pictorial presentation of complex ideas and data. Edmond Tufte has already shown some of the tantalizing possibilities in his books.²⁵

It used to be assumed that “Geography is about maps, but Biography is about chaps.”²⁶ This is an outdated image. Human geographers in particular tend to treat cartography as a rather primitive aspect of their discipline. In recent years, as Kim Economides has shown, their interests have converged with those of socio-legal scholars.²⁷ However, in this lecture I shall resist the temptation to chase such enticing hares as geojurisprudence or virtual reality constructions of law. Rather I want to explore some rather old-fashioned concerns about why even elementary mapping of law in the world is difficult. I shall concentrate mainly on the theoretical complexities that underlie constructing quite simple overviews of law in large geographical areas through either physical or mental maps.

GEOGRAPHICAL MAPS: KHARTOUM, 1958-61

In my first year of teaching, I was responsible for a course called “Introduction to Law” in the University of Khartoum. Ignorant of earlier precedents, and inspired by Karl Llewellyn’s precept “see it whole”, I decided to begin by setting the Sudan legal system in the context of a picture of law in the world.²⁸ Instinctively I chose a map as the means of depiction. I was quite conscious of history, but in this context space was privileged over time. I obtained a blank map of the whole world and used a palette of coloured chalks to characterise the legal systems of different countries. The map marked the borders of countries, that is nation-states and various forms of dependency. I do not recall the exact details, but I might have used blue chalk for the common law (deliberately avoiding imperial pink), brown for civilian or Romanist systems, red for Socialist countries, yellow for Islamic Law, and green for customary or traditional

²⁵ E. Tufte, *The Visual Display of Quantitative Information* (1983), *Envisioning Information* (1990), and *Visual Explanations* (1997).

²⁶ Edmund Clerihew Bentley, *Biography for Beginners* (1905).

²⁷ Kim Economides. “Law and Geography: New Frontiers” in Philip Thomas (ed.) *Legal Frontiers* (Dartmouth, 1996); cf. Chand Wije, “Applied Law and Applied Geography”, 8 *The Operational Geographer* 27 (1990); Nicholas K. Blomley and Gordon L. Clark, “Law, Theory and Geography”, 11 *Urban Geography* 433 (1990); Nicholas Blomley, *Law, Space and the Geographies of Power* (1994); Paul Wiles, “A Research Agenda for Analysing Crime in Cities”, 31 *Comp. L. Rev.* 23 (1997).

²⁸ On the use of “total pictures” as one form of context see William Twining, “Talk about Realism” 60 *N. Y. U. L. Rev.* 329, at 372-78 (1985); *LIC* at pp. 57, 298-99.

law. Countries with “plural” or mixed national legal systems were clumsily depicted by stripes in different colours.

This first attempt, though consciously crude, helped to make some useful points. First, there were discernible patterns some countries had relatively pure common law or civilian systems, some were mixed or plural, including countries in the Soviet bloc. Second, these patterns were intimately linked to colonisation and colonialism. Japan, Turkey and Ethiopia were held up as relatively exceptional instances of “voluntary” receptions.²⁹ Third, Sudan at the time was a clear example of a plural national legal system that conformed to British colonial patterns even though it had officially been a condominium until independence: imported or imposed “common law” in the form of off-the-peg statutes and “codes”, English precedents, a handful of reported local cases, and a catch-all reception clause. Both Mohammedan Law and customary law were recognised in limited spheres subject to various provisos.³⁰ Fourthly, the map communicated some simple patterns and yet hinted at some puzzling complexities, such as the relationship between official state law and “living law” in most of the country, especially in rural areas.³¹

At the time I felt that this map served my immediate purposes. It gave first year students some sense of a wider world and of Sudan’s place within it. It set an agenda both for studying Sudanese law as a “plural” system and for discussing issues about future “legal development” in a newly independent country. I continued to use it during my three years in Khartoum, but I was vaguely puzzled and dissatisfied. My first ground for dissatisfaction was quite mundane: how could I improve the colour scheme so as to incorporate Public International Law, different constitutional patterns, and a more refined picture of legal pluralism? Such questions are not trivial, but they only scratched the surface. In time I learned that many others had made similar attempts.

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²⁹ At the time I treated as exceptional Liberia, Siam and parts of the United States and I did not challenge the idea of a “voluntary” reception. See, for example, Robert Kidder in Barbara Harrell-Bond and Sandra Burman (eds.), *The Imposition of Law* (1979) Ch. 6.

³⁰ Civil Justice Ordinance s. 5 “Where in any suit or other proceeding in a Civil Court any question arises regarding succession, inheritance, legacies, gifts, marriage, family relations or the constitution of wakfs, the rule of decision shall be:

a any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience and has not been by this or any other enactment altered or abolished and has not been declared void by a decision of a competent court;

b the Mohammedan Law, in cases where the parties are Mohammedans, except in so far as that law has been modified as is above referred to.”

On the difficulties experienced by the courts in interpreting “custom” during the condominium period, see C. d’O Farran, *Matrimonial Laws of the Sudan* (1963) 88-91. A useful overview of the official legal system in the period is Zaki Mustafa “Sudan” in Anthony Allott, *Judicial and Legal Systems of Africa* (1st ed., 1962; 2nd ed., 1970); cf. Egon Guttmann, “A Survey of the Sudan Legal System” (1956) Sudan L. Jo. Reports 6; Akolda Tier, “The Legal System of the Sudan” in K. Redden (ed.), *6 Modern Legal Systems Cyclopaedia: Africa* (1985) ch. 12.

³¹ On the unrealities of teaching English Law in the Sudan, see *LIC* Ch.2 “The Camel in the Zoo”.

Later I discovered that John Henry Wigmore had devised a neat solution to my problem about colours. By using a quite simple mixture of letters and numbers he was able both to depict mixed systems and to give an indication of the Age and Duration of legal systems.³² But Wigmore's "solution" compounded my doubts, for his presentation seemed naive and simplistic. Wigmore was a committed populariser and his three volume *Panorama of the World's Legal Systems*³³ and his *Kaleidoscope of Justice* were both overtly directed at general audiences.³⁴ These two works are fairly characteristic of Wigmore's strange mixture of the folksy and the methodical: on the one hand he had an insatiable curiosity and fascination with the variety of things; but Wigmore was known as "the Colonel" and his simple military mind required that all phenomena, however complex, should be reduced to order and paraded in neat, simple patterns.³⁵ In *Invisible Cities* "Kublai Kahn had noticed that Marco Polo's cities resembled one another, as if the passage from one to another involved not a journey but a change of elements".³⁶ Wigmore compared the legal cultures of the world to a kaleidoscope: "When the Basic Pattern revolves, the Prisms Cause Variant Patterns in Different Communities; But the Latent Elements Remain the Same Throughout." He illustrated this cryptic statement with an incomprehensible picture without any serious attempt at explanation.³⁷

I was not alone in feeling uneasy about Wigmore's efforts. Indeed, he had been the butt of such mocking criticism by Plucknett and Goodhart in the *Harvard Law Review* and the *Yale Law Journal* that he had instructed his publishers, Little, Brown, not to submit any of his future publications for review in these journals.³⁸ In the eyes of some, armchair legal tourism in the style of *The National Geographic* was not academically respectable. This is just one example of a more general tendency to dismiss attempts to give a picture of law in the world as inevitably superficial.³⁹ My concern is to challenge this view.

³² J. H. Wigmore, *A Panorama of the World's Legal Systems* (3 vols., 1928; 2nd edn., 1 vol., 1936)).

³³ *id.*

³⁴ J. H. Wigmore, *A Kaleidoscope of Justice* (1941).

³⁵ William Twining, *Theories of Evidence: Bentham and Wigmore* (1985) 110-11.

³⁶ *IC* 43.

³⁷ *Kaleidoscope*, Frontispiece. While Wigmore's *Kaleidoscope* and *Panorama* each contains some useful tit-bits of information and occasional insights, they are in many respects naive, prejudiced and inaccurate. It would be rather like flogging a dead horse to subject them to detailed theoretical or scholarly criticism. They are probably best treated as curious period pieces.

³⁸ Wigmore also had his defenders, including W. Holdsworth and B.A. Wortley. For accounts of the episode see William R. Roalfe, *John Henry Wigmore: Scholar and Reformer* (1977) pp. 259-62, 331 and Twining, *Theories of Evidence*, op. cit., (1985) at pp. 218-9, n. 3 (based in part on Wigmore's papers at Northwestern).

³⁹ It is no coincidence that Wigmore's chief critics were based in England. For the first half of the twentieth century was a period in which the intellectual climate was generally hostile to grand theory, historical jurisprudence was marginalised, and the first Professor of Comparative Law at Oxford, Harry Lawson, could say in his inaugural lecture: "... nowadays to be universal, is to be superficial". (F. H. Lawson, "The Field of Comparative Law" 61 *Juridical Rev.* 16 (1950)) In the United Kingdom micro-comparative studies have almost invariably been preferred to the Grands Systemes approach.

A second puzzlement about my map was more theoretical: in a reception what is received and who were the main agents of reception? My first venture into print as an academic was an attempt to answer such questions. Drawing on Weber and Llewellyn, I concluded that rules are not the only, nor even the main, phenomena that are transplanted; that the reception of “lawyers’ law” and legal techniques is less problematic than matters that are closely related to local *mores* or political issues of the day; and that the main agents of reception of law as technology are the legal *honoratiores*, Weber’s ironic term for the dominant legal elite.⁴⁰ This might be interpreted today as an early and moderate version of Alan Watson’s famous transplants thesis.⁴¹

This may have been passable as a first effort, but it did not advance the topic very far either analytically or empirically. In retrospect, I think that I missed an opportunity. I might have developed the ideas much further if I had made issues raised by mapping and reception the focus of a research programme or as part of a final year course in Jurisprudence. The latter would almost certainly have provided a better basis for a theoretical understanding of law in the Sudan than rehearsing the ideas of a somewhat random selection of Western jurists. However, at this stage rather than pursue the matter further, I concentrated on the more “practical” task of developing local law reporting and thereby missed out on a career in legal cartography.⁴²

COMPARATIVE COMMON LAW: BELFAST 1967-72

I was left vaguely puzzled by this youthful effort, but during the next five years my attention was directed elsewhere. However, shortly after I moved to Belfast in 1966, I revived the idea as part of our LLM course in Comparative Common Law. A number of factors stimulated this enterprise apart from my African background: first, teaching in Northern Ireland made one acutely conscious that we were continuously involved in making more or less explicit comparisons with England and Wales, the Republic of Ireland, and more broadly with American and Commonwealth sources and literature. This presented a challenge to Harold Gutteridge’s dismissal of the idea of comparative common law.⁴³ I was also struck by stories about Montrose’s introductory lectures in which he had tried to place law in the context of a map of all learning.⁴⁴ This typically bold

⁴⁰ William Twining, “Some Aspects of Reception”, (1957) Sudan Law. Jo. and Rep. 229.

⁴¹ Alan Watson, *Legal Transplants* (1974; 2nd edn., 1993). This has occasioned a great deal of controversy; for a balanced appraisal, see William Ewald, “The Logic of Legal Transplants: Comparative Jurisprudence Part II”, 43 Am. Jo. Comp. L. 489 (1995), Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences” 61 M.L.R. 11 (1998).

⁴² On law and geography see above n.27.

⁴³ “No special form of technique seems to be called for if the comparison is, for instance, between Australian and Canadian law or between English law and the law of the United States.” Preface to *Comparative Law* (1946). Gutteridge also doubted the value of comparing legal systems at different stages of development. (justifying his focus on differences between civil and common law systems).

⁴⁴ Some idea of the style and vision can be obtained from his “Address to Queen’s University Belfast Matriculation Students” published in J. L. Montrose, *Precedent in English Law and Other Essays* (Hanbury ed., 1968) Ch.2 (see also

vision had impressed many Queen's graduates, who reported that they had found it both memorable and way above their heads. Here was a recurrence of the mapping metaphor another attempt to set a broad context at the start of one's legal education.

Thus stimulated, I devised a group exercise for the postgraduates taking the course on "Comparative Common Law". I recently discovered the relevant handout among my papers. It is worth quoting from it at some length. Headed "Taxonomy: The Common Law World", the opening paragraphs read as follows:

"Your course takes "Comparative common law" as its organising concept. Presumably "common law" in this context is contrasted with "civil law", "Hindu Law", "Islamic Law", "African customary law" and so on. Presumably "common law" is *not* contrasted with "equity" or with "statute law". To what extent can we give a precise meaning to "common law" in this usage? To what extent can we make universal generalisations about "the common law world"? or broad generalisations, admitting of a few exceptions? What jurisdictions comprise "the common law world"? Are there useful distinctions to be made between "common law jurisdictions"? Are there distinctive features of some or all of the legal systems in "the common law world" which are not to be found outside it?

You are asked as a group to look into these and related questions. A possible, but not the only, way of approaching the subject would be to try to plan a map of "the common law world" within the general framework of a map of the world's legal systems. It is suggested that as a preliminary you need to give careful thought to such questions as: Is it possible to construct a working taxonomy of world legal systems? If so, how? If not, why not? Some of the factors that might be considered as possible bases for classification might be: historical factors (The British Empire? The Commonwealth? Voluntary importation of "common law", of "civil law"?); linguistic factors (does the common law operate anywhere in a language other than English?); values (does the common law have a necessary or regular association with certain ideals?); personnel (career judiciary? split profession? juries?); procedures (adversary v inquisitorial?); substantive doctrine (the doctrine of precedent? the trust concept? consideration in contracts?); methods... and so on. From detailed consideration of such factors (the above are only a sample) certain patterns may become apparent. Are these patterns sufficiently clear and sufficiently significant for it to be possible to construct a map, or a series of maps, based on a relatively precise taxonomy?"

In retrospect, this appears to me to be a rather demanding exercise in applied jurisprudence. Many of the questions are still worth asking. I have not kept the products of the group projects, but I do recall that discussions of these issues extended over several weeks and, at a general level, we did not get much further than some healthy, but essentially elementary, lessons of complexity: that a single "scientific" classification of legal systems is impossible even if one has a clear purpose and specified units of comparison; that elucidation of concepts, such as "legal system", "legal tradition", "common law", "reception", and "lawyers' law", is an essential

id., Ch.7); but I am told that his introductory lectures to first year law students were more expansive.

precondition to mapping;⁴⁵ and that generalisation is dangerous even within the common law “family”.⁴⁶ At least it legitimated the claim that “comparative common law” deserves recognition as a viable form of comparative law, but I was still left with a nagging sense of dissatisfaction, which was not helped by the existing literature.

At Khartoum I had proceeded largely by instinct. For the Queen’s seminar I was better prepared. There was a quite extensive literature on the spread of the common law, on receptions, on commonwealth and colonial law; and almost nothing on multi-lingual legal systems. There was some quite useful but uninspired writing about comparative law theory. The most immediately relevant literature concerned the “legal families” debate in comparative law. Since the latter is the most obvious precedent it is worth commenting on it briefly.

The classification of legal systems or legal orders into “families” has been one of the main concerns of macro comparative law exemplified by René David’s *Grands Systèmes de Droit Contemporains*, Derrett’s *An Introduction to Legal Systems*,⁴⁷ and Arminjon, Nolde and Wolff, *Traité de Droit Comparé*.⁴⁸ The debate has rumbled on for almost a century and continues today⁴⁹. Perhaps the most sophisticated discussion is that of Zweigert and Kötz who frame the issues as follows:

“Can we divide the vast number of legal systems into just a few large groups (legal families)? How can we decide what these groups should be? And, supposing we know what the groups should be, how do we decide whether a particular legal system belongs to one group rather than another?”⁵⁰

Comparative lawyers have struggled in vain to produce a neat taxonomy of “legal families” in response to such questions.⁵¹ Zweigert and Kötz

⁴⁵ See below text at n.24-36.

⁴⁶ My views at the time are summarised in a review of J. D. M. Derrett (ed.) *An Introduction to Legal Systems* (1968) in 14 J. African Law 206 (1970).

⁴⁷ op. cit.

⁴⁸ P. Arminjon, B. Nolde, and M. Wolff, *Droit Compare* (3v., 1950-51).

⁴⁹ A recent example is Ugo Mattei, “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems” 45 Am. Jo. Comp. L. 5 (1997). The debate about classification of legal systems has been taken more seriously in Continental Europe where the *Grands Systèmes* approach to Comparative Law has been quite influential especially in legal education. Most of the debate is rather tedious and repetitive: the main context is discussion of introductory courses on Comparative Law, and there seems to be a general consensus that legal systems are not susceptible to Linnean type scientific classification and any one of several possible schemes may be adequate for this modest purpose.

⁵⁰ K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn., trs. Tony Weir, 1997) 63-4.

⁵¹ Early attempts to classify by race or geography or solely by origin have generally been rejected by modern comparatists in favour of multiple criteria (e.g. Zweigert and Kötz, op. cit. Ch.5). Arminjon, Nolde and Wolff favoured “substance”, paying due regard to originality, derivation, and common elements. They produced a division into seven legal families, French, German, Scandinavian, Russian, Islamic, and Hindu. Eorsi constructed a Marxist classification in terms of relations of production, the major division being between socialist and capitalist, the latter being sub-divided into systems at different stages of evolution and different outcomes in the struggle between the

having rejected attempts to use race or geographical location or relations of production or ideology as the main criterion, limited the idea to the predominant *styles of legal thought* of contemporary living legal systems. On this basis, they identify five factors as central to the style of a legal family:

“(1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) especially distinctive legal institutions, (4) the kinds of legal sources it acknowledges and the way it handles them, (5) its ideology.”⁵²

Zweigert and Kötz, like other scholars, emphasise that there is no single right way of classifying systems. For the purpose of introducing “the great legal systems of the world” their multiple criteria lead to a seven-fold classification: (1) Romanistic family, (2) Germanic family, (3) Nordic family, (4) Common Law family, (5) Socialist family, (6) Far Eastern systems, (7) Islamic Systems, and (8) Hindu law.

Given that they acknowledge some of the difficulties and that there are many hybrids (which include the People’s Republic of China, Israel, South Africa, Louisiana, and Quebec), this classification probably serves their limited purpose as well as any other, but it is still deeply unsatisfying,⁵³ for if the enterprise of picturing law in the world is a necessary part of understanding law, it seems that something more intellectually ambitious is required.

bourgeoisie and the feudal class. G. Eorsi, *Comparative Civil (Private) Law* (1979) criticised by Kotz, *RabelsZ* 46 (1982); Rene David’s revised classification was into late Romano-Germanic, common law, Socialist and “other systems”, which included Jewish, Hindu, Far Eastern and African; cf. the subtle analysis of differences between East and West German doctrine before the fall of the Berlin Wall, which doubts the explanatory value of differences between “grand ideology”, Inga Markovits, “Hedgehogs or Foxes?” 34 *Am. Jo. Comp. L.* 113 (1986).

Other possible bases for classifying legal systems (but not traditions?) would include wealth (rich/poor countries), form of government (democratic/dictatorship/aristocratic etc.), language (anglophone, francophone, other), religious/secular, or climatic.

⁵² At 69-75.

⁵³ One obvious point is that the items on the list are not species of a single genus: (1)-(5) could refer to national state legal systems so could (6), but that raises questions about the reason for choosing this as a category; however, there is no single state whose legal system is today based mainly on Hindu Law. Similarly, Islamic Law has a much wider ambit than the few Islamic states. During the Cold War period it made sense to treat the Eastern bloc as a group, based on ideology and Soviet power, but mixed in with a strong civil law tradition. Since the collapse of the Soviet bloc the situation is more complex. “Far Eastern systems” refers to a geographical grouping of states which seems rather diverse in respect of style. “Common law” can refer to historical origin, or a legal culture (ideas and practices and possibly institutions), or tradition, or factors to do with colonialism on the one hand and the growth in importance of English as a world language on the other. Civil law, partly because of its perceived greater translatability, was received in a wider variety of historical situations. But there it is now widely acknowledged that in some respects there may be more important differences within “the civil law family” than between that family and “the common law”.

BOSTON 1996

Two years ago, at the start of a seminar modestly entitled “Globalization and Legal Theory”, I set the students an exercise. I asked the class first, to draw a map of the main legal orders in the world, next to draw an historical chart of the rise and fall of the main legal cultures in the world, and then to consider the relationship between the two. This was a modification of the Queen’s exercise, but it was more explicitly linked to contemporary legal theory. At our second meeting the students asked for an extension. I granted this, subject to the proviso that their maps or pictures should include classical Roman Law and Islamic Law. At the next meeting, I granted a further extension, but added in the *lex mercatoria*, *ius humanitatis*, and Pasagarda Law that is the legal order of illegal squatter settlements in Brazil as depicted by Santos. Each time they asked for an extension, I added further candidates for inclusion. Around about the sixth week they gave up and we discussed why the exercise was problematic.

Rather than reconstruct our discussions, let me state my own position on the reasons why earlier attempts have been flawed, my own as well as those of Wigmore and the *Grands Systèmes* comparatists.

GEOGRAPHICAL MAPPING: A POST-MORTEM

I have now reported a sense of dissatisfaction with several previous attempts to present an overview of law in the world through maps. What are the main sources of this dissatisfaction? Can anything constructive be rescued from such exercises? Or is legal cartography as an enterprise doomed to failure? Each of the examples considered involves illuminating errors.

To start with my first effort in Khartoum. Aside from my conscious puzzlements, at the time I did not question a number of assumptions that I would now reject. Three in particular are significant:

First, I just assumed that what was to be mapped was the national legal systems of “countries” and that the starting-point for classification was national and state borders. My map included colonies, and subordinate jurisdictions, such as Canadian provinces, but did not provide for Public International Law or even for Islamic Law, except as a subordinate part of the law of secular states. It completely omitted candidates for the appellation “legal orders” at the global, regional, transnational, communal and local or sub-state levels. Most legal maps that I have come across make the same dubious assumption.⁵⁴

Second, I unconsciously privileged common law and civil law by depicting almost all national legal systems as belonging to one or other of these two “parent families”. Indeed, I used this to emphasise the importance of colonialism in the spread of law. This same assumption still dominates the study of comparative law today. From an historical perspective the idea of “parent” legal systems has some justification, even if it is patronising.⁵⁵ But the concept is past its sell-by date. For example, in 1998 who is the “parent” in matters legal as between Scotland and England, or the United States and the United Kingdom? Or between the

⁵⁴ Santos, *op. cit.*, is a notable exception.

⁵⁵ Another standard justification is one of economy. The argument goes that “parent systems” can conveniently be treated as representative of their respective “families”. However, this argument too is becoming increasingly questionable.

international community and nation states in respect of bills of rights? If Alan Watson is even half-right in suggesting that imitation is the main engine of legal change, the interaction between legal systems today can hardly be characterised as being like that between parent and child.⁵⁶

Thirdly, in Khartoum I had glossed over the problem of taxonomy of legal systems. By the time I revived the idea in Belfast, I was familiar with debates among comparatists about legal families and they featured in our discussions about comparative common law. In raising questions about how far one can generalise across the common law world, we went beyond state legal systems to include the more elusive ideas of “culture” and “tradition” and we had a stab at exploring the relationship between law and language in multi-lingual societies still a seriously neglected topic.⁵⁷ All of this was an advance, but the focus was still on state law; for example “legal pluralism” was still conceived in the weak sense of pluralism within official legal systems rather than in the strong sense of a multiplicity of overlapping orders co-existing within the same territorial or social space.⁵⁸

We recognised that all the standard taxonomies, such as those of René David, or Arminjon, Nolde, and Wolff were unsatisfactory, but we did not get to the root of why this might be so. What is wrong with them? A satisfactory taxonomy needs to have a clearly defined purpose or purposes; clear units of comparison; precise and definite differentiae; and, ideally, non-overlapping species that exhaust their genus.⁵⁹ Within the legal families debate these conditions are generally not satisfied.

First, *purpose*. The most common use has been to introduce law in general or a particular legal system to beginning law students or as an introduction to comparative law or to a non-specialist readership. Most of the *Grands Systèmes* debate has taken place in the context of introductions to elementary courses on comparative law. Such *introductory mapping* can serve a very useful function in providing a general context for particular studies. My own modest effort to set the Sudan legal system in the context of a picture of law in the world had a similar aim. The tendency of comparatists is to move fairly smartly from macro- to micro- comparison, very sensibly given the difficulties. For such modest purposes a relatively crude overview is probably adequate; it can take many forms, and the relative merits of different taxonomies hardly deserve serious theoretical attention.

However, for the purposes of developing a modern general jurisprudence the approach to constructing total pictures of law in the world needs to be more systematic and rigorous. The more intellectually ambitious

⁵⁶ Watson, *Legal Transplants*, op. cit. n. 41.

⁵⁷ In many countries only a minority of the population speak the official language(s) of their state legal system. This is a neglected issue which is quite different from the much more discussed topic of the comprehensibility of legal language to ordinary speakers of that language. On the politics of official languages, see David Crystal, *English as a Global Language* (1997) and references there. The most extended account of language policy in relation to law is L. J. Mark Cooray, *Changing the Language of the Law: The Sri Lanka Experience* (1985).

⁵⁸ John Griffiths, “What is Legal Pluralism?” (1986) op. cit. n. 8, Teubner (1998) op. cit. n.41.

⁵⁹ Max Black *Critical Thinking* (2nd edn., 1952). However, Black observes of the last requirement that “in practice this ideal is seldom attained” at p. 224.

enterprises of a Leibniz or Blackstone or Austin are designed to provide a conceptual basis for systematic enquiry.⁶⁰ Such *foundational mapping* is a more serious matter: for example, Duncan Kennedy in his critique of the structure of Blackstone's *Commentaries* argues that what purports to be a systematic presentation of an internally coherent system is really a justificatory apologia that masks the inherent contradictions of the common law.⁶¹ The general part of Austin's ideas, especially his agenda for jurisprudence and his command theory of law, have attracted the most criticism. His defenders may argue that these can be interpreted as little more than general prolegomena to the detailed analyses which represent his most worthwhile contribution. My own view is that some such prolegomena are not best treated as mere prefatory grace notes. In legal theory, as in political and social theory, elucidation of abstract concepts is a critically important task. It is particularly difficult to identify or construct concepts that transcend different cultures and, for this reason, the decline of general analytical jurisprudence at least in the English-speaking world is a matter for regret.

Second, *levels of comparison*. If one's list of candidates for mapping includes various kinds of non-state law as well as national and sub-national state systems, then it is difficult if not impossible to find a single basis for classifying them: Scots law, common law, New York law, Islamic law, Pasagarda law, and European Union Law are not species of a single genus. Many of the candidates for inclusion in a reasonably comprehensive map of world law do not respect national boundaries: Islamic Law, *lex mercatoria*, canon law, or Roman law for example; other candidates, such as European Union Law and Public International Law transcend state boundaries but are intimately related to sovereign states; some, such as Mississippi law or Dinka or Maori law, are confined within national boundaries.⁶² To depict legal orders dealing with global, international, transnational, regional, and local relations, as well as national, requires some differentiation of levels of classification. Each level will require its own differentiae. Most standard taxonomies are confined to one level, that of municipal law.⁶³

Third, even assuming that the focus is on state law, it is unclear whether the *units of comparison*, what is being compared, is systems, orders, cultures or traditions. Sometimes these are run together so that the

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⁶⁰ Below p. 32.

⁶¹ Duncan Kennedy, "The Structure of Blackstone's Commentaries" 28 Buffalo L. Rev. 205 (1979).

⁶² In the case of the Dinka, their traditional law has in practice had a much wider scope than that recognised by the state: indeed, the scope of Dinka law depends upon one's standpoint: it has a very limited scope in the national legal system of the Republic of the Sudan, a very wide scope in the life of the Dinka people, and an intermediate position in the areas occupied by the Sudan People's Liberation Army. See further the discussions of administration of justice in the Southern Sudan and the "common law movement" in the United States above n. 10 and 11. For a sceptical interpretation of the notion of "customary law" in colonial settings, see Martin Chanock, *Law, Custom and Social Order* (1985).

⁶³ But see, for example, R. Dehousse, "Comparing National EU Law: The Problem of Level of Analysis", 42 Am. Jo. Comp. L. 761 (1994); a more sceptical view is being developed by Ian Ward, e.g., "The Limits of Comparativism: Lessons from UK-EC Integration", 2 Maastricht Jo. of European and Comparative Law 23 (1995). See further below p. 30-31.

classification does not consist of species of a single genus. In other words it is by no means clear what legal families are families of.⁶⁴

The most common is “legal system”. Most comparatists either explicitly or implicitly treat “legal systems” as the unit of comparison.⁶⁵ but this is used ambiguously: German law, Islamic law and African law are “legal systems” in quite different senses.⁶⁶ For example, Zweigert and Kötz divided legal families into eight groups: Romanistic, Germanic, Nordic, Common Law, Socialist, Far Eastern Systems, Islamic Systems, and Hindu Law. Some schemes include African Law and Chinese Law. Whilst some of these categories could be interpreted as families of municipal or state legal systems, this is not the case with Islamic, Hindu or African law. Hindu law can be interpreted as a system of concepts and principles, but not as a state legal system anywhere; while there are a few officially Islamic states, Islamic Law is surely not confined to them.⁶⁷ Similar considerations apply to other bodies of “religious law” such as Jewish or Buddhist law or stateless cultures or traditions such as “Gypsy Law”. Socialist law or socialist legal systems refers to national legal orders strongly influenced by a particular political ideology at a particular phase in history. Even before the “collapse of socialism” this was an uneasy category. The term “African Law” was originally coined to refer to traditional or customary law of African peoples; it is hardly ever used to refer to the national legal systems of modern sovereign states in Africa.⁶⁸

Fourth: part of the legal families debate has centred on the *differentiae* of classification. There are almost as many ways of classifying legal systems or orders as there are for cities and countries. Race, language, stage of

⁶⁴ See, for example, Pierre Legrand, “Comparative Legal Studies and Commitment to Theory” 58 M. L. R. 262 (1995) at p. 267.

⁶⁵ e.g. Ake Malmström, “The System of Legal Systems” 13 Scandinavian Stud. in Law 129 (1969); Arminjon et al., op. cit. David, op. cit. Zweigert and Kötz, op. cit., Ch. 5, de Cruz, op. cit., entitles his Chapter 2 “The Classification of Legal Systems into Families”.

⁶⁶ If “legal system” is used in a precise sense, for example the state legal systems of all members of the United Nations or, more broadly, those legal orders that satisfy some recognizable juristic criteria for the existence of a legal system, such as those of Hart or Kelsen, then it is not possible to accommodate some of the standard candidates such as Islamic, Hindu, or African law. If one substitutes “tradition” or “culture”, the terms are so vague as to raise serious doubts of their being used for any precise or useful system of classification. See the discussions in David Nelken (ed) *Comparing Legal Cultures* (1997) esp. Ch. 1-4.

⁶⁷ One can view Islamic law from a variety of perspectives: for example, as a system of norms, or as a body of ideas, or as a culture involving practices and interpretive styles as well as ideas, or as a tradition which involves change or development over time in respect of all of these even in a system decreed by God. If one looks at Islamic law in Saudi Arabia or Sudan or Iraq or England, in order to understand it one will need to consider local history, institutions, personnel, and practices as well as norms and ideas and culture.

⁶⁸ While there is a body of legal theory providing criteria for identifying the legal systems of sovereign states or parts thereof, the same is not true for the vaguer “legal traditions” and “legal cultures”. For the legal systems of nation states there are identifiable units, one can count the members of the United Nations or the number of legal orders that satisfy Hart’s or Kelsen’s or some other mainstream jurist’s criteria for the existence of a legal system. There will of course be a few borderline cases.

economic development, ideology, historical origin, substantive concepts and “institutions” and even climate are among the factors that have been suggested.⁶⁹ The more sophisticated attempts at constructing a taxonomy of legal families have insisted on multiple criteria of classification, for example, Zweigert and Kötz, in respect of styles.

While the emphasis on history and factors in addition to substantive doctrine is welcome there is a danger of reductionism in this approach. For example, the idea that there is a single characteristic or predominant⁷⁰ mode of thought in the English legal profession assumes that the profession is monolithic and that all that English lawyers think about is questions of law.⁷¹

Similarly, when comparative lawyers contrast the characteristic “styles” of thought or “mentalities” of civilians and common lawyers, they seem to make the big assumption that differences between common law and civil styles are more significant than differences within a given legal culture or tradition. But an equally plausible alternative hypothesis is that within most legal cultures there is a constant tension between formal and substantive, literal and purposive, and other more nuanced contrasts that one finds within our own tradition.⁷²

This Cook’s Tour of some previous attempts to use geographical maps to depict legal phenomena suggests a number of lessons, including the following:

First, if one accepts that there are different levels of legal relations and legal ordering, the phenomena of law are probably too complex to be depicted on a single map or picture. At the very least one would need something more like a historical atlas, with a series of different kinds of maps and charts, using different projections, scales, time frames and “classificatory” categories. Some maps could use countries or nation states as an important unit of analysis, some would be better to ignore national boundaries. In *Invisible Cities*, Kublai Khan in his search for order and patterns has an atlas that depicts continents, sea routes, and particular cities that Marco Polo has visited or heard described. It also reveals possible cities that do not yet have a form or name.⁷³ “In the last pages of the atlas there is an outpouring of networks without beginning or end, cities in the shape of Los Angeles, in the shape of Kyoto-Osaka, without shape.”⁷⁴

⁶⁹ de Cruz 34; Zweigert and Kötz 63-9. One could turn to classifications used in other disciplines, such as economics, politics, and geography. Comparatists often use the term “institutions” to refer to concepts such as contract and trust, rather than in a broader sociological sense.

⁷⁰ de Cruz talks of the “predominance principle” in relation to styles or mentalities, op. cit. at 33-4.

⁷¹ On reductionism in respect of “the lawyer”, “the legal mind”, “legal method”, and “skills” in the United States see *LIC* Ch. 16 and 17.

⁷² *Ibid.*

⁷³ *IC* 137-9.

⁷⁴ *IC* 139. It has been pointed out that Kublai Khan’s atlas does not produce a single overall order: “There is no global map, only a sheaf of insets of hypothetical cities in an atlas whose order is either unknown or fanciful,” Albert H. Carter III, *Italo Calvino: Metamorphoses of Fantasy* (1987) at pp. 120-21.

"I think you recognize the cities better on the atlas than when you visit them in person," the Emperor says to Marco Polo, snapping the volume shut.

And Polo answers: "Traveling, you realize that differences are lost: each city takes to resembling all cities, places exchange their form, order, distances, a shapeless dust cloud invades the continents. Your atlas preserves differences intact: that assortment of qualities which are like letters in a name."⁷⁵

A second lesson of my tour has been that geographical maps are just one means of depicting "mainly spatial" relations. They have their uses; indeed, a reasonably; sophisticated historical atlas of law in the world could be quite illuminating and I know of serious scholars who have contemplated such a project. But maps mainly depict physical relations and distribution and, as such, they have a restricted application to legal phenomena.⁷⁶

After nearly a century of unsatisfactory debates, it is natural to ask two questions: are all attempts at a systematic classification of legal systems or legal families doomed to fail? If so, does it matter?

The *Grands Systèmes* approach of macro-comparison has sometimes been dismissed as superficial or unscholarly or of little or no utility.⁷⁷ Such criticism may be valid when applied to poorly executed examples or to very general treatments that never get down to concrete details. However, there are good reasons for taking the enterprise of mapping the phenomena of law in the world quite seriously.

First, setting the local in the context of the global serves the values of any form of contextual study for example, maintaining a sense of scale and proportion; avoiding the dangers of parochialism; establishing the relationship of the subject of study to others. For example, my attempt to get Sudanese students to see their national legal system as part of a broader world picture had a worthy aim, even if the execution was faulty.

Second, micro-comparison presupposes macro-comparison; they are complementary rather than alternatives. In so far as legal systems or cultures are organic, it is necessary to set even the most detailed object of study, an institution like the ombudsman, or local contract doctrine, or even a single rule, in the context of some larger whole. Even the most narrow formalist wishes to see a particular rule as part of a system of rules or rules-and-principles; seeing whole legal systems in a broader world picture is taking the process one stage further.

Thirdly, if one task of jurisprudence is to construct a coherent "total picture" of law, one job for general jurisprudence should be to construct such a picture for legal phenomena in the world as a whole. This is not just an exercise in abstract theorising. A skewed vision of law can have all sorts of practical implications witness, for example, the incredibly delayed response of our systems of legal education and training to human rights law and membership of the European Community; the confusion created

⁷⁵ id. 137. This passage might give comfort to both convergence and *difference* theorists, on which see Richard Hyland, "Comparative Law" in Dennis Patterson (ed) *A Companion to Legal Philosophy and Legal Theory* (1996) Ch. 11.

⁷⁶ But see above n.27.

⁷⁷ e.g. Watson, *Transplants*, Ch. 1; cf. Basil Markesinis, *Foreign Law and Comparative Methodology* (1997) Ch.1.

by ad hoc responses to quite predictable aspects of the internationalisation of legal practice; and the naivety of some attempts at harmonisation of laws.

It is interesting that the debate about “families” and mapping world law has taken place largely within comparative law with almost no help from legal theory. Yet the problems of mapping law are essentially jurisprudential. The difficulties that face anyone trying to construct a map of law in the world are familiar problems of legal theory: what is the subject of our study? On what basis does one decide to draw a line between “legal” and “non-legal” phenomena? How can legal phenomena be classified? and so on. The key point is that geographical maps presuppose mental maps. That is to say they are means of presenting pre-existing concepts and data. The main weakness of my own early attempts and those of Wigmore and others,⁷⁸ is that they were jurisprudentially naive. The problems underlying the “legal families” debate are almost entirely conceptual; the debate brings out the point that there are questions and doubts about purposes, levels, units of comparison, differentiae, and over-generalisation that need to be addressed before one can produce a satisfactory overview of law in the world. This seems to me to be a neglected job of analytical jurisprudence. So we need to proceed from geographical to mental mapping.

MENTAL MAPPING

The metaphorical use of “map” as “a mental conception of the arrangement of something” is quite common in legal theory. For example, Leibniz talked of a *theatrum legale mundi*.⁷⁹ Blackstone⁸⁰ and Austin⁸¹ used mapping as a metaphor for providing general overviews of English law. More recently post-modernists, such as Santos and Goodrich, have used the metaphor in more complex ways. Perhaps the most important example is Santos’ well-known essay “Law a Map of Misreading”⁸² in which laws themselves are presented as maps that both distort and construct social relations. Mainstream theories of law, such as those of

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⁷⁸ Above p.19-22.

⁷⁹ Leibniz, *Nova methodus discendae docendaeque jurisprudentiae* (1667); *Theatrum legale* (1675); Patrick Riley, *Leibniz’ Universal jurisprudence: Justice as the Charity of the Wise* (1996).

⁸⁰ W. Blackstone, *Commentaries on the Law of England* (1st ed., 1765) I.1.35. Blackstone’s concern was to present English law, especially the common law, in a systematic or scientific fashion by identifying the basic principles that gave it coherence. The most germane passage is worth quoting: “[The academical expounder] should consider his course as a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet.”

⁸¹ J. Austin “The Uses of the Study of Jurisprudence” in *The Province of Jurisprudence Determined Etc.* (Hart ed., 1954) 379. Austin began his lecture series with this lecture, but it was not published until 1863. Interestingly, like Blackstone, Austin used this not in relation to general jurisprudence, but rather to the need of the student for a map of English law, in order to have an overview of basic concepts and principles as a system or organic whole.

⁸² “Law: A Map of Misreading. Toward a Post-modern Conception of Law”, 14 *Jo Law and Society* 279 (1987), now reprinted in *Toward a New Commonsense*, op. cit. Santos also presents an interesting chart of laws in the world at id., p. 275.

Kelsen, Hart, Llewellyn or even Dworkin, can be interpreted as attempts to construct one kind of mental map of state legal systems.

In an earlier lecture I began to explore how far mainstream theories that have focused on municipal legal systems and that treat societies as enclosed units can be adapted to apply to other levels of legal ordering and deal with the complexities of the phenomena of legal pluralism.⁸³ There is much more to be said about mainstream legal theory as mental mapping, but here I shall confine myself to some less obvious examples: global statistics; the increasingly fashionable use of rankings at global, national and other levels; and some different ways of profiling a legal system or order. What these have in common is that they are examples of mental maps.

GLOBAL STATISTICS AND RANKINGS

Almanacs, encyclopaedias, and world surveys are a long-established phenomenon. The first edition of the *Encyclopaedia Britannica* was published in 1768-71.⁸⁴ In the last twenty years there has been a striking increase in the production of data, mainly but not entirely statistical, presented in standardised forms that provide, or purport to provide, a basis for world-wide comparison. Tabulated information is widely used in fields such as population, economics, health, and education. Well-respected examples include the *Britannica Yearbook*, *The World in Figures* (published by the Economist) and reports by United Nations agencies, the World Bank and IMF. Some of the best-known are very general, but there are, of course, many more specialised publications dealing in greater detail with narrower areas.⁸⁵

Someone might ask: what has this to do with law? A survey of this general literature brings out a number of related points: first, these kinds of data are almost totally absent from the literature of mainstream comparative

⁸³ GLT 36-39.

⁸⁴ *Whitaker's Almanack* dates from the late 1860s, the 1997 edition is the 129th Annual volume; the *World Almanac and Book of Facts* (formerly *World*) can be traced back to 1860.

⁸⁵ The trend is towards not only greater sophistication and standardisation, but also an increase in the range of producers. While the great majority of such data is based on official statistics, with their own particular criteria for selection and biases, governments do not have a monopoly on the production of global data. Non-governmental organisations, corporations and commercial publishers have contributed to the trend. With the communications revolution the range of producers is proliferating, exemplified by the range of conventionally published reference works now on the market, especially in the United States. Some of these are addressed to the general public, others are aimed at quite specific commercial, educational, and professional audiences. One of the main publishers in this area, Facts on File, explicitly targets secondary schools and public libraries. The variety of such works is illustrated by their titles. Atlases include *The Macmillan World Reference Atlas* (1994); *The State of the World Atlas* (1995) and a great variety of specialised atlases. I have only found one explicitly legal atlas, *The Legal Atlas of the United States* (1996), but I am told that others exist (e.g. Galgano (ed) *Atlante di diritto comparato* (1992) I am grateful to Giovanni Sartor for this reference, but I have not had access to a copy. See further *The World Map Directory: A Practical Guide to U.S. and International Maps* (1992-3).

law;⁸⁶ conversely, law is strikingly absent as a significant category from most of the general statistical literature. With one major exception, crime statistics, law as such is hardly treated as a significant category. To take a fairly representative example: *The Britannica Yearbook* uses over 20 categories for organising its presentation of global data, including agriculture and population, language, religion, employment and labour, manufacturing industries, communications, trade, housing and construction, household budgets, health services, and education. The only explicit mention of a legal category is crime, which is one of three sub-categories of social protection and defence services along with welfare and security forces. It takes up less than 2% of the volume for 1997.⁸⁷ There are international statistics for crimes, police and prisons and a few more items can be extracted from tables of “social indicators” and the like.⁸⁸

It might be objected that law is a cultural phenomenon of a kind which is less prone to statistical analysis than areas such as economics, health and education. Indeed cultural and legal relativists, including some leading members of the new generation of comparative lawyers, who wish to emphasise *difference*, may argue that most legal statistical data is likely to be unhelpful, misleading or just meaningless.⁸⁹ They can point, with some justification, to the unhappy history of attempts to subject legal institutions and processes to allegedly “scientific” quantitative analysis, from the Johns Hopkins Institute in the 1920s through to the abortive Stanford Studies in Law and Development of the 1970s that tried to produce Legal and Social Indicators for Comparative Study in Latin America and in Mediterranean Europe.⁹⁰ I shall not enter here into the debate in

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⁸⁶ CLLT. Two exceptions are the intelligent use of statistics by Basil Markesinis, *Foreign Law and Comparative Methodology* (1997) Ch. 20 (on “litigation mania”) and Inga Markovits in her studies of East and West Germany before the transition, e.g. “Hedgehogs or Foxes?” 34 *Am. Jo. Comp. L.* 113 (1986).

⁸⁷ Other examples include *The Sourcebook of Global Statistics* (1998) which draws on over 200 sources, only about 1-2% of which are explicitly legal, mainly in respect of crime.

⁸⁸ It might be objected that this downplaying of law is mainly a matter of taxonomy; a great deal of data can be extracted from these sources about legal activities, institutions, processes and personnel. After all, since law is a generally pervasive feature of most aspects of social life many statistics about accidents, divorce, employment, housing, homelessness, immigration, the police and so on are more or less directly “legally relevant”. However, even international crime statistics are less developed than most of these other fields and fundamental questions about the comparability of legal phenomena across nations and cultures need to be addressed.

⁸⁹ Eg L. Zedner, “In pursuit of the vernacular: comparing law and order discourse in Britain and Germany”, 4 *Social and Legal Studies* 517(1995). cf. Pierre Legrand’s scepticism about the use of economic analysis as a basis for comparative law on the grounds that it excludes or underplays the importance of history and culture, review of Ugo Mattei, *Comparative Law and Economics* (Ann Arbor, 1997) in [1997] *C. L. J.* 638; Richard Hyland, “Comparative Law” op. cit. n. 75.

⁹⁰ On the generally sad story of such studies in the United States see J. H. Schlegel, *American Legal Realism and Empirical Social Science* (1995). A rather striking example in comparative law is J. H. Merryman, D. Clark, and L. Friedman, *Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal and Social Indicators for Comparative Study* (1979). This was an unsuccessful attempt by distinguished legal scholars at Stanford to break away

comparative law between universalists and difference theorists, that is to say those who emphasise the unique aspects of each legal system and culture.⁹¹ Questions of cultural relativism of law are central to contemporary jurisprudence.⁹² So too are questions about the extent to which legal institutions and practices are susceptible to economic or other kinds of quantitative analysis.

Such questions need to be addressed as preliminaries to the compilation of meaningful global statistics about law. However, these kinds of data are in fact already becoming increasingly important in policy formation and other decision-making at local, regional, international, transnational and global levels. Comparators and standards for assessing the health of aspects of legal systems exist and are being used either explicitly or implicitly for all sorts of purposes. A few well-established standards or comparators do exist in law but they tend to be fragmented: for example, Amnesty International, the International Committee on Human Rights and numerous other bodies assess the human rights record of different nation states and regimes by reference to general human rights norms.⁹³ The World Bank, the IMF, and donor states and agencies subject potential recipients to notional standards implied by the phrase “democracy, good governance and human rights”. “Democratic audit” is becoming a fashionable phrase.⁹⁴ Recently, Transparency International has developed a quite sophisticated methodology for analysing the extent of corruption in a given country and for constructing “national integrity systems”.⁹⁵ At a national level, courts and legal services are becoming increasingly subject to bureaucratic evaluation.⁹⁶ Educational institutions, including law

from the unempirical approaches that had characterised “Law and Development” studies by providing “quantitative descriptions of legal systems”. Collections of statistical tables, devoid of any context or commentary and without discussion of issues of comparability and concepts, proved to be singularly unilluminating and the project appears to have been sunk almost without trace. See also, Heinz Schaffer and Attila Racz (eds) *Quantitative Analysis of Law: A Comparative Empirical Study* (1990). This Budapest-based project involves a quantitative comparative analysis of “sources of law in Eastern and Western Europe”, mainly in relation to “normative acts” of different kinds.

⁹¹ Richard Hyland, op. cit. n.75.

⁹² *LIC* Ch. 8; Richard A. Wilson (ed.) *Human Rights, Culture and Context* (1997).

⁹³ For example, Amnesty International, Annual Reports; Freedom House, *Freedom in the World: The Annual Survey of Political Rights and Civil Liberties* (1978-); US Department of State, *Country Reports on Human Rights Practices* (annual) regularly reviewed by Lawyers Committee for Human Rights in *Critique* (1978-); Charles Humana, *World Human Rights Guide* (3rd edn., 1992). For general discussions of this literature see J. C. McCrudden and G. Chambers, *Individual Rights and the Law in Britain* (Oxford, 1994) Ch. 16; Youcef Bouandel, *Human Rights and Comparative Politics* (1997); Franseca Klug, Keir Starmer and Stuart Weir, *Three Pillars of Liberty* (1996).

⁹⁴ e.g. F. Klug, K. Starmer, and S. Weir (1996), op. cit., D. Beetham, *Auditing Democracy in Britain* (Democratic Audit Paper No. 1, 1993).

⁹⁵ Jeremy Pope, *The TI Source Book* (Berlin 1996), TI annual reports.

⁹⁶ Probably the most developed in respect of courts is the US National Center for State Courts, *Trial Court Performance Standards* (1990); cf. publications of the New South Wales Bureau of Crime, Statistics and Research. In England there has been significant recent work in respect of franchising legal aid, e.g. Richard Moorehead, Avrom Sherr, and Alan Paterson, “Judging on results? Outcome

schools, are also becoming aware of the uses and misuses to which performance indicators and other external criteria of evaluation can be put on which more later. Some agencies have formulated performance indicators for different sectors of a legal system, not all of which are published.⁹⁷ Some of the formulated standards are explicitly qualitative; some are based on carefully constructed statistics; some are artificially or dubiously quantified.⁹⁸ Other standards for evaluation are left implicit, which may be even more dangerous. Like it or not, most public institutions are now part of a performance culture. We have to live with such evaluations, whether explicit or implicit. We need to assess their uses, limitations and dangers and to examine critically their intellectual foundations. So far as law is concerned, the underlying jurisprudential assumptions need careful scrutiny.

RANKINGS

A relatively new phenomenon, rankings, has grown up on the back of the increasing standardisation of statistical data. A familiar example is educational "league tables", such as the notorious *US News and World Report* rankings of graduate (mainly professional) schools,⁹⁹ the Norrington Table in Oxford and, the more recent, and only slightly less controversial, the London Times *Good University Guide*.¹⁰⁰

Educational rankings are only one small part of the rapidly expanding rankings game. The American passion for statistics linked to the relative easiness of standardising data relating to the 50 states makes the United States the clear leader in the field. For example, the *Gale State Rankings Reporter* for 1994 features over 300 tables comparing the 50 states, with no less than 5200 specific sets of rankings.

Under American leadership the rankings game has spread to largely popular attempts to produce global rankings with titles like *The New Book of World Rankings* or *World Facts and Figures*.¹⁰¹ At present the lack of

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measures: quality, strategy and the search for objectivity" 1 Int. Jo. Legal Profession 191 (1994).

⁹⁷ A general example is Roberto Mosse and Leigh Ellen Sontheimer, *Performance Monitoring Indicators Handbook* (World Bank Technical Paper No. 334, 1996).

⁹⁸ cf. David Braybrooke's "Scale of Scientificality", *Philosophy of Social Science* (1987) 43-6.

⁹⁹ The *US News and Report 1998 Annual Guide* covered Business, Law, Medicine, Health, Education, Engineering and Public Affairs (March 2, 1998). This is, of course, only one salient example from a very extensive and controversial literature.

¹⁰⁰ John O'Leary (ed), *The Times Good University Guide* (1998) is subtitled *For Students Entering University in 1999*.

¹⁰¹ Examples include *The New Book of World Rankings* by George Thomas Kurian, now in its third edition, (1991) and Victor Showers, *World Facts and Figures* (3rd edn., 1989); cf. IBRD, *The Development Data Book: a guide to social and economic statistics* (World Bank, Washington D.C. 1995) and UNESCO *Statistical Digests* (annual). An example of compiling international rank orders for scholarly purposes is Muller (op. cit., 1998) who states: "One of the three principal purposes for which this compendium has been prepared is the analysis of *international rank orders*. International rank orders are the result of *differences* with regard to national participation in *highly valued scarce goods* such as military strength, national wealth, or human capital. This means that *international rank orders* are much more than theoretical

availability and standardisation of statistics make such tabulations much cruder and less detailed than those confined to the United States, but no doubt that will change over time.

Global legal rankings do exist in a number of fields. There have been a few published league tables in respect of human rights, corruption, and various kinds of democratic audit. For example, those produced by Charles Humana and Freedom House on national human rights performance,¹⁰² Transparency International's Corruption Perception Index,¹⁰³ and various organisations' reports on crime trends.¹⁰⁴

One is tempted to dismiss such rankings as ridiculous and not worth the attention of serious academics. That was my first reaction. But I have changed my mind for three reasons: first, even the cruder ones are not entirely meaningless; second, rankings are becoming increasingly influential in many types of practical decision-making; and third, they are often used or misused for purposes quite other than those for which they were intended.

The first point can be illustrated by an example that is at first sight quite absurd. I recently came across an American book entitled *Where We Stand*, the sub-title of which is *Can America Make it in the Global Race for Wealth, Health and Happiness?*¹⁰⁵ The opening words of this bizarre publication are: "America is as competitive as a Chevrolet." It produces a series of league tables centred around seven themes: Who is the wealthiest? Who is the smartest, healthiest, busiest, freest? Who are the best lovers? Who has the best home? The bottom line, a combination of all factors into a single index, concludes that the United States is only the sixteenth "most habitable" country and that "THE WINNER IS JAPAN".¹⁰⁶

At first sight this looks like no more than a piece of enjoyable nonsense. The style is breezy, iconoclastic and tongue in cheek. The book seems to be designed to shock American readers out of a sense of complacency about their society by banging them over the head with figures about gun ownership, murder, oil spills, clean air, teachers' salaries, and over one

constructions. They constitute *social stratifications* of national societies which are relevant for these societies in terms of their collective fears and aspirations. This stratified nature of the world system has led us to focus the contents of the compendium on research questions of the following kind:

- What is the shape of the stratification pyramid of a given rank order?
- Which are the nations belonging to a given stratum of the international system?
- Are certain strata or groups of nations more mobile than others and what are the reasons for this mobility?" (id. 15. Italics in the original). Note that the basic unit of comparison is assumed to be the nation-state.

¹⁰² op.cit. n.93. Amnesty International and the US Department of State provide some contextual information and avoid some of the cruder pitfalls by not producing "league tables"; but they nevertheless use implicit comparators with all the problems of comparability and potential bias that these entail.

¹⁰³ op. cit. n.95.

¹⁰⁴ E.g. United Nations, Trends in Crime and Criminal Justice 1970-85, in the Context of Socio-Economic Change (1992); Crime Trends and Criminal Justice Operations at the Regional and International Levels (1993).

¹⁰⁵ Michael Wolff, *Where We Stand: Can America Make it in the Global Race for Wealth, Health and Happiness?* (1992).

¹⁰⁶ id.

hundred other matters. Interestingly, and perhaps worryingly, it is actually quite informative: the sources are generally the best available, the rankings are fairly plausible, and some of the findings are quite surprising. The final composite index is blatantly subjective in its weightings of different variables, but at least readers are given the opportunity to give their own weightings to different factors.

Where we Stand is not nearly as silly as it looks. Read with the more sophisticated American books of rankings it suggests what might be achieved if a greater amount of reliable international data were available in relatively standardised form, as has already happened in some fields. With the rapid increase of international and global standardisation we are not far off reaching such a situation.

So let us look briefly at one law-related example. Transparency International (TI) is a non-profit non-governmental organisation established in 1993. Its mission is to combat corruption world-wide.¹⁰⁷ TI publishes an annual Corruption Perception Index, based on the perceptions of multi-national firms and institutions.¹⁰⁸ Although this is only a small part of TI's many activities, it is by far the best known, largely through highly condensed reports in newspapers and other media.¹⁰⁹ On closer examination one finds that TI is a small, but highly professional organisation that concentrates largely on specific issues in particular countries. It uses sophisticated and seemingly effective techniques for analysing a local situation,¹¹⁰ devising tailor-made strategies for reducing corruption, and mobilising practical support for the effort. The simplistic composite league tables, as reported in the press, mask the professionalism of the organisation.¹¹¹ The TI indexes have provoked protests and have had some unintended political consequences. Although vulnerable to many of the standard objections to league tables, these eye-catching publicity "gimmicks"/devices seem to have served several useful functions

¹⁰⁷ Its purpose is "To curb corruption by mobilising a global coalition to promote and strengthen international and national integrity systems" ; Transparency International, (TI) Mission statement 1997. "Corruption" is broadly defined as "the misuse of public power for private profit". Jeremy Pope, *The TI Source Book* (1997) Ch. 1.

¹⁰⁸ The methodology is discussed at length in *The TI Source Book* Ch. 6, which emphasises that this is an index of perceptions based on a poll of polls. The popularity of the index has surprised those responsible who are investigating ways of refining it.

¹⁰⁹ In 1996 Nigeria came first (out of 54 countries) on the index as the country perceived to be the most corrupt, and New Zealand came bottom of the league at 54th. Britain at 43rd was rated as being thought to be less corrupt than the United States, Austria, and Germany, but fared worse than Ireland, Austria and the Netherlands. It may come as no surprise that Nigeria or Pakistan or Venezuela fared worse than New Zealand and the Scandinavian countries, but it is difficult to take seriously the idea that within Scandinavia Denmark, Sweden, Finland and Norway can be precisely ranked, and that, in football league terms, only the first three are candidates for relegation from the Premier Corruption League.

¹¹⁰ Part A of *The TI Source Book* outlines a general analytical framework, which draws heavily on a wide range of sources and, as far as I can tell, is the most sophisticated attempt to establish a method for analysing and constructing a "national integrity system".

¹¹¹ E.g. *The Wall Street Journal Europe* Fri-Sat 3-4 Jan, 1997 (one of the most substantial press reports).

in generating public awareness about corruption issues, in raising the profile of the organisation, and in putting pressure, both directly and indirectly, on governments, organisations, and individuals in countries that have fared badly in the ratings. They have also had a number of unintended consequences, such as being used in election campaigns. Publicity, as Jeremy Bentham repeatedly proclaimed, is the most potent tool for controlling the abuse of power. League tables are crude, but they can also be effective attention-getting tools for publicity and shame.¹¹²

The question arises: would it be possible to produce a theoretically sound source book of global legal statistics or a book of rankings of the health of national legal systems of the world that could be of real value? A short answer is that there is a mass of data already available, but they are patchy and scattered and most are not standardised. Even international criminal statistics are far less sophisticated than in other cognate fields. There are some areas, for example judicial statistics, delay, legal services, levels of compensation for personal injuries, lawyers' earnings, most of which raise difficult questions of comparability. But before contemplating such a possibility one would need to address some fundamental theoretical questions, such as: What might be acceptable indicators of the health of a legal system analogous to social or economic indicators? To what extent is it possible to standardise such comparators in a meaningful way? What might be the uses, abuses, limitations and dangers of such indicators? These seem to be significant theoretical questions that need to be addressed by legal theorists and comparative lawyers. It is beyond the scope of this paper to address such questions in detail, but it is worth pausing to consider briefly one familiar example which may serve as a cautionary tale.

THE LAW SCHOOL RANKINGS CONTROVERSY¹¹³

To illustrate the methodological problems let us look at a familiar, reasonably developed and highly controversial area: national law school rankings in the United States.

The first *US News* rankings of law schools were published in 1987, but the present series started in 1990. There is a longer history of educational rankings, but what is relatively new is the phenomenon of national journals publishing rankings that claim to be methodologically sound. A prolonged, often heated controversy, has been stimulated by these league tables in many disciplines.

Among the many objections to *US News and Report* law school league tables, five are particularly significant in the present context.¹¹⁴

¹¹² For an excellent account see Philip Schofield, "Jeremy Bentham on Political Corruption" 49 *Current Legal Problems* Part. 2, 295 (M. Freeman ed., 1996).

¹¹³ I have been asked about the relevance of this section to the theme of the lecture. The answer is that law school rankings are a familiar example of the problems and dangers of this increasingly common kind of metaphorical mapping.

¹¹⁴ From the extensive literature I have learned most from an unpublished paper by Richard Lempert and a series of short articles in the *National Law Journal*, 1997-98, and various contributions on the Internet, mainly discussing the relative merits of the *US News* and Leiter methods of ranking. On the latter see Brian Leiter, *The Legal Gourmet Report, 1997-8, Ranking of Law School by Educational Quality* on the website of the University of Texas Law School and *Press Release* by Leiter on New Educational Quality Ranking of U. S. Law Schools for 1998-99 (bleiter@mail.law.utexas.edu); see also Leiter, "Why U.

(i) More emphasis is given to simple data that are easily quantified and standardised such as Law School Admission Test (LSAT) scores rather than to more complex or qualitative measures. Hard variables tend to push out soft variables.¹¹⁵ A striking example of an omission is that *US News* does not include quality of teaching as an indicator.

(ii) The choice of indicators and the weighting given to each is arbitrary, so that composite scores are at least biased,¹¹⁶ at worst meaningless or positively misleading.

(iii) Detailed league rankings involve false precision¹¹⁷; to say that Harvard, Stanford, Yale and Chicago are near the top of the Premier League is not news; to say that Yale or Stanford is better than or “beats” Harvard is newsworthy but almost meaningless. Unfortunately it is just these close calls that may be the most important. For example, in the United Kingdom a potential applicant might be unduly influenced by meaningless small gradations in choosing between the three leading London law schools or between say Sheffield, Warwick and Leicester, three quite different institutions ranked 8th, 9th and 10th by the Times in 1998.¹¹⁸

(iv) The tables are full of insidious hidden assumptions: for example, that all law schools have identical missions and functions;¹¹⁹ that full-time first degree students are the only significant beneficiaries of legal education; that the quality of entrants and their immediate employability is more important than the quality of their educational experience or the “value added” factor, or longer-term benefits or research record.

(v) Perhaps the most important point is the danger that league tables prepared for one purpose are used or misused for other quite different purposes. *US News* justifies its rankings as does the *Times Good*

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S. News Makes State Law Schools Angry”, 19 Nat. Law. Jo., March 24 A24 (1997); David E. Rovella id v. 19 n. 40 June 2 A1 col 3. A useful survey of five leading sets of US law school rankings is found in ABAJ, March 1998, at 50.

¹¹⁵ The most influential variable is LSAT scores; opinions of peers and of the legal profession are given a place, but weigh less heavily. The biggest single difference between *US News* and Leiter’s rankings is that the latter gives greater weight to assessment of the quality of the faculty and of teaching.

¹¹⁶ *US News* is said to be biased in favour of small, private schools and those oriented to success in bar examinations., see Leiter, op. cit. n.114.

¹¹⁷ Lempert, op cit., n.114.

¹¹⁸ *Times Good University Guide* (1998) at 42. In the same table Queen’s is sandwiched between the Law Department at SOAS and East Anglia School of Law - an even more motley trio.

¹¹⁹ Professor Martin Harris, Chairman of the Committee of Vice-Chancellors and Principals commented as follows: “Naturally these students demand more information about the range of universities in this country and what they can offer. The *Times Good University Guide* goes some way towards meeting this demand. But vice-chancellors believe that single “super” league tables, attempting to cram all universities into one mould, cannot do justice to the needs of such a wide variety of students, and to what we can justifiably boast is one of the world’s most diverse higher education providers.” (The Times May 11th 1998). On the plurality and multi-functionalism of law schools, see *Blackstone’s Tower*, op. cit., Ch. 3 and “Thinking About Law Schools: Rutland Reviewed”, 25 Jo. Law and Soc. 1 (1998).

University Guide on the grounds that they are meeting a genuine need in providing a guide to potential applicants in making important choices.¹²⁰ But the League Tables are said to have a disproportionate influence on alumni, university administrators, employers, fund-raisers, donors, and even faculty. Rankings can affect policies on such matters as admissions, library, curriculum, preparation for bar examinations and activities that do not count for the purpose of ranking, such as postgraduate work, continuing legal education, or contributions to the local community.¹²¹

US News, it is said, conscientiously tries to listen to criticism and improve its methodology; but it is caught in two dilemmas: as its methodology changes the validity of comparisons over time is undermined; and, more important, *US News* is a business and its rankings issue is one of its best-sellers. There is an apparently insatiable demand for simplistic, composite rankings that are the modern substitute for the mixed metaphor.¹²² The weakest aspect, the composite table, is the most popular.

There is a need to explore further possible analogies between law school rankings and other legal rankings such as those produced by Freedom House¹²³ and Transparency International.¹²⁴ The debate on law school rankings deserves attention because of its detail and relative sophistication. Here, I shall confine myself to two points:

First, the phenomenon is not entirely unhealthy. The febrile *US News* debate has at least stimulated systematic collection and construction of data, sophisticated discussion of methodology and alternative schemes for evaluating and comparing US law schools. Whilst crude league tables have sometimes distorted policy, they have also provoked critical reappraisal of some institutional arrangements that to an outsider seem to be locked into rigid and often self-stultifying sets of practices and

¹²⁰ Clearly applicants need guidance and rounded works like the *Times Good University Guide* are helpful, if imperfect. In a recent *Times* survey only 11% of sixth formers in 1998 gave league tables as their main source of advice in choosing a university. (*Times*, May 12th, 1998). In practice, few applicants would rely on only one source.

¹²¹ *The National Law Journal* (May 11, 1998) reported that during the academic year 1997-8 no less than seven law school deans had been squeezed out of office and it has been suggested that a major factor was *US News* ratings: "These days quality is not the only measure of success. Many law school deans are expected to share tuition revenues and donations with the university, while accounting for every little expense. At the same time, thanks in part to *US News and World Report*, law schools must compete publicly on the basis of very raw criteria: LSAT scores and grade point averages." To an outsider one of the puzzles is why such a simplistic measure should have so much influence upon informed insiders.

¹²² League tables invite sporting metaphors. Criticism of the Research Assessment Exercises in the United Kingdom is sometimes expressed in terms that suggest that the goal posts keep moving, the system of scoring is kept secret from the players, and the prizes and penalties are determined after the event. Insofar as law schools have different missions, functions, situations etc., ranking them in a single league is more akin to popularity contests in which footballers, cricketers, swimmers, politicians, and pop stars compete for "personality of the year".

¹²³ *op. cit.*

¹²⁴ *op. cit.*

assumptions.¹²⁵ They have have increased self-criticism and public accountability, but at a price.¹²⁶ Similarly, a reflective approach to evaluating the health of national legal systems, other legal orders or parts thereof may be stimulated by even the cruder efforts at producing national rankings. What is involved in seriously evaluating a legal system or order, a national criminal justice system, or any particular legal institution is a neglected job of jurisprudence.

The second point is more worrying. The rankings phenomenon tends to make explicit, often in simplistic and sensational form, what has been going on implicitly in arcane ways that may be equally crude. In a recent review of secondary and tertiary literature about comparative law, I concluded that one of the most striking omissions has been hardly any discussion of comparators, that is standards or measures for comparison.¹²⁷ On one standard model of “comparing” that is analysing similarities and differences between comparable phenomena analysis requires both clear conceptions of comparability and standards or indices for comparison. Such indices may in first instance be descriptive, such as a tape measure or weighing scale or an index for measuring mortality rates; they may be explicitly evaluative, such as a marking system, or performance indicators, or international human rights norms; more often than not they are a combination of the two or implicitly evaluative, such as indexes of infant mortality or GNP. We use comparators not only to compare two or more objects, but also to describe individual phenomena. When one describes a city or a legal system in terms of its salient features one is more or less explicitly comparing it to some general norm or standard or ideal type. Any description involves selection and comparators are the main, but not the only, criteria for selection.¹²⁸

One reason why I have dwelt on the phenomenon of rankings is that they dramatise the use and difficulties associated with comparators in law as elsewhere. The controversy about American law school rankings raises fundamental questions about the comparability of law schools as institutions, their nature and functions, and what are possible criteria for the evaluation and comparison of the health of such institutions, if indeed they all belong to a single genus. Similar problems arise about the description, comparison, and evaluation of legal systems or indeed of any legal phenomena. Legal institutions and practices are increasingly subject to the kinds of analysis and evaluation associated with management consultants what might be called “bureaucratic rationalism”.¹²⁹ Like it or not, they are increasingly important and the methodological problems and the underlying assumptions need to be examined critically. Within the discipline of law these problems are primarily jurisprudential because they

¹²⁵ W. Twining, “Rethinking Law Schools: A Response to Schlegel”, 21 *Law and Social Inquiry* 1007 (1996).

¹²⁶ However, league tables confirm part of the orthodoxy, for example that only those reading for first degrees in law count as “law students”. American law schools have long had to take internal and external evaluation seriously, but the main standards set by the ABA have been criticised as being cosy and self-serving. On the history of ABA accreditation, see Robert Stevens, *Law School* (1983).

¹²⁷ CLLT.

¹²⁸ cf. Charles Taylor, “Comparison, History, Truth” in *Philosophical Arguments* (1995).

¹²⁹ W. Twining, “Bureaucratic Rationalism and *The Quiet (R)evolution*” 7 *Legal Ed. Rev.* 291 (1996)

raise issues about abstract concepts and general assumptions and presuppositions.

I have suggested that geographical maps involve selection from pre-existing data that themselves presuppose conceptual schemes and taxonomies. In this context such maps are little more than one technique for visual presentation of, typically simple, data.¹³⁰ Statistical tables are similarly just one kind of mental or metaphorical map, which have similar presuppositions. Rankings are just one, usually crude, form of pseudo-statistical mapping that help to dramatise some of the underlying theoretical problems. Statistical tables and ranking involve comparison; but comparison in turn assumes description or at least giving an account of salient characteristics or differentiae. Questions about comparing and evaluating legal orders and other phenomena presuppose answers to questions about what is involved in giving an account of one such system or phenomenon.

PROFILING

So let us move from ranking and comparison to profiling. My argument suggests that even a description of a single system or other phenomenon typically involves the use of comparators that may be explicit or implicit. So, what is involved in depicting (i.e. interpreting, describing and explaining) a single legal system or order? It is to such questions that a substantial part of our vast heritage of jurisprudential writing is ostensibly addressed. Most of our mainstream jurists Kelsen, Hart, Llewellyn, and Dworkin, for example purport to give accounts of the nature of law and legal systems.

So is not my question the central question addressed by general theories of law? Up to a point the answer is "Yes". I have from time to time in teaching jurisprudence set an exercise in which a motley team of jurists are planning an expedition to Xanadu a mythical country, more like that of Coleridge or Calvino than the real place in order to construct an account of its legal system for a new Encyclopaedia of Comparative Law. They are behind a veil of ignorance about Xanadu and they are discussing how they should go about their task. The exercise usually leads to the conclusion that each jurist would ask somewhat different questions, and that for the most part they would complement rather than conflict with each other. In short, they would bring different conceptual schemes to bear. Hart, Kelsen and Fuller might on investigation differ as to whether Xanadu has a legal system at all;¹³¹ or, if it satisfies each's criteria for the existence of a legal system, they might give different accounts of its salient features: a

¹³⁰ On modern methods of increasing data density in presentation of information, including on maps, see Tufte (1983), (1990) (1997) op. cit., n.25.

¹³¹ In teaching, these exercises raise familiar questions about the definition or, better, the boundaries of the concept of law. In this context I have generally not had great difficulty in persuading a class that for the purposes of the enterprise of understanding law there will always be some borderline cases, but that if one wishes to understand law in Brazil one is going to miss a great deal if one omits or overlooks the institutionalised orders of the squatter settlements which affect the property and other day to day relations of many thousands of people. In 1970, "Pasagarda", one of the squatter settlements outside Rio de Janeiro, had an estimated population of 50,000 (Santos, 158). A jurisprudential basis for this view can be found in the ideas of Llewellyn and Honore: "The first question in descriptive legal theory is then not 'What is a rule?' but 'What is a group?'" A. Honore, *Making Law Bind* (1987) 33.

disciple of Hart and Kelsen might describe, with slight variations, the basic form and structure and criteria of validity of a system of rules or norms. A Fullerite might assess how far the norms satisfy his principles for the internal morality of law;¹³² a Dworkinian would try to divine the fundamental principles of political morality the ideology in a non-pejorative sense that give the legal order coherence or integrity. She might also provide an account of the modes of reasoning in adjudication (and interpretation generally).¹³³ A follower of Karl Llewellyn would try to find out empirically how the law-jobs were in fact done through asking about actual disputes and how they were in fact handled;¹³⁴ if there were judges, the Llewellynite would ask questions about their styles of justification perhaps coming up with not very different answers from Dworkin.

Each of these general theories might provide a basis (or at least a starting-point) for giving a particular account of the legal order in question. In our discussions, we usually conclude that far from providing rival or radically different interpretations, a richer account of legal ordering in Xanadu might emerge through subjecting it to such multiple perspectives. We also sometimes come to other, less banal, conclusions. First, on their own, these general theories are too abstract to give much guidance on the handling of detail. Kelsen and Hart would end up with rather thin descriptions of form and structure. Llewellyn would point to thicker and more realistic accounts, but his law-jobs theory and his extended case-method are suggestive ideas that need to be refined and fleshed out to provide an adequate methodology.¹³⁵ How far Ronald Dworkin's theory of law is applicable to different kinds of legal orders and cultures is still largely unexplored.¹³⁶

This exercise also brings out the point that most standard accounts of actual legal systems do not draw explicitly on our stock of legal theories. Rather such accounts tend to be conventional and pragmatic, based on generally unarticulated and not very coherent or precise assumptions about law students' or foreigners' needs at the start of their studies. For example, standard introductory accounts of "The English Legal System" rarely articulate their basic assumptions or any criteria of selection; they do not talk of basic norms or rules of recognition or interpretive concepts or "law jobs", nor do they pause to clarify what is meant by a legal system, an institution, a process, a dispute, a court, or a profession.¹³⁷ Writers of such

¹³² L. Fuller, *The Morality of Law* (1964) Ch.2.

¹³³ I have suggested elsewhere that Dworkin's "theory of adjudication" is better characterised as a theory of interpretation, because it can apply to non-judicial interpreters and potentially might be applied to legal orders without courts and legal traditions such as Islam (*LIC* 165-77). For an extension to the European Union, see J. Bengoetxea, *The legal reasoning of the European Court of Justice: Towards a European Jurisprudence* (1993).

¹³⁴ Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (1941).

¹³⁵ A classic discussion is A. L. Epstein (ed), *The Craft of Social Anthropology* (1967); cf. Twining, "The Idea of Juristic Method: A Tribute to Karl Llewellyn" 48 U. Miami L. Rev. 119 (1993).

¹³⁶ *LIC* Ch. 8.

¹³⁷ GLT pp.24-25. Even a more theoretically informed text, such as Fiona Cownie and Anthony Bradney's *English Legal System in Context* (1996), which explicitly espouses legal pluralism, makes so many concessions to traditional syllabuses, especially in respect of providing basic (i.e. orthodox) information, that its coherence and originality seem to me to be artificially restricted. A

works do not draw much more directly on legal theory than writers of guide books refer to the literature of urban sociology. Similarly the *International Encyclopaedia of Comparative Law* (and similar less scholarly works) has a standard format which is based more on common sense and the conventions of comparatists than on explicit theory.¹³⁸ In short, there appears to be only a tenuous connection between our stock of general theories and standard accounts of actual legal systems.¹³⁹

A quite different perspective on the institutions of a municipal legal system is to be found in the context of foreign aid. Development agencies, foreign donors, and institutions such as the World Bank often employ techniques of institutional analysis that are much more systematic than those used in accounts of legal systems by academic lawyers. Some of the basic ideas of institutional appraisal appear to be inspired by management consultancy perspectives, with a strong tendency to bureaucratic rationality. In my experience they tend in practice to be stronger on prescription than diagnosis, but they do pose illuminating questions about goals, structures, “stakeholders and beneficiaries”, outcomes, performance indicators and costs. There is much that could be said about what might be termed “the Jurisprudence of the World Bank”. In the present context, the relevant point is that such perspectives and methodologies when applied to legal institutions contrast quite sharply with orthodox academic accounts of “legal systems”. There are, of course, many other perspectives human rights “auditing”, economic, anthropological, linguistic, historical, evocative, for example that can be employed in depicting a legal system or order.

Detailed analysis of particular examples must await another occasion. Instead, I wish to conclude by suggesting that depicting a legal system or order is closely analogous to depicting a city. If one is about to visit Venice or Oxford or Hong Kong for the first time and wants to do some reading in advance, there are many different kinds of literature to choose from. One might start with a map of the country and of the city. One might move on to a tourist guide Rough for the economically disadvantaged; Blue for culture vultures or gastronomes. For setting a tone, one might turn to evocative works that report personal impressions by a Jan Morris or a Bill Bryson or some more orthodox travel writer. Depending on one’s purposes or interests one might proceed to histories, or novels, or

similar point is made in a review of the book by Julian Webb, 32 *The Law Teacher* 344 (1998).

¹³⁸ The nearest thing to an attempt at theorisation is the Introduction by René David in vol. II of the *International Encyclopedia: The Legal Systems of the World: Their Comparison and Unification* which is mainly concerned with problems of internal division and classification of legal doctrine.

¹³⁹ Moreover, such accounts make very little use of either maps or available statistical data. For example, *The Legal Atlas of United States* (1996) contains substantially different information from standard descriptions. Compare for example two very different attempts to introduce their own legal systems to foreigners, E. Allan Farnsworth, *An Introduction to the Legal System of the United States* (1963) and E. Blankenburg and F. Bruinsma, *Dutch Legal Culture* (2nd ed., 1994). Only exceptionally are statistics used in a systematic way as part of a profile of a national legal system. A partial exception is Michael Zander, *Cases and Materials on the English Legal System* (London, 7th ed., 1996) which makes quite extensive use of statistical data. Combine these sources and one will have quite different, mainly complementary, accounts.

specialist works on politics or economics or transport or architecture or folklore or drains or even law.

I suggested earlier that Calvino's *Invisible Cities* could be interpreted as fifty-five accounts of Venice; it would not be difficult for an avid reader to find more than fifty-five different treatments of Venice or Oxford or Belfast.¹⁴⁰ Some of the accounts might be thicker and overlap more than Calvino's spare evocations; but the outcome would be similar a complex, multi-layered cumulation of accounts, built up from multiple perspectives. This is the opposite of reductionism.

Cities attract metaphors. Calvino uses labyrinth, maze, chessboards, bridges, canals as symbols of aspects of invisible cities. A legal order, like a city, is typically a human construct, but not the work of a single mind¹⁴¹; rather it reflects the beliefs, decisions and practices of generations of its inhabitants. Both are complexes of muddle and order.¹⁴²

There are some suggestive parallels between debates and divisions within urban sociology and within the discipline of law.¹⁴³

- For example, a central theme of talk about cities is that they are all similar and yet all unique. Sir Patrick Geddes wrote: "Though the woof of each city's life be unique, and this may be increasingly with each throw of the shuttle, the main warp of life is broadly similar from city to city."¹⁴⁴ One could substitute legal order for city without changing the rest of the wording.

¹⁴⁰ This is a very modest assessment. According to Peter Ackroyd there have been more than 25,000 printed works on London's history (Book review, London Times 13 August 1998, at p. 35).

¹⁴¹ Contrast the insistence of the arch-planner, Jeremy Bentham that "each code should be drafted by a single individual" so that it would systematically conform to the principle of utility and responsibility for it should be clearly located, on which see Philip Schofield, "Jeremy Bentham: Legislator of the World" (115 (1998) Current Legal Problems). Bentham did, of course, allow for participation in discussing drafts.

¹⁴² As Weis puts it: "Calvino regards the city as a 'complex symbol' which allows him to express 'the tension between geometric rationality and the entanglements of human lives' (*Six Memos* 71). In fact, in order to understand fully his interest in cities and their evolution and decline, one must see them as representative symbols of human behavior. Going back to the beginning of civilization, since their designs and disposition are never arbitrary, cities reflect the doctrine and practices of the society which creates and maintains them." Beno Weis, *Understanding Italo Calvino* (1993) 156-7; cf Brian Simpson on the common law being more like a muddle than a system, "The common law and legal theory" in Simpson (ed.) *Oxford Essays in Jurisprudence*, 2nd series, (1973).

¹⁴³ Describing cities is a good metaphor for mental topography. We are comparing the problems of depicting cities and legal orders, not the objects of depiction. Calvino reminds us that a city is not its description; the idea of a city is abstract and a map of a city is a higher level of abstraction. Albert H. Carter, *op. cit.* (1987) pp. 120-21.

¹⁴⁴ Geddes: "He is no true town planner, but at best a too simple engineer, who sees only the similarity of cities, their common network of roads and communications." Even a sound engineer, doing work to endure, let alone an artist in his work must know the city indeed, and have entered its soul." cf.

- Classical writers have been criticised for presenting top-down perspectives and for neglecting the points of view of the inhabitants and users.¹⁴⁵
- There is much debate about whether cities are “systems”; so too with law: Brian Simpson has memorably characterised the common law as more a muddle than a system.¹⁴⁶
- Urban literature is characterised by deep ambivalences, with strong strains of extreme pro- and anti-urban views; leading theorists, such as George Simmel take centrist and ambivalent positions. There is also pervasive ambivalence about the costs and benefits of a well-ordered and efficient urban system.¹⁴⁷ Similarly in law the natural law tradition and its successors idealise our subject and present aspirational perspectives, some theorists emphasise the benefits of efficiency and order, whereas Marxists, realists and others point to the repressive, problematic, or seamy side of actual legal orders.
- According to Langer, four images of the city have dominated the literature of urban sociology: the city as bazaar, jungle, organism, and machine.¹⁴⁸ All four of these metaphors can be illuminatingly applied to accounts of legal orders.¹⁴⁹

Calvino’s book depicts invisible cities. Legal orders, too, are largely invisible, that is only a few aspects are susceptible to geographic mapping, pictures or videos or even to statistical analysis. Law is not particularly photogenic, although watching trials on television reminds one that the common law is more telegenic than the civil law. Legal orders are made up of complexes of social relations, ideas, ideologies, norms, concepts, institutions, people, techniques and traditions. Calvino’s concern is “to portray the diversity and at the same time universality of human experience.”¹⁵⁰ He captures brilliantly what is involved in describing and understanding a city the elusive mixture of patterns and complexity and arbitrariness and the capacity and the limitations of the human mind to grasp these realities.¹⁵¹ The dialogue between Kublai Khan and Marco Polo revolves around how and whether the diverse cities of his empire can be mentally reduced to order. The great Khan hopes to master the invisible order by learning the rules as if they are like chess. His is a reductionist temperament.¹⁵² Marco Polo emphasises hidden complexities, exceptions,

Patrick Geddes, *Cities in Evolution* (rev. edn., 1969); cf. Calvino, “Only the name of the airport changes”, *IC* 128.

¹⁴⁵ OPP 208ff.

¹⁴⁶ op. cit. n.142 above; cf. Charles Sampford, *The Disorder of Law* (1989).

¹⁴⁷ Andrew Lees, *Cities Perceived* (1985).

¹⁴⁸ Peter Langer, “Sociology Four Images of Organized Diversity” in Lloyd Rodwin and Robert M. Hollister (eds) *Cities of the Mind* (1984) Ch. 6.

¹⁴⁹ I have discussed all four images elsewhere, especially “The Great Juristic Bazaar” 14 JSPTL (N.S.) 185 (1978); Holmes’ Bad Man and the legal jungle, OPP 204 ff; functionalist and technological views of law, “The Idea of Juristic Method” (1993) op. cit..

¹⁵⁰ Sara M. Adler, *Calvino : The Writer as Fablemaker* (1979) at 49

¹⁵¹ Albert H. Carter, op. cit. (1987) 123-4.

¹⁵² Kublai Khan, the pessimist, sees his chessboard as a reduction to nothingness; Marco Polo, by contrast, treats each square as a starting-point for seeing a multiplicity of things in a little piece of smooth and empty wood, for example: “Your chessboard, sire, is inlaid with two woods: ebony and maple. The square on which your enlightened gaze is fixed was cut from the ring of a trunk that

contradictions, the elusiveness of hidden orders. He accepts that there are patterns, but they are too complex to capture from a single perspective. He even acknowledges that a basic design exists, but it is too elusive to be understood through the logic of a game, even one as complex as chess. Rather, the order that structures human attributes and relationships ought to be compared to the logic and structure of dreams:

“With cities it is as with dreams: everything imaginable can be dreamed, but even the most unexpected dream is a rebus that conceals a desire, or its reverse a fear. Cities, like dreams, are made of desires and fears, even if the thread of their logic is secret, their rules are absurd, their perspectives deceitful, and everything conceals something else.”¹⁵³

A similar tension between geometric rationality and the messy complexities of human relations runs through our discourses about law. In jurisprudence we have our Kublai Khans and our Marco Polos. Like Calvino, I side with Marco Polo. Calvino is sometimes identified as a “post-modernist”. If that label implies disregard for facts, or extreme subjectivity or indeterminacy in interpretation, or that all patterns are merely constructed by the reader, I think that this is a mis-reading. Calvino, while emphasising complexity, paradox, the elusiveness of reality, agrees that there is a “hidden ‘filigree of design’ upon which all human experience is built.”¹⁵⁴ The idea of a city is a good metaphor for mental topography in general and for law in particular. Like Calvino, we need many mental maps of our invisible cities.¹⁵⁵

grew in a year of drought: you see how its fibres are arranged? Here a barely hinted knot can be made out: a bud tried to burgeon on a premature spring day, but the night’s frost forced it to desist.” *IC* 130-1.

¹⁵³ *IC* 44.

¹⁵⁴ Adler (1979) 51-2; *IC* 5-6, 43-44.

¹⁵⁵ “The Great Khan owns an atlas whose drawings depict the terrestrial globe all at once and continent by continent, the borders of the most distant realms, the ships’ routes, the coastlines, the maps of the most illustrious metropolises and of the most opulent ports. He leafs through the maps before Marco Polo’s eyes to put his knowledge to the test.” (136) After Polo has given accounts of cities he has seen, cities he knows by hearsay, and possible cities that he does not know whether they exist or where they are, the Great Khan says:

“I think you recognize cities better on the atlas than when you visit them in person.” And Polo answers: “Travelling, you realize that differences are lost: each city takes to resembling all cities, places exchange their form, order, distances, a shapeless dust cloud invades the continents. Your atlas preserves the differences intact: that assortment of qualities which are like the letters in a name.” (137) *Vive la différence!* cf. Richard Hyland on “difference theorists” in comparative law in Dennis Patterson op. cit. (1996) Ch.11.

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