Macro-Comparative Law – Reloaded

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Abstract This article deals with macro-comparative law by making use of the metaphor of 'reloading'. Legal family, culture and tradition are regarded as key parts of the conceptual software of comparative law. The metaphor of reloading is used as a device for seeing macro-comparative law in terms of starting afresh without rejecting the old notions. The article shows that, despite differences, these macro-constructs overlap each other even though their methodologies and disciplinary frameworks differ. Hong Kong law, Dutch legal culture and Hindu legal traditions are used as illustrations. It is argued that the key macro-notions can be used simultaneously, and that there is no black-or-white logic requiring only one conceptualization. In short, what needs to be removed is the taxonomical objective of twentieth century comparative law. This means embracing the paradoxicality of the world of law today and accepting commensurable overlapping conceptualizations.

Keywords: comparative law, legal families, legal cultures, legal traditions

1. Introduction

Through the comparative study of law and legal systems, their intellect and imagination, we have developed epistemic tools to understand the nature of law – from individual rule to global scale – as we study modes of legal thinking in different societies and human communities encompassing legal language, myth, legal history and legal philosophy. This endeavor has not only taught us many things about law, but also about the nature of our attempt to understand law on a global scale. It turns out that some of our conceptual tools are, if you like, evergreen in their nature. In the field of comparative law, one evergreen tool has been legal family i.e. it refuses to disappear, or is morphed into something at least seemingly different. Even today 'many, if not, most, comparative law books and treatises continue to be organized around this framework'.[1] There seems to be no way of escaping the overarching epistemic grip over comparative law theory of the legal families approach.

[1] Mariana Pargendler, 'The Rise and Decline of Legal Families' (2012) 60 AJCL 1043, 1043

This article deals with the theory of comparative law by making use of the metaphor of *reloading*, which is derived from the world of computers.[2] What this metaphor evokes is rather simple. When computer programs reload they start a program over again. This normally happens when a program starts to act strangely. Often the reason for this strange behavior is that the program has a programming problem or, more importantly in this context, it conflicts with other software. The key idea behind reloading is that shutting down will restart the software and, thus, make the problem disappear. The problem may be caused by the program itself, or it might be that outside factors are causing the strange behavior that creates, in turn, a need to reboot the computer.

The underlying assumption here is that today's comparative law theory is acting strangely and, moreover, that this strange behavior calls for reloading the macro-comparative law's theoretical program. All the same, this reinstalling does not require the creation of a new software but instead refers to reinstalling the malfunctioning components of the software that are already installed. In practice, this means that no new macro-concepts or notions are being constructed or proposed in this article.[3] The situation at hand is rather such that, much like malfunctioning software, the present sub-programs of macro-comparative law (families, cultures, traditions) are not performing well together. For these reasons, this article seeks, in a sense, to overwrite incompatible parts of macro-comparative law's theoretical program that are not working anymore or are not functioning together. This overwriting requires relocating some of the existing macro-comparative law information and replacing certain parts with new suitable particles; this is the case especially concerning the relations between key components. Importantly, today's macro-comparative law theories (sub-programs) have more or less failed to function together and have thus made the comparative law theory act strangely i.e. in a incoherent and non-analytical manner. As a result, there is no clarity concerning the proper usage of macro-constructs; what to use, when to use, how to use, and so on.

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[2] I will frequently use the expression 'comparative law' (*Rechtsvergleichung*, *droit comparé* meaning the same, although not literally) in this article in a very broad sense as to mean the comparative study of law. I am aware, nonetheless, that for some 'comparative law' may refer to a rather old-fashioned positivistically oriented approach. However, the latter meaning is not assumed here. Accordingly, notions of 'comparative legal studies' could also be used, even though this is not done in this article.

[3] It has been suggested that comparative law would be in need of a fresh start when classifying legal systems globally. See Esin Örücü, 'Family Trees for Legal Systems: Towards a Contemporary Approach' in M Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004)

The applied metaphor relies essentially on the idea of 'reloading' in the sense that in general comparative law heuristics, we should start afresh. However, the argument in this article does not otherwise draw profoundly on computer related vocabulary; rather, the goal is to fuse different macro-approaches in a novel compatible and tapestry-like manner without claiming that one-size-fits-all. In essence, as defined by Kenneth Burke, metaphor is a 'device for seeing something in terms of something else'.[4] In this case, it is about conceptualizing macro-comparative law's key notions in the term of 'reloading'.

To continue the metaphor, like the software code, incompatible groupings and classifications of legal systems are causing a system failure in the software.[5] This failure can be seen in the way various competing macro-constructs of comparative law prevent us from grasping the totality of the world's legal systems in a comprehensive manner. For one thing, because notions compete with each other, there is no coherence between theoretical macro-comparative law programs. To function properly or even tenably would require having an overall theoretical framework for different conceptualizations of legal systems in the world. The purpose of this article is to discuss a possible solution to these problems by seeking to explain the relationships between various macro-constructs in a new manner. The discussion here omits the public/private distinction and addresses examples from both public and private law, although it is evident that traditional classifications were made exclusively on the basis of private law.[6] The reloading proposal made here is important for comparative law in two respects. The first is that it is advantageous for comparative law to be freed from rigid taxonomies which imitate scientific precision poorly. The second is that comparative law's theoretical and conceptual deposit should not be impoverished because the world of law is a very diverse sphere where one-size-fits-all methodology seldom works. Despite this, it would be a mistake to claim that there will not also be other attempts to reconstruct classical macro-comparative notions. Importantly, recent scholarship in the field of constitutional law is an area where deconstructions oriented towards private law have been attempted.[7]

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[4] Kenneth Burke, *A Grammar of Motives* (University of California Press 1969) 503

[5] This article does not deal with the factors behind legal family typologies and their changes. For a detailed discussion, see Pargendler (n 1)

[6] It has been pointed out by Mark Van Hoecke that comparative law understands, first and foremost, 'legal system' to mean national systems of private law. But, as Van Hoecke says, this definition has become increasingly difficult. See Mark Van Hoecke, 'Do 'Legal Systems' Exist?' in SP Donlan and L Heckenhorn Urscheler (eds), *Concepts of Law: Comparative Law, Jurisprudential and Social Science Perspectives* (Ashgate 2014).

[7] See, eg, Thomas Fleiner and Cheryl Saunders, 'Constitutions Embedded in Different Legal Systems' in M Tushnet and others (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013)

The remainder of this paper is organized as follows. In chapter 2 the key dimensions of macro-comparative law are discussed, and its key notions are highlighted as a kind of comparative law system software. Chapter 3 discusses the existing software by explaining the existing core macro-constructs, which are legal families, legal cultures and legal traditions. Chapter 4 contains an attempt to create a new order for macro-constructs by reinterpreting them in such a manner that they fit satisfactorily together. In the fourth chapter there are three short case studies or examples highlighting the relevant qualities of the core macro-constructs. These illustrative example cases are Hong Kong's law (member of common law legal family), the Netherlands (the Dutch legal culture), and the Hindu law (a legal tradition). Finally, chapter 5 discusses the conclusions of this study.

2. Setting the Scene: Macro-Comparative Law

Above, the notion of macro-comparative law has been referred to. But what, in fact, is it? In comparative law literature the discipline is normally divided into two main areas: micro-comparison and macro-comparison. Micro-comparison deals with specific legal institutions or problems, whereas macro-comparison is interested in the legal profession, the spirit and style of law or the emblematic methods of thought and characteristic legal procedures of different legal systems.[8] In essence, macro-comparative law is the study of whole systems and not particular legal institutions (e.g. marriage, contract and so on) or specific legal questions.[9] Accordingly, systematization, grouping and classification, and often also taxonomization of the legal systems of the world lie at the heart of macro-comparative law.[10]

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[8] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 4-5. This edition is a translation from the German original: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (1969). The original version was first published in 1969 (oddly, part 2 was published first and it was only then, two years later in 1971, that part 1 come out).

[9] Gilles Cuniberti, *Grands systèmes de droit contemporains* (3rd edn, LGDJ 2015) 21-22

[10] For an earlier discussion of the various approaches to the classification of legal families, see Åke Malmström, 'The System of Legal Systems: Notes on a Problem of Classification in Comparative Law' (1969) 13 Sc St L 127 and Helmut Heiss, 'Hierarchische Rechtskreiseinteilung. Von der Rechtskreislehre zur Typologie der Rechtskulturen?' (2001) 100 Zeitschrift für Vergleichende Rechtswissenschaft 396

In this context, as well as throughout this article, the underlying notion of 'legal system' is used in the broadest possible sense of the word.[11]

2.1. Macro-Comparative Law as a Part of Comparative Law

Macro-comparative law has always sought to answer one fundamental question: Can the great number of legal systems of the world be divided into a few large entities, i.e., families, groups, spheres, cultures, traditions or equivalent macro-constructs?[12] The idea of categories and ideal types probably came from historical sociology and was later turned into a method of law and economics (so-called legal origins scholarship). This discussion concentrates on comparative law literature, even though the methodological connection between historical sociology and macro-comparative law seems quite plausible.[13]

Typically, macro-comparison places people, central legal actors and institutions in the foreground, whereas micro-comparison underlines the role of individual rules, cases and practices.[14] In the same way, the underlying idea behind macro-comparison is that, by means of macro-constructs, the comparatist can organize the plural and sometimes mosaic-like reality of a given legal system under study into a comprehensible generalized entity (sources of law, use of the sources of law, interrelationship between rules, systematics, and key concepts and so on). The overarching idea seems to be that when the central features such as the use of legal sources, methods of legal argumentation, relation between religion and law are basically similar, they belong to the same legal family, legal culture or tradition, thus rendering it possible to explain and discuss foreign legal systems existing as parts of larger entities. For instance, we are fully aware that when we speak of Canadian common law, Italian civil law or Chinese socialist law, they are approximations derived from legal theoretical generalizations.

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[11] Essentially, the notion of legal system is not a technical term as noted by Joseph Raz, 'The Identity of Legal Systems' (1971) Cal L Rev. 795, 795. Clearly, Raz's understanding of legal system is different than what is used here, but this basic observation is an important one, and it also works here.

[12] cf Pargendler (n 1) 1043-44

[13] For further discussion, see Jaakko Husa, 'Family Affair – Comparative Law's Never Ending Story?' *Annuario diritto comparato* (Edizioni scientifiche italiane 2014) 25

[14] cf Thomas Lundmark, *Charting the Divide between Common Law and Civil Law* (OUP 2012) 18

In spite of this, macro-comparative law is not and has not been without its difficulties, and so it certainly comes as no surprise that macro-comparative scholarship has been critical towards the attempt to construct global classification or an unblemished taxonomy of legal systems.[15] One of the key points of criticism has been a claim according to which macro-comparative law's attempt to group and classify all legal systems is a fundamentally biased and non-neutral project of global Western governance.[16] This argument is not without merit, as such criticism can be directed towards the comparative law discipline. Besides, the global legal world is not easily divided into well-defined families or other macro-constructs because the world of law is a world of 'legal contaminations'.[17] Our legally polluted world can be seen in the manner by which virtually all systems seem to have at least something in common.[18] Yet – and no comparative lawyer would deny this – there are also significant differences between the various systems of law. Accordingly, despite the rise of the notion of global law, we are far from having a truly cosmopolitan law in a substantive sense.[19]

If we leave the above criticism aside, we can say that macro-constructs like common law or civil law 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 and epistemic community. Alternatively, we can use these conceptualizations when describing our own systems to outsiders. Of course, macro-constructs may be useful for economic analyses of law too. However, this rather contested dimension is not dealt with in this article.[20] Importantly, by means of macro-constructs, crude explanation and analysis may take place even if the content of a legal system is not described by means of overwhelming detailed information. As an ideal type, i.e. a type that has been refined by removing detailed characteristics (a huge amount of detailed qualitative legal data), a macro-construct as such is not to be reduced to

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[15] See, eg, Jaakko Husa, 'Classification of Legal Families Today – Is It Time for a Memorial Hymn? ' (2004) 56 Revue internationale de droit comparé 11 and Mathias Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' (2016) 12 J Inst Economics 579

[16] See Pier Giuseppe Monateri, 'Everybody's Talking: the Future of Comparative Law' (1998) 21 Hastings Intl & Comp L R 825, 839

[17] See Pier Giuseppe Monateri, 'The Weak Law: Contaminations and Legal Cultures' (2003) 13 Transnational L & Cont Problems 579

[18] This idea is the fundamental assumption behind H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, OUP 2010)

[19] For a wider discussion see, eg, Neil Walker, *Intimations of Global Law* (CUP 2014)

[20] See, eg, Simon Deakin and Katharina Pistor (eds), *Legal Origin Theory* (Elgar 2012). For a critical overview of the uneasy relationship between comparative law and law and economics, see Florian Wagner-Von Papp, 'Comparative Law & Economics and the "Egg-Laying-Wool-Milk-Sow"' (2014) J Comp L 137

any real, existing legal system. [21] Put simply, describing Australian or Canadian systems as common law systems does not suffice in order to receive a more detailed view filled with relevant subtleties. To sum up, the macro-construct is the culmination of the typical features of its empirical models; if you like, it is a kind of simplified shadow representation of the intricate real model.[22]

2.2. Macro-Constructs as the System Software

Essentially, to argue that the epistemic problem lies in the macro-comparative law's software means that there is an issue with the program or data, but not a problem with the computer. Of course, in this context, the computer is the field of macro-comparative law which is being regarded here as a legitimate form of comparative law scholarship.[23] But what the metaphorically used term 'software' actually means against this backdrop requires some clarification. Basically, macro-comparative law consists of layers which are concepts (or key notions) constructed by comparative law scholars. In this article they are called macro-constructs which are formed by combining distinctive elements of groups of legal systems.[24] Simply put, these constructs form the software of macro-comparative law's theory.

Macro-comparative law's theory and the constructs are the interface between individual legal systems (hardware) and user applications, i.e. what comparatists actually do. From there it follows that academic legal texts rely on the legal-theoretical language, which is largely the language of macro-comparative law: We speak of common law, civil law, indigenous law, Islamic law and so on. Now, this kind of macro-comparative law consists of several parts that are incompatible today, i.e. incapable of harmonious coexistence or of being used together because they are paradigmatically intended to exclude each other. However, before we can proceed to reorganizing the current macro-constructs, we need to discuss and briefly explain

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[21] See Jaakko Husa, *A New Introduction to Comparative Law* (Hart 2015) 221-222

[22] See for a more detailed discussion on the shadow argument, Jaakko Husa, 'The Future of Legal Families' in *Oxford Handbooks Online – Law* (2016), DOI 10.1093/oxfordhb/9780199935352.013.26.

[23] However, there are some views that doubt the legitimacy of comparative law as a field, David Kennedy, 'The Method and the Politics of Comparative Law' in P Legrand & R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003)

[24] These may be called also by other names. For example, in his article Mattei called them 'patterns of law'. Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 AJCL 5

what the key components of the present software are. Importantly, we do not need to maintain that macro-comparative law's taxonomies and classifications would be an important scientific question.[25] It suffices here to recognize and discuss the key components of the macro-constructs from the point of view of reloading the theoretical program of macro-comparative law. Accordingly, the following discussion is not meant to be exhaustive. Instead, it seeks to point out the main features and related issues.

3. Installed Software – the Major Macro-Constructs

Arguing in the previous section that macro-constructs are a kind of a software for macro-comparative law may lead to other questions. One relevant question is as follows: how can we use a vocabulary originated in the world of computers in macro-comparative law? But in fact, the chosen metaphor is not as disingenuous as one might assume because macro-constructs of comparative law, broadly speaking, have similar underlying features: while they are not exact empirical descriptions of a group of legal systems, they are conceptual devices that provide an overall view of law over the globe and a rough first-step outline for more detailed comparative studies. As such, all macro-constructs contain both empirical and analytical features. In short, macro-constructs are broad epistemic matrixes of macro-comparative law. Generally speaking, macro-constructs may facilitate the study of foreign law and provide a sweeping overall view of a system for a student or an outside lawyer who cannot grasp the substantive contents of a foreign system to any large degree.[26] In what follows, the macro-constructs of *family*, *culture* and *tradition* are explained as parts of the theoretical software of comparative law.

3.1. Families

In the world of macro-comparative law there are two paradigmatic legal family groupings that have been particularly central to the software of macro-comparative law. Their scholarly impact has been multiplied by numerous editions and translations into other languages over

[25] See Vernon Valentine Palmer, 'Quebec and Her Sisters in the Third Legal Family' (2009) 54 McGill L J 323, 335

[26] See Jaakko Husa, 'Legal Families in Comparative Law - Are They of Any Real Use?' (2001) 24 Retfærd 15

the years. These are the renowned groupings by *René David* (1906–1990), and by *Konrad Zweigert* (1911–1996) and *Hein Kötz* (1935–), which are situated at the very heart of what we can call mainstream comparative law.

David is famous for his influential *Grands Systémes* approach, which was mainly built upon the epistemic foundation of the private law of the Western nation-states.[27] He distinguished four great legal families: Roman-German, common law, Socialist law, and philosophical or religious systems. In the last group he included Muslim law, Hindu law, law of the Far East and the law of Africa and Madagascar. However, David's last group was not actually a legal family because the systems allocated in it were quite independent of each other; this is in contrast to the systems within the other genuine legal families with historical relations or actual points of contact. David gave great significance to Socialist law, today drastically diminished. This is because, in his thinking, comparative law acted as a tool for finding certain common ground between the enemies of the Cold War; he wanted to find commonality in the area of law of the socialist states and Western states.[28] The taxonomy and approach of Grands Systémes was long accepted by many as being plausible; in the Francophone world especially, this scholarly tradition seems to have a relatively strong position even today.[29]

After David, the place of orthodoxy in macro-comparative law has, at least outside the Francophone world, been occupied by the influential and widely spread system of legal families by Zweigert and Kötz.[30] They distinguished these legal families after the collapse of the socialist, Romanist, Germanic, Nordic and common law families. Besides these, they also recognized the law of the People's Republic of China, Japanese law, Islamic law and Hindu law. Their basic starting point was to commence from a group of criteria and not to lean on any single criterion. Their most important criterion was that of style: the comparatist must grasp the legal style of a system and use its distinctive features as a basis for classifying legal

[27] Originally published in 1964, today the book is already in its 12th edition. René David, Camille Jauffret-Spinosi, Marie Goré, *Les grands systèmes de droit contemporains* (12th edn, Dalloz 2016)
[28] For a more detailed discussion, see Jorge Esquirol, René David: at the Head of the Legal Family' in A Riles (ed), *Rethinking the Masters of Comparative Law* (Hart 2001)
[29] See Cuniberti (n 9) and Raymond Legeais, *Grands systèmes de droit contemporains – Approche comparative* (3nd edn, LexisNexis 2016)
[30] See Zweigert & Kötz (n 8) part I B

systems into groups. As with their immediate predecessors, the classification was made especially from the point of view of private law.[31]

Within the style of a legal system there were multiple individual factors to be taken into account. These were the historical development, distinctive mode of legal thinking, characteristic legal institutions, sources of law and ideology. In this sense Zweigert and Kötz's taxonomy was a combination of many of the features of earlier classifications. Their most important novelty was, as soon as from the early German editions, the division between Roman and German law. Furthermore, Zweigert and Kötz even recognized the problem with hybrid systems, which are difficult to place within any single family or group of law. Along similar lines to David, they also said that their grouping served the function of introducing the great legal systems of the world. In short, Zweigert and Kötz's method by and large co-insides with David's Grands Systémes approach in a methodological and epistemological sense: formal legal rules and institutions, as well as the historical paths of the Western official law, played a dominant role.

Today, in addition to the legal families of civil law and common law, a third legal family of mixed legal systems can also be discerned. It has been argued that mixed legal systems, such as Scotland, Quebec, Israel and South Africa, are a separate legal family with common characteristics alongside civil law and common law systems.[32] Mixed legal systems typically simultaneously contain key characteristics of other legal families, albeit with different routes towards the hybridity of the legal system. According to Palmer, the third legal family is 'conceived for purposes of convenience, utility, and explanatory power', and it can be used 'only if it provides better insights than comparative analysis has provided in the past'.[33] As with the approaches of the other legal families, the third legal family approach also gives great weight to written law and the pedigree of official legal institutions by disregarding the contexts of law. This brings us to the next section, where we discuss legal cultures.

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[31] See Jaakko Husa, 'Legal Families' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Elgar 2012)
[32] See Vernon V Palmer (ed), *Mixed Jurisdictions Worldwide: the Third Legal Family* (2nd edn, CUP 2012)
[33] Palmer, 'Introduction' in (n 32)

3.2. Cultures

The notion of legal culture is a relatively recent newcomer to the world of comparative law. If one reads older literature there is rather scarce use of this concept; perhaps only a passing mention here and there.[34] When *Ehrmann*'s book, using the very concept of 'legal culture' in the context of comparative study of law, was published in 1976 the use of the concept was still in its infancy compared to today.[35] But, taking stock of today's scholarship, the situation is evidently different. There is a repeated use of this concept, which is entertained, normally, to denote the versatile, purely non-legal embedding of law: history, language, society, politics, and so on. Moreover, this notion is used by many scholars – not only comparatists – and for many purposes. For the present purpose, the focus is on comparative law theory, where legal culture is used as an alternative macro-level conceptualization or substitute for legal family.

Obviously the notion of culture differs from the notion of family as a macro-construct describing a group of legal systems. But where did it come from? We may, perhaps, trace the growth of legal culture back to the influential writings of *Friedmann*, whose contribution has been understood to refer to the external attitudes, ideas and expectations concerning law, i.e. especially to those who are not looking at law from inside, or doctrinally, as jurists do.[36] From this angle the mainspring in using legal culture is that it seems to contain a methodological promise to comparative law, i.e. it surpasses the doctrinal and narrowly historical view dominating the legal family approach.[37] This is an important point because by using such an open concept as legal culture (as opposed to the narrower 'legal system', which reflects positivism) there would be a possibility to transform comparative law to become more sociologically meaningful by bringing in 'larger frameworks of social structure and

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[34] For example, Kamba spoke of intra-cultural and cross-cultural comparisons and referred to 'different cultural and socio-economic backgrounds' (eg English, French, African) and quoted earlier literature that mentioned also 'the cultural background'. WJ Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 ICLQ 485. Of course, however, such a handy concept has been in the background or otherwise present in the writings of earlier comparative law authorities. See also Jacques Vanderlinden, *Comparer les droits* (Kluwer 1995) 326-327

[35] Henry Walter Ehrmann, *Comparative Legal Cultures* (Prentice-Hall 1976)

[36] Roger Cotterell, 'Comparatists and Sociology' in (n 23)

[37] Örücü describes the intellectual climate in which this promise is received by saying that: 'We as comparative lawyers see the need for such understanding and yet require the help of others such as economists, political scientists, sociologists and psychologists in order to grasp true meanings, even when we are looking at our own legal system.' Esin Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff 2004) 45

culture', which would, in turn, 'reveal the place of law in society'.[38] However, it remains a fact that as a large, or even almost all encompassing concept, legal culture is awkward to place in a genuinely global definition.[39]

In any case, in literature there are some basic observations that can be easily made concerning some of the most characteristic uses of the concept. One typical category of use is to deploy it in order to explain something. For example, we may claim that there is something called Japanese legal culture while we seek to explain or to understand certain features of Japanese law in a very broad and general sense. Often by saying this we use very general factors, such as mentality or social philosophy, which are offered as a way to explain relevant macro-level findings of comparative research. For example, in the case of Japanese law there has been a tendency to say that it culturally emphasizes Confucian social tradition, which is by its fundamental nature harmony seeking and conflict avoiding. By saying this we normally explain the low number of lawyers and low number of civil litigation rates.[40] Along similar lines we have become accustomed to refering to, say, Chinese legal culture (as a certain kind of legal fiction) in a manner that is labelled fittingly – with critical flavor – as 'legal orientalism'.[41] By using the concept of legal culture in this manner, we wish to escape from the mere 'law in books' and hope to place law in a larger socio-cultural context. This epistemic move is reasonable and, in the light of the pedigree of comparative law, also somewhat justified – if you follow those who stress legal culture, you are very likely going to give a different answer to the question 'what to compare' than those who would like to concentrate on 'law in books'.[42]

This usage of legal culture is characteristically restricted to a certain system or to a certain geographical area. In essence, it is a macro-construct patched up by comparative legal scholars who do not wish – or deem it otherwise problematic – to use legal families belonging to more traditional comparative law. In the former meaning we may speak of

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[38] David Nelken, 'Legal Culture' in (n 23) 375

[39] See Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd edn, CUP 2006) 173-190. And as critics have pointed out it may have 'just too many meanings for it to be a serviceable concept to use to explain differences in socio-legal attitudes and behaviour', David Nelken, 'Legal Cultures' in DS Clark (ed), *Comparative Law and Society* (Elgar 2012)

[40] See, eg, John O Haley, *The Spirit of Japanese Law* (University of Georgia Press1998)

[41] On this concept see Teemu Ruskola, 'Legal Orientalism' (2002) 101 Mich L Rev 179

[42] See Örücü (n 37) 41-50

Italian legal culture, Finnish legal culture, or Hungarian legal culture, and so on.[43] In the latter meaning we may even coin large areas as belonging to some vaguely studied and perhaps even more vaguely understood legal culture as a sort of a macro-size legal fiction, such as South-East Asia or Africa. In comparison to the legal families approach, the cultural approach is more contextual in its nature; it broadens its scope beyond and outside the official law and doctrine, but does not inevitably look into the more philosophical and broadly understood epistemic-anthropological issues. In essence, legal culture is a socio-legal conceptualization, whereas the notion of legal tradition seems to go beyond the societal dimensions.

3.3. Traditions

Comparative law circles became more familiar with this concept probably due to *J.H. Merryman*'s famous book *The Civil Law Tradition*.[44] Anyone reading that book, or its later editions, will grasp that Merryman's way of defining legal tradition is close to those definitions and uses that are sociological or relate closest to socio-legal studies. Notable comparatist *H. Patrick Glenn* (1940–2014) sought to define, understand and use it differently from Merryman. Glenn's approach represents modern macro-comparison in which the orientation is theoretical and has a modern anthropological and legal-pluralism friendly touch. For Glenn, the most significant legal traditions in the world were the following: the Jewish, civil law, Islamic, common law, Hindu and the Far East legal traditions, and the oral traditions of the indigenous peoples (chtonic legal traditions). Glenn not only dealt with each tradition in its separate box, but also placed them in a parallel position to one other, thus exposing the interaction (present and past) between different traditions. The interaction between traditions is outlined through lengthy processes, not so much by means of individual cases of foreign law adoption or reception. Yet, our view of law and tradition has been

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[43] Eg, Erhard Blankenburg & Freeks Bruinsma, *Dutch Legal Culture* (2nd edn, Kluwer 1994). This may sometimes, in its sophisticated form, take a plural outlook as in John Bell, *French Legal Cultures* (Butterworths 2002)

[44] JH Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press 1969). Later the concept was used in the famous book Mary Ann Glendon, Michael Wallace Gordon and Christopher Osakwe, *Comparative Legal Traditions: Texts Materials and Cases in the Civil Law, Common Law and Socialist Law Traditions with Special Reference to French, West German, English and Soviet Law* (West Group 1985). Both of these books have had numerous later editions.

problematic because Westerners do not want to see ourselves as traditional societies because we are accustomed to contrasting tradition with progressive and independent thinking.[45] Glenn, however, saw a fundamental problem with this. The core-feature of our legal mind has its historical roots in the European past because we were forced to destroy the governance of traditional society in order to overcome the inequalities of the past.[46] But what actually is 'tradition'? According to Glenn, 'tradition emerges as a loose conglomeration of data, organized around a basic theme or themes, and variously described as a "bundle", a "toolbox", a "language", a "playground", a "seedbed", a "ragbag" or a "bran-tub."'[47]

So, tradition is a kind of transmitted information and, accordingly, legal tradition is transmitted information concerning what is law, where we acquire knowledge of it from and the kind of approaches we should use while seeking valid information about law. Legal tradition conceived in this manner is of a positive nature. Accordingly, there are not many sane people who would seriously defend a tradition of corruption, even though it may be an extremely firmly rooted legal tradition of a given country or a society.[48] The same is true for many other examples (Mafia, female genital mutilation, so-called honor killings, and so on).

In Glenn's view, when dealing with the question of relations between legal traditions, the question of identity surfaces. Concerns about identity arise primarily in situations in which there are external contacts, and it is this interaction by which identities are constructed – the 'Other' legal tradition is, in this sense, essential for the process of self-understanding. Simply put, denying the (legal or law-related) value of another tradition makes our own more vibrant. However, this picture is partially false since traditions are not autonomic, but have something in common with other traditions. In this view, things such as color (or ethnicity), state (or

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[45] While listing *Rechtskreis'*es Hein Kötz speaks of common law, civil law and so on, but when he mentions Chinese and Japanese law he refers to *der konfuzianischen Tradition.* Hein Kötz, 'Abschied von der Rechtskreislehre?' (1998) 6 Zeitschrift für Europäisches Privatrecht 493, 494 . Grossfeld hits the mark when referring to Islamic, Mosaic, Hindu and Canon law and the modern Western legal understanding of itself: 'We do not see our own law as falling in any such category'. Grossfeld, *The Strength and Weakness of Comparative Law* (Clarendon 1990) 107

[46] 'For centuries in western thought, tradition has been associated with static forms of social order'. Patrick Glenn, *Legal Traditions of the World* (2nd edn, OUP 2004) 23

[47] Glenn (n 46) 15

[48] Tradition also 'bears within the seeds of corruption, the various forms of human frailty which would convert it to an instrument of perverse and personal ends. All this is the world within, the risks and perils in the internal life of a tradition. There is also the world beyond, the world of other traditions and of the relations between traditions. It too presents its perils'. Glenn (n 46) 29. Menski has the view that often 'tradition' is held to belong in the same category as 'religion' Menski (n 39) 31

nationality) or geography do not form a proper basis for historically conditioned information of law's ontology, epistemology and methodology. Moreover, there are no pure social identities either: 'Each is constituted by tradition and all traditions contain elements of the others'.[49] In this sense, Western legal tradition contains something from the Eastern, and they share common elements and even common themes of discussion, as did Socialist law and Western bourgeoisie law.

It looks as if Western rationality and individualism have received a major boost from the present situation since they are able to influence other traditions or, alternatively, other traditions have been forced to put more effort into using persuasion to defend their traditions. In all Western states, the formal law encounters the religious-based rules of Islam, which may play 'an important role in the lives of islamic people living in the west, whether or not it is recognized by the state.'[50] According to the argument backing the incommensurability of traditions, we, the Westerners, are basically saying that because our legal systems are so different from other legal traditions, we cannot learn from them – traditions are, in all ways, incommensurable. But this untranslatability thesis is not valid because it is denied by human experience. Glenn explained that: 'Knowing only one's tradition is partly knowing others'.[51] In a sense, the very idea is to consult different legal traditions and, by doing so, attempt to identify comparative learning possibilities.[52] This idea is, of course, rooted in the thinking according to which law and general culture/tradition are not separated from each other such as is typically the case in legal families and legal cultural approaches.

4. Reorganizing the Existing Software

[49] Glenn (n 46) 38

[50] ibid 215

[51] ibid 46. The argument here is not as odd as it may appear at first glance. Basically, it has theoretical grounds in hermeneutical philosophy. Gadamer also recognized the same phenomenon: 'To be situated within a tradition does not limit the freedom of knowledge but makes it possible'. Hans Georg Gadamer, *Truth and Method* (2nd edn, Continuum 1994) 361. In this sort of thinking the idea rests upon hermeneutical experience which in turn 'is concerned with tradition', ibid 358.

[52] Also Watson's theory of legal transplants recognizes this interaction and, thus, comparative learning. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 6-7. (This edition contains an afterword, not present in the first edition of 1974, in which Watson comments on some of the criticism, and updates his thinking concerning legal borrowing and change).

Basically, the macro-constructs dealt with above all perform tolerably in their restricted areas and for certain purposes. However – and here is the thing – issues arise. To simplify a great deal: positive law for doctrinalists, contexts of law for socio-legal scholars and epistemic-anthropological dimensions for those seeking to understand how law adapts to its cultural environments under long periods of time. The argument here is not to claim that macro-constructs would fail for their intended specific purposes. Nevertheless, the problem is that they do not work together, i.e. they are incompatible and often openly hostile towards each other. If macro-comparative law's theoretical program is reloaded, then, it is not an unsurmountable obstacle if parts of the software work in different areas and for different purposes, provided that the macro-constructs do not harmfully overlap and cause malfunctions because of the actively *colliding components*. Yet, these macro-constructs form macro-comparative law's conceptual system or a group of related components that ought to fit together, at least to an extent, if we are to avoid an openly conflictual theoretical disarray.

Crucially, the disciplinary pattern is clear: chronologically later macro-constructs claim to be better, at least in some key respects, in comparison to other competing macro-constructs. In other words, they are explicitly or implicitly built on an assumption that other macro-constructs perform poorer in their attempt to depict the global world of law and differing legal systems. Consequently, it is argued here that the existing collection of macro-construct components is possible to organize – reload – in such a manner that parts are arranged to serve a common purpose of global classification of legal systems without inevitable collisions with each other. This is not as paradoxical a feat as it may appear at first appear, but it requires reinterpretation and a certain distance from the rhetorical conceit of mainstream comparative law scholarship. Or, in other words, we can have our cake and eat it.

4.1. Family – Underlining Doctrine and Positivistic Legal History

The previous section pointed out that what separates the notion of legal family from other macro-constructs is the fact that it is built on an overarching and underlying idea of family relations between certain legal systems. If one reads comparative law literature, one detects that the vocabulary and style of writing on legal families tends to be stylistically doctrinal and focuses on official law and legal sources. In essence, legal family contains an idea of direct historical family relations between legal systems. That is one of the reasons why legal family

approaches are strong with common law, civil law and Islamic law but struggle to cope with things like Hindu law, Asian law or indigenous law. The notion of legal family underlines the legal ancestry of official law and its lineage, unlike the notions of legal culture and legal tradition.

Basically, legal systems are perceived as official law relatives that are connected to a certain family through inheritance or by forced marriage (i.e. colonialism). The legal family approach is a historically determined and doctrinally oriented macro-comparison holding that there are relevant actual past interrelations between systems. The idea of a family means that a group of legal systems are related by legal historical contacts: we can have parenting systems like English law for common law systems, children and cousins like Nordic law for civil law, and so on.[53] The point is that interaction or other kinds of contact has once existed in the real world (i.e. as a blood relation in a biological family), as opposed to being merely part of a theoretical narrative based on certain commonalities. Quintessentially, this conceptualization – if we exclude the analytically constructed 'third' legal family – contains an idea of genealogical relations based on ancestry, descent, or other relationships (through transplanting or reception) of all members of the family tree (common law, civil law, Islamic law, and so on).[54] Importantly, though, this does not necessarily mean that legal family approaches would actually take legal history into account very deeply. Hence, legal historical relations are the foundational epistemological assumption rather than an actual scholarly tendency to do actual research in legal history, i.e. legal historical contacts are something that are taken for granted because of the genealogy of formal rules, cases, doctrines and legal institutions. There are many examples, but here we will discuss the legal system of Hong Kong briefly as an example of family relations, i.e. law's blood relations or kin. What is more, this illustration sheds light on how to become a member of the common law legal family.

4.1.1. Illustration of Legal Family: Hong Kong's Common Law

[53] Some have underlined the role of history for the comparative study of law. Watson, in particular, has argued that 'in the first place, Comparative Law is Legal History concerned with the relationship between systems'. Watson (n 52) 6

[54] Descent and kinship as elemental parts of legal families, *see also* Erhard Blankenburg, 'Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany' (1998) 46 AJCL 1, 1-2

Legal systems normally tend to represent only one predominant (internal) legal pattern, although there are many examples of systems following more complicated structures.[55] This is also one key reason why we can patch macro-constructs with some level of internal coherence. In spite of this, in Canada, for instance, the French speaking Province of Quebec clearly differs from the rest of Canada because it follows French civil law, whereas the English speaking parts of the country follow the model of English common law.[56] Hong Kong also follows a similar type of dualistic system but, of course, the historical reasons for this state of affairs are different from those of Canada, although there are also certain similarities related to the colonial heritage.[57] However, whereas in Canada both legal systems are Western, in Hong Kong the two simultaneously existing legal patterns are distinctly different from one another. Whereas Hong Kong places its trust in the independent common law judiciary and the written Basic Law, mainland China may view the judicial application of even its own Constitution 'as potentially threatening to the party leadership'.[58] Accordingly, Hong Kong follows two kinds of legal cultural patterns even though it belongs – for now at least – to the common law legal family. Similar examples could also be South Africa, which offers a fascinating example of many legal families; common law, Dutch Roman law, and the re-emergence of old customary traditions.[59]

Hong Kong has a distinct and unique legal and constitutional history that explains many of the mixed features of its present system of government and law. However, it would be a mistake to regard its special features as a recent occurrence because, 'Hong Kong, from the beginning was fated to be anomalous' concerning the way it was to be governed.[60] And, from

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[55] See Palmer (n 32) 6

[56] In the case of Canada, the term 'bijuralism' is referred to. It's a notion that has emerged as a descriptive term for the situation in which two legal traditions exist within a single State. Accordingly, Canada is regarded as a bijural country because the civil law and the common law coexist legally and in official languages. See, eg, Louise Maguire Wellington, *Bijuralism in Canada: Harmonization Methodology and Terminology* (Department of Justice Canada 2000) http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b4-f4/bf4.pdf. See also Michael McAuley, 'Quebec' in (n 32)

[57] For common law originated in the British Empire and its relation to nation-States, see Glenn (n 18) 262-69 ('embedding of common law thinking in a large number of diverse societies around the world', 262).

[58] Qianfan Zhang, 'A Constitution without Constitutionalism? The Paths of Constitutional Developments in China' (2010) 8 Intl J Const L 950, 962

[59] Moreover, South Africa can be compared to Scottish law, with similar legal cultural transformations, without customary law though. See Cornie van der Merwe, 'The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation' (2012) 18 Fundamina 91

[60] Frank Welsh, *A History of Hong Kong* (Harper Collins 1997) 147

the beginning, there were two sets of legal conventions seeking to govern the colony: English law and Chinese law.[61] Against this backdrop, Hong Kong's law has had a mixed legal culture since the 1840s. In essence 1997, the year of the Handover, did not lead to a drastic change in the mixed nature of the law of Hong Kong. But, of course, the ingredients of the legal mixture changed dramatically. However, 'In Hong Kong, the common law system is still in place'.[62] The Hong Kong Special Administrative Region (HKSAR) has enjoyed significant autonomous self-rule, with human rights and civil liberties provided by the Basic Law and enforced by a common law style judicial system.[63] In the sense of legal families, Hong Kong's law belongs to the common law because of its legal ancestry, official law and internal legal culture.[64]

As is typical for the legal families approach, the historical path of official law is of importance and Hong Kong is no exception to that. First, Hong Kong was a British Crown Colony for more than 150 years after China ceded Hong Kong Island to Britain in 1842. Moreover, in 1898 China leased the area north of Kowloon to the British for 99 years. In 1982, talks began between China and the UK concerning the future of Hong Kong. These negotiations led to the signing of the Joint Declaration on the Question of Hong Kong by the respective Governments in 1984, which affirmed Chinese sovereignty over Hong Kong from 1997.[65] In 1985, the Hong Kong Act provided for the ending of British sovereignty and jurisdiction over Hong Kong for good. From 1997, Hong Kong has been a Special Administrative Region of the PRC.[66] The most important legal document of a constitutional nature is the Basic Law of Hong Kong.[67]

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[61] Welsh (n 60) 138

[62] Junwei Fu, 'China' in (n 31) 137.

[63] From a comparative law point of view, see Guobin Zhu, 'A Tale of Two Legal Systems: The Interaction of Common Law and Civil Law in Hong Kong' (1999) 51 Revue internationale de droit comparé 917

[64] Internal legal culture is typically related to the ideas, behavior and practices of legal professionals. See David Nelken, 'Using the Concept of Legal Culture' (2004) 29 Australian J L Phil 1, 8-9

[65] About the background, see Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, HKU Press 1999) 1-33. See also Welsh (n 60) 502-35.

[66] The official name is Hong Kong Special Administrative Region of the People's Republic of China, in Chinese: 中華人民共和國香港特別行政區 (Jyutping Romanization: zung1waa4 jan4 man4 gung6 wo4 gwok3 hoeng1 gong2 dak6 bit6 hang4 zing3 keoi1 zing3 fu2).

[67] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990, effective as of 1 July 1997).

The first Article in the Basic Law defines HKSAR as 'an inalienable part of the People's Republic of China'. Even though the exact nature of the Hong Kong Basic Law is all but clear, it is undoubtedly an exceptionally important legal document that has a constitutional nature.[68] Notwithstanding, from mainland China's perspective the HKSAR Basic Law does not hold status as a constitutional document and, in fact, there are more than 60 such 'basic laws' in force in the PRC.[69] In the macro-comparative view, Basic Law demonstrates how two kinds of legal cultural heritages can be knitted together within one legal family: Basic Law is a hinge between the Chinese socialist version of civil law and Hong Kong's common law legal culture and heritage.

In a macro-comparative perspective, Hong Kong's past and present is reflected in its legal system, which can be characterized as mixed law. However, in most aspects it is more common law than mixed. By and large, Hong Kong follows the English common law model, but it must also observe – to an extent – the civil socialist legal system of the PRC.[70] This mixture system made up of statute laws is known as the 'One Country, Two Systems' doctrine. This also means that Hong Kong maintains a capitalistic economic system within the People's Republic of China, which follows quite a different economic system and internal legal culture.[71] The Basic Law contains many provisions securing the role of common law in the HKSAR. For instance, Art. 84 provides that the HKSAR courts 'may refer to precedents of other common law jurisdictions'. Generally, this model 'envisages the co-existence of two distinct legal systems alongside one another'.[72] But, these links also cause inconveniences because forging common law and socialist civil law together is not an easy feat. No surprise, then, that at first the common lawyers of Hong Kong clearly overlooked the coexistence of

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[68] About the nature of the Hong Kong Basic Law, see Danny Gittings, *Introduction to the Hong Kong Basic Law* (2nd edn, HKU Press 2016) 36-54

[69] Gittings (n 68) 42 (refers to Michael Dowle).

[70] Art. 8 of Basic Law provides that, 'The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.'

[71] According to the Basic Law's Art. 5, 'The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.'

[72] Johannes Chan, 'Basic Law and Constitutional Review: The First Decade' (2007) 37 Hong Kong L J 407, 407. Chan continues: 'On one side of the border, there is a well-established common law system that is based on Western liberalism and the doctrine of separation of powers…On the other side of the border…Chinese legal system is based on both the socialist system and the civil law system, but it is subject to increasing influence from the common law system in recent years.' ibid 407-8.

'the very different system that applies in the rest of China, where interpretation is not necessarily linked to deciding court cases'.[73] It is hardly a surprise that there are pressures mounting in China against the internal common law legal culture of Hong Kong legal professionals.[74] The relationship between the common law and mainland version of civil law models can be characterized as tense.[75] Tensions become highly visible, mounting to a legal clash, whenever the Standing Committee of the National People's Congress of China issues an authoritative interpretation on Hong Kong's Basic Law.

Crucially, from the point of view of this article, Hong Kong's legal system is classified as belonging to the common law legal family. Hong Kong adopted common law not because it was a virtuous foreign law, but because it was part of the colonial governance of the United Kingdom. In this particular sense Hong Kong really is a member of the common law family, yet its external legal culture is no longer purely of a common law nature. Nevertheless, its legal language, legal education and legal literature are English, which demonstrates how strongly Hong Kong still belongs doctrinally and historically to the common law legal family. However, from the point of view of legal culture, taking into account the effect of mainland China makes the situation more complicated than that.

4.2. Culture – Underlining Socio-Legal Dimensions

Even though legal culture is primarily a socio-legal construction, it may be useful to make the point that not all the uses or definitions of legal culture stem from a socio-legal framework. Instead, they transcend the limits of legal families' legal positivism so that law's internal

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[73] Gittings (n 68) 220

[74] There are lots of examples where foreign judges have been subjected to criticism for allegedly not protecting the public interest against individual interest. For instance, in March 2017 the jailing of seven police officers who beat up a protester led to harsh criticism and even downright anger at the British judge who passed sentence, thus reopening the debate about the number of expats in the Hong Kong judicial system. See Eddie Lee, 'Beijing throws the book at Hong Kong's foreign judges' *South China Morning Post*, March 10, 2017, *available at* http://www.scmp.com/news/hong-kong/law-crime/article/2077521/experts-line-throw-book-hong-kongs-foreign-judges.

[75] Jaakko Husa,''Accurately, Completely, and Solemnly' – One Country, Two Systems and an Uneven Constitutional Equilibrium' (2017) 5 Chinese J Comp L 231

description of itself is replaced by an external description of law. Here we find different socio-historical, sociological, cultural and historical frameworks.[76] Accordingly, legal culture may be defined so that it contains elements from multiple fields that study law – not just doctrinal studies, but sociology, philosophy and history.[77] This almost all encompassing understanding of legal culture is broad, and it seems to contain the necessary elements that we need in order to escape from an approach that would rather conceive law in doctrinal isolation.[78]

Nevertheless, this definition seems to refer primarily to the legal-sociological understanding of the concept; it does not just refer to the manner reminiscent of legal theory, namely when the professional (internal) dimension of law is characterized. In a very broad view legal culture is conceived of as kind of a sum or a bundle of historical, empirical and psychological factors that include law's development, its application, the interests and qualities of professional legal actors, and even the general consciousness of the public.[79] But there seems to be more to it. The macro-construct of legal culture seeks to be more than just a faithful empirical description of legally relevant patterns of social behavior and attitudes towards law within a society.[80] In any case, it exceeds the doctrinal and narrowly historical gaze of the legal families approach.

In essence, legal culture is integrally a methodological framework that plays a certain role within the general methodology of the comparative study of law. Accordingly, we may

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[76] Csaba Varga, 'Legal Traditions? In Search for Families and Cultures of Law' (2005) 4 Acta Juridica Hungarica 177 (Varga, however, actually distinguishes two ways to understand 'legal culture'. The first is in a sociological way, while the second is in a cultural anthropological way in which legal culture is seen as a 'general mode of thinking' which contains an 'underlying world-view'.)

[77] Varga (n 76) 182. Varga's conception contains various elements: 'Legal cultures include ethos, values, conceptual and referential frame related to law, judicial skills and habits, as well as ideology and deontology of legal profession, among others. It is component that gives law a life, makes it dependent from local histories and domestic culture define its orientation, shapes its receptiveness, and, in case of eventual reform, backs or withstands to it'. Csaba Varga, *Transition to Rule of Law: On the Democratic Transformation in Hungary* (Philosophiae Iuris 1995) 85

[78] Obviously one might feel tempted to argue that this definition is poorly analytical. The weakness of this counter-argument can nevertheless be met by denoting the pluralistic nature of law reflecting social reality: 'Le pluralisme juridique est le corollaire du pluralisme social' ('Legal pluralism is the consequence of social pluralism') as Reyntjens says. Filip Reyntjens, 'Note sur l'utilité d'introduire un systéme juridique «pluraliste» dans la macro-comparaison des droits' (1991) 41 Revue internationale de droit comparé 41, 43

[79] See Volkmar Gessner, Armin Hoeland and Csaba Varga, 'Foreword' in V Gessner and others (eds), *European Legal Cultures* (Dartmouth 1996)

[80] In the words of Grossfeld: 'law is an expression of cultural experience, of an understanding exceeding that of single generation' Grossfeld (n 45) 44

distinguish levels of comparative study of law. These are the level of legal-theoretical and legal-dogmatic comparisons, legal comparisons, comparative implementation research and comparisons of legal systems.[81] The latter level contains all the previous levels, but also includes the behavior of those outsiders involved with the law i.e. 'legal addressees'. It is of importance to note that this methodologically driven manner of defining legal culture is not purely sociological because it encompasses the other levels too. In other words, legal norms and legal doctrines, judicial practices and scholarship, application of law and – finally – a larger sociological or even social-psychological component are also taken into account. The methodological spectrum seems to contain the most relevant layers of comparative law's own history; from official texts (sources of law) to empirical contexts. This sort of comparative inquiry does not stay inside the boundaries of formal law or within the methodology available for studying only instruments of positive law and ending up with legal families. Understood in this manner, law is conceived by the comparative legal culture(s) approach as a culturally-situated phenomenon that exists 'within a culture-specific discourse'.[82] Notwithstanding this, the notion of legal culture is first and foremost a socio-legal concept and not a historical-doctrinal construct like legal family. As an example, we next discuss the Dutch legal culture in order to illustrate how legal culture differs from the macro-construct of legal family and how both of these notions – paradoxically, perhaps – may be simultaneously fitting.

4.2.1. Illustration of Culture: Dutch Soft Approach

Until 1648 the Netherlands was a part of the Holy Roman Empire, which largely explains why Dutch law has so many basic similarities with German law.[83] Therefore, it comes as no surprise that Dutch law belongs to the civil law legal family; it exists somewhere between French and German law, yet it has its own distinctive legal cultural features that separate it from both the French and German legal systems. According to *Smits*, 'There is no doubt that the Dutch legal system can be qualified as a civil law system as it has codified major parts of

[81] Gessner, Hoeland, Varga (n 79) 245
[82] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht J Eur & Comp L 111, 124
[83] Blankenburg (n 54) 2

private law and criminal law in codes and meets all other requirements usually attributed to the civil law legal system'. According to this macro-view, Dutch law is situated in between French and German law although it is, in a formal sense, closer to German law. The Dutch Civil Code from 1992, in particular, makes it visibly clear that official Dutch law is close to German law.[84] Consequently, the Dutch legal system is at home in the civil law legal family. However, there are many features that set Dutch legal culture apart from German law. Accordingly, the notion of family seems to be simply insufficient. Often the literature mentions liberal attitudes towards certain emblematic features, which are attitudes towards euthanasia, prostitution, and the use of soft drugs.[85]

Nevertheless, there are remarkable similarities between German and Dutch law if and when the focus is on the letter of the law and the history of formal legal institutions, as is the case with the legal family conceptualization. But although these systems are close to each other on paper, the Dutch legal vision embraces the principle of discretion rather than the principle of legality, i.e. the Dutch notion of *redelijkheid en billijkheid* (broadly 'reasonability') is by and large resorted to. Importantly, this legal cultural feature leads to a non-legalistic and pragmatic legal culture which is different from the German legal culture.[86] In other words, even if Germany and the Netherlands belong to the same legal family (civil law and especially its sub-group German law), they still have different legal cultures. In other words, the legal family approach is not sufficient in order to tell these legal systems apart.

According to the analysis of *Blankenburg*, there are certain key differences between German and Dutch legal culture even though they do belong to the same legal family. This analysis also illustrates how the macro-constructs of legal family and legal culture are not the same thing. Now, Blankenburg distinguishes differing legal cultural patterns of legal behavior by focusing on things like the legal profession, access to justice, courts and litigation, civil litigation and criminal courts.[87] One of the key differences between Dutch and German legal cultures is the fact that there are many more lawyers in Germany. The size of the legal profession reflects the fact that they are not functionally equivalent professions because in

[84] Jan Smits, 'The Netherlands' in (n 31) 620; Blankenburg (n 54) 2-3 ('especially close'), and Husa (n 21) 264
[85] See Smits (n 84) 623. See also Wibo Van Rossum, 'Dutch Legal Culture' in Jeroen Chorus, Ewoud Hondius & Wim Voermans (eds), *Introduction to Dutch Law* (5th edn, Wolters Kluwer 2016)
[86] Van Rossum (n 85) 18
[87] See Blankenburg (n 54) 39

Germany there is a statutory monopoly, whereas in the Netherlands lawyers as a profession face competition from other professions.[88] In fact, the Dutch legal culture has certain general similarities, such as flexibility and the avoidance of legalism, with the Nordic legal culture.[89]

But what actually separates the two members of the very same legal family? Generally speaking, there is a certain Dutch reluctance to go to court straight away. When it comes to access to justice, the Dutch litigants and attorneys are cautious about alternatives to going to court and costs of the judicial process.[90] Moreover, the fact that the Dutch do not spend so much money on the judiciary, but focus rather on things like legal aid and the social outfit of prisons, tells us something about the differences concerning litigation behavior and attitudes towards courts in general.[91] The differences in litigation in Germany and the Netherlands are simply that the Germans produce a clearly higher level of civil litigation, whereas Dutch figures are considerably lower.[92] One explanation for these figures is that in Germany there have been fewer alternatives to avoiding courts.[93] Differences in punitivity have also been significant, and they can be explained by the differing professional mentalities in the two countries: the German 'strict penal positivism' differs from the Dutch 'more circumstantial medical-social work' approach.[94]

In essence, the Dutch legal culture is something we can characterize as tolerant or reasonably flexible: people are accustomed to a state of affairs where there is a largely accepted tolerance concerning the following of legal rules.[95] However, these Dutch features are no coincidence. Rather, they are a part of the Dutch societal atmosphere, which can be seen also in other walks of life. For instance, Dutch politics is based largely on negotiation and compromise because in the multi-party system, no single political party can achieve an absolute majority in the Parliament.[96] The Dutch constitutional culture has been described as

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[88] Blankenburg (n 54) 6

[89] About Nordic (Scandinavian) legal culture see, e.g., Ulf Bernitz, 'What Is Scandinavian Law' (2007) 50 Scandinavian St L 14. See also Jan Smits, 'Nordic Law in European Context' in J Husa, K Nuotio & H Pihlajamäki (eds), *Nordic Law – Between Tradition and Dynamism* (Intersentia 2007)

[90] Blankenburg (n 54) 12

[91] ibid 16

[92] ibid 18

[93] ibid 20. In fact, Blankenburg speaks of 'the Dutch art of avoiding litigation' ibid 23

[94] ibid 32. See also Van Rossum (n 85) 18

[95] Van Rossum (n 85) 16 ('Rules should also only be applied if they serve a goal, and not for their own sake.')

[96] ibid 19

a ‘rather sober or moderate’ with the role of legal Constitution being rather small in the Dutch democracy.[97] Again, this is reminiscent of the Nordic constitutional culture which differs clearly from the continental European models.[98]

One of the overall explanations for the Dutch legal culture is, in fact, not legal at all in its nature. Of practical historical importance is the so-called *poldermodel*, which refers to the Dutch fight against sea water in a country that is largely situated below sea level.[99] This explains more about the Dutch legal mentality than being a member in a certain legal family in a doctrinal and narrowly legal historical sense would. This model has created a high-trust society where the law is no substitute for social trust; instead, the law in practice may function in a non-legalistic and consensual manner. For an outside comparative legal researcher, the fact that the battle against water has shaped the Dutch legal culture so strongly may come as a surprise. Nonetheless, it is a crucial factor to take into account if one tries to understand Dutch law-in-action and to explain why a seemingly (rules, institutions, doctrines, cases and so on) German-style legal system functions with a softer approach, circumventing legal positivism and legalism on the basis of high-trust society features.

In this cultural view, the fact that Dutch law is a member of the civil law legal family and a member of its German sub-division plays no decisive role. In his book about the history of Amsterdam, *Mak* makes it clear how the ‘defence of the land against their greatest enemy: water’ has been important for the Dutch societal, political and legal culture.[100] In a methodological sense the legal culture approach fulfils much of its methodological promise by going beyond the positive law and doctrinal genealogy; it is more than what the doctrinal-historical notion of legal family can provide as it allows us to distinguish between Dutch and German law from the point view of macro-comparative law. Then again, we also have to take into account the fact that Dutch pragmatism and social trust is, of course, influenced by other factors too. One important historical reason is that Netherlands has been an open trading

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[97] Maurice Adams & Gerhard Van Der Schyss, ‘Constitutional Culture in the Netherlands’ in M Adams, A Meuwese & E Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* 358, 375 (CUP 2017)

[98] See Jaakko Husa, *Nordic Reflections of Constitutional Law: A Comparative Nordic Perspective* (Peter Lang 2002)

[99] See Van Rossum (n 85) 21-23

[100] Geert Mak, *Amsterdam: a Brief Life of the City* (Harvill Press 2001) 11 (‘State is entitled to prosecute a crime, but it is not bound to do so, especially if the means of prosecution is deemed to be worse than the crime’ ibid 77).

nation for more than five centuries and too rigid a legal system would have been economically impractical. Accordingly, law has been molded to follow political economy.[101] To conclude, the historical paths of Nordic and Dutch legal systems are different; however, the Dutch system is clearly a part of the continental European civil law family, but its legal culture resembles that of the Nordic region.

4.3. Tradition – Underlining the Living Roots of Law

If we follow Glenn's theory we can see that his legal traditions differ from families or cultures. In fact, there are traditions that exist within larger traditions. Glenn mentioned such lateral traditions as *casuistry* (Roman, Talmudic, Islamic, common law and even perhaps Hindu law).[102] He also mentioned *analogical reasoning* (Islamic and common law), fundamentalism and the tradition of the professional jurist. However, the most important lateral traditions are the forms of mega-traditions. One example is the tradition of *universalism,* which may take an aggressive or a more subtle form; regardless, it relies on universalistic ideas that it holds to be true for all (peace, God, rights, metaphysics and the like).[103] The tradition of tolerance is very close to Glenn's main argument, because if 'major legal traditions are to co-exist in the world, without […] violence, imperialism and suppression, it therefore seems necessary to examine somewhat more closely the teaching of different traditions with respect to universalism and […] tolerance.'[104] This kind of view of law differs not only from the doctrinal-historical approach, but also from the socio-legal cultural approach, and draws inspiration from epistemically focused legal anthropology.

If we look deeper into the theory of legal traditions we can see that most such traditions are universally normative. Talmudic and Islamic laws are clearly normative, extending their

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[101] One aspect of this feature has been the use of laymen in Dutch courts. See Corjo Jansen, 'The participation of laymen in the Dutch judiciary 1811-2011' (2014) 20 Fundamina 427

[102] It might be within the limits of the possible that lateral traditions are not easily taken into account by the 'comparative legal cultures' approach. Then again, even traditions have places and times; they do not come from emptiness or outside social groups.

[103] This sort of legal tradition is also a normative tradition because it is at the heart of the universalizing tendency to make a strong claim for normativity: 'Binding no one can scarcely give rise to a claim to bind everyone'. Glenn (n 46) 347. And yet, there are traditions with this sort of tolerance, e.g. Hindu tradition, ibid 292-98.

[104] Glenn (n 46) 347

norms to regulate most aspects of human life. Hindu law seems to allow plenty of room for choice, but if one is Hindu there is no escape from certain norms and rules (see chapter 4.3.3.). Similarly, the Asian tradition (broadly understood) seems to allow free space but, while it rejects much of the formal law, it contains other sorts of social norms regulating behavior. One might be inclined to think that Western law would be the least traditional and the most concerned with granting freedom and rights, but this is a superficial image. The hidden normativity of the Western traditions is that one is obliged to be free and to exercise one's rights.[105] Normativity causes a problem where one would like to develop a theory of reconciling legal traditions: how can reconciliation take place where traditions are normative and require universalism without lapsing into sheer relativism? If we follow Glenn, the answer lies within the complexity of most legal traditions.

Major legal traditions are complex; they contain overlapping internal and lateral traditions that are inconsistent with each other and perhaps not even consistent with the ruling version within their major tradition. This is possible because they have the ability to hold together sub-traditions that are mutually inconsistent. Even so, the traditions entertain a particular way of thinking, as do legal families and legal cultures. This notwithstanding, the major legal traditions are steeped in multivalent thinking even though Western legal self-understanding in particular maintains that Western law is built on bivalent thinking. But what is meant by bivalent and multivalent (legal) thinking?

In short, one may say that bivalent logic insists under all circumstances that one is faced with 'A' or 'Not A'. To simplify crudely: either you have civil law or Islamic law; either you have Talmudic law or common law; either you belong to this legal family or to that legal family; either you belong to the Western legal culture or you belong to the Eastern legal culture, and so on. According to bivalent logic, there are no other possibilities: either you eat the cake or you do not eat the cake. To say that something was 'A and Not A' would constitute logical inconsistency. Applied to macro-comparative law, this would mean that a system is normally conceived of as a civil law system or common law system but not both. But as we already saw above, this is not the case; the realities of actual living legal systems are far more

[105] Glenn also points to one rather interesting factor between civil law and common law; the form of Western legal doctrine 'often claims for itself a universal role'. Glenn (n 46) 268

nuanced than that. Importantly, everything is – according to multivalent thinking – a matter of degree.[106]

Essentially, all major legal traditions are multivalent because they are constructions of a middle-ground allowing constant reconciliation of the inconsistent extreme poles of the tradition. They are also able to overcome the argument of incommensurability so that they hold the legal tradition together. And yet traditions are normative, and complex legal traditions are 'irresistibly normative'. Nonetheless, major traditions do not have any universalizable core, and in fact they offer grounds for (internal) accommodations with other complex major legal traditions. Moreover, there is interdependency between traditions, unlike between legal families or legal cultures.[107] Hindu law is a good example of this kind of legal tradition, which we will look at it more closely in the following section.

4.3.3. Illustration of Tradition: Hindu Law's Presence of the Past

There is a certain parallelism between Hinduism and Buddhism and, as noted by *Berman*, both of these religious belief systems share 'dharma which might be translated as "law" but which should, however, be conceived of more as a kind of sacred law rather than positive State-law'.[108] In any case, we can assume that *dharma* (as the duty to do the right thing) is a

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[106] Glenn (n 46) 351. Menski deals with the concept of 'inter-legality' (originally from de Sousa) and links it directly with Glenn's argument. Menski (n 39) 26-7

[107] 'Chthonic law is used to criticize civil and common law dealing with the environment. Islamic law criticizes civil and common law jurisdictions for their treatment of the poor and the persecuted; western lawyers criticize Islamic criminal sanctions and its limits on human expression and speech. Talmudic law knows that the law of the state is law, and may even incorporate some of it, while itself being cited as a different (and perhaps better) model of law than state law. Civil and common law jurisdictions "borrow" from each other, or create "mixed" jurisdictions, and these processes now appear as western and formalized versions of the exchange of information between complex traditions which has always gone on, in a massive way. Hindu and Asian law exist as layered traditions, those which have developed indigenously and those which have been developed in some manner from western models.' Glenn (n 46) 356-57. Formulated in this way, the position differs from Watson's idea, according to which 'where there is no relationship there can be no Comparative Law'. Watson (n 52) 7

[108] Menski explains that there is 'no one prescription possible' because dharma is 'a very wide concept, something like "rule of law", into which one can fit ideal democracies as well as dictatorships'. Menski (n 39) 12. According to Cuniberti, there is no equivalent in Indian languages for the Western concept of 'law', and they do not separate between 'legal', 'religious' or 'moral' norms. Cuniberti (9) 316. See also Benoy Kumar Sarkar, 'The Theory of Property, Law, and Social Order in Hindu Political Philosophy' (1920) 30 Intl J Ethics 311 ('Dharma is a very elastic term…It really admits of almost all the ambiguities associated with the term "law"' 314-15)

key concept in Hindu law.[109] This kind of law deals crucially with the spiritual precepts through which people may attain enlightenment and nirvana, which refers to the ultimate rebirth.[110] Undoubtedly, Hindu law is quite a slippery notion because it is both a legal system and a religious tradition. Notwithstanding this, it is a good example of a legal tradition that contains both legal and religious elements simultaneously.

The Hindu legal tradition of today is still rooted in the past and emanates from the Vedas, the Upanishads, and other religious texts. It has been transformed by later practitioners from various Hindu philosophical schools, and even later by Jains and Buddhists.[111] An important ancient document is Manu Smriti or 'The Laws of Manu', which is an ancient text that formed the source for Hindu law and social customs for thousands of years.[112] Although The Laws of Manu are sacred in their nature, they differ from many other types of religious laws. Importantly, Hindu legal tradition does not have a sacred code of laws which would be dictated verbatim by God, as is the case in Islamic or Jewish legal traditions.[113] In fact, the codes of Hindu law are based upon the time, place and contemporary circumstances of the people and communities to whom they apply.[114] Crucially, Hindu law is neither a legal family nor does it seem to be a legal culture with definable geographical borders.

As a macro-construct, legal tradition closely resembles an anthropological way to view law. Legal anthropology tells us, among other things, that 'people in local communities often do not distinguish clearly whether and to what extent their norms and practices are based on

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[109] Werner Menski, 'Sanskrit Law: Excavating Vedic Legal Pluralism' (2010) SOAS School of Law Legal Studies Research Paper Series 5-6. Also the linguistic complexity of the ancient Sanskrit texts and concepts causes also problems for the present legal understanding of those texts, ibid 13

[110] Harold J Berman, 'Comparative Law and Religion' in M Reimann & R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 743

[111] In short, vedas are the sacred texts of Hinduism and smritis are rules of conduct that are basically derived from the vedas.

[112] However, a critical point of view may be useful when discussing the Laws of Manu, see Werner Menski, 'Postmodern Hindu law' (2001) SOAS Law Department Occasional Papers 31

[113] Glenn says that the Hindu law books 'are law books of a particular kind', and even though they are derived from divine sources and hold authority they are not structured in such a manner that there is a clear hierarchy. Glenn (n 18) 239. ('Nobody talks about pyramids in hindu law' ibid 290). See also Menski (n 112) 111. They remind us that, as a legal tradition, Hindu law is closer to African laws and other informal East Asian laws than those legal traditions that originate from the Middle East.

[114] This is an empirical fact in the sense that Hindu law is applied to living situations and by living human beings. From the point view of Hindu legal philosophy, on the contrary, the legal sources are not related to any certain time or space, and are instead regarded as 'beginningless (anadi), self-existent and forever immanent'. Glenn (n 18) 291

local tradition, tribal custom, or religion'.[115] In addition, Hindu law shows that it is not only national Indian law, but is also applied widely abroad where it may be recognized as a form of personal law, as in some states in Africa (e.g. Kenya).[116] Yet, it would not be quite right to describe these legal systems as belonging to the Hindu legal family or Hindu legal culture in the sense of macro-comparative law. Moreover, Hindu law can also be found in the West, where Hindu people still follow their traditional law albeit in the form of unofficial law, which is invisible to a narrow gaze centered on doctrinal or official law.

As a legal tradition Hindu law is old, but it too has changed. A significant change in the historical development of Hindu law occurred in the sixteenth century when India fell under Islamic rule, and thus the jurisdiction and administration fell under the influence of Islamic law. Later, the formal position of Hindu law improved in the British period of the nineteenth century, when it was given official status.[117] The British period also meant restrictions in the sphere of Hindu law, because its application was limited to certain fields of law while at the same time the British general law in regard to India was correspondingly expanded.[118] The underlying and unavoidable problem was legal cultural because, as *Shah* explains, '[t]he British were reading Indian society according to their own understanding of state-religion relations'.[119] As a practical result stemming from the Anglo-Hindu law, the classical Hindu law and jurisprudence started to weaken and petrify.[120] The attempts of British judges and administrators to follow Hindu law in their decisions were, due to an insufficient knowledge base that was often distorted, unfortunate for the development of Hindu law. As a result, a

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[115] Jan Michiel Otto, *Sharia and National Law* (Amsterdam University Press 2008) 30 (talking especially about Sharia).

[116] However, the actual role and weight of Hindu law does not necessarily rely on the official law. For example, in South Africa the official legal systems (State law and customary law) are accompanied by the unofficial legal systems like Hindu law, Jewish law and Muslim law. See for a more detailed discussion, Christa Reutenbach, 'Deep Legal Pluralism in South Africa' (2010) 42 J L Pluralism 143

[117] British Crown rule was only formally established in 1858, which ended a century of control by the East India Company (1757–1848). The British influence on the law of India had started already during the East India Company period. Yet, in fact, some form of British rule was in place in India between c. 1600–1947.

[118] Glenn notes that the very nature of the Hindu legal tradition (lacking a clear legal structure in the Western sense) offered relatively little resistance to the expansion of Western law. Glenn (n 18) 311

[119] Prakash Shah, 'The Difference that Religion Makes: Transplanting Legal Ideas from the West to Japan and India' (2015) 10 Asian J Comp L 81, 94

[120] British rule was behind this development and stressed the official law according to the paradigm of the State law. 'Hindu law came to be, under the appellation Anglo-Indian law, "not the sastraic law but the law as declared by the courts themselves"...decisions became win-lose…clarity replaced imprecision, custom became difficult to establish…the role of traditional tribunals declined'. Glenn (n 18) 313

combination of law, not quite Hindu or British, emerged.[121] In general, courts were expected to apply the common law in their decisions, but the possibility remained that Islamic or Hindu law would be applied if the case involved family law or law of inheritance. The basic situation is still the same, even though India, of course, is an independent state.[122] However, by and large the new official law of the independent India changed, and Hindu law went underground and turned mostly into an unofficial law. In contrast, the official law belongs mostly to the common law legal family, although, due to the federal nature of Indian law, its legal culture differs from English common law.[123] Yet, Hindu law did not cease to be a legal tradition with its own claim of normativity concerning religious Hindus. This is true also with indigenous groups and their internal legal traditions in India; however, the analysis here concerns Hindu law as a more extensive legal tradition, not simply as a part of the Indian legal system.[124]

Modern Hindu law is a similar type of personal legal system along with equivalent systems for Muslims and Sikhs. Hence, even though there is change and mutation, there is also continuation and evolution of the Hindu legal tradition. As *Menski* points out: 'there will always remain an element of dharmic foundation in the legal system applying to, and being applied by, Hindu people'.[125] The Westernization of Indian law and Hindu law may only be a superficial phenomenon.[126] In this sense, Hindu law is a legal tradition in the sense meant by Glenn. If we choose to look at Glenn's epistemology from the point of view of academic disciplines, we can sense that he is not to be placed in the ranks of sociology, theoretical jurisprudence, economics, history or linguistics; instead he combined historically sensitive

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[121] See Shah (n 119) 94

[122] Yet, it might be useful to understand that the relationship between law and the colonial empire in India was rather complicated. Imperial law was, importantly, also shaped by Indian legal culture. We might argue that in practice the imperial law had to negotiate with the indigenous Indian legal culture(s). See Sandra den Otter, 'Law, Authority and Colonial Rule' in DM Peers & N Gooptu (eds), *India and the British Empire* 168 (OUP 2014)

[123] Menski (n 112) 7. Yet, the fact that Hindu law largely became unofficial does not mean that it would have lost its significance or as Shah says, 'Hindu law, or Indian traditional laws in general, as centrally composed of diverse…are constantly pushed into the "unofficial" sphere…, as Chiba might say, where they continue to exercise their pull'. Shah (n 119) 96

[124] India's population includes almost one hundred million 'tribal people'. The Indian Constitution (Art. 366(25)) recognises indigenous groups by speaking of 'Scheduled Tribes'. These groups have, to an extent, their own tribal customs and customary laws. See Apoorv Kurup, 'Tribal Law in India: How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better' (2008) 7 Indigenous L J 89

[125] Menski (n 112) 30

[126] Cuniberti (n 9) 347

comparative law with heavy doses of epistemic anthropology and theory of knowledge, with small pinches of relativist ingredients.[127] Consequently, Glenn's notion of 'legal tradition' is theoretically more subtle than the notions of legal family and legal culture. However, it is undoubtedly closer to legal culture than legal family. For lack of a better word, the legal traditions approach may be described as epistemic macro-legal anthropology, and as such it differs from the doctrinal-historical (families) and socio-legal approaches (cultures) in macro-comparative law.

5. Conclusion

Although this article makes only a tentative start on the process of reloading macro-comparative law's theoretical program, one key observation concerning the macro-constructs seems almost inevitable: Families, cultures and traditions overlap with each other.[128] What is more, no clear winner emerges. From there it follows that we may use all of these conceptualizations in the same text without the risk of the text becoming hopelessly incoherent or incomprehensible.[129] But, as we saw above, the three macro-constructs are not similar, and they work poorly together because they are conceived as mutually exclusive. By the same token, if and when we apply multivalent logic, things look different and exclusiveness is shown to stand on shaky ground. Although not all would agree with this perspective, this article has shown that despite differences all the key-macro constructions are close to each other and, indeed, there are no unbridgeable chasms between them if we abandon narrow technical understandings of them. However, this article did not develop an explanatory or predictive theory concerning the simultaneous usage of macro-notions. Yet, it

[127] It is important to make the point that the use of 'culture' and 'tradition' do not follow blindly the distinction between sociology and anthropology since the concept of 'culture' is not alien to the anthropological study of law. See, eg, MW Prinsloo, 'Field Research in Indigenous Law' (1993) 92 Zeitschrift für Vergleichende Rechtswissenschaft 221, 227-28. For a wider discussion, see Lawrence Rosen, 'Comparative Law and Anthropology' in M Bussani & U Mattei (eds), *The Cambridge Companion to Comparative Law* (CUP 2013)

[128] This overlap can be seen especially in mixed legal systems such as Guyana's law, which combines 'Roman-Dutch law and English common law, with an overlay of colonial era and post-independence statute law and a written constitution'. Christine Toppin-Allahar, 'Guyana: "Mosaic or Melting Pot?"' in S Farran, E Örücü & SP Donlan (eds), *A Study of Mixed Legal Systems: Endangered, Entrenched, or Blended* 37, 37 (Ashgate 2014)

[129] See, eg, Wen-YeuWang & Yen-Lin Agnes Chiu, 'The Defining Characteristics of the Legal Family in East-Asia' in (n 13)

was shown above that these conceptualizations are not mutually exclusive – that is the key basis of the *reloading* metaphor.

The legal family approach is typical for a doctrinally oriented (Western) comparative study of law that focuses on legislation and case law. The legal cultural approach takes positive law and doctrine into account, but does not blindly rely on legislation and case law (i.e. official law); rather, it seeks to take into account interrelationships between official law and un-official law, which has to do with the actual behavior of legal actors within a legal culture.[130] In other words, legal families approaches focus on 'law in books' whereas legal cultural approaches look more at the 'law in action'. As *Wibo Van Rossum* explains, the legal cultural approach 'requires more than a historical analysis of what qualifies as "law" or part of "the legal system" in a legal positivistic sense'.[131] The difference between family and tradition, and culture and tradition, is related to the different epistemic nature of these macro-constructs: family and culture both emphasise and start from the assumption according to which legal things – or generally speaking, societal things – related to law are *different* among other peoples.[132] Tradition, on the contrary, is not built so clearly on the epistemology of difference.[133] As is the case with Hindu law, legal tradition is able to survive and exist in many kinds of legal families and legal cultures: traditions may survive in the porous sub-systems of legal families and legal cultures. As a result, we can see that each macro-construct has *an interactive bond* with the disciplinary view of a legal system (in a very broad sense), which is generalized accordingly under the heading of family, culture or tradition.

But where does the proposed reloading lead us? Basically, it seems to offer more possibilities. It is possible to say that a legal system belongs to a certain legal family that is different from the legal culture it belongs to? For instance, if and when we look from the epistemological point of view of an outsider, we may argue that Hong Kong's law belongs to the family of common law, but its legal culture on the whole bears clear Asian legal cultural characteristics, and Chinese law characteristics in particular. As another example, for instance, we can claim that the Dutch legal system belongs to the civil law legal family (sub-group of Germanic law), but in a larger view the Dutch legal culture resembles quite clearly

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[130] cf Blankenburg (n 54) 40
[131] Van Rossum (n 85) 17
[132] cf Van Rossum (n 85) 16
[133] For a larger discussion, see H. Patrick Glenn, 'Legal Cultures and Legal Traditions' in (n 3) 7

the Nordic legal culture in its softness and flexibility. Hindu law, in turn, seems to be able to survive and function under many kinds of legal families and legal cultures ranging from Indian common law to Kenyan African legal culture. And, we can expand this conclusion beyond the confines of this paper: Scotland's legal culture is of a common law type, although in the sense of legal families it does not belong to the common law legal family.[134] Or, for example, we may say that Turkish law belongs technically to the civil law legal family, whereas its legal culture has clear features of the Islamic legal tradition.[135] Here we can see another kind of problem concerning the role of religion in that it used primarily to describe non-Western systems, whereas Western systems are painted as based on reason and secularism. This kind of usage of religion quite likely reinforces the idea according to which the West is fundamentally different. The relationship between religion and macro-constructs is clearly an area for further critical scholarship on macro-comparative law, but that is beyond the scope of this paper

Finally, if macro-comparative law's conceptual framework is reloaded it makes it possible to use the old notions of family, culture and tradition simultaneously. This means that there is no simple black-or-white logic implying that there are only two options that would work for macro-comparative law. According to bivalent logic, the only possibilities are either legal system A or B, because to say that something is A and Not A would constitute logical inconsistency. Paradoxically, this is precisely what works in the world of macro-comparative law if and when its theoretical program is reloaded in the manner proposed in this article. Some groups of systems may rightly be called legal family, whereas others might be described more aptly as legal culture or legal tradition. As we saw above, these notions are not mutually exclusive, hence, we may speak of *reloading* i.e. theoretically rebooting the heuristic conceptualizations without having to abandon them.

The only thing that really needs to be deleted is the taxonomical objective of twentieth century comparative law – particularly the civil law trait – which means embracing the paradoxicality of the world's law, whether it is in the form of families, cultures, traditions or

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[134] 'In some areas common law and civil law can continue to coexist in one system without convergence and without one tradition overwhelming the other'. Elspeth Reid, 'Synthesis or Serendipity? The Case of Mixed Jurisdictions' in (n 13) 157

[135] See, eg, Fatih Öztürk, 'The Republic of Turkey and Women in Divorce Cases' (2012) 1 Human Rights Rev 35

some other overarching generalization.[136] On the whole, if we are ready to conceive the global legal world as plural and divergent, then, it would not make sense to deploy one-eyed epistemology and the accompanying exclusiveness of a one-size-fits-all macro-construct.

[136] cf Glenn (n 18) 173-74