CARTOGRAPHY AND THE WORLD'S LEGAL CULTURES

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The taxonomy of the world's legal cultures became a matter of lively discussion when France's René David published the first edition of his treatise, following speculation on the classification of legal systems by a few earlier authors of the century.[1] The concept of taxonomy was not new to legal scholars, therefore, when Roberto L. Mantilla Molina published in 1959 a report on the program and accomplishments of the Instituto de Derecho Comparado which he directed.[2] What attracted attention in that report was the use of cartography to illustrate the David thesis.

Mantilla Molina chose to indicate graphically the reception of legal models by draftsmen borrowing from other jurisdictions. He devoted the first pages of the report to maps of Mexico, indicating which state models had been used by draftsmen in preparing civil and penal codes and codes of civil and penal procedure. After filling some pages with brightly colored maps, he placed near the end of the report, perhaps as a grand gesture inspired by what he had done for Mexico, a map depicting the migration of legal systems throughout the world.

On a sketchily drawn world map the cartographer splashed four colors in broad brush strokes leading from the sources of four great legal systems to the ends of the earth. The map's golden brush stroke began at Bologna and passed through Europe to Latin America with droplets in Quebec and the Philippines. The blue brush stroke began in England and was pushed on to North America and around the Cape of Good Hope to India, Malaysia, Australia and New Zealand. The green brush stroke of Islam began in Arabia and passed eastward to Iran and Pakistan and westward to North Africa. The fourth stroke, painted in red, had its beginning point in Moscow and was then ex-

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[1] See Wigmore, J.H., *Panorama of the World's Legal Systems*, Washington, D.C., 1936.

[2] See Universidad Nacional Autónoma de México, *Instituto de Derecho Comparado*, México, 1959, p. 11 has the map entitled "Grandes corrientes jurídicas".

tended westward to Eastern Europe and eastward across Siberia to China. Except for the green in North Africa, the African continent was given no color, perhaps because at the time its peoples had not been free to choose their legal systems.

The experiment in legal cartography intrigued me as I began in 1962 to consider a justification of my own for a red "socialist" brush stroke. I planned at the time a volume to consider whether there was good cause to recognize as distinctive a "socialist" family of legal cultures based upon a model introduced into Russia during the revolutionary period of 1917-18. When I began my study, René David had already declared his view that there was reason to define a distinct family of legal cultures in Eastern Europe despite the Romanist traditions of the region. He was cautious for he said that he was beginning to question the conclusions reached in his 1950 treatise that the legal system of the Soviet world was unique because "of the socialist structure of societies to which it is applied with all of the consequences which this socialist structure, which is essentially an economic order, brings into the political, social and moral order at the same time".[3]

By 1961 David was saying that he was prepared to abandon an economic basis for classification of Soviet law and to turn to a political one. With his new insight he placed in the forefront not a distinctive economic factor but what he believed to be a concept different from that found in Western legal cultures based on the Romanist and English families. He had concluded that the decisive element in the East was negation of the "rule of law" as known in the West. This "rule" he defined as reverence for the ideal of law reigning supreme in the relations between citizen and citizen as well as in relations between citizen and state.[4]

David's change of mind seems to have been stimulated by the flowering in Western Europe of the "welfare state" concept, for he thought that new concept changing the face of capitalism so much that the contrast between capitalism and socialism was no longer a valid basis for distinction. He denied the claim of Soviet leaders that their country provided the sole example of a socialist economy. Nevertheless, he thought it evident that the legal cultures of Eastern Europe were still to be distinguished from those of Western Europe with which they

[3] See David, René, *Traité élémentaire de droit civil comparé*, Paris, 1950, p. 224.
[4] See David, René, "Existe-t-il un droit occidental?", published in Nadelmann, K.H., A.T. von Mehren and J.N. Hazard (eds.), *Twentieth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema*, Leyden, 1961, pp. 56-64.

had been allied for centuries as a result of a common ancestry in the law developed by the Roman glossators.

Since my own studies of the public order system created by communists had brought me close to David's new view, supported as it was by Mantilla Molina's map with its red stroke illustrating at a glance my position, I requested and received permission to reproduce the map as a frontespiece to my book *Communists and their Law*.[5] The map seemed to confirm my own conclusion that although much variation had appeared among the various Marxist oriented legal systems, there could be discerned in all of them in the early 1960's a common core.

That common core's distinction was the introduction into a public order system of features that went beyond legal techniques to encompass codes of morals, and new types of political, economic and social structures. As I warmed to my theme in my new book, I permitted myself to write, perhaps as an exaggeration, that the "civil law relations [in socialist states] in their traditional Romanist form have been pushed to the fringes of social relationships somewhat like the first settlers, the aborigines, who now live on the Indian reservations of the United States or in the mountains of Japan and Taiwan.[6] I added, "The original outlines can be identified by an expert using methods akin to the techniques of the anthropologists searching for remnants of tribal law in Africa, but they have been penetrated by a new culture."

Having been stimulated by the 1959 map, I was pleased to find that Mantilla Molina's successors in their history of the Instituto de Derecho Comparado, which had by this time the name of Instituto de Investigaciones Jurídicas, chose to place a the end o ftheir volume celebrating the 40th anniversary a more ambitious map.[7] No longer were the colors depicting the major families of law brushed across continents with a broad swath giving only a general impression. The new cartographers of 1980 were attentive to detail, coloring each country of the world distinctively to show its membership in one of the same four families recognized on the 1959 map but with an addition. They now added an "Oriental System", as David had done, to include Japan, South Korea, Taiwan, Afghanistan and Ethiopia. They also colored for the

[5] See Hazard, J.N., *Communists and their Law: A Search for the Common Core of the Legal Systems of the Marxist Socialist States,* Chicago, 1969.

[6] *Idem,* p. 523.

[7] See, *XL Aniversario del Instituto de Investigaciones Jurídicas,* México, 1980. The map appears at the back cover with the title "Los grandes sistemas de derecho contemporáneo: tendencias predominantes".

first time the spaces that had been left blank in 1959 in sub-Sahara Africa. Presumably, that change in Africa had been made because the cartographers felt that with independence of African states in the late 1950's and early 1960's new leaders had been able for the first time to choose a legal system for themselves. The marvel was that the cartographers decided that Africans had opted for the laws of their former metropoles so that the appropriate colors were those of the Romanist or English common law systems. The only independence demonstrated by African leaders was among those now claiming to be "scientific socialists" under Marxist influences. For these countries, which the cartographers identified as Algeria, Libya and the Congo, they introduced the color of red.

In a volume published in honor of Dr. Héctor Fix-Zamudio, under whose Directorate from 1966 to 1978 the Instituto perfected its classification ideas and on whose Consejo Interno he still sat at the time of publication of the 1980 map, it may be appropriate to congratulate him on the courage he and his fellow editors showed in designing the detailed map. The festive occasion also provides me with an opportunity to indicate how much my own ideas on the cartography of legal cultures have matured since 1962.

It now seems necessary to abandon the idea of a single map to indicate the reception around the world of various legal models. Two things have happened. The developing countries have had more time to think of appropriate legal systems since their independence, and new studies have been published in comparative law refining the distinctions of David's generation. I devoted myself to the first of these developments in a consideration of colors appropriate to the post-colonial states of Africa in a paper published in a festschrift published in Hungary.[8] I concluded in the light of what I found that not one but three maps were now to be desired: "one based upon social goals of those who devise legal systems; another based upon judicial methods used by judges to fin and administer law; and a third to depict what philosophers identify as the moral foundations of legal systems, for example Islam, Hinduism, Confucian ethic, Hebraic theology, the Christian ethic and the communal ethic of the Africans organized in extended families."[9]

[8] See Hazard, J. N., "Socialist Legal Models for Africa", published in *Legal Theory Comparative Law: Studies in Honour of Professor Imre Szabó*, Zoltan Péteri, ed. 91, Budapest, 1984.

[9] *Idem*, p. 96.

In my thinking as it stood at the time I prepared my Hungarian paper in 1982 there seemed to be but three appropriate bases for a taxonomy of legal systems. Today, in the light of more recent studies I wonder whether there are not more. I have found impressive the even more segmented classification system proposed by Christopher Osakwe of Tulane University of New Orleans in his contribution to a jointly writen volume on *Comparative Legal Traditions*[10] and a 1985 article in which he summarized his views.[11]

Osakwe[12] argues in his paper on "prerogativism in modern Soviet law" that he can identify four bases of distinction in legal systems: infrastructure, methodology, ideology and theology. The first two create in his view the "form" of law, while the latter two establish the "substance." Using this four-part analytical scheme to define Soviet law's distinctive features, he says that its "form" is Romanist because its institutional foundations, its internal divisions, the methodology employed by the various legal actors, the technical rules of its procedural codes and its attitude toward sources of law are all deeply rooted in the civil law tradition.[13]

Osakwe's theory puts more elements before the reader than I had done in proposing my map, for my Map No. 2 was to be based solely upon judicial method used in finding and administering law. Osakwe goes beyond judicial methodology to require consideration of structures and technical rules. In short, distinctive aspects of "form" may require not one but two maps.

Osakwe's points on "substance" are even more arresting. He suggests that classifiers distinguish between ideology and theology. To make his point he turns to old Russia in which he finds the elements in its tradition to be composed of paternalism, prerogativism, megalomania and xenophobia. He had inadequate space to describe each of these, but one may assume that he had in mind the paternalism so often mentioned by Professor Harold J. Berman in his studies of Soviet law's roots, as evidenced by attitudes manifested my the Russian Tsars who sensed their duty to be the nurtering of people as one nurtures a child. It is true that this sense of a Tsar's duty was shared by his

[10] See Glendon, M. A., M. W. Gordon, and C. Osakwe, *Comparative Legal Traditions in a Nutshell*, St. Paul, Minn., 1982.

[11] Osakwe, C., "Prerogativism in Modern Soviet Law: Criminal Procedure", published in *Marxism and the Law*, 23 Columbia Journal of Transnational Law 331, 1985.

[12] *Idem*, p. 335.

[13] *Ibidem*.

subjects, at least up to 1905. At that time there was a rude awakening when a procession of peasants led by their priest moving toward the Palace to present a petition were fired upon and dispersed in an event that has gone down in history as "Bloody Sunday."

The attitude of subjects toward their ruler as a "little father" seems also to have been present in China where the Emperors were accepted as the protectors of their people up to 1911. To Berman and Osakwe it is not too much to see the Soviet leadership in the same tradition of thought, a tradition that has become part of the ideology of government. There is no doubt that it is basic to Soviet thought that the peoples of the USSR need to be nurtured to adulthood, for it is only then that they can be expected to achieve their destiny. Until that time nurturing requires the guidance of a "vanguard party" in which only the relatively few can participate.

For Osakwe "prerogativism" as the second element of ideology was evidenced throughout Russian history by Tsars who sensed that they were the creators of law and, therefore, "above" restraint. This attitude was manifest as late as 1905 when Nicholas II resisted the introduction of a parliamentary system and reserved to himself in the Basic Law of 1906 the prerogative of ruling alone when the Duma was not in session.[14]

To those who argue that this feature has continued in the minds of Soviet leaders proof is to be found in the leaders' evident distinction between the laws they have created and to which they seem to sense that it is expedient to conform, and those which they are willing to ignore when they think the system in danger.

Megalomania has its dictionary meaning for Osakwe. He finds it manifest in the Russian sense of "greatness", demonstrated in the Tsar's declaration that Russia embodied in itself the "Third Rome". Megalomania may be sensed as present today when Soviet models are pressed upon the leaders of neighboring states as the assured instruments of social salvation, tested in the sixty years of Soviet history and believed to have been proved as a model for reinvigorating the world.

Xenophobia as a fourth element of a distinctive Russian and Soviet ideology is seen by Osakwe to be manifest in a veiled hatred of foreigners, which he traces back to early times. Perhaps it was rooted in the fear engendered by the brutality of the Mongols, which is still very much in the minds of Russians even today, and it has been refreshed

[14] Basic Law of the Russian Empire, 1906, Art. 87.

by the later experiences with the Teutonic Knights, the Swedes, Napoleon, the German Emperors and Hitler.

What Osakwe has defined as the influence of cultural tradition upon law is specific, of course, to Russia. If cultural tradition is to be a bas is for taxonomy of all legal families, cartographers will be presented with a challenging task, for it will become necessary to gather facts on the reception not only of foreign legal forms as one's own but of cultures as well. Sometimes the form and the culture will be the same because of the absence of a contrasting culture in the country in which the foreign form is received. Thus, in the absence of a surviving vigorous indigenous culture in Anglo-phonic North America, Australia and New Zealand not only English forms but the cultural base as well were introduced by the colonists. The same could not be said of India, Malaysia or Anglo-phonic Africa where indigenous cultures blendid with that of England to create a mutation of the English cultural base. The same mutation occurred in Latin America when the Spanish forms and cultural base met a strong indigeous cultural tradition, as was the case also when Chinese cultural approaches to dispute resolution spread to Japan, Korea and Vietnam to be followed later in Japan by German forms and in Vietnam by French. Likewise, Russian cultural tradition, as defined by Osakwe, has come to Eastern Europe with reception of Marxist inspired forms although here too the reception has not been total because of the strength of humanistic cultural tradition common to both Eastern and Western Europe.

It cannot but be evident that a cartographer seeking to identify families of law not only by forms but by what Osakwe calls substance or content is going to have a more difficult task than one using only my three-map plan, for it is questionable whether any set of maps could depict effectively the broadly based elements of received cultural tradition accompanying reception of forms. Indeed, the task might be sufficiently difficult to justify René Rodière's fear that comparatists might be forced to go beyond comparison of what he would recognize as a "legal system" to a comparison of what he called "civilizations".[15] For him, such an endeavor would be unimaginable.

Osakwe's focus on ideology and theology might conceivably be reflected on my maps Nos. 1 and 3, for I too called for a map to reflect ideologically influenced social goals of state leaders, and I too was prepared to indicate on a map moral foundations of legal systems which are to be found in the world's great religions whose faithful predominate

[15] See Rodière, René, *Introduction au droit comparé*, Paris, 1979, p. 28,

in vast areas of the globe converted by missionaires to their faiths. If Osakwe is right that Soviet and, therefore, socialist law can rightly be identified as having a base whose goals are influenced not just by an ideology but a theology, there are aspects of socialist law as yet unexplored by numbers of comparatists.

Osakwe argues that socialist inspired leaders are moved by theology because they profess concern not only for political and economic goals but also for the inner qualities of the individual. To him socialist law operates on the assumption that "present man is evil and imperfect... in need of a legal regulation of his evil behavior".[16] Osakwe finds an assumption among socialist leaders that law can perform an historic mission in cleansing man of his evil ways, thus creating out of him a "new man", a *homo sovieticus,* after which achievement law will wither away, as Marx and Engels said it must, leaving man to live in a state of tranquility to be called "communism". As much, communism is hailey by Soviet "theologians", not as a negation of law, but as the triumph of law.

Finding law to have theological elements, Osakwe is ready to compare the system of socialist law with Islamic, Christian canon, Jewish and Hindu law, all of which are universally recognized as resting on a theological base, if not being religions in themselves. Some would add to the list of theologically based systems the mediational legal culture of China, for in spite of the reception of Russian influenced socialist forms in the People's Republic, it cannot but be evident to any visitor to a Chinese community that the Confucian abhorance of litigation is still prominent. The emphasis is still upon resolution of disputes through conciliation, facilitated by Confucian-inspired respect for seniors who guide conciliatory efforts, often as officially sponsored conciliation committees. There remains the cultural sense that those who resort to litigation lose dignity. Litigation is not expected to lead mankind to the achievement of tranquility. Perfection of man comes not from confrontation but from reconciliation.

Attitudes toward reconciliation survive in regions where the Chinese have had no influence, as in Africa. Whether a map designed to indicate such a "theology" should use distinctive colors for the Chinese and African varieties or not remains a problem for the cartographer concerned with theologies, and he must think also of other peoples who,

[16] See Osakwe, *op. cit.,* note 11 at 336. See also his lecture at Chuo University, Tokyo, of December 20, 1984, published as "Rethinking the Nature of Soviet Law: A Methodological Analysis of the Modern Soviet Legal System", published in XIX-1 *Comparative Law Review,* Japan, 1985, pp. 73-93.

like the Africans, are organized in an extended family where there can be no litigation. Are these systems all Oriental for mapmaking purposes?

In my original three-map scheme the reconciliation cultures could have been recognized on my map No. 3, where religions create the base for conformity to rules of social order rather than étatist measures represented by state intervention through legislation in the affairs of men. Such a map would become a map depicting alternatives to law in the preservation of order and would probably add traces of the color chosen for such a system of social regulation even to localities in the United States where a movement is developing to introduce organized conciliation institutions into some urban communities. The aim is to further tranquility and to reduce the current heavy burden of litigation lying upon the judiciary. Such movement is, however, proving effective only in communities populated with peoples still culturally close to the conciliating cultures from which they or their forebears emigrated.

What can be concluded in light of this review of the possibilities facing the cartographer intent upon indicating comparison of legal systems graphically on colored maps, following the lead of the Instituto de Investigaciones Jurídicas? First and foremost one can conclude that the Mexican approach to cartography as an aid to understanding comparative law deserves praise. It shows at a glance what words take far more time to establish, namely that the world's legal systems owe much of their structures, institutions and methods to reception of legal systems devised by those who constitute foreign societies. Secondly, one can conclude that maps need to be multiplied to identify the various elements of legal cultures. One map is not enough to introduce the onlooker into the complexity of a legal culture, into the cultural components that are received from abroad and the cultural components indigenous to a people who have looked abroad for a new legal system to meet the perceived needs of the modern world.

Thirdly, and this may be the most difficult task, cultural traditions, whether indigenous or imported need to be analyzed to discover cultural components: theology, usually springing from a hoary past and often sanctified as a religion, and ideology, usually a product of more recent vintage, having been developed by thinkers of the past two centuries concerned with revolutionary change as in 19th century France and Germany or 20th century Russia.

The magnitude of the task conceived in these terms discouraged René Rodière, as has been indicated. He preferred limiting comparisons

to legal systems having a Judeo-Christian base. Should Rodièr's restrictions discourage the comparatists of contemporary societies who have a broader vision than Rodière? The answer is no longer to be found in discussion limited to theories. There are now compelling facts encouraging comparisons not only for the sheer enjoyment of theoretical game playing, but in the interest of coping whith the pressing problems of the late 20th century. Something can be learned by studying solutions to contemporary problems devised by peoples in other lands, no matter what their cultural traditions. That is why comparatists gather in international congresses to compare views of trends in law. This attitude has been evident particularly among legal scholars in developing countries who hope to introduce laws that will speed transition to modern societies while avoiding some of the mistakes experienced by societies of the 19th and early 20th centuries.

Yet, it has become evident in recent years that there may be danger in moving toward foreign models quickly. Segments of the Islamic world where rulers did not consider sufficiently resistance to change have demonstrated the need to think of tradition. Appeciation of this danger has become evident even among the Marxist inspired leaders. Not long ago Soviet specialists recommended to like-minded leaders that they could not do better than introduce into their countries models developed in the USSR during its more than 60 years of experimentation. Circunstances have forced Soviet scholars to abandon simplistic expectations based on failure to study comparative law in other than doctrinaire ways. Perhaps that is why Soviet literature is becoming more sophisticated, although it still seems to be hampered by the dictate that in comparison there are only two families of law to be discerned, those that are socialits and those that are capitalist, with, perhaps, a third emerging system that is transitional, the "non-capitalist-way" of the self-styled "scientific socialists" of the developing world.[17] Attitudes toward the nature of law and its relation to societies are important to the structuring of purposeful legal systems designed to improve economies and man himself. Cartography may foster appreciation of this fact, and that is why I, at least hope that the Instituto in Mexico will try its hand again at drawing a series of maps suited to the complexity of the times in which we live.

[17] For the argument that there are only two families of law in the world, see Szabó, Imre, "Theoretical Questions of Comparative Law", published in I. Szabo and Z. Péteri, eds., *A Socialist Approach to Comparative Law*, Leyden-Budapest, 1977, p. 13. The same position is taken by Tille, A. A., *Sotsialisticheskoe Sravnitel'noe Pravovedenie*, Moscow, 1925, p. 91.