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**The “modernisation” of the Portuguese-Spanish-Berber-American legal culture
in the 19th and 20th centuries and its current core values**

The topic of legal culture³ is much broader and more comprehensive than its richness of thought could be perceived in the context of an article. Connecting law to the concept of culture is a relatively recent phenomenon. In the middle of the 19th century, the concept of culture that is still accepted today is that culture means everything that it has created through the physical and mental work of human society. At the beginning of the 20th century, the German Jurist, Kohler regarded the most important task of law and jurisprudence as the contribution to the advancement of culture. For him, law is a creative science and it evolves to satisfy the needs of society. Professor Radbruch, a German professor, defined law as a cultural power, a component of culture. Zjelmann saw the main value of comparing law in that that it allows law to be perceived as a cultural phenomenon.

Legal culture is still an intensively researched term of arts. Perceptions can be divided into at least three types. L. Friedman separates the “internal” legal culture, which means the set of attitudes and values of the legal profession, from the “external” legal culture, which is the attitude and set of values of the laity, society.

The other group of authors, such as Nelken, is a proponent of a broader definition. In this way, the law and the tendency to sue are included in the concept. Finally, there are those who suggest a different concept than “legal culture”. Cotterrell replaced it with the notion of “legal ideology”. According to him, “[l]egal ideology consists of the elements of value and cognitive ideas assumed, expressed and formed in the practice of the development, interpretation and application of the legal doctrine in the legal system.”

Upendra Baxi differentiates between “residual”, “emerging” and “dominant cultures”. The first is a remainder of the past, but it is also actively involved in the cultural processes of the present. The emerging culture is associated with emerging strata or groups, but is usually difficult, slow and subordinate to the dominant culture. Applying this theory to the legal culture, the author emphasizes that residual elements are active, expressing living experiences and even values. The situation of the dominant culture is unstable compared to the other two, the situation may change. There is also a viewpoint that sees a danger in legal culture introducing an anthropological element that is difficult to define into law.

As for the latest developments, the concept of “comparative legal cultures” has emerged, which, according to its representatives, can serve as a primary means of exploring more deeply the connections and interconnections that work in the creation and operation of many factors of law. The evaluation of this new Janus faced (double sided) trend can be a way out of the uncertain situation associated with the paradigm shift in the field of comparative law, and, on the other hand, it can contribute to the integration of comparative law into the broader framework of legal history, legal ethnology or sociology of law.

There is a constant interaction and a multifaceted relationship between culture and law, which can be summarized in two basic theorems: on the one hand, law is one of the components

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³ Visegrády Antal: Jogi kultúra, jogelmélet és joggyakorlat. Aula Kiadó, Budapest, 2003, pp. 122.

of the culture of a given society, and on the other hand, there is no law or legal system that is not influenced by the culture of society.

The legal culture consists of the following elements: 1) the written law and the law in force (“law in books” and “law in action”); 2) institutional infrastructure (court system, legal profession); 3) models of legally relevant behaviour (e.g. litigation) and 4) legal awareness.

In broad lines, a distinction can be made between the so-called regulatory and indicative legal cultures. The former covers the Western cultures, where the acceptance of law takes place as a rule of conduct indeed, in a normative sense, but by no means to the same extent. In the common law system, for example the authority of the court is more preeminent than in other countries. However, the European or the so-called continental legal cultures are not uniform either. Just to note two examples: in contrast to the German legal culture, which traditionally values law and is at the forefront of civil litigation in Europe, Dutch legal culture is characterized by the legal term *Beleid* (the English policy), which means following favourable laws and avoiding harmful laws (circumvention). An utmost example of this is that until the enactment of the Euthanasia Act of 1993, according to which in exceptional cases medical assistance for suicide is permitted and is not punishable, yet, the Criminal Code had banned it, but the medical practice continued with assistance for suicide. The Dutch are working to resolve their conflicts out of court.

In indicative legal cultures – such as the Asian and African legal cultures – the law is not necessarily normative in the true sense of the word, nor is it perceived as such by society. They traditionally had an informative and indicative significance, and this social attitude is only reinforced by the increase in the number of unenforceable, often symbolic, laws. A separate scientific trend, the so-called “Law and Development” deals with the problem of how modern legal acts and legal institutions are introduced / taken over and function differently from regulatory legal cultures in the legal cultures in question. The legal culture of the Central and Eastern European region is characterized by a historically developed legal approach, the essence of which is a belief in legal regulation, excessive trust in legal regulation. Simultaneously, there has been and still is an approach to social problems within a certain legal framework. The effectiveness of the law was also influenced by the growing importance of the norms of behaviour developed by real processes due to untraceable legal regulations.

At the same time, studies on the legal culture of Hungarian society indicated knowledge and approval of legislation embodying traditional values (e.g. in 1976: 83% of the respondents said that an increase in the number of divorces was “unfavourable”. However, the divorce rate is very high in Hungary. All of this sheds light on the contradictions in the legal culture.

To sum it all up, a legal culture that shapes the behaviour of organizations and citizens in line with the objectives of the legislation enhances the effectiveness of the law, otherwise it reduces the effectiveness of the law. There is no country with a single, unified legal culture. This is because there are many different cultures in each country, due to the complexity of societies (communities, groups). Another view speaks directly to legal “subcultures”. A noted example is the legal-anti-culture of criminals and the legal culture of law enforcement. The latter is well illustrated by the fact that the courts condemn conscientious objectors in northern and southern Norway, while acquitting them in western and central Norway. Although legal cultures in the same society lead to different behaviours, relevant research has also shown that age, gender, income, nationality and race etc. is determining, therefore this is why they are correlated with an attitude towards the law.

Legal culture has historically developed just like political culture and the latter influences and may even shape the characteristics and realization of the former. Legal culture is always between tradition and innovation. The development of a legal culture is a long-term process, involving not only intrinsic growth but also the task of nurturing an existing culture.

Hence, a legal culture is not only an adherence to what has developed, but also a change for the sake of change.

An interesting and valuable explanation for the development of legal cultures is given by Alan Watson's theory of transplantation. Many case studies show the mystery and novelty of the similarity of legal development in the most diverse socio-economic formations and legal arrangements from the ancient Middle East to present-day New Zealand, rather than in original ingenuity, rather, it lies in taking over what is already known elsewhere and at most thinking it further. Transferring of law is a universal development factor for the legal system. In his recent work, he explains that his studies of the history of law have convinced him that, since the rulers of the Western world had little interest in the private law, this task gradually fell into the hands of a non-legislative elite (e.g. Roman jurists, medieval English judges and continental legal professors). These legal developers then developed their own legal culture, detached from social reality, which determined, on the one hand, the parameters of their legal thinking and, on the other hand, the nature of the legal system they considered worthy of lending and the extent of lending. This culture differs from society to society, but it does have common historical characteristics. Thus law and legal culture do not develop mechanically from economic, social and political relations!

We can also give a modern example of all this. In Austria, in 1977, the institution of the ombudsman was taken over from the Scandinavian legal system and transformed into a parliamentary oversight body called the "People's Advocacy", in accordance with their political system. However, under various circumstances, it has survived its "transposition" into the Austrian legal system and has proved its worth in the meantime.

In our previous studies we have tried to prove with arguments that the Portuguese and the Spaniards (collectively called Castilian, Aragonese, Catalan, Basque, Gallego, etc.)⁴ have created an independent legal culture, while Roman law, for example, has become the preserved principle of this modernity!

We also want to point out that European civilisation in Ibero-America, in these two former colonial powers, represented a specific Portuguese-Spanish cultural tradition, imbued with Catholicism, an ideological, missionary evangelisation, crowned by the use of economic coercion.

Centuries of coexistence have given birth to an Ibero-American legal culture that has evolved from the wars of independence in the 19th century to the present day, and which, while it may have its own particularities from country to country, can be seen as a coherent whole in terms of its foundations and main components. It is another matter entirely whether, within this structure, we can point out where Ibero (or Hispanic) culture ends and native (Indian) culture begins, from the point of view of, say, customary law. This aspect of the indigenous question began to have an impact on the unfolding of native (indigenous) peoples' movements around the 1992 bicentennial and then, in the 2000s, its thematization, especially in Bolivia. Among blacks, the continuation of African traditions is not expressed in customary law, but in the world of religion, superstition, nature spirits and creatures, rites, ceremonies, bird feathers, emblems, wood carvings, etc.

⁴ It is not our intention to blur or confuse the existing and perceived ethnic differences that so characterise Spain, as we shall see, a legal system that is becoming modernised and unified is becoming Spanish, so that it can leave behind legal particularism and replace it with regionalism and autonomous legislation – a process that is fraught with setbacks and setbacks, and the best evidence for this argument is to be found in the texts of the constitutions.

I. The transformation of the pre-modern Portuguese-Spanish legal culture into a modern legal system during the legal unification efforts of the 19th and 20th centuries

By the beginning of the 19th century, the pre-modern Portuguese-Spanish legal culture was under complex fire. It was constantly challenged on the ideological side by the Enlightenment, on the practical and political side by the French Revolution, and then by its extended arms, both legally and militarily, the Code Civil (1804) and the arrival of Napoleon's invading army (1808) in the Iberian Peninsula. The result is known here in Europe.

But in Ibero-America, its mechanism of action was no less underestimated. It reinforced the maturing independence aspirations of the past. The creoles of the Spanish viceroyalties, with the exception of Mexico, saw the time ripe for a real takeover. They did so successfully after a long and short armed struggle, while failing to create a single federative/confederative independent state or to carry out any substantial restructuring of the existing colonial administration, in the absence of a modernisation concept. A change of power from above, a replacement of the Spanish elite in the old country, was carried out.

In Brazil, the House of Bragança retained control throughout of the independence process, thus preserving the natural and political unity of the country and avoiding the separatism and caudillo (civil) wars that characterised the former Spanish colonies, as well as the “Haitization” of the former French colony Haiti (uncontrolled and uncontrollable anarchy, lack of security of life and property). Brazil's constitution of 1824 was adopted as a mixture of Anglo-Saxon and French legal concepts.

I.1. The main elements in the development of modern law in the 19th century

Conceptually, the point of departure is the Enlightenment and rationalism, including the rationalist aspect of German philosophy. On the side of the economic policy, the idea of liberalism and the free market is also complemented by a German (Prussian) approach – Fichte's theory of the closed trading state – which takes the form of the German Zollverein.

On the legal side, what can be described as a turn to modernity, based on the need for the unification of the law, which was brought about by the French political-legal revolution, was also achieved by French methods (the introduction of legal codes on the one hand, military conquest in the name of freedom on the other).

In principle, there are three codes that can be considered from the point of view of modernity: the Allgemeines Landrecht (ALR) of 1794, the Code Civil (CC) of 1804 and the Allgemeines bürgerliches Gesetzbuch (ABGB) of 1811, but the Code Civile has proved to be the most influential in terms of its innovations and solutions, style and interpretability.

Among the German thinkers, Hegel, Savigny and Thibault were influencing legal theory, philosophy and history at this time, and the historical-legal school, with its rethinking of pan-dictatorship, made a great step towards the crystallisation of Germanic law by the end of the 19th century.

In the development of Anglo-Saxon common law, the US common law diverged from that of the former mother country at several points and this was the form that the former Spanish colonies, which became Ibero-America, had to contend with later.

By the end of the 19th century, comparative law had emerged as a new science and it became possible to “compare” the legal systems of the modern world, to show similarities and differences.

I.2. The modernisation of Portuguese-Spanish legal culture in nineteenth-century Latin America

Replacing and redesigning the inherited colonial legacy of the independent states has become a daily legal policy issue. One thing seemed certain: Spanish law as a mother law was out of the question, as its transcendence was on the agenda. In addition, a modern civil code was not enacted in Spain until 1889.

Latin American countries have maintained a legal education based on Roman law. The Code Civil was therefore the most appropriate model for the restructuring of the civil law part of the legal system. Several countries introduced it and translated it from French into Spanish (e.g. Haiti in 1826, Bolivia in 1830, Dominica in 1884).

Uwe Kischel⁵ points out that, in addition to simple adaptation, a separate Latin American jurisprudence has already taken off.

I.2.1. Andrés Bello's legal innovation activity

Andrés Bello (1781-1865) was a multifaceted personality (writer, linguist, lawyer, politician and compiler of the law code, etc.) who was a major legal theorist in Chile from 1828. Based on the Code Civil, he drafted the Chilean Civil Code, which he codified in 1855 after fifteen years of work, so that it could enter into force in 1857, after its adoption in 1856.

Bello, as a “Roman jurist”, not only sought to transcend the heterogeneous confusion of Spanish colonial law⁶ by relying on the Code Civil, but also took into account the more recent Spanish and Prussian-German (Savigny's historical-legal school of Pandectism) trends and even studied the English legal model.

The Chilean Civil Code served as a benchmark for other newly independent states. Succession and contract law are also regulated in separate books. As a linguist, he took care to pay more attention to the language of the text and included examples as a methodological innovation. Bello has become an inescapable authority as a legal scholar and codifier, and in our view, he laid the foundations of Ibero-American legal culture as a legal system based on modernity.

Bello has also broken new ground in the field of constitutional law. His constitutional concept is twofold. It has a legal-ethical and a political-social aspect. What unites the two sides is social reality with its systems of relations. State power is solid because the legislature, government and the practice of the authorities operate subordinate to the legal order, while on the other hand, citizens, relying on their rights (exercise of freedoms and exercise of liberties), achieve a state of equilibrium from the point of view of society as a whole. This could be called an ideal situation if it were so. Bello's attention, like Rousseau's, does not fail to be drawn to the great inequality of wealth that is unfolding as a cause of socio-economic tension. It runs through the entire history of Latin America in the 19th and 20th centuries, and has had (and continues to have) consequences to this day.

⁵ Kischel, Uwe: *Comparative Law*. Oxford University Press, Oxford, 2019, pp. 585-619. Hamza Gábor: Andrés Bello, the humanist thinker and codifier and the development of private law in Chile. In *Jogelméleti Szemle*, vol. 2013/3, pp. 205-210.

⁶ In Chile, following the Spanish conquest, compilations reflecting the influence of Roman law (*Breviarium Alaricianum*, *Fuero Juzgo*, *Fuero Real*, *Siete Partidas*, *Ordenamiento de Alcalá*, etc.) were initially used, but the *Nueva Recopilación*, promulgated in 1567, was also in force, which was a detailed codification of Spanish law. The *Recopilación de las Leyes de las Indias*, promulgated in 1680 and applied in the colonies, was also in force, as was the *Novísima Recopilación* of 1805, promulgated by the Spanish Emperor Charles IV (1788-1808).

I.2.2. Augusto Teixeira de Freitas and the new foundations of Brazilian law

Augusto Teixeira de Freitas (1816-1883) was given the official task of framing a draft – *Esboço* – of the Brazilian Civil Code. The work lasted four years (1860-1864), and the draft was intended to be a comprehensive and complete regulation with 4908 articles, but it remained unfinished. De Freitas was attentive to Bello’s Chilean Civil Code in preparing the draft, but his style is more akin to Germanic abstract and systematic ideas. As a collection of private law, the *Esboço* is also specific and unique in that it is structured as a forerunner of the German BGB, which came into force in 1900. It is divided into general and special sections, each of which has its own general rules, and is therefore a logically coherent work that represents a considerable individual intellectual effort. It is in this sense that he can be said to be independent of either the Code Civil or the Chilean Civil Code, and he considered Roman law to be the basis of civil law. Although the *Esboço* did not become a code, its value as a model is undeniable. The civil systems of Argentina and Uruguay drew on these solutions.

I.2.3. Dalmacio Vélez Sársfield’s Argentinean Roman civil law reflections

Dalmacio Vélez Sársfield (1800-1875) was a politician and lawyer and the sole author of the Argentine Civil Code (1869), which was passed by parliament and came into force in 1871. A special feature of Sarsfield’s work is that he includes a footnote explaining the wording of the law – each article – and giving specific reasons why he chose this particular approach. This has also facilitated the interpretation of the legal texts and has essentially enforced the principle of the comparative method.⁷

I.2.4. The Brazilian Civil Code and the legal development and system theory of Clóvis Beviláqua

In 1900, at the time of the epoch of this point, Clóvis Beviláqua (1859-1944) completed his design, which he had been commissioned to do in 1889. It was adopted much later, in 1916, with an entry into force in 1917. Beviláqua also based his draft on the Roman legal tradition, and included a commentary.

At the end of the 19th century, as a result of his legal development and systematization activities, he classified the state legal systems of the time into three groups.⁸

1) Those where the influence of canon law and Roman law is negligible; the corresponding geographical area is Northern Europe with the Nordic countries, England, the USA and Russia.

2) States which were decisively influenced by Roman and canon law; the geographical area is the southern zone of Europe: Portugal, Spain, Italy and Romania.

3) States where the Roman and Germanic elements are present in “roughly equal proportions”; the geographical area is Central Europe: France, Germany, Switzerland and Belgium.

Everything would be fine, but he makes a very important addition. “It is necessary to extend these three groups to include a fourth, which includes the law of the Latin peoples. These

⁷ As the footnotes indicate, de Freitas drew most of his inspiration from the Code Civil and the German *ius commune*, but also from the Civil Codes of other Latin American countries as sources, examples and solutions.

⁸ Catalano, Pierangelo: *Roman law still alive today: the great legal systems of the world and Latin American law*. In Hamza Gábor (szerk.): *Tanulmányok a római jog és továbbélése köréből*. (Kézirat.) Nemzeti Tankönyvkiadó, Budapest, 1995, pp. 45-74.

have not been the subject of the attention of the French jurist, and the laws of Latin America cannot logically be included in any of these groups; for, although they are drawn from European sources of a fairly homogeneous character (namely, Portuguese and Spanish law), this common stock has been worked up in different ways, according to their particular characteristics and by the incorporation of other European, and especially French, elements. And even if we disregard the new states of the continent, which are essentially democratic, this fourth group bears traits of a determination courage which does not shrink from the new and a sincerity which increases the hope of the coming of freedom.”⁹

Bevilaqua thus openly states – following the French comparatist Ernst Gasson, but going beyond him in a theoretical sense – that Latin America constitutes a legal group.¹⁰

1.3. The development of Latin American (Ibero-American) law and the expansion of common law in the 20th century, and the impact of these legal cultures on each other

As the US extended its sphere of influence into Ibero-America, common law and the public law institutions that had already been noticed and even tried to be copied by these countries, with little success, emerged as competing law.

The Romano-Germanic-based Ibero-American legal group has taken up the gauntlet against the intrusion of US common law.

European civilisational origins alone did not and do not make the Anglo-Saxon United States and the Iberian (Hispanic and Luzobrazilian) origin and language countries as deeply rooted cultural cousins, since the institutions that form the most durable fabric of these societies (the family, the more patriarchal way of life, the specificities of agriculture, trade and traffic relations, etc.) are the “children” of the Romano-Germanic legal culture and not of the extreme individualism of the common law, which they reject.¹¹

1.3.1. Formation and main elements of Ibero-American legal culture

Ibero-American legal culture is based on the Romano-British-Pre-Columbian cultural blocs. It takes its form from Roman law, in Latin “*ius commune Americanum*”, in Spanish “*derecho común americano*”. This European Romanist tradition is blended with the customs and institutions of the native indigenous peoples.¹² In Brazil, only indirect effects are mentioned

⁹ Ibid. p. 54.

¹⁰ In Brazilian comparative jurisprudence, the category of the “Latin-American group of laws” (or, to use Bevilaqua’s expression, the group of “Latin-American legislations”) has thus been accepted since the last century; the criterion for the formation of the group is, as we have seen, the greater or lesser weight of elements from Roman law in each legislation. The same comparatist approach can be found in Abelardo Saraiva da Cunha Lobo’s great work on Roman law (*Curso de Direito Romano*, Rio de Janeiro 1931). The first two volumes deal with the “organisational structure” and “extent” of Roman law, respectively. “The first two books examine the “structure and the expansion” of Roman law, the first two examine the “structure and the expansion” of Roman law, the third discusses the “worldwide impact” of Roman law, with particular reference to modern codifications, and then outlines the characteristics of “Ibero-American law” within this framework. The history of the development of Roman law, from the time of the *leges regiae* to the emergence of Ibero-American law, is thus traced in a vast arc that shaped the thinking of generations of Latin American jurists.” Ibid.

¹¹ However, it may also be true that, from a modernisation perspective, American common law is more pragmatic in its approach to litigation, more attentive to the discovery of facts arising from the conduct of life and more reflective of templates for behaviour. From this perspective, Ibero-American countries are seen as a hybrid of Westernised civilisation rather than being solely Western (perhaps because they are not Anglo-Saxon, though of Germanic origin.)

¹² “The differences within the unit are partly due to the historical circumstances that preceded the codifications

in relation to indigenous Indians and African Negroes when the development of the law in their country is discussed. As early as 1896, Bevilaqua drew attention to the specific legal institutions of the native peoples and their study with little success.

Given the fact that the conquest of the New World was carried out in the spirit of the concubinage of the sword and the cross, and that Catholicism and its institution were state-controlled and financed by the colonial churches, and canon law was part of Portuguese-Spanish law, this issue remained important after independence. This issue is described as the “Romanist-Canonical tradition” (“tradición romano-canónica”).

A separate component is the social order, described and legally protected in the Civil Code of each state, in which the individual as a citizen is given a much greater role and rights than in pre-Columbian cultures, where the primacy of the community has always prevailed. These civic codes reflect a strong Romanist outlook and, in political terms, they carry democratic values.

Last, but not least, it is necessary to talk about those elements that have their origins in the Romanist-canonist tradition of Ibero-American legal culture, but which are problematic areas in contemporary societies (whether we look at them from the point of view of social policy, anthropology, jurisprudence, etc.).

First and foremost there is the problem of the demographic explosion, which is linked to the changing values of marriage, cohabitation (without marriage) and the family.

Secondly, there are the cases of state taxes, restrictions on land ownership for the public interest, the unhealthily disproportionate distribution of land tenure in Brazil, the fate of Amazonia and its forests, and the environmental protection. The most important task to be resolved, and the oldest problem, should be to rethink the close relationship between land and the family.

A major step forward was the introduction of the Brazilian Civil Code in 2002, which is a good summary of the legal culture of Brazil, now a legal superpower and an emerging regional power.

1.3.2. The “infiltration” of common law into Ibero-American legal culture and their interaction

In several waves during the 19th and 20th centuries, Anglo-Saxon common law came into permanent contact with the Ibero-American legal culture, which was modernising from the old Portuguese-Spanish law and moving towards unification.

Historically, the first in line is Quebec, which was acquired by Britain from France during the Seven Years’ War (1756-1763). The USA increased its territory through purchases, wars and “altruistic aid” to Anglo-Saxon settlers (see the case of Texas), which had Romano-Germanic legal systems (except Alaska, which was purchased from the Russian Empire in 1867). In 1898, with the war against Spain, Puerto Rico, Cuba and the Philippines fell into its lap. The American common law has also “attacked” the legal systems of these countries and has put constant pressure on their Roman law-based civil systems. In the US Louisiana is the only exception because of its Roman legal structure of private law.

(Spanish or Portuguese conquest, the existence of indigenous communities or the existence of a pre-Columbian institutions), and partly to centrifugal tendencies that emerged in parallel with the emergence of independent nation states and codified state legal systems (e.g. in the Pacific and Andean states, civil law codes show the influence of the *Código* of Andrés Bello, in the Atlantic equatorial states, the influence of the *Esboço* of Teixeira de Freitas and the *Código* of Vélez Sársfield (72), and partly the influence of the various European codes” – writes Catalano. *Ibid.* p. 58.

Roscoe Pound, the famous legal theorist and scholar, concluded at the beginning of the 20th century, in pages 2-6 of his “The Spirit of the Common Law”, published in 1921, that the advancement of the common law in the codification in other countries was dynamic, a kind of triumph, with the exception of Japan, where they had failed. The strength of the common law is made possible by the specific dispute resolution method already mentioned, the individual legislative activity of the judiciary, and this is the driving force behind the slow but sustained and steady influx of American common law. The other factor is found in the concept of “extreme individualism” in Anglo-Saxon law. But Roman law is not individualistic.

Koschaker called Roman law *Juristenrecht* and contrasted it sharply with common law. The two categories initiated by him and De Francisci were suitable, for example, to show the “legal Americanisation” of Puerto Rico as a penetration effect, and then the resistant factors had to be found and detected: this was found in family law. The basic unit of the societies of the Ibero-American legal cultures is the family, while common law is based on the individual, “the” individual. If Anglo-Saxon law makes a breakthrough here with the pressure of penetration, resistance will diminish and then be transformed to meet the demands of the new penetration. The victorious law will call this modernisation.

The penetration of common law at the expense of the Ibero-American legal culture is most evident in the field of commercial law. It is a general opinion and perception that the reception of a foreign legal institution – common law – with all its solutions, instruments and adaptation of its legal procedures, has breached the wall of unity of the Romanist legal system.

1.4. The modernisation of the legal cultures of Portugal and Spain in the 19th and 20th centuries

The modernisation of the Portuguese legal system in the area of private law began in 1833 with the adoption of the Ferreira Borges Commercial Law – *Código de comercio* – which was replaced in 1888 by a new modernised law with Italian and Spanish influences.

Preparation of the Portuguese Civil Code – *Código civil* – began in 1850 and was drafted by Professor António Luis Visconde de Seabra and enacted from 1868. He used the ALR, the *Code Civile* and the ABGB to draft it.

A new Civil Code was adopted in 1966 and came into force in 1967¹³ (the influence of the German BGB can be seen in the structure and terminology of the code.) Portuguese private law has since followed German rather than Romanist legal solutions.

The transformation of the Spanish legal system has been slow and setbacks due to a series of public law battles. The fundamental problem and dilemma was that the political-economic objectives of centralisation and unification were in constant conflict with the survival of the political-administrative apparatus of the old system, including local legislation, which remained the “guarantee” of the fragmentation of the legal system.

The Penal Code was promulgated in 1822, and by 1829 the Commercial Code had been adopted, but the codification of the Civil Code met with even greater resistance than expected. The Civil Code was finally adopted in 1888, came into force in 1889 – and is still in effect today.

It is important to note that the Civil Code is not a code, has subsidiarity in certain areas of law (*derecho civil común*) and “applies mainly to matrimonial, succession and property law, as opposed to local (private) law (*derecho foral*), which is also directly based on Roman law

¹³ The Civil Code was also enacted in Portugal’s colonies, and after 1974, when Angola, Guinea-Bissau, Mozambique, São Tomé and Príncipe and Cape Verde became independent, it was maintained in force as their own code.

and whose organisation into official collections (Compilación) continued after the adoption of the 1978 Constitution institutionalising regional autonomy”¹⁴.

We agree with D’Ors’ view that “the old European *ius commune* in Spain has contributed to the survival of legal pluralism to this day, in contrast to the French-style centralisation and unification efforts.”¹⁵ Indeed, separatism and regionalism within Spain were also built on legal particularism.

II. The “classification” of the Portuguese-Spanish-Berber-American legal systems according to the classifications of legal theory

For the sake of theoretical clarification, an overview of the typology of modern legal systems, perhaps the best known concept of which is the family of laws, seems necessary. Our starting point is René David.¹⁶ His famous work has been revised and clarified several times, and his former students have continued to reflect on it and add new insights. We will also analyse the legal theory of the authors Zweigert-Kötz, Professor Antal Visegrády’s insights on legal culture and Kischel’s analysis of the civil law of Latin America.

II.1. Theoretical issues and ways of dealing with the grouping of legal systems: families of law

Since the beginning of the 20th century, the science (theory and methodology) of comparativism has been on the agenda to examine legal-legal approaches, mainly from a legal-theoretical point of view, operating as legal-legal systems in the societies of modernity and in other traditional or religious states. If we wish to sketch briefly the 20th century attempts of comparativism to classify the law in a schematic way, yet in their succession (but not necessarily in a sequential way), the line opens with Georges Sauser-Hall (1884-1966)¹⁷ back in 1913. Based on the notion of race, he creates four groups: 1) the law of the Aryan (Indo-European) peoples; 2) the law of the Semitic peoples; 3) the law of the Mongoloid peoples; 4) the law of the barbarian peoples.

Shortly afterwards, in 1934, the Argentine legal philosopher Enrique Martínez Paz (1882-1952)¹⁸ also classified legal systems into four categories: 1) Common law-Barbarian-English, Scandinavian, etc.-laws; 2) Barbarian-Romanesque-German, Italian, Austrian-laws; 3) Barbarian-Romanesque-Canonical-Spanish and Portuguese-laws; 4) Romanesque-Canonical-Democratic-above all Latin American, Swiss and Russian-laws.

Swiss jurist Adolf Schmitzer (1889-1989)¹⁹ distinguished five legal systems from the historical point of view: 1) the law of primitive peoples; 2) the law of ancient civilisations; 3) European-American law (a) Romanist, b) Germanic, c) Slavic, d) Anglo-American law; 4) religious law; 5) Afro-Asian law.

The Arminjon-Nolde-Wolff trio of authors²⁰ understands a typical legal system as national laws, seven in number: 1) French; 2) Germanic; 3) Scandinavian; 4) English; 5)

¹⁴ Hamza Gábor: *Az európai magánjog fejlődése*. Nemzeti Tankönyvkiadó, Budapest, 2002, 159. p.

¹⁵ Sanchez-Arcilla Bernal, José: *The survival of the Roman legal tradition and the reception of the common law (ius commune) in Spain*. In Hamza Gábor (szerk.): *Tanulmányok a római jog és továbbélése köréből*. (Kézirat.) Nemzeti Tankönyvkiadó, Budapest, 1995, p. 117.

¹⁶ David, René: *A jelenkor nagy jogrendszerei*. Közgazdasági- és Jogi Könyvkiadó, Budapest, 1977.

¹⁷ Visegrády Antal: *Jog és állambölcselet*. Menedzser Praxis, Budapest, 2016, p. 62.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.* p. 63.

Russian; 6) Islamic; 7) Hindu. René David first formulated his theory of families of law as the great legal systems of the world in 1950. At that time, he identified five groups: 1) Western French and Anglo-American legal systems; 2) Soviet; 3) Muslim; 4) Hindu; 5) Chinese.²¹

By the end of the 1960s, he had come up with a new classification. He reduced the names of the families of rights to four, restructured them and changed them in important respects: 1) Romanist-Germanic; 2) Anglo-Saxon; 3) Socialist; 4) Philosophical or religious.

There are clearly ideological considerations beyond historicity. David's theoretical construction has been subjected to a correction by Swedish jurist Ake Malmström. She also considers that there are four families of law, but that Zweigert's theory of legal competence has led to the creation of new subgroups within them. For the purposes of our study, he is the first to equate the Latin American legal system with the other Western legal families, in a non-Martinez Paz eclectic way. Here are his groups: 1) Western (European-American): a) the family of continental European legal systems; b) the family of Latin American legal systems; c) the Scandinavian legal systems; d) the Anglo-Saxon family of legal systems; 2) Socialist (Communist) group: a) Soviet law; b) People's democratic legal systems; c) the Chinese legal system; 3) Asian non-communist legal systems; 4) African states: a) Anglophone; b) Francophone legal systems. After 1989, this theoretical construct also became obsolete. We would like to point to two further developments as a realistic process of legal family formation in legal theory and philosophy. One is the trend towards mixed legal systems, the other is a family of socialist legal systems, which has undergone a metamorphosis of its own, changing its name and partly its structure. Already after 1989/1990, with the disappearance of the Soviet bloc, it was suggested that it might be replaced by a post-socialist family of laws, following the lead of Balázs Fekete.²² This expectation was not viable, and the processes of realpolitik and actual legal system-building moved in a new direction, towards illiberalism.²³

II.2. Zweigert and Kötz: legal powers as “stylistic elements” of legal systems

The theoretical basis of the powers is as well-known as the Davidian construction. The German authors came up with the idea in 1971, which they further refined in their 1996 book,²⁴ that five so-called stylistic elements form the basis of the scope of rights.

The five stylistic elements are: 1) historical background captured in its development;²⁵ 2) legal-legal mindset (norms of “what law is”); 3) characteristic legal institutions; 4) sources of law and ways of dealing with them; 5) analysis of ideologies.

²¹ Ibid. For the grouping of legal systems see Varga Csaba: *Law and Philosophy*. Budapest, 1994, pp. 209-211.

²² Fekete Balázs: *A jogi átalakulás határai: egy jogcsalád születése 1989 után Közép-Kelet-Európában*. In *Kontroll – Jogtudományi folyóirat*, 2004, vol. 2, no. 1, pp. 4-21.

²³ [Now – it seems – such a political system might have a better chance with legal systems that “faithfully” model it: with China, Russia, Turkey in the lead, because each of them has a different religious background (e.g. Confucianism and leftist ideology; Orthodox Christianity and Slavic missionary consciousness or Islamism and resurgent Turkish regional power ambitions).

²⁴ Zweigert, Konrad – Kötz, Hein: *Introduction to Comparative Law in the Fields of Private Law* (3rd edition) Tübingen, Mohr, 1996. But in the 1998 English edition, the socialist jurisdiction has already been removed, while the Far Eastern, Islamic and Hindu jurisdictions have not “earned” the inclusion! The categorisation as a grouping provided an opportunity for Siems (Siems, Mathias: *Comparative Law* Cambridge, Cambridge University Press, Cambridge, 2014, especially pp. 74-80.) and Kischel to further discuss these issues and the latter's position will be discussed in more detail later.

²⁵ Here we refer to the fact that development in the philosophical and legal-philosophical sense is a “one-way crystallization”, which can be development (progress), regression (decline), a cycle or a dead end – in the light of subsequent historical processes. The Hegelian *Aufhebung* (*Aufhebung*, abolishing, preserving) can be a good example of a substantive demonstration of the discrepancy between the original meaning of an earlier stylistic element and the concept it currently carries.

Zweigert and Kötz point out that their classification is for private law and not public law, but they refer to the possibility of a change of jurisdiction (in David's case, this can be a change of family or a mixed family).

Mathias Reimann²⁶ talks about legal traditions instead of families of laws and legal powers, which is more dynamic in its approach by extending it to economic, religious, etc. factors, so that legal systems can be understood, described and grouped as part of a culture, as an expression of the underlying mindset (mentality).

If we follow Max Weber's guidance, then ideal types such as the concepts of families of laws and powers are nothing more than conceptual abstractions, which do not exist in reality because they are neither perfect nor complete due to their constant change (Eliot writes that no concept is ever brought into focus until it is misused – an observation worth considering²⁷).

The legal theory of jurisdiction, which is more closely associated with Zweigert, the Arminjon – Nolde – Wolff author triad, based on the division of seven groups,²⁸ divided legal systems into eight legal systems: 1) Romanist; 2) Germanic; 3) Nordic; 4) common law; 5) socialist; 6) Far Eastern; 7) Islamic; 8) Hindu.

In the 1996 German and the 1998 English editions, the authors Zweigert-Kötz emphasise the stylistic elements of the chosen legal system as the “parent system” and, in comparison, speak of an “affiliated” legal system.

It is the mother of French and Italian Roman law, German (Germanic) and Swiss law, and English and American law.

The subsidiary laws, in our case Portuguese, Spanish and Ibero-American, are part of the Roman (Romanist) legal system, which is the mother law, and their development has an impact on their development, and their direction of development determines whether they remain within this circle or go beyond it. This is an important aspect to consider when classifying our study into a legal system or legal scope based on legal theory.

II.3. The Romanist legal field and its main stylistic elements after the millennium

In the classification of the states under the Romanist jurisdiction, we find three elements that are specific to them and not to others. These are: 1) the absence of the rule of law, which leaves ample scope for governance by decree; 2) the existence of the so-called organic laws (lois organiques)²⁹; 3) the existence of a bicameral parliament.

The stylistic elements listed here are of a nature of public law, which goes beyond Zweigert and Kötz's theory based on the grouping of private law systems.

A very detailed yet comprehensive description and analysis of the stylistic elements of the Romanist legal system is provided by the Badó-Harkai-Hettinger trio.³⁰

Among the legal styles, the treatment of the principle of historicity is particularly suitable for delimiting the members (states) of the Romanist legal area outside Europe.

To name the historicity that has conquered Ibero (Latin) America for the second time, this time – and not a little exaggeratedly – the system that represents and carries modernity, the

²⁶ Reimann, Mathias: The Progress and Failure of Comparative Law in the Second Half of the 20th Century. In American Journal of Comparative Law 2002, vol. 50, p. 671.

²⁷ Eliot, Thomas Stearns: A kultúra meghatározása. Szent István Társulat, Budapest, 2003, p. 9.

²⁸ Arminjon, Pierre – Nolde, Boris Baron – Wolff, Martin: Traité de droit comparé I. LGDJ, Paris, 1950, pp. 42-47. The seven groups: 1) French; 2) Germanic; 3) Scandinavian; 4) English; 5) Russian; 6) Islamic; 7) Hindu

²⁹ Organic laws are designed to unburden the constitution. Its classic home is France, but it is also included in the laws of Romania and Spain.

³⁰ Badó Attila – Harkai István. – Hettinger Sándor: Badó Attila; Harkai István; Hettinger Sándor: A romanista jogkör stíluslemei a 21. században. In Csink Lóránt – Schanda Balázs (szerk.): Összehasonlító módszer az alkotmányjogban. Pázmány Press, Budapest, 2017, pp. 145-199.

Roman law, i.e. the Code Civil (with Napoleon's powerful midwifery). The direction of the development of Portuguese and Spanish law is important for the topic of our study, because, for example, the Spanish Constitution of Cadiz of 1812 (in force until 1814) included the relationship between the mother country and its colonies,³¹ which also gave them representation in the Cortes. This liberal constitution, with its forward-looking legal solutions, was lost. The former colonies later sought to transplant and establish their ideas in public law from the Constitution of the United States of America, but without success.

The Portuguese have also failed to keep Brazil together with the mainland. The Portuguese Civil Code of 1867 (Código civil) still reflects French and Spanish influences, while the Código civil of 1966, now in force, has more German (Germanist) Swiss and Italian legal features, and therefore the Zweigert-Kötz literature questions its Romanist character, preferring to reclassify it as Germanist.

The legal development of Latin (Ibero) America has favoured the spread of Romanist law, but the legal penetration of common law (see I.3.2 below) is a common phenomenon and the last millennium has seen a new force in the customary laws of native peoples. Reform efforts in public law are also reflected in the incorporation of new constitutional guarantees for the protection of minorities and human rights.

The Ibero-American countries almost completely reproduce the three specific elements described in the first paragraph of this section, which give the Romanist jurisdiction its Ibero-American character. The question is whether this is already a "big girl" or still a girl branch, or whether we can speak of a young mother branch becoming independent.

If the latter is accepted, then the introduction to the concept and system of legal culture may be of particular importance.

II.4. Uwe Kischel: Latin America is a Spanish-Portuguese family of laws?³²

Uwe Kischel's book entitled *Comparative Law* was published in 2019. On pages 585-619, he looks back at the legal systems of Latin America to its colonial past, and moves forward to the search for legal models for the independent states during the 19th century, in which the constitutional solutions of Romanist French law and the American version of common law came to the fore. In addition to the French Code Civil, these former colonies were also interested in these French versions of the republican polity. In the 20th century, US interest in the "backyard" also increased, but it was mainly to promote attempts to penetrate common law. A paradigm shift between the two halves of the Americas, Anglo-Saxon and Ibero-American, began to take place in the 1980s, bringing about a major change in the human rights and customary law situation of indigenous peoples.

Kischel looks at both the generations of fundamental rights and the possibilities for their judicial enforcement, namely their enforceability.

The book draws attention to the particular social consciousness that the Spanish colonial authorities had a habit of using the phrase "se obedece, pero no se cumple", i.e. "obey the law, but don't follow it". This is how the legal text became a written form and the legal reality became a question of fact, with a deep gulf between them, representing one of the hallmarks of this legal culture. This problem was not the same for all the viceroalties and audiencias, and

³¹ The colonial territories were New Spain (Mexico), New Galicia (audiencia in the north of Mexico), Yucatan (Mayan peninsula in the southeast of Mexico), Guatemala, the eastern and western provinces, Cuba, Florida, Santo Domingo, Puerto Rico, New Granada (a sub-kingdom of present-day Panama, Colombia, part of Venezuela and Ecuador), Venezuela, Peru (a sub-kingdom), Chile and Rio de la Plata (a sub-kingdom of present-day Argentina, Uruguay).

³² Kischel: op. cit. p. 590. *A Spanish-Portuguese Legal Family?*

was not present at the same time, but it persists to this day and has a negative impact on these societies. It is interesting to note that, given the difficulty of effectively transposing written law into these cultures, this is compounded by the very crude language used in the commentaries to describe the phenomena, and is presented as a genuine “culture of indispensability” or “lawlessness”. The problem becomes apparent when a minister can publicly state: “Who cares about the constitution. It’s just a piece of old paper.” Therefore, reforms and complaints achieve nothing. A specific terminology, *impunidad*, develops for this situation. The elite, even at the level of generality, is not afraid of accountability and becomes immune to criminal law and to prosecution. The aforementioned deep chasm creates parallel worlds with rules and behaviours that govern and influence them. And people live their lives adapting to this duality. Large sections of the population are turning to evasion of the law because they do not trust the courts to apply the law, and there is a growing sense of human injustice.³³ The written laws that guarantee judicial independence in all Ibero-American countries do not in any way guarantee the required degree of practical and effective independence, and their ineffectiveness is well known.

II.4.1. Low prestige of the judiciary

The third branch of power is a living legacy from colonial times of failure. While the inquisitorial process has a very different content in Romanist France or German criminal procedure, in the vast majority of Ibero-American countries we are dealing with “authentic inquisitorial elements”. The suspects were often imprisoned, their detention on remand prolonged and only with great difficulty were they able to regain their freedom. The whole thing was shrouded in mystery. Neither legal protection nor the principle of freedom of speech were in question. The reforms in the field of criminal law were based on German law. In Ibero-America, as with all reforms, when legal reform is undertaken, successful change – change in itself – is only possible as a result of a sustained political effort, and this has an impact on the change in legal culture. Complicating factors are mistrust and lack of financial resources.

In the field of justice, we can talk about a major change after 1992, but the situation is still not reassuring. What we are seeing is the infusion of socio-cultural rights into constitutions (the literature speaks of social constitutionalism), but this also opens the way to judicial

³³ The trio of authors Badó-Harkai-Hettinger (p. 27) reaches the same theoretical conclusion about the mechanisms of the influence of the branches of power on society: “Latin American countries are mostly characterized by a strong, interventionist executive. However, using the terminology of the World Bank, the implementation of “good governance” is particularly deficient in the field of law. The often very weak or possibly non-existent legislature has left a deep wound in the legislative process. Make no mistake, Latin American countries have no shortage of elegantly drafted codes, constitutions and other legislation. The Chilean Civil Code, the work of Andrés Bello, is considered by some to be literary in its wording and structure. In Latin America, this legislative technique has a long history. Nevertheless, an examination of Latin American legal systems reveals that, in many respects, the law does not reflect the heterogeneous social realities of each nation, with many sections of the population choosing to evade the law and the courts applying it in a way that creates social injustice. The dysfunctional relationship between law and society seems to be deepening, exacerbated by the population explosion, the rural-urban migration and the debt crisis of the 1980s. The executive has repeatedly taken the place of the legislature in Latin America, and the executive has regulated by decree the conditions of life that require regulation by law. This was compounded by the fact that executive power was often concentrated in the hands of military regimes, which allowed laws to be promulgated without transparency and accountability. Thus, the legislature was not, and could not be, in a position to do its job in a way that took account of social needs and context. The legislature has a history of inefficiency and lack of parliamentary debate. Weak or non-existent legislative power has resulted in law that does not reflect social reality. Latin American states do not necessarily share the ideals of the civil law system. If we take into account the pace of development of Latin American societies and the heterogeneity of the population, we can conclude that, in its purest form, the objectives of a civil justice system in the strict sense cannot be achieved in Latin America.” Badó – Harkai – Hettinger: *Op. cit.* pp. 178-179.

interpretation of the law, which is a solution of case law, i.e. it loosens up the civil law system, so that the new constitutional norms open the way to the penetration of common law. It also disrupts the uniform regulation of traditional areas of private law.

Therefore, public and private law do not form a stable legal system, because neither the political, economic nor social situation and environment allows it (although international conditions have changed very favourably). Stability is also counteracted by the extent and entrenchment of corruption and drug trafficking, which influence the functioning of all parts of the state, albeit in different ways and at different levels, depending on the country. “There is a statistical correlation between the level of mistrust in a particular country and the objective level of income inequality, as well as the extent to which citizens perceive this inequality as unfaithful. In other words, the greater the inequality, the greater the mistrust.”³⁴

II.4.2. Judicial enforcement of fundamental rights

Following the American example, the use of the judicial route was introduced in the mid-19th century and became the trigger for case law adjudication. In the 20th century, there was a move towards a more European model of constitutional adjudication, with separate constitutional adjudication and, from time to time, independent constitutional courts. Constitutional courts are often “activist”, seeking to establish and challenge the unconstitutionality of a given piece of legislation by means of abstract judicial interpretations of the law. This marks a paradigm shift. It is also the case – for example in Chile – that the right of judicial review extends only as far as the law has not become final. In other countries, such as Mexico, the time limit is 30 days (Art. 105, para. 2 of the Constitution); in Nicaragua, 60 days (Art. 12 of the Ley de Amparo); in Peru, it is up to 6 years (Art. 100 of the Constitutional Code of Procedures); and there are states where there is no time limit and also states that allow a certain number of citizens or parties to have access to judicial review.

We should also mention Brazil, which has built also its own constitutional system. As Gábor Hamza has already stressed, Brazil is not only an emerging economic power (the so-called BRICS countries, i.e. Brazil-Russia-India-China-Southern-Africa), but also a legal power.

The judicial route initially took the form of an empowerment and any federal court could review the constitutionality of laws in any particular case and, if necessary, revoke their validity. This already required the decision of a plenary session of the Court or a special body created for this purpose, under Article 97 of the Brazilian Constitution, which required an absolute majority of votes. At the top of the Brazilian judicial hierarchy is the Supremo Tribunal Federal (STF) (Supreme Court of Justice). The STF can call on the upper house of the legislature, the Federal Senate, to revoke the law, the latter not being bound by the STF and thus free to decide at its own discretion.

Another way to challenge the law is to file a direct complaint of unconstitutionality (*ação directa de inconstitucionalidade*) under Articles 102(1)(a) and 103 of the Constitution. This provision provides for the possibility for a limited number of constitutional bodies to lodge a complaint without a time limit, either on the grounds of a law being challenged or on the grounds of the failure to adopt a law. However, the decision taken in this procedure is already valid *erga omnes* (against everyone). A subtype of this complaint, governed by the same constitutional provisions, is the complaint for a declaration of constitutionality (*ação declaratória de constitucionalidade*). This serves the purpose of compensating for the shortcomings of indirect judicial review, namely the uncertainty generated in the legislative

³⁴ Kischel: op. cit. p. 605.

system, because the regulation does not have an erga omnes effect, the power of decision is not limited to one court, an STF provision that a law is unconstitutional is not linked exclusively to federal status. The ação declaratoria does not allow the STF to make an abstract decision that has general effect and thereby provide legal certainty.

Brazilian law does not allow for a constitutional complaint, modelled on the German model, where a citizen is allowed to bring a violation of his fundamental rights before the Constitutional Court after having exercised his right to a remedy before the ordinary court. This fully clarifies the fact that the STF is, in any case, the highest judicial forum on all issues, making a special form of constitutional complaint unnecessary. However, there are special procedures which allow for the bringing of personal fundamental rights cases before the STF. These include the so-called habeas corpus, which applies to proceedings concerning detention, the Mandado de Segurança, as a comprehensive complaint for all violations of personal rights (not just those guaranteed by the Constitution), and the Mandado de Injunção, which applies to complaints of maladministration in certain areas, such as social rights. These specially designed procedures are apparently absent from civil law and are called injunctions even in Brazil. That being said, the entire system of legal protection of constitutional rights cannot be understood only by reference to foreign legal systems, but can be approached through its own – Brazilian – terminology.

II.4.3. One component of Ibero-American legal culture (legal systems): customary law

Customary law is an important element of legal culture and has a special place in Indian history as a source of law. Kischel devotes a great deal of space to the present-day law of the Indians (indigenous, native, amerind) and their ancient customs. Also worth to note here the book *Civilization of the South American Indians: With special Reference to Magic and Religion (Classic Reprint)* by Rafaël Karsten (1879-1956), republished in 2018, which provides an inescapable factual record and helps to better understand Indian customs.

II.4.3.1. The Inca civilisation: the survival of the cultures of a totalitarian state

In our study we have already presented the basic features of the Inca culture, now we will go into little more details, because the Ibero-American legal culture goes beyond the Portuguese-Spanish legal system precisely with the customary law of the indigenous people, but whether it becomes independent or remains a special part of the latter is an open question. The Aymaras of Southern-Peru, Northern-Chile and Western-Bolivia, as well as the Quechuas – in the same countries and in Ecuador and Argentina – and the Guarani of Paraguay (and their close linguistic cousins, the Tupi of Brazil) are the modern descendants of Pre-Columbians.

The Incas and their subject peoples lived in village communities (ayllu), which were grouped into communities of ten, one hundred, one thousand and ten thousand families. The chieftaincy was held by the chunca-camayoc. The Inca state was made up of four regions, each of which was made up of counties. Before the arrival of the Spaniards, the Inca state had undergone a shift of power towards the northern region, thus sharpening relations within the ruling elite. The unresolved succession issue favoured both the Spaniards and the aspirations of the subject peoples for independence. The struggle was soon settled, and the European (Roman) principle of divide and rule abolished the Inca state, but the culture and customs of its constituent peoples did not disappear. The Spaniards (during the Viceroyalty of Toledo) discovered the comprehensiveness of the system of compulsory public works, which meant both compulsory and forced labour. It was classified into nine categories according to age. They

placed great importance on education for work and on the primacy of community. Individualism and isolation were out of the question. Everyone was literally looked after, no one was left destitute (consumer communism). Hence the fact that the institution of monogamous marriage was not known, let alone practised.³⁵ The most senior people could have up to fifty concubines, while the chiefs of the communities could have thirty concubines as “middle-men” (huno-camays). It is no coincidence that the transplantation of Portuguese-Spanish family law was very slow among the indigenous population. The archaic features of Indian societies were preserved for a long time, so that the production processes hardly changed (see mita system), and the influence of Christian ideology, liturgy and organisation can be seen as the main reason for the slow spread of the monogamous family.

The Inca “criminal law” was aimed at punishing acts against the person (murder, theft, against the Inca ruler and his family) and, as a speciality, aggression against property (destruction of buildings: bridges) and, in modern terms, the protection of the environment, animals and plants.

The observance of laws, customs and rituals based on the Inca Sun cult was absolutely required, so crimes were very rare.

The Inca Empire, as a precise, well-organised vast empire, suggests an image that does not question their autocratic power structure, but is complemented by their socially sensitive customary law, which allowed social discontent to be managed and contained. The fall of the empire was brought about by a combination of power struggles within the ruling “classes”, the armed uprising of the subject peoples and the Spanish conquistadors.

II.4.3.2. Indigenous rights and their constitutional levels of recognition

We refer back to the Spanish (and Portuguese) legislation of colonial Ibero-America that recognised Indians first as human, then as Christians and later as citizens – in theory (see “se obedece, pero no se cumple...”).

In the struggles for independence in the early 19th century, the Creoles led the way (Mexico being the exception, as we know) and relied heavily on the mestizo class. There was little change in the fate of the Indians.

However, after the independence, the concept of national unity took on a special significance for the Creole leadership. Therefore, at least on paper, they wanted to make the “indios” citizens of the new republics. This took the form of attempts at assimilation, not only by abolishing the former colonial protections but also the autonomies already guaranteed and limited by the former colonial powers. Cultural and political rights were “absorbed”, some “popular elements” were retained as customary law and the culture of indigenous peoples was explicitly persecuted. The “civilisation of the Indians” was accompanied by a kind of colonial strategy of separation, combined with a limitation of the rights of the Indians. This tactic initially appeared to be temporary, but either because of its slowness (in Spanish-speaking areas) or its results (in Brazil) it became a strategy.³⁶

³⁵ Consequently, with the arrival of the Spaniards, not all mestizos were conceived as a result of violence, and we also know that many of the representatives of the cross, mainly the (secular) clergy, but also many of the monks, became fathers in this “great mixing”.

³⁶ See Kischel: op. cit. pp. 606-611. Brazil provides an example of how the strategy of assimilation has had different effects in practice: while the de facto separation of white and indigenous populations has been maintained in the legislation of other Latin American states, Brazil has begun to promote the mixing of the two ethnic groups, with remarkable success. A side effect of this demographic development was the almost complete disappearance of the indigenous Indian population, which claimed to be indigenous. In some ways, this strategy can be seen as both a complete avoidance of the need for assimilation and the most radical form of assimilation imaginable.

By the middle of the twentieth century, the policy of assimilation had become a kind of integration, characterised by the recognition of certain specific and communal rights of the “indios”. It was recognised that the abolition of colonial legal protection did not liberalise the indigenous people, but rather led to the concentrated land ownership of a few white oligarchs and the oppression and inadequate development of the indigenous population, including agriculture. These negative effects were in contrast to the typical mechanisms of the welfare state, which were included in Latin American constitutions during the same period. New laws were introduced to protect against exploitation, but also, in part, to protect specifically indigenous organisations, common property rights, the right to use the mother tongue and the right to practice indigenous culture. At the same time, the legal system retained the concept of a single (unitary) state and recognised only one legal system, the formal state legislature. At most, certain Indian customs were recognised, but only and exclusively as customary. Indians were still seen as a vulnerable, weak minority requiring special protection.

In many Latin American states, it was only after the end of the military dictatorships at the end of the twentieth century that the conditions were ready for a new approach. It was the pluralist concept that quickly gained ground. This approach was no longer based merely on the recognition of certain specific ‘Indios rights’ that gave them protection or recognised their specific organisations and groups. Rather, they were recognised as an equal group of peoples within the framework of a multi-ethnic, multicultural state with co-existing legal systems. This development is particularly clearly reflected in the modern official characterisation of Bolivia, the *Estado Plurinacional de Bolivia*. The constitutions of other countries have also drawn inspiration to a greater or lesser extent from pluralism, such as Ecuador, Colombia, Mexico, Paraguay and Peru. In these cases, however, the situation can vary considerably from country to country. The Chilean Constitution, for example, still lacks any reference to the indigenous population and thus, from a constitutional point of view, retains the expression of an assimilationist policy. In international law, pluralism finds particularly strong support in ILO Convention 169 on Indigenous and Tribal Peoples, which was promulgated in 1989 and entered into force in 1991 (replacing ILO Convention 107 of 1957, which was often seen as the embodiment of assimilationist tendencies.)

A pluralistic approach is often seen as multicultural and thus placed in a global context, which requires a plural character for any constitution. One of the main reasons for this linguistic turn is to place emigration in dialogue. This argument is legitimate, though hardly urgent, since the difference between the two phenomena is as simple as it is far-reaching. With regard to indigenous peoples, as in Latin America, the pluralist movement demands recognition of the special rights of groups that lived there before the arrival of the colonialists and had their own social and legal structures. It is hardly possible to demand the integration or assimilation of these groups on the same grounds as immigrants. At the same time, the concept of pluralism is not limited to “indios”, even in Latin America, but can also be applied to people of colour of African descent who from time to time raise their voices against discrimination. In the absence of a strong constitutional system responsible for the protection of minorities, some constitutions take the surprising and unusual step of treating blacks as equal to “Indios”, for example in relation to special rights to land.³⁷ Other countries, such as Colombia, opt instead to introduce protection based on law.³⁸

³⁷ See the full provisions in Articles 3, 32, 100, 2, 395 and 1 of the Bolivian Constitution and Articles 56, 58, 60 and 257 of the Ecuadorian Constitution.

³⁸ See Ley 70 de 1993, *Diario Oficial* of 31 August 1993, No. 41,013, which focuses on continental law; on this law and its practical implications see e.g. Agier, Michel – Hoffman, Odile: *Las tierras de las comunidades negras en el pacífico colombiano – Interpretaciones de la ley, estrategias de los actores*. In *Territorios – Revista de estudios regionales y urbanos*, 1999, pp. 53-76.

II.4.3.3. *Indigenous rights and levels of recognition*

The rights given to indigenous Indian populations are varied.³⁹ First, at the heart of the principle of plurality is the designation of such groups as peoples – groups of indigenous people are recognised as peoples, who can therefore claim far more rights than mere minorities.⁴⁰ The word “peoples” is used in the constitutions of Bolivia (Articles 2 and 3; the word “nations” is also used), Argentina (Article 75, paragraph 17), Ecuador (Article 56), Colombia (Article 246), Mexico (Article 2, paragraph 2), Nicaragua (Article 5), Paraguay (Article 62) and Venezuela (Article 119). But still, this term is linked to the backbone of the problem of pluralism. A “people” may claim the right to self-determination under international law, and thus possibly the creation of an independent state. Long established states tend to view these secessionist efforts with extreme reservations.⁴¹ Even ILO Convention No. 169 addresses this problem in Article 1, paragraph 3, which explicitly states that the description as a people “shall not be construed as having any legal effect which might be attached to the term under international law” – a remarkable phrase to find in the toolkit of international law. According to this, despite the many affirmations of the diversity of peoples and nations in Latin American constitutions, the unity of the State is never in question. While the recognition of indigenous groups as peoples generally goes hand in hand with the recognition of cultural diversity (C 1 and 56 of the Ecuadorian Constitution), the right to self-determination is only mentioned in very few cases, if at all. Article 57, § 2 of the Ecuadorian Constitution mentions the right to self-determination for indigenous peoples, but only in cases where they wish to remain in self-isolation. Even Bolivia, despite having once been at the forefront of pluralist movements, does not use the word “autodeterminación” in its constitution, but rather refers to free determination within the framework of a unitary state;⁴² the situation in Mexico is similar.⁴³

The special rights of indigenous peoples to their land are recognised by a number of different texts, often somewhat cautious.⁴⁴ Rights to natural resources are mentioned even less

³⁹ See the well-compiled questionnaire in Aguilar, Gonzola et al, *Constitutional Recognition of Indigenous Peoples in Latin America*. In *Pace International Law Review, Online Companion 2/2(2010)*, 44 (47), for treatises on developments mentioning Nicaragua, Ecuador, Mexico, Guatemala and Bolivia see Hausotter, Carola: *Das Recht indigener Völker Lateinamerikas auf interne Selbstbestimmung*, Nomos, Baden-Baden, 2010, pp. 246.

⁴⁰ For a thorough discussion of discrimination against minorities, see Hausotter: *op. cit.* (n506) 30.

⁴¹ Barié (492) 550 speaks in a typical way of the eternal fear of separatism (“el eterno temor al separatism”).

⁴² “Dada la existencia precolonial de las naciones y pueblos indígena originario campesinos y su dominio ancestral sobre sus territorios, se garantiza su libre determinación en el marco de la unidad del Estado, que consiste en su derecho a la autonomía, al autogobierno, a su cultura, al reconocimiento de sus instituciones y a la consolidación de sus entidades territoriales, conforme a esta Constitución y la ley”; 2. Article 2 of the Bolivian Constitution (“Granted the pre-colonial existence to the nations and indigenous rural native peoples and their ancestral control over their territories. Therefore, their free determination is guaranteed within the framework of the unity of the State. This includes their right to autonomy, self-government, their culture, recognition of their institutions and consolidation of their territorial units in accordance with this Constitution and the law.”)

⁴³ “El derecho de los pueblos indígenas a la libre determinación se ejercerá en un marco constitucional de autonomía que asegure la unidad nacional”; Article 2, Paragraph 5 of the Mexican Constitution (“The right of indigenous peoples to self-determination may be exercised within a constitutional framework of autonomy that guarantees national unity.”)

⁴⁴ For example, the Mexican Constitution, Article 2.A.VI guarantees the following right, which is subject to numerous reservations: “Acceder, con respeto a las formas y modalidades de propiedad y tenencia de la tierra establecidas en esta Constitución y a las leyes de la materia, así como a los recursos naturales de los lugares que habitan y ocupan las comunidades,...” (“To achieve, while respecting the forms of property ownership and land tenure established in this Constitution and in the laws on this matter, as well as the rights acquired by third parties or members of the community, the beneficial use and enjoyment of the natural resources of the areas in which the community lives...”) Article 394 of the Bolivian Constitution. Article 394, paragraph 3, goes much further: “El Estado reconoce, protege y garantiza la propiedad comunitaria o colectiva, que comprende el territorio indígena originario campesino, las comunidades interculturales originarias y de las comunidades campesinas, La propiedad colectiva se declara indivisible, imprescriptible, inembargable, inalienable e irreversible y no está sujeta al pago

frequently and are generally more cautiously worded. For example, Article 57, § 1, numbers 6 and 7 of the Ecuadorian Constitution mentions the mere right to participate in the use, administration and maintenance of renewable resources – non-renewable resources are only subject to prior and unlimited consultation, but any result does not commit them to anything.

Most Latin American constitutions protect indigenous languages as part of the right to self-determination. Solutions here can range from the protection of indigenous languages as national heritage to the recognition of 36 indigenous languages as official national languages. Or the use of at least two official languages by national and local authorities, in the case of Spanish. In contrast, the Argentine Constitution does not mention any protection. The use of languages in school is of particular importance for their successful protection, mutually school can be one of the most successful ways of establishing a common language in everyday life. This point of the Ecuadorian Constitution is exceptionally clear. It provides for intercultural, bilingual education and specifies within this framework that the language of the relevant indigenous group should be used as the main language, while Spanish is the language of intercultural relations.⁴⁵

The political participation rights of Indians play a crucial role in some constitutions. Articles 171 and 176 of the Colombian Constitution authorise quota representation for indigenous people in both houses of parliament. The Mexican Constitution protects an exceptional right to elect authorities and representatives to indigenous municipalities or communities with indigenous populations and imposes a duty on all levels of the state to consult indigenous peoples, see Articles 2.A.III, 2. A. VII, 2.B. IX of the Mexican Constitution.

In order to grasp the many ways in which indigenous rights are incorporated (or not) into Latin American constitutions, it may be useful to divide them into groups. An approach that has been used in many areas as part of comparative law. There is a certain uniformity and transparency at the extreme ends of the spectrum. While the constitutions of Belize, Chile, Uruguay and Suriname make no mention of indigenous rights, Bolivia is generally considered at the forefront of the model and concept of the pluralist state. Accordingly, a three-tier classification is sometimes used: first, the countries mentioned above that do not mention indigenous peoples; second, those that do mention them but only in a superficial way (Costa Rica, El Salvador, Guyana, Honduras); and third, the leaders of indigenous recognition that defend the ethnic identity of indigenous peoples as part of their citizenship (Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Venezuela). Other studies simply omit countries that ignore indigenous rights from their constitutions and classify the remaining states according to how many of the alleged nine types of indigenous rights they recognise. This approach also differentiates between three groups and ranks them in the following order: Bolivia, Ecuador, Mexico, Nicaragua, Paraguay and Venezuela with seven out of nine rights; Argentina, Panama, Peru, Guatemala and Brazil with

de impuestos a la propiedad agraria. Las comunidades podrán ser tituladas reconociendo la complementariedad entre derechos colectivos e individuales respetando la unidad territorial con identidad.” (“The State recognizes, protects and guarantees communal or collective property that includes indigenous rural territory, indigenous intercultural communities and rural communities. Collective property is indivisible, irrevocable, non-transferable, inalienable, irreversible and not subject to agricultural property taxes. Communities can be owners, recognizing the complementarity of collective and individual rights, respecting the unity of territory and identity.”) Ecuadorian Constitution Article 57.1. paragraph 4 no. less reserved: “Conservar la propiedad imprescriptible de sus tierras comunitarias, que serán inalienables, inembargables e indivisibles. Estas tierras estarán exentas del pago de tasas e impuestos.” (“To maintain the irrevocable ownership of communal lands, which are inalienable, inalienable and indivisible. These lands must be exempt from fees and taxes.”)

⁴⁵ “Garantizar el sistema de educación intercultural bilingüe, en el cual se utilizará como lengua principal de educación la de la nacionalidad respectiva y el castellano como idioma de relación intercultural,” Article 347 no. 9 of the Ecuadorian Constitution. (“To guarantee an intercultural bilingual education system in which the main language of education is the language of the nation concerned and Spanish is the language of intercultural relations.”)

six to four rights; and Costa Rica, El Salvador and Honduras with three to one right. The fact that this classification is highly simplistic, as it does not even take into account the level of protection of each right, is acknowledged even by the authors of the study.

Other approaches, for example, attempt to create a classification based on actual criteria, distinguishing between two concepts of assimilation: a) protection by exclusion and b) protection by recognition. In this structure, the concept of assimilation has become useless and can at most be attributed to those states that do not mention indigenous rights at all. Protection by exclusion means that while Indians are not recognised as an autonomous group, certain measures are used to actively promote their “separation” from the rest of society. The goal is similar to that pursued by the early colonial separation regime, i.e. to protect Indians by keeping them separate. All this is illustrated by Brazil, which is the main practitioner of this, the idea being to protect the small, remaining tribes that live their lives in almost total isolation from modern society and wish to continue to do so in the future.

Article 7 of the Brazilian Estatuto do Índio ensures that Indians and Indigenous communities that have not yet been integrated into the national community are all under the guardianship of the State,⁴⁶ after all, Article 4, §4 of the Brazilian Civil Code refers to this constitutional provision.⁴⁷ It is a controversial question within Brazil whether this state of the law is sustainable, since Article 232 of the Brazilian Constitution gives Indians and indigenous communities the right to defend their rights in court. Protection by exclusion can be contrasted with the two models of protection by recognition, which are not exclusive. The first type recognizes the right of Indians to establish their own legal system. The second type provides Indians with special incentives and rights to increase their participation in the national political process, such as through the introduction of quotas in representative bodies or the reconfiguration of electoral districts in favour of Indians. Both types can occur simultaneously, for example when the federal state establishes independent federal governing units in which at least a majority must be Indians.

II.4.3.4. Evaluation of the Indian defence

Approaching Indians on a legal basis remains a controversial issue at best. While some prefer the broadest possible form of legal pluralism, others argue that each legal system should have its own specific advantages and each should correspond to a “so-specific” country. Thus, the Brazilian system of “protection by exclusion” can be explained by the specific situation of indigenous peoples in Brazil, as described above. And the lack of recognition in Uruguay can be explained simply by the fact that Indians make up an extremely small percentage of the population and, in contrast to Brazil, do not amount to more than a few thousand people per tribe. The very extensive Bolivian legal approach can only be applied in states where the Indian population is already in majority.

The difficulty in evaluating different approaches can be explained by the fact that the subjective interests of Indians can be quite diverse. Do they want to adapt or do they want to completely separate themselves in order to preserve their culture as much as they can? Or do they want to become part of society and participate fully, but retain their Indian identity – and if the latter is their choice, how can this be achieved in practice? What should happen when individual Indian groups or villages themselves are divided on these issues? The central and laudable premise of pluralism is that it is not for non-Indians to decide on these or similar issues,

⁴⁶ See Article 7, 8 Estatuto do Índio, Éaw 6.001; under Article 9, any Indian may be released from this guardianship in certain circumstances if it can be shown that he is integrated.

⁴⁷ Article 4 § 4 § 1 of the Brazilian Civil Code provides that “A capacidade dos índios será regulada por legislação especial.” (“The legal capacity of Indians is regulated by special legislation.”)

because the state cannot have the right answers and establish them as paternalistic if it posits itself as modern.

That the objective interests of the Indians are no more apparent here than in any other area of life, is it precisely because the Indians themselves have to decide whether these decisions should be taken collectively or individually? At what level (village, region, nation, all Indians in a particular state) do we define the collective? Or, how to reconcile divergent decisions between a collective and a smaller unit, or even just individuals. These are theoretical questions, but practical solutions must be found.

Even constitutional consultation can offer a limited understanding of the existing but more effective protection of indigenous rights. The fact that constitutions and their content are an indispensable part of the discussion of this problem can be partly explained by the fact that the legal basis is not always present to highlight constitutional protections. In this respect, the Brazilian Estatuto do Índio is an exception, even though it sometimes takes a step backwards rather than forwards in relation to the Constitution. Nevertheless, there are a number of interesting details in the statute law. This is not only true for Colombia, where, as we have seen, the protection of the land rights of the Afro-Colombian population is not enshrined in the Constitution but in specific laws. Chile, which is sometimes “censured” for the lack of provisions in its constitution representing indigenous interests, covers and protects indigenous peoples in its 1993 Ley Indígena.⁴⁸ Completely independent of these broadly specific laws, the specific situation of the indigenous population should be taken into account in the general laws. Thus, Article 10, paragraph 169 of the ILO Convention calls on nations to take into account the economic, social and cultural characteristics of indigenous peoples when prosecuting them for crimes. They invoke their community-based customary law to demand that the state give preference to punishments other than imprisonment. According to them, Article 15 of the Peruvian Penal Code of 1991 contains a rule that addresses cultural conflicts in a guided manner, ensuring that these people cannot be punished for offences committed in order to respect their own culture and customs.⁴⁹ The law thus decriminalises cultural differences.⁵⁰ This in itself is a huge step forward.

But it is also true that even the interpretative framework of the legislation does not paint the full and true picture. As elsewhere in Ibero-American law, there are often large gaps between the specific (written) law and the applied law. The protection of indigenous peoples’ rights may appear to be solvable on paper, but in reality they often differ substantially from the scriptum. Indigenous peoples often lack real access to the legal system and, as a result, their options to protect their rights are more limited. This becomes exceptionally clear when the economic interests of large landowners or natural resource industries conflict with the interests of indigenous populations.

⁴⁸ Ley No 19253 de octubre de 1993 sobre Protección, Fomento y Desarrollo de los Indígenas; for his law, see Aylwin, José, *El derecho de los pueblos indígenas a la tierra y al territorio en América Latina – Antecedentes Históricos y Tendencias Actuales*, 2002, 13ff, <http://ibcperu.org/doc/isis/12328.pdf> (last visited December 18, 2012).

⁴⁹ In Article 15, we read: “El que por su cultura o costumbres comete un hecho punible sin poder comprender el carácter delictuoso de su acto o determinarse de acuerdo a esa comprensión, será eximido de responsabilidad. Cuando por igual razón, esa posibilidad se halla disminuida, se atenuará la pena.” (“Anyone who, because of his culture and customs, commits a crime but is unable to understand the delictual character of his act or to act with an understanding of it, will be excluded from responsibility. If for the same reason this capacity is reduced, the sentence will also be reduced.”)

⁵⁰ Yrigoyen Fajardo, Raquel, *Peru – Pluralist Constitution, Monistic Justice – A Post-Reformation Appreciation*, see Sieder, Rachel (ed.): *Multiculturalism in Latin America – Indigenous Rights, Diversity and Democracy*. Palgrave Press, London, 2002, pp. 157 (166).

II.4.3.5. *The importance of indigenous (native) laws*

a.) The role of indigenous law in the constitutional protection of indigenous peoples: problems and limits

Recognition of indigenous customary law systems by Ibero-American states is of particular importance in indigenous cultures and of particular interest to those working in comparative law. At the same time, the existence of the indigenous customary law system marks out the most important areas of conflict between the state and its internal sovereignty. The power of the state is mainly exercised through legislation. When it accepts the existence of customary law “entrenchments”, it also legitimates and limits its most fundamental claims. Yet for many Indians, the expectations of their own legal culture are as binding, if not more so, than those of the state. Indigenous law is also closer to them, easier for them to understand and much easier for them to comply with. Its recognition as an autonomous legal system is therefore a routine and vital part of Indigenous claims to protect their identity and culture.

The interaction of the Indian and the state legal systems has led and continues to lead to a wide range of problems, which are only superficially covered by legal norms that are intended to recognize Indian legal customs in a rather confusing and generalized language. Such is the case of Article 231 of the Brazilian Constitution.⁵¹ The first question is whether Indian customary law can extend to their own tribal and similar organizations. To ask this question from a comparative perspective, it assumes that the separation of the factual and organizational aspects of the law is consistent with typical Western legal thinking. But this is difficult to fit into the flexible nature of Indian customary law, which is clearly not separable from social structure. It would therefore be impossible to select and recognise only the “actual law”. If a judge appointed by the state were to attempt to decide such a case “according to Indian law” it would be a futile effort. Ibero-American constitutional laws therefore generally combine recognition of indigenous law with recognition of indigenous decision-making bodies. Article 246 of the Colombian Constitution, for example, guarantees the exercise of judicial power through indigenous authorities, in accordance with their own norms and rules of procedure.⁵²

Another problem lies in the personal, geographical and factual conditions of Indian law and state justice.⁵³ Sometimes there are no “real” boundaries, as is the case when even serious crimes are dealt with by indigenous authorities. However, there are provisions, such as Article 171 of the Ecuadorian Constitution, which only allows the application of indigenous law in cases of “internal conflicts”. This is likely to be perceived as a *de facto* restriction.

The rules of geographical justice are clearer. They often provide that indigenous jurisdiction shall be applied only within the territory of the native groups (“dentro de su ámbito territorial”).⁵⁴ This seems clear enough on the surface, but leaves many questions unanswered

⁵¹ Article 231 of the Brazilian Constitution: “São reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições...” (“The social organization, customs, languages, religions, and traditions of the Indians are recognized...”)

⁵² Colombian Constitution, Article 246: “Las autoridades de los pueblos indígenas podrán ejercer funciones jurisdiccionales dentro de su ámbito territorial, de conformidad con sus propias normas y procedimientos, siempre que no sean contrarios a la Constitución y leyes de la República. La ley establecerá las formas de coordinación de esta jurisdicción especial con el sistema judicial nacional.” (“The authorities of the Indigenous Peoples may exercise their judicial functions within their own territories in conformity with their own norms and procedures, always ensuring that they do not contradict the Constitution and laws of the Republic. The law shall establish the forms of coordination of the special court with the national court structure.”)

⁵³ On the following points, see Yrigoyen Fajardo, Raquel: *Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries. Beyond the Law – Informal Justice and Legal Pluralism in the Global South* 10 (2004), p. 32 (37ff).

⁵⁴ See, e.g., Article 246 of the Colombian Constitution, Article 149 of the Peruvian Constitution, Article 260 of the Venezuelan Constitution

in the depths. For example, there may be difficulties in determining what exactly constitutes indigenous territory; Article 231 of the Brazilian Constitution therefore explicitly requires the state to draw the boundaries. The Bolivian Constitution raises questions about the precise relationship between a cause and Indian territory. It chooses between two possible relationships: either the place where the act was committed gives rise to the dispute or the place where the disputed act had an impact.⁵⁵ In the Ecuadorian constitutional law, as if by way of contrast, the question is again sharpened to how to define “internal disputes” within the grammatical meaning of constitutional texts. As a personal justice system, one option is to follow Article 260 of the Venezuelan Constitution, which limits justice to conflicts that affect only Indians. On the face of it, this could also be the solution to the “internal strife” clause in the Ecuadorian Constitution. Yet this clause can also be read as a grant of the indigenous right to determine what constitutes an internal dispute. This last approach is also feasible when the law does not contain any provision for personal jurisdiction, as in the cases of Colombia and Peru. To be sure, once the absence of any relevant provision can be read differently there is nothing left to do but to create the possibility of applying indigenous law to all conflicts within indigenous territories, ignoring the people who are affected. But it would be unusual, and probably alien to the character of Indian law, to allow other state authority to be taken over people who are not required by Indian law itself. Another approach is Article 191, § 2, paragraph 1 of the Bolivian Constitution. This basically provides that only Indians are “subject” to Indian jurisdiction, but then states that this rule applies even if the person concerned is a plaintiff or defendant.⁵⁶ Therefore, it is sufficient when only one side in a legal dispute is involved as a party to the Indian.

The problems of aboriginal law, which have been sketched in broad outline above, overshadow the question of the special relationship and the relationship of Indian customary law to state law. The idea of pluralism, taken to its logical conclusion, would require true equality with the laws of the state at all levels, including the constitution. But even Bolivia does not go that far. For safety’s sake, the Bolivian Constitution clearly demands equality between indigenous judiciaries and state courts in Article 178 and obliges all state authorities to follow indigenous rulings in Article 192, first paragraph. However, aboriginal judgments are clearly subject to the state constitution in Article 190 § 2.

The underlying problem is that indigenous law is in no sense an ideal and natural law that would forge Indian communities into a harmonious whole if it were simply allowed to apply freely. Romanticised views such as this “overlook” show the innumerable problems that aboriginal law presents.

In particular, fundamental human rights are not always guaranteed. Indigenous laws often do not require or establish equality between the sexes and personal freedom often has to take a back seat in the interests of the “common good”. For us, archaic behaviours such as forced marriages of women may even be considered commonplace. Collective communities, such as families, are often held accountable for the behaviour of one of their members. Moreover, power also plays a role in the creation and application of indigenous laws.

⁵⁵ Article 191, Paragraph 3 of the Bolivian Constitution: “Esta jurisdicción se aplica a las relaciones y hechos jurídicos que se realizan o cuyos efectos se producen dentro de la jurisdicción de un pueblo indígena originario campesino.” (“This justice applies to relations and legal acts that are carried out or their effects are produced within the jurisdiction of indigenous rural peoples.”) of the law implementing Article 11 (Ley de Deslinde Jurisdiccional, Ley 073 of 29 December 2010), contains virtually the same language, clarifying that this legal norm applies to territorial scope.

⁵⁶ Article 191, paragraph 2, no 1 of the Constitution of Bolivia: “Están sujetos a esta jurisdicción los miembros de la nación o pueblo indígena originario campesino, sea que actúen como actores o demandado, denunciadores o querellantes, denunciados o imputados, recurrentes o recurridos.” (“Members of the nation or of rural indigenous peoples are subject to this justice even if they act as plaintiffs or defendants, petitioners or defendants, and even if they are persons who have been denounced or accused, or appellants or respondents.”)

Consequently, it is possible that different groups, such as young and old, may have different opinions on the content and application of these laws and those with more social power may impose their will, especially on the application of these laws. The constitutional guarantee as a limit can be seen as the minimum necessary to protect common or simply higher values. Even if it represents a departure from the basic idea of pluralism.⁵⁷ Therefore, the limit of the constitutional guarantee is also mentioned, for example, in Article 171 of the Ecuadorian Constitution or Article 149 of the Peruvian Constitution. Other Ibero-American constitutions go much further than this minimum standard and incorporate indigenous rights into the fundamental law of the state.⁵⁸

II.4.3.6. The actual content of Indian law

A question that is asked with surprising infrequency, although it should come up immediately is the following. What is the content of the indigenous legal system? What are the actual and legal procedural rules? Indeed, only tentative answers to these questions seem possible? The answers may remain inadequate for Western jurists for a long time to come, since even the formulation of the questions does not provide an appreciation of indigenous law.

Indigenous law cannot be captured by the standards and terminology of Western law. In our study, we started from the assumption and tried to prove that the Portuguese-Spanish legal culture, like a legal system, is composed of legal norms applied to a specific situation within a procedure, which is itself, as far as possible, regulated by law. Yet even the notion of isolated, identifiable legal principles cannot be applied to indigenous law. No successful attempt has been made to judge the independence of indigenous law on the basis of individual cases.

Therefore, it is even more difficult to talk about the “application” of indigenous law rules. Rather, indigenous law develops as an expression of an experience and culture through specific solutions to individual problems. The process of its application is hardly distinguishable from its content, such as the impossibility for a state court to rule under indigenous law if it were expected to do so under conflict of laws. The characteristic feature of native law, all things considered, is to provide a comprehensive solution which seeks to take into account all aspects of the problem and its consequences for a particular group of persons. Such an approach requires a precise understanding of the group and personal involvement in the culture in which the problem arises. Indigenous law is therefore not static, but in a state of constant evolution. Its variability is one of its most distinctive features and this would be lost if rights were to be enshrined in a permanent written form. The same can be said on the generalisation or incorporation of indigenous law into state law (e.g.: externally imposed land registration systems or the election of representatives.) The flexibility and constant change of indigenous customary law would also make it a mistake to regard it as a remnant of pre-colonial indigenous culture. Rather, it seems that the old law has completely disappeared and a modern Indian law has evolved as a product of colonialism and subsequent times, adapted to their situation.

Finally, it is unclear whether this category of law, as distinct from mere social norms, does full justice to indigenous law. Specifically, it is this distinction that contradicts the claim of indigenous law, which is that it solves problems in a holistic way and also addresses all social

⁵⁷ For this reason, some commentators suggest that protected constitutional rights should be subject to intercultural interpretation, for example by creating mixed tribunals to decide these issues, see Yrigoyen Fajardo: *op. cit.* (n 535) p. 43s.

⁵⁸ See, for example, Article 246 of the Colombian Constitution, Article 260 of the Venezuelan Constitution, which adds *ordre public* (in English: public order, which includes the fundamental institutions and principles of the legal system).

aspects. This is a very different approach from that of civil or private law, which take into account only certain limited aspects of social relations between parties and leave everything else to society and its mechanisms. The fact that the activities of the *rondas campesinas* in Peru,⁵⁹ for example, are implicitly seen as a perfect example of indigenous law that shows how these phenomena test the extreme limits of Western law. These activities seem to have emerged as a kind of neighbourhood self-help in the face of the failure of ineffective state justice institutions. From this perspective, such a phenomenon is a self-defence-security contract, as the armed vigilantes of the American neighbourhood demonstrate. Yet legal scholars in the United States would hardly see the activities of these groups as evidence of an independent legal system that demands recognition and equal consideration. Rather, they would see them as a threat to the law, tending towards vigilante justice and in any case as a purely social and not legal phenomenon.

II.4.3.7. Customary law of the Mapuche (Araucanian) Indians⁶⁰

In fact, we can find a description of the content of indigenous law, such as the Mapuche law. Mapuche people is an indigenous people whose territory extends beyond Chile and Argentina. When the Mapuche people describe their internal customary law system, it becomes clear once again how closely the customary system of this indigenous people is linked to community life and the rest of the culture. A people that is particularly difficult to describe from a Western perspective and with Western concepts.⁶¹

The Mapuche cosmological worldview is the indivisible basis for their laws. In general, the Mapuche law, *Az Mapu*, contains individual and collective norms of behaviour that Mapuche are obliged to obey in order to preserve cosmic harmony. Any violation of these

⁵⁹ In Peru, in the 1970s, increasing thefts and livestock thefts, coupled with ineffective state protection, led to the creation of the so-called *rondas campesinas*. This was a kind of “neighbourhood watch system” with elected leaders. The *rondas campesinas* took the law into their own hands and forced the perpetrators to compensate for the losses they caused, sometimes even beating them. However, they refused to impose any further punishment and officially stated their preference for non-physical punishments, such as community work, especially in the form of participation in patrols. This has led to conflicts, as the *rondas campesinas* have been accused, by the state or by those caught breaking the law, of committing offences such as kidnapping and assault. Conflict continued between the *rondas campesinas* and the state, with multiple accusations against members of the *rondas*. The legislature passed a law to put an end to this situation in 1986. The law recognised the right of the patrol and the *rondas campesinas* to self-defence, but did not give them the power to seek justice. Such authority was outlined in Article 149 of the Constitution in 1993. “The campesino communities and the authorities of the indigenous peoples, with the support of the *Rondas Campesinas*, can implement the laws within their own territories, in line with the existing law, as long as they do not violate the fundamental rights of the individuals. Laws will decide the forms of coordination of special justice, with justices of the peace and other parts of the justice system.” Shortly before the legislation came into force, the *rondas campesinas* were placed under military control. This seriously undermined the guarantee of independence in the 1993 Constitution. Some *rondas* refused this supervision, which meant that their members could be prosecuted if they continued their activities. The same thing happened when local authorities refused to recognise certain *rondas* as required under a 1988 law. This refusal was sometimes justified on the grounds that the legislation requiring recognition was irrelevant once the *rondas* had been placed under military supervision. The Peruvian courts did not protect the rights of *rondas* under Article 149 of the Peruvian Constitution. For example, a *ronda* caught a cattle rustler and sentenced him to several days of patrol. The state court ruled this a kidnapping. Arguments about Article 149 were dismissed on the basis of the simple observation that the *rondas* deprived the man of his personal liberty, a fundamental right that is highlighted as a heightened protection under Article 149. Only a 2004 decision by the Peruvian Constitutional Court gave a clean slate to the *rondas*’ rights.

⁶⁰ Kischel gives a detailed description of the living conditions of the Araucanian Indians (Mapuches) and their customary legal system on pages 617-619 in his work.

⁶¹ For a general description from an internal perspective, see Sánchez Curihuentro, Juan: *El Az Mapu o Sistema jurídico mapuche*. In *Revista Crea*, 2001, vol. 28, no. 2, p. 28.

behavioural norms disturbs the cosmic balance, which can then be restored in a number of ways. The application of the law is therefore a restoration of cosmic balance. We are not talking about a Western understanding of law, but rather a holistic system that includes all connections to nature, society and the spiritual world. Therefore, Az Mapu details the cosmological theory of the Mapuches as the unity of man, earth and nature; the four forces of nature: earth, water, air and fire; and the four divine beings. For the Mapuches, man is not master of the earth, rather the earth is master of man. For them, the earth has many more dimensions than in the Western concept. It is integrated into the world's cycle and subject to its positive and negative energies. The earth contains much more than just land; it also contains subsoil, water, plants, animals and their products.

The smallest political system of the Mapuche is the lof, the village community and its elected leader, the logko. The term village community should be used with caution, as lofs are not necessarily synonymous with state-organised self-government. Even in real villages, not all families necessarily belong to a lof. For example, because they are Christians and do not fall under Az Mapu. The logko is responsible for all traditional ceremonies and therefore also for the application of Az Mapu in specific matters. Each group of the nine lofs is linked through patrilineal ties to a Rewe Mapu, whose leader is the sitting logko chosen by the nine participating lofs. Nine Rewe Mapu form an aillarew or fütalmapu, a small Mapuche state under the leadership of the elected ülmen fūxta logko. The Mapu also governs the economic life of the Mapuche and includes norms on certain aspects such as community work, community house building and the division of labour within the family. Men, for example, are responsible for fishing and harvesting, while women are responsible for household management, resource management and small gardens. To outsider Western jurists, only a small part of this sounds like law, while the larger part is more akin to a description of the social structure of the Mapuche. Yet, for members of this people, these matters form an indivisible part of Az Mapu.⁶²

⁶² Mapuche law is peculiarly strict in its description of individual cases and their solutions. For example, a murderer was released from state prison after only three months and returned to his village. The village community sentenced not only him but his entire family to 2 years of exile from the community. The reason for this sentence was that the family contested the right of the assembly that had been convened to pass sentence and thus denied Az Mapu. Such banishments are considered a severe punishment in a collectively oriented community and entail social isolation in daily life, where even greeting another person on the street is forbidden. A Mapuche's close connection to his community can be observed when a Mapuche leaves his village to live in the city, but continues to consult the logko for help with important problems. This was the case of a woman who had not lived in the village for 20 years. She was obliged to spend a week in jail because her niece was arrested while buying marijuana and showed the police her aunt's identity card, which she had previously pocketed. The niece's father stated to the village community that he had no control over his daughter and that her behaviour was completely unrelated to him, even though he considered it very unfortunate. As a sanction, the family was merely instructed to instruct their children, reassuring everyone in the community that no one should offend a family member. A final case illustrates the collective form of the Mapuche economy, which also prevails over the individual actions of the state. To support the Mapuche, Chile provided agricultural subsidies which were available to individuals upon application. The village community had previously decided that all the subsidies obtained through this procedure would be invested in a common fund from which manure and seeds would be purchased and distributed to the 35 families in the community. 15 people received grants, but one of them kept the money for himself. The common fund was therefore only used for 34 families. However, in Mapuche's view, the refusal to pay into the common fund was an unjust misappropriation by one individual. Because of this betrayal, the perpetrator was sentenced to exclusion from all community benefits and activities by the village community until he explained his behaviour and repaid at least part of the money (which, incidentally, he never did).

III. The legal culture of indigenous peoples and its relevance to the Ibero-American legal system

In the 20th century, and especially after 1950, Ibero-America was also hit and shaken by a major population explosion. Within a rapidly expanding population, the indigenous (i.e. native indigenous) population experienced an above-average increase in birth rates and a decrease in mortality. However, in the different Latin American countries, the profiles of the indigenous population are different, as is the proportion of the indigenous population. It can be as low as 0.4% in Brazil and Uruguay, 8% in Chile and 14% in Mexico, but it can also be as high as 38 % as in Ecuador, or 74 % in Peru, or 66 % as in Guatemala and 71 % as in Bolivia. Regardless of the distribution of the indigenous population, all Ibero-American states have had to face demands for recognition of indigenous rights that go far beyond the mere protection of minorities or support for integration. This process has been accelerating for more than a millennium and has achieved remarkable results.

From the perspective of comparative law, one of the most interesting questions is what indigenous legal customs are, what rules they contain and what are their specific characteristics. Information on these questions remains vague when looking at the situation from a Western perspective only.

Therefore, we have analysed in more detail the Indian legal customs and the so-called indigenous laws of each state. We have come to the conclusion that a process of legal pluralisation has been set in motion and that a paradigm shift has taken place. The state guardianship of the Indians, paternalistic protection – along with segregation and exclusion – began with the Portuguese-Spanish conquest.

It is known that the first step of the conquerors was to take possession of the Indian lands, destroy the leading layer to the top, and reduce the natives to a subordinate population. Subsequently, a system of colonial segregation was established, where the social spheres and the indigenous population were fundamentally separated from those of the colonisers. As a result of this segregation, indigenous people were given some protection for their territorial claims and had the right to resolve minor legal problems within their communities but were denied the right to adjudicate on major issues such as serious crimes. Apart from this relative independence, indigenous peoples were subject to colonial regulation and legislation, which often exercised power through indigenous social structures. However, the colonial system did not reach all tribes, with some tribes only being reached by treaties and others only by missionaries. After independence, the concept of national unity emerged, as we have already pointed out, but this did not change the fate of the Indians.

All in all, and starting from the present, the legal culture of the indigenous population represents first and foremost the “surplus” in Ibero-American legal culture that is not to be found in the Portuguese-Spanish one.

The question is whether this can be taken together with the assumption of a common legal-technical-legal-legal culture of Portuguese-Spanish-Berber-American law, or whether they have split and form two separate groups.

IV. Our position on the classification of Portuguese, Spanish and Ibero-American legal cultures

In our view, the following “classifications” could be considered:

- the establishment of a separate Spanish-Portuguese family of laws;
- the Portuguese-Spanish jurisdiction (including Ibero-America), which was separated from the Romanist jurisdiction and made autonomous;

- Portuguese-Spanish legal culture, which includes Ibero-American legal systems;
- there is a separate Portuguese-Spanish and an Ibero-American legal culture;
- finally, it can exist as a Portuguese-Spanish-Berber-American legal culture (where the divergence of the individual legal elements does not reach the level necessary to become autonomous).

If we look at this range of possibilities and take into account the results of legal theory and philosophy of law studies, we can make the following observations on the above:

- the notion of a family of laws as elaborated by René David, which is questioningly assumed by Uwe Kischel as the “Spanish-Portuguese family of laws”, is not, in our view, met by either the Spanish-Portuguese or the Ibero-American legal systems taken together;
- the move away from the Romanesque jurisprudence, the fading of the “French model”, is a real process, but the influence of German and Swiss law has increased and after 1978 Spanish jurisprudence and jurisprudence has also gained in prestige in Ibero-America.

In our view, the best position for this hypothesis is to leave it within the scope of the Romanist law, which is subject to increasing German and common law influence;

- the common basis of the last three classifications: the approach to legal cultures, which has been considered as a corollary throughout the discussion; in this way, legal culture is considered the most flexible concept when performing a “taxonomy”.

We have tried to map out the components of the first Portuguese-Spanish and then, after colonialism and independence, the Ibero-American legal culture.

Consequently, we can imagine several kinds of discontinuities in the life of these legal cultures. From the point of view of modern legal systems, it seems easy to distinguish between pre-modern and modern. If we approach them from the point of view of their development, their enrichment in terms of content, form and legal technique, and their changes, we can draw almost any number of epochs.

The emphasis on change is also important because there are elements of these legal cultures which are not currently in the foreground (such as canon law), elements which are in a “state of flux”, so to speak, i.e. they are sometimes in the foreground and sometimes in the background, apparently dormant. Ibero-American customary law cultures and the Visigoth-Germanic legal influence of the Spaniards fall into this category.

The Portuguese-Spanish legal culture, in addition to the aforementioned Visigoth (and Swabian) influence and adoption, incorporated Frankish law into its early system (especially Catalonia) and the Bourbon rule of the 18th century paved the way for the “gift” of the Code Napoleon and its rapid reception by Napoleon, who had been “gifted” with an armed invasion in 1808. Legal modernisation came from outside and proved overwhelming. The same thing happened in Ibero-America. Here, the accumulation of antagonisms between society and the law, leading to the development of a complex system of extra-legal norms, whether in the acquisition of property, trade or the settlement of disputes “in the field of governance at the community level”, is seen as an aggravating factor.⁶³ These negative consequences show the low effectiveness of formal (written) law.⁶⁴

⁶³ Badó-Harkai-Hettinger: op. cit. 187. p.

⁶⁴ “The Latin American countries can be described in terms of the conflict between law and society as follows: first of all, there is a conflict between the customary law of the informal sector and formal law. Secondly, there is also a conflict between the bureaucratic ideal of the civil judge, adopted as a model, and the heterogeneous and changing social reality. Thirdly, formal law is often widely eschewed in favour of transactions that are beneficial

Nor can we ignore the “strong opposition to custom in the field of formal law”. For example, one of the most important principles in the drafting of the Chilean Civil Code was the primacy of written law. According to Juan G. Matus Valencia, “custom does not have the force of law except in cases where the law expressly so provides”. This attitude is the prevailing view even in the revision of the civil codes in Latin America today. Article 1 of the Peruvian Civil Code expressly prohibits the application of customary law that is contrary to the law. This section of the law has important implications both for customary law traditionally established in indigenous circles and for modern customs in the informal sector. Indigenous societies have centuries-old history of normative legal institutions, which are at best reluctantly and sporadically recognised by the formal legal system. In the 20th century, with the rise of the informal sector, there has been a proliferation of uncodified, unwritten principles.

The informal sector exists in many Latin American countries, and governments have enacted legislation outside the scope of the legal codes, tacitly acknowledging that the codes do not reflect real social conditions. In Brazil, for example, with the adoption of the Microenterprise Law, the legislature has created a registration requirement for illegal businesses created in the grey economy to bring them back into the legal, white economy. Merryman sees this as a form of “legal micro-legislation”. These “laws” do not come out of the hands of law professors writing law books in a vacuum, but are the result of a compromise between heterogeneous forces in societies with great potential that threaten the status quo.

Latin Americans have ambivalent feelings about the law. In some respects they ignore it, but in others they still have an idealistic view that legislation can solve all problems.⁶⁵

The real power is the executive, and most constitutions empower governments to regulate areas of life by decree and thus override judicial decisions, so that judicial power and control can only be apparent. There is also a need to improve the quality of the administration of the judiciary, which involves a reform of the appointment and promotion system. A sign of this is the creation of judicial councils along European (Spanish-French) lines (such as the OIT in Hungary, now called the OBH).

Judicial councils, as self-governing bodies, can only carry out their functions effectively and autonomously if the whole judiciary is restructured.

V. Summary

In our study, we have undertaken to outline the history of the development of Portuguese-Spanish-Berber-American legal culture in the 19th and 20th centuries and to analyse it from the point of view of legal theory and philosophy. The most important thing is that they should become modern legal systems, because it was the mainly Romanist and to a lesser extent German-Swiss legal solutions that made this possible. The efforts that have been made in Ibero-America to create its own legal culture is also worth to be noted, which has a significant degree of identity or similarity with Portuguese and Spanish, but which has also become part of the Ibero-American legal system through the slow process of recognition of indigenous customary law. It is a vision of the expansion of the common law and the changes this expansion has brought to the legal system. We compared the models of classification of legal systems accepted in the literature based on David, the Zweigert-Kötz authors and the patterns of legal cultures. We have highlighted the work of a Hungarian – Professor Antal Visegrády – and a foreign – Professor Uwe Kischel – authority on legal theory and philosophy, and presented their main conclusions. We have focused on the analysis of Ibero-American legal systems, relying heavily

to society or the economy. Lastly, the de facto legitimacy of non-constitutional governments and the long tradition of their legislation continues in the Latin American region.” Ibid.

⁶⁵ Ibid. 188-189. pp.

on the insights of Professor Kischel. We have devoted a great deal of space to the presentation of Indian customary law, giving an exemplary overview of its essential elements. Finally, we have taken a stand on the classification of our study and have clearly voted in favour of the definition and classification of the Portuguese-Spanish-Berber-American legal culture.