COMMON-LAW AND CIVIL-LAW LEGAL FAMILIES: A MISLEADING CATEGORISATION

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Certification

This thesis is submitted to Bond University in fulfilment of the requirements for the Degree of Master of Laws by Research.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Signature: *Date:*

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SUMMARY

This thesis examines common-law and civil-law jurisdictions in order to find differences between them. These differences are then being qualified as either relevant or irrelevant for the categorisation of individual jurisdictions. This reflects the argument that only features occurring in only one of the legal families can be relevant when categorising jurisdictions. Only such features can be, from the author's point of view, specific and typical for their legal family and inherent features of them..

The first thing to be considered under this premise is the respective sources of law (Chapter 1). These are in civil-law jurisdictions traditionally statutes and in common-law jurisdictions predominantly courts' decisions. There are, of course, statutes also in common-law jurisdictions and previous courts' decisions play an important role also in civil-law systems. The differences are not inherent. Furthermore, there are fundamental legal concepts, that is important concepts underlying the respective rules. These concepts may explain differences between the rules. The examination of sources of law, altogether, does not reveal any distinguishing factors.

Chapters 2–5 discuss the issue of attitudes of common-law and civil-law judges to statutory interpretation. Chapter 2 examines the respective methods of statutory interpretation. This does not reveal any differences as to common-law and civil-law judges' attitudes; for instance, greater adherence of common-law judges to the literal meaning of rules arguably does not exist. As shown in Chapter 3, this is true also in

the area of Criminal Law under the special safeguards this subject provides. Chapter 4 asserts terminology causes differences between the systems; this is true even in case of identical terminology which is sometimes being interpreted in a diametrically different way. Moreover, differences can also be compensated for elsewhere in the legal system. Altogether, Chapter 4 does not reveal any inherent differences between the systems. As Chapter 5 shows, there is an ongoing process of convergence between common-law and civil-law systems, which means the categorisation into legal families becomes even less plausible.

Chapter 6 shows that the categorisation into legal families is not only incorrect but also highly misleading and that there are numerous scholarly statements relying incorrectly on the family concept. The proposition (Chapter 7) is that it may nevertheless be feasible to structure comparative-law texts according to the well-known legal families, as these show a common historical background. However, for conducting research into particular foreign legal rules (micro-comparative research), the family concept becomes a misleading starting-point. Insofar the concept should be abandoned or, at least, used only together with an appropriate warning.

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