The Indian Yearbook of Comparative Law
Series Editor: Mahendra Pal Singh

Mahendra Pal Singh
Niraj Kumar *Editors*

The Indian Yearbook of Comparative Law 2018

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Series Editor

Mahendra Pal Singh, Centre for Comparative Law, National Law University, Delhi, New Delhi, India

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Mahendra Pal Singh · Niraj Kumar
Editors

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Editors
Mahendra Pal Singh
Centre for Comparative Law
National Law University, Delhi
New Delhi, India

Niraj Kumar
Centre for Comparative Law
National Law University, Delhi
New Delhi, India

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Foreword

The Fruits of Labour in Comparative Legal Studies

Given that there is simply no globally agreed definition of 'law', and thus also of 'good law' in view of continuing human suffering that is often generated by law (Baxi, 2002), any attempt to work on comparative law becomes potentially highly idiosyncratic, even meaningless for many people and will of necessity be contested. What is the point of such endeavours? Are these esoteric academic pursuits, ivory or plastic tower activities, telling us more about the views and ambitions of the respective author(s) than the subject, with limited relevance for practical applicability? I am not starting with such critical comments here because I am against comparative law in principle, far from it. But in view of undeniable ubiquitous local specificities, we have to be cautiously realistic at all times to assess the fruits of labour in comparative legal studies. Professor M. P. Singh, in his Preface to the maiden edition of *The Indian Yearbook of Comparative Law 2016* (Singh, 2017: xiii), rightly indicated that comparative law has had to struggle, in India and elsewhere, to find wider acceptance as a useful academic pursuit, and as a tool to sharpen the minds and improve the skills of legal professionals of the highest calibre. Insightful reflections on the growth of comparative law as an exciting and expanding sub-discipline are found in an inspiring introductory chapter (Nelken, 2007) to an important earlier handbook on comparative law (Örücü and Nelken, 2007). The increasingly high profile of scholarly writing and teaching on comparative law today confirms that various battles of recognition of such fruitful outcomes seem to have been won by now.

Yet serious critical questions continue to be asked about what one may sensibly compare and with what underlying aims. Basically, the challenge is still how to make law-related comparisons a useful pursuit and how to understand what one may actually learn from such activity. The lurking presumption still is that 'law', somehow, in the form of state law and also human rights law and international law, is of necessity good, while other forms of law are challenged as causing problems and leading to abuses of rights. In reality, as we see all around us, no type of law

can be fully trusted, so everything needs to be carefully monitored, constructively scrutinised and assiduously engaged with (see now Topidi, 2018). Notably, Nelken (2007: 39) concludes in this regard that scholars must always reflect on their responsibilities. Similarly, Baxi (2017: xviii), welcoming the *Indian Yearbook of Comparative Law 2016*, emphasises the need for consciousness of cultivating demosprudence (see Baxi, 2014) and thereby highlights the key role of responsible academic, political and legal leadership.

There are, however, many risks that engagement with comparative law becomes a journey without clear directions or a well-defined purpose. If the law is everywhere culture-specific, time-bound and thus highly dynamic and situationally ambivalent, and time ticks on relentlessly, generating new legal scenarios every split second, this constantly ruins hopes of the precious commodity, for many doctrinal lawyers, of 'legal certainty'. Observers and analysts may lack not only comparative skills, but also sheer agility, with the risk of losing the plot or being emotionally blown away by some recent development. Working more historically brings different added risks, for the mere descriptive collection of dated law-related details soon becomes an archive of massive proportions, too large to be practically useful, adding to an increasingly common sense of information overload. This is felt by newcomers who may lack sensible direction and skills in the methods of comparison and awareness of why any particular comparative activity may be undertaken, but also hits those who have been engaged in comparative law work for some time. Actually, a lot is demanded and expected from all individuals who venture into comparative law work.

Difficult basic questions continue to arise, in particular, about whether one should look for similarities, or is comfortable with difference(s). In the twenty-first century, described by some as the age of comparative law, it is becoming clearer that understanding law from a global perspective cannot mean that a sensible cosmopolitan discipline of law aims simply for a uniform law for the whole globe (Twining, 2009). Debates about this notably employ telling symbols and much rhetoric. During the launch of an important edited book on comparative law (Donlan and Urscheler, 2014), in the Swiss Institute of Comparative Law in Lausanne, the difficulties of comparison were problematised through playful images of comparing apples and oranges. Yet one of the main conclusions was that since both are fruits, belonging to the same genus, in the same basket, so to say, they could be usefully compared. So, is law comparable to a basket of fruit? But if so, what then is the next step or level of comparison?

Intriguingly, the *Indian Yearbook of Comparative Law 2016* started with an article comparing apples and mangoes, representing the European Union and India. Studying law in this way is indeed offering the possibility to examine many fascinating topics (Dann, Bönnemann and Herklotz, 2017: 3). As these authors instantly confirm, we still know much more about various Eurocentric legal orders or regulatory systems, comparisons between elements of common law jurisdictions, and between civil law and common law systems than about legal orders of the Global South. So, there will be more need in future to compare mangoes and bananas, for example, and many other exotic elements found in the global basket of laws.

Such fruity symbolisms for comparative constitutional law, in particular, indicate and reflect the growing awareness of significant differences between the Global North and the Global South, involving increasingly sophisticated attempts to learn from each other worldwide through comparative analysis and finetuning of the multiple methods of comparative law. Gone are the times when the imperial centres provided blueprints for 'progressive' development, for colonial legal intervention was largely not a positive or friendly experience. Nor can we trust the supposedly most advanced jurisdictions in the world to deliver responsible leadership and plurality-conscious management of normative (Topidi, 2018) or law-related conflicts today, as the BREXIT mess starkly confirms. The wider public is realising this, too, and hence not only comparative lawyers are writing about this. For example, from a cultural and policy perspective, Kaufmann (2018) now argues rather convincingly, as do others, that the liberal, conceited presumption that white people must be post-ethnic or post-racial cosmopolitans has outlived its usefulness. All humans have much to learn from each other, in a spirit of respect for difference, through different ways of interaction, yet without disabling critical faculties, as Twining (2009) also suggests.

Comparative lawyers today not only describe different manifestations of law or of governance at various historical moments of human history, but also analyse the potentially far-reaching implications of such observed differences, both in theory and in relation to practice, earlier, today and in future. Sensible comparative law today is clearly both descriptive and normative, as it seeks to identify models and samples of 'best practice', often testing to what extent certain elements may be adopted or transplanted into another legal order or scenario. Law, after all, is a globally present living mechanism composed of rules and principles, which always involve values and ethics, as the Japanese legal scholar Masaji Chiba taught long ago (see Menski, 2006: 119–28) and Twining (2009: 8) clearly endorses, too. In addition, as a living mechanism, law is also manifested in law-related processes of innumerable kinds, which manage and manipulate these rules and values. Hence, there are many uses, but also numerous potential abuses of the law.

While welcoming the 'naturalistic turn' in post-modern jurisprudence in its moderate form, Twining (2009: xix) therefore rightly warns that its extreme versions need to be guarded against, for they tend to disable protective checks and balances for securing basic rights and reducing avoidable forms of human suffering. Earlier, Baxi (2002) highlighted this increasingly discussed conundrum of the law, namely that legal action often generates precarity, rather than bliss or justice. With increasing clarity, therefore, we see today the constant need for alert constructive interaction and negotiation of competing law-related expectations to identify possible constructive ways forward, especially in conditions where various social normativities are found to be in conflict (Topidi, 2018). The ubiquitous presence of pluralities of social normativities and closely connected value preferences, in a global context, cannot reasonably be used to blame comparative lawyers, or scholars of legal pluralism, for that matter, for undermining commitments to responsible labouring in favour of better justice. In this context, it is no coincidence that comparative constitutional law scholars are now finding, especially regarding

environmental law and ecological responsibilities that classic principles of freedom of contract are actually a recipe for global disaster. Broadly speaking, they are simply too thin to generate individual sentiments of responsibility for universal well-being and tend to encourage selfish, trumped-up nationalistic non-holistic tendencies. There are other, typically minoritarian perspectives about responsible action in the global basket of law-related tools (see now Rankin, 2018) that future comparative law scholarship simply cannot ignore any longer by dismissing them as tainted by their 'traditional' or 'religious' antecedents.

Increasing excitement is now experienced among comparative lawyers about the huge scope for comparisons of something European, or Global Northern, with something from anywhere in the Global South. Notably, another important collective publication identifies that South–South comparisons are becoming highly pertinent (Vilhena, Baxi and Viljoen, 2014). The present edition of the Indian Yearbook of Comparative Law studiously continues this truly cosmopolitan and global trajectory, and this trend is warmly welcomed. The present volume presents an exciting range of new comparative law writing that demonstrates, in many different ways, the constant need to balance the many competing expectations that all kinds of law-related stakeholders have from 'the law'. This confirms that we are no longer reluctant or afraid to compare apples and oranges, which after all may have some kind of saffron colour, or add other fruits in various shades of green. Playing with such symbolism of colour serves to indicate that 'law and religion', 'law and society' and 'law and culture' are no longer necessarily to be seen as enemies of responsible law-focused analysis. They are in fact fertilisers of potentially excellent effect in the interdisciplinary orchards of law, essential vitamins and minerals for cultivating new fruits of realisation about how human coexistence based on respect for the difference may be nurtured and managed with more insights and sensitivities about justice in the twenty-first century.

It should not remain unmentioned here, finally, that such new writing in the field of law does not appear and literally sprout from nowhere. There has been a lot of hard labour involved in this, often involving complex private–public partnerships. Various international networks of comparative law scholars and educational institutions, including prominently the University of Luzerne in Switzerland, the Università degli Studi della Campania *Luigi Vanvitelli* in Italy, the National Law University at Delhi in India, but in future also the Rajiv Gandhi National University of Law in Patiala, have spearheaded and facilitated such exciting developments. The present Yearbook offers an excellent selection of a new crop, with rich pickings of further fruits of labour in truly global comparative law. This volume, unquestionably, deserves a wide readership of legal scholars and their students, as well as legal professionals and policy-makers from all over the world.

Werner Menski
Professor Emeritus of South Asian Laws, SOAS
University of London

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Preface

Introduced as one of the courses in legal studies in India since the 1960s, comparative law has acquired special significance since it is becoming an integral part of more than one mandatory and elective courses in postgraduate—LLM—legal studies since 2013. But except one preliminary monograph by Khan and Kumar—*An Introduction to the Study of Comparative Law*—in 1971 published by the Indian Law Institute, no substantial academic engagement with the subject has been pursued either individually or institutionally in India. Of course those, like one of us —Mahendra—who has been pursuing the subject as an elective course since the mid-1980s in graduate legal studies—LLB—should share the blame for not very satisfactory state of affairs. An accidental proposal from the 2016 LLM class at National Law University, Delhi, for a journal of comparative law led to the discussion on the modalities of giving practical shape to the proposal. But in view of only one-year LLM studies with multiple tasks to be executed by the students in terms of two written examinations and presentation of a dissertation besides class engagement and other engagements such as response papers and project writing and presentation in multiple courses, it was not practically possible for them to run a journal. But keeping in mind the need and desire of the students to engage more intimately with the subject, we at the Centre for Comparative Law of the University decided to take the issue forward. Considering the frequency a journal demands, we decided to have an annual publication in the form of a Yearbook with contributions from the accomplished as well as upcoming or interested scholars, including young students, in comparative legal studies. The decision led to the birth of *The Indian Yearbook of Comparative Law* in 2016.

Unfortunately due to various factors, the Yearbook missed a volume in between (2017). It is back as part of a series published by Springer from 2018 and we hope that the Yearbook will continue to publish timely volumes in future too. We hope in this background our contributors whom we had asked to submit their contributions for the 2017 edition will excuse us for the delay in the publication of their contributions and will continue to contribute in future being assured of timely publication of their contributions. We also apologise to the hon'ble members of the Advisory Board for this unexpected delay.

We are also conscious of the fact that in the field of law, journals or periodicals are started with great hope and promise of encouraging innovative research and writing of successively high quality advancing the rule of law and administration of justice in the society nationally and globally, but fail to sustain, much less advance, it for long. Therefore, it is absolutely necessary that not only promising scholars should be encouraged to research, write and publish high-quality and innovative papers, but they should also be associated in carrying forward publication of such research. Therefore, the Yearbook is open for such young and promising scholars for becoming part of its editorial team to carry forward its hope and promise. We hope such persons will keep coming forward to join this venture for not only adding to the existing team but also replacing the ones who are incapable of sharing the responsibility of carrying forward the goals of the Yearbook because of age, health or any other reason.

We are grateful to Prof. Menski for considerably enhancing the value of the Yearbook by contributing a comprehensive Foreword. In the end, we thank all the contributors of papers to this issue of the Yearbook, Vice Chancellor, National Law University Delhi, Prof. Dr. Ranbir Singh and his office for all help and support in its publication, and the two successive researchers Shri. Akhilendra Pratap Singh and Ms. Akshaya Chandani for their help and assistance in multiple correspondence with prospective contributors, publishers and others as well as in arranging, maintaining and systematising all aspects of each paper from title to footnotes.

We close with the hope and expectation that the prospective readers will find this Yearbook (2018) as a step forward in the direction of understanding and promotion of comparative law.

New Delhi, India

Mahendra Pal Singh
Niraj Kumar

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About the Editors

Mahendra Pal Singh is Professor Emeritus, University of Delhi and currently Chair Professor at Centre for Comparative Law, National Law University (NLU) Delhi. He has also served as the Chancellor of the Central University of Haryana, Chairperson of Delhi Judicial Academy, and Vice Chancellor of the National University of Juridical Sciences (NUJS), Kolkata. He was a fellow and visiting professor at several institutions and universities abroad and in India. His publications include numerous articles in national and international legal journals and several books. He is the founding editor of the *NUJS Law Review* and *The Indian Yearbook of Comparative Law* and has collaborated on national and international research projects in the area of comparative public law. He is currently directing a project on "Exploring the Nature of the Indian Legal System".

Niraj Kumar is currently working as an assistant professor at National Law University Delhi, where he is also Project Co-director of "Exploring the Nature of the Indian Legal System" at the Centre for Comparative Law. He taught at the Faculty of Law, University of Delhi previously. He has published several articles in journals and has presented papers on environmental law, constitutional law and comparative public law. His most recent publication is a book chapter in *Biodiversity, Law, Policy and Governance*, edited by Tandon et al published by Routledge in 2017. His areas of interest are administrative law, constitutional law, environmental law, interpretation of statutes, jurisprudence and comparative law.

Part I
Comparative Law: General Themes

Chapter 1
Comparative Law and Globalization in Asian Perspectives: Two Proposals of Methodological Framework

Nobuyuki Yasuda

Abstract Considering current paradigm shifts of comparative jurisprudence from narrow "legal" view to wider "social/political" concerns, this paper proposes two methodological frameworks for comparative legal research from Asian perspectives. First is the idea of "three types of laws" (indigenous, modern, and developmental), "three (legal) principles" (community, market, and command), and "three societal dimensions" (social, economic, and political), which aims at rather static understanding of "law." Further, in order to understand dynamic socio-legal developments within region, it conceptualizes "two dynamic forces" (market and community), to show the historical development of law and societies, and examines major legal problems under the ongoing current globalization. Second, the paper creates the "three-layered understanding of law"; "law as rule," "law as institution," and "law as culture," which construct the cycling structure of the national legal system. Legal systems function successfully only when "law" cycles these three phases smoothly and inclusively. Finally, discussing how the globalization impacts on the national legal systems, it suggests that "law" would change its nature from "legal or formal" to more "social and political or substantial/reflexive," illustrating two examples of "transnational law," on the regulations of transnational corporations and the autonomous rights of indigenous/local people.

1.1 Introduction

Since entering the new Millennium, the comparative jurisprudence has been changing its traditional paradigm, facing with the globalization which started probably in the 1980s, and has been transforming drastically the political, economic, and social systems based on nation-state framework.

N. Yasuda (✉)
Nagoya University, Nagoya, Japan
e-mail: yasuda14nobu@gmail.com

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Asia[1] is not exceptional, but rather a central part of this phenomena, because (1) there are numerous laws and legal systems, state/formal and non-state/informal, within the region,[2] and (2) the states in this region have experienced drastic political, economic, and social changes, and achieved a remarkable development since their independence.[3] There seem to be, however, only few lawyers who concerned with the comparative jurisprudence in this region, because they tend to conceptualize the "law" rather narrowly within state/formal laws substantially based on Western modern legal traditions, and to disregard their own non-state/informal laws. But, as a result of the Globalization, there are clear indications that scholars have started adventuring a comprehensive comparative work not only at practical level confined into formal/state law, but also from the wider and deeper perspective in the context of social, economic, and political development among the region or non-Western nations as a whole.[4] It is a time now to create a new and comprehensive research framework for the Asian-based global comparative jurisprudence.

[1]It might be necessary to define "Asia," though this task seems nearly impossible. I, tentatively, confine it to mean "monsoon Asia," composed of (Far) East Asia, Southeast Asia, and South Asia, which have created a broadly common culture or value symbolized by the term "harmony" on the basis of collectivistic agricultural tradition of rice cultivation under monsoon climate, as well as by the term of "chthonic legal tradition" Glenn 2004, 2014 originated in primitive history, in contrast with other area of the world especially Europe and West Asia, which produced rather individualistic culture (Yasuda 1998). However, I believe that my arguments can be expanded more widely to all non-Western world in contrast with West to some extent, because substantial parts of this area had been characterized as "agriculture" based society before they faced Western "(modern) industrial" civilization, which forced them to adapt Western modern law.

[2]In this region, there are almost all kinds of law, either state/formal law transplanted from the West under her colonial rules or in the process of modernization, such as common law, civil law and even socialist law, or non-state/informal law such as indigenous/chthonic, or oriental (religious) laws like Islamic, Hindu, Buddhist, etc. In this paper, I define "law" broadly as including "non-state/informal law," which can be defined as "commonly accepted and forced norms in the society."

[3]This area is one which has achieved the most successful development in the world since the 1980s, as we exemplify China, India, and ASEAN countries.

[4]Now "ASEAN Law Association" plays important roles for the harmonization or integration of regional laws in various fields; see https://www.aseanlawassociation.org/. Further, since the 1990s, there have been various law research and practice movements, such as the Third-World Approach to International Law (TWAIL) (Chimni 2006), the conceptualization of "transnational law" (Calliess 2010; Cotterrell 2012; Zumbansen 2012) and internationalization of US origin "public interest law" (Cummings 2008), all of which relate closely with the comparative jurisprudence in Asian or non-Western contexts. See also Maldonado 2013 for an example of recent work on comparative constitutions within non-Western countries. "Social Action Litigation" or "Public Interest Litigation" movement in India since the 1980s is a remarkable example of achievement of Indigenization of Western (British/American) Constitutional laws and practices and creation of its own modern/contemporary Constitutionalism. See Baxi 1985 for its ideal and implication for Indian socio-legal development, and Maldonado 2013 for the comparison with similar adventures in Colombia and South Africa.

This paper aims at exploring a new methodology on how we understand the contemporary Asian legal systems under the ongoing Globalization, and, hopefully, to contribute to the current effort to build a new paradigm of comparative jurisprudence from the perspective s of Law and Development Study (LDS)[5] under the current Globalization. For this purpose, **first**, I survey the development of comparative jurisprudence briefly and show the new trend of expanding the concept of "law" from narrow legalist formal/state law on the basis of "legal family/legal system" paradigm to wider "social" concerns including informal/non-state law/norms (I). **Second**, I propose a new methodological framework in order to understand the current legal phenomena, which consists of three types of "laws" (indigenous, colonial, and development laws), "legal principles" (community, market, and command), and "societies" (social dimensions) (communal/social, economic, and political), and further creating the new dynamic concept of "forces"; "market," and "community," I sketch the historical development of the laws and legal systems of Asian developing countries and their current problems under the ongoing Globalization (II). **Finally**, I propose the another structural framework in order to understand current "national legal system," especially of these countries, on the setting framework of three-layered structure of "law as rule," "law as institution," and "law as culture," and examine how the Globalization impacts it. (III)

1.2 Comparative Jurisprudence in Asian Perspectives

There has been increasing understanding among comparative lawyers that existing orthodox methods of comparative jurisprudence are not adequate to grasp the reality of law and legal phenomena in Asia and other non-Western world. Modern Western law and jurisprudence occupies a dominant position in the national legal systems of non-Western countries of the world, because almost all of their laws and legal systems were based on the transplanted Western law during the colonial rule or in the process of forced modernization.[6] This results in producing a serious discrepancy between "state/formal law" transplanted from modern Western nations and "non-

[5] Law and Development Study (LDS) has a long history since the 1960s (Trubek and Galanter 1974), changing its paradigm since the Globalization. See Trubek and Santos 2006, Carothers 2006 on the examination of its Rule of Law (ROL) paradigm. See also Gillespie and Nicolson (eds.) (2012) and Tamanaha/Sage/Woolcock (eds.) (2012) on the recent LDS. I believe that LDS is an effective branch of comparative jurisprudence.

[6] Within the region, only China, Japan, and Thailand could avoid the Western colonial rule, although they are forced to introduce Western law in order to create "a civilized nation-state," which was an essential condition to revise the unequal treaties with Western powers. It is interesting that these countries introduced civil law mainly from Germany.

state/informal law" originated in their indigenous law and custom and still regulating people's life tenaciously.[7] In this section, I examine how the traditional comparative jurisprudence expands their concern from the simple "legal family" paradigm confined its interest within "state/formal law" to more comprehensive understanding "law" including non-state/informal law. This can be epitomized as shifting or expanding the scope from "legal (formal)" to "social/political."

1.2.1 Legal Family: Classic Taxonomy of Comparative Jurisprudence

Modern legal science or jurisprudence was born and developed in Western modern world, on the same stream of other social sciences such as economics, political science, and sociology. Its common disciplinary method is based on taxonomy which first separate or differentiate objects by the nature of things. This is why the classic comparatist engaged in categorizing "legal family"[8] as its essential part. Their mapping standards and methods are different by schools, but commonly based on modern Western legal tradition. For example, Zweigert/Koetz propose four major "legal families," Roman, Germanic, Anglo-American, and Nordic, emerged and developed in the Western hemisphere, and distinguishes them from other "law."[9] David/Brierley propose four major families, such as "Romano-Germanic Family," "Socialist Laws," "common law," and differentiate "Other Conceptions of Law and the Social Order."[10]

It seems undeniable that these concepts of "legal families" are categorized on the basis of Western tradition of legal knowledge and institutions developed endogenously within a common culture and formed a substantial part of a national/state law, and applying them for categorizing laws of the world.[11] This framework causes serious biases when we try to understand non-Western legal systems, because it tends

[7] The distinction between formal and informal law is based on the difference of authority of law, and interchangeable with "state/formal law" and "non-state/informal law" (I use this term hereinafter) or official law and non-official law, while the difference of "indigenous law" and "transplanted law" is categorized by the origin of law. See Chiba 1986.

[8] See David and Brierley 1986 on the idea of "legal families."

[9] "Socialist Legal Family" was omitted in the Third Edition. Other laws include Chinese Law and Japanese Law in the Far East, under the heading of the "Law in Far East" and Islamic Law and Hindu Law under "Religious Legal Systems," but they seem not to be classified as "Legal Family" (Zwaigert and Koetz 1998).

[10] They survey Muslim Law, Law of India, Laws of Far East, and Laws of Africa and Malagasy in the last category. *Supra* note 8 pp. 455–576.

[11] It never means that there is no conflict national/state law and local non/state law in Western countries, which has become an important subject of legal anthropology or sociology of law in the distinction of state/formal law and non-state/"living law." See Ehrlich [1913] 2001.

to focus only on the state/formal law based on Western law transplanted to these countries, and to disregard or dismiss their own indigenous law, whose substantial parts are "non-state/informal law."

1.2.2 Socio/Cultural Taxonomy of Law: Mattei 1997, Van Hoecke and Warrington 1998, and Glenn 2004, 2014

In the 1990s after witnessing the collapse of "Socialist Legal Families," and probably observing a successful economic development of the East Asian region,[12] some Western comparative lawyers have started reconsidering their orthodox "legal family" theories, and proposed new frameworks of understanding world legal systems in more inclusive perspectives. Among them, it seems that three adventurers are important.

One is Mattei 1997, who proposes "three patterns of law" for the new comparative framework to understand world legal systems including non-Western ones. Those are (1) the Western Legal Tradition (WLT) based on "rule of professional law," (2) the Law of Development and Transition (LDT) based on "rule of political law," and (3) the oriental view of the law (OVL) based on "rule of traditional law." His taxonomy is more advanced for the examination of legal systems of the present world than the classical legal family theories, because it provides more effective tools for the systematic framework of analysis of them, including both former socialist transiting and non-Western developing countries, through modifying the concept of "law."[13]

First, WLT is categorized by two homogenous factors, (1) the legal arena is clearly distinguishable from political arena, and (2) the legal process is largely secularized,[14] where professional lawyers play a dominant role in the autonomous legal system separated from political field. He does not distinguish between "civil law"

[12] Since the 1970s, East Asian region (Japan, Korea, China, and major ASEAN countries) has recorded a tremendous economic growth, of which success story in the 1980s is examined as World Bank (WB) 1993. It is important to know that these nations took rather a different path of development from Western models. Their success in development has been based on informal traditional or indigenous custom and value which sometimes conflicted with formal transplanted legal system. A typical example is "Gyoseisido" (administrative guideline) of Japan which is implemented by the informal negotiation between bureaucrats and business without any authorization of law. See Johnson 1986. I characterize this type of capitalism by "community (based) capitalism" in contrast with Western "market (based) capitalism" (Yasuda 2001). However, the East Asian Economic Crisis erupted in 1997–98 exposed the limits of community-based capitalism, and since then, all East Asian nations including Japan have been struggling for "law and economic reforms," some with the assistance by World Bank and other institutions. See III.

[13] It is interesting that last OVL is still a "View," but not "Law" distinguished from former two, even in his taxonomy.

[14] Mattei 1997.

and "common law" as the traditional "legal family" schools, and discusses that above two factors are the common in modern Western law which seems to represent market/capitalist economies. Needless to say, those also link with the Western liberal democratic idea such as in constitutionalism, judicial independence, judicial review, and so on.

Second, LDT is based on what he defines as "rule of political law," of which "the legal process is often determined by political relationship … and there is not such a thing as formal law binding on government."[15] We may take it a typical example of former socialist/communist legal systems based on the political ideology of "proletarian dictatorship." Witnessing the collapse and disappearance of major socialist states in the end of 1980s, he exemplifies this legal family by those of "transition and development states," where political hegemony is superior to the judiciary.[16]

The contrast between "rule of professional law" and "rule of political law" shows familiarity to the distinction between horizontal/market (capitalist) model and vertical/command (socialist) one, as I discuss later in II.[17]

Third, OVL family and the concept "rule of traditional law," however, is set up by a different rationale based on the socio-cultural contrast between "modern" and "traditional," although he defines it simply as "systems where the separation of law and religion and/or philosophical tradition has not taken place."[18] According to his criterion, this family is an attribute to all major Asian laws including Islamic, Hindu, and Chinese law countries.[19] He points out that this type of law exists as living law even in the countries which receive Western professional law, and exemplify Japanese indigenous management practice in the corporate governance law transplanted from the West.[20]

He is mapping for the world legal families or traditions as follows.[21]

[15] Ibid., p. 28.

[16] This is a common nature of "statism," and more or less ubiquitous in Asian or non-Western "authoritarian regime" in the world, and relates to what I define "command principle" in II.

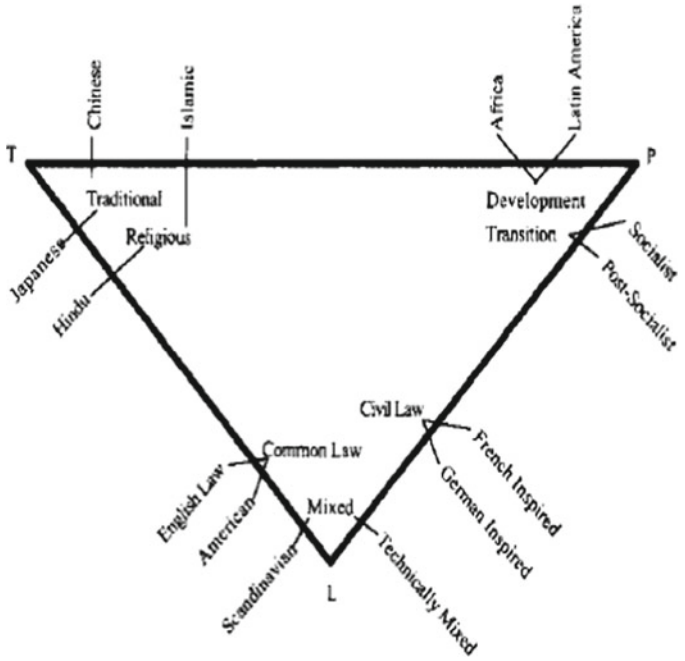
[17] I discuss this contrast as "market" and "command" principles in II.

[18] *Supra* note 14, p. 30.

[19] Ibid., p. 36.

[20] Ibid., p. 38.

[21] Ibid., p. 44.



(T: Traditional Law <OVL>, P: Political Law <LDT>, L: Lawyers Law) <WLT> (Mattei 1997:44)

His taxonomy records a remarkable contribution to the effort of comparative jurisprudence to expand the concept of law from narrow Eurocentric legalist definition to wider sociological one including laws of Asian and other non-Western world. His effort to conceptualize "rule of traditional law and OVL" suggests the direction to investigate what is the common essence of Asian and (non-Western) law, beyond the modern binary methods between horizontal/market and vertical/state, although it seems necessary to refine it in order to make clear the position of Asian law.[22]

Hoecke/Warrington also seek for a new paradigm to break through the narrow limits of Western legalism for understanding law and legal system in more comprehensively including laws of Asia and other non-Western world.[23] Interestingly, they propose multiple eyes to make a comparative research of world legal systems, by showing two different approaches of comparative method. One is to utilize the traditional concept of "legal families" following Western legal traditions, such as Roman-Germanic family, common law family. By this criterion, legal systems all over the world can be classified into one of these legal families, because law at this level is of similar nature to Western law, either evolved endogenously in Western mother countries, or imposed or transplanted under the colonial rule in non-Western

[22] I discuss it as "community principle" in II.

[23] Van Hoecke and Warrington 1998.

countries. They characterize law at this level by "law as rule" and "legal family,"[24] because of its nature focusing only on the narrow legal structure, and conclude that this approach is not adequate to examine the nature of non-Western legal systems.

This is why they propose another category called "cultural families" based more on the sociocultural nature of law and society, which they call "law as culture." They recognize four major legal cultures broadly or at world level, that is, African, Asian, Islamic, and Western, mainly based on geocultural criteria,[25] and contrast their natures by the terms of "individualism" and "rationalism" in the West and "collectivism" and "irrationalism" in Asia (and Islamic and African).[26] And they propose to approach "law as culture" at three levels, that is, (1) in the context of the large cultural families on a world scale: African, Asian, Islamic, and Western (legal) cultures, (2) comparative law in the more traditional, strict sense, and (3) a more or less purely technical comparison.[27]

What they propose is a comprehensive framework for understanding "legal culture," definition of "law," and "legal doctrines," etc., by devising various concepts and methods such as on "law as rule"/"legal family," and "law as culture"/"cultural families," as well as "law and language" matters, although their scope of analysis seems to be actually limited to the Europe and European law.[28]

I appreciate their efforts at least for two points, (1) finding the distinction of "law as rule" and "law as culture," and (2) contrasting "individual and rational law" in the West and "collective and irrational law" in Asia (and other non-Western regions), as a basic concept for the comparison of "legal culture" between two worlds, though it seems necessary to improve and clarify at three levels as they proposed above.

Finally, Glenn 2004, 2014 propose a new typology of "legal tradition," on which he start examining the concept of "tradition" in detail and defines it in a way to include "non-law tradition" widely, based more on "cultural structure" of law or customary norm.[29] He categorizes seven major legal traditions, "Chthonic," "Talmudic," "civil law," "Islamic," "common law," "Hindu," and "Confucian (Asian)," on the basis of "legal tradition," which looks like meta-legal cultures or civilizations far beyond the traditional concept of "legal families."[30] The idea of "legal tradition" shows some affinity to what Hoecke/Warrington define briefly as "cultural family" or "legal

[24] Ibid., p. 502.

[25] They define Western cultural family as "those cultures with European roots (Europe, America, and Oceania)," and mention that Russian family is bridging Western and Asian one. Ibid., p. 502.

[26] Ibid., pp. 502–504.

[27] Ibid., pp. 532–533.

[28] Ibid., pp. 513–532.

[29] *Supra* note 1 Chaps. 1 and 2 He discusses what is the tradition, referring to the contemporary information or communication theory in Chap. 1 and its relation to the identity of communities in Chap. 2, but does not disclose what are the common elements or criteria to characterize "legal traditions" themselves, although he suggests it simply as "traditions of normative communications."

[30] Glenn emphasizes that legal tradition is just a "normative information," wider and deeper than "legal system" defined within a certain (national/state) border. See Glenn (2008) 425. This is why I identify them as "meta-legal" concepts.

culture" at world level, while Glenn examines a full details of each major legal tradition of the world under the above seven categorizations.

What is important from my concern is his concept of "chthonic legal tradition" (ChLT) which seems like the proto-legal tradition for all world major legal traditions, and its relation with "Asian (Confusion) Legal Tradition."[31] First of all, ChLT is identified with "aboriginal," "native," or "folk" law, although he is negative to use these terms.[32] He characterizes its nature by various terms, such as "orality" and "informality,"[33] "inducement of consensus,"[34] "living close to land in harmony with it,"[35] "no separation of law and anything else,"[36] "polytheistic (many gods), or even animistic (many many gods …),"[37] and "the idea of inter-generational obligations."[38] It is interesting that these characterizations show a close affinity to the basic natures of traditional Asian or non-Western law as a whole. Actually, he includes indigenous African law and Asian law in chthonic legal tradition to some extent, although the latter part of his analysis tends to confine in "laws of indigenous people."[39]

His discussion on Asian Legal Tradition deals mainly with Chinese Legal Tradition, where he examines its nature by contrasting between Li in Confucian ideology and Fa in Legalist law of China.[40] He discusses other Asian traditions such as Southeast Asian Adat law,[41] Asian Buddhism (Glenn 2004:313–315), and Chinese Taoism and Japanese Shintoism (Glenn 2004:315–317), and suggests that they have a certain resemblance to ChLT, although it seems that the Legalist (Li) tradition of China belongs to different value from ChLT.[42]

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[31] He admits that ChLT has a close relation with "Asian Legal Tradition" which he originally named in his old Editions, but renamed to "Confucian Legal Tradition" from the Fourth Edition of 2010.

[32] *Supra* note 1, p. 60–62.

[33] Ibid., pp. 64–67.

[34] Ibid., p. 65.

[35] Ibid., pp. 69–72.

[36] Ibid., p. 72.

[37] Ibid., p. 76.

[38] Ibid., p. 80. As I discuss in II later. These features are very similar to what I define as "community principle."

[39] He categorizes the relation of chthonic law to (modern) Western tradition of the state by two basic models, (1) "the state constructed by western powers in colonized countries, which persist following withdrawal of western authority" as in Asia and Africa, and (2) "the state constructed by western powers in the process of permanent settlement in colonized territories, which persists as an ongoing instruments of western authority" as in Americas and Australia, although he discusses them focusing on the latter model mainly, and its implication in the modern world, where he discusses the interrelation with contemporary states (Glenn 2014:85–89).

[40] *Supra* note 1 Glenn 302–321.

[41] Ibid., pp. 302–303.

[42] His understanding on Chinese law seems to be influenced by the mainstream of comparative lawyers like Zweigert/Koetz and David as seen in the characterization as having informal or moral nature, although he adds more information and new view such as the relation between Li and Fa (Glenn 2014:320–326). Needless to mention, Hindu Legal Tradition is discussed independently in Chap. 8.

For my concern, it seems important that he suggests that "it ('Asian Legal Tradition') is a tradition of great and friendly persuasion, just based on all of us …. (t)here is something of the chthonic in it, yet Asian has greatly refined the chthonic" in his Second Ed.[43] This implies that Asian Legal Tradition in wider sense is a product of evolution and refinement of CLT within the region, although it mixed with other legal traditions such as Islamic tradition in some of South and Southeast Asia.[44] Therefore, we can conclude that what he conceptualizes as ChLT forms also a common essence of wider Asian legal tradition as a whole and probably more widely of the non-Western legal traditions, and further consists of substances of what Mattei defines "oriental view of law" and "rule of traditional law" and Hoecke/Warringtons' idea on "irrational and collective" nature of non-Western legal cultural families in contrast with "rational and individual" one of Western family.

1.2.3 Legal Transplants, Mixed Legal System, and Legal Pluralism

Even in the era of Globalization, the national law and legal system is undeniably the basic unit for comparative jurisprudence, which is classified traditionally by the "legal family." However, especially in non-Western countries, it would be impossible to define their legal system by a single "family" or "tradition," because of their mixed and plural nature. For example, Indian (national) Legal System belongs not only to "common Law Family/Legal Tradition" due to the former British colony, but also categorized as "Hindu Law Tradition" continuing more than 3000 years, as well as adapted "Islamic Law Tradition" which has consisted of an important part of proto-state legal system due to its expansion to the subcontinent probably since the tenth century. In Japan who has no colonized experience, in addition to "civil Law Family" as the result of Western-styled "Codification" in the process of "Modernization" started in the latter part of the nineteenth century, there are existed the chthonic legal tradition (such as Sintoism) mixed with Confucian and Buddhist Legal Tradition clearly.[45]

These facts request us to set up a more meta-legal framework to understand the situation of Asian legal systems at regional and national levels. This is the main object of this paper and discusses it in the following sections. Before then, it is necessary to think about the topic of "Legal Transplant" and "Mixed Legal System" briefly, for the bridging between general comparative jurisprudence and national legal study under the Globalization.

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[43] *Supra* note 1, p. 302.

[44] Southeast Asian Adat Law examined as a part of 'Asian Legal Tradition" in Glenn's 2nd Ed. (Glenn 2004:303–304) is shifted to the part of "Islamic Legal Tradition" in 5th Ed. (Glenn 2014:226–227), while Sintoism of Japan is still dealt in relation with Fa and Taoism and Buddhist traditions as a part of "Confucian Legal Tradition" (Glenn 2014:330–331).

[45] See Halpérin 2014 on comparative research of legal transplants between India and Japan.

(1) Two Phases of "Legal Transplants"

"Legal Transplants" or "Reception" is one of the common and important topics of the comparative jurisprudence for drawing the dynamic views of movement and transformation among relatively static "legal systems." This can be divided into two phases. **First** is a rather legal oriented movements such as "Reception of Roman Law" in European countries. This movement relates to the formation of modern Western "legal families" like "civil law" and "common law," etc., where legal historians examine this process how the modern Western law was evolved since the middle age, and how the Roman Law was transplanted and diversified by the local situations such as state ideology, professional lawyers and chthonic or feudal laws, in Germany, France, UK, and other European countries. Since the end of nineteenth century, legal professions, either academic or practical, started comparative research for the harmonization of national laws especially in the field of private (civil) laws within the region, and further they expanded their interest all over the world. Their interest, however, was confined rather in legal/technical matters, but not seemingly extended to wider social/cultural effects.[46]

The movement of harmonization of European civil laws[47] is the latest example of this type of Legal Transplant. It is interesting to see even in this process that some comparative lawyers started discussing heatedly about the impossibility of Legal Transplants.[48] This shows that the concept of "law" has been expanded beyond the narrow legalist technical definition to the wider one in the context of social and cultural meaning. This relates to what I call the second phase of Legal Transplant.

The second phase of Legal Transplant relates to the expansion of modern Western law to the non-Western countries through the colonial rule or other form of hegemonic power, There are wide differences in the processes and results of this type of Legal Transplants, due to the stages of economic and political development, both of the Western colonizing/hegemonic powers and of the Asian subordinate/colonized regions. However, it was common that this imposition of "modern" Western law to the colonized "traditional" or even "primitive" societies caused binary or plural conflicting "legal dualism" or "legal pluralism," characterizing the post-independent Asian or non-Western legal systems.[49]

These relate to the concepts of "colonial state" and "colonial law."[50] It is natural to think that Western modern law was transplanted in the commercial and relevant field

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[46] See Watson 1974 on Legal Transplants such as the reception of Roman Law and the expansion of Western Laws over the world, though his view point seems to be rather on "rule"-oriented legalist position. See Graziadei 2008 on the recent arguments on this topic.

[47] See Hartkamp et al. 2010 on the comprehensive studies on recent movement for the EU Civil Code.

[48] See Legrand 2001 who insists strongly that legal transplants are impossible because of the cultural nature of law. See also Watson 2000. See Graziadei *supra* note 46 on the recent arguments on this topic.

[49] See Mommsen and De Moor 1992 for the general outlooks of this process in Asian and African regions as a whole.

[50] "Colonial state" is loosely defined as "quasi-state" which externally or under the international law is classified as the subordinated part to a sovereign state, but internally or under the domestic

such as commercial laws and judicial institutions dealing with their dispute settlement, because the aim of colonial rule was motivated mainly to exploit the economic wealth of these colonies. As capitalism of home states was matured, colonial governments needed to establish more stabilized and refined legal system to govern the commercial activities in the colonialized society on the basis of the market or capitalist "rationality." They saw that there were no indigenous laws and norms effectively to regulate and manage these activities in the colonized societies, because it was nearly impossible to identify with Western idea of "law." This is why the "modern" Western laws were newly introduced, especially in the field of commercial transaction.

In contrast, in the communal/social field of the colonial societies such as family, succession, and other communal life, laws and customs of local and religious communities were left untouched largely as an autonomous area of "personal laws" among inhabitants, because this area was not relevant directly to the aim of colonial rules of the economic exploitation. As the colonial rule was stabilized in each territory, "colonial state" governments were requested to establish general laws on government and judicial institutions, copying their mother law, although, because of the "colonial rule," those lacked the liberal and democratic nature which was being established in Western mother countries since the nineteenth century.

Therefore, the legal dualism/pluralism becomes a common and basic character of Asian or non-Western colonial legal systems, although this problem seems not discussed so seriously during the time of the colonial rule.

(2) **Post-colonial Law Reforms and Mixed/Plural Legal System**

After World War II, Asian and non-Western people gained their own sovereignty and started building their own nation-state, which I call "developmental state,"[51] because of their common nature of aiming at their social, economic, and political development of the nation by the state initiatives. The state (government) mobilizes law to achieve the comprehensive political, economic, and social development. Law is thought as an effective policy tool to achieve the development, and they legislated various economic and social reform laws, as well as judicial reforms during the 1960–70s. These laws belong broadly to the category of "transplanted state law," because their form and substance were not only on the common base not only "colonial law" but also on the contemporary Western "social/welfare state law" and/or "socialist law" in

law enjoys comparatively independent or autonomous status, in the legal form, and "colonial law" means "quasi-state law" legislated or introduced by home or "colonial government." Ivarsson and Rud 2017 introduce Young's definition of "colonial state" by three lacking as regular nature of nation (1) sovereignty, (2) nationalism, and (3) subjectivity of international law in African context. British India after the establishment of "Indian Empire" in 1877 and "Codification of Anglo Indian Code" was a typical example of "colonial state" and "colonial law" through the late nineteenth century.

[51] This concept is originally proposed by Johnson 1986 (*supra* note 12) for explaining modern Japan's development process which went on a middle way among capitalist/market and socialist/command economies, adapting the strong government/state initiatives. This is expanded to developing states as a whole (Wo-Coming 1999).