The Future of Legal Families

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Abstract and Keywords

The aim of this article is to give an account of legal families as a comparative law approach and as a classification of legal systems. The text discusses especially the future of legal families. The article begins with a short review of macro-comparative law’s basic approaches and concepts. It then considers the past and present of the basic notions of macro-comparative law, focusing on the classification of legal families and the recent critique of them. Finally, this article examines the new roles of legal families and, in particular, it addresses the possible future utility of legal family as a basic notion and as an approach in macro-comparative law.

Keywords: legal family, comparative law, taxonomic categorization, comparative epistemology, legal culture

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I. Introduction

The underlying idea that laws of different states, regions, nations, peoples, or cultures can be categorized and generalized into neatly organized theoretical constructs is widespread within the academic study of law. As H. Patrick Glenn pointed out, “the number and diversity of our laws has led to an apparently irresistible process of
aggregation and categorization." On closer analysis, specifically comparative lawyers and legal historians make and use these generalizations. But, in fact, the vocabulary of comparative law is also deployed by many other types of legal scholars. If one takes a broad perspective on legal studies, it is easy to notice that legal family notions like common law, civil law (the Romano-Germanic or Continental family of law), mixed law, Islamic law, Asian law, or indigenous law are in frequent use. But, where do these macro-constructs come from?

In general, comparative law as a discipline can be divided into macro-level and micro-level comparison. In a micro-comparison, the objects of research are normally individual legal rules, judgments, or individual legal institutions. In macro-comparative law, comparison is done between legal systems or legal cultures. Typically, macro-comparisons deal with higher abstractions than micro-comparison. For instance, a micro-comparatist may ask what constitutes a legally binding contract, whereas a macro-comparatist may ask whether the rules of contract are based on statutory law or case law. Commonly, macro-comparative law is practiced by academics and theoreticians, whereas micro-comparatists tend to hold interest in more practical-natured legal questions. The distinction between micro- and macro-comparison is far from clear. Nevertheless, this distinction suffices for the purpose of the present analysis, which is a research review evaluating the current state and future of legal families. Further, the following discussion is based on an idea according to which legal families are not meant only for pedagogical purposes.

It can generally be said that in macro-comparison, there have been multiple theoretical frames. By far, the most widely spread conceptualizations are legal families accompanied with the later notions of legal cultures and legal traditions. Even though there are differences between these notions, they ultimately concern the same thing: the typification of legal systems (in a broad sense) into bigger entities according to their general characteristics and legal histories.

Now, it is beneficial to bear in mind that the great majority of legal scholars are not comparative lawyers and that of the comparatists, only a small portion actually deal with macro-comparative law. Nevertheless, almost all legal scholars use or otherwise refer to comparative macro-constructs in their academic publications. Looking around, we find that particularly the notions of common law and civil law are in frequent use by many but that also the notion of Islamic law has become much more commonplace than was the case some twenty years ago.

In the discipline of comparative law, one of the most widely spread and solidly established macro-constructs is the notion of legal family. In comparison with other macro-constructs, legal family has one special feature; it implies historical relationship (or ancestry) concerning the origin or influence of a legal system on another. At the basic level, legal family-related concepts are conventional and are used rather straightforwardly in many types of legal academic texts. Importantly, even those who do not use the notion of legal family still speak frequently of such things as common law and civil law. However, the
developments of the last few decades seem to have challenged the idea that systems can be grouped into major families. Reasons for this are diverse, but one of the crucial aspects is the fact that the key component of traditional macro-comparative law—the state—is in decline, and we are now more aware of legal pluralism than we were in the past.\textsuperscript{10}

Arguably, much of the troubles are due to comparative law’s own intellectual history: it was forged in order to respond to the fragmentation of European laws and the birth of national codifications in the nineteenth century.\textsuperscript{11} Notwithstanding this fact, there are still thoughtful comparative scholars who think that the classification of legal families “is an important scientific question.”\textsuperscript{12} It is unnecessary to decide whether classification is an important question or not; however, we can see that legal families play a significant role in today’s legal academia, which is no longer confined to a single state.

\section{II. Past and Present}

By and large, Western comparative starts out with two central constructs: common law and civil law. Common law, which is largely uncodified form of law, emerged in medieval England and spread as it was applied in British colonies across the globe. Civil law, which is largely a codified form of law, developed in continental Europe during the Middle Ages and spread across continents as it was applied in the colonies of European imperial powers. Whereas common law is based on the long, continued tradition of precedents by the high courts, civil law is essentially based on the Roman law models. These constructs are still in wide use, and they have been key components of Western comparative law’s intellectual fabric since the nineteenth century.

Legal families started as a distinctly taxonomic project during the nineteenth century.\textsuperscript{13} Overall, legal families became part of the canon of comparative law during the twentieth century, but in fact, they contain various elements and dimensions from much earlier periods.\textsuperscript{14} As a result, legal families are theoretical amalgams and are not coherent and analytical notions. For these reasons, it makes sense to look first at the older classifications and only after that to look into the contemporary paradigm and the critique it has received. Following that, we can discuss some of the key reform ideas presented in the contemporary macro-comparative law. Now, because there is an extensive academic literature discussing legal families, we will look in more detail only at the most broadly known examples.

\subsection{1. Older Classifications}

Some things seem evident: classifications and groupings continually reflect the intellectual climate of the period in which they are created.\textsuperscript{15} Politics and economy have also had a profound significance for the legal families.\textsuperscript{16} So it comes as no surprise that at the beginning of the twentieth century, race, nationality, and culture (in the sense of a value judgment) were regarded as significant factors and played a decisive role. A telling example is the influential classification made by the famous comparatist, Georges Sauser-
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Hall, at the beginning of the twentieth century. According to this classification, the legal systems of the world are grouped into the laws of the Aryan peoples (Indo-European peoples), Semitic peoples, Mongolian peoples (i.e., Japan and China), and uncivilized (or barbarous) peoples, which include, for example, the law of Negroes and the law of Melanesians. For a modern reader, beyond a shadow of a doubt, the racial grounds on which this classification was built is simply unacceptable.

Another example is offered by Ernest Glasson, who, in the late 1800s, published a book that dealt with civil marriage in the age Antiquity and, at that time, the modern European legal systems. In his study, Glasson divided the marital right to property into categories according to macro-principles by separating systems that had been influenced by Roman law, systems that were immune to Roman law (i.e., common law), and systems that combined ideas from Roman law and national laws. In any case, when the twentieth century truly arrived and new ideas were assumed, macro-comparative law also abandoned openly racist classifications. This is easy to understand, given that the underlying universalism of most of the great twentieth-century comparatists simply could not have coexisted with open racism. Consequently, the next phase in the development of macro-constructs molded its epistemic base on the Western private law thinking.

In taking steps toward less biased classification, for example, John Henry Wigmore distinguished sixteen historic and later legal systems through a kind of pictorial method. This method involved using illustrations, accompanied by text for each legal system, to display such things as courthouses, key legal actors, and typical legal materials. His classification covered Egyptian, Mesopotamian, Chinese, Hindu, Hebrew, Greek, maritime, Roman, Celtic, Germanic, canon, Japanese, Islamic, Slavic, civil, and English law. However, the following steps toward the domination of private law were taken when Pierre Arminjon, Boris Nolde, and Martin Wolff presented their classification in the 1950s, which later became very influential through the paradigmatic work by Hein Kötz and Konrad Zweigert. The onmarch of a new paradigm also marked the upper hand of law over disciplines such as history and anthropology. Once law was conceived primarily in terms of Western private law, it became possible for lawyers to construct a paradigmatic legal family classification.

2. The Paradigm and Its Critique

Kötz and Zweigert’s methodological innovation was to use a group of criteria and not to lean on any single criterion while grouping and classifying legal systems. Their most important criterion is that of style: the comparatist must grasp the legal style of a system and use the distinctive features as a basis for classifying legal systems into groups. As with their immediate predecessors, the classification is made especially from the point of view of private law. Their grouping (1998 edition), which includes Romanistic, Germanic, Anglo-American, Nordic, Far East, and religious (Islamic, Hindu) laws became the macro-comparative paradigm during the last decade of the twentieth century.
Curiously though, Zweigert and Kötz did not themselves start the terminological tradition. In the original work, reference is made to legal sphere or Rechtskreis—in the translation to legal family—where the large constructs in macro-comparison are called families. Nevertheless, their work has conveyed to the twenty-first century this epistemological tradition that is based on the theoretical and conceptual foundation of European legal history. Also in the French tradition, the phrase familles de droit has been and still is used when reference is made to the so-called major modern legal systems (grands systèmes de droit contemporains). In the classic work by René David, Les grands systèmes de droit contemporains (1st ed. 1964), Romano-Germanic law, common law, and socialist law were presented as actual legal systems. Historically, we may safely assume that these types of modern classifications, like that of David’s in the 1950s and 1960s, have their background in the totalitarian systems of Nazi law and socialist law. Nazi law disappeared in the Second World War, and socialist law simply disappeared from the discipline (e.g., Zweigert and Kötz’s book) after the collapse of the Soviet Union. As non-Western legal systems, David mentioned Islamic, Hindu, and Jewish law and the laws of the Far East, Africa, and Madagascar. Among French-speaking legal academics, the tradition of grand legal families has not faced such a sharp critique as is the case within English-speaking legal academia. Then again, not all French macro-comparatists have taxonomic purposes.

Indeed, legal families and the approaches that are based on legal families have been extensively criticized. It is predominantly thought that legal families have various problematic features and dimensions. Mostly, these difficulties are epistemological and methodological in nature. The quintessential problem of the legal families approach has been its ingrained cultural bias. This can be seen in the fact that the families are constructed from the point of view of Western—that is, Romano-Germanic—and common law. Culturally remote systems are positioned in a shallow class, such as, for instance “religious law” or “indigenous law,” making them nothing more than mere appendices. No wonder, then, that even Kötz himself wondered in the late 1990s if it was time to say farewell to the legal family classification and approach. Undoubtedly, there are several problems associated with legal family classifications and legal family as an approach to macro-comparative law.

First, Western law’s legal positivist orientation on formal norms, institutions, cases, and doctrines has left the empirical realities of the other legal spheres largely in the shadows with regard to intercultural macro-comparisons. An example of this is the neglect of Southeast Asia by comparative law; to say that the laws of that area are simply Asian, customary, authoritarian, Confucian, or Islamic hardly captures the complex and nuanced legal reality of them. Often, this problem is painfully visible in the area of Western research on Chinese law, where the Western representations of Chinese law are discussed in comparative law studies, even though these research results actually tell quite little about the actual Chinese law as it is understood and practiced in China.
Second, another key defect of the legal-families approach is the concentration on private law. Comparative law in general, and specifically macro-comparative law, has for a long time almost omitted public law. Only during the twenty-first millennium has this state of affairs started to change.\textsuperscript{32} Especially, the emerging field of comparative constitutional law has been establishing itself as an important field of comparative law.\textsuperscript{33}

The third major problem is the fact that by and large, classifications do not change over time, but rather petrify and stop evolving.\textsuperscript{34} For instance, speaking of Islamic law as a legal family seems to implicitly suggest that there is a great uniformity and coherence in Islamic law and the legal systems of Muslim countries. The problem with this implicit suggestion is that the plurality and different developments in various school systems are left unnoticed when a large categorical notion of Islamic law is resorted to.\textsuperscript{35} Fourth, we can see many other types of theoretical critiques, mostly based on the generalizing tendency of the legal families approach.\textsuperscript{36} Finally, one of the quintessential problems with the legal families approach has been its apparent inability to take into account hybridity or mixité of law.\textsuperscript{37} These criticisms are not entirely fair. Be that as it may, these difficulties have led to new developments and efforts to renew the legal families approach.

3. New Trends

It seems feasible that, even though the legal families approach continues to be a target of criticism, it is unlikely to be completely abandoned by the scholars. The landscape is further complicated by the fact that there are some attempts not only to criticize but also to renew and refine the legal families approach. Two of the most interesting attempts concern taking the parentage and hybridity, respectively, into account and, thus, escaping from the stiffness of the old legal families approach. A third attempt seeks to understand the relation between different systems of law and economy by relying on legal family classification. In contrast to the previous classifications and approaches, these new attempts are clearly of an interdisciplinary nature.\textsuperscript{38}

First, Esin Örücü has attempted to renew the legal families approach with her “family trees” approach.\textsuperscript{39} This approach brings to the foreground a legal historical understanding, according to which legal systems would be classified pursuant to their parentage and constituent elements. The following novel grouping would also take into account the resulting blend in accordance with the mixed legal systems thinking. However, even this classification would lean on the idea of predominance, that is, identifying typical major (internally hegemonic) characteristics. Whereas the old legal family classifications treated the mixing of constituent elements of law with suspicion, Örücü’s approach regards all systems as mixed and overlapping.\textsuperscript{40} The idea is not to see any system as pure, but to see some basic elements of law taking new shapes and forms. To simplify a great deal, Örücü’s main point is to try to deconstruct the conventionally labeled pattern of legal systems and to create a reconstruction on the basis of legal ancestry.\textsuperscript{41} However, there is no such final classification produced by this approach. But
even as a reformed version of legal families approach, it certainly is an interesting and worthwhile attempt.

Second, since the beginning of the twenty-first century, we have seen a new kind of legal family classification taking shape by scholars who represent mixed legal systems. A mixed legal system refers to a system that has elements from more than one legal family. Typically, systems such as those in Scotland, South Africa, Louisiana, and Quebec are given as examples because these systems have the nature of mixedness in their private laws; the content is partly derived from the civil law legal family and partly from the common law legal family. A key figure in the constructing of this new legal family is Vernon Valentine Palmer, who argues that mixed jurisdictions, in fact, constitute new legal families of their own. Palmer is well aware of the theoretical and empirical difficulties that entail the concept of legal family. However, he claims that the idea of a third legal family, besides those of common law and civil law, consists of mixed legal systems. The third legal family is constructed, thus, “for purposes of convenience, utility, and explanatory power,” which means that a new legal family makes sense because it provides better insights than the previous classifications have done. Moreover, we should also register the historically oriented comparative law research in the field of mixed legal systems and mixing of laws by Reinhard Zimmermann, who has highlighted especially the relationship between the English common law and continental civil law and such mixed legal systems as Scotland and South Africa.

A third attempt to reinterpret or to develop the legal families approach has been presented by the so-called legal origins theory. It is a branch of study that combines macro-economics with macro-comparative law and especially the classification of legal families. Legal origin theory’s core scheme can be divided into two separate claims: first, the historical origins of the legal system determine what kind of legal rules there are, and second, these rules have a strong influence on the economic outcomes of a country. One of the fundamental ideas underlying the legal origins theory is the claim that legal origin (i.e., the nature of a legal system as it has been received historically) influences financial development. Thus, the economics argument has been that legal origin matters for financial development because legal families differ in their ability to adapt efficiently to evolving economic conditions. This argument leans heavily on certain classical macro-comparative assumptions. Even though this theory has provided a new interpretation and novel theoretical frames to legal family classification, it has also been criticized especially by legal comparatists.

Finally, none of the above classifications of legal families or legal family definitions have been universally accepted by scholars. In any case, David’s and Zweigert and Kötz’ classifications are by far the most widespread and accepted, at least implicitly, by many. Despite the flaws, legal families and legal family classifications continue to exist and, more important, they are continuously used by many legal scholars. Moreover, we can
argue that areas exist in international legal research where there would be a clear need for a general comparative law knowledge.49

While all of this provides an interesting overall picture of the past and present of legal families, it is not very helpful for envisaging the future of legal families.

### III. Future Directions

The attempt to group the world’s legal systems has commonly been an important part of academic comparative law. Even later conceptual and theoretical development, such as the work of H. Patrick Glenn, has not changed this basic state of affairs. Scholars still classify and group even though the outcomes have never been pragmatic tools demanded by practitioners or national doctrinalists. The previous section discussed the past and present of legal family classification, and, as we saw, despite the evident shortcomings, the classification does not seem to disappear. As a matter of fact, the last twenty years have brought macro-comparative notions back into the center of comparative law debate. Taking into account the persistence of legal families, it may be justified to consider what kinds of rational roles legal family classification or the legal family approach may hold in the future. In this section, we will look at the future of legal families. From a contemporary viewpoint, we can distinguish at least three possible roles for legal families in the future of scholarly comparative law. We will see that these roles or functions have to do with the methodology, epistemology, and theoretical self-understanding of macro-comparative law. Importantly, none of these roles strive toward a taxonomic purpose, which is in contrast to the earlier legal family classifications.50

#### 1. Role in Comparative Methodology

One key question concerns the utility of legal families in the actual comparative law research on a micro-level. The short answer is that legal families may play a role in the early stages of research as a structured pre-understanding or a kind of a fuzzy firsthand map. Crucially, according to this view, legal families are not the aim but, metaphorically speaking, are instead like a launch vehicle, which is a rocket used to launch a spacecraft or satellite into an orbit or a trajectory. According to this view, legal family is an instrumental help-tool. To conceive legal family in terms of methodology, it is necessary, first, to conceive comparative law study as a process.

At the early stage of a research process, an individual legal system can be understood broadly when comparing it to the theoretical-hypothetical construct, that is, the legal family that has been constructed in the theory of comparative law. The first-stage ideas, macro-constructs, are in essence preliminary and general hypotheses about the foreign legal system under study. Accordingly, they give references to the subsequent formation of a hypothesis. In other words, there is a kind of hermeneutical spiral in action that is movement between the legal family and foreign legal texts (micro-dimension), which spirals the comparatist closer and closer to the domestic legal meaning of foreign texts—
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yet, the nearing of the meaning is placed ultimately in the comparative framework, and not in the domestic sphere of legal meanings.

Therefore, a legal family is a conceptual-theoretic tool by which we can group the general content of a real legal system and demonstrate the special qualities (structure, central institutions, and concepts) and central principles of a group of systems, which in relevant ways resemble each other. We may speak of distinctive features of law—the characteristic and features by which the system can be recognized and demarcated from the others. Basically, any macro-construct fundamentally does one thing: it reduces the empirical complexity in foreign law. For the research process, when trying to hold in check the mass of foreign legal information, the macro-construct has significance in leveling and reducing difficulties with large amounts of detailed legal information. The legal family (or legal culture, legal sphere, or legal tradition) is a crudely sketched firsthand roadmap for the comparatist who studies foreign law. A parallel is offered by art: a large landscape painting looks quite different depending on whether you look at it from a distance of a few yards or from just a step away.51 Much, if not all, depends on the perspective of a scholar.

2. Epistemic Role

The second issue concerns the epistemological role of legal families as a discourse. Discourse, when used in this context, is a linguistic conglomeration produced through academic language and practices; that is, it does not actually arise from reality in a strictly empirical sense.52 Discourses’ relation to social reality is curious: they are ways of talking about and also acting toward an idea.53 This performativity means that these kinds of macro-constructs are not purely categorizations, but they can also play a facilitating role when it comes to actual analysis of foreign information sources of law. For instance, to an extent, the common law legal family provides a conceptual macro-setting for understanding each individual member of the family. Accordingly, for example, Canada, Ghana, and New Zealand all have certain legal similarities, but also differences. Also, the Canadian experience with Quebec shows a high level of mixité in which common law and civil law elements are able to coexist.54 And, in New Zealand, there is a distinct element of indigenous law (Maori law).55 Ghana, on the other hand, has a system where strong common law elements of colonial origin are mixed with the local customary law.56 Yet, all of these systems may be described as belonging to the common law legal family because of historical connections and certain key commonalities, like the doctrine of precedent.57

But what is discourse from the point of view of macro-comparative law? By and large, discourse may be defined as a group of statements that provide language in order to be able to speak about certain information concerning a certain object; that is, it offers a language device through which we can represent information. Accordingly, when one speaks of, say, civil law, and this takes place inside the discourse of macro-comparative law, then, speaking of civil law offers a certain way to conceive civil law systems in a
specific manner: a certain order of things is implicitly assumed. This order of things has epistemic functions.

By saying that the “legal system of Blefescu belongs to the civil law legal family,” a certain epistemic structure of law is implicitly assumed—for instance, the division between private and public law. There is a broader point. While relying on a certain macro-construct to speak of Blefescu’s legal system, other possible ways become limited. Other representations become difficult if not impossible, because if one wishes to stay inside the professional discourse of international legal academia, one must use its language—including its terms and concepts. This language, in turn, consists of jurisprudential categories such as precedent versus enacted law, divided versus uniform court system, code versus case law, domestic versus international law, and so on. All of these legal theoretical categories are produced through the use of comparatist language as constructs belonging to a discourse and having an interactive role with various legal realities. For instance, the classification proposition by Jacques Vanderlinden is based on similar kinds of, though private law-oriented, legal theoretical categories.58

Accordingly, one possible manner to deal with the problems that concern the macro-constructs is to regard them as in between generalized notions, which not only describe reality but also have an effect on our understanding of that reality by shaping its epistemological structure. In other words, if one studies common law or Asian law and is already filled with preconceptions about what they are, then the conclusions are not drawn out of tabula rasa: there is already a certain structure and certain theoretical language that holds the comparatists in its epistemic grip.59 This consequence, the epistemic grip, is both a positive and a negative consequence; it offers a general view but disregards details.

3. Necessary Evil?

A third important issue is the nature of legal families and the question of what could be reasonably expected from them, or, putting it differently, what legal families are in a more philosophical sense. One possible way to conceive legal families is, indeed, a philosophical one, and it suggests that legal families are constructions of the shadowland. This is a reference to Plato and his famous image of a cave, which is a dark place, kind of an epistemological prison, isolated from the rest of the world.60 This image is familiar to the readers of Plato’s Republic. He asks us to imagine a group of people in a cave. They have lived there all their lives and know of no other reality. A fire burns behind them, casting flickering shadows on the walls around them. This is their world, the only reality they know, something we may call “the Shadowlands” of comparative law.61 Now, shadows are like legal families, and legal families’ relation to the outside reality is like that of the shadows, which means that comparatists are the (epistemic) prisoners in the cave. Plato’s allegory of the cave is more than 2,000 years old and holds a specific role in philosophy, and it can be used also to explain what legal families are as to their theoretical nature.
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We may think that the shadows (i.e., legal families) the prisoners (comparatists) see and the echoes they hear are what they take as the reality. When they would be finally freed, and they would turn to the true light outside of the cave, they would meet the rich plurality of legal detail. As a result, they may find it difficult and even painful to accept it as the true reality, something truer than what they grew up knowing. For instance, the comparatist may note that common law has as much statutory law as civil law, or that supposedly the Islamic legal system may in fact not be very religious after all, or one notices that most of the legal systems are actually of a mixed nature. From a philosophical viewpoint, legal families are but blurry shadows, that is, generalizations. Moreover, we should stress that generalizations are not deceptively elusive only when dealing with non-Western systems. Of course, the problem of the immensity of detail concerns all kinds of legal families. For instance, legal Latin is an example that shows that the meanings of many Latin legal maxims are not necessarily identical or similar, even in the systems that belong to the same legal family.62

Allegorically, for Plato, the freedom of the prisoners means that their minds are opened for intellectual enlightenment. However, comparatists have no such luck, because the sun burns too bright; that is, there is no way of “seeing” it all as it really is because the reality of laws around the world is that there are too many and they are too rich for anyone to fully grasp. By the same token, this does not mean that macro-comparatists must always keep watching the shadows. However, it does imply, at least in part, that from time to time, comparatists must go out (i.e., to do micro-level research) and remind themselves that their discipline is a discipline of shadows, and their specialty is a specialty of approximates.63 In other words, all macro-constructs are necessarily generalizations and fuzzy pictures of the much more nuanced world of law.64 Further, we should bear in mind that the shadows reflect the realities of the world of law, although quite incompletely—very much like macro-constructs vaguely reflect the detailed rich plurality of legal systems grouped in families.65 The uneven correlation of real legal systems and shadowy generalizations explains the empirical weakness of legal families, just as it lies behind their simplifying scholarly strength.

Realization—that legal families and other similar types of macro-constructs are reasoned from the vast masses of detailed facts about law to generalizations—is needed if these notions are to have a future as a part of macro-comparative law. And we can go further with this assumption. As the debate over convergence between common law and civil law indicates, even the basic distinction of legal families into common law and civil law is a problematic one and should be understood in a context.66 From this standpoint, it may be argued that the future of legal families does look less taxonomic and overarching than previous classifications and approaches. Furthermore, we can also expect the groupings of legal families that are based on “law as rules,” in a Western private law sense (legal positivist tradition), to essentially collapse.67 Harold Berman has even argued that Western law, altogether, is in crisis because of the weakening of the belief system on which it was historically based and because it encounters other legal traditions in the continuous construction of a body of transnational and transcultural “world law.”68
is, in any case, very little reason to doubt that we can expect the debate to continue among the scholars.\textsuperscript{69}

**IV. Concluding Remarks**

The challenge of dividing the world of law into major legal families is a formidable one. Scientific exactness seems to be out of the question simply because law does not exist in the physical world and is always interconnected with the legal culture of a particular society.\textsuperscript{70} Therefore, it is justified to ask where we are today. As stated above, there is no common understanding. It has been argued that comparative law has “arrived at a much richer, especially more nuanced and dynamic, view of the world map of law than we had in 1950.”\textsuperscript{71} There certainly is some truth in this argument, but regardless of nuances and dynamics, macro-comparative law seems, as we saw above, to be virtually cornered by the “legal families trap.”\textsuperscript{72} Which of these views can emerge as the dominant narrative in macro-comparative law?

Paradoxically, both of the above views are defensible in the sense that our legal family classifications today are more nuanced and, indeed, dynamic even though macro-comparative law still struggles with its intellectual origins, which are both categorizing, taxonomic, and Western private law-oriented. And yet, the fact that a system can move from one family to another clearly indicates that classifications are not necessarily petrified as we can see in the case of socialist legal systems. Today, many continental European legal systems that thirty years ago were part of the socialist legal family are now, or so it seems, a part of the civil law legal family. But even today, it is clear that the scholars, with their legal families and other macro-constructs, are much better at dealing with common law and civil law than they are at dealing with non-Western legal systems. To be sure, legal orientalism is but one example that highlights the permanent defects of macro-comparative law as a profoundly Western-oriented discipline.\textsuperscript{73} And, of course, discussion about the mixed legal family has also broadened our understanding of legal family classification.

It may turn out that legal families are best suited for describing and generalizing civil law, common law, and (Western or Western-influenced) mixed legal families. Then, perhaps, for other kinds of legal systems (in a very broad sense), we may need to rely on different conceptualizations like legal cultures or legal traditions. In fact, these notions cannot be separated distinctively as they are largely overlapping, yet, they seem to have different areas of use. Accordingly, simply, traditional legal families underline the parentage and Western private law, whereas legal cultures and legal traditions have different kinds of focuses. So none of these macro-constructs are objectively better than the others—they are merely suited for different scholarly purposes. In that light, it seems likely that these notions do not replace each other; but, rather, they are complementary as to their nature.
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One example is the above-mentioned faith in the former socialist legal family, which is now virtually extinct. It would seem natural to argue that socialist law all but disappeared in the 1990s. Clearly, as a legal family containing ideas of socialist law in the formal sense, the disappearance is a fact. However, the idea that socialist legal practices would be dead and buried (as claimed by most comparatists) is clearly premature if socialist law is regarded as a legal tradition or legal culture. It has been pointed out that in the dissolution of the socialist legal family, some features of the old tradition have proven to be surprisingly resilient and unaffected by change in the statutory law. To a greater or lesser extent, paradoxically, it would appear that we may claim that the socialist legal family is dead and buried, but the same does not apply to the socialist legal tradition.74

To conclude, there still probably is a future for the legal families approach, but it is most likely a future without a taxonomic endeavor; that is, the grand project of an exact taxonomy is ended. This more nuanced and developed legal family concept is, of course, very close to a notion such as legal tradition. Novel approaches are struggling to take into account the hybridity and plurality of law and the diminishing role of the state.75 It is therefore not surprising that the macro-constructs of the future are probably quite blurred as to their borders. Despite hybridity and blurring, more subtle approaches like anthropological, linguistic, or sociolegal are needed if macro-comparative law is to provide more reliable outcomes than it does by relying on the old mainstream approach.76 Perhaps, it may prove to be an insurmountable obstacle for the legal families approach to endure successfully in a world where the state is no longer the defining factor for law.77 But, then again, legal family classifications have never admittedly been dictated by traditional state borders. And this borderlessness has always been one of the strengths of macro-comparative law approaches; borders of states are not necessarily borders of legal families, cultures, or traditions.78

Suggested Reading

The literature on legal families and on legal cultures and traditions is voluminous. In addition to the references already cited, the following are also useful and informative.


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Notes:


(2) Clearly, this is not the only way to classify the comparative study of law. For example, John Henry Wigmore distinguished between three different approaches: (1) nomoscopy describes foreign legal systems, (2) nomothetics analyzes the strong and weak points of systems, and (3) nomogenetics pays attention to the chronological development and the influences the systems have on each other. See John Henry Wigmore, A Panorama of the World’s Legal Systems (St. Paul, MN: West Publishing, 1928), 1120–1121.

(3) However, in the comparative sociology of law, the concept of macro-comparison is different; it refers to cross-national study with broad theoretical ambitions. Roger Cotterrell, “Comparative Sociology of Law,” in Comparative Law and Society, ed. David Scott Clark (Cheltenham: Edward Elgar, 2012), 39–60, 42–45.


(5) See also, in a critical tone, Geoffrey Samuel, An Introduction to the Comparative Law Theory and Method (Oxford: Hart, 2014), 50–53, at 50 (“dichotomy must be treated with caution”).

(6) It has been argued that the main function of legal families and other similar types of classification is pedagogical, and, moreover, due to this, the bias of Western orientation is

(7) Most typically, the usage of legal families is, however, in comparative legal study. An example is Richard Hyland’s magisterial study of gifts; Hyland does not explicitly refer to legal families, but one can see that his approach is based on distinguishing Romano (France and Belgium, Italy, and Spain), Germanic (German), and common law legal families. See Richard Hyland, *Gifts—A Study in Comparative Law* (Oxford: Oxford University Press, 2009).


(10) Basically, legal pluralism refers to an “idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one ‘law’ or legal system,” as defined by Margaret Davies, “Legal Pluralism,” in *The Oxford Handbook of Empirical Legal Research*, eds. Peter Cane and Herbert M. Kritzer (Oxford: Oxford University Press, 2012), 805–827, at 805.


(14) It should go without saying that the importance of context means that legal family classifications do not follow any clear line of evolution or development. As Pargendler (2012, at 1073) says, “legal family categories followed a parabolic, rather than linear, path.” See also Husa (2015), 271.

(15) Of course, this applies to all kinds of comparative law approaches and theories. For example, we can see that in France, comparative law as a discipline arose as a counterreaction against formalism and the exegetical approach in the nineteenth century.
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(17) Georges Sauser-Hall, Fonction et méthode de droit comparé (Geneva, Kundig, 1913) (droits aryens et indo-européens, droits sémitiques, droits mongols, droits barbares). Sauser-Hall specifically based his classification on race because according to him each race had its own internal legal development (“qu’à l’intérieur de chaque race,” at 63).


(19) Typically, comparatists and legal historians have concentrated on Western law, and other systems taken into account have been systems influenced by Western law (e.g., Latin America, Turkey, and Japan). However, since the 2000s, this trend has changed, and comparative scholars have opened up to types of law other than Western law. For a more detailed critical analysis on this topic, see Werner Menski, Comparative Law in a Global Context—The Legal Systems of Asia and Africa, 2d ed. (Cambridge: Cambridge University Press, 2006).

(20) Wigmore (1928), 1140–1145 (“world-map of present day legal systems”).


(22) Other competing or complementing notions like legal cultures or legal traditions are also largely used, but it seems that legal scholars still more often use the concept of legal family and that these later notions are more popular among legal sociologists, ethnologists, and anthropologists. For an earlier and more detailed discussion, see Léontin-Jean Constantinesco, Traité de droit comparé, vol. 2 (Paris: LGDJ, 1974), 94–98.

(23) See Zweigert and Kötz (1998), 67–73 (taking into account historical development, distinctive mode of legal thinking, characteristic legal institutions, sources of law, and ideology). Criteria in general, in turn, has been argued to be the constant problem for various taxonomic projects. See Glenn (2006), 437. About criteria in general, see Jacques Vanderlinden, Comparerer les droits (Diegem: E. Story-Scientia, 1995), 311–337.

(24) It seems that Adhémer Esmein was first to use the concept of legal family in the sense of legal systems forming larger groups (“des familles ou de groupes,” at 488). See Adhémer Esmein, “Le droit comparé et l’enseignement du droit,” Nouvelle revue historique de droit français et étranger 24 (1900): 489–498.
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(25) It makes sense to point out that the classifications by Zweigert and Kötz and by René David are the most well known by those who deal with comparative law. Cf. Mathias Reimann, “The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century,” American Journal of Comparative Law 50 (2002): 671–700 (“today, everybody in the field is familiar at least with the modern classics: René David’s scheme and Zweigert & Kötz’ widely accepted definition,” at 676).


(28) For example, Michel Fromont, Grands systems de droit, 7th ed. (Paris: Dalloz, 2013), deals with Roman law (Europe: Germany, Italy, Netherlands, and Switzerland; world: Brazil, China, Japan, and Russia) and common law (Europe: England; world: Canada, United States, and India). There is no resolute attempt to classify and create taxonomy, but instead there is a typical Western-oriented approach where only Western or Western-influenced systems are taken into account. This approach has deep roots in the continental European comparative law. See, e.g., Mario Sarfatti, Introduzione allo studio del diritto comparato (Torino: Giappichelli, 1933), 51ff.


(32) 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 conception has become increasingly difficult. See Mark Van Hoecke, “Do ‘Legal Systems’ Exist?,” in Concepts of Law: Comparative Law, Jurisprudential and Social Science Perspectives, eds. Seán Patrick Donlan and Lukas Heckenhorn Urscheler (Farnham: Ashgate, 2014), 43–57, at 53.
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(33) See, e.g., the collection of articles in Michael Rosenfeld and András Sajó, eds., The Oxford Handbook of Comparative Constitutional Law (Oxford: Oxford University Press, 2012). In the Introduction (pp. 1–22, at 5), the editors point out that: “The theories of comparative law reflected considerations and concepts of private law, and constitutional law was often neglected in the comparative study of great legal systems.”


(35) Simply, different Islamic states adopt different schools of Islamic law; there is heterogeneity and no single accepted authoritative interpretation. So, the role of Islamic law in comparative law is not very straightforward at all. See Hamid Harasani, “Islamic Law as a Comparable Model in Comparative Legal Research,” Global Journal of Comparative Law 3 (2014): 186–202.

(36) For example, one strand of this critique is based on the difficulties of bundling Asian systems together under very broad headings. See, e.g., Harding (2002), 264–265 (criticizing Mattei’s assumption that all Southeast Asian legal systems are based on the “rule of tradition although they may tend to the rule of politics”).

(37) This point is made by Seán Patrick Donlan, “Comparative Law and Hybrid Legal Traditions—an Introduction,” in Comparative Law and Hybrid Legal Traditions, eds. Eleanor Cashin-Ritaine, Seán Patrick Donlan, and Martin Sychock (Lausanne: Swiss Institute of Comparative Law, 2010), 9–18 (arguing that hybridity challenges legal nationalism, positivism, centralism, and monism, which are all part of the old legal families approach).

(38) Normally, interdisciplinary research is something that is underlined and held in high regard by comparatists. However, to combine comparative law with other disciplines is not necessarily easy or without risks. See Journal of Comparative Law (Special Issue) 9 (2015): 1–190. This special issue concentrated on the value of interdisciplinary scholarship for various kinds of comparative legal studies.


(40) Örücü explains that her “family trees’ scheme starts with the given assumption that all legal systems are mixed, whether covertly or overtly, and groups them according to the proportionate mixture of the ingredients.” Esin Örücü, “What Is a Mixed Legal System: Exclusion or Expansion?,” Electronic Journal of Comparative Law 12 (2008), http://www.ejcl.org/121/art121-15.pdf.
Crucially, Örücü (“Family Trees for Legal Systems,” (2004), at 362) underlines the very core dimension of classical legal family classification, that is, the historical roots of a system (“going back to observe the seeds of the trees, the emerging roots, the growing of the shoots and the trees, and the spreading of the branches”).


The key assumption of legal origins theory is this: “If we find that legal rules differ substantially across legal families and that financing and ownership patterns do as well, we have a strong case that legal families, as expressed in the legal rules, actually cause outcomes.” La Porta, Lopez-de-Silanes, Shleifer, and Vishny (1998), at 1126.


The original theory has been somewhat modified later even though the macro-comparative law-related methodological problems are still present. See Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, “The Economic Consequences of Legal Origins,” Journal of Economic Literature 46 (2008): 285–332.

Clearly, the nature of legal families is accepted as something that is, by definition, vague and fuzzy. But this feature is certainly not a novelty in the discipline. See, e.g., Arminjon, Nolde, and Wolff (1950), 52–53 (explaining that groupings of systems lack scientific rigor: “pas une exactitude et une rigeur”). See also Mattei (1997): 15 (explaining that actual systems never really perfectly correspond to a legal pattern) and Husa (2015), 222 (discussing fuzzy pictures and shadow images).

An obvious example is “law and development” research that has not used comparative law knowledge, even though there clearly would have been a great need for it. For a more detailed discussion, see Jedidiah Kroncke, “Law and Development as Anti-Comparative Law,” Vanderbilt Journal of Transnational Law 45 (2012): 477–555.
However, there is at least one emerging statistical network-based approach, developed by Mathias Siems, that has a taxonomic purpose. See Mathias Siems, “A Network-Based Taxonomy of the World’s Legal Systems” (working paper, Durham Law School, 2014), http://dx.doi.org/10.2139/ssrn.2387584.


Vanderlinden (1995), 338–355 separated customary systems, doctrinal systems, jurisprudential systems, legislative systems, and systems based on revelation, that is, religious systems (coutumier, doctrinal, jurisprudentiel, législatif, révélatif).


Plato, *The Republic*, Book VII 514a, 2 to 517a, 7. Of course, for Plato, the cave (τὸ σπῆλαιον) allegory had to do with his theory of knowledge, so it illustrated the contrast between the world of sense-perception and the real world; the world of thought/mind. Hence, fire and shadows cast on the walls of a cave correspond to the sun (and the “real” reality in Plato’s sense), and the world outside of the cave symbolizes Plato’s world of ideas (in 514a). Plato, speaking through the voice of Socrates, speaks with Glaucon and starts with the image of a cave: “Picture men dwelling in a kind of subterranean cavern with a long entrance open to the light on its whole width” (original ἰδὲ γὰρ ἀνθρώπου ἱδέου ἔιν καταγείῳ οἰκήσει σπηλαιώδει, ἀναπεπταμένην πρὸς τό φῶς τὴν εἴσοδον ἐξούσιον μακράν παρά πάντα τῷ).
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(61) This expression was used also by C. S. Lewis, for example, in “Farewell to Shadowlands,” the last chapter of his book, The Last Battle, which is the last novel in The Chronicles of Narnia series. C. S. Lewis, The Last Battle (New York: HarperCollins, 1956), 228.


(64) Clearly, this kind of description of macro-comparative law makes it clear that it cannot be a very exact scientific venture. Moreover, as pointed out by Geoffrey Samuel, law in general “is not a science dedicated to enquiry about the physical world, society or social relations.” Geoffrey Samuel, “Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?,” Journal of Law and Society 35 (2009): 431–459, at 431.


(70) Cf. Mattila (2013), 137 (from the viewpoint of legal language).


(72) Harding (2002), at 264.

(73) Many kinds of conclusions can be drawn from this fact. Interestingly, there has been a call to more openly admit the political-legal dimension of comparative law by David Kennedy, “The Method and the Politics of Comparative Law,” in Comparative Legal Studies: Traditions and Transitions, eds. Pierre Legrand and Roderick Munday (Cambridge: Cambridge University Press, 2003), 345–433.
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(75) Some may go even further and argue that the role of nation-states is actually fading away. See H. Patrick Glenn, The Cosmopolitan State (Oxford: Oxford University Press, 2013). Yet, this does not mean that the state would become meaningless but rather that domestic state law coexists with other legal orders and that there is no clear hierarchy between different orders—that is, legal pluralism appears on the global sphere. See Ralf Michaels, “Global Legal Pluralism,” Annual Review of Law & Social Science 5 (2009): 1–35 (discussing “the irreducible plurality of legal orders in the world”).

(76) A similar type of challenge concerns also the traditional state-centered philosophy. Cf. Davies (2012), 825.

(77) However, it would possibly be an overstatement to argue that the state-centered understanding of law would actually prevent taking into account legal diversity. For a balancing view, see Matthew Grillette and Catherine Valcke, “Comparative Law and Legal Diversity—Theorising about the Edges of Law,” Transnational Legal Theory 5 (2014): 557–576.

(78) However, it is not claimed here that there would not be differences between macro-constructs, as pointed out by Glenn (2006). So, families and traditions may be different, but as macro-constructs, they nevertheless appear surprisingly similar; they do overlap to a significant degree.

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