Legal Systems and Legal Families: Italy and Japan in Comparative Perspective

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Abstract

This article analyses the role and the significance of taxonomies in modern comparative law, taking the classification of Italy and Japan as examples.

The first part explains the concepts and purposes of taxonomies in science and in comparative law.

The second part analyses the reasons why Italy and Japan are often classified as civil law countries as well as the significance for comparative law scholars and Japanese law specialists in particular of calling Japan a civil law country.

The final part reviews the latest trends in taxonomic projects in comparative law and offers legal taxonomic pluralism as an approach to mitigate the problem of contradictory taxonomies.

I. Introduction

This article is divided into three parts.

The first part reviews the concepts and purposes of taxonomies and includes examples of the use of taxonomies in science and in comparative law.

The second part reviews the reasons Italy and Japan are often classified as civil law countries as well as the significance for comparative law scholars, and Japanese legal scholars especially, of calling Japan a civil law country.

The third part reviews the latest trends in taxonomic projects in comparative law and offers an approach to mitigate the problem of contradictory taxonomies.

II. What are Taxonomies?

1. Taxonomies in Science

Most, if not all, cultures name and classify things and concepts. Classifying things is the implicit foundation of cognitive processes.[1] It is crucial to the

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[1] P. Lambe, *Organising Knowledge: Taxonomies, Knowledge and Organisational Effectiveness* (Oxford: Chandos Publishing, 2007); G.C. Bowker and S.L. Star, *Sorting Things Out: Classification*

gathering and communicating of information.[2]

Taxonomies are an important part of natural history and science. The system devised by Carolus Linnaeus in the eighteenth century is firmly established as the way of naming and classifying species of animals and plants.[3] In the same century, Georges Louis Leclerc de Buffon's thirty-sixth volume *Histoire naturelle* (published 1749-1789) offered a dynamic account of the earth's formation as well as the changes over time and distribution over the globe of animals, plants and minerals.[4] A century later, Darwin's theory on the origin and evolution of the species advanced these natural history projects greatly by providing an explanation of how living beings change in time.

The Linnaean taxonomy and Buffon's natural history, together with Darwin's evolutionary theory, were spectacularly successful and were received and adopted well beyond the fields in which they were developed.[5] They, or at times their vulgarized versions, had a considerable impact on social sciences, including jurisprudence and comparative law.[6] The influence of Linnaeus, Buffon and Darwin is evident in two types of inquiries commonly performed by comparative law scholars.

The first, echoing closely the Linnaean taxonomic project, is the synchronic analysis, in which legal systems are analysed and sorted into groups and subgroups. These groups and subgroups are then labelled with various names, producing as a result a map of the world's legal systems.

The second is the diachronic analysis, in which the inquiries focus on the evolution of legal systems. This approach is influenced by Linnaean taxonomy insofar legal taxonomies are taken as the starting point of the inquiry. However, this approach recalls Buffon's *Histoire naturelle* when it adds historical and

and Its Consequences (Cambridge, Massachusetts-London: The MIT Press, 2000); K.D. Bailey, *Typologies and Taxonomies: An Introduction to Classification Techniques* (Thousand Oaks: SAGE Publications Inc, 1994).

[2] P.L. Farber, *Finding Order in Nature: The Naturalist Tradition from Linnaeus to E.O. Wilson* (Baltimore, Md: Johns Hopkins University Press, 2000), 1.

[3] W. Blunt and W.T. Stearn, *Linnaeus: The Compleat Naturalist* (London: Frances Lincoln Publishers Ltd, 2004); P.L. Farber, n 2 above, 1.

[4] T. Hoquet, *Buffon: Histoire naturelle et philosophie* (Paris: Honoré Champion, 2005); P.L. Farber, n 2 above, 19.

[5] Hayek claims that it was in fact Darwin who borrowed the concept of evolution from the social sciences and applied it to biology: F.A. Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (Chicago: University of Chicago Press, 1978), 22. This first borrowing is not widely known, probably because of the spectacular success of the theory of evolution in biology or of the discredit around the idea of 'social Darwinism'. Therefore, the notion of evolution by natural selection is nowadays associated with Darwin and not with the 'Darwinians before Darwin' as Hayek refers to the eighteenth century moral philosophers and the historical school of law and language, citing August Schleicher and Max Müller: ibid 23, fn 33.

[6] H.P. Glenn, 'The Aims of Comparative Law', in I.M. Smits ed, *Elgar Encyclopaedia of Comparative Law* (Cheltenham: Edward Elgar Publishing, 2nd ed, 2012), 67; R. Michaels, 'The Functional Method of Comparative Law', in M. Reiman and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 339-382.

geographic dimensions to the picture. There are also frequent references to the Darwinian theory of evolution. Sometimes they are explicit.[7] Sometimes they are not explicit or even intentional. Yet the mere use of keywords such as 'evolution' or 'adaptation' in legal writings cannot fail to evoke Darwin's evolutionary theory.[8]

Comparative law does not rely on one dominant taxonomy or one original theory of legal evolution in contrast to how the majority of natural science scholars recognize those based on Linnaeus and Darwin. There are many ways of classifying the world's legal systems and of explaining their evolution. Some have been borrowed from Linnaeus and Darwin,[9] but the different methodologies have produced different results.

Limiting this inquiry to modern taxonomies, we can see that the civil law and the common law group are present in most, if not all, recent taxonomies.[10] The Islamic law group is another quite ubiquitous one. All comparative legal scholars are familiar with other groups such as African, Confucian or Eastern Asian, Hindu and Socialist law. It was not always like this: the fathers of comparative law identified fewer groups, mostly due to their lack of knowledge about non-European law. More groups have been identified as the discipline of comparative law has expanded. Undoubtedly, still more groups will be identified.[11]

Japan is often defined as a civil law country.[12] Even the authors who stress the distinctiveness of Japanese culture and its influence on the law of the

[7] E.D. Elliott, 'The Evolutionary Tradition in Jurisprudence' 85(1) *Columbia Law Review*, 38-94 (1985); H. Hovenkamp, 'Evolutionary Models in Jurisprudence' 64 *Texas Law Review*, 645 (1985); M. Zamboni, 'From Evolutionary Theory and Law to a Legal Evolutionary Theory' 9 *German Law Journal*, 515 (2008); M. Barberis, 'Evolutionist Jurisprudence (Legal Epistemology)' *Encyclopedia of the Philosophy of Law and Social Philosophy* (Dordrecht: Springer, 2017), 1-7.

[8] The evolution of the common law is sometimes explained in Darwinian terms. It is seen as a process of elimination of the least efficient rules through adjudication, just like species evolve eliminating of the least adaptive traits through natural and sexual selection. M. Barberis, ibid 7.

[9] See n 11 below.

[10] As noted by Pargendler, it was not always thus. The *summa divisio* between civil law and common law emerged in the twentieth century: M. Pargendler, 'The Rise and Decline of Legal Families' 60 *The American Journal of Comparative Law*, 1046 (2012).

[11] It is of course impossible to cite here all the works that presented legal taxonomies. Some reviews of the literature on taxonomies can be found in: L.J. Constantinesco, *Traité de droit comparé* (Paris: Economica, 1983), III; C. Varga, 'Taxonomy of Law and Legal Mapping: Patterns and Limits of the Classification of Legal Systems' 51 *Acta Juridica Hungarica*, 253-272 (2010); M. Pargendler, ibid; M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014), 72.

[12] The statement is commonly found in the literature, especially that written by Japanese scholars and is deemed so obvious that it often comes without a citation. See, for example, among recent works in English by Japanese scholars: J. Shimizu, 'Common Law Constitutionalism and Its Counterpart in Japan' 39 *Suffolk Transnational Law Review*, 1-46 (2016); S. Matsui, 'Constitutional Precedents in Japan: A Comment on the Role of Precedent' 88 *Washington University Law Review*, 1669 (2011); M. Kamiya, 'Chosakan: Research Judges Toiling at the Stone Fortress' 88 *Washington University Law Review*, 1618 (2011); Y. Hasebe, 'The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms' 5 *International Journal of Constitutional Law*, 299 (2007).

archipelago do not deny that from the second half of the nineteenth century the Japanese legal system has been by and large modelled on Western patterns and that now shares many features with European legal systems.[13] While Japan is sometimes a 'victim' of these characterizations,[14] it is useful to assess whether this view is correct, and if so, what information that it conveys.

2. Usefulness of Legal Taxonomies

Since most comparative law textbooks divide legal systems into groups, many law students acquire their first notions about the world's legal systems according to those groups.

While it is obvious that every legal system possesses some special characteristics or original institutions, most legal systems have features that are similar or equivalent, when not identical, to those of other legal systems. Therefore it is more practical to start learning about foreign law by focusing on what legal systems have in common, thus creating a map of the world's legal systems based on the similarities between systems.[15]

After having identified some groups and built a rough map of the various groups,[16] the next step should be to focus on the similarities and differences among legal systems within the groups, ie on the original traits of each legal system. By adding details, one can obtain a deeper and more accurate picture of each group.

Thus, legal taxonomies serve a distinct didactic purpose, as they greatly simplify the description of the world's legal systems.[17] Three other reasons also support the utility of creating and maintaining legal taxonomies.

The first basic reason is related to the identity of a particular system. By claiming that a certain national legal system belongs to a certain group, the identity of that legal system is clarified. Finding differences between legal systems or, more broadly, between cultures is an effective way of establishing a community's or nation's identity.

The second basic reason is practical. A search for a correct division into groups is justified for the practical reason that it can help predict the success of

[13] For a recent example, H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford-New York: Oxford University Press, 5th ed, 2014), 345. More nuanced: J.H. Merryman and R. Pérez-Perdomo, *The Civil Law Tradition* (Stanford: Stanford University Press, 3rd ed, 2007), 4.

[14] Japan is often seen as an exotic legal system. The abundance of literature on it makes it easy for the non-specialist to discuss Japan as an ornamental example or counterpoint. For the specialist of Japan, however, such literature often just adds superfluous noise or perpetuates surpassed clichés. See G.F. Colombo, 'Japan as a Victim of Comparative Law' 22 *Michigan State International Law Review*, 731-753 (2013).

[15] G. Danneman, 'Comparative Law: Study of Similarities or Differences?', in M. Reiman and R. Zimmermann eds, n 6 above, 383–419.

[16] See M. Siems, n 11 above, 73.

[17] K. Zweigert and H. Kötz, *Introduction to Comparative Law* (Oxford: Oxford University Press, 1998), III.

legal transplants. It has been suggested that transplants have a higher probability of success when made between countries that share common features and are classified together in the same group.[18]

However, this may not always be the case. Many historical examples show that transplants may occur between legal systems that are commonly classified in different groups and not believed to share the same legal culture.[19] Japan is an example of this type of reception.

A third basic reason for the popularity of taxonomies can be found in the fact that the very act of naming and classifying things should indicate an understanding of and competence about what is named and classified, ie a certain field of knowledge.

Finally, taxonomies and divisions into groups may also be related to the physical nature of books and to long-established conventions of how books are structured. Books are made of pages which are conventionally organized into paragraphs, chapters, sections, etc. As the contents need to mirror that structure somehow, it is natural to have legal systems also divided into paragraphs, subparagraphs, chapters, etc and then classified into larger groups such as civil law, common law, etc. This way legal families will coincide with sections or larger parts of books, and mundane elements such as editorial conventions may exert a subtle influence on how the contents are conceptually arranged.

3. Problems with Legal Taxonomies

The International Congress of Comparative Law of 1900 in Paris transformed comparative law scholarship into a modern and mature branch of jurisprudence. Many participants at the Congress saw the search for a taxonomy of the world's legal systems as a central mission for the young science of comparative law.[20]

Scholars painstakingly started looking for the soundest methodologies and the most convincing criteria into which to divide the world's legal systems. These methodologies and criteria had to be grounded on firm theoretical foundations and have clear explanatory value.

However, many criteria have been followed in the history of comparative law: *quot capita, tot sententiae*.[21] Distinctive aspects of the groups of legal systems include historical features and development, geography, structural features of the legal systems, and various aspects of the culture of which the legal system is a part.

[18] M. Siems, n 11 above, 73; U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' 45 *The American Journal of Comparative Law*, 5-44 (1997). On transplants in general see M. Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' 10 *Theoretical Inquiries in Law*, 723-743 (2009); A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens: University of Georgia Press, 1993).

[19] A. Watson, *Society and Legal Change* (Philadelphia: Temple University Press, 2nd ed, 2010).

[20] M. Pargendler, n 10 above.

[21] 'Many heads, many opinions'.

Some scholars propose complex taxonomies based on more than one criterion.[22]

Taxonomies presented in the past are regularly revised by younger generations of scholars who present new taxonomies, which in turn are abandoned by following generations, etc. The search for the one convincing and conclusive taxonomy of the world's legal systems reminds one more of the endless task of Sisyphus rather than the Popperian ideal of marginal scientific progress through falsifications and refutations.[23]

Divergences emerge not only in the methodologies and results of the inquiries but also about which term is the most accurate and should be used to define the groups of systems resulting from the classification.[24] Legal families, legal systems, *grands systèmes de droit*,[25] and legal traditions[26] are among the most common.

The list is made more complex by the multiplicity of languages used by comparative law scholars. In fact, while 'family' can be translated into the French '*famille*', the German '*Familie*', the Italian '*famiglia*' and the Spanish '*familia*' relatively easily and with relatively little loss of information between the languages, it is not always so easy or straightforward to translate 'legal family', 'legal tradition' or '*grand système de droit*' into a language such as Japanese. The opposite is also true: translating '*hozoku*', '*hoken*', or '*hotaikei*' poses specific problems for the comparative law scholar who keeps an eye on Japan.

Finally, legal systems are always evolving. Today's mapping can easily become outdated tomorrow because of reforms, revolutions, or small, incremental changes in any of a legal system's formants.[27]

III. Italy and Japan as Civil Law Countries

1. Italy and the Civil Law Tradition

Italy has long been considered a civil law country. While Italy as an independent and unified state emerged only in the second half of the nineteenth century, the Italian legal tradition predates the proclamation of the Kingdom of Italy in 1861.

Italy and the civil law tradition are generally seen as inextricably linked for

[22] J. Husa, 'Legal Families', in J.M. Smits ed, n 6 above, 491-504.

[23] A reference to Popper and the idea of progress of science through marginal improvements is found also in M. Siems, *Comparative Law* (Cambridge UK: Cambridge University Press, 2014), 74.

[24] In order to take a neutral approach, this article up to this point has used the expression 'legal system' to mean the formal law of a state, and did use the term 'group' as a neutral synonymous of legal tradition, grand système de droit, legal family.

[25] R. David, *Les Grands Systèmes de Droit Contemporains: Droit Comparé* (Paris: Dalloz, 1964).

[26] P. Glenn, n 13 above.

[27] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' 39 *The American Journal of Comparative Law*, 1-34 (1991); Id, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' 39 *The American Journal of Comparative Law*, 343-401 (1991).

historical and geographical reasons. The consensus among legal historians and comparative law scholars is that the civil law tradition itself originated in the Italian peninsula. From the eleventh to the thirteenth century, Italian jurists were among the most prestigious in Europe. Their methodology, known as the *mos italicus*, was the standard method of studying law for centuries. The way of organizing legal education conceived in the Bologna Law Faculty was adopted in all continental Europe. Legal scholarship was a European phenomenon, and its language was Latin. No political entity represented Italy as a whole: any reference was simply geographical. One could argue that it is not possible to talk of an 'Italian tradition' since there was no 'Italian' legal system. However, starting at the latest from the publication of legal treatises in Italian in the seventeenth century,[28] it seems undeniable that Italy had a distinct legal tradition despite its political fragmentation and the absence of a formal legal system applicable to the entire peninsula.

Over time foreign law influenced the Italian legal tradition, especially French and German law and jurisprudence.[29] Comparative legal research shows what were the formants most affected and in what periods. In recent years, the influence of Anglo-American law has been more pervasive.

However, the reforms in several areas of Italian law through provisions inspired by Anglo-American law have not been sufficient to alter the general perception of Italy as a civil law country. In the many mappings of world legal systems in comparative law history, when Italy is not classified as a civil law country, it is because it is absent from the picture or because the name of the family is not 'civil law' but 'French' or 'Romano-Germanic' family. The substance does not change: these classifications are subsets or substantially equivalent to what lately is conventionally called the civil law family. At the moment there are no classifications where Italy is part of the Islamic family, the Far Eastern tradition, or even the common law family.[30]

2. Japan as a Civil Law Country

The profound political and social changes known as Meiji Restoration transformed Japan from an agricultural, poor and secluded country into a

[28] The first major works in jurisprudence written in the Italian language are those written in mid sixteenth century by G.B. De Luca: A. Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (Cambridge-New York: Cambridge University Press, 2017), 291. It is worth noting that some of the oldest existing documents written in the Italian language are legal documents: the 'Placiti Cassinesi', four short judicial opinions written between nine hundred and sixty and nine hundred sixty-three.

[29] R. Sacco, 'Modèles français et modèles allemands dans le droit civil italien' 28 *Revue internationale de droit comparé*, 225-234 (1976).

[30] More on this later. See also M. Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' 12 *Journal of Institutional Economics*, 579-602 (2016), in which Italy is a part of the 'European legal culture' cluster.

modern industrialized state.

The legal system was revolutionized. In three decades, Japan built a fully functional, modern legal system and enacted its first modern Constitution, codes and statutes covering all areas of law. Japan was able to do so thanks to the tireless work of its young elites and to the valuable assistance from foreign legal advisers invited by the government.

The literature on the birth of the modern Japanese legal system in the Meiji period is extensive. It shows that for the most part it was not a process of creation of original institutions and rules, nor it was a meticulous and fine-tuned adaptation of the existing laws to the new social order. It was by and large a massive adoption of foreign models, with two exceptions.

The first exception was the obvious need to adapt the imported rules to the local needs. The elites wanted to modernize and strengthen the country, without granting too many civil rights and liberties to the people. This was evident in areas such as family law and successions, or in the constitutional law provisions on the Emperor's powers and on civil liberties.

The second exception was the lack of a fully developed legal lexicon in the Japanese language. The Japanese intellectuals and legal scholars of the time had to create the words to express the legal concepts of foreign legal science that they were introducing. The creation of a refined lexicon proved to be a more difficult task than the mere translation of the words needed to draft the Constitution of the young Meiji state.

The legal systems taken as models were the continental European legal systems, in particular the French and German systems.[31] These gave the Japanese legal system the appearance of a continental European legal system.

The classification of modern Japan as a civil law country has been proposed since early times. Nobushige Hozumi, one of the leading figures in the legal modernization of Japan,[32] was among the first proponents of this view. In a paper presented at the International Congress of Arts and Science of 1904 in Saint Louis, he explicitly addresses the issue of the position of the Japanese Civil Code among the legal systems of the world.[33] After having identified

[31] This is a well-known, and generally uncontroversial fact. The literature is extensive.

[32] N. Hozumi was born in rural Japan in 1855. After attending a governmental elite school, he was sent to England to study law in 1876. There, besides attending lectures, he was admitted to Middle Temple and qualified as a barrister in 1879. Hozumi then moved to Berlin to study German law for a year and went back to Japan in 1881. In 1882, he was the first Professor of Jurisprudence at the Imperial University of Tokyo, and the first doctor of laws in Japan in 1888. In the 1890s he was one of the three drafters of the Civil Code of Japan. He was appointed to the Japanese House of Peers (*kizokuin*) and to the Privy Council (*sumitsuin*). See H. Aoki, 'Nobushige Hozumi: A Skillful Transplanter of Western Legal Thought into Japanese Soil', in A. Riles ed, *Rethinking the Masters of Comparative Law* (Oxford, UK-Portland, Oregon: Hart Publishing, 2001), 129-150.

[33] N. Hozumi, *The New Japanese Civil Code, as Material for the Study of Comparative Jurisprudence. A Paper Read at the International Congress of Arts and Science, at the Universal Exposition, Saint Louis, 1904* (Tokyo: Tokyo Printing Co, Ltd, 1904).

> 'seven Great Families of Laws namely, (1) the Family of Chinese Law, (2) the Family of Hindu Law, (3) the Family of Mohamedan Law, (4) the Family of Roman Law, (5) the Family of Germanic Law, (6) the Family of Slavonic Law, (7) the Family of English Law',[34]

he states that with the legislation of the Meiji period 'Japanese law was at that time rapidly passing *from the Family of Chinese law to the Family of European laws*'.[35] A few paras later, after a brief summary of the achievements of Japanese legal science in the 1890s, Hozumi states that

> 'the new Japanese Civil Code stands in a filial relation to the European systems, and with the introduction of Western civilization, the Japanese civil law passed from the Chinese Family to the Roman Family of Law'.[36]

This conviction is repeated in the conclusion: 'Within the past thirty years, Japanese law has passed from the Chinese Family of Law to the European Family'.[37] Hozumi qualifies his position in the final lines, stating that 'the Code is only a skeleton of law' and that 'Law is national or territorial, but the science of law is universal, and is not confined within the bounds of any state'.[38] However, the general message one gets from his paper is that the transition of Japan from the Chinese to the European family was completed.

The idea of Japan as a civil law country became commonplace in the early 20th century.[39] Even the authors who stress the uniqueness of Japanese culture and the influence of centuries of indigenous tradition on the law of the Japanese archipelago, do not deny that the modern Japanese legal system has been modelled on Western patterns and that it now shares many of its features with archetypical civil law systems such as France or Germany.[40]

The characterization of the Japanese legal system as the result of the adoption of continental laws was, and still is, influential in a different but very profound way: for decades the most brilliant young legal scholars of Japan overwhelmingly chose France or Germany as their destinations to spend a period of study abroad. They became professors of law with solid backgrounds in French or German law, breeding new generations of scholars who again specialized in French or German law. This was for decades a self-reinforcing loop that is only recently

[34] ibid.
[35] ibid (italics in the original).
[36] ibid 19 (italics in the original).
[37] ibid 71.
[38] ibid 73.
[39] Some of the most straightforward paras on the civil law-oriented character of Japanese law in the first half of the 20th century can be found in K. Takayanagi, 'Contact of the Common Law with the Civil Law in Japan' 4 *The American Journal of Comparative Law*, 63 (1955).
[40] n 11 above.

apparently partially losing its influence.[41]

There are also works in which comparative scholars do not classify Japan as a civil law country. In these mappings, Japan is sometimes a member of the Confucian or Mongoloid family or sometimes of the far Eastern tradition.[42] The geographical location of Japan is an indisputable fact, and it influences the perception and image of its legal system. Sometimes, the distinction is made between the Japanese legal system, modelled on Western patterns, and the Japanese legal culture, categorized among non-Western legal cultures in the subset 'Asian legal culture'.[43] These classifications clearly focus on the persistence of pre-modern traditions as components of the current legal system.

Japan was under American military occupation from 1945 to 1952. The current Okinawa prefecture was under American control until 1972. A large part of modern statutory Japanese law finds its origins in American influences and was drafted following American models. The current Constitution is the typical example. Other areas of statutory law (eg criminal law, criminal procedure, antitrust law, as well as the court structure) were – at least on paper - deeply influenced by American law.[44] This may be not enough to classify Japan as a common law country, but it surely adds important details to the understanding of the Japanese legal system.[45]

3. Italy and Japan: Two Civil Law Countries?

Although there appears little room for discussion as to whether or not Italy is a civil law country, can Japan also be called a civil law country? Clearly, Japan is not a common law country, nor a country of the Islamic, Talmudic or Chthonic legal traditions. Thus, it would appear that Japan can be called a civil law country

[41] Of course, English and American law have been studied in Japan since early times. In addition to classes in French and German law, top Japanese universities have had chairs or classes in English or Anglo-American law. However, especially in the first half of the 20th century, professors with a background in continental law were the majority. Often the French and German legal doctrines were seen as directly applicable to Japan, while the common law doctrines were considered extraneous and not directly applicable to Japan.

[42] See M. Siems, n 11 above.

[43] M. Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' 47 *International and Comparative Law Quarterly*, 495-536 (1998).

[44] See T. Kinoshita, 'Introduction The Reception in Japan of the American Law and Its Transformation in the Fifty Years since the End of World War II' 26 *Law in Japan,* 1-13 (2000), and all the arts featured in the special section 'The Reception in Japan of the American Law and Its Transformation in the Fifty Years since the End of World War II' 26 *Law in Japan*, 14-74 (2000).

[45] A short, balanced depiction of the Japanese legal system and its influences is made by H. Oda, *Japanese Law* (Oxford: Oxford University Press, 2009), III, 1-9. See also the excellent analysis of the binding force of precedents in Italy and Japan made by Colombo in G.F. Colombo, 'Nomophilacy and Beyond: Comparative Reflections on Judicial Precedents by Supreme Jurisdictions in Italy and Japan' 2 *European Journal of Comparative Law and Governance*, 281-315 (2015).

because there are no better choices available.

However, such a reference to Japan is often followed by references to the persistence of the Confucian cultural background or to the undeniable fact that the Japanese archipelago lies in East Asia. A statement like 'Japan is a civil law country but…' is not wrong, but it seems to convey too little information.

Japan could perhaps be put in a class on its own. However, a legal family made of only one country does not appear to be a convincing example of taxonomy.

This reflection on Japan leads us to review the importance and role of taxonomies in comparative law and to search for possible solutions to the conundrum of taxonomies as 'useful but wrong'.

IV. New Approaches to Taxonomies

1. Recent Trends

Comparative law is a discipline that still cannot provide results for what a century ago was seen as one of its fundamental goals. On the contrary, the more comparative law progresses, the further from reaching conclusive results it appears to be. This has led some prominent comparative law scholars, including early proponents of the taxonomic project, to acknowledge its limits or to declare its failure.[46]

Other scholars have not given up and have advanced new perspectives on taxonomies and new approaches. The debate has never ceased. In fact, new approaches to the traditional, list-based approach to taxonomies have produced interesting, innovative results. Ugo Mattei[47] and Werner F. Menski[48] have proposed visual representations of legal systems. Jaakko Husa has proposed a singular taxonomy based on a matrix[49] although in his latest works he seems to take a different and more nuanced approach to taxonomies and legal families.[50]

In the recent comparative law literature on taxonomies and legal families three trends are recognizable.

The first trend is the attempt made, primarily by economists, to measure the relationship between legal institutions and economic development. This approach produced the highly controversial body of literature going under the

[46] L.J. Constantinesco, n 11 above, 153; M. Siems, n 11 above, 88.

[47] U. Mattei, n 18 above.

[48] W.F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006).

[49] J. Husa, 'Classification of Legal Systems Today – Is It Time for a Memorial Hymn?' 12 *Revue Internationale de Droit Comparé,* 54 (2004).

[50] J. Husa, 'Family Affair – Comparative Law's Never Ending Story?' *Annuario Di Diritto Comparato e Studi Legislativi*, 25 (2014); Id, *A New Introduction to Comparative Law* (Oxford-Portland: Bloomsbury Publishing, 2015); Id, 'The Future of Legal Families' *Oxford Handbooks Online: Law* (Oxford: Oxford University Press, 2016), 1.

label of 'legal origins' or 'law and finance'.[51] The weaknesses and limitations of this literature have been already discussed by others.[52] Among comparative law scholars there is a general scepticism over the methodology and results of this approach. What is relevant to point out here is that, according to the 'legal origins' literature, legal taxonomies are the starting point of the analysis rather than the original result of an innovative approach. Legal families are taken for granted, not questioned critically. In brief, this line of research does not help us find new approaches to taxonomies.

The second trend is the adoption of quantitative methods in comparative law research. This is perhaps affected by the literature on legal origins[53] and is part of a general trend towards a wider, more refined use of quantitative methods in the social sciences. Of course, legal scholars have known statistics and used them in their analysis for decades. Especially in the Anglo-American world, the economic analysis of law has long been a well-known and widespread approach to legal studies. However, the application to comparative law of more refined quantitative and empirical approaches is relatively recent.[54] Mathias Siems writes of 'numerical' comparative law[55] to stress how numbers can be used to measure what so far comparative lawyers analysed and described through qualitative methods. Examples of where this approach has been applied would include the thoughts on the impact of foreign ideas or the similarities between and differences among legal systems.

Siems has proposed a legal taxonomy based on a number of variables from certain datasets that he has then combined using the method of network analysis.[56] The result is a legal mapping made of four clusters: the European legal culture cluster, the rule by law cluster, the mixed legal systems cluster, and the weak law-in-transition cluster.

[51] The literature on the topic is now too extensive to be cited properly. The first paper of this current is usually considered R. La Porta et al, 'Law and Finance' 106 *Journal of Political Economy* 1113–1155 (1998). See also R. La Porta et al, 'The Economic Consequences of Legal Origins' 46 *Journal of Economic Literature*, 285-332 (2008).

[52] For a review of the literature, see N. Garoupa et al, *Legal Origins and the Efficiency Dilemma* (New York: Routledge, 2016); M. Schmiegelow and H. Schmiegelow, *Institutional Competition Between Common Law and Civil Law: Theory and Policy* (Heidelberg: Springer, 2014). See also the works collected in *Annuario di diritto comparato e di studi legislativi 2012* (Napoli: Edizioni Scientifiche Italiane, 2012).

[53] R. Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' 57 *The American Journal of Comparative Law,* 765-795 (2009).

[54] The Journal of Empirical Legal Studies started being published in 2004. The body of literature in this field is mostly published after the 2000s. See R.M. Lawless et al, *Empirical Methods in Law* (New York: Aspen Publishers, 2016); H. Spamann, 'Empirical Comparative Law' 11 *The Annual Review of Law and Social Science*, 131-153 (2015).

[55] M. Siems, 'Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity' 13 *Cardozo Journal of International and Comparative Law*, 521-540 (2005); M. Siems, n 11 above.

[56] M. Siems, n 30 above.

While this approach is stimulating, it also involves a certain degree of arbitrariness on the part of the researcher that inevitably is reflected in the results. This can be seen in crucial areas such as how laws and rules are converted into the numbers fed into the datasets, how the variables interact among them, or how the variables themselves are chosen. As recognized by the author himself, 'even when we identify community structures such as clusters, this does not deny possible ambiguities'.[57]

The third trend originates from a more refined understanding of the fundamental problem with any approach to taxonomies, ie the problem of definitions and scale. In creating the taxonomy, how should we define the basic unity of inquiry, ie the legal system? What are its boundaries? When the taxonomic project was launched, comparative law took it for granted that the comparison had to be made between national legal systems.[58] In 2018 this is no longer the case. An analysis of mixed and hybrid legal systems shows that state borders are not always the best markers of the boundaries between legal systems. Usually, a country's legal system encompasses many legal systems as the same legal tradition can often be spread among many countries.

On the other hand, it would be just as unreasonable to ignore the importance of national borders and legal positivism on the law of an area or people. It goes without saying that state power, jurisdiction and tribunals have a significant influence on how law is perceived and practiced in an individual community.

This dilemma is acute when discussing the Japanese legal system. The depictions of the Japanese legal system vacillate between Japanese law as a copy of the European models of the 1800s, on the one hand, and Japanese law as the archetype of a modern industrialized society's legal system. In the latter type of legal system traditional, informal rules take over and therefore deprive state law and written agreements of any value.

The comparative law scholar is then again faced with a choice. Should the scholar choose clarity over accuracy and conduct the analysis utilizing countries only? Such a choice would obviously be at the expense of a subtle analysis that could take into account regional differences within a country and differences in religious, social, economic, linguistic and cultural conditions. Should the scholar choose accuracy over clarity, thereby bidding farewell to any hope of building an easily understandable, practical taxonomy?

2. Legal Taxonomic Pluralism

The new trends mentioned above lead to original and insightful results, but additional new ways to classify legal systems will always be proposed. The existence of conflicting taxonomies of the world's legal systems seems unavoidable.

[57] ibid 598.

[58] M. Reimann, 'Beyond National Systems: A Comparative Law for the International Age' 75 *Tulane Law Review*, 1103-1120 (2000-2001).

However, these conflicting taxonomies result more from different starting points or the focus of the authors rather than from methodological flaws. Therefore, it is not possible to say which taxonomy is better than another.

Comparative law could profit from a complete review of the taxonomies proposed up to the present day, which would bring us closer to a better understanding of the differences and similarities among systems. Some attempts have been made,[59] but the review has been limited to mainstream sources in certain languages. These reviews are valuable but cannot be said to be complete. Hence, a complete review would be an important achievement and a rich source of information from which to start further research.

Unfortunately, there are two main reasons why a review of all taxonomies is far from being feasible. First, such a review would have to be addressed by a team of researchers in many countries and should cover all languages with comparative law materials. Coordination and translation problems might ensue. Second, because legal taxonomies are found in comparative law works in social sciences and humanities sources some already published papers could be overlooked. In addition, when the taxonomy is implied, eg 'Country A is a civil law country', there are no sources cited as the statement is considered so obvious that it does not need to be supported by a source. A complete mapping would therefore imply sifting through an enormous quantity of text.

It is possible to imagine that one day a complete review of taxonomies might be practical through advancements in computer-assisted techniques (optical character recognition, natural language processing, text mining, etc). Data could in turn be aggregated and combined in many ways. This would produce innovative results and new ways of representing groups of legal systems and their relations in space and time.

As it is not possible to evaluate which taxonomy is more accurate than another, the only solution left is to recognize the value of each taxonomy according to the perspective it wants to highlight. After all, each taxonomy is built to answer a certain question, and the answer is specific to the question (eg a geographical mapping or a phylogeny). A corollary to recognizing the specificity of each taxonomy is the impossibility of having a general, all-encompassing taxonomy of all the legal systems of the world. This is because each taxonomy would be limited to some aspects of the legal system.[60] Many taxonomies can coexist. This is not a fundamental contradiction and does not bring discredit to the entire discipline of comparative law. Some can be more revealing or more inspiring, but all contribute to a better understanding of the multiplicity of the law.

V. Conclusion

[59] n 11 above.
[60] M. Van Hoecke and M. Warrington, n 43 above, 520.

Legal studies have embraced legal pluralism as a key to understanding that many rules operate at many levels in different legal systems.

From the classifications point of view, all taxonomies are an answer to specific questions. However, questions and points of view change over time. Legal taxonomic pluralism shows that contradictions exist because they are in fact different answers to different questions. Comparative law should embrace a pluralist approach to taxonomies as the key to understanding the many different classifications of legal systems.