Comparative Legal Families and Comparative Legal Traditions

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Abstract and Keywords

The concept of legal families maintained the law of other peoples in the western view at a time of legal scientism and legal nationalism, in the nineteenth and twentieth centuries. It did so by accepting the idea of national legal systems and the possibility of a taxonomic description of them. As communication between the peoples of the world accelerated in the late twentieth century it became more and more evident that national legal systems could no longer be treated as autonomous and sovereign, as both new and ancient forms of non-state law asserted themselves. The notion of legal traditions allows a conceptual understanding of the relations of laws conceived as normative information. There can thus be multiple laws applicable in a given territory, with varying degrees of influence, since the concept of legal tradition is one which accommodates multiple sources of law and gradations in the force of their normativity.

Keywords: legal nationalism, legal scientism, taxonomic categorization, normative information, national legal systems

(p. 422) I. Introduction

How should one think about the laws of the world? The simplest response would be to think about them as the laws of the world, with no further qualifications or categorizations. This option is sometimes used, but the number and diversity of our laws has led to an apparently irresistible process of aggregation or categorization. Amongst comparative lawyers over the last century the categorizing notion most frequently encountered has been that of 'families' of laws, and all of the laws of the world could thus be divided and understood as members of this (relatively limited) number of legal families. The law of France would belong to the civil law family, the law of England to the common law family, the law of Saudi Arabia to the Islamic law family, and so on. Some countries might fall within a socialist legal family, though today both the family and its members are questioned. René David's treatise was entitled *Les grands systèmes de droit contemporain* but in spite of its title the notion of legal systems was largely abandoned in favour of 'The Idea of a Family of Laws' and an ensuing discussion of 'Legal Families in the World Today.'[1] The notion of an existing family (as opposed to a dysfunctional or divided one) is a positive and constructive metaphor and unquestionably served a useful purpose in a time of radical legal nationalism. It reminded lawyers, and others, of forms of belonging which the state could not encompass, or avoid. At the same time, however, it was a product of its times and appeared to accept and even reinforce the idea of autonomous national legal systems, the relations of which could only be described in terms of international law or in terms of membership in larger, though non-normative, legal families.

The developments of the last few decades, however, have challenged the idea of autonomous national legal systems and their grouping into legal families. The state is said to be in decline, even to have failed entirely in some parts of the world, and both new and ancient forms of law are increasing in influence.[2] The conclusion has thus recently been drawn that '[t]he taxonomic orientation … largely spent itself' with the treatise of David and that of Zweigert and Kötz, [3] though it is said that the 'discourse of legal families still partly dominates the imagination of comparative legal studies today'.[4] So the notion of legal families would represent an ongoing important idea, though of declining influence. That of legal tradition would have (p. 423) become, however, in the last quarter century, the 'dominant paradigm' in understanding the world's laws and would look 'beyond … legal systems and families as static and isolated entities'.[5] It is therefore appropriate to attempt an assessment of these two large and apparently imprecise ideas. What can be said in favour of each of them? What difference will the use of one or the other make to the relations amongst the laws of the world?

II. The Taxonomic Project

The contemporary academic discipline of comparative law arose as a reaction to the decline of overarching concepts of law in Europe in the nineteenth century. It was in some measure an antidote to the various forms of nationalization of law which were then taking place, largely through codification and the development of a national concept of *stare decisis*. Chairs and societies of comparative law were created throughout the nineteenth century and in 1900 a first International Congress of Comparative Law was held in Paris. It is important to situate the new discipline within larger intellectual and political movements which were then current.

The legal unification of the nation-states of Europe created new law and new legal institutions which were designed to overcome much of the corruption, imperialism, and imprecision of the earlier times. The new institutions and laws had widespread popular support, were meant to last, and were the result of some of the very best legal thinking of all time. They were, in short, irresistible, and notably irresistible through invocation of older ideas of Christian unity or universal natural law. If bridges were to be rebuilt, it could not be with the old stones, but with the techniques of modern law and modern science. So the new states had to be taken as cornerstones of the new science of comparative law and they had to be situated within a new, scientific cadre which would *describe* what was actually going on, in terms of the new, positive institutions, but which would also *surpass* them in indicating their relative characteristics. This scientific dimension of the new comparative law drew heavily from two related intellectual movements.

The first was that of comparison in the physical and notably biological sciences, a process begun by the taxonomy of Linnaeus in the mid-eighteenth century and (p. 424) continuing in the nineteenth with the development of comparative anatomy (Cuvier), comparative biology, and comparative linguistics. Scientific progress here resulted from classification and systematization of entire fields of human knowledge, and the notion of families in science thus extended well beyond those of human beings. The process of classification initially requires the fixing of boundaries of various classes. There is then assignment or allocation of objects to the appropriate larger classes based on their patterns of observable characteristics. The emphasis is on the process itself and it is a given that there are objects of classification, objects found in the real world for the physical sciences and in the existence of particular laws for the new science of comparative law. The objects of classification find their true, and distinct, identity through their assignment to a particular class. A national legal system could thus be better understood, and its existence affirmed, through its classification as a common law system or a civil law system.

The second intellectual movement which influenced the new science of comparative law was that of social Darwinism. This idea has today been discredited in considerable measure but in the nineteenth century the progression of peoples through distinct, evolutionary stages of social organization was taken as a serious scientific hypothesis. The end point of the evolution coincided remarkably with the then present state of European society, such that other peoples were thought to be appropriately described as 'primitive' in some measure and there was a deep, underlying justification for the process of colonization, which could accelerate the process of evolution. The end of colonization brought about the end of the underlying theory, but it contributed greatly to the emergence of comparative law as a distinct academic discipline founded on scientific classifications.[6] Today the notion of progression through evolutionary stages of society has become very faint, but the underlying notion of taxonomy and classification is seen as separable and had vigorous defenders in the late twentieth century.[7]

The taxonomic project in comparative law was thus strongly influenced by developments in the physical sciences, as was law in general in the nineteenth century. In the physical sciences great efforts were made to extend classifications to the immense range of living and other objects. In contrast, and this is of interest for the entire taxonomic project, very little effort has been expended on the classification of national legal systems. It is generally recognized that it is national legal systems which are the appropriate objects of classification, [8] and it would be an (p. 425) immense and difficult task, given the diversity of sources of national law in the world, to assign all national laws to particular legal families. Yet efforts of classification have been directed almost exclusively to definition of the legal families which should control the classification process and there has been very little agreement on the appropriate definitions. This problem will be returned to (see Section VI, below) but for present purposes it will suffice to observe that the taxonomic project in law, unlike that in science, never progressed much beyond debate as to the criteria for classification.

In contrast to the taxonomic objective underlying the concept of legal families, that of legal traditions has no explicit taxonomic purpose. Indeed, it may well be impossible to categorize national legal systems according to legal traditions, since the concept of tradition is simply that of normative information[9] and national systems may repose on different and varying amounts of (traditional) normative information. The concept of legal tradition thus suggests that one look for the *degrees* to which different traditions have been influential in the make-up of different national laws, and would be antithetical to exclusivist categorizations according to a limited range of criteria. Legal traditions would thus underlie and infiltrate national legal systems, which could no longer be taken as simple objects of classification and taxonomy.

It is true that one can still debate the manner of identification of legal traditions, and there could be perhaps as much disagreement on this question as there is on the definition of legal families. Moreover, many legal families (though not all, see Section V, below) reappear as legal traditions, such as those of the civil and common law. As normative information, however, legal traditions are largely self-identifying and need not

answer to taxonomic requirements of providing the best means of understanding and structuring legal systems. The information of a legal tradition tells you that it is a common law tradition, or a romano-germanic tradition, or an Islamic tradition, and people and lawyers adhere to each tradition because of its content and identification. The boundaries of a legal tradition, moreover, are fuzzy. Since information is largely uncontrollable, the information at the core of every legal tradition will be complemented, in some measure and to some degree, by information drawn from other legal traditions. So legal traditions themselves are not exclusivist in character and debate as to their content and identity is essential and internal to them, not to be avoided through imposition of scientifically defined criteria. Debate is the normal state of things, and not an obstacle to scientific precision. If taxonomy and classification are effected through fixing the scientifically chosen boundaries of various classes, the nature and working of tradition is thus opposed to the fixing of boundaries and criteria for their fixation. Taxonomy and legal families have the task or objective of separation and distinguishing, whereas legal traditions have the task only of supporting their own (p. 426) forms of normativity. This usually involves more art than science, more attempting to do justice than attempting to build and classify systems.

Of course, legal traditions antedate the nineteenth century and legal scientism, while legal scientism grew up within the Western legal traditions and even became a sub-tradition within them. So there is no fundamental antagonism between the idea of legal families and legal tradition. It is a question of age and generality rather than opposition. The idea of legal families would represent a particular legal tradition the influence of which is now in decline, leaving the older and more general idea of legal traditions to play a more obvious role. This appears to be recognized by those who have been most influential in developing taxonomic ideas and the concept of the legal family. René David thus concluded that legal families did not correspond to ‘biological reality’ and were no more than ‘didactic devices’ or means of understanding, [10] while the greater part of his treatise was given over to the explanation of what may be considered to be the major legal traditions of the world.

While the concept of legal families may thus be seen as a particular variant of legal tradition, there remain major differences in the methods and objectives of the two concepts. Families are distinct biological entities, inviting taxonomic determination of their members. A tradition is ongoing normative information, inviting compliance and not classification (least of all of itself). These underlying differences may be of consequence for the relations of the laws of the world, and our understanding of them.

III. Taxonomy and Stasis

In a world seen as fast moving, it is a major criticism to refer to a concept or idea as 'static'.[11] The criticism does not simply reflect a fascination with novelty, however, but is rather directed to the manner of understanding the world which the idea of legal families would represent. It would notably impede, or even prevent, any appreciation of change or variation in the course of human and legal life and would therefore constitute a major obstacle to human understanding. This point should perhaps be emphasized. It is often said that the taxonomic project is not driven by instrumental or other objectives but is simply a means of understanding law and therefore justifiable as such. To this is often added a defence of the (p. 427) academic function as opposed to that of the legislator, judge, or legal professional. The criticism of stasis, however, is to the effect that the means of understanding which the concept of legal families provides is one which distorts or impoverishes our understanding of the legal world. Being free of instrumental objectives is not in itself a justification. Understanding of the legal world is not enhanced if major dimensions of it are excluded by the concepts employed. Legal families would thus conceal more than they reveal and are not justifiable as a means of understanding.

How exactly is the concept of legal families a static one? Like all means of classification it is inherently static by fixing, at least temporarily, the objects of classification for purposes of their classification. Where the objects of classification are not physical objects, but large amounts of legal information, the classification attempts to freeze the contemporary flow of information in the world, for purposes of the present classification. The process parallels the contemporary concept of the national legal system, which would exist not in enduring form but rather as a succession of 'momentary' legal systems, each one of which would represent the law in force at a given moment.[12] Each of these 'momentary' systems would be classified during the brief moment of its existence. Once the law is no longer in force by virtue of the present system, however, it is dead law, of no interest for purposes of the present system. More precisely, it becomes legal history, which thereby becomes the study of law which is no longer in force. So the process is inherently static because it has no means of assessing or appreciating what is often referred to as the 'development' of law or its variation over time. It is an entirely synchronic process, by itself. It tells us to understand law as though we were required to watch a film through looking first at one frame, then at another, with no necessary recollection of the previous frame.

The taxonomic endeavour in the physical sciences rested in large measure on the physical stability of the objects of classification. There is, however, no such stability of legal systems, which exist not as 'solid and sensible entities' but rather as 'thought-objects, products of particular discourses rather than presuppositions of them'.[13] If we fix them at particular times, we lose the flow of the discourse, the variation of the system over time and any sense of direction this may provide. We are unable to assess the extent of change or the extent of resistance to change. There is an inevitable loss of normativity, and it is

an inherent element of the teaching of positivist legal systems that they are unable to create an obligation to obey the law.[14] They simply exist, at a given moment. The concept of legal families (p. 428) adds no normativity to this way of thinking, but would rather simply confirm the existence of these systems within the broader cadre of (descriptive) legal families.

In contrast to the inherently static character of legal systems and legal families, legal traditions exist as ongoing, normative information, and their normative force is drawn in large measure from their duration over time. This is not an obstacle to change, however, and resort to tradition is the primary justification for the most radical of changes, [15] as when those responsible for the 'revolutions' of the eighteenth century 're-volved' or returned to the tradition of Greek rationality as the most effective justification for their activity. Tradition thus provides justification for change and a means of measuring it, as actual, contemporary conduct can be evaluated against prior teaching. Legal traditions thus do not 'bind' but, as tradition, provide justification for conduct and may even be taken as the source of obligation. In this they surpass legal systems and families in terms of normative force.

How does a tradition function through time, such that it cannot be described as static? There must first be capture of information (which may be revelatory, decisional, legislative, or other). Capture is already an indication of normativity, since only information of particular value will justify the effort of capture, through memorization, writing, or recording in mechanical or electronic form. Most information relating to human or other activity simply disappears, and this is as true today as it was millennia ago, even with contemporary means of capture. Once captured in accessible form, information may become a standard of conduct, such that people purport to act in accordance with it. They will then seek to ensure that it remains available, through transmission, or *traditio*, to subsequent generations. These subsequent generations may or may not act in accordance with the particular tradition, or they may develop variations within the tradition, such that it must develop intellectual means of accommodating internal variation. Whatever is done, it will generate more information, and this information is then in turn subject to capture and subsequent transmission. Each generation thus represents a continuation of the tradition, if this is indeed the case, and a contribution to it in the form they have chosen. The mass of information of the tradition is then enhanced in terms both of its size and of its legitimacy. A living tradition thus functions by way of a continual reflexive process, through looping or feedback. We can observe it as we would a film. It is a process which is necessarily diachronic in character.

Different legal traditions may or may not insist on a formal definition of the legal. The tradition of Western legal systems has taught the necessity of formal definition over the last two centuries. Other legal traditions are less concerned with formal definition and have no pure concept of law. This is not considered a disadvantage. Identification of that which is law will therefore depend on the tradition, but in all cases it will be recognizable as law as a result of the working of tradition over time. The only instance of 'static' tradition which can be recognized (p. 429) is in the case where the information of a

tradition is no longer adhered to by a present group of people, though the information of the tradition may continue to be known and available. The tradition is then in a state of suspended animation, as Roman law is said to have become inoperative in the early middle ages, or as the law of the ancient Middle East, preserved on tablets or monuments, became literally covered over through the ages and now exists only in museum collections. To the extent that the information of the tradition remains available, however, it may be revived as a living tradition (as with the Hebrew and Welsh languages) and present adherents will thus continue and contribute to the revived tradition, revising it as they see fit. A living tradition thus represents a remarkable process of oscillation between stability and variation. It cannot be described as static.

The notion of static legal systems and families also raises major questions as to the relations betweeen them.

IV. Taxonomy, Comparison, and Conflict

The notions of categorization and comparison are well known in the sciences. Indeed, it was through borrowing from the physical sciences that the taxonomic project for legal systems was initiated. Yet the sciences also recognize a gradation in the power of explicative concepts, and categorization is at the lowest or least effective level of these concepts. Carnap thus distinguished between classificatory, comparative and quantitative concepts and saw classificatory concepts as the 'simplest and least effective kind of concept'.[16] Comparative concepts would be more 'powerful' in enabling 'a more precise description of a concrete situation' and they would allow this more precise description because they constitute a 'relation' as opposed to a 'property'.[17] 'Warmer' is thus more descriptive than 'warm' since it indicates a higher degree than the purely classificatory concept of 'warm'. We thus find that the degrees of analysis of legal systems provided by the concept of tradition (above Section II) correspond to a characteristic of a truly comparative concept, as opposed to a purely classificatory one. In expressing the *relationship* of two objects of comparison, and in variable degrees, the comparative concept is true to the underlying etymological origins of the word, derived from the Latin 'cum', or (p. 430) with, and 'par', or equal. So the comparative concept is inherently *relational* and involves a bringing together for purposes of evaluation or judgment.

There would be, of course, an element of comparison in the classification of legal systems, to the extent this process was actually undertaken. Each legal system would have to be compared to the criteria fixed for the definition of each legal family, and categorized according to the results of this comparison. Yet the comparison involved is not that of legal systems themselves, but that of a given legal system with a theoretical construct, and we have already seen that the construction of these theoretical constructs more or less exhausted the efforts of those involved in the taxonomic process. There was relatively little categorization actually undertaken and correspondingly little comparison of system to system, in terms of their ongoing relations and degrees of representation of theoretical models. The taxonomic project would thus have represented a relatively low-level project, in terms of scientific concepts, and would not have progressed very far in terms of implementation. There may be important, underlying reasons for this lack of progress in the scientific undertaking.

Léontin-Jean Constantinesco, in developing the taxonomic project, reflected contemporary teaching of the nature of the legal system in referring to it as a 'totality', or a 'tout' in the original French.[18] It is a bounded entity, characterized by the interaction of its internal elements. Systems are thus profoundly inner-directed and that which lies beyond their boundaries is in principle of no interest to them. The taxonomic process, in seizing systems as static entities according to their present characteristics, ignores their development over time but also, perhaps more fundamentally, ignores their reciprocal relations and reciprocal influence. In so doing it acts according to the teaching of the nature of legal systems, which by its nature can have very little to say about that which is

beyond the system. Contemporary positivists are very explicit about this. Hart declared, for example, that '[t]he legal system of a modern state is characterized by a certain kind of *supremacy* within its territory and *independence* of other systems …'.[19] while Kelsen spoke of the relations between 'norm systems' as being either those of independence or subordination.[20] Legal systems thus do not give reasons for their own application, and provide no suggestions as to when they are open to external influence. They suggest their own incomparability, and Constantinesco acknowledged that intersystemic comparison appeared at first sight impossible, while eventually recognizing a process of 'osmosis' by which certain civilizations would see a decline in the 'pure' character of their values and characteristic institutions.[21] Underlying the teaching of legal systems and legal families there is therefore a profound epistemology of separation, which inevitably had its effect on the entire taxonomic project.

(p. 431) The taxonomic school of comparative law thus never reached the stage of actual comparison, or bringing together, of laws.[22] This appears paradoxical, but flows quite naturally from the underlying concepts, of legal systems and legal families, which were widespread in the nineteenth and twentieth centuries and with which comparatists had to work. The absence of actual comparison appears, however, undeniable. John Merryman thus concludes that '[m]ost comparative law teaching and scholarship could more accurately be called "foreign law" since its principal aim is to describe foreign legal systems'.[23] This general phenomenon is perfectly consistent with Constantinesco's claim that '[e]ach legal system must be judged in relation to its own frame of reference, but this frame of theoretical reference must first be confronted with its own practical reality'.[24]

The absence of active comparison was comprehensible at the time of the greatest legal nationalism which the world has known. Moreover, the debate about how to classify autonomous legal systems at least raised the question of how to think about the laws of other people. It may be too charitable, however, to think of the taxonomic project as simply benign and ineffectual. It may have contributed in a significant way to conflictual and antagonistic relations between peoples and laws. The nineteenth century was not only the century of the emergence of comparative law as a scientific discipline. It was also the century of the paramountcy of the notion of conflicts of laws, as a means of conceptualizing relations between legal systems. Differences between laws were thought of as necessarily involving conflicts, such that each legal case involving a 'foreign' element was seen as requiring a preliminary decision as to which legal system was to be controlling over it. This is still the positive law of some jurisdictions today. All cases thus had to be assigned to one or another paramount legal system, and since there was incompatibility between systems their nature was inherently conflictual. The taxonomic process would have reinforced the free-standing, autonomous, and conflictual nature of legal systems, and it has recently been stated that the process allows a better understanding of what Samuel Huntington has described as a 'clash' of civilizations.[25] If law is understood in terms of incompatible systems, grouped in families of greater or

lesser size, it will be viewed as a primary weapon in conflictual relations between peoples.[26]

(p. 432) Unlike the notions of legal systems and legal families, which involve categorization but little or no comparison, the notion of legal traditions would be characterized most of all by an absence of sharp boundaries and systemic features. This would not prevent the development of the particular tradition of legal systems, but the concept of tradition in itself provides no demarcation of its own limits. Conceived as normative information, moreover, tradition is difficult to reconcile with a notion of spatial or categorical limits. Information is difficult to control or limit, and attempts to do so can be derived only from particular traditions which tend to the systemic. So the notion of a legal tradition is one which by its nature facilitates comparison or bringing together. In a sense, the hypothesis is the reverse of that of the legal system, where the question is whether and to what extent there can be a bringing together. With the concept of legal tradition, the question is whether and to what extent there can be a keeping apart. Traditions by their nature rub against one another, and overlap. They are more, or less, influential, in different places and with different peoples. In that respect, they are insidious, since they will persist in spite of all efforts of exclusion and control. Above all, however, they involve constant comparison, since they speak constantly to the relations between the local and the less local, and even between the local and the distant. The other tradition must be evaluated, even implicitly, and its relation to local tradition will be seen as one of increasing, or decreasing, influence, however satisfying or infuriating this may be. All legal traditions thus necessarily contain teaching on their relations with other legal traditions. In the language of scientific concepts, they express relations, and not properties. They claim to represent the better, as opposed to the good, the bad, or the adequate, and thus lend themselves to more comprehensive forms of understanding. Even radical difference is no obstacle to the process of comparison inherent in the idea of legal traditions. This is recognized by basic works on language, if not in discussion of taxonomic comparative law. In the United States a standard work on synonyms and antonyms thus states, under the word ‘Contrast’, that ‘[t]o *compare* … is to place together in order to show likeness or unlikeness. We *contrast* objects that have already been *compared*. We must *compare* them, at least momentarily, even to know that they are different’.[27] The taxonomic process would thus have lent itself to a decline in understanding of the laws of the world, in attempting to reduce comparison between legal traditions through crystallization of them in the form of legal systems. The historical relations amongst legal traditions are today, however, in the process of restoration. There is a corresponding increase in the active process of comparison of laws.

Though the concept of legal systems has dominated western legal theory for the last two centuries, just as the concept of legal families has dominated that of the scientific discipline of comparative law, the comparative relations of legal (p. 433) traditions remained vigorous at the level of judicial and legal practice in most of the world. This is evidenced by the ongoing relations between European laws and the laws of their former colonies. These relations were never adequately captured by the idea of territorially paramount legal systems, since European laws have never been able to impose

themselves overseas, in a so-called ‘binding’ manner, and it has always been a question of their relative influence in the face of local and non-systemic forms of normativity. The process was the same as that of the spread of the common laws of Europe, within Europe, as local law prevailed over expanding common laws, best conceived as normative legal traditions.[28] Comparison of laws has thus been endemic in much of the world and much of legal practice, as lawyers and judges constantly evaluated and appraised the suitability of application of local or distant (metropolitan) law.[29] In so doing, they deployed a scientific concept, that of comparison, which was more powerful than the concept of categorization practised in the scientific discipline of comparative law.

There is a further dimension of the taxonomic process which is important for the relations of laws in the world. As a descriptive enterprise, the classification of legal systems into legal families concentrated on the dominant or leading characteristics of legal systems in order to assign them to the appropriate family. In so doing it necessarily did away with the teaching inherent in all legal traditions on the relations of each tradition to the other. Legal traditions are not autonomous or independent, and in all cases they have developed means of reconciling their teaching with conflicting opinion, whether recognized as within or without the tradition. European legal history is particularly instructive in this regard, since for centuries multiple legal traditions were applicable on particular European territories and a great deal of law was developed as to how to reconcile these different legal traditions. The *ius commune*, the common law, and the other common laws of Europe were thus reconciled for centuries, through various comparative processes of interpretation, with the different particular laws, or *iura propria*, which accompanied them. The construction of autonomous legal systems, however, meant the elimination of such practices of reconciliation and active comparison, while the classification into legal families only reinforced an apparent lack of need for such reconciliation. As exclusivist legal theories today decline in influence, we are in great need of techniques of reconciliation of different laws which would be applicable on the same territory. The teaching of legal families cannot, however, by its nature, provide such information. There must therefore be some measure of revival of the teaching of legal traditions on their own mutual reconciliation.[30]

(p. 434) The process of reconciliation of laws raises profound questions, however, as to possible bias in the process. To what extent do the concepts of legal families and legal traditions lend themselves to bias in the appreciation of the multiple laws of the world?

V. Eurocentrism

The expression ‘Eurocentric’ has recently become current. It appears to be closely related to the emergence of ‘post-colonialism’, which would be an intellectual movement in favour of a new equilibrium in world relations, as a present corrective to the European colonialism of the past. In itself, Eurocentrism is a perfectly normal and profoundly human attitude, for Europeans and those who admire European achievements. It is used as a mild pejorative, however, to describe European (and now more generally western) attitudes towards non-European phenomena, and more particularly where the persistence of European attitudes gives rise to distortion in the comprehension of the non-European. Reconciliation of the different laws of the world would therefore become difficult if Eurocentric attitudes prevented appreciation of the merits of non-European laws.

There is now widespread criticism of the notion of legal families, and the taxonomic process it entails, as being Eurocentric in character.[31] The notion of legal families would be Eurocentric because the work devoted to it has concentrated very largely on laws derived from Europe, with corresponding marginalization of the other laws of the world. This is not to say that the non-European laws of the world have been entirely ignored. They would rather have been treated in an essentially unsympathetic manner. Thus the treatise of René David famously dealt with civil, common, and socialist law, and then with all other laws of the world in a fourth section entitled ‘Other Conceptions of Law and the Social Order’.[32] This was described by René Rodière as a ‘pocket-emptier’ (‘vide-poche’) and as making as much sense as a jurist from the islands of Touamoutou lumping together civil, common, and Islamic law in the same ‘family’.[33] David's treatment was, however, broadly representative of the taxonomic school's representation of non-Western laws. This was on occasion defended. Rodière, in spite of his criticism of David, argued that the only ‘true’ comparison which was possible was that which took (p. 435) place within the ‘christianized’ or ‘civilized’ world, [34] reflecting the limited view that comparison is only possible of similar entities or concepts. David justified his exclusion of Jewish law on the basis that its sphere of influence was (even) ‘incomparably’ less than other laws, in spite of its ‘historical and philosophical interest’.[35] Treatment should thus follow present demographic importance as opposed to intellectual and historical influence.

The explanations offered by the taxonomic school of their treatment of non-western laws did not acknowledge, however, the inherent bias of the concept of legal families in favour of western concepts of law, and notably in favour of the concept of the legal system. Western legal traditions are the only ones of the world which have developed the concept of a legal system, and the only ones of the world which purport to *describe* law, notably in terms of legal families, as opposed to simply living according to it. There are thus no candidates for inclusion in the legal families of the world other than the legal systems which western laws have inspired. The project of categorizing the laws of the world was in reality a project of categorizing nation-states and their legal systems, and all nation-

states are conceived in terms of the sources of law recognized by western traditions. The *Rechtsstaat* or State of Law is one which is founded on western law. So it really was necessary to categorize states according to criteria of western law (civil, common, socialist) since there were no other types of state. States inluenced by non-western forms of law could incorporate such laws into their structures in some measure but, as states, inevitably did so with western instruments of state law. Non-western laws were thus inevitably seen as non-law ('Other Conceptions … of Social Order') or as law which was relevant to the taxonomic process only to the extent it had received state approval. Since this was often not the case, appreciation of non-western law was rare and haphazard, essentially perceived as beyond the taxonomic process. Only the human importance of such laws favoured some measure of analysis of them.

It is possible to see this exclusionary tendency of taxonomic comparative law as a product of comparative law thinking of the nineteenth and twentieth centuries, but such thinking is itself rooted in profound tendencies of western law and western legal education. Since the origins of contemporary legal education and research, in the twelfth century, western lawyers have taught, and learned, only one law, originally the *ius commune* derived from Roman law, in the universities of both the continent and England, then the common law, in the Inns of Court, then the law of the state, in public institutions of education. This may be seen largely as the result of the joint influence of the Holy Roman Empire and the Church, both of which were oriented towards the idea of a single, universal law, the *ius unum*. There was thus little or no teaching of the *iura propria* of Europe, the laws of the people. Comparison was avoided, and it has been said recently that (p. 436) this was the case because of a widespread fear of 'contamination' through the process of comparison. To say that God was larger than the human person, even infinitely, was to measure God from the perspective of the human person.[36] It was therefore a major development when some formal teaching of 'comparative law' became recognized in the nineteenth and twentieth centuries, but this recognition and teaching of foreign law remained subject to profoundly anchored notions of the nature of law.

The movement away from the concept of legal families and towards that of legal traditions may thus be seen as a movement towards a more open and objective means of appreciation of diverse laws. The conclusion is itself a comparative one and there is no suggestion of objectivity in an absolute sense, which may be illusory. The concept of legal tradition would be less burdened, however, with the characteristics of western legal thought than that of legal families. Conceived as normative information, the concept of legal tradition would be broad enough to include all the laws of the world, while still allowing crystallization in the form of specific traditions corresponding to particular beliefs and circumstances. Religious laws thus rely explicitly on the notion of tradition, as do the infinitely varied forms of *lex non scripta*. Western lawyers also rely on the concept of western legal traditions, in spite of widespread notions in the contemporary western world of a 'modernity' somehow divorced from the long history of western thought. Nor would the notion of legal tradition be somehow antagonistic towards the idea of legal

systems and legal families, since these represent particular traditions of western legal development. Western legal systems would thus rest, not on presumed basic norms or inexplicable general habits of obedience, but on a vast body of normative legal information which gave rise to the contemporary concept of a legal system.

The concept of legal tradition thus allows comparative appreciation of laws of the world which are non-systemic in character. They need not be filtered through state systems in order to be included in a taxonomic process of categorization, but may be appreciated as normative information with their own criteria for human grouping. Still more advantageously, they may be seen as influencing, in greater or lesser degree, the structures of contemporary states. The state and its legal system thus becomes no longer a positive construction, which either exists or does not exist according to criteria which are difficult to define, but a place of meeting and potential reconciliation of different laws.

The notion of legal tradition would thus be more apt in conceptualizing contemporary legal relations than that of legal families, and this involves appreciation of these ideas in the contemporary state of the laws of the world.

(p. 437) VI. Legal Families, Legal Traditions, and the Laws of the World

It has been remarked (above, Section I) that both new and old forms of law are today of increasing influence, with a corresponding decline in influence of the formal law of the state. It is also the case that populations today are mobile as they have never been before, and that all states contain minorities who may be more or less constant in their adherence to one form or another of non-state law. All of the non-state laws in question are laws of great persuasive authority, and the older forms of them may have exerted this persuasive authority over millennia. The newer forms of transnational law find their justification in contemporary need, modern technology, and deliberate human collaboration. To what extent can the concepts of legal families and legal traditions speak to these contemporary circumstances?

The constant problem for the taxonomic project of classifying national laws into legal families has been the choice of criteria for classification. In the formal language of scientific taxonomy, it has not been the ‘extension’ of the classification which has created the difficulties, the listing of cases to be classified, but rather its ‘intension’, the listing of properties which characterize the cases.[37] Vanderlinden lists fourteen criteria which have been used, including race, culture, origins and history, sources, technique, structures, professionalization, doctrinal autonomy, and others, along with the authors who have deployed them.[38] It has been said that there are as many classifications as there are

comparatists, and the number and variety of classifications is itself an indication of the failure of the enterprise. The legal families enterprise would thus have become the 'legal families trap', in the present circumstances of the world.[39] There appear to be two fundamental reasons for this.

The first is found in the persistent tendency of the taxonomists to classify according to a limited number of criteria and even a single criterion, however fluid it might be. The classification would tend to the 'monothetic' as opposed to the 'polythetic'. All laws of the world would thus speak in some measure to this limited number of criteria of classification. In a time of increasing multiplication of sources of law in a given territory, the nature of the classification process thus requires concentration on a limited range of explanatory concepts, to the necessary exclusion of others. Are the civil and common laws today 'hermetically sealed' (p. 438) from one another, or converging? Is the United States of America a civil or common law jurisdiction? What of China? In what family should the law of the European Union be classified? Are rules of product liability the product of common or civil law thinking? Is there a socialist legal family today? To what extent can a legal system be said to have 'failed'? These are all questions which pose fundamental problems for the taxonomic project. It is not that no answers can be given. It is rather that the answers will not convince, since the entire enterprise appears too crude or simplistic to respond to the fluidity of present circumstances. This is inevitable with 'limited feature classification', [40] since the multiplication of characteristics in an object of classification results in the classification system losing plausibility and practicability.[41] The problem would not have been cured by the multiplication of criteria for classification, since this has resulted in a collapsing of the multiple criteria into a larger, composite factor.[42]

The second problem is a still larger one, and involves the entire project of submitting legal traditions to criteria imposed by the taxonomist. This problem remains whatever the criteria and whatever their number. The major legal traditions of the world are themselves encompassing phenomena. They deal with life, death, and all between, in a normative manner. They are all different from one another, from basic points of departure or world-views down to the most precise forms of day-today regulation. Yet they also speak and relate to one another, in comparative terms (above Section IV). What criteria can be constructed by a contemporary comparative lawyer, even drawing from knowledge of the traditions, which could encompass and order all of the laws of the world in a way which respected each of them and which also reflected the dynamic amongst them? No one has been able to do so because it is unlikely in the extreme that anyone could. No contemporary, constructed criteria can be imposed on such complex normative phenomena. The same conclusion has been suggested by some social science observers, expressing fundamental criticism of the possibility of classification of social phenomena. Any given system of classification would thus inevitably be arbitrary.[43] Such a conclusion would be devastating for classificatory social sciences and for the taxonomic project in

comparative law, as suggested by taxonomic practice to date, but this would be without prejudice to the ongoing process of comparison of laws in the world.

This more advanced scientific process of comparing laws to one another is entirely compatible with the concept of legal tradition, which because of its nonpositive character is suitable to the current flows of legal normativity in the world. Territory has become largely irrelevant to the relations of legal traditions, since a tradition other than one's own may provide a model over any terrestrial space, in (p. 439) societies now described as networked.[44] It is symptomatic of this state of affairs that a call has thus been made recently in Europe, home of the legal system, for admission of tradition as a source of law to complement the inevitable inadequacy of state law. Tradition would here include 'comparative law' and what is meant by this is not the macro-process of taxonomy, but the issue-by-issue bringing together (*com-parare*) of different solutions.[45] Legal traditions thus influence, though do not displace, one another. They may thus coexist as a matter of degree and correspondingly provide a means of conceptualization of laws which overlap in some measure in their application in a given territory. They also provide a source of obligation and legitimation and are thus essential to the decisional responsibilities of the lawyer and judge.

VII. Conclusion

The concept of legal families maintained the law of other peoples in western view at a time of legal scientism and legal nationalism, in the nineteenth and twentieth centuries. It did so by accepting the idea of national legal systems and the possibility of taxonomic description of them. Legal comparison was thus undertaken at a so-called 'macro' level, but the efforts of taxonomic categorization foundered on the difficulty of fixing criteria for membership in the legal families and the difficulty of actually comparing legal systems perceived as autonomous and static. As communication between the peoples of the world accelerated in the late twentieth century it became more and more evident that national legal systems could no longer be treated as autonomous and sovereign, as both new and ancient forms of non-state law asserted themselves. The notion of legal traditions allows a conceptual understanding of the relations of laws conceived as normative information. There can thus be multiple laws applicable in a given territory, with varying degrees of influence, since the concept of legal tradition is one which accommodates multiple sources of law and gradations in the force of their normativity. The process of comparing legal traditions is the ancient one of bringing together (*com-parare*), without prejudice to the ongoing existence of that which is compared, in order to achieve the most just solution of whatever problem has arisen.

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Notes:

(1) René David and John E. C. Brierley, *Major Legal Systems in the World Today* (3rd edn, 1985), vii.

(2) See eg, H. Patrick Glenn, 'A Transnational Concept of Law', in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003), 839; H. Patrick Glenn *On Common Laws* (2005).

(3) John Langbein, 'The Influence of Comparative Procedure in the United States', (1995) 43 *AJCL* 545, 547, cited in Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems', (1997) 45 *AJCL* 5, 10.

(4) Jaakko Husa, 'Classification of Legal Families Today: Is it Time for a Memorial Hymn?', (2004) 56 *Revue internationale de droit comparé* 11, 13.

(5) Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the 20th Century', (2002) 50 *AJCL* 671, 677; and see John H. Merryman, *The Civil Law Tradition*, (2nd edn, 1985); Mary Ann Glendon, Michael Gordon, and Christopher Osakwe, *Comparative Legal Traditions* (1994); Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996); H. Patrick Glenn, *Legal Traditions of the World* (2nd edn, 2004).

(6) David and Brierley (n 1), 4–5.

(7) Leontin-Jean Constantinesco, *Traité de droit comparé*, vol III: *La science des droits compares* (1983), 55 ff.

(8) David and Brierley (n 1), 23; Husa, (2004) 56 *Revue internationale de droit comparé* 13; Esin Örücü, 'Family Trees for Legal Systems: Towards a Contemporary Approach', in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (2004), 359; Jacques Vanderlinden, *Comparer les droits* (1995), 309.

(9) Glenn (n 5), ch 1.

(10) David and Brierley (n 1), 21; cited approvingly in Hein Kötz, 'Abschied von der Rechtskreislehre?', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 493, 494.

(11) Reimann (n 5), 677.

(12) Joseph Raz, *The Concept of a Legal System* (1970), 34; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979), 81.

(13) Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999), 113.

(14) Raz, *Authority* (n 12), 242–5; M. B. E. Smith, 'Is There a Prima Facie Obligation to Obey the Law?', (1973) 82 *Yale LJ* 950 ff.

(15) Glenn (n 5), 23.

(16) Rudolf Carnap, *Logical Foundations of Probability* (1950), 12. Quantitative concepts allow still further precision, if quantification is possible, and provide a more precise means of comparison.

(17) Carnap (n 16), 10, 12.

(18) Constantinesco (n 7), 241.

(19) H. L. A. Hart, *The Concept of Law* (2nd edn, 1994), 24.

(20) Hans Kelsen, *Pure Theory of Law* (trans M. Knight, 1967), 330, 332.

(21) Constantinesco (n 7), 245.

(22) The remark is limited, however, to the taxonomic school, and much distinguished comparison of laws has taken place in what is often referred to as 'micro-comparison', though the expression is not an entirely happy one.

(23) John Merryman, David Clark, and John Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (1994), 1.

(24) Constantinesco (n 7), 423.

(25) Heinrich Scholler and Silvia Tellenbach (eds) *Die Bedeuting der Lehre vom Rechtskreis und der Rechtskultur* (2001), 11.

(26) Ibid.

(27) James C. Fernald, *Funk & Wagnalls Standard Handbook of Synonyms, Antonyms, and Prepositions* (1947) (emphasis in original).

(28) Glenn, *Common Laws* (n 2).

(29) For the present acceleration of comparative legal practice, see H. Patrick Glenn, 'Comparative Law and Legal Practice: On Removing the Borders', (2001) 75 *Tulane LR* 977 ff.

(30) For the teaching, see Glenn (n 5), chs 3–9, in the fourth section of each chapter.

(31) Glenn (n 5), 164, with referencess; Mattei, (1997) 45 *AJCL* 5, 8; Vanderlinden (n 8), 416; Husa (n 4) 579.

(32) David and Brierley (n 1), 453.

(33) René Rodière, *Introduction au droit comparé* (1979), 26, 27.

(34) Rodière (n 33), 25, 30.

(35) David and Brierley (n 1), 29.

(36) Xavier Thunis, ‘L’empire de la comparaison’, in Francois R. van der Mensbrugghe (ed), *L’utilisation de la méthode comparative en droit européen* (2004), 5 at 6.

(37) H. Feger, ‘Classification: Conceptions in the Social Sciences’, in Neil Smelser and Paul Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (vol III, 2001) 1966, 1968.

(38) Vanderlinden (n 8), 328.

(39) Husa, (2004) 56 *Revue internationale de droit compare* 32, citing Harding.

(40) Hiram Chodos, *Global Justice Reform* (2005), 39.

(41) Feger (n 37), 1968 (‘comorbidity’ in medical patients).

(42) Chodos (n 40), 39.

(43) Feger (n 37), 1972 (citing Galt and Smith).

(44) Manuel Castells, *The Rise of the Networked Society* (2000).

(45) Eugen Bucher, ‘Rechtsüberlieferung und heutiges Recht’, (2000) 8 *Zeitschrift für Europäisches Privatrecht* 394.

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