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## Western Legal Culture – Comparative History and Theory of Legal Methods

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# Content

# Task 1 – The Federal Systems in the United States of America and Germany

## I. Introduction

In this essay, I shall account for the federal systems in the United States of America (henceforth the US) and Germany. In order to describe federal systems, it is first necessary to establish a general idea of what *federalism* is. As a starting point, federalism can be described as a political system where the areas within a country are governed by a state and a national level of government.[1]

The aim of the essay is to enhance the knowledge of the federal systems in the US and Germany. In order to satisfy this aim, I shall first look at the structure of their governments in in light of their constitutions. However, understanding the federal structures in the US and Germany, also requires knowledge of how federalism affects their legal culture, i.e. "ideas of expectations to law made operational by institutional(-like) practices". [2] Hence, in section III, I shall apply the Legal Cultural Model (LCM),[3] as this allows us to observe of how federalism has affected the institutional and intellectual aspects of the American and German legal systems. Finally, we´ll look at the historical origins of the US and Germany as this also allows us to explain *why* they are federal states today.

## II. The Federal Structure

### *a. The US.*

In order to grasp the federal systems of the US and Germany, it is first necessary to understand their structure. In the US, the structure of the federal state is embedded in the Constitution. [4] Particularly important is section I of Article IV, which implies that each state has its own legislative, executive, and judicial authorities separated from the federal ones. [5]

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[1] https://www.law.cornell.edu/wex/federalism/ accessed 21st of October 2022.

[2] Jørn Øyrehagen Sunde, "Managing the Unmanageable – An Essay Concerning Legal Culture as an Analytical Tool", in Sören Koch & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures*, (2nd ed Fagbokforlaget 2020) 27.

[3] Ibid. 31 ff.

[4] Constitution of The United States (US. Const.).

[5] Cf. US. Const. Art. IV. Section 1.

Consequently, federalism is horizontal and vertical. [6] The former denotes the relationship the states in between, while the latter describes the states relationship to the federal government.

### *b. Germany*

The concept of federalism is embedded in the German Constitution as well. [7] The Basic Law (BL) Art. 20 states that Germany is "a democratic and social federal state".[8] As in the US, this implies that each state has its own legislative, executive, and judicial branches separate from the federal ones. [9] However, as we shall see in the section on legal culture below, the organization of the state and federal level and the division of competences between them is quite different in Germany and the US. In addition, a distinct feature of the German Federal State is that there is a second federal legislative and administrative organ called the *Bundesrat*, consisting of members representing the state-governments. [10] The Bundesrat is particularly important in German norm production, as we shall see below.

## III. The Legal Cultural Impact of Federalism

We now move on to observe how federalism has affected the legal cultures of the US and Germany, in light of the institutional and intellectual elements of the LCM. It must be emphasized, however, that not all its elements are relevant when answering a question. [11] Hence, I have chosen to focus on the institutional elements *conflict resolution* and *norm production* as well as the intellectual elements *legal method* and *legal education*, as I find these best suited for elucidating the impact federalism has had on the US and German legal systems.

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[6] Lloyd T. Wilson, JR., "A View of the Legal Culture of the United States of America in Sören Koch & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures,* (2nd ed Fagbokforlaget 2020) 640.

[7] Basic Law for the Federal Republic of Germany (BL).

[8] BL Art. 20 (1).

[9] BL. Art. 20 (2).

[10] BL. Art. 50 & 51 (1).

[11] Sunde (2020) (n. 2) 38.

### *a. Conflict Resolution*

#### *(i) The US.*

A first important observation regarding the impact of federalism on the American legal culture, is the organization of the state and federal courts. States have their own court systems usually consisting of trial courts, courts of appeal and a Supreme Court, like in Norway. The federal courts are organized this way as well.[12] However, regarding jurisdiction, there are considerable differences between state and federal courts. The latter only decide on matters explicitly stated in the Constitution.[13] In all other matters, the state courts have exclusive jurisdiction, and the final court of appeal is then the Supreme Court of the state where the legal dispute was raised.

#### *(ii) Germany*

In Germany, the federal structure also makes it necessary to operate with courts on state and federal level. However, the distinction between state- and federal courts is not as strong as in the US. The German court system has only one hierarchy, in which both state and federal courts are placed. In total, there are six federal courts which act as courts of last instance in specific areas of law.[14] Consequently, it appears that federalism affects conflict resolution differently in Germany and the US. The former has one single court hierarchy with state courts at the bottom and federal courts on top, while the latter has divided state and federal courts into separate hierarchies. This implies that legal unity might be easier to achieve in Germany than in the US.[15]

### *b. Norm Production*

#### *(i) The US.*

The federalist structure of the US also affects their norm production. The federal legislator, i.e. the Congress,[16] is only able to enact statutes in areas of law explicitly stated in the

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[12] Wilson Jr., (2020) (n. 6) 644 ff.

[13] Cf. US. const. Art. III Section 2 first paragraph.

[14] See Sören Koch "An Introduction to German Legal Culture" in Sören Koch & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures* (2nd ed Fagbokforlaget 2020) 228.

[15] See Task 2, section II, point b. below.

[16] Cf. US. Const. Art. I Section 1.

Constitution.[17] Other areas of law, such as civil law, are hence the concern of the state legislators.[18] In these areas, it is hence hard to achieve national legal unity.

*(ii) Germany*

In Germany, there is a similar division of legislative competence between federal and state legislators as in the US. The BL Art. 70 propounds that the states "have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation".[19] Consequently, the German states, as the American, have wide reaching legislative competences. However, in order to ensure national legal unity, important areas of law such as civil and criminal law are mainly regulated by the federal legislator.[20] The states are though heavily involved in the legislative process on the federal level as well, as the BL requires the "consent of the Bundesrat" in order to enact specific types of legislation.[21] Consent from the Bundesrat is given by majority vote, [22] which can be hard to attain (see section II in Task 2).

### *c. Legal Method and Legal Education*

*(i) The US.*

The federal structure of the US finally has impact on their legal method. First, vertical federalism influences the hierarchy of sources of law as federal law prevail over state law.[23] Second, horizontal federalism leads to deviating legal methodologies in the different states, as is elucidated by the different views on preparatory works as a legal source.[24] This is also due to the fact that states have their own educational programs and bar exams,[25] which is a result horizontal federalism as well.

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[17] Cf. US. Const. Art. I Section 8 & Amendment X (1791).

[18] See e.g. the Civil Code of the State of California

[19] Cf. BL. Art. 70 (1).

[20] Cf. BL. Art. 73 & Art. 74..

[21] Cf. BL. Art. 73 & 74 (2).

[22] Cf. BL. Art. 52 (3).

[23] Cf. US. Const. Art. VI second paragraph.

[24] Wilson Jr. (2020) (n. 6) 655-656.

[25] Ibid. 678, 680.

*(i) Germany*

The German legal methodology is not affected by federalism in the same degree as the American, even though German states also have their own educational programs. This is due to the federal regulation of important areas of law, and the tight cooperation between the German state-universities which allows students to learn the same legal methodology regardless of where they study.[26]

## IV. Historical Origins

*(i) The US.*

Finally, it remains to explain *why* the US and German states are federal, which is done by looking at their historical origins. In the former, federalism was in many ways a natural repercussion of the colonies securing independence from the British Empire on the 4th of July 1776. The colonies were namely entirely separate political units of different national origin.[27] Thus, they did not secure their independence collectively as one nation but were in fact separate sovereign states until the ratification of the Constituion in 1788.[28] A federal structure was hence preferred by the founding fathers as this provided the states with continued independence. Furthermore, the colonies wanted to rid themselves of all things British.[29] A centralized structure, as was applied in Britain, was therefore not desirable.

*(ii) Germany*

In Germany, the notion of self-governance has been prevalent for a long time as well. The Holy Roman Empire, which lasted from 962 till 1806, did not have one single political power, but was a confederation of political entities of varying national origin.[30] Consequently, even before the contemporary notion of federalism existed, Germany evidently had federal traits. Furthermore, the second German Empire founded in 1871 originally consisted of sovereign

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[26] Koch (2020) (n. 14) 258.

[27] Johan Ruben Leiss "The US Legal Culture" in Power Point G (2022) 6-8.

[28] Wilson Jr. (2020) (n. 6) 638-639.

[29] Kinvin Wroth, "Common Law" in Stanley N. Katz (ed.) The Oxford International Enclyopedia of Legal History, Vol II. (Oxford University Press 2009) 84.

[30] Simon Duits, "Holy Roman Empire" *World History Encyclopedia*. Last modified June 09, 2021. https://www.worldhistory.org/Holy_Roman_Empire/ accessed 21st October 2022.

states. [31] Hence, a federal structure was desirable as this allowed the states a high degree of continued of independency. The states independency increased in the Weimar Republic inter alia due to the development of The Bundesrat,[32] which still exists today.[33] Federalism retained a strong position in Germany until the Nazi party's gradual abolishment of the structure in the 1930´s.[34] In order to prevent the horrors of the Nazi regime from happening again, and to stay true to their history prior, Germany returned to federalism with the enactment of the BL in 1949 which explicitly allows the public to resist any other state-structure. [35]

## V. Conclusions

The analysis above has rendered some interesting results. First, it has shown that federalism may affect institutional and intellectual elements of legal cultures differently. Second, that federalism both in the US and Germany can be seen as a repercussion of the individual states initial sovereignty, and as a means to remedy the injustices of their past.

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[31] See Wolfgang Renzsch "German Federalism in a Historical Perspective: Federalism as a Substitute for a National State" *Publius* Vol. 19, No. 4 (1989). 19-20.

[32] Ibid. 22.

[33] See point *b.* of section II and III above.

[34] See Renzsch (1989) (n. 31) 23, and Jeremy Noakes "Federalism in the Nazi State" in Maiken Umbach (ed.) *German Federalism* (Palgrave Macmillan 2002) 113 ff.

[35] Cf. BL. Art. 20 (4).

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# Task 2 – Merits and Limitations of Federal and Centralized Legal Cultures

## I. Introduction

In this task, I move on to discuss some legal cultural merits and limitations of federalism and centralism. *Centralism* denotes a state structure where "a single authority has power and control over the entire system" [1] and is hence the opposite of federalism as we defined it in Task 1.

The aim of the essay is to establish an idea of what repercussions these state structures can bring to a legal culture. In order to reach this aim, the assignment is divided into two parts. First, I shall assess the legal cultural pros and cons of having a federal structure. The information on the federal systems of the US and Germany in Task 1 will provide the base for this part of the assignment. This then allows me to observe the positive and negative effects of centralism in a comparative perspective.

## II. Federalism

### *a. Experimental Development and Local Adjustments of Law*

Concerning the legal-cultural merits of federalism, one must mention that it allows states to serve as "laboratories" of legal change. [2] The state legislators and judiciaries can namely draw inspiration from the legislative and judicial regulations of other states. For instance, one might observe that another state regulates criminal law in a highly successful manner, and hence adopt their solution. On the other hand, one might abstain from enacting a specific rule due to the negative experiences of states which apply the same rule.

Another legal-cultural merit of federalism is that it allows local adjustments of law. Ever since the 7th century, it's been recognized that a good law is one that "is adjusted to local conditions and customs". [3] Federalism facilitates such adjustments as state legislators can

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[1] https://www.britannica.com/dictionary/centralism/ accessed 21st October 2022.

[2] *New State Ice Co. V. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting).

[3] Jørn Øyrehagen Sunde, "Managing the Unmanageable – An Essay Concerning Legal Culture as an Analytical Tool", in Sören Koch & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures*, 2nd ed (Fagbokforlaget 2020) 25, with further reference to *The Etymologies of Isidore of Seville* (Cambridge University Press 2006) 121 no. xxi.

enact legislation with regard to the cultural, sociological and economic needs of the local environment.

*b. Prevents Legal Unification and Legal Change*

Federalism might, however, be an obstacle in the pursuit of legal unity. This is illustrated by the US where the wide legislative competence of the state legislators creates a significant variation of law. [4] A recent decision of The Federal Supreme Court in the case of *Dobbs v. Jackson*[5] may be illustrative. The court ruled that the Constitution does not prohibit states from prohibiting abortion, which hence facilitates drastically varying regulations of abortion from state to state. [6] This elucidates the low degree of legal unity in the US and the unpredictability of law from a national point of view. Lawyers are hence normally prevented from practicing law in more than one state. [7] Finally, the strong identities of federal states may result in several distinct legal cultures within one nation. Hence, there is a risk of insulation, an issue which has been prominent in comparative law for a long time. [8]

However, this does not entail that legal unity is incompatible with federalism. This is elucidated by Germany, where legal unity is facilitated by having a state and federal combined court system, a federal legislator with wide legislative competences, and a tight cooperation between the state Universities. [9] A prevalent issue of federalism is nevertheless that it can make it difficult to amend and enact federal legislation. In Germany, this is due to the fact that changes in federal law, as beforementioned, often require the consent of the majority in the *Bundesrat* (see point b section II and III in Task 1) This is a complicated process, as its members, the representatives of the state-governments, naturally will have diverging political interests. In addition, each state is granted different amounts of votes which complicates the process even further. [10]

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[4] Lloyd T. Wilson, JR., "A View of the Legal Culture of the United States of America" in Sören Koch & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures*, 2nd ed (Fagbokforlaget 2020) 641.

[5] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022) (*Dobbs*, 597 U.S.).

[6] See *Dobbs*, 597 U.S. at 3 in the dissenting opinion of Justices Breyer, Sotomayor and Kagan, JJ. .

[7] Wilson (2020) (n. 4) 680-681.

[8] See Pierre Giuseppe Monateri, «Methods in Comparative Law: An Intellectual Overview" in Pierre Giuseppe Monateri (ed.) *Methods of Comparative Law* (Cheltenham 2012) 9-10 and Task 3.

[9] See the third section in Task 1.

[10] See Basic Law for the Federal Republic of Germany (BL) Art. 51 (1) ff. & Art. 52 (3).

## III. Centralism

### *a. Facilitates Legal Unity and Legal Change*

Centralism, applied in e.g. Norway, does on the other hand make legal unity more achievable due to the fact that there is one legislator with (near) exclusive competence to propound legislation. Hence, there are few local variations, which implies that law is more predictable from a national point of view than in federalist systems. Another repercussion is that legal education is regulated nationally instead of regionally. [11] Consequently, students are taught the same principles of law regardless of where they study which allow them to practice law in the whole of the country after graduation.

Whether it is accurate to claim that there generally is a higher degree of legal unity in centralized systems is however questionable. In Norway for instance, the prevailing legislative tradition of enacting individual statutes makes law appear as fragmentary, rather than unified.[12] In federal Germany, however, important areas of law are systematically codified which facilitates a scientific approach to law and a high degree of legal unity. Nevertheless, a merit of centralization is that legislative changes can happen effectively and unhindered by the counties.

### *b. Disregard of Cultural Differences and Limited Access to Justice*

On the other hand, centralization prevents local adjustments of law, as opposed to federalism. When enacting legislation, the legislator in centralized systems must disregard the inter alia cultural, political, and sociological differences that may exist within the country. Hence, there is a risk of legislation ending up as nothing more but "a meaningless form of words". [13] Finally, centralization can result in fewer local courts in the legal system which in turn makes justice less accessible due to travelling distances, the duration of proceedings and high case costs. These issues have been prominent in Norway.[14] Yet, the French legal system shows that

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[11] See e.g. the Norwegian University Act of 2005 ("Universitets- og Høgskoleloven").

[12] See Marius Mikkel Kjønstad, Sören Koch and Jørn Øyrehagen Sunde «An Introduction to Norwegian Legal Culture" in Sören Koch & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures*, 2nd ed (Fagbokforlaget 2020) 117.

[13] Pierre Legrand, *The Impossibility of Legal Transplants* (1997) 4 Maastricht Journal of European and Comparative Law, 120.

[14] See Prop. 11 L (2020-2021) s. 19.

accessible courts are attainable in centralised states.[15] This might be due to the prevalent notion of justice as being a part of public service in France,[16] and their scientific approach to law which allows judges to decide cases quickly.

## IV. Conclusion

To sum up, federalism and centralism seem to flourish where the other fails. The former allows locally adapted laws based on real-life experience, but at the cost of legal unity and legal change. The latter facilitates legal unity and legal change, but at the cost of cultural differences and access of justice.

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[15] See Sunniva Cristina Bragdø-Ellnes "An Introduction to French Legal Culture" in Sören Koch & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures*, 2nd ed (Fagbokforlaget 2020) 477-478.

[16] Ibid. 480.

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# Task 3 – A Critical Discussion of the Use of Taxonomies in Comparative Law

## I. Introduction

Finally, I shall critically discuss whether the use of taxonomies is fruitful in comparative law. This first requires a brief explanation of what is meant by these terms. *Comparative law* describes an intellectual activity where one compares the different legal systems of the world.[1] *Taxonomies* denotes classification of legal systems into larger entities, i.e. legal families, traditions or cultures. [2]

The aim of the essay is to develop a deeper understanding of the use of taxonomies in comparative law. In order to satisfy said aim, I divide the essay into three parts. First, I take a brief look at some common examples of classification in comparative law and their purpose. This creates an appropriate point of departure for identifying strengths and weaknesses in the subsequent sections.

## II. Taxonomies – Nature and Purpose

In the introduction, I briefly touched upon some examples of taxonomies in comparative law, i.e. legal families, traditions and cultures. These classifications all have one thing in common, viz, they are all core constructs of macro-comparison. [3] Consequently, they are used to compare the spirit and style of whole legal systems, rather than specific rules and institutions i.e. micro-comparison. [4] The (Roman) civil law and (English) common law traditions are specific examples of taxonomies used for macro-comparison. This distinction is assessed below.

The purpose of taxonomies in comparative law has traditionally been to construct legal identities and to strengthen the notion of an "us" and a "them". [5] Today, the purpose is rather

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[1] Konrad Zweigert & Heinz Kötz, *Introduction to Comparative Law* (3rd ed., Clarendon Press 1998) 2.

[2] Jakko Husa "Macro Comparative Law – Reloaded" (2018) Vol 131. No. 4 *Tidskrift for Rettsvitenskap* 414-415.

[3] Ibid. 413.

[4] Zweigert & Kötz (1998) (n. 1) 4-5.

[5] See Pierre Giuseppe Monateri, «Methods in Comparative Law: An Intellectual Overview" in Pierre Giuseppe Monateri (ed.) *Methods of Comparative Law* (Cheltenham 2012) 9.

to allow comparators to "organize the plural and sometimes mosaic-like reality of a given legal system under study into a comprehensible generalized entity". [6]

## III. Strengths

### *a. Facilitates General Understanding of Foreign Law*

This leads us over to a first strength of classifications in comparative law, viz, that they facilitate a general understanding of a plurality of legal systems. Comparative law is an immense field with extensive amounts of legal material due to the many legal systems of the world and is hence an academic field hard to grasp.[7] Taxonomies can make this material easier to handle. They allow the comparator to get an overview of the legal world, without having to dive into specific legal systems. Consequently, taxonomies "offer broad conceptual devices with which we can measure law and clarify the most central elements of legal reality outside of our own legal world". [8]

### *b. Allows Navigation and Identification of Similarities and Differences*

This generalization furthermore allows the comparator to navigate among unknown legal systems. Imagine an English lawyer in search of a legal solution in, let's say, the German legal system. If the lawyer is familiar with the notion of law as a codified science in the civil law tradition, she will then probably have a good idea of where to look in order to find this solution, i.e. in the legislative codes and scholarly commentaries. This implies that lawyers of e.g. the common law and civil law will find it easier to analyze systems related to these traditions.[9] Hence, classifications "enable us to understand the relationship between similarities and make it easier to identify differences".[10]

### *c. Facilitates Fruitful Legal Transplants and Micro Comparison*

Classifications may furthermore be used to facilitate legal transplants. They allow legislators and judiciaries to identify foreign systems with traits similar to the domestic system, which

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[6] Husa (2018) (n. 2) 415.

[7] Max Rheinstein, "Teaching Tools of Comparative Law", (1952) American Journal of Comparative Law, 99.

[8] Husa (2018) (n. 2) 416.

[9] See also Sören Koch, «Legal Culture and Comparative Law – Diving into the Ocean" in Sören Koch & Jørn Øyrehagen Sunde (eds.), *Comparing Legal cultures*, 2nd ed (Fagbokforlaget 2020) 60.

[10] Ibid. 59-60.

reduces the risk of them adopting a "meaningless form of words".[11] Finally, taxonomies facilitate effective micro-comparison as the comparator can limit herself to the original parent systems across different classifications. [12]

## IV. Weaknesses

### *a. Risk of Overlooking Similarities and Differences*

On the other hand, taxonomies merely focus on the similarities of legal systems within one classification and the differences to legal systems in others. Thus, the comparator might overlook differences among systems in the same classification, and the similarities between systems in different ones. The dichotomy between civil law and common law may illustrate this: Generally, it is assumed that civil law can be distinguished from common law due to its connection with Roman law and its emphasis on codified law. Those who take these assumptions for granted, might miss out on the fact that the common law also was influenced by Roman law, and that some common law systems are codified, e.g. the State of California.[13]

### *b. Provides no Explanation of Similarities and Differences*

Although taxonomies facilitate identification of similarities and differences across legal systems, they do not explain the findings. Explanation requires that the comparator makes use of other approaches, such as the LCM which provides the institutional and intellectual contexts of similarities and differences as well.[14] In addition, this model can be used to explain differences within, and similarities across classifications. [15]

### *c. Other Limitations*

Furthermore, classification creates a risk of insulation, i.e., an idea that there is an "us" and a "them", as beforementioned. Some even claim that the use of taxonomies in comparative law is a "biased and none-neutral project of global Western governance". [16] Hence, classifications

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[11] Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4 Maastricht Journal of European and Comparative Law 1997, 120.

[12] Zweigert & Kötz (1998) (n. 1) 40-41.

[13] Alan Watson *The Making of the Civil Law* (Harvard University Press 1981) 2-3.

[14] Koch (2020) (n. 9) 62.

[15] Ibid. 61.

[16] Husa (2018) (n. 2) 415-416.

may create a Western vacuum of law. This can prevent us from achieving an international unification of law, which is desirable for several reasons.[17] Another related issue of taxonomies in comparative law is their incompatibility, which prevents us from "grasping the totality of the worlds legal systems in a comprehensive manner". [18] Finally, it must be mentioned that taxonomies are of little use in micro-comparative law, which is what lawyers usually deal with.[19] This implies that the need of taxonomies is limited from a practical perspective.

## V. Conclusion

In conclusion, taxonomies seem valuable in comparative law as they allow us to make sense of different parts of the legal world despite the extensive amounts of legal material. Moving forward, however, we must go one step further and tear down the barriers created by the existing taxonomies by establishing a new one which allows us to view the legal world as one totality. This is albeit easier said than done.

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[17] See e.g. Zweigert & Kötz (1998) (n. 1) 25.

[18] Husa (2018) (n. 2) 412-413.

[19] Jakko Husa, *Comparative Law Today* – Speech on 12 December 2016 at The University of Helsinki, 4.

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