

# A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's *Legal Traditions of the World*, 2nd Edition

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Glenn, H Patrick. *Legal Traditions of the World* (2nd edition). Oxford, Oxford University Press, 2004. xxvii + 401 pp. £26.99. Paperback. ISBN 0-19-926088-5.

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## Introduction

NICHOLAS HD FOSTER

As William Twining observes in his contribution, Patrick Glenn's book caused a considerable stir on its first appearance.<sup>1</sup> The publication of the second edition has prompted this review.<sup>2</sup>

In order to do justice to a work with a truly global scope, we have assembled a team of colleagues, each of whom has assessed a particular topic or, in some cases, the near absence of it. Some reviewers have also taken up the invitation extended to them to

\* Of the Editorial Board. Many thanks to contributing colleagues for making this series of pieces much more than a review and for their collegial spirit and patience throughout, and in particular to Bill Butler, who had the original idea and who provided invaluable advice and exceptional support.

In this review the page numbers of *Legal Traditions of the World* are set out in brackets in the text, eg (1) denotes page 1 in the book; references to other parts of the review are indicated by the name of the author and the page number, if relevant.

<sup>1</sup> See, inter alia, Carbonneau, TE (2000) 'H Patrick Glenn: *Legal Traditions of the World. Sustainable Diversity in Law*' (48) *American Journal of Comparative Law* 729; Cheung, A (2001) '*Legal Traditions of the World*, by H Patrick Glenn' (31) *Hong Kong Law Journal* 345; List, M (2001) 'H Patrick Glenn *Legal Traditions of the World*' (34) *Verfassung Und Recht in Übersee* 388; Raisch, MJ (2003) '*Legal Traditions of the World: Sustainable Diversity in Law* (HP GLENN)' (31) *International Journal of Legal Information* 124; Strong, S (2001) 'GLENN, H PATRICK: *Legal Traditions of the World: Sustainable Diversity in Law*' (60) *Cambridge Law Journal* 421.

<sup>2</sup> The review has been produced in the spirit of the advice given by Zweigert and Kötz: 'The cleverest comparatists sometimes fall into error; when this happens the good custom [...] is not to hound the forgivable miscreant with contumely from the profession, but kindly to put him right' (Zweigert, K and Kötz, H (1998) *An Introduction to Comparative Law* (3rd ed) Clarendon at 36). Hardly any of us have chosen as a residence the type of glass house Professor Glenn has chosen to inhabit, but we recognise his bravery for doing so, and we have therefore done our best to resist the temptation to throw (unfair) stones.

comment on more general aspects, or to use their review as a springboard for a more general discussion, or both.

The result is a set of pieces varying greatly in length, style and approach, for no constraints were set on contributors. Each can be read independently. However, all contributors benefited from an awareness of colleagues' opinions, even if those opinions were not necessarily shared, as there was a considerable degree of collaboration and consultation. Some attended a meeting to discuss the project, all drafts were circulated to each reviewer, and comments were exchanged.

This introduction is intended to serve as a guide to the review. The first part is organised by contribution, and contains a short summary of each piece. The second part is organised by commonly occurring issues, and provides a summary of the opinions regarding them, giving the reader an indication of some places where those issues are discussed.

We trust that this review will stimulate further discussion in the *Journal of Comparative Law* and elsewhere. To initiate that debate, Professor Glenn has been asked to reply.

The tasks were split up as set out below. The order of treatment is more or less that of the book (the placing of Andrew Halpin's contribution is arbitrary, as it deals with issues contained at the beginning and end of the work). Chapters five and nine were assigned three reviewers each in view of the nature of the material.<sup>3</sup>

General	Overview of Glenn on Tradition	William Twining
General	Broader Philosophical Issues	Andrew Halpin
Chapter three	Chthonic Law	Gordon Woodman
Chapter four	Talmudic Law	Bernard Jackson
Chapter five	Civilian Law	John Bell
Chapter five	Scandinavian Law	Camilla Baasch Andersen
Chapter five	Transitional Law (Russian Law)	WE Butler
Chapter six	Islamic Law	Nicholas HD Foster
Chapter seven	Common Law	Martin Shapiro
Chapter eight	Hindu Law	Werner Menski
Chapter nine	Asian Law (Buddhist Law)	Andrew Huxley
Chapter nine	Asian Law (Chinese Law)	Michael Palmer
Chapter nine	Asian Law (Japanese Law)	Sian Stickings
Chapter ten	Sustainable Diversity	Nicholas HD Foster

## SUMMARY OF CONTRIBUTIONS

In his contribution, William Twining discusses the book's virtues as he sees them: intellectual ambition; erudition; an attempt to broaden the field; a 'bold central argument' based on theory and history; and hope of a fresh start for comparative law. He looks at the state of comparative law which gave rise to the need for the book, its approach, the idea of tradition as used by the author and Glenn's treatment of the diffusion of law. He concludes with the general assessment that works like this 'have made important contributions to understanding' and that 'Even if some of the details are faulted, this is an important book'.

<sup>3</sup> The author's names for the 'traditions' have been kept, but not the use of lower-case letters.

Andrew Halpin looks at the degree to which we can rely upon language to resolve philosophical problems as well as at incommensurability and multivalence. He maintains that it is not possible to produce a definitive assessment of the book because more work needs to be done on the practical value of the approach. He praises Glenn's intellectual ambition and his carrying forward of previous work on tradition as applied to law, but is critical of his understanding and application of incommensurability and multivalence in attempting to accommodate competing traditional values, as well as of the author's 'overambitious and unsuccessful attempt to turn tradition into a totalising force in law'.<sup>4</sup>

Gordon Woodman examines the 'chthonic' law of chapter three. He is critical of various aspects, such as the definition of tradition (not clear enough), the category of 'chthonic law' (also not clear enough, 'as an identifier')<sup>5</sup> and the lack of 'an explanation of the concept of "law"',<sup>6</sup> as well as various other matters, including the notion that 'chthonic law' is necessarily environmentally friendly. He concludes that 'the category of chthonic law is not useful for comparative law as [Glenn] has planned it'. However, he also writes that much of the chapter is very instructive and that it contains useful insights.

Bernard Jackson builds on a previous piece in which he considered chapter four of the first edition, taking his review as a stepping-stone for a full-length article on the internal and external comparisons of religious law. Anyone interested only in the conclusion on Glenn's chapter should look at section one ('Religious Law in Comparative Law and Comparative Religion') and section six ('And Finally, Glenn ...?').

The reviewer looks at the author's attempt to transcend the 'basic methodological dilemma [...] the tension between internal and external points of view' by looking for 'common processes within all cultures' and comparing 'particular manifestations of those processes within particular cultures [...] in terms of information flow'.<sup>7</sup> He praises the author's general strategy, but feels that the idea of tradition is used in too limited a way.

In the main body of the article, Jackson argues that the study of 'religious systems of law', even when concentrating on their 'public' aspects, reflects an 'external' point of view, involving the imposition of categories derived from Western, secular systems, with their very different ideological presuppositions. He illustrates this from two case studies in Jewish law: first, its approach to analogy (reflecting its conception of the language of religious law); secondly, the problem of the 'chained wife' (reflecting its approach to the resolution of disputes on the basis of halakhic rules). These case studies indicate at the same time some methodological opportunities presented by both semiotics and legal philosophy. The article then contrasts a very different ('internal') discourse, which addresses the religious meaning of observance of the halakhah. The conclusion deals with some observations on the implications of the argument for comparative religion.<sup>8</sup>

As regards Jewish law itself, the reviewer concludes that the chapter is flawed, but that as regards the level of the nature of the core that constitutes the identity of the tradition and its underlying justification, Glenn's approach has the potential for the derivation of useful hypotheses which deserve to be investigated.

<sup>4</sup> Halpin at 121.

<sup>5</sup> Woodman at 125.

<sup>6</sup> Ibid.

<sup>7</sup> Jackson at 178 and 179.

<sup>8</sup> This paragraph is an amended version of Bernard Jackson's abstract of the first version of this article.

In his assessment of chapter five, John Bell considers that 'there are significant deficiencies in Glenn's conception of law and his focus within the civil law tradition', but that he does offer 'valuable insights [and] wider perspectives',<sup>9</sup> even though they are more about Western law rather than civil law as such. A further criticism is made that the author does not take sufficient account of the mixed origins of the civil law tradition, nor its debt to criminal law, public law, and institutions, in particular the medieval Church. More generally, he argues that the definition of a legal tradition in terms of a network of information is limited as regards law, and that the very concept of tradition as information is itself flawed.

Camilla Baasch Andersen deals with the treatment of Scandinavian law in chapter five, or rather, its absence, regretting the almost total lack of treatment of the subject, a lack even more severe than in Zweigert and Kötz's *Introduction to Comparative Law*. By this omission, Glenn 'misses a great chance to use Scandinavian law as an example of one which has evolved between the common and civil law traditions'.<sup>10</sup>

WE Butler offers some preliminary reflections on the current state of comparative legal studies and then observes with incredulity that Russia and the CIS, who were involved in the greatest legal revolution of the 20th century and one of the greatest in world history, are consigned to a single paragraph in chapter five, with no account taken of the relevance of 'tradition' to their particular situations. Legal change is postulated in that single paragraph to be a mechanical insertion and deletion, with respect to those systems, of ideological postulates which the author thinks may have guided Soviet policymakers.<sup>11</sup>

The present reviewer looks at chapter six (on Islamic law) and finds that Glenn's treatment has some interesting sections, particularly as regards the comparisons with Islamic law, and that the accessible style makes it easy to read. However, the chapter has significant weaknesses overall. As an application of the idea of tradition, some parts, such as that comparing Islamic and Jewish law, contain valuable insights but the Islamic revival and the relationship between Islamic law and Western law are hardly touched upon. On the positive side, the idea of tradition is of considerable interest in this area and the book may well provide a stimulus to fruitful academic analysis.

Martin Shapiro, looking at chapter seven on the common law, views the idea of tradition as 'Enormously useful in orienting students', but also as something which 'almost inevitably produces a pollyannish result'. He sees the glass as 'about seven-eighths full'. Shapiro looks at various problematic areas of Glenn's treatment, such as 'a curious kind of denaturing of reality' in his view of the common law. He also considers Glenn's view of comparative law.

Werner Menski writes both as an expert on Hindu law and as the author of a book with a similar breadth of coverage. In assessing Glenn's project as a whole, he finds that it is 'admirable and daring'. He praises in particular the use of the concept of tradition as a way of moving away from 'our fixation with positivism'. He also expresses some reservations and gives some ideas for improvement, such as an abbreviation of the treatment of tradition, leaving more space for examples, and the development by the author of 'a more sophisticated analytical framework'.<sup>12</sup>

On the treatment of Hindu law in chapter eight, the reviewer is also positive, lauding Glenn's general understanding of Hindu law. However, in his estimation the chapter

<sup>9</sup> Bell at 130.

<sup>10</sup> Andersen at 140.

<sup>11</sup> This paragraph was contributed by WE Butler.

<sup>12</sup> Menski at 154.

also contains various errors because it was necessarily based on 'inadequate and deeply misleading writing' since the author did not have access to more accurate recent work.

Chapter nine ('An Asian Legal Tradition: Make It New (with Marx?)') deals with 'Asian' law. From a taxonomic point of view, this chapter is one of the most problematic of the book because, according to all three reviewers, the category is far too wide.

Andrew Huxley writes that Glenn 'is unimpressed by claims that a Buddhist legal tradition exists'.<sup>13</sup> Unsurprisingly, he disagrees, and takes the opportunity to give a concise introduction to modern scholarship on the subject.

He moves on to consider the author's categorisation of the laws of a vast area as 'Asian' and concludes that this taxonomy 'fails, in large part, because of his dismissal of the Buddhist legal traditions'.<sup>14</sup> He challenges the assertion that 'China, by its great size, influences everything in Asia' (308, a sentiment repeated at 326), suggests a key role for Buddhist law in Central Asia and Southeast Asia, and proposes two different taxonomies: 'break down Asian law into more categories, by finding room for, among others, Japanese and Buddhist legal traditions [and] collapse the categories of Europe and Asia by exploring their common history'. In the ensuing discussion, the reviewer praises Glenn's project — Glenn 'asks the right questions and supplies enough plausible answers to get a discussion going' — then contributes to that discussion, referring to the importance of writing systems as taxonomical factors and the advantages which can be obtained from looking at law from a Eurasian point of view, using epidemiology, linguistics and genetics.

Michael Palmer commends the author's 'bold, provocative statements, useful references to current thinking about the role of Confucianism, and an interesting characterisation of imperial China's dominant ideology of Confucianism'.<sup>15</sup> However, he argues that the author's analysis may well not add 'significant value to our understanding of the Chinese legal tradition for the discourses of comparative law [and] may even detract'.<sup>16</sup> In his view, the author's conception of tradition has at least two weaknesses: the 'failure to tell the reader what he understands to be the nature of a specifically "legal" tradition' and the 'positive gloss' put on tradition by Glenn, a gloss which is inappropriate for China, where tradition has a 'dark side'. As regards taxonomy, Palmer agrees with Huxley that the idea of an identifiable 'Asian' legal tradition based upon supposed Chinese influence is not sustainable. More specifically, the emphasis on Confucianism in Chinese law as opposed to Legalism is criticised and found wanting.

Sian Stickings finds the breadth of scope afforded by the idea of tradition as applied to Japanese law liberating, because it permits a consideration of Japan's place among the world's legal traditions unconstrained by the origin of its law or its geography. However, she finds it difficult to apply to Japan Glenn's ideas on the 'simultaneous preservation [of different traditions], layered in time but without prejudice to the survival of all'.<sup>17</sup> Transplants from the West to Japan have become legal history: 'Japanese lawyers work within — and see themselves as working within — a legal system of West-European parentage'.<sup>18</sup>

Like other colleagues, she traces some of Glenn's difficulty in this area to the fact that he (intentionally) does not specify what is legal in a tradition, and she discusses

<sup>13</sup> Huxley at 158.

<sup>14</sup> Huxley at 160.

<sup>15</sup> Palmer at 165.

<sup>16</sup> Ibid.

<sup>17</sup> Stickings at 172.

<sup>18</sup> Ibid.

the problems in applying the author's ideas of tradition to the 'Asian' legal tradition and, in particular, to Japan. She also points out the lack of consideration of the Japanese legal tradition as part of the civil law, an issue of considerable significance for modern jurisdictions other than those in Western Europe and North America.

The present reviewer looks at the final chapter, a discussion of sustainable diversity. The philosophical arguments contained in this chapter are dealt with by Andrew Halpin, so this contribution concentrates on considering, in the light of that analysis, the effectiveness of Glenn's suggestions regarding the reconciliation of traditions, a recipe for world peace on the legal plane. The conclusion is that there seem to be significant weaknesses in the author's suggested solutions to the problems of conflict between traditions, but that the chapter is nonetheless of great importance as a starting point for debate on, and the provision of vital tools for the potential resolution of, vitally important but sadly neglected issues.

### SUMMARY OF ISSUES

It can be seen from the contributions summarised above that the book has considerable virtues, but also that there are considerable difficulties inherent in a project which attempts to cover the entire world using a multidisciplinary approach.

One such difficulty was raised initially by Andrew Huxley and has been discussed during the course of the drafting of the review. Is the work one book or two? In the 'two books' view, it is made up of a theoretical part on legal tradition and related matters (chapters one, two and ten) and a 'more sophisticated "Cook's Tour"' of the legal world (chapters three to nine). In the 'one book' view, 'the chapters on particular traditions should be viewed as concrete illustrations and elaborations of a central argument'.<sup>19</sup> Perhaps the author could have made his objectives clearer.

Whichever view one takes, the theoretical chapters are, as pointed out by William Twining, particularly difficult, partly because they are compressed; indeed, as pointed out by Werner Menski, all of the book is compressed. According to both reviewers, these characteristics provide obstacles to its use in teaching.

And whether the middle chapters constitute a 'Cook's Tour', 'concrete illustrations and elaborations', or both, contributors have, as seen above, criticised the taxonomy. Gordon Woodman finds the category of 'chthonic law' wanting; the category of 'Asian law' is seen as unjustifiable by many (Andrew Huxley, Michael Palmer and Sian Stickings) and John Bell considers that, on the scale of this book, it is questionable whether separate chapters on the common and civil law are justified. Contributors have also criticised the weighting of the treatment of traditions (see WE Butler, Andrew Huxley, Camilla Baasch Andersen and Sian Stickings).

Two further issues arise from the topic of 'legal tradition' itself: the 'totalising' use of the concept of tradition and the legal nature of the traditions considered. Both are discussed by various colleagues.

For William Twining, Glenn's work provides 'a rich set of ideas on which to base a bold account of legal traditions', but he also suggests that 'Glenn is perhaps too dismissive of [the concepts of culture, system, legal family and civilisation], some of which are useful at different levels of generality'. Other colleagues are more critical. Andrew Halpin

<sup>19</sup> Twining at 108.



challenges the author's 'totalising' notion of tradition as being both over- and under-inclusive; for Werner Menski, the author 'glides too elegantly and sometimes sloppily over huge areas of violent disagreement in relation to law and different traditions'.<sup>20</sup>

The legal nature of the traditions considered is also discussed generally by William Twining, who suggests that 'in order to transcend and compare legal traditions, Glenn needs an analytic concept of the "legal"'.<sup>21</sup> For other colleagues such as Gordon Woodman, John Bell, Michael Palmer and Sian Stickings, this is an issue of considerable importance in relation to their specialist areas. William Twining puts both sides of the argument; other colleagues find that the author's decision not to provide a definition of 'legal' is problematic for their specialist areas.

On a more practical level, attitudes to the author's style vary. Werner Menski praises the approach of 'Hard theory wrapped in soft packaging'; William Twining describes it as 'laconic'; on a more critical note, Gordon Woodman finds that it can contribute to the fudging of issues, the passing off in a succession of ideas, sometimes stated, sometimes obscurely hinted at, which do not follow from each other.<sup>22</sup>

As regards the general value of the work, many reviewers are understandably critical of the attempts of a non-specialist to deal with their field. However, according to William Twining, 'This kind of work needs to be assessed on its own terms'.<sup>23</sup> Looked at in that light, the project is, as noted above, favourably assessed by Werner Menski; Bernard Jackson writes of the 'overall merits of Glenn's general strategy'; Andrew Huxley 'applaud[s] Glenn's analysis of tradition'. More guardedly, Andrew Halpin makes the point that a conclusive assessment of the intellectual value of the book regarding its call for tradition as the base concept for comparative law is inappropriate because 'Much still needs to be done in considering the practical value of his approach towards different traditions and their interaction'.<sup>24</sup>

On another tack, reviewers have remarked on the book's potential to stimulate debate on a new approach to comparative law (witness this review) and, in chapter ten, the use of comparative law in a search for acceptance among traditions. Finally (a point not specifically made in the reviews), it has sold exceptionally well for a comparative law book and has therefore already made, and will presumably continue to make, a contribution to popularising comparative law, as well as Glenn's global, contextual and inter-disciplinary approach to the subject.

<sup>20</sup> Twining at 112; Halpin at 118; Menski at 155.

<sup>21</sup> Twining at 113.

<sup>22</sup> Menski at 153; Twining at 107. The last phrase was drafted by Gordon Woodman.

<sup>23</sup> Twining at 109.

<sup>24</sup> Halpin at 121.

## Glenn on Tradition: An Overview

WILLIAM TWINING\*

The first edition of Patrick Glenn's *Legal Traditions of the World* (2000) was an instant success. Even before publication it was awarded the Grand Prize of the International Academy of Comparative Law. It attracted an unusual number of reviews, nearly all of them enthusiastic: 'the book that had to be written', 'an "effective antidote" to the clash of civilizations', 'the right book at the right time', 'a new classic' were typical accolades. The publication of a second edition four years later provides an occasion for a detailed assessment. The work has been updated, moderately extended and refined, lists of websites have been added to the bibliography, but the organisation, the laconic style, and the central thesis are much the same.

The reasons for the book's enthusiastic reception are fairly obvious. First, it is intellectually ambitious, 'offering a new means of reconceptualizing law and legal relations across the world'.<sup>1</sup> Secondly, it is impressively erudite, based on immensely wide reading across several disciplines and traditions. Thirdly, it represents a brave attempt to break away from almost exclusive emphasis on nation-state legal systems of or influenced by 'the West'. Fourthly, it takes both theory and history seriously and uses them as the basis for a bold central argument. And, finally, it offers hope of a fresh start to comparative law at a time when the field has been subjected to mounting internal and external criticism.

This last point deserves elaboration. The complex processes known as 'globalisation' have presented some sharp challenges to the discipline of law, and especially to comparative law which has a potentially key role to play in advancing our understanding of law from a global perspective.<sup>2</sup> During the 1990s, mainstream comparative law became the subject of sharp criticism from several directions. Some younger comparatists, notably William Ewald and Pierre Legrand, challenged its lack of theoretical underpinnings;<sup>3</sup> critical legal scholars belatedly turned their attention to the subject, but failed to produce constructive alternatives;<sup>4</sup> unsatisfactory debates about 'legal families' and 'legal transplants' added to the sense of malaise; the present reviewer, from the standpoint of an outside observer, satirised 'the Country and Western tradition' for being Euro-centric, unempirical, ahistorical, and over-concerned with the domestic law of 'parent' nation states.<sup>5</sup> Europhiles and globalisers presented theses about convergence that seemed to some to be overstated and self-interested. Scholars

\* Of the Editorial Board, University College, University of London (Emeritus). For helpful comments, I am grateful to Nick Foster, Andrew Halpin, Martin Krygier and fellow contributors who attended a seminar on the book held at SOAS on 4 January 2005.

<sup>1</sup> Cover.

<sup>2</sup> Twining, W (2000) *Globalisation and Legal Theory* Butterworth chapter 7.

<sup>3</sup> Especially, Ewald, W (1995) 'Comparative Jurisprudence (I): What was it Like to Try a Rat?' (143) *University of Pennsylvania Law Review* 1889; Legrand, P (1999) *Fragments on Law-as-Culture* WEJ Tjeenk Willink.

<sup>4</sup> For example, (1997) 'Symposium: New Approaches to Comparative Law' (2) *Utah Law Review* 255. See also Kennedy, David (2003) 'The Methods and the Politics' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press.

<sup>5</sup> Twining, W (2000) 'Comparative Law and Legal Theory: The Country and Western Tradition' in Edge, I (ed) *Comparative Law in Global Perspective* Transnational Publishers.

<sup>6</sup> Taylor, V (2004) 'Law Reform Olympics' in Lindsay, T (ed) *Law Reform in Developing States* Federation Press.



of law and development still seemed to be in 'self-estrangement'.<sup>6</sup> Febrile introspection about the purposes, nature and methods of comparative law continued and added to the sense of malaise. Particular studies diversified. Many of these were excellent, but, overall, there was no clear sense of direction and an aura of detachment from major issues concerning international relations, the global economy, revival of religion and world peace. It was strange to encounter comparative lawyers who seemed to have no interest in human rights, structural adjustment or Islamic finance.

*Legal Traditions of the World* distances itself from these tendencies and adopts and maintains a genuinely global perspective. By treating 'tradition' as the core concept, it puts history at the centre of comparative law, and it presents a sustained argument based on an explicit theory.<sup>7</sup> This thesis has implications for some issues of contemporary concern that have hardly featured in the orthodox texts: economic and cultural globalisation; 'the clash of civilisations'; corruption; fundamentalism; diffusion and convergence; nationalism and identity politics; universalism, relativism and incommensurability; multivalent logic; and even chaos theory. In addition, Glenn uninhibitedly breaks free from 20th-century comparatists' aversion to social theory and philosophy, but in a somewhat idiosyncratic fashion.

Although the initial reception of the book was positive, indeed adulatory, several reviewers complained that the first two chapters were extraordinarily difficult, perhaps unnecessarily so. This, they suggested, would be an obstacle to using it in teaching. This criticism is confirmed by my own experience.<sup>8</sup> Scholars as well as students do find the theoretical introduction hard, and there is a temptation to follow the author's advice in the preface and jump to the seven chapters dealing with particular traditions. This is likely, in my view, to lead to a misreading of the book. It invites the interpretation that this 'fresh start' for comparative law is no more than a more sophisticated 'Cook's tour' of the great legal families of the world — as if one has been upgraded from an ordinary package tour to a luxury cruise ship with a more sophisticated guide to the standard sights. A different reading is that the chapters on particular traditions should be viewed as concrete illustrations and elaborations of a central argument that presents a radical — and potentially controversial — vision of law in the world and of the enterprise of comparative law.

Such an ambitious undertaking involves obvious risks. World history, as a genre to which this book belongs, is notoriously vulnerable to criticism, especially about details; it can help to map areas of ignorance, but in its positive assertions it can only be as well grounded as the best available sources. Some deny that such an enterprise can be intellectually respectable, let alone scholarly. Others, myself included, take the view that, whatever their faults, the likes of Vico, Toynbee, Braudel and Wallerstein, or in our own discipline, Sir Henry Maine and Harold Berman, have made important contributions to understanding. We need 'whole views', bold hypotheses and imaginative scenarios, not least because they stimulate further research and fresh debates. Glenn offers us a vision of law in the context of world history and the prospect of a fresh start for comparative

<sup>7</sup> On Glenn's denial that he is offering a theory of tradition, see below.

<sup>8</sup> This also suggests a problem about audience: a quite abstract theoretical work squeezed into the format of an introductory text for anglophone law students. One reason why the theoretical parts of this book are difficult is that they are quite compressed. Several of the central themes are explored at greater length in articles, some of which are cited below.

<sup>9</sup> At 158; at 362 he talks of conflict of laws as 'disintegrated'.

law. This kind of work needs to be assessed on its own terms. There is also room for some, but not too much, charity in interpretation.

It is accordingly important to clarify the author's general thesis. As a first step, it may be helpful to sketch his background and concerns. Patrick Glenn is Canadian. After gaining degrees from two universities in Canada, he did postgraduate work in law at Harvard and in Strasbourg, where he completed a doctorate in private international law. Since 1971 he has taught law at McGill University in the 'mixed' jurisdiction of Quebec, in recent years specialising in comparative law. He has held a number of visiting appointments, mainly in Continental Europe. In short, Patrick Glenn is by training and profession an academic lawyer who has immersed himself in particular instances of the two main Western traditions of municipal law and has learned about the rest largely through self-education.

In the preface to the first edition, Glenn mentions two main reasons for trying to understand legal traditions, both of which relate to 'globalisation'. He cites, first, 'the decline in normative authority of formal sources of law' in the West. For example, his own initial specialism, private international law, has lost its pre-eminence to informal processes of harmonisation.<sup>9</sup> On a broader canvass, he stresses the lessening in importance of national boundaries and the start of a decline in importance of the nation-state.<sup>10</sup> Secondly, the world is becoming more interdependent, necessitating 'collaboration amongst jurists of all traditions in the resolution of many problems of the world [...] How should we think about general relations amongst law and lawyers, somehow recognized as different?' (xxiv). Thus, the aim is to construct a broad framework for mutual comprehension and dialogue across major legal traditions.

One senses some further concerns: a dislike of abstract theorising and of legal positivism, especially its tendency to focus exclusively on state law; a sense of dissatisfaction with mainstream comparative law; and even a somewhat ambivalent flirtation with post-modernism (xxiv). More importantly perhaps, Glenn is opposed to doctrinaire versions of universalism and fundamentalism, which he sees as potential forms of 'intellectual corruption' (28-29). He is also sceptical about strong claims that legal systems are 'converging': a certain amount of formal and informal harmonisation of laws may be taking place, but the major legal traditions are stable and are likely to maintain their distinctive identities (358-65). Above all, Glenn is concerned with the attempt to break out of the iron cage of Western rationalism and to interpret each tradition on its own terms. How far he has succeeded in breaking free from his own tradition is discussed below.

Glenn's treatment of the concept of tradition is the key to understanding his argument. He rejects the more fashionable 'culture' for several reasons<sup>11</sup>: it is vague and ambiguous; in some usages it combines both ideas and behaviour, whereas tradition focuses only on information (ideas); interpretations of 'culture' are often driven by the Western tendency to emphasise the internal unity of groups and systems and thus to stress separation

<sup>10</sup> 'The state as a frozen construct, is beginning to melt, but the process may be a very long one'. This theme is developed at greater length in Glenn, HP (2003) 'The Nationalist Heritage' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press chapter 4.

<sup>11</sup> This summary of Glenn's caution about, if not antipathy to, 'culture' as an analytic concept is based on several of his writings and a conversation with him in 2003.

and difference rather than permeability and continuities.<sup>12</sup> 'Culture' and 'system' tend to be used to de-emphasise history, whereas tradition draws attention to the normative survival of the past in the present (xxv). Furthermore, in recent times 'culture' has sometimes been used as a euphemism for race, in much the same way as 'civilisation' was used to justify colonialism, racial superiority or technocratic modernisation (for example, 'the civilising mission' of empire).

Like 'culture', 'civilisation' is a Western concept that presupposes tradition. It is closer to tradition in that it emphasises continuity over time and points to relatively stable underlying structures rather than precise outer boundaries.<sup>13</sup> But 'civilisation' gained currency as a concept of universal history used to justify colonial rule.<sup>14</sup> In sharp contrast to Samuel Huntington's 'clash of civilisations',<sup>15</sup> Glenn uses the more fluid, open concept of tradition as the basis for his vision of 'sustainable diversity'.

There are some who resist the idea of tradition. The adjective 'traditional' sometimes carries suggestions of static, conservative, old-fashioned or out of date. It is sometimes contrasted with 'rational', but rationalism, he suggests, is itself a tradition which cannot escape from itself.<sup>16</sup> It is true that emphasising tradition directs our attention to the past and that inertia and routine are familiar aspects of tradition; but traditions are rarely static — ideas about change are often a distinguishing characteristic. No tradition can exercise full control over what information is preserved and captured in the future.

For Glenn, tradition involves the communication of information over time. The concept emphasises memory, communication, continuity and selection. A tradition typically has a stable core, but no fixed boundaries. Major traditions are complex, constituted by traditions within traditions, which are often competing or conflicting with each other. They accordingly accommodate internal controversy and debate, provided that the core of ideas is stable or only changes slowly. If a tradition is undermined by doctrinaire lateral movements, such as fundamentalism or universalism, the tradition is corrupted and, in extreme cases, ceases to exist.<sup>17</sup>

Glenn asserts that traditions contribute a sense of identity to societies and peoples, often more so than ethnicity or race or geographical location (33-38). The extent to which law is constitutive of that identity varies between traditions (40).<sup>18</sup> Traditions typically precede the formation of political structures, such as the state, though subsequently they may be influenced by them (35-38).

<sup>12</sup> Glenn is clearly uncomfortable with systems theory (eg 50-51, 153-54). He points out that French legal scholarship has moved away from its former emphasis on 'legal systems' (153-54) and he emphasises the duality of formal and informal legal orders. He even goes so far as to say: 'a state (or national "legal system") is only an institutionalised recognition of the ascendancy of a particular tradition at a particular time, which is unlikely to have obliterated other, competing traditions even within its territory' (53).

<sup>13</sup> Braudel, F (1993) [1987] *A History of Civilizations* Mayne, R (trans) Penguin

<sup>14</sup> At 154, note 114.

<sup>15</sup> Huntington, S (1997) *The Clash of Civilizations and the Remaking of World Order* Simon and Schuster

<sup>16</sup> I agree with Andrew Halpin on this point; see his contribution to this review at 117.

<sup>17</sup> Eg 'Fundamentalism, and violence in pursuit of it, is [...] not inherent in tradition, but represents a departure from its most important characteristic' at 23.

<sup>18</sup> The extent to which law is constitutive of identity varies: Islamic law and Jewish law purport to regulate most aspects of life, Chthonic law and common law far less so. Glenn substitutes 'Chthonic' (meaning living in or in close harmony with the earth) for 'custom', 'native', 'aboriginal', or 'customary law', because of the negative associations these terms have acquired (73-74). For a critique, see Woodman at 123ff.

A focus on tradition raises questions about the forms and methods of communication of ideas over time: which ideas are transmitted how, when and by whom is an essential part of the story of any tradition. It also raises questions about change within and between traditions. The idea of tradition can provide a basis of comparison because although different cultures may have different conceptual schemes, traditions are comparable<sup>19</sup> because every tradition has to address four issues: the nature of the core that constitutes its identity; its underlying justification; its conception of change; and how the tradition relates to other traditions (xxvi). These four concerns provide the framework of analysis for the seven chapters dealing with particular traditions. An important question for contributors to this symposium is whether Glenn has applied this framework consistently.

Citing Popper (1-2), Glenn denies that he is advancing a general theory of tradition. He does this in order to distance himself from *a priori* theorising and concept construction that he attributes to Western rationalism. Instead, he claims he arrived at his central themes by immersing himself in each of several legal traditions and identifying shared concerns. However, Glenn cannot escape from using a coherent framework of analytic concepts – including information, communication, selection, normative, justification, history, corruption and legal. So the question arises: how far has Glenn succeeded in transcending his own background?

Although Glenn is reluctant to draw on abstract theory, there is a distinguished tradition of theorising about tradition by Carl Friedrich, Edward Shils, Harold Berman, and Martin Krygier, among others.<sup>20</sup> Of these, Krygier seems to be the closest. In a deservedly well known article, he emphasised three themes which find echoes in Glenn: first, that tradition is central to understanding the nature and behaviour of law and, far from being peripheral, it is central to most legal systems; secondly, Krygier rejects the post-Enlightenment tendency to treat tradition and change as antimonies; and thirdly, ‘important traditions are a combination of inheritance and (often creative) reception and transmission’.<sup>21</sup> A broad concept of tradition is crucial to understanding law because it captures elements that tend to be missed by legal theorists who analyse law in abstract terms (such as command, norms, rules and principles) or social theorists who analyse it in terms of roles, interests, power, systems and so on. What they miss is ‘pastness’: ‘tradition draws attention to the authoritative presence of the past, which is so pervasive in almost all legal systems’.<sup>22</sup>

Glenn accepts all this, but he goes further on several points: first, he emphasises that tradition involves the communication of information rather than the handing down of practices and institutions. Secondly, tradition is not a matter of passive acceptance. Rather, even when there is little or no resistance, there is a process of ‘massaging’,

<sup>19</sup> Glenn enters into an elaborate argument about comparability and commensurability at 44-48 and 354-55, but see especially Glenn, HP (2001) ‘Are Legal Traditions Commensurable?’ (49) *American Journal of Comparative Law* 133. It is questionable whether it is necessary to enter into the complex philosophical controversies for the purpose of asserting that legal traditions are comparable in respect of the ‘shared problems’ that he attributes to them. In one view, not all comparable phenomena are commensurable.

<sup>20</sup> Friedrich, C (1972) *Tradition and Authority* Macmillan; Shils, E (1981) *Tradition* University of Chicago Press; Berman, HJ (1983) *Law and Revolution: The Formation of the Western Legal Tradition* Harvard University Press; Krygier, M (1986) ‘Law as Tradition’ (5) *Law and Philosophy* 237; and Krygier, M (1988) ‘The Traditionality of Statutes’ (1) *Ratio Juris* 20. Cf Hobsbawm, E and Ranger, T (eds) (1983) *The Invention of Tradition* Cambridge University Press. Several other writers about tradition are cited by colleagues.

<sup>21</sup> Krygier, M ‘Law as Tradition’ *supra* note 20.

<sup>22</sup> *Ibid.*

involving selection, refinement and the filtering out of 'noise' (16-18). Thirdly, Glenn emphasises that in the long term, adherence to a tradition depends more on persuasion than domination or repression. 'The great and powerful traditions are those that offer great and powerful, even eternal and ultimately true, reasons for adherence' (41).<sup>23</sup> Fourthly, as we have seen, unlike Krygier, he is resistant to ideas of culture and system, insofar as they suggest enclosed, self-contained units.

Glenn's picture of a tradition is of a continuous, constantly changing flow of ideas over time that contains a relatively stable core, but no precise boundaries. Traditions are not like billiard balls; they are more like waves or clouds, except that they are more stable. His general vision is captured quite well in the following passage:

Traditions and hence communities, thus come to be defined by the totality of the flow of information in the world, including its quality and meaning. In the past the flow of information from tradition to tradition was largely that of formal learning (*translatio studii*), since contact between traditions was less frequent. Evolutionary (autonomous) or multi-independent theories of social development thus enjoyed considerable support. Today these theories have become increasingly hard to defend, at least in contemporary contexts, since it has become increasingly hard to identify any tradition which maintains itself through exclusively internal reflection and debate. All of the legal traditions discussed here, which cover the greater part (if not the totality) of the world's population, are in constant contact with one or more of the other legal traditions. There is thus the possibility of transmission and exchange of all forms of tradition, and of all or most of their content. Formal learning is now accompanied by other forms of diffusion.<sup>24</sup>

Whether or not Glenn has constructed a full-blown general theory of traditions, he has produced a rich set of ideas on which to base a bold account of legal traditions. Here I shall confine myself to three points that bear directly on his central argument.

First, as an organising concept, 'tradition' clearly serves Glenn's purposes better than 'culture', 'system', 'legal family' and 'civilisation'. In particular, it captures pastness, normative authority, and active involvement of the recipients ('massaging') that are central elements in his picture. 'Civilisation' is too general for Glenn's purposes, and 'culture' and 'legal system' are too specific. However, Glenn is perhaps too dismissive of these other concepts, some of which are useful at different levels of generality. For example, 'culture' is admittedly both vague and ambiguous and susceptible to reification. It needs to be given a precise meaning that has analytic value in a given context. But for some theorists, including Lawrence Friedman, David Nelken and John Bell, 'culture' captures some elements better than 'tradition' — for example, attitudes, expectations, institutions, habits and actual practices.<sup>25</sup> It is useful where it is important to treat these elements and their interrelations together. Glenn's conception of tradition implies a quite sharp distinction between information (ideas in a broad sense) and actual behaviour.<sup>26</sup>

<sup>23</sup> This theme is developed in his important article, Glenn, HP (1987) 'Persuasive Authority' (32) *McGill Law Journal* 261. See note 34 below.

<sup>24</sup> See also Bell at 130ff.

<sup>25</sup> See, for example, Bell, J (2001) *French Legal Cultures* Butterworths chapter 1.

<sup>26</sup> 'A tradition is thus composed of information, and it would be inappropriate to see it, as mooted by JGA Pocock, as "an indefinite series of repetitions of an action". This would be to confuse the results or

Although they overlap, ideas may not be implemented, practice may not be based on articulated ideas. Tradition involves the transmission of information (ie ideas).

John Bell is probably right in suggesting below that this leads to a quite narrow conception of law, because it leaves out institutions, praxis, the law in action. However, I disagree that it commits Glenn to equating 'law' with legal rules or doctrine. The 'information' that is transmitted through tradition is much broader than that: it can include stories, concepts, beliefs, facts, symbols, values, political theories, heuristics and, if not actual institutions, at least ideas about institutional objectives, design and significance.<sup>27</sup> Moreover, Glenn emphasises that what kinds of information are selected not only varies between traditions but is fundamental to the tradition itself (14).

By confining his focus to ideas, rather than to their application in practice, Glenn makes his enormous subject more manageable. His thesis is best interpreted as a contribution to the history of ideas rather than as a history of actual legal processes, institutions, and power relations — a much larger and more complex subject.

Secondly, if one accepts this limitation, the question still arises: how in Glenn's account are legal traditions differentiated from other kinds of tradition — political, religious, moral, literary or culinary, for example? Does he not need an analytic conception of 'legal' in order to identify his primary unit of analysis? Glenn seems to beg this question almost systematically: first, such differentiations vary between traditions and, as in the case of our own, distinctions between law, morality, politics, and religion can be regularly, perhaps essentially, contested. Secondly, Glenn is dismissive of attempts to construct a general definition of law.<sup>28</sup> I am personally sympathetic with such impatience, and prefer to use different conceptions of law in different contexts. However, it could be argued that Glenn needs a distinction in the context of his argument, for he treats legal traditions as the main unit of comparison. Even if law is conceptualised differently within traditions (or is the subject of endless debate) that tells us about 'law' as a folk concept; but in order to transcend and compare legal traditions, Glenn needs an analytic concept of the 'legal'.<sup>29</sup> Like it or not, Glenn is working within the Western intellectual tradition and his main background is in law — none of us can escape entirely from our own intellectual roots.

Glenn's possible response to this argument is that he is trying to escape from the constraints of his own tradition and that his method is to look for patterns by immersing himself in different traditions without the aid of a comparator (or *tertium quid*) (47, 353-55), in this case, an abstract criterion of identification of 'legal traditions'. This is consistent with his emphasis on continuums in preference to binary distinctions and precise general definitions.<sup>30</sup> This raises issues too complex to be pursued here. In the

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impact of the tradition, its immediate manifestation with the tradition itself' at 13, citing Pocock, JGA (1968) *Time, Institutions and Action* at 212.

<sup>27</sup> Of Bell's seven facets of law, summarised by the mnemonics CHIP and PIN, Glenn's concept of tradition can include concepts, heuristics, ideas and norms — it cannot capture all that might be covered by empirical accounts of processes, institutions and power. That is a limitation, but not necessarily a weakness. See Bell at 135 and 136.

<sup>28</sup> See especially the discussion of 'chthonic law' at 69.

<sup>29</sup> For criticism of Tamanaha's 'labelling theory' as an attempt to use 'folk concepts' to provide the basis of a general (analytic) conception of law, see Twining, W (2003) 'A Post-Westphalian Conception of Law' (17) *Law and Society Review* 199 at 223-43.

<sup>30</sup> For a discussion of Glenn's views on multivalent logic, see Halpin at 120-21.



present context, he appears to rely in part on convention: he is giving an account of and comparing seven examples of what are widely recognised (by Western scholars) as major traditions. The selection is inevitably a bit arbitrary, but it is not capricious, his selection will not please everyone, and the conventional categories are controversial.<sup>31</sup>

This leads on to a further question that threatens to revive the sterile taxonomic debates about 'legal families': how can legal traditions be classified? Five of Glenn's seven categories are recognisable: three religious traditions (talmudic, Islamic, and Hindu); and two familiar Western traditions (a common law and a civil law tradition). But two are quite novel, 'Chthonic' and 'Asian'. As these are discussed by colleagues below, I shall not pursue this here, except to say that an element of arbitrariness in his categories and selection does not seriously undermine the value of Glenn's general thesis, but it does raise questions about the validity of his treatment of the two more controversial ones.

It may be useful to finish by considering some of the wider implications of Glenn's thesis by reference to the topic of diffusion of law. This is a subject on which I have been working and I have been pleased to find that we have arrived at very similar conclusions by quite different routes.<sup>32</sup> This particular example illustrates some of the far-reaching implications of Glenn's perspective if it survives critical scrutiny.

The subject of transplantation, reception, and diffusion of law has been the focus of much attention and controversy in recent years. Some leading comparatists (including Rodolfo Sacco, Alan Watson, Otto Kahn-Freund and Patrick Glenn himself) treat it as a core aspect of comparative law. Much of the discussion of the subject has centred on state law and is underpinned by what can be termed 'a naive model of diffusion', which postulates a paradigm case with the following characteristics:

a bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change [...] it is commonly assumed that the standard case involves transfer from an advanced ('parent') civil or common law system to a less developed one, in order to bring about technological change ('to modernise') by filling in gaps or replacing prior local law.<sup>33</sup>

While deviations from this ideal type are recognised in the literature, some such model is widely assumed to represent a paradigm case. Glenn, by contrast, seems to treat none of these features as necessary or even characteristic of the processes of interaction between legal traditions: interaction and influence between traditions have been continuous throughout history; external communication of information, instead of being exceptional or noteworthy, is the normal state of affairs — isolation of a legal tradition is wholly exceptional. Most diffusion has been informal rather than formal; most influence involves exchange or reciprocity rather than movement in one direction; the main agents of change are not always governments but can equally well be individuals and groups such as merchants, jurists, emigrants (including colonisers),

<sup>31</sup> On the difficulties surrounding concepts like 'religious law', see Huxley, A (ed) (2002) *Religion and Law* RoutledgeCurzon.

<sup>32</sup> Twining, W (2005) 'Social Science and Diffusion of Law' (32) *Journal of Law and Society* 203; and Twining, W (2004) 'Diffusion of Law: A Global Perspective' (49) *Journal of Legal Pluralism* 1.

<sup>33</sup> Twining, W 'Social Science and Diffusion of Law' *supra* note 32 at 205.

frontiersmen and peoples in diasporas (55-56); common law and civil law traditions have been as much importers as exporters and are only part of the story in the context of world history; the information that is passed on and exchanged is of many different kinds and feeds into existing debates, controversies and conflicts within a recipient tradition; it is true that in the last two centuries the spread of Western legal ideas has been closely associated with colonisation, imperialism and attempted domination, but, says Glenn, there is no such thing as an imposed reception.<sup>34</sup> Adherence to tradition is more a matter of belief than coercion.

If this is an accurate reconstruction of the implication of Glenn's views for the study of diffusion, it suggests how far from traditional comparative law he has moved.

To conclude, in presenting a bold overview of the history of legal traditions in the world in only 400 pages, Glenn makes many intriguing statements, some provocative, some puzzling, and some almost certainly wrong. Even if some of the details are faulted, this is an important book. It is not possible in a short review to chase all the hares he has started. My colleagues will try to trap a few more.

<sup>34</sup> 'It is therefore inappropriate to consider reception as either imposed or voluntary, since all reception that occurs is necessarily voluntary' (Glenn, HP 'Persuasive Authority' supra note 23 at 265). This provocative statement seems to contradict a great deal of recent writing on law and colonialism. It implies that a reception is only successful if it is internally accepted by those subject to it. What Glenn means is that successful receptions depend on the persuasiveness of the ideas rather than on force, whether or not they were first introduced by politically or economically dominant actors. This is a likely point of controversy.

## Glenn's *Legal Traditions of the World*: Some Broader Philosophical Issues

ANDREW HALPIN\*

The immediately impressive feature of Patrick Glenn's treatment of legal tradition is that it offers far more than an ordinary account of different legal traditions. It is not just that Glenn seeks to provide a richer account of legal traditions (the grander 'Cook's Tour' in the imagery used by William Twining). It is not merely that through a richer account of legal traditions he hopes to open up a broader perspective on our understanding of law, escaping the confines of formal sources captured in a positivist time frame. It is not simply that through a broader understanding which takes in the dynamic development of the law in the wider social context he attempts to provide a more secure foundation for the comparative endeavour. Glenn's ambition for tradition in the law is all encompassing. By the end of the book, he has eradicated totalitarianism and fundamentalism as deviant forms of tradition, has avoided imperialist assumptions in favour of any one tradition, has found common ground between different legal traditions on the basis of their very reliance on tradition, has allowed for mutual respect and continuing diversity within a 'sustainable diversity' of legal traditions — and advanced the cause of world peace.<sup>1</sup>

It is the appeal of Glenn's grander ambition, I think, that sets his work apart. Taken together with the timeliness of an intellectual project that strives to provide a global account of different legal traditions, and a global basis for their harmonious flourishing, it is understandable that the accuracy of particular points of detail relating to one tradition or another might be overlooked in the pursuit of the greater prize. Other contributors will comment on Glenn's grasp of specific legal traditions and the extent to which his work brings local illumination in their own fields of expertise. At times, contributors may appear charitable in forgiving the occasional error while praising the deeper enterprise. At other times, there may seem to be an element of frustration with Glenn that goes beyond a specific lapse of accuracy and challenges his grasp of deeper things. Within this contribution to the collaborative project of surveying Glenn's book, I shall attempt to focus on some of the broader issues, Glenn's treatment of which undergirds the more ambitious aspects of his work.

I shall deal with three principal issues. First, there is the issue of how much reliance can be placed upon language as a means of resolving philosophical or other troublesome problems. Certainly, language is used to pose these problems. Language is also used as a medium to convey proposed solutions, and to allow the discussion of and argument between competing solutions. The interesting point is whether it is the practice of language that determines which solution is acceptable, or whether we need to recognise a more basic source of experience, which adjudicates between competing solutions. Since Glenn quite pointedly treats tradition as being located not in the repeated occurrence of behaviour but in the transmission of information (13-14), there is an essentially linguistic character to his conception of tradition.

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<sup>1</sup> The final sentence of Glenn (365) suggests that the application of 'multivalent thought' permits a non-violent process of selection from the great variety of legal solutions available for the regulation of social relations. Cf Glenn's aspiration for making an impact on the arms trade (52).

The second and third of these issues are closely related in Glenn's argument. These are the issues of incommensurability and multivalence. Glenn's positions against incommensurability, and for multivalence, are crucial in supporting his vision of a 'sustainable diversity in law' based on a full recognition of the role of tradition. Although the problems of (in)commensurability and bivalence/multivalence are complex and remain controversial within the wider philosophical literature, I shall seek to show that there are certain key practical points that Glenn has elided in his oversimplified portrayal of these topics.

Before dealing with these three issues, I would like to make a few preliminary comments to provide some context to the more detailed discussion that follows. One very valuable feature of Glenn's book is that he reinforces Martin Krygier's insight<sup>2</sup> that tradition need not be regarded with the negative characterisation, cast upon it by the Enlightenment, as an oppressive reactionary force, which obstructs rational reflection on the problems of the human social condition. Tradition has the positive potential to provide a basis for further reflection on such matters and, moreover, the due recognition of its widespread incidence in the law makes it difficult to see how such positive opportunities can be pursued entirely without the support of some tradition. This point resonates well with the work Michael Freeden has undertaken<sup>3</sup> to demonstrate that ideology in political thought should not be discarded as an instrument of false consciousness. Freeden argues forcefully that ideology has a positive role to perform in helping us to make sense of the political world — without some form of ideology we are unable to develop a coherent political picture. There are, however, important differences between Glenn's approach to tradition on the one hand, and Krygier's approach to tradition and Freeden's approach to ideology on the other hand. Krygier explicitly acknowledges the limited contribution that tradition has to make to our understanding of law;<sup>4</sup> and Freeden is prepared to accept not only the positive but also the negative potential of ideology, to the extent that he is prepared to argue for one ideology over another.<sup>5</sup> So, despite rescuing tradition and ideology respectively from their tarnished images, neither Krygier nor Freeden is prepared to give either the wholesale endorsement that Glenn accords to tradition — to the point of denying that unacceptable totalitarian or fundamental manifestations of tradition are actually true forms of tradition (23, 49-50).

It is the total dependence on tradition in Glenn's work that will be questioned most severely in the points that follow. Before proceeding with the detailed discussion, there is one further preliminary observation to make about the way in which Glenn's unfailing regard for tradition threatens to undermine another insight of Krygier's<sup>6</sup> that Glenn otherwise supports. This is the way that an appropriate recognition of the role of tradition in law directs us to the contribution that the empirical social sciences may offer in developing our understanding of law. For Krygier, an analysis of law without tradition is bound to be distorted. The danger is that an analysis of law conducted wholly through

<sup>2</sup> Krygier, M (1986) 'Law as Tradition' (5) *Law and Philosophy* 237.

<sup>3</sup> Freeden, M (1996) *Ideologies and Political Theory: A Conceptual Approach* Clarendon Press.

<sup>4</sup> Krygier, M 'Law as Tradition' supra note 2 at 245, 251; Krygier, M (1988) 'The Traditionality of Statutes' (1) *Ratio Juris* 20 at 20, 23.

<sup>5</sup> In particular, he expresses a preference for one strain of liberal ideology over another. See Freeden, M (2004) *Liberal Languages: Ideological Imaginations and Twentieth-Century Progressive Thought* Princeton University Press.

<sup>6</sup> Krygier, M 'Law as Tradition' supra note 2 at 239; Krygier, M (1982) 'The Concept of Law and Social Theory' (2) *Oxford Journal of Legal Studies* 155.

Glenn's notion of tradition is going to obstruct the empirical observation of factors other than those caught up within his idea of tradition, including those traditional factors which militate against Glenn's uniformly favourable representation of tradition.<sup>7</sup>

## LANGUAGE GAMES

Tradition for Glenn is a dynamic, reflexive and self-validating process. One develops tradition through the practice of tradition. Both the transmission of information and the judgment as to how to go on with the information received occur within tradition (15, 21-24). As Krygier explicitly recognises,<sup>8</sup> the practice of tradition amounts to participating in an interpretive community. The use of the idea of an interpretive community to capture the ability of language to set the parameters of our understanding *and* provide us with the means of questioning and developing those parameters has been popularised within legal theory through the work of Stanley Fish.<sup>9</sup> Rather more obscurely, the later philosophy of Wittgenstein grants to language the same explanatory power and exclusive domain over the presentation and resolution of philosophical problems.<sup>10</sup> Where Fish deals with interpretive constructs used by interpretive communities, Wittgenstein plays language games organised around a form of life.<sup>11</sup> The important point for both authors is that nothing serves as a source to challenge or validate our understanding other than what can be found within the language practice itself.

Although Glenn does not make reference in his book to interpretive communities,<sup>12</sup> as Krygier does, an analysis in such terms is implicit in the open (32) yet self-sufficient (41, 46) character Glenn gives to tradition as a linguistic device for the transmission of information. Moreover, Glenn uses Kuhn's idea of a scientific paradigm as an analogy for tradition elsewhere.<sup>13</sup> This is effectively another representation of a language game worked out within the more specialised setting of a scientific interpretive community. And, in adopting Kuhn's paradigm as a model for the incommensurability problem, Glenn openly follows Kuhn in stressing that there is nothing outside of the practice of the paradigm/tradition that can influence the decision to accept or reject it as valid.<sup>14</sup>

Yet this totalising power of a language game (and of the interpretive community that plays it and is organised around it) provides a far from satisfactory explanation of what exactly accounts for the conflicts between opposing understandings, either within or between different interpretive communities. In particular, what determines the decision to abandon one interpretive community in favour of another? In general, how can an

<sup>7</sup> See William Butler's complaint, in his contribution on Russia in this volume at 142, that Glenn fails to deal with the rich empirical material from the law of the former Soviet states that would have a bearing on how a legal tradition should be understood.

<sup>8</sup> Krygier, M 'The Traditionality of Statutes' *supra* note 4 at 31-34.

<sup>9</sup> Fish, S (1989) *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* Clarendon Press.

<sup>10</sup> Wittgenstein, L (1958) *Philosophical Investigations* (2nd ed) Anscombe, GEM (trans) Basil Blackwell.

<sup>11</sup> For comparison of the two approaches, see Bix, B (1993) *Law, Language, and Legal Determinacy* Clarendon Press at 54-55; Halpin, A (2001) *Reasoning with Law* Hart Publishing at 7.

<sup>12</sup> Glenn comes close in his discussion at 42 of an 'epistemic community'. Although the authors he cites have used this phrase in a way which overlaps with an interpretive community, Glenn's own concerns are to take it in other directions.

<sup>13</sup> Glenn, HP (2001) 'Are Legal Traditions Incommensurable?' (49) *American Journal of Comparative Law* 133 at 134.

<sup>14</sup> *Ibid* at 134, 144.

explanation in terms of the language practice under consideration shed light on the defects apparent in that very practice, when the assumptions in our language bump up against the experiential realities of life?<sup>15</sup> There is extensive evidence to suggest that humans rely upon language to utilise and express rational faculties, but have access to a more basic level of experience than the experience of participating in a language practice. Even Kuhn was capable of shedding doubt upon the totalising power of a scientific paradigm by acknowledging a more basic experience of nature.<sup>16</sup> If this is so, then Glenn's readiness to embrace tradition as both setting the question and providing the answer to everything is dangerously misconceived. Furthermore, his insistence that all conflict within and between traditions is resolved by tradition (46-47, 355-56) detracts from anything we might learn from empirically examining true points of conflict, or even from exploring the possibility of common human experience that may be open to us beyond the limitations of particular traditions.<sup>17</sup>

Glenn's persistent evasion of these possibilities is conducted through extraordinarily imperialist claims made on behalf of tradition, though these claims are made in a far from consistent manner. When faced with an uncomfortable intellectual position, Glenn is capable of first rendering it as a tradition and then dissolving its potency in the melting pot of all traditions. Since each tradition is taken to share in every other tradition (38), none can be regarded as standing in opposition to the others. For such awkward instances, there no longer remains the possibility of selecting them as vibrant forms of thought from the 'bran tub' of tradition. As an example, consider Glenn's reduction of rationalism to a form of tradition (19). It may be the case that there exists a rationalist tradition, but a rationalist intellectual position can be identified without displaying *any* of the features of a tradition identified by Krygier or Glenn, and its particular merits or defects need to be engaged with rather than effaced by reducing it to a tradition and then disposing of it as tradition slurry. Alongside this debilitating work Glenn gives to tradition, he fortifies the imperial sway of tradition by some bold philosophical claims on its behalf.

## COMMENSURABILITY AND MULTIVALENCE

The plausibility of Glenn's sustainable diversity of different legal traditions cannot rely on a number of abstract manoeuvres in promoting the totalising reach of tradition. The evident practical differences found in any serious survey of legal traditions are sufficient to call into question their harmonisation, or even their harmonious coexistence. Without denying these differences, Glenn seeks to accommodate them by developing an alternative perspective upon them.

<sup>15</sup> For further discussion of these points, in relation to both Fish and Wittgenstein, see Halpin, *A Reasoning with Law* supra note 11 at 10-12, 130-33.

<sup>16</sup> Kuhn, TS (1970) *The Structure of Scientific Revolutions* (2nd ed) University of Chicago Press at 77, quoted by Glenn, HP 'Are Legal Traditions Incommensurable?' supra note 13 at 134 note 7. Although Kuhn is seeking to emphasise that the way nature is perceived is affected by the prevailing paradigm, there is no doubt that the experience of nature for Kuhn is capable of opposing the prevailing paradigm, and preparing the way for an alternative paradigm. Cf Kuhn at 72 on the need to confront Newtonian theory with an experience of nature.

<sup>17</sup> At 46 Glenn appears to associate the 'very idea of being human' with the ability to communicate with each other from within tradition(s) rather than considering the possibility of a common humanity which might transcend our traditions.



First, it is necessary to fit the different traditions within a single perspective. This is effected through Glenn's support for the commensurability of values found within different traditions (46-47).<sup>18</sup> This part of Glenn's strategy might be thought of as leading to a point of final resolution of all local differences within the final form of a global legal tradition, but although Glenn is prepared to relate all legal traditions to each other, and to allow for borrowings from one another, he stops short of such final uniformity. The second part of Glenn's strategy is his support for multivalence, whereby he seeks to maintain a diversity of traditions in harmonious coexistence (354-65).

However, neither part of his strategy is credible. In the first case he confuses the possibility of making a comparison between two different phenomena (the values of different traditions) with their commensurability. Absolutely anything can be compared with anything else, even if it is only at the point of comparing the presence of a feature in one item with its absence in another. Apples are comparable with oranges in a number of ways, using features which are common to both or are distinctive to one of them. This does not make apples and oranges commensurable. What is the answer to three apples minus two oranges?

Glenn seems to think that because it is possible to choose between apples and oranges, it follows that they must be commensurable.<sup>19</sup> But this merely demonstrates that they may be subject to a criterion of choice — that they can be compared in accordance with that criterion. And that criterion of choice needs to be selected. Someone may prefer apples to oranges on the grounds of their having a firmer flesh, because it contributes to that person's enjoyment of eating them. Another person may prefer oranges to apples on the grounds of their having a rounder shape, because that satisfies this person's aesthetic sensitivities when viewing them in the fruit bowl. The incommensurability of apples and oranges now becomes apparent in the conflict over how they should be compared. No such problem affects our ability to provide an answer to three apples minus two apples.

In a very instructive discussion of the commensurability of values provided by Brian Bix,<sup>20</sup> the point clearly emerges that for commensurability to be recognised in any meaningful sense, one value must be capable of being assessed in terms of the other, or each value must inherently be capable of being reduced to an overarching value. Otherwise, the values are not commensurable, and the comparison of values, if it is to proceed, depends on the selection of an imposed criterion. The recognition of the need for an external criterion would not only indicate the strict incommensurability of different traditions, but would also wreck the totalising claim made on behalf of tradition: that the process of selection from alternative traditions is entirely conducted from within tradition.

The second part of Glenn's strategy, in relying on multivalence to allow otherwise competing values from different traditions to coexist, is no more credible than the first. Here Glenn confuses a multivalent approach with a multifaceted approach. Multivalent logic<sup>21</sup> moves beyond the bivalent values of traditional logic, which specifies that one

<sup>18</sup> See also Glenn, HP 'Are Legal Traditions Incommensurable?' *supra* note 13.

<sup>19</sup> *Ibid* at 135; *Legal Traditions of the World* at 44.

<sup>20</sup> Bix, B *Law, Language, and Legal Determinacy* *supra* note 11 at 96-104.

<sup>21</sup> For a pioneer of many-valued logic, see Łukasiewicz, J (1970) *Selected Works* Borkowski, L (ed) North-Holland Publishing — discussed in Halpin, A *Reasoning with Law* *supra* note 11 at 95-96. Fuzzy logic, which Glenn also refers to, is, loosely speaking, the application of multivalent logic to vague terms. For further and more technical discussion, see the entries of Gottwald, S (2005) 'Many-Valued Logic' and

or the other of only two values, or states of affairs, must be the case (true/false;  $p$  or not- $p$ ) It adds other states where the affirmation or negation is not definitely made out, such as 'possibly  $p$ '. Within a system of multivalent logic we could then have coexisting 'possibly  $p$ ' and 'possibly  $q$ ', where it would not be possible to recognise  $p$  and  $q$  in a system of bivalent logic where it happened that  $q$  amounted to a case of not- $p$ .

The point can be illustrated with one of Glenn's examples (361), taking  $p$  to refer to state determination of jurisdiction and  $q$  to refer to party determination of jurisdiction. We can further treat these two mutually exclusive options as belonging to different legal traditions. It then appears that a multivalent logic permits the coexistence of both traditional responses to the problem, since it allows us to grant that jurisdiction will be possibly state determined and possibly party determined. In fact, all that multivalent logic has allowed us to do is to express each response in a conditional state. It has not brought about the coexistence of both responses.

Suppose we do nevertheless draw on both traditions, and allow that in some cases we will opt for state determination and in others for party determination of jurisdiction. Yet in each case it will have to be decided either that it will be for the state to determine jurisdiction or that it will be for the parties. So we have developed a multifaceted approach to the issue by drawing on the richer resources of both traditions, but as each case is decided it will still fall within a bivalent logic of being  $p$  or not- $p$ . Furthermore, we require something to determine the *choice* from among the different traditional responses on offer, and this is not itself contained within the traditions. Again, Glenn's attempt to support the totalising force of tradition has failed.

The merits of a multifaceted approach, drawing on the richer resources of a number of traditions so as to explore the further facets of an issue that might otherwise be overlooked, is something that deserves serious study. However, the opportunity of mounting a proper investigation of the social context which might make this attractive, *or not*,<sup>22</sup> is lost by a spurious assertion that all competing traditional values can be accommodated by taking a multivalent approach.

## CONCLUDING REMARKS

It would be inappropriate to offer any sort of conclusive assessment of Glenn's book at the close of this contribution. Much still needs to be done in considering the practical value of his approach towards different traditions and their interaction. However, it might be appropriate at this stage to draw out a couple of implications from the above discussion. The value of Glenn's work in enhancing the important emphasis given by Krygier to the role of tradition in understanding law, and providing proper regard to its social context, is likely to be diminished by an overambitious and unsuccessful attempt to turn tradition into a totalising force in law. As for Glenn's endeavours to reinvigorate comparative law, these too suffer from the same infirmity in his argument.

Hajek, P (2005) 'Fuzzy Logic' in Zalta, EN (ed) *The Stanford Encyclopedia of Philosophy*, available at: <<http://plato.stanford.edu/>>. For a less technical and somewhat sceptical overview of the field, see 'Introduction, 1996' in Haack, S (1996) *Deviant Logic, Fuzzy Logic: Beyond the Formalism* University of Chicago Press.

<sup>22</sup> Some contexts might be supportive of enriching the options available by drawing on alternative viewpoints, but in other contexts there will be steadfast opposition to the alternative viewpoint. Consider, eg, the case of female genital mutilation.

The inconsistent and overpowering role allocated to tradition makes it impossible to find clear working taxonomical structures. Practices may be absorbed into or spewed out of traditions, internal conflicts within traditions, or a state of coexistence between traditions, at will.<sup>23</sup> Nor is there a clear basis for comparison — certainly not within the murky envelopment of totalising tradition, but neither at the level of actually examining together different traditional practices through the prefatory list of characteristics that all traditions possess.<sup>24</sup> Perhaps the greatest danger for comparative law arising from Glenn's approach is that in seeking to make all comparative insights relevant and all insights comparative,<sup>25</sup> Glenn seemingly protects the comparative enterprise from the possibility of offering insights that may not be of value, but instead deprives it of the prospect of providing insights of actual practical use.

<sup>23</sup> See further, the discussion of taxonomical problems by John Bell (Western Law), Andrew Huxley (Asian Law) and Sian Stickings (Japanese Law) in their contributions to this collective review.

<sup>24</sup> Each tradition has a particular nature, an underlying justification, a concept of change, and a way of relating to other traditions (xxvi). These are formal characteristics, which may be helpful for expository purposes, but do not in themselves provide any basis for comparison.

<sup>25</sup> 'Human reasoning inevitably becomes comparative reasoning' at 46.

# The Chthonic Legal Tradition — or Everything that is Not Something Else

GORDON WOODMAN\*

The principal value of this work must lie in its contribution to the role of comparative law ‘in advancing our understanding of law from a global perspective’, as William Twining puts it.<sup>1</sup> To measure that value we should enquire how far the theoretical apparatus presented in the first two chapters enables and enriches the studies of particular legal traditions in the following seven. This part of the inquiry is directed to chapter three, ‘A Chthonic Legal Tradition: To Recycle the World’.

Two general criticisms of the book may be mentioned at the outset: that the notion of a ‘tradition’ is not defined with sufficient precision; and that the distinction between a legal tradition and the other constituent parts of a more general tradition is not explained nor sufficiently discussed. These criticisms have a bearing on some of the comments to be made on chapter three.

The chapter contains useful insights into various laws around the world, but a number of criticisms must be made. These are concerned, first, with the lack of precision in the qualification ‘chthonic’ as applied to traditions, peoples and laws; and, secondly, with the related problem of the inaccuracy of some of the generalisations about the nature and content of ‘chthonic’ laws.

The notion of the ‘chthonic’ is introduced over the first two and a half pages of the chapter (59–61). These begin by referring to ‘Peoples subjected to European domination in recent centuries’. This seems a reasonably clear category, provided it is accepted that governmental, formally established ‘domination’ is meant, not economic or cultural domination alone. The category refers both to territories where the Europeans left or moved into formally subordinate roles on the termination of colonial rule (ie territories where the peoples in question are in the majority), and territories where large numbers of Europeans settled permanently (ie territories where the peoples in question are minorities). The terms ‘aboriginals’, ‘natives’ and ‘indigenous peoples’ are rejected by Glenn since ‘in particular cases [...] the peoples designated have themselves come from elsewhere, and hence after an imprecise “beginning” [sic]’, and the terms are sometimes found objectionable. It is argued that the terms are defective also because ‘they tell us little about the people themselves or their way of life’. Thus far the argument seems persuasive — although its success depends on whether a better term can be found than those which are rejected.

Then the argument becomes increasingly vague. The ‘people there when the Europeans arrived [...] appear [...] as just folks, living their lives and not unhappy with them. So we could call these people “folk”, and their law “folk law”’. But, ‘In our unguarded moments we are all folks’. It may be replied, as to the naming of peoples, that there seems to be a good argument for calling all peoples folks, that it is hardly a term to be ashamed of, and that it is difficult to see why we should admit that we are folk only in ‘unguarded’ moments. But it is more important to notice that in these words Glenn has moved imperceptibly from the naming of ‘peoples’ to the naming of laws. Here a different question arises. There is no reason for the laws governing every folk on

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<sup>1</sup> In his contribution to this collective review at 107.

earth to be called 'folk laws', including, for example, laws which have been imposed on the folk by a colonial power, or by a reforming legislature with a codification project.<sup>2</sup> The word 'folk' when used as an adjective does not mean 'appertaining to any folk whatever'. A more common understanding of 'folk law' is that it is law which emanates from the body of the folk which observes it.<sup>3</sup> Glenn notes that Savigny used the term *Volk* when referring to the historical laws of European peoples,<sup>4</sup> and apparently sees this as a ground for rejecting the term because he is not concerned in this chapter with the laws of European peoples. It might, on the contrary, have been thought illuminating to seek in past and present societies of European peoples law of the same category as that of peoples recently subjected to European domination.

Having rejected other terms to refer to this category of peoples, and so to a category of laws, Glenn turns to the term *chthonic*. To describe people as being chthonic 'means that they live in or in close harmony with the earth' (60).<sup>5</sup> 'To describe a legal tradition as chthonic is thus to attempt to describe a tradition by criteria internal to itself, as opposed to imposed criteria' (60-61). Here Glenn appears to say that a legal tradition is to be classified as chthonic if the people in question consider themselves to be chthonic, whether or not they are so in reality. A people's conscious or unconscious aspirations or imaginings are no doubt relevant to a social scientific analysis of a population which includes that people. But objective observation and empirical verification normally have — and should have — an overriding part in analysis. Furthermore, in his references to chthonic peoples, Glenn does not elsewhere identify subjects of discussion by asking whether people consider themselves to be chthonic. It would seem that he is not convinced by his own suggestion that this is a designation by internal criteria.

In summary, the course of Glenn's argument thus far seems to be the following. A legal tradition is to be identified through the general human tradition of which it is a part. The tradition investigated in this chapter is identified with the category of peoples to whom it belongs, and this is initially identified through the recent political histories of the peoples, specifically by their subjection to European domination. He claims that this category of peoples coincides with the category of those who live in or in close harmony with the earth.

These, then, are chthonic peoples, and their laws constitute the chthonic legal tradition. More precisely, as it emerges later in the chapter, chthonic laws are those parts of the laws of chthonic peoples which were not brought by the European dominators. In every case, chthonic laws are entangled with laws from other traditions because, as Glenn says, 'There are no pure chthonic traditions in the world today' (79). But this still leaves unanswered the question to what extent are the laws of 'peoples subjected to European domination in recent centuries' (excluding laws imported from outside) in

<sup>2</sup> Glenn notes that the term 'folk law' has been accepted by the Commission on Folk Law and Legal Pluralism, 'whose work is immensely valuable'. But this Commission has never imagined that it might be defining its field of interest in terms of 'folks', only in terms of folk laws.

<sup>3</sup> A suggested definition is: 'Law which derives its existence and content from social acceptance' (Woodman, G (1993) 'Folk Law' in Arnaud, A-J (ed) *Dictionnaire encyclopédique de théorie et de sociologie du droit*, (2nd ed) Librairie Générale de Droit et de Jurisprudence at 262-65). See also references to 'self-generated' law; thus Sally Falk Moore refers to 'rules that could be said to have evolved "spontaneously" out of social life' in Moore, SF (1973) 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject Of Study' (7) *Law & Society Review* 719, reprinted in Moore, SF (1978) *Law as Process: An Anthropological Approach* Routledge & Kegan Paul chapter 2.

<sup>4</sup> von Savigny, FC (1814) *Zum Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* [Of the Vocation of our Age for Legislation and Jurisprudence] Berlin.

<sup>5</sup> He states that the term is derived from Goldsmith, E (1992) *The Way: An Ecological World View* Rider.

truth chthonic, in the sense of being related in some way to life 'in or in close harmony with the earth'? This question is returned to later. Here, we may remark that, as an identifier, the notion of the chthonic is less than clear.

The second main issue arising from this chapter concerns the accuracy of the generalisations it contains about the nature and content of chthonic laws. In the course of the four parts into which this chapter is divided (according to the pattern of each of chapters three to nine as mentioned earlier), Glenn seeks to depict various characteristics, some extensive and fundamental, others of more limited but still real significance, of laws belonging to the chthonic legal tradition. He draws his examples from a number of peoples who have been 'subjected to European domination in recent centuries'. He takes those parts of their state and non-state laws which do not belong to other traditions. We may consider whether he demonstrates that the laws of these peoples have the characteristics claimed.

First, Glenn claims that in this legal tradition it is a characteristic of law that it is not separated from morals or from any other beliefs of the people. There are few institutions in chthonic law, so that law is neither command nor decision, 'and can be found only in the bran-tub of information which guides all forms of action in the chthonic community' (69). Glenn argues, in a section entitled 'Law's Domain' (69-70), that religion is important in the chthonic world, and 'other forms of life simply had their own autonomy and were expected to function' (70). Consequently, law does not dominate the normative field, or, as Glenn puts it: 'So in being meshed with all else in society law does not get to call all the shots' (70). To support these claims, he cites one item of empirical evidence, derived from the work of Francis Deng on the Dinka of Sudan.<sup>6</sup> They could have been tested against some dozens of other well-documented examples in Africa alone. Had he done so, it is doubtful whether all the examples would have produced identical results.

But it may be more important to note that, before any such testing were done, we would need a satisfactory conceptual basis in the form of an explanation of the concept of 'law', which Glenn fails to provide. We cannot discuss the place of law within a tradition or a society, compare its place with those of morality, religion and 'other forms of life' (whatever that means), or consider whether it is separated from them (whatever exactly that may mean) unless we have at least a rough, working notion of what we mean by 'law'; and this Glenn does not consider. The debates on this issue in legal anthropology conducted by Malinowski, Hoebel, Gluckman, Bohannan, Pospisil, Moore, Roberts, Rouland, Le Roy, Vanderlinden and the Benda-Beckmanns are ignored. Nearly all of these authors are referred to, but not for what they variously say about the concept of law and its differentiation from other social phenomena.

One may sympathise with this avoidance of the issue. The demand for the delineation of a distinction between law and 'positive morality' or other normative orders, in stateless societies — that is, in the societies most frequently studied by anthropologists — has led to great difficulty. On the one hand, there has been a series of attempts at differentiation by scholars desperate to avoid the ethnocentric (as they feared) conclusion that stateless societies had no law. These attempts have generally failed. On the other hand, there has been the conclusion that differentiation is impossible, and that the concept of law must be limited to the law of the state. In that case, so-called customary law, indigenous law, aboriginal law and chthonic law do not exist, or very rarely exist, despite widespread

<sup>6</sup> Glenn cites Deng, F (1990) 'A Cultural Approach to Human Rights among the Dinka' in An-Na'im, AA and Deng, FM (eds) *Human Rights in Africa: Cross-Cultural Perspectives* Brookings Institute at 261.



talk about such laws.<sup>7</sup> It would seem that, until we have the means to distinguish legal norms from, for example, the norms of a religion, we cannot begin to determine the relationship between law and religion, as Glenn wishes.

A second characteristic of the chthonic legal tradition is its orality (Glenn's term). This means that 'the teaching of the past is preserved through the [...] means of human speech and human memory' (61-62). Consequently, it does not contain 'voluminous detail' (62), and knowledge of an influence upon the law is communal, not limited to a privileged class (63-64). Institutions are not complex and are relatively non-authoritarian (63-64). These claims are supported with a number of citations, and would seem, on the whole, to accord with African legal experience. The oral nature of these laws might be better identified in the lack of written authoritative sources, as distinct from a lack of written records, for the latter have become common.<sup>8</sup> Glenn recognises that orality exists in other traditions also. He cites the case of the Roma legal tradition (which he considers non-chthonic) as another oral tradition (61-62, note 8). He might also have referred to the large part of the common law not contained in written legislation. It might also be argued that the lack of voluminous detail in the form of explicitly stated rules is often supplemented by great subtlety, extremely difficult to express fully, in the underlying understandings of legally approved behaviour. For example, there may be no more than a few rules in an African law defining persons' rights and powers in a particular field of activity; but those may be subject to understandings as to when they may and may not be enforced which are so complex that it would be impossible to set them out expressly and precisely.<sup>9</sup>

A number of other generalisations may be mentioned briefly. In focusing here on that which is open to criticism, I do not deny that there is much else which is highly instructive. 'Dispute resolution was usually informal' (64). Often that is the case, although in many African laws there are requirements to adhere to detailed formal procedures for particular legal transactions. There follow claims about the branches of substantive law of chthonic peoples. Thus, 'There appears to be relatively little recognizable chthonic law of obligations (contract and tort)', but 'it is rather the land itself [...] and the personal relations of the people who live upon it, which is the object of what we can discern of

<sup>7</sup> An illustration of the difficulty is Tamanaha, BZ (1993) 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (20) *Journal of Law and Society* 192. This demonstrates the weakness of past distinctions between law and other normative orders, and then, assuming that there must somehow be a clear distinction, concludes that it must be a distinction between the normative order of the state and other normative orders. Thus, only state law is law. This has been discussed in Woodman, GR (1998) 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (42) *Journal of Legal Pluralism* 21 at 41-45. See also the argument advanced by Simon Roberts in Roberts, S (1979) *Order and Dispute: An Introduction to Legal Anthropology* Penguin Books chapter 2 'Why Not Law?'; Roberts, S (1998) 'Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain' (42) *Journal of Legal Pluralism* 95; and Roberts, S (2005) 'After Government? On Representing Law without the State' (68) *Modern Law Review* 1.

<sup>8</sup> See, eg, Cotran, E (1968) *The Law of Marriage and Divorce, Restatement of African Law, Vol. 1, Kenya*, I Sweet & Maxwell; Cotran, E (1969) *The Law of Succession, Restatement of African Law, Vol. 2, Kenya*, II Sweet & Maxwell; Obi, SNC (1977) *The Customary Law Manual: A Manual of Customary Laws Obtaining in the Anambra and Imo States of Nigeria* Government Printer.

<sup>9</sup> See, eg, Bohannan, P (1957) *Justice and Judgement among the Tiv* Oxford University Press for the International African Institute; the accounts of disputing and negotiating processes in Gulliver, PH (1963) *Social Control in an African Society: A Study of the Arusha, Agricultural Masai of Northern Tanganyika* Routledge & Kegan Paul; and Comaroff, JL and Roberts, S (1981) *Rules and Processes: The Cultural Logic of Dispute in an African Context* University of Chicago Press.

chthonic law' (65). Family law is informal (65-66). There is little notion of ownership or dominium of property (66-68). There was a criminal law, but it was concerned mainly with physical injury to the person, and after a crime, civil society would act, seeking to restore community (68). These generalisations contain accurate and useful insights, although they may not be universally applicable.<sup>10</sup> It is stated that there are generally no individual rights in chthonic laws, and especially not rights against the community (71-72). This claim is persuasively argued, and seems to me broadly correct in respect of those African laws with which I am acquainted, but it is hugely controversial. Possibilities of changing the law are limited in chthonic societies, although they are present if disguised (74-77). Again, I would agree, but would add that we should recognise a strong readiness in many of these peoples to adapt to the changing social and economic environment, especially in this age of globalising processes.<sup>11</sup>

Some generalisations are likely to provoke stronger doubt in the student of African societies. Thus, 'Exit was available to all those for whom the tradition was entirely or partially unacceptable' (63, and similarly at 77, 79). This appears to be largely wrong. If we envisage the types of economy and forms of production of these societies, it seems clear that in the past (which is under discussion here) survival would have been impossible for an individual or group who left, although perhaps sometimes it was possible for the discontented to shift to membership of another community. Glenn cites no evidence to support this claim, but says that there appears to have been no sanctions for voluntary departure (63, note 13). There are not likely to be prescribed sanctions for an act which is, in practice, impossible.

Finally, we should return to the generalisations implicit in the choice of the term 'chthonic', that is, in the claim that the laws under discussion have the characteristic of being chthonic. 'Chthonic' is clearly intended to mean more than 'not within any of the other listed traditions'. All that Glenn says when first introducing the word is that chthonic means to 'live in or in close harmony with the earth'. Without engaging in a detailed linguistic analysis it may reasonably be suggested that it is impossible to give this phrase a precise or even a particularly meaningful interpretation. Later there is further discussion in similar terms. Thus, of proposed changes to the law, the question to be asked is, according to Glenn, 'What projects are ultimately sufficiently dangerous for the world to be outside the tradition? [...] There is here no real difference between the teaching and the world; the word and the being. They all teach; they are all sacred' (77). The 'constant' of chthonic law is said to be 'the sacred character of the cosmos' (125). Even more mysteriously, 'Chthonic law didn't really talk about change; it could happen, on the ground, but that was just the life of the world' (146). Finally, there is a reference to chthonic law 'proscribing all conduct incompatible with a recycling cosmos' (348, giving no evidence). As far as one can give meaning to these statements, it seems that 'chthonic

<sup>10</sup> For example, Glenn includes a comment on the fundamentals of matrilineal social organisation which, applied to the Asante of Ghana (as he does, supported by the citation of one, little-known text) is grotesquely erroneous, and culminates with the suggestion that the Asante matrilineal system is related to the practice of polyandry (66, note 31, citing Emiola (1977) *African Customary Law*). Cf Rattray, RS (1923) *Ashanti* Oxford University Press; Fortes, M (1950) 'Kinship and Marriage among the Ashanti' in Radcliffe-Brown, AR and Forde, D (eds) *African Systems of Kinship and Marriage* Oxford University Press for the International African Institute 252.

<sup>11</sup> Examples are given in Woodman, GR, Wanitzek, U and Sippel, H (eds) (2004) *Local Land Law and Globalization: A Comparative Study of Peri-Urban Areas in Benin, Ghana and Tanzania* LIT Verlag chapters 2, 3 and 4.

law' is law which encourages or requires conduct which tends to preserve the natural environment.

But is this true of all the laws in question? There is a marked lack of cited evidence to support the words just quoted. A sceptic might conclude that there were almost no chthonic laws anywhere in the world. I think this would be mistaken, but a study of the literature on African laws suggests that on that continent the chthonic aspect of most laws is quite limited. Of course, a people which wishes to survive into future generations will seek to ensure that its members do not destroy all sources of sustenance in the territory where they are settled. And peoples who lack plentiful supplies of the technology developed in the West in the last two centuries usually lack the means to devastate the environment very thoroughly. But a reading of the literature on African laws suggests that far more ingenuity, concern, persuasion and coercion have been invested in laws with objectives other than the preservation of the natural environment, for example laws concerning the maintenance of family and group cohesion; the encouragement of respect for the ancestors; the maintenance of group identity; the regulation of marital and other family relations; the sharing (not necessarily in egalitarian manner) of possibilities to exploit land and other natural resources; the maintenance of social and political hierarchies; and the conduct of effective aggression against neighbouring groups. While Glenn refers to much literature on law in Africa, a great deal of important work appears not to have been consulted.<sup>12</sup>

The laws of the indigenous peoples of North America and Australasia may be different. In these peoples' struggles for respect for and recognition of their laws, for self-determination and for land rights based on their laws, they have advanced claims founded on their respect for the natural environment and their view of their relationship with the earth. They have had some success in these struggles. It is certain that Glenn, based in the Law School of McGill University, will know much about the Canadian First Nations' part in this. But it is hardly justifiable to extrapolate from these cases to the rest of the world's 'peoples subjected to European domination in recent centuries'. The notions of the laws of indigenous or aboriginal peoples may be more useful than Glenn has recognised. The term *authochtone*, widely used in French and especially in French Canadian writing, is not considered. It means sprung from the earth itself, and so, like the term indigenous (as it is often translated), refers to the origins of a people rather than their character. However, the difficulty with all such terms is that, while in the study of a particular society they serve to distinguish law originating there from that which has been first developed elsewhere, they do not serve to draw distinctions which are useful in a global comparative study. Glenn rightly seeks a category which will not be defined in terms of recent histories, and is thus compelled to move beyond his starting point of European domination in the modern age.

It was suggested above in passing that a classification of laws in terms of the nature of their authoritative sources might have been attempted. 'Folk law', defined as suggested, might appear to constitute a useful category, as might 'customary law' with the same meaning. Glenn seems to approve this, arguing that 'we should think of custom as the outcome of a particular tradition, the result of a process of massaging pre-existing information and deciding how to act. It is therefore the result of an entirely respectable process[...] Chthonic law is customary law in this sense' (74).

<sup>12</sup> It is not appropriate to attempt to present here a comprehensive bibliography of law in Africa. It may only be remarked that Glenn makes little use of the many volumes in Forde, D (gen ed) (1950-77) *Ethnographic Survey of Africa* Oxford University Press for the International African Institute.

But he rejects the name 'customary law' because, he says, this has now become associated with the idea of following habit without rational justification (73-74). It might be argued that it is 'custom' which is associated with mere habit, whereas 'customary law' imports the notion of obligatory conduct. A more serious difficulty with categories such as that of customary law is likely to be similar to that raised by the terms indigenous and aboriginal. They may well comprehend almost all the instances which we wish to enfold in one category, but they also cover a good many more. Large parts of the common law can be categorised as customary law,<sup>13</sup> as can the cultural, traditional part of many other legal cultures.

The main difficulty facing Glenn is made clear when he writes: 'Since all people of the earth are descended from people who were chthonic, all other traditions have emerged in contrast to chthonic tradition' (61). So, in this chapter he is looking for a common factor in the legal traditions of all those peoples who do not belong to any other legal tradition. The conclusion must be that, while the other legal traditions identified by Glenn may each have a degree of coherence (and other contributors consider that question), the category of chthonic law is not useful for Glenn's comparative enterprise as he has planned it, notwithstanding that he writes much which is interesting in this chapter.

<sup>13</sup> See, eg, Simpson, AWB (1970) 'The Common Law and Legal Theory' in Simpson, AWB (ed) *Oxford Essays in Jurisprudence* (2nd ed) Clarendon Press, reproduced in Twining WL (ed) (1986) *Legal Theory and Common Law* Basil Blackwell 20; and in Dundes Renteln, A and Dundes, A (1994) *Folk Law: Essays in the Theory and Practice of lex non scripta* Garland at 119.

## Chapter Five: Civil Law Tradition

JOHN BELL \*

With so much already written on the civil law tradition, and with so much to cover in terms of history and legal systems, an account in just over 40 pages is bound to appear selective and even superficial. The key to success in the enterprise is the selection of the broad themes and issues to be covered. There may be much in the detail to criticise, but the focus must be on the broader perspective. My approach is to engage with Glenn's broad themes.

In my comment, I wish to argue that there are significant deficiencies in Glenn's conception of law and his focus within the civil law tradition. In the end, the most valuable insights he offers are not really about the civil law tradition in particular, but about the Western conception of law in general, and this calls into question the need for two chapters on the civil and common law traditions. In the wider perspectives that Glenn interestingly and challengingly calls upon the reader to adopt, are the two not variants of the same tradition, at least when contrasted with the diversity of 'Asian legal tradition'?

Unlike many studies,<sup>1</sup> Glenn focuses essentially on the core European experience of the civil law tradition, and does not deal with the spread of the civil law tradition into a variety of countries outside Europe. These days, the civil law tradition has a very varied existence. Glenn's account is historical and presupposes a way in which the historical experience of the founding scholars of the civil law tradition is maintained into a distinctive legal culture across a wide geographical and culturally distinct spread of countries. There is, as a result, only a limited discussion of the mixing of legal systems. Most would agree with Özücü<sup>2</sup> that the majority of legal systems are a mix of different legal traditions. As I will argue, that is true of the civil law tradition itself. Glenn offers some archetypes of legal traditions with central characteristics that can be identified within the mix of a particular legal system. That is valuable. But one factor that would be left out is how the traditions are maintained and developed. In the case of mixed legal systems, there are deliberate policies of maintaining and fostering links between cognate systems. These policies maintain the tradition. It is not as if the tradition will maintain itself on its own.

### GLENN'S HISTORY

What does Glenn identify as significant in the civil law tradition? First, he identifies the civilian tradition as seen from the outside, noting the features that distinguish it from other kinds of systems, rather than those that insiders see as the most important. In the past, the civilian tradition gave an order and system to a chthonic world. The Roman revolution was to create a secular law with written rules and written legal literature, a formalist procedure, and rational decision-making (albeit essentially casuistic). But it was not a closed system. It was its literature and debate, rather than its solutions, which

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<sup>1</sup> For example, Zweigert, K and Kötz, H (1998) *An Introduction to Comparative Law* (3rd ed) Weir, T (trans) Oxford University Press chapter 8.

<sup>2</sup> Özücü, E (1996) *Studies in Legal Systems: Mixed and Mixing* Kluwer chapter 20.

marked a great leap forward. This civil law tradition emerges from a gradual process in which the historical roots have been re-worked over various periods of time and in different countries. As a result, it has come to acquire a cumulation of features, many of which are common to the Western legal tradition. In the medieval revival, it dominated the chthonic ideas and provided a legal canvas larger than a local area, a network of ideas and discussions.

Inevitably when talking about a 'tradition', Glenn is drawn to talk about the presence of the past (5-12) — 'tradition is an extension of the past to the present' (12). Within an inevitably brief account of the past, Glenn therefore identifies a number of significant features of the civil law tradition. First, as part of his general analysis of legal traditions, Glenn notes the gradual evolution of features distinguishing it from the chthonic tradition. His argument is that in the early development of Roman law, around the time of the Twelve Tables and then in the renewal of Roman law from the 11th to the 14th centuries, the civil law tradition developed as a means of moving away from the chthonic tradition, a kind of 'folk law' developed locally and typically orally within relatively simple social organisations (60-62). The Roman Empire and the world of nation states were far too complex for this mode of social organisation, and the civil law tradition had an important role in facilitating and responding to the new social and political environment (127-34).

Secondly, civil law is seen as a Roman heritage that is reworked at different periods. By contrast to the chthonic tradition, there developed a corpus of texts that could be re-read and re-interpreted over successive periods.

Thirdly, and allied to the body of texts, is the development of a method. That method involved three elements. There is the importance of technical, abstract rules. Rather than casuistry, the civil tradition developed general rules and concepts to provide a more systematic organisation of legal regulation. It is this approach, as well as some of the concepts themselves, that was transmitted and re-interpreted in later periods. The civil law method involved rational justification in terms of these rules and concepts, rather than intuition as to the fairest result. If there is rational argumentation, then there were certain processes of deliberation before decision-making that became part of the civilian way of conducting law.

Whilst these three features constitute the Roman past, Glenn goes on to identify a number of features that have become part of the civilian tradition since the medieval period. First, there is humanism with its focus on the individual (143). A person is no longer simply part of a family or tribe, but is a unit of the legal order in his or her own right. Since the Enlightenment, this individual has been seen as a bearer of rights, and the focus on rights is seen as a distinctive feature of the civilian tradition.<sup>3</sup> The second modern feature is the attitude to change. The tradition of the modern state, facilitated by the ability to draw on civilian ideas and personnel, is that the law is capable of change, and the idea of legislation, well developed in Roman practice even before the Empire, became an important part of this. The priority given to the legislator in more recent civilian systems, notably from the period of codification in the late 18th and 19th centuries, provides a way of conceiving of law as an instrument of social change (151). In order to achieve this, it was necessary to treat the past law as a fact, rather than a *norm* that governed the present. Deprived of its normativity, the law was capable of being

<sup>3</sup> See Samuel, G (1987) '“Le Droit Subjectif” and English Law' (46) *Cambridge Law Journal* at 264.



changed either by interpretation or by legislation (147). The chthonic law was seen as the product of the local community, which had its own community social glue. The newer civil law provided a different form of social cohesion than was provided by close-knit communities, and thus provided a basis for a more loose-knit and mobile society.

As a description of early medieval Europe, the label 'chthonic law' is inadequate. As Lupoi points out,<sup>4</sup> the post-Roman communities were complex. They had different origins and had their own customs. But they also absorbed elements of Roman law and canon law when they took over territories. So there is a real question about whether there was ever a post-Roman law stage which was a pure chthonic law. Rather there appear to be mixed legal systems whose mix changes over time, especially with the revival of Roman law and the increase in pan-European trade from the 11th century.

Among the criticisms one might make about this history is the very limited distinctiveness of the civil law, compared with the common law. The focus is on the Roman law heritage, but that is not absent from the common law. As a result, the need for separate chapters on the two aspects of the Western tradition is not really justified. On a more specific feature of the history, especially in relation to legal processes and institutions, Glenn's account does not really stress enough the importance of the medieval church. Many of the processes that he identifies (the judge-led process, the resident judges, the written procedure) stem from the medieval church and canon law. It is the very bureaucratic nature of the medieval church that contributed to the development of national laws, and for very similar reasons. Indeed, the continuity of the Roman church and its canon law made feasible the recovery of the Roman law heritage. The church, as an international organisation, sought to create a system of order outside the local laws. It needed more sophisticated processes, in particular writing. Other religious systems did not seek to be international in the same sense, leaving decisions to the local religious courts. The Roman church system was an organisation's system, a highly institutionalised process. It generated models of procedure and of rule-making that stimulated and supported the parallel developments of Roman law within the universities (themselves church creations). It was the church that created the written, evidence-based systems of procedure that Glenn attributes to the civil law tradition. This arose out of the bureaucratic and educated approach of the clerics, as opposed to the more oral and testimony-based approaches of customary or local laws. The approaches were adopted because of the internal needs of the church, and were then exported to the state. In fact, these church reforms and ideas came first, including codes and doctrinal legal writing. Once we move into criminal and public law, then the canon law influence is greater. Many of the issues of the locus of power and legal capacity were problems developed by the canon lawyers. To take one example, the idea of a legal person, separate from a physical office-holder, comes from the canon law. Of course, Catholic canon law was a religious law, and so the separation of the civil and religious laws as part of the development of the Western tradition was not clear-cut, even if it is now part of the legal tradition. In many ways, the dialogue between the church law and that of the state fostered the development of the latter, as much as the dialogue between the Roman law and the local customary laws.

In my view, Glenn focuses far too much on the Roman features of the civil law tradition. The Western legal tradition has a mix of at least Roman law, canon law, local

<sup>4</sup> Lupoi, M (2000) *The Origins of the European Legal Order* Belton, A (trans) Cambridge University Press chapter 4. The inadequacy of the concept of 'chthonic law' is made clear by Gordon Woodman in this collective review.

customary law and mercantile law. These operated in combination with each other, and the kind of mix in any particular country depends on the circumstances of its development. In general one could say that Roman law and canon law were taught and interpreted across Europe before the Reformation. The local or king's courts were applying aspects of customary law, influenced to greater or lesser extents by the other two laws. The mutual interpenetration of these has made the modern civil law systems. At the level of detail in the analysis of a particular legal system, this has as a consequence that Glenn's characterisation of the civilian legal tradition is of limited use to analyse how a legal system is working. As Örüçü has pointed out,<sup>5</sup> there are many forms of mixing between legal traditions. The 'pure' legal tradition is really only an ideal type, rather than a concrete reality. Zweigert and Kötz<sup>6</sup> accept that their classification is vulnerable to the criticism that classifications change over time. Thus, when we descend from the level of abstraction or the ideal type with which Glenn is dealing, we have to confront a more messy reality. But even at the level of abstraction with which he is working, then the canon law influence is immense in shaping so many features of the legal concepts, legal procedures and legal ideas which we now associate with the civilian tradition.

### The Modern Tradition

Glenn identifies a number of features of the modern civilian tradition. At one level, he identifies five specific features about the nature of law and the legal process that emerge from the medieval period: codes of law; resident judiciaries; procedural control by the judge; denial of judicial law-making; and the historical prestige of the law-maker (136). At a broader level, he identifies the law as the product of reason (rational instrumentalism), that is laid down by human beings (legal positivism) who exercise a power to change (lack of authority of the past). That law has a rational and systematic structure, and it serves to provide legal and social identity and unity. It is not clear at what point all these features are said to coexist. As broad generalisations, they have some value, though they need to be made more specific. The judicial control over procedure was more true of criminal law than civil law. The denial of judicial law-making is neither universal over time, nor over branches of law. Without codes in some parts of Germany, there was an inevitable role of judicial law-making well into the 19th century.<sup>7</sup> The sweep of time in which these emerge on his account covers the 13th to the 18th centuries, so one presumes that these become cumulative features of the tradition. Yet, in a topic like judicial law-making, it is more plausible to agree with Van Caenegem that, depending on the period of time, the initiative in legal development belongs in varying degrees to judges, legislators and professors, depending on the availability of others to undertake the task.<sup>8</sup> It could also be said that the same was true of the balance between Roman law and customary law. After all, in England, the use of civilian courts to provide speedy civil justice was a feature of the 16th century, while the common law courts regained the ascendancy because of their ability to stand out against the king in the 17th century. The level of generality at which Glenn is proceeding requires him to make selections of features that are 'central' that are really contestable.

<sup>5</sup> Örüçü, E *Studies in Legal Systems* supra note 2 at 331ff.

<sup>6</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 1 at 62.

<sup>7</sup> Van Caenegem, R (1987) *Judges, Legislators and Professors* Cambridge University Press chapter 2.

<sup>8</sup> Id.

In describing the civil law tradition, there is a tension between an emphasis on how it grew up over various phases and its current character. A tradition brings into the present a heritage of texts and ideas, and it is important to know these. But the work of comparative lawyers stresses not only this aspect of the *traditum*, but also the *mentalité* with which they are received and interpreted.<sup>9</sup> To make the past texts come alive and operationally normative, there are practices of interpretation and understanding that are part of the tradition. In studying the latter, it is far less important to give a historical account of the tradition and it is far more important to focus on the contemporary perception.

## CRITIQUE

### Scope: A Focus on Private Law

A first critique is the scope of the civilian approach presented by Glenn. The Roman law he describes is essentially private law. There were also public law and criminal law (not to mention commercial law). Now these have very distinctive features and origins, which are not really picked up by Glenn's analysis. Since criminal law was a major reason for the growth of national law, this is an obvious weakness; and since from the medieval period this area owes far more to canon law than Roman law, we are missing an element that has shaped Western law in general. Any account of the civil law system would pay much attention to the different forms of criminal procedure, inquisitorial and accusatorial, and how these have shaped differences between the civil law and common law. In this regard, the absence of the work of Damaska from the bibliography of the chapter is regrettable, as this is a major reference point in the field.<sup>10</sup> The more recent *Corpus Iuris* work on criminal procedure<sup>11</sup> shows the extent to which these aspects of the tradition are being questioned and harmonised across Europe at a far more rapid pace than the harmonisation of private law to which Glenn devotes so much space (159-61).

Glenn does not give an account of the public law traditions within the civil tradition. Of course, they are recent and owe relatively little to Roman law itself, other than a broad conceptual distinction between public and private law and certain concepts. Public law owes much to canon law, the law of the first great European public administration. But it developed in its own way. If concepts such as fundamental individual rights rightly find their place in Glenn's account of the civil law tradition, as it now exists, then the values of the *Rechtsstaat* or *l'Etat de droit* also are essential parts of it. The submission of the state to law is a deeply embedded value these days, even if it was a product of 19th-century liberalism. For many civilian countries, there is a deep cleavage between the rules and principles of public law and those of private law, yet also a way of living with these two sets of norms. Fewer legal systems have distinct courts to reinforce this distinction in the norms that are applicable to public and private persons. Yet, both of these features are important aspects of the civil law tradition today in contrast to the common law.

<sup>9</sup> See Bell, J (2001) *French Legal Cultures* Butterworths at 6-8.

<sup>10</sup> Damaska, MR (1986) *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* Yale University Press.

<sup>11</sup> Delmas-Marty, M and Spencer, JR (2002) *European Criminal Procedures* Cambridge University Press chapter 1.

If a belief in individual rights rooted in the Enlightenment forms part of the civil law tradition, then the modern manifestations of this in constitutional justice and in the European Convention on Human Rights deserve more than a cursory mention at 160. As Favoreu and Philip have pointed out, there is a tradition of constitutional justice now found in the countries of the civil law tradition, which is distinct from common law and Scandinavian countries.<sup>12</sup> Since the creation of the Austrian constitutional court in 1920, there has been a development of constitutional courts that are distinct from the ordinary courts. These have helped to develop a distinct constitutional law that has facilitated the protection of rights, as well as enforcing more domestic concerns on the division of powers either among federated entities or between the executive and the parliament. Members of these courts have regular links and it would seem strange to omit this feature from a description of the modern civil tradition. One can recognise, as do Zweigert and Kötz,<sup>13</sup> that the division into 'legal families' or 'legal traditions' is different depending on whether one looks at public law or private law. All the same, there is sufficient in common between the public and criminal law heritages of the civil law countries to give this a place in an account of the modern tradition.

### Glenn's Definition of 'Law'

One of the key ideas in the book lies in the definition of a legal tradition as a network of information (21-22). I would see this as a rather limited definition of law. For me, the law has a number of facets, which one can summarise with the mnemonics 'CHIP' and 'PIN': Concepts, Heuristics, Ideas, Power, Processes, Institutions and Norms.

### CHIP

In an important sense, law lies in the realm of ideas — it affects perceptions of reality (the legal point of view) and not directly reality itself. People get run over, but whereas the ordinary person sees a car driver and a pedestrian with a broken limb, the lawyer sees a tortfeasor, a broken standard of care and a victim entitled to compensation. Importantly, when lawyers learn law, they learn a *concept map*, a way of ordering social reality to make it amenable to legal solutions. Geoffrey Samuel has explained the importance of the Gaian conceptual structure to the understanding of civilian private law, at least in contrast to the common law.<sup>14</sup> This conceptual map and the rules that relate to this are then used to analyse social situations from the legal point of view.

This concept map leads to a specific set of questions to be asked when considering a situation, a *heuristics* for discovering the truth from the legal point of view. The set of concepts and connected heuristics may be specific to a particular system. As Weinberger and McCormick have pointed out, law is not simply a set of rules, but rules organised in terms of 'institutions'.<sup>15</sup> Drawing on the work of Searle, they show the way that law classifies and interprets 'natural facts' and turns them into legally significant facts. Searle points to the way in which a green piece of paper acquires significance as 'a dollar bill'

<sup>12</sup> Favoreu, L (1996) *Les cours constitutionnelles* (3rd ed) Presses Universitaires de France at 16-27.

<sup>13</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 1 at 75.

<sup>14</sup> Samuel, G (2000) 'Can Gaius Really be Compared to Darwin?' (49) *International and Comparative Law Quarterly* 297.

<sup>15</sup> McCormick, N and Weinberger, O (1986) *An Institutional Theory of Law* Kluwer chapter 3.

through the social institution of money.<sup>16</sup> The 'dollar' is an institutional fact. In the same way, the road accident becomes a 'tort' or 'the act of a thing' according to the institutions which a particular legal system deploys. The institution focuses attention on specific features of non-legal reality and turns them into key elements of legal reality.

The concepts and heuristics will reflect certain *ideas* and values, which may be specific to that legal system. But it is perfectly possible that two different sets of concepts may reflect similar underlying ideas. In the case of road accidents, there may be differences between legal systems as to whether tort law should focus only on individual fault, or whether it should provide compensation for risks that have been created or even payments given out of solidarity between citizens.<sup>17</sup>

A key feature in any legal system is who has the authority to determine its content. Here it is a question of *power*. The power of legislators, judges or professors (as Van Caenegem would have it) will vary between systems and over periods. If Sacco is right that it is more useful to examine the different statements of the law as 'formants' for a decision,<sup>18</sup> then the importance of these different authorities and their power is significant. It is a matter of weight.

### *PIN*

Law is not just rules, and any study of legal development needs to take account of the wider features of law. *Law as processes* sees the contribution of law to be the establishment of processes that enable changes in social relations or to resolve social problems. People make the changes, but the law introduces processes that facilitate and direct this, for example through institutions such as conveyancing or wills. Legal adjudication can be seen as a process by which individuals gain satisfaction for their grievances, but also whereby insurance companies can have rulings that enable them to routinise the coverage of losses.

A focus on *institutions* or organisations makes us examine the people who support the transmission of a tradition and who are authoritative in upholding and developing it. These institutions of educators, professions and practitioners will develop methods that ensure that the heritage is correctly interpreted.

A focus on *norms* pays attention to the way in which society sets out its ideals through law. Norms can have a symbolic role in society, as well as a practical effect. As Kelsen pointed out, normativity is not the same as effectiveness. A focus on norms enables a focus on what is specifically legal.

This broader definition of law enables us to see which features belong to a tradition. As Geoffrey Samuel points out, law is a way of reading reality, of making sense of it.<sup>19</sup> Law does this through a conceptual map that is superimposed on reality, which creates connections and establishes legally significant relationships and questions. Thus, Roman law created *conceptual structures* within private law organised around persons, things and actions, and between public law and private law. This sets up a series of questions, *heuristics*, for investigating reality and for locating a particular situation within the legal

<sup>16</sup> Searle, JR (1995) *The Social Construction of Reality* Penguin at 47-50.

<sup>17</sup> See the debate in Tunc, A (1972) 'Tort Law and the Moral Law' (31) *Cambridge Law Journal* at 247 and Hamson, CJ (1973) (32) *Cambridge Law Journal* at 52.

<sup>18</sup> Sacco, R (1990) *La comparaison juridique au service de la connaissance du droit* Economica chapter 4.

<sup>19</sup> Samuel, G (2003) *Epistemology and Method in Law* Ashgate chapter 4.

map. At each period, there is a set of dominant *ideas* that identify the purposes of the law. For the Romans, *dominium* and *patria potestas* dominated private law relationships. These ideas supported social and political *power*, the power to change legal relations, and were linked to the power of the emperor to change the content of the law. But the Roman tradition also protected the power of certain individuals, notably the *paterfamilias*. As Glenn implies, this Roman heritage has been re-worked considerably. The conceptual structure has been redefined in many areas, such as public law, criminal law, family law, and even property law. The dominant ideas have changed quite radically in terms of individual rights and gender equality. The kinds of power relations that are supported are very different. A focus on the modern civil law tradition, such as that in the work of Geoffrey Samuel or Reinhard Zimmermann,<sup>20</sup> to take just two examples, would be concerned about the way in which the Roman heritage has been re-interpreted to remain normative for today. In the process, many of the dynamics and ideas of the past have become less significant.

Glenn's principal focus is on ideas. As Glenn points out, processes of making rules and applying them to concrete situations are important. Roman law did have distinctive ways of resolving disputes that had some similarities to the chthonic systems (the use of the lay iudex), but had special features, such as the role of the praetor. But these Roman features are not significant parts of the contemporary civilian tradition, with its professional judges. The distinctive feature of the Western legal tradition inherited from Roman law is the discrete character of the legal dispute: the problem is only seen from the legal point of view, rather than allowing the parties to present a holistic approach to a problem (as would happen in mediation). Processes beget *institutions*, such as courts and legal professions. Law is also begotten within the institution of the state, which is separate from society. Roman law itself did not create many professions, except possibly that of jurisconsult, but later versions of the tradition have, for example notaries. Roman law did not have many formalised processes of legal education to induct novices into the tradition. The importance of universities alongside the professions in the process of induction has become important since the Middle Ages, but takes different forms. Legal education is as much shaped by understandings of national education policy, as by the civilian heritage. Finally and importantly, the law is by nature normative, and so there are *norms* that lay down what should happen. The rules and principles are typically national, with many common features between systems that have been in dialogue with each other over many centuries. The precise content of norms is perhaps less significant than the conceptual structure within which they work. All the same, some shared norms and a shared conceptual language in speaking about the law enables a sense of familiarity among the civilian lawyers looking at each other's systems that does not exist as much in their relations to other legal traditions.

Taking this broad view of the nature of law, then a focus on information is too limited. At best, this seems too focused on the rules. The importance of the distinctive and abstract conceptual structure of the law is, as Samuel suggests, a major contribution of Roman law. It is a conceptual structure that is only partly shared with the common

<sup>20</sup> Zimmermann, R (2001) *Roman Law, Contemporary Law, European Law* Oxford University Press offers an insight into how much the Roman heritage forms part of the understanding of the civil law in the modern day and in the 19th century. He shows convincingly that they are distinct. This is further shown by his detailed work in Zimmermann, R (1990) *The Law of Obligations: Roman Foundations of the Civil Law Tradition* Oxford University Press, which shows how the modern law in this archetypal civilian field is linked only in part to Roman law.



law. Its discrete, secular character marks it out from religious systems. As a result, the heuristics of the legal system are different from those of the religious community or of the social community. Glenn's account does not really put an emphasis on this important feature of the Roman revolution.

The organising ideas or values are significant features of Glenn's account. But for him, the major big organising ideas are change, rationality and humanism. He is right to identify the importance of legal positivism. One major idea that gets less prominence is the rule of law, the idea that the law provides an overriding scheme for assessing reality. Glenn does have the idea that law expands its empire and provides a mechanism for social bindingness (137), but perhaps this feature is not stressed. Equally, the constitutional tradition of modern times provides a substantive rights content to the rule of law.

The rule of law is connected with another Kelsenian idea of power, the monopoly of force by the state. The idea of controlling force is not original, but the institutionalisation and monopolisation of force is perhaps distinctive in the West. Law in many ways goes beyond simply recognising private power, it legitimates and limits it, if not also replacing it.

### **Factors for Change**

Glenn's account of the tradition notes throughout the way in which the tradition has changed and developed. But any account of the tradition needs not only to understand its content, but also the factors that shape its development and change. It is here that the concept of a tradition as information (13) is deeply flawed. The law is not just a 'bran tub' of information that can be re-processed in the modern time. It has a coherence that is re-negotiated over time.

Glenn underplays the importance of institutions for the development of law, and as the product of law. In many ways, in modern times, constitutional law is the result of the creation of constitutional courts. In the civilian tradition, institutions are ways in which the law becomes focused. A final feature of institutions and processes is that they give rise to professions in the canon law tradition. Roman law did not really give rise to legal professions. That happened much more with the canon law courts and then the courts of local and national sovereigns. The creation of professions institutionalises the distinctive nature of state law. Institutional features are thus a major part of the picture of law.

Glenn rightly points to legal positivism as a feature of the modern civilian system. In contrast to religious law, the normativity of law comes from a series of commitments that human beings make to their community. Yet there are also fundamental values that are seen as transcendent such as liberty and human rights. It is this tension between a commitment to positivism and a belief in some absolute values that is not fully captured in Glenn's analysis.

### **The Civil Law as a Tradition**

One of the consequences of seeing the civil law in the context of institutions is to suggest a different view of its purpose. For Glenn, the major contribution of the civil law is to replace chthonic law, the law of small communities. I would argue that the Roman tradition enabled the church and then emerging national states to create their own institutional law, and to incorporate a variety of individuals across a range of local communities within it. The law of the local community or lord was not wiped away,

but the focus of attention moves to a different plane, the national kingdom. The break-up of local communities owes much more to the Black Death than to Roman law. The replacement of chthonic law is an incident, rather than a purpose of the emerging civil law.

Glenn's tradition is a tradition of rules and ideas, but an institutional perspective would also focus on the processes of transmission and the way in which individuals are brought into the tradition. How do people learn to apply the tradition properly? Well, there are processes of education and professions that individuals join. Being part of a traditional community enables one to learn the sources to use, the techniques of interpretation, and the fundamental values. Of course, the tradition is developed by each generation, but there is an important aspect of continuity. Such a community has its leaders, its honoraries, who carry authority, as Weber points out. For Van Caenegem, the balance of influence between different groups of honoraries (judges, professors and legislators) accounts for much legal development. In a sense, Glenn does not provide much insight into this part of the life of the civil law tradition, but it is a feature that makes it different from Islamic, talmudic and even common law traditions.

The ability of the civil law tradition to serve new, broader organisational needs explains why it replaces other forms of law, when the underlying social base changes. The abstract form of law fits this more flexible world of government and commerce across different communities. The organisation supporting the rules becomes more important, as the community is no longer close-knit and self-sustaining.

Glenn has set himself a challenging agenda to explain the essence of the civil law tradition. As with most traditions, there is no essence, but a range of features that offers a family resemblance. The Roman law heritage is only one of these. By blending in ideas from the Enlightenment, Glenn accepts that there are more major features involved in any proper account of the tradition. He would have been better off limiting the claims of the chapter — a focus on the civil law tradition in Western Europe would have been more exact, perhaps with some illustrations of its major dissemination. But we claim too much if we can capture the civil law tradition and its influence over the whole world by such a limited focus of attention.

## Scandinavian Law in *Legal Traditions of the World*

CAMILLA BAASCH ANDERSEN\*

Scandinavian law is an interesting subject for study but is often overlooked in the broader comparative context. This is perfectly understandable on a pure numeric basis, as there are less than 30 million Scandinavians in the world today. The importance of these systems in the discussion of legal tradition, however, is far greater. And not only to the Scandinavians — or so I am told.

The Danish legal system, for example, essentially based on Roman law principles but without some of the influences which affected other European traditions, is fascinating. Denmark was one of the first democracies in the world. The peasants were freed before the French Revolution (just) and an elected parliament was introduced before the revolutions of 1848 (just). The hierarchy of courts, the continuing use of ancient codes, but applied by courts in a way quite different from that which their wording would suggest, smack of common law. Indeed, the classification of Scandinavian law as 'civil law' is often controversial.

So imagine the disappointment of a Scandinavian lawyer when, in a much acclaimed work which purports to cover the legal traditions of the world (in other words, all the important ones), the author very perfunctorily bunches them all up, and in so doing misses a great chance to use Scandinavian law as an example of one which has evolved between the common law and civil law traditions.

Indeed, Glenn completely ignores not only the very challenging issue of categorising Scandinavian law, but its very existence. The sum total of the author's discussion comes in a passage concerning 'different forms of expression of [civil] law': 'There was resistance, however, in Scandinavia, the enlightenment idea losing some of its allure on entering the "cooler climate of the North"'.<sup>1</sup>

Here, in order to avoid dealing with the issue, Glenn oversimplifies to the point of being misleading. The reference to Ditlev Tamm in support of this proposition is misplaced, as Ditlev's volume on Roman law influences in Europe deals only with the Roman law aspects of the Enlightenment. The Enlightenment certainly reached Scandinavia, and it had a profound effect, prompting the codification of laws on more than a regional level. The 'modern' law of King Christian V of 1691 (surviving to this very day, and itself largely based upon the *Jyske Lov* law book of 1241) is most decidedly a product of considerations connected to the Enlightenment. What is interesting (and what Glenn may be trying to say) is that the effect of it was somewhat dissimilar to the wave of academic law and theories and principles taken from Roman law washing over other areas of Europe. It did not 'lose its allure', it lost some of its academic theory and Roman law principles — and even these did find considerable footing.

Apart from his reference to the cool climate, Glenn mentions only the Saami in a Scandinavian context, and these references are also rife with mistakes and misconstruction.<sup>2</sup> Another sore point for the Scandinavian reader is the fact that, despite

\* Of the Editorial Board.

<sup>1</sup> At 139, with reference to Ditlev Tamm in a footnote.

<sup>2</sup> At 135 and 303. Two out of the three indexed references to Scandinavia concern the Saami of Norway as the only modern chthonic peoples of Europe. From a Scandinavian perspective, this is incorrect, the (Danish) Greenland Eskimos should also be mentioned. Moreover, if Europe extends to Siberia, then there are exceptions here as well.

treating the subject of positivism, Glenn ignores the contribution of Scandinavian scholars with a worldwide reputation, such as Alf Ross. The development of positivism in the 20th century owed more to the work of Ross than the posthumous publication of Bentham's *Principles of Morals and Legislation*. Glenn's failure to mention Ross, who is often labelled the 'father of positivism', is puzzling. The reference in note 103 at 151 to 'immersion in German legal theory and preceded in formulation [...] by Jeremy Bentham' has much potential for outrage in Ross fans and Danes alike. But, regardless of this label, Ross is an undeniable shaping force on legal theories and positivism as a whole. He, as well as Scandinavian law, are deserving of more attention in a book as ambitious as this.

Zweigert and Kötz are often criticised by Scandinavians for their temerity in treating Scandinavian law so perfunctorily, but, although they only devote eight pages to it, at least those pages are contained in a separate chapter, according it the status of a legal family, albeit a minor one. Scandinavian law may be a minor tradition but, as stated above, it is of considerable interest, particularly from the point of view of law as tradition. Although it is, of course, impossible to deal with every such tradition in the scope of less than 400 pages, it is nonetheless regrettable that Glenn has chosen to ignore it almost completely, apart from one reference to Scandinavian coolness.

## Russia, *Legal Traditions of the World*, and Legal Change

WE BUTLER\*

For those who wish to delve into the history of 18th-century Russia, no better and more readable introduction can be found than Lindsey Hughes' *Peter the Great: A Biography* (2002) and Isabel de Madariaga's *Catherine the Great: A Short History* (1990). Yale University Press happens to have commissioned each on the basis of the monumental studies which preceded the concise versions. Patrick Glenn's erudite work on comparative law, *Legal Traditions of the World*, represents the process upside down: a concise introduction to what he sees as the major legal traditions, but without a monumental work of scholarship behind it, either by him or by anyone else needed to sustain a synthesis, or even hypotheses, of the breadth posited.

The early third millennium does not find the discipline of 'comparative law' in a happy state. Forces of globalisation and of fractionalisation contend as never before; legal traditions and systems dismissed as 'third world', 'developing' or 'transitional' (Chinese law, Hindu law, Islamic law, African law, Latin American law, Russian, Central Asian, and Caucasian law) are being propelled by economic progress and simple weight of numbers to an importance on the world stage never previously recognised. The so-called 'classic' preoccupations of comparative legal studies with French and German law are being overtaken by the law of the European Union, within which both systems are being integrated with English, Greek, Scandinavian and Soviet approaches to law, among others, and a new hybrid body of law formed. Germany and France gradually grow in stature, but decline in relative importance against the fabric of global processes (one wonders how long both legal systems can claim a place in law school teaching, as such, outside their own borders).

The number of comparative lawyers is in decline, it would seem; at least so law faculty appointment committees claim (although they may not know what they are seeking). A law school or two has pretensions to being a 'global' institution, yet a close examination of the breadth and depth of faculty pre-eminent in the principal legal systems or in other applications of the comparative method to legal studies shows that none is remotely close to achieving such stature. There is a lot of 'tokenism' in individual fields of foreign law (ie one specialist in a particular foreign legal system), but most of them are not dealt with at all. Innovative faculty exchange schemes, joint appointments, joint degree programmes, and similar measures offer considerable promise, and enlightened bars in some jurisdictions are encouraging easier recognition of foreign legal qualifications or degrees. These measures all help promote professional legal mobility, but do not necessarily advance the cause of comparative legal scholarship.

As for comparative law itself, it atrophies in abstract methodological exegesis that mostly turns upon accepting one definition or another *a priori* about what comparative law is or should be. The weighty general literature in English (Gutteridge) and translations of European works (David/Brierly, Zweigert/Kötz) reflect the thinking of five to six decades ago. Small wonder that Glenn's book has been so warmly welcomed — an oasis in a desert where the thirst for something, anything, to dampen the palate

\* \* Of the Editorial Board, Dickinson School of Law, Pennsylvania State University; University College, University of London (Emeritus).

is desperately required. That it should be interdisciplinary too, in a discipline notably ignorant of, even resistant to, the learning of other disciplines and theories, is so much the better.

At the international level, our discipline wallows in simplistic and antediluvian structures for cooperation that positively discourage development of the field. The International Academy of Comparative Law, more than a century old, meets in congress at four-year intervals to hear 'national reports' on designated topics. In principle, each country with a national committee may choose or encourage individuals to prepare a report on any of the topics concerned; presumably, from discussions of the jungle of national reports, useful generalisations based on national approaches or practices may generate insight into the larger subject of comparative law. The structure assumes that English jurists will, for example, produce reports on the English-law aspects of the relevant topics; the structure does not assume that English institutions can put forward learned papers on Chinese, Islamic, Hindu, Russian, Central European, Japanese and other approaches to the same subject. While there is no formal bar to our doing so, the structure never imagined that foreign law specialists may exist anywhere in the world and do not, nor should not, necessarily 'represent' a national legal system.

Moreover, the notion of 'national' reports is no longer relevant to other subjects of comparative legal interest: applications of the comparative method to public and private international law, international judicial and arbitral processes, foreign relations law, and so on.

A comparatist specialising in 'Russia' and its Soviet legal heritage may perhaps be unusually sensitive to the general observations above. Although a definitive study remains to be undertaken, it would appear that Russian jurists prior to 1917 were deeply interested in comparative law, but did not take an active part in the various international measures to advance the discipline. Excellent comparative legal research was undertaken, especially of customary law, among what today are called the 'little' peoples in the territory of the Russian Empire (having in view population and not stature). I can find no evidence, however, that comparative law was taught in Russian law faculties (as distinct from foreign law). There would have been, as today, strong pressure to regard the comparative method as part of the theory of state and law and to predetermine the status and scope of comparative legal enquiry accordingly.

The Soviet era, for obvious reasons, suppressed comparative legal enquiry except to stress its contribution to contrasting the positive virtues of Soviet law against the negative features of 'bourgeois' law. While the post-Soviet era has done away with those simplistic characterisations, surprisingly comparative legal studies have not been embraced with enthusiasm as such: chairs of comparative law are mostly non-existent; other comparative law subdivisions within law faculties are subordinated to the theory of state and law or other branches of Russian legal science that mostly suffocate rather than encourage the development of the comparative method. While there may be what the Russians like to call 'objective reasons' for this state of affairs, the acid which Patrick Glenn has poured in the wounds is unexpected, undeserved, and thoroughly damaging to the larger discipline of comparative law. This review concentrates upon the Russian law aspects of *Legal Traditions of the World*.

The index discloses four references under 'Russia(n)'. The first (135) mentions Eastern Europe and Russia in the section 'Constructing National Law', incidentally as being part of the codification movement and having 'to have their codes'. Codification, says Glenn, was 'an idea whose time had come, the culmination of a long struggle, a long tradition'. But Russia was assuredly within the 'world of codification' (as indeed



was the United States to some extent), and the search for at least order and organisation in the statute book, if not fully fledged rationality, goes back far enough in Russia to suggest that the 'construction of national law' may deserve a new periodisation. The *Sobornoe ulozhenie* (1649) certainly dwarfs any French achievements in the form of royal ordonnances as 'indications of a centrally-directed, national law on the continent' (134). Some legal historians have cited the *Russkaia Pravda* (11th century) as the first proper modern codification in written form.

The second reference to Russia is merely to note the appearance in the Russian language of translations of Qing legal documents, also styled 'codes' (307).

The most substantial references to Russia are tucked away in the chapter on 'Asia as Centre of the World', under the subsection devoted to 'Western Law in Asia'. Russia is first mentioned (328) as an example today of a part of the world, together with Eastern Europe, where the struggle continues for the 'prestige and influence of western versions of legal rationality', a process which Japan is said to have led in the late 19th century amidst the jostling of French and German codification models for influence.

Then we come to the most substantial references to Russia, relegated to footnotes (note 29 at 330; note 130 at 331 — the index omits the first reference). I recall some 12 years ago being visited by a senior Mongolian jurist on his first visit to England. He asked if I could obtain for him a copy of the 'Law on the City of London', by which he meant not the financial district, but all of Greater London. I said that there was no such law and, so far as I was aware, no prospect of enacting separate laws for individual cities in the United Kingdom. Alas, he replied, 'had there been such a law, I would have translated it into the Mongolian language and our Parliament would have adopted it without change for Ulan Bator'. I asked why he believed that a law adopted for London would be suitable for Mongolia. He observed that both London and Ulan Bator were capital cities, both had the largest populations in their respective countries, and both were of considerable age.

Glenn produces comparative law insights of similar profundity at 330:

If you are a western lawyer with no previous experience of Soviet or socialist law, there are no major conceptual problems in understanding it. Simply assume a hyper-inflated public law sector in the jurisdiction in which you presently function. Historical fields of private law such as contract, commercial law, civil responsibility or torts, property, bankruptcy or competition simply shrink away to relatively insignificant proportions, to be replaced by public law variants or replacements. State contracts (of innumerable agencies and units of production) largely displace private contracts; private commercial law and bankruptcy become essentially irrelevant; public compensation regimes replace, almost totally, court-ordered compensation; land is made public or collectivized. There need not be repeal of existing private law; it simply finds little future application. This public law regime relies intensely on formal law, which is even more visible than in non-socialist western law. It is formal law with a difference, however, since its application is entirely in the hands of the guardian of socialist legality, the communist party, which exercises its influence through an entire network of organizations, shadowing those of the state and the courts. Judicial decisions, of allegedly independent judges, are subject to party control and revision. The inherent western tendency to corruption, through the creation of large, instrumental bureaucracies, is exacerbated enormously. The Soviet regime fell in part because nobody could possibly believe in its formal, state institutions. To

reverse a communist legal order you simply reverse the process; the problems are those of implementation (massive though they are), not of fundamental concepts. Who gets the new private property? How do you avoid corruption in the process of allocation? How do you convert corrupt institutions into ones of integrity? How do you keep the mob, with its own informal tradition, from profiting from the transaction? (330-331, omitting footnotes).

The paragraph above, omitting citations, is the full text of all that the author has to say in his book about Russian law. The citations are substantial and cite the principal writers in the field, including my own contributions. Glenn is not a Russian-law specialist, and it would be unfair to criticise him for observations that are normally within the domain of comparative area specialists. It is certainly the case that those who have written about Soviet and Russian law have, with varying degrees of generality, undertaken to highlight what they considered to be distinctive features of socialist legal systems. But I do not believe that any of the authors mentioned in Glenn's footnotes would subscribe to the above paragraph; to the extent that they would so subscribe, I am unaware of any who would accept the beginning and final propositions: '[for] a western lawyer with no previous experience of Soviet or socialist law, there are no major conceptual problems in understanding it [...]. To reverse a communist legal order you simply reverse the process'.

Glenn is not the only comparatist to accept this falsehood. There is a certain amount of Bolshevism in the assumptions he sets out, for there is ample evidence that the early Soviet leadership massively underestimated how to go about introducing legal change on the scale and in the directions essential to achieve their objectives. Policymakers in major Western capitals did the same in the early 1990s and, on that basis, structured law reform projects and retained lawyers to assist. Some of the most misdirected and inept law reform assistance ever rendered was the result. Law firms learned the hard way, but learned fast, and quickly required associates to have a command of Russian, then a Russian law degree, and now, ideally, prior professional experience.

Leaving aside whether Soviet socialist law in its homeland succeeded in becoming a 'young tradition' or not, it did shape a legal mentality, a legal vocabulary and a system of legal concepts that have been exceedingly difficult to dislodge, adapt or replace.<sup>1</sup> Most of Glenn's book addresses considerations that would militate against simplistic formulas for implementing or analysing legal change; why he should stumble here is not apparent. Russian law, just as others, has its strengths and weaknesses. By introducing reforms which play to and take advantage of its strengths (some of which are Soviet in origin), in my experience, those reforms are likely to be more enduring and effective.

<sup>1</sup> In reviewing an early draft of this review article, Andrew Halpin suggested that this observation might be extended to ask whether Soviet legal experience challenges the viability and validity of Glenn's very notion of 'tradition' in the sense that elements of legal culture (in this case, Soviet legal culture) or conceivably the legal culture as a whole may operate to restrain or obstruct the constant 'process of review' and 'exchange of information' so central to Glenn's understanding of tradition. Indeed it may, and in one sense the very Soviet era may be seen as a deliberate undertaking to interfere with, intervene in, or otherwise shape or reshape the elements of prior legal tradition(s) and/or culture. The transition to a market-economy is no less instrumental, but the blueprint is vaguer and indeterminate. Rather than being consigned to oblivion on the basis of caricatures of Soviet law, one would have expected from Glenn at least some thoughtful consideration of how Russian, Soviet and post-Soviet legal experience affected his model of legal tradition. There is a real possibility and risk, though, that the relevant legal experience is prejudicial to his central thesis.

The task of introducing a market economy within the Commonwealth of Independent States is far from finished,<sup>2</sup> which is why many comparatists believe that in the 15 Independent States that formerly comprised the former Soviet Union, we now have what are called 'transitional' legal systems — a fashionable term but not one which necessarily tells us where exactly they are headed. The fact that these systems have codes, far more codes than other continental European jurisdiction (I believe — Russia has at least 19 in force), does not make them 'continental legal systems', at least, not so far.<sup>3</sup> Russian law has not been measured yet as a legal tradition in the sense in which Glenn uses that term, assuredly not by Russian jurists. Given the role of Russia as a laboratory of legal change during the past 15 years, this is the opportune moment to begin to do so, perhaps by starting where Glenn did not venture — an examination of what cannot be captured by Glenn's comprehension of tradition, be that legal tradition or something more general.

<sup>2</sup> I include the Baltic States in this assertion. Even though they are becoming associated with the European Union, their law reforms, apart from disengaging from their eastern neighbours, have done astonishingly little to replace Soviet legal concepts, rules and approaches to institutions. The European Union has a larger law reform task on their hands than may appear to be so at first glance.

<sup>3</sup> We perhaps need to reconsider the interface between 'continental' and 'codification'. Some of Glenn's own evidence casts doubt on the association between the two (eg Qing codes), and depending upon how broadly one defines the elements of codification (systematisation, consolidation, unification, and others) the human aspiration to make sense of the statute book reaches back far and wide. This is not to detract from the French achievements of symmetry, structure and logic in their day.

## Islamic Law as Tradition: Chapter Six of *Legal Traditions of the World*

NICHOLAS HD FOSTER\*

This chapter is curiously placed. Presumably, there are not many people who would read the book sequentially, but for those who do, the transition from Civilian Europe to Islam comes as a surprise.

The task Glenn has set himself is a mammoth one. Islamic law is a vast, difficult, emotive, controversial and, in proportion to its importance, under-researched topic, although the amount of research being done has greatly increased in recent years. It is a brave non-specialist comparatist indeed who ventures into the field, and a braver one who attempts to look at it from a new perspective.

It is not surprising, therefore, that this valiant attempt encounters numerous difficulties, both as an introduction to Islamic law and as a case study of the application of the idea of tradition. However, there are also some more positive things to say. To give a personal example, writing the first draft of this piece and discussing it with colleagues produced various ideas regarding the way in which Islamic law has reacted with secular authority over the centuries, the commonalities with Jewish law in this regard, differences with secular-based law, the issues arising from the enactment of Islamic law as positive law, and so forth. In other words, the idea of viewing Islamic law as tradition is of itself very useful, and has great potential for stimulating debate.

The introduction deals briefly with the legal context of the beginnings of Islam, although it only refers to Roman and Jewish law, making no mention of other possible sources, which are dealt with only at the end of the chapter.

In the first major section ('A Tradition Rooted in Later Revelation'), the first sub-section deals with the revelation of the Qur'an, missing out the controversy about the true amount of legal content in it. Oddly, and unusually for an introduction to the subject, it does not discuss the injustices and cruel customs of the *jahiliyya*, the Age of Ignorance, customs which were abolished by the Prophet: burying baby girls alive, oppressive lending law, oppression of women, etc, a 'tradition' which Glenn later lumps into his 'chthonic' tradition. Nor does it mention that the replacement of these customs by a just and humane regime is one of the decisive characteristics of Islam.<sup>1</sup> Nor does it deal with the way in which the Prophet reformed the law by selective abolition, amendment and addition rather than wholesale replacement of one system by another.

Glenn then provides an exposition of the sources of law. This contains useful and interesting comparisons with Christian, and extensive comparison with Jewish, attitudes to law. The author concludes that the Jewish and Islamic traditions share similar approaches: 'real parallels in the development of Islamic and talmudic law, in spite of differences in content and further development'. However, the difference between the Islamic idea of consensus (*ijma'*) and the 'ongoing conversation, or argument, of the Talmud' creates a significant difference (174-74). Some comparison is also made

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<sup>1</sup> The categorisation of the law of pre-Islamic Arabia as 'chthonic' is problematic for Glenn if this reviewer's impression is correct that he regards 'chthonic' law in a generally positive light. It is rightly regarded by Muslims as being, in many important respects, thoroughly nasty.

with Western law when discussing reasoning by analogy (*qiyas*).<sup>2</sup> This section is one of the most successful in the chapter, and shows the value which can derive from a fresh analysis by a non-specialist who can benefit from a broad overview of many legal traditions.

Glenn goes on to look at the roles of the qadi and the mufti in another interesting comparative discussion, this time of adjudication as between Islamic, common and civilian law. Unfortunately, here the problem arises of Glenn's 'timeless' approach to the subject, discussed below, when he refers to the system of qadis and muftis as if it were an integral part of contemporary Islamic law. The final part of this section, discussing the 'institutional support' of Islamic law, does not explain the relationship of Islamic law to the state in the classical period, nor does it refer to the situation as it developed later on.<sup>3</sup>

This section is followed by one on the substance of the shari'a in which some important concepts are briefly mentioned. Most of it is informative to the neophyte, but unfortunately there are also many errors and misconceptions, on which more below. The passage on commercial law is full of them.

The third major section ('Shari'a and Revelation') starts by dealing with the all-inclusive scope of Islamic law, comparing it once more with Jewish law, and goes on to discuss the nature of Islamic law and its conceptual techniques with reference to its historical development, with a significant amount of time devoted to *ijtihad* and the 'closing of the door of *ijtihad*' in fairly conventional terms. The section finishes as it began with a discussion of human rights of a kind which has many problems of anachronism, cultural relativism, and so on. Such problems are, however, inherent in the subject and Glenn cannot be blamed for them.

In the fourth major section ('Ijma and Change'), the author looks at variations in Islamic law (the Sunni/Shi'i divide and the various schools) and its potential to accommodate change. It is in this section that the author refers for the first time to the essential topic of the relationship of Islamic law to secular authority. His method of explaining the issue is strange, however. He lumps together *siyasa*, *kanun* and the *diwan al-mazalim*, then comes to the controversial and over-simplified conclusion that 'secular rulers can therefore make law, as they see fit', after which he generalises, but in so doing uses an unhistorical approach divorced from any specifics of place or event. This does not work, because the text does not demonstrate any appreciation of the difference between (to use a very rough periodisation) the pre- and post-modernisation situations, nor the very wide differences between jurisdictions. Statements such as 'legislation could be seen as repealing Islamic law and this has been said to have occurred in the Tunisian abolition of polygamy' do not help his cause. (Islamic law cannot be repealed, it is the law of God. Tunisian law is quite a different matter. Therein lies one of the essential problems of Islamic law today, and if you do not understand that, everything else will be shrouded in fog. No doubt the author understands the point, but a neophyte could easily be misled.) It is difficult to tell since the text is silent on the matter, but it would seem that he has in mind Saudi Arabia and Oman for most of the discussion.

It is hard to see how anyone who is not already reasonably well acquainted with the subject could arrive at a true understanding of the situation by reading the relevant

<sup>2</sup> One might wonder why this was not also done when discussing consensus.

<sup>3</sup> There are resonances here with John Bell's criticisms of the author's approach to civilian law in his contribution to this collective review at 130.

passage (199-200). Since it is one of the most important issues in Islamic law today, this is particularly unfortunate.

The unhistorical approach also affects the discussion of the various schools. There is no placing of their importance in the relationship between religion and secular authority. Nor is their use in modern times discussed, for example as guides to judges in the legislation of some states (Art 1 UAE Civil Code is one instance). Nor is any indication given of the way in which the shari'a is being 'reconstructed'.<sup>4</sup> It is all very well to give a history of ideas, but it must be a history, and where the relationship with other institutions is an essential part of the picture, it needs to be mentioned.

The section concludes with a discussion of the re-opening of the door of *ijtihad*. It is reasonably useful, but again suffers from floating outside time and place. And the section is permeated with problems. In particular, it is disappointing that the author does not take advantage of the opportunity to discuss the numerous issues relating to the different traditions which exist within Islam and outside it, with their various tensions and conflicts. This is a surprising omission, given that tradition is, after all, the theme of the book.<sup>5</sup>

The fourth and final major section ('Islams and the World') starts by looking at the relationship between Islamic law, its variations, and the notion of an Islamic community and an Islamic identity. The second section deals with the question of the possible external origins of Islamic law and the way in which the Prophet reformed, but did not replace, 'chthonic' law. As said above, the placement of this discussion is odd, the very first section of the chapter having not made any mention of these important issues. There are various other peculiarities, such as the statement that 'Islamic law is all revelation'. The reader who remembers the discussion of the very human techniques of consensus and reasoning by analogy could be excused for being confused here. Professor Abdullahi An-Nai'im, and people who think like him, would presumably disagree strongly.<sup>6</sup> We then have a discussion of apostasy.

In the sub-section entitled 'Contrapuntal Exchange, With Islams', we are at last given a discussion of the interchange between Western ideas of the state and Islam. The discussion concentrates on public law, human rights and the status of women. It misses out the consequences of the adoption of the Western state for law in general, which is dealt with in the following section, curiously entitled 'The Islamic Diaspora' (it starts by explaining the present situation in Muslim-majority jurisdictions, a topic which has nothing to do with diaspora). The thought which presumably underlies this title, and the section, is the interaction between the Western and Islamic traditions. However, Glenn only articulates this in the very last sentence of the chapter when he refers to 'the external challenge [which] comes from the west, from the combined resources of civil and common law traditions' (218). Granted, the last section is the one which he has assigned in his structure as the place to discuss the relationship with other traditions, but even so, one would expect something more, perhaps at the expense of some of the footnotes.

<sup>4</sup> On the idea of reconstruction, see Arabi, O (2001) *Studies in Modern Islamic Law and Jurisprudence* Kluwer at 200.

<sup>5</sup> There is a very brief reference to 'internal' variations in the final chapter, 'Reconciling Legal Traditions: Sustainable Diversity In Law', and to the tension between Islamic and Western law. Internal variations are mentioned at 344, mixed jurisdictions are very briefly referred to at 356, but the mixed nature of all Muslim-majority jurisdictions is not mentioned.

<sup>6</sup> See, for example, An-Nai'im, AA (1998-1999) 'Shari'a and Positive Legislation: Is an Islamic State Possible or Viable?' in Cotran, E and Mallat, C (eds) *Yearbook of Islamic and Middle Eastern Law* Vol 5 Kluwer.



In order to review the chapter without too many interruptions, only a few problems and mistakes have been mentioned. These are regrettably numerous, and range from straight errors to misapprehensions and distortions.<sup>7</sup> It is difficult to understand why there are so many when they would have been easily spotted and remedied by someone with a knowledge of Islamic law and the Arabic language, and their sheer number means that the chapter cannot be recommended as an introduction to the subject. It is a good example of the pitfalls which lie in wait for the non-specialist when following the legal academic writing tradition of 'going it alone'.

As a case study of the author's ideas on legal traditions, however, the chapter has some valuable passages and ideas, as well as many useful references. Perhaps most importantly, like other chapters in the book, it serves as a useful stimulus for further work. Curiously enough, the issue of comparing Christian and Islamic attitudes to law came up in an LLM seminar a short time after reading this chapter for review purposes. It was Glenn's analysis which provided the answer to the question from the class, and provided the seed for further comparative study in this reviewer's own work.

<sup>7</sup> Only a few examples are cited here. Transliteration is inconsistent and often wrong; Islam is submission to the will of Allah, not 'divinity' (173); the author has not fully understood the Islamic attitude to precedent (177-78), see Al-Hejailan, F (2000) 'Precedent in the Shari'a - with Special Reference to Saudi Arabia' (3) *Middle East and North Africa Legal Yearbook* 36, Art 16 Majalla; he has not understood, or at least not properly explained, the key concept of *riba*; etc.

## Common Law Traditions

MARTIN SHAPIRO\*

As other contributors to this joint project have noted, it would be extraordinarily difficult to inject much originality into the incredibly wide-ranging yet concise text that Glenn has produced unless, of course, you had a rigorous and parsimonious, theoretical starting point. Glenn's starting point is not such a theory, but rather a loose, both over- and under-inclusive notion of legal 'traditions', that is what people of a given society think and say about their law over time. Enormously useful in orienting students, such a starting point, which spotlights law talk rather than legal institutions and concrete legal practices, almost inevitably produces a pollyannish result. For in most societies, law talk is far more aspirational than law practice. It is not that Glenn entirely hides the dark side. For instance, he reports Robert Cover's, for Cover, quite amazing discovery that law is full of coercion and violence, a discovery that might have been more obvious for an inhabitant of a depressed New England city. And his section on Western law and corruption opens interesting critical avenues. Yet, the overall effect of reading this volume is that the glass is about seven-eighths full. It is not easy for Glenn's reader to remember that at its height, before massive statutory invasions, 19th-century common law in its American version countenanced and, indeed, facilitated slavery and, in its English version, a horrendous regime of child labour. There is a curious kind of denaturing of reality. That the Norman Conquest was indeed a conquest and the common law a conqueror's law is fully acknowledged, but somehow or other it all turns out to be a sympathetic story of Norman tolerance for the old local law. English judges are independent, but also deferential to administrators and obedient to Parliament.

Glenn does a service to students in emphasising, perhaps overemphasising, the contributions of Jewish, Islamic and Roman law to common law. He paints the conventional picture of common law as judge-made case law with substantive law bubbling up from the interstices of the procedural law created by the writs. Surely not incorrect, such a picture will require considerable touching up by the teacher to show the strong contributions of statutes to even medieval common law and the degree to which the authors of the writs, while using procedural language, were quite consciously and openly concerned with creating substantive legal protections.

The problem of accurately describing, let alone capturing the essence of, a precedential law in which change constantly occurs and where there is a complex interplay between the facts of particular cases and their *ratio decidendi* has yet to be solved. Glenn's solution is to describe the early common law as precedent without *stare decisis*, without rules or rights, and without appeal. He assigns the rise of *stare decisis* to the 19th century and then says *stare decisis* is 'not what it was'. Space, of course, is precious in this one volume, all encompassing work, but teachers will have to supplement or explain away Glenn's rather Delphic presentation with ample case law illustrations of both the stability and change in actual English case law, the nature of common law 'rules', the discourse of rights that has long flourished at the intersection of English political and legal thinking, and the system of centralised courts and collegial appeal through such courts as the Exchequer Chamber that was the English substitute for pyramidal, hierarchical appeals structures. Some attention to the differing styles of dealing with precedent in the US and

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the UK would also have been welcome.

Glenn is also conventional in proposing a particular common law intellectual style, reasoning by analogy, which he rightly says is comparable to a major strain of Islamic juridical practice. Here, again, the problem is not that Glenn is wrong but that the student reader will believe that he has learned something when he hasn't. For, quite obviously, everything in the world is somewhat like and somewhat unlike everything else. If law is made by analogy, then what two things the law-maker thinks are sufficiently alike to be treated alike and what two things are not is crucial. In each instance what lies behind the labelling 'like' or 'unlike'? Is water that breaks through an earthen dam and damages a neighbour's property more like a cow or a lion? If the former, the dam-keeper only needs to have tended the dam carefully to avoid liability for the damage done by the escaped water. If the latter, then the keeper, like a lion-keeper, must act with extraordinary care. Does anyone really believe that the judge spent hours puzzling over whether water was more like a cow or a lion? Or was the judge really thinking in terms of rough cost benefit analysis of impounded water for agricultural and industrial uses in a country of abundant but irregular rainfall? Or about whether industrial development ought to be encouraged by law?

Glenn's emphasis on the movement to statutory law in the US in the 19th and 20th centuries is useful, but a little misleading for students because he cites the widespread 'codification' of US law without explaining that US codes, unlike European, are usually merely collections of statutes rather than purporting to be complete and systematic statements of 'the law'. Only the most careful reader will realise that Glenn is also correct in saying that 20th-century English law also became heavily statutory. Almost entirely missing is the massive role now played by administratively created rules and regulations, or 'delegated legislation' in both the US and the UK. Again, space concerns are crucial, but readers of this chapter will barely catch a glimpse of the modern, administrative, regulatory state or the welfare state both defined by, operating through and constrained by masses of statutory and administratively created legal rules.

The common law chapter contains a short section on comparative law whilst the civil law chapter contains much longer sections. Glenn's view of comparative law is in line with the long held normal practice of legal scholars. Similarities of ideas, practices and outcomes in two or more legal systems, even when expressed in differing terminologies, are to be catalogued. Other legal traditions are to be mined for ideas that might be useful in one's own. Glenn is fairly firmly set against turning such cataloguing and mining into an assertion of universal legal principles. Thus, his insistence on traditions in the plural. Surely there is nothing wrong with choosing this comparative method. Some teachers of comparative law, however, will wish to supplement it with the kind of comparison in which general hypotheses about law are stated and then tested by a comparative method, that is, by searching the world's legal practices for data falsifying or confirming the stated hypothesis. Glenn's focus on traditions and his emphasis on their malleability and permeability do not lend themselves easily to the construction of testable hypotheses about the nature and dynamics of law. But he does not see that as his task; indeed, he might well reject such work as a form of Western rationalist imperialism.

# Glenn's Vision of the Hindu Legal Tradition

WERNER MENSKI\*

Glenn's study is admirable and daring, even if he may be trying to do too much in too compressed a space. The project of writing a largely theoretical book on tradition in relation to law, and then covering so many different traditions as well, has inevitably resulted in a large work and considerable dissatisfaction on the part of regional specialists. Yet there must be something wonderful about it to have evoked such praise for the first edition.

I have often used the first edition for reference and for teaching the first year comparative jurisprudence course at SOAS, 'Legal Systems of Asia and Africa'.<sup>1</sup> Some students have found Glenn's book useful, but on the whole it is too diffuse for their needs.

In his general part, Glenn's approach to tradition in relation to law makes so much sense that even reservations about the chatty style and easy-going approach to the reader probably endeared this work to a wide readership. Hard theory wrapped in soft packaging does not offend and still says the right thing. It does not offend in its generality, because it is plain commonsense to say that tradition is old and is still with us, also in law. If a reader is open to pluralist perspectives, then this book simply *must* make sense. If someone were merely a rigid positivist, then Glenn's book would be either irrelevant or a nuisance, and could be easily dismissed. However, Fiona Cownie has shown that most legal academics are aware that law is more than that which can be fitted into black-letter boxes.<sup>2</sup> They may not be able to undertake socio-legal or theoretical work themselves, but they are no longer hostile to it. Glenn, therefore, carries the burden of a self-imposed load that others are not prepared to bear. Seen in this light, maybe many scholars feel good that someone writes about law in a way they could never do.

So I defend Glenn's project and oppose its rejection. Indeed, I suggest that critics should criticise this project only if they have better things to say and write. As someone who has been trying to do just that,<sup>3</sup> I feel entitled to comment on the general approach, before turning to the Hindu law section.

Glenn's project not only explores the manifestations of tradition in and of itself and in traditional laws around the globe, but also the presence of tradition in contemporary legal systems. The mere assertion of the strong presence of tradition today is audacious and may explain some praise for the book. To critique continuing modernist assertions about the death of tradition in law requires courage. But such things need to be said because all over the world black letter lawyers and their proclaimed superior positions of authority, practicality and, therefore, implementation dominate thinking about law.

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<sup>1</sup> This is a first year law course at SOAS which I have convened and largely taught almost without interruption since 1981. The course was inherited from Professors Derrett and Allott but has significantly moved on since then. See Derrett, JDM (ed) (1968) *An Introduction to Legal Systems* Sweet & Maxwell [(1999) first Indian reprint, Universal] and Allott, AN (1980) *The Limits of Law* Butterworths.

<sup>2</sup> Cownie, F (2004) *Legal Academics: Culture and Identities* Hart.

<sup>3</sup> Menski, W (2000) *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* Platinum; Menski, W (2006) *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd ed) Cambridge University Press.

Glenn performs that task superbly. The concomitant annoyance among colleagues may indicate that we continue to carry heavy positivist baggage within the reviewer team, not that Glenn's project is deficient.

Twining opened our eyes about the urgency of providing chapter and verse on how our customary fixation with positivism impacts on current understandings of what law is and how it works in daily reality all over the globe.<sup>4</sup> Twining's was a rallying call, not an execution of the project itself. Glenn's project is a combination of what Twining advises and a study of various legal traditions all over the world. It is mine, too, though in a different way. We are both inspired by a concern that global conflicts will ensue over law and its meaning if we do not talk about what is meant by law.

Legal scholars are aware that pure positivism suffers from circular fallacies and hence underwrites not only myriad dictatorships small and large, but also Nazi and other recent genocidal atrocities. As legal scholars, we cannot fail to be aware that 'extra-legal' should be a profanity rather than 'legal pluralism' carrying that label. Still, we cling to certain belief systems, which we label rational and thus superior, and deceive ourselves that we are learned, skilled and superior because we are modern and have transcended tradition and the shackles of 'religion'. It is not the case that we do not know that 'others' have traditions and 'religions'. Rather, we tend to claim that they are not legally relevant and, at any rate, should be curtailed. In a global context, such self-serving claims of Eurocentric rational thought have become a widely abused form of what the social anthropologist Ballard calls 'skilled cultural navigation',<sup>5</sup> the ability to make sense of different traditions at one and the same time. Many lawyers deviously practise this skill, using universal claims to truth and power to deny 'others' the right to exist, overlooking their competing claims to global relevance. Glenn extinguishes some candles on that self-celebratory cake, which is perhaps another reason to heap praise on his book.

But there are aspects of the 'big picture' that I would like to see improved in a next edition. First, the central point about the relevance of tradition for today's legal scenarios is now evident, and could be made briefly in order to devote more space to providing examples of how this works (or does not work) in practice all over the globe. One major problem with Glenn's study is that he has not developed, between the first edition in 2000 and the second edition in 2004, a more sophisticated analytical framework within which to analyse the legal traditions of the world and their various manifestations. The mere assertion of unlimited plurality and situation-specific flexibility over vast spans of time and over the entire planet leads to a general picture that is not satisfactory for a profound understanding of the way in which different kinds of tradition and different layers and kinds of law interact. Lack of analytical depth is illustrated by his image of the conceptual bran-tub of legal traditions (from 13 onwards). While there are indications of plurality-consciousness earlier, it is only at 49 that Glenn states: 'A tradition is a bran-tub of information. It necessarily contains varying and even conflicting views. It is today always in contact with other traditions'.

Applying Twining's black-box test,<sup>6</sup> I asked myself whether this image of the bran-tub suffices to illustrate the diversity of tradition. It does not. A good housekeeper would not store all kinds of things in a bran-tub (and Glenn repeatedly uses the image

<sup>4</sup> Twining, W (2000) *Globalisation and Legal Theory* Butterworths.

<sup>5</sup> Ballard, R (ed) (1994) *Desh Pardesh: The South Asian Presence in Britain* Hurst & Co.

<sup>6</sup> Twining, W *Globalisation and Legal Theory* supra note 4.

of delving into that tub to extract more tradition) so a better image is needed. What about a huge sweet-box, with different kinds of goodies in it, some wrapped, some not? If you delve in, you find a lot of different things, rather than more of the same. Traditions in the plural, as correctly used in the title of the book, become as problematic and as potentially plural as 'laws', and we may argue forever about whether what is in the sweet-box qualifies as a sweet or not.

Glenn skilfully avoids this critical issue, or at least he does not make enough of it. So perhaps we should give him credit for being so subtle that one does not even notice that he is constantly raising this key issue. My assessment of the book as a whole is that he rather glides too elegantly and sometimes sloppily over huge areas of violent disagreement in relation to law and different traditions. The author does this in a spirit of universal debate, aware that globalisation does not mean simple unification of laws and the disappearance and displacement of lots of traditions through the assertion of a few dominant ones. While that message is sound, it remains too general, and the execution of the project in the regional chapters gives much occasion to make critical comments.

Specifically on Hindu legal tradition, Glenn uses chapter eight to argue that his major thesis, that tradition is diverse and manifests itself in many different ways over time and space, is well-illustrated by Hindu law:

All of hindu law is right, but you can be excused for thinking that some of it is more right than the rest. And since there's nothing wrong with diversity, since it's all united in the end, you can even have a little more diversity. [...] To solve a problem, you're therefore never very interested in hindu law in the abstract. You have to know the people, the place, the school, and the local circumstances. It's all united, but it gets very specific (291).

Quite so. Such general comments indicate that Glenn, as a legal philosopher, has properly understood the 'essence' (that bad word!) of Hinduism and of Hindu law, and probably also of all 'law'. The above statement is useful to reiterate the basic message of the book, but it does not explain how Hindu law works in detail, nor how various Hindu traditions interact with each other and with other elements from the rich bran-tub or sweet-box of tradition. While damning criticism of Glenn's efforts to understand Hindu law would be unfair, some negative comments must unfortunately be made. Evidently, Glenn did not have access to my new book on Hindu law.<sup>7</sup> We shall see in due course how that study impacts on the third edition. For the moment, Glenn has been paralysed, as we all have been, by the inadequate and deeply misleading writing which fills the shelves of university libraries around the world and still impresses many academics, and above all Indian lawyers. It would be unfair to blame Glenn, as a non-specialist, for relying on deficient traditions of scholarship even among specialists.

My criticism can be brief, because it is self-evident and applies throughout. Glenn relied on a number of leading studies without being able to cross-check. Thus, he did not make a rather important distinction for the benefit of his readers and his analysis. Apparently, there are two major extreme views on how the traditions of Hindu law developed: 'According to one view it is of "divine origin" while the other view is that it is based upon immemorial customs and usages'.<sup>8</sup> The internal view clearly privileges

<sup>7</sup> Menski, W (2003) *Hindu Law: Beyond Tradition and Modernity* Oxford University Press is part of the bibliography, but listed as forthcoming.

<sup>8</sup> Agarwala, RK (2003) *Hindu Law* (21st ed) Central Law Agency at 7.



‘religion’ and speaks of divine revelation, as though the Hindus had equivalents to God, His Holy Book and Prophets, and as a result had written laws that dominate ‘tradition’. This internal view claims that Hindu law is a ‘religious’ law based on texts, thus making it appear on par with other ‘civilised’ legal systems.

The ‘external’ view, on the other hand, focuses on the traditions of Hindu law as an integrated socio-cultural element, constantly worked out in specific contexts and thus constantly changing, not without input from ‘heard’ and written religious sources, but so flexible that the written sources are not portrayed as dominant. Perceptive readers will note that this is not really just an ‘external’ view. Rather, it is an alternative plurality-conscious reading of Hindu perspectives that is less positivism-focused than the so-called ‘internal’ view, which is contaminated by Western-style positivism and Judaeo-Christian (and Islamic) religious traditions.

As a non-specialist, therefore, Glenn fell into a familiar trap and committed the classic mistake of almost all writing so far, relying on what certain leading textbooks tell us about the subject.<sup>9</sup> Most authors have tended to be British-trained, positivism-infected lawyers with contempt for the traditions of common Indians and their cultural particularities, ie customary laws and religious concepts. Even though Glenn begins to take more account of other views, the end result is still dominated by such misguided black-letter perspectives. These muddle secular legal positivism with a particular kind of Hindu religious positivism (thus playing into the hands of ‘fundamentalist’ *hindutva* arguments) and make totally unsustainable claims about the nature of Hindu legal traditions and their practical manifestations.

Although Glenn cannot be blamed for such errors, I often cringed that an award-winning book should still be repeating, in 2004, such profoundly deficient notions about how Hindu law has developed and is developing today. The biggest conceptual mistake (and I am weary of pointing this out) is to rattle the skeleton of Manu in the cupboard of Hindu legal tradition (290 et al). There is much to be done if this particular chapter is to be improved for the next edition. However, Glenn’s efforts should not be blamed for the infelicities of our forebears. Hindu authors, for reasons best known to them, Western ‘Orientalists’ and Sir Henry Maine and his influential vision that sophisticated law was to be found in codes, have all contributed to an unholy alliance of agreement that the ancient Hindu cultural texts were codified religious law, laid down by ancient, divinely inspired law-makers or sages, who stood up like Napoleon and declared Hindu law for all times and for all Hindus. The outcome of this has been the almost deified fictional figure of Manu, allegedly the most important Hindu law-maker, to whom copious reference is made whenever one does not know a proper answer. Thus, reference to the mythical Manu has become a handy tool to assert the dominance of tradition within Hindu law in whatever way the speaker desires. This has led to multiple distortions. For example, feminists, instead of challenging the alleged power of these old men, have fallen into the trap of believing their assertions to be true, further pushing women and low-caste people into subjugation instead of empowering them to question tradition from within. This positivist construct has, in turn, created its own powerful assertions about the nature of Hindu law, but this constructed tradition does not match with the socio-legal realities of Hindus anywhere in the world. Hence, it cannot be a full and

<sup>9</sup> Two classic textbooks on Hindu law were extensively used by Glenn: Desai, ST (ed) (2000) *Mulla’s Principles of Hindu Law* (17th ed) Butterworths, and Diwan, P (1993) *Modern Hindu Law* (9th ed) Allahabad Law Agency. The latter author died in 1997, but his textbooks continue to appear in new editions.

proper explanation of the nature of Hindu legal tradition. Glenn's approach seems unable to penetrate these layers of disingenuous construction of Hindu law.

Were I to be asked to provide further specific criticism, there is a large choice of objectionable examples apart from how the mythical Manu is treated by lawyers as an Austinian patriarch. No less irksome are incautious comparative comments, for example when the *shastra* is portrayed as equivalent to Islamic *sunna* (276), with no recognition that *sunna* can mean many different things or that the Prophet of Islam was a special person and had a unique role in influencing tradition. Related to this, the suggestion that revelation is a continuing process (id) would alarm Muslims as well as opponents of militant *hindutva* and should make comparative lawyers uneasy about the quality of the analysis in this comparative legal study.

Related to this, too, the question of whether the door of *ijtihad* was closed (277) or not (287) is left too open for comfort. The suggestion that writing is a principal source of Hindu law is true for lawyers and those whom Glenn consulted, but not for the traditional system as a whole. The suggestion (294) that with the onslaught of modernity tradition in India folded back into itself (and vanished?) is not adequate. Tradition might have been hidden at the bottom of the bran-tub or gradually submerged, but it has not disappeared. That, after all, I thought, was the main message of Glenn's book. The deficient way in which this is illustrated for modern India demonstrated to me that Glenn himself remains too focused on Western, even North American, visions of self-importance in global contexts and has been unable to locate the trends that postmodern Indian and Hindu laws now show.<sup>10</sup> A brief trip to London to learn about Hindu law and an even briefer excursion to the National Law School of India in Bangalore was not the right method to learn about how Hindu law works today. Fortunately, our knowledge of Hindu law has grown since the book was written. Hopefully, the next edition of this important book, freeing itself from the shackles of positivist colonial mindsets in relation to Hindu law's tradition, and mindful of various temptations to portray Hindu traditions in analogy to Abrahamic models, can achieve a better understanding of Hindu law.

<sup>10</sup> Menski, W *Hindu Law: Beyond Tradition and Modernity* supra note 7.

## Buddhist Law, Asian Law, Eurasian Law

ANDREW HUXLEY\*

### BUDDHIST LAW

‘The Buddha had other than things legal on his mind [...] because of buddhist teachings there aren’t many lawyer buddhists’ (313-34). Glenn, we can safely say, is unimpressed by claims that a Buddhist legal tradition exists. Since I have spent the last 25 years researching Buddhist legal traditions, I tend to think he is mistaken. Thrice mistaken, indeed, for there are at least three different Buddhist legal traditions — the Tibetan, the Chinese and the Pali. But, in explaining why Glenn is wrong, I am put in the embarrassing position of complaining that he has paid insufficient attention to my own work. I am one of a handful of lawyers working on Buddhist law, alongside Rebecca French of Buffalo Law School and Myint Zan of the University of the South Pacific. We lawyer-Buddhologists would accept that the linguists and historians who investigate the subject are more learned than us. Many of these specialists contributed to the *Law and Buddhism* special issue of the *Journal of the International Association of Buddhist Scholars*.<sup>1</sup> Glenn has not read them, and I doubt that he has read the work of us lawyers in any depth. He summarises Rebecca French’s work on Tibetan law in an eight-line footnote, unchanged from the first edition. My work on the Pali Buddhist legal tradition did not feature in the first edition, but has made it into a footnote of the second. Myint Zan has analysed some 17th-century Burmese legislation which restricts the forms of permissible legal reasoning that lawyers may use in court, but he doesn’t even get a footnote.<sup>2</sup> I describe and define a Pali Buddhist legal tradition that is more than 2,000 years old. Glenn, plainly, is unpersuaded by my account, but does not say why. French has a persuasive analysis of just what it means to call Tibetan law ‘Buddhist’, but Glenn does not engage with it at all.

I cannot speak for French and Myint Zan, but my own work on Southeast Asia is far from iconoclastic. I follow a consensus that has been built up by the last two generations of Southeast Asian legal historians. Since the 1950s, Burmese and Thai scholars have criticised the colonial legal history written in the late 19th century. While the colonial historians regarded the tradition as wholly derived from Sanskrit texts such as *Manusmṛti*, the 1950s scholars emphasised the Pali-Indian contribution and the local contribution to the law texts. Since the 1980s, a younger generation has used scanners and microfilm to make systematic collections of surviving law texts. Thanks to them, there is now about

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Editorial note: given the nature of the works cited in this section, the place of publication is given, as is, where necessary, the ISBN.

<sup>1</sup> (1995) (18) *Journal of the International Association of Buddhist Scholars*. Two other, non-lawyer, scholars whose work sheds light on the Pali Buddhist legal traditions are Steve Collins of Chicago and Ryuji Okudaira of Tokyo. See, for example, Collins, S (1998) *Nirvana and other Buddhist Felicities: Utopias of the Pali Imaginaire* Cambridge: Cambridge University Press; Okudaira, R (1996) ‘A Hypothetical Analysis on “Theravada Buddhist State at its Height” under King Badon with special reference to *Manugye Dhammathat* (1782 Manuscript)’ in *Traditions in Current Perspective: Proceedings of the Conference on Myanmar and Southeast Asian Studies* Yangon: Universities Historical Research Centre 30.

<sup>2</sup> Myint Zan (2000) ‘Woe unto Ye Lawyers: Three Royal Orders Concerning Pleaders in Early Seventeenth Century Burma’ (44) *American Journal of Legal History* 40.

three times as much primary material accessible than before. I went to some trouble ten years ago (since these younger scholars published only in their vernaculars) to edit a volume in which they presented their work in English.<sup>3</sup> I am sorry that Glenn has not read what Southeast Asians are saying about their own legal tradition.

To summarise the modern consensus: the four Pali Buddhist cultures of the mainland share a legal tradition. To be more accurate, the Thai, Khmer, Mon and Burmese law texts share the same three genres, within which many paragraphs are shared across different languages. This shared legal tradition regards Pali as its classical language, and Pali literature as its classical literature. All the region's law texts are written in a mixture of Pali and the local vernacular. Much of the common material in the law texts is derived from the Pali canon, which is to say the Buddhist scriptures. The law texts show some Hindu influence as well (meaning that paragraphs written in the vernacular or in Pali are textually similar to Sanskrit verses found in *Manusmṛti*). But let's not get things out of proportion: if Pali Buddhist influence flows broad and deep like the Thames, Hindu influence straggles narrow and shallow like the Fleet Ditch. Please judge for yourself. The following Southeast Asian law texts are easily available in English or French translation: *Manugye dhammathat* (written in Upper Burma during the 1750s); *King Mengrai thammasat* (Chiangmai, probably 15th century), *Khamphi phra thammasat buhan* (Vientiane, perhaps 17th century), *Eleven Mon dhammasats* (Lower Burma, various unknown dates).<sup>4</sup> Spend an evening reading one or two of these in translation and make your own decision on whether 'Buddhist' is the *mot juste* that describes them.

Good arguments can be made against the existence of Buddhist legal traditions. I have had exhilarating discussions with certain Western Buddhists who were attracted to the Dhamma in part by what they saw as its antinomian tendencies. We disagree, I think, because they judge *meditation* to be the central Buddhist activity, while I judge it to be *residence in a monastery*. Arguing with Glenn is less exhilarating, because he starts from such a low knowledge base. He says that Buddhism essentially rejects the spirit of enquiry 'with bookish learning seen as largely irrelevant to the process of awakening' (323). On the contrary, Pali Buddhism is above all a literary culture, one that exchanged ideas by writing commentaries, epitomes, precedents and analyses. In mainland Southeast Asia, Pali Buddhist monks handled all the teaching jobs, from primary to post-graduate. According to the hagiographies of Southeast Asia's great scholar-monks, they routinely crowned their career by achieving enlightenment. 'Buddhism', Glenn says elsewhere, 'displays little interest in controlling a single territory or state' (338). Trevor Ling has persuasively argued the opposite: Buddhist cultures in the real world have been no less belligerent than Christian cultures.<sup>5</sup> There are three or four suttas in the Pali canon (including *Mahasammata the First Elected King* and those about the

<sup>3</sup> Huxley, A (1996) *Thai Law: Buddhist Law: Essays on the Legal History of Thailand, Laos and Burma* Bangkok: White Orchid Press, ISBN 974 89758 94.

<sup>4</sup> Richardson, D (1896) *The Damathat, or the Laws of Menoo* Rangoon: Government Press. Probably the third edition of a work first published in 1847. Aroonrut Wichienkeeo and Gehan Wijeyewardane (1986) *The Laws of King Mangrai* Canberra: The Richard Davis Fund and the Australian National University, ISBN 0 9589029 09. Raquez, A (1902) *Pages Laotienmes* Paris: Schneider. The 'Code de Vientiane' is summarised at 402-18. This translation was reprinted in 1970-72 in *Bulletin des Amis du Royaume Lao* at 23-6; 75-88; 94-99; 123-31; 70-76. Nai Pan Hla (1992) *Eleven Mon Dhammasat Texts* Tokyo: The Centre for East Asian Cultural Studies for Unesco, ISBN 4-89656-605-X.

<sup>5</sup> Ling, T (1979) *Buddhism, Imperialism and War: Burma and Thailand in Modern History* London: Allen & Unwin.

*Wheel-turning Emperor*), which Southeast Asian kings treated as depositories of empire-building rhetoric. Steve Collins and I collaborated to trace these themes from their canonical origin right up to the present day.<sup>6</sup> Buddhist nationalism is still an important force around the Bay of Bengal. The rhetoric employed by the Thai state against the Muslims of Pattani, or by Sri Lankan politicians against the Tamils of the northeast coast is rooted in the Pali tradition.

Glenn's bibliography of Asian law contains a single book on Buddhism: Alexandra David-Neel's *Buddhism: Its Doctrines and Its Methods* (first published 1939). The book is now over 60 years old, and every year Buddhologists challenge more of the pioneer's conclusions: it would be prudent to send the student to something more recent.<sup>7</sup> That said, David-Neel (1868-1969) cut a figure several sizes larger than life. She was by turn an armed radical, a theosophist, a hashish-user, a Parisian actress-chanteuse, a practitioner of tantric sex rites, and a determined explorer who managed to get to Lhasa despite all attempts to stop her. Perhaps her wide experiences did give her a deeper insight into the Dhamma than is available to mere scholars.

## ASIAN LAW

There are, Glenn asserts, seven traditions which 'appear presently as the major traditions in the world' (343). These are 'chthonic, talmudic, civil, islamic, common, hindu and Asian' (342). Despite their lower-case disguise,<sup>8</sup> you will recognise comparative law's favourite sons, civil and common law, along with Jewish, Hindu and Islamic law, sometimes called the 'Religious Systems of Law'. The remaining two traditions are Glenn's own innovations: 'chthonic' refers to the custom of pre-literate people, and is discussed in Gordon Woodman's review.<sup>9</sup> 'Asian' law spans 'from Moscow [...] Turkey, Israel and Saudi Arabia [...] to Japan and Philippines in the east' (301). Within this vast area he hopes to identify 'attitudes [...] more distinctively Asian, representing a kind of Asian default position' (301). His project is overambitious and it fails, in large part, because of his dismissal of the Buddhist legal traditions.

By 'Asian legal tradition' Glenn appears to mean the Chinese legal tradition. He asserts that 'China, by its great size, influences everything in Asia' (308, 326). Perhaps that will be true in 40 years, but it is not the case now, and has never been yet. (If anyone was the driving force of Asian history, it was the horsemen of the Central Asian steppes.) If Asian law simply means Chinese law, this leaves a huge gap in the map between Istanbul (30°E) and Dunhuang (105°E). Glenn hopes to plug the gap with Islamic and Hindu traditions. But these still leave Central Asia and mainland Southeast Asia untouched. As for island Southeast Asia, Glenn is forced to treat it as a mixture of Islam

<sup>6</sup> Huxley, A (1996) 'The Buddha and the Social Contract' (24) *Journal of Indian Philosophy* 407; Collins, S (1996) 'The Lion's Roar on the Wheel-turning King: A Response to Andrew Huxley's "The Buddha and the Social Contract"' (24) *Journal of Indian Philosophy* 421; Huxley, A (1996) 'When Manu met Mahasammata' (24) *Journal of Indian Philosophy* 593; Collins, S and Huxley, A (1996) 'The Post-Canonical Adventures of Mahasammata' (24) *Journal of Indian Philosophy* 623.

<sup>7</sup> The works by Harvey and Gethin, which he cites in footnotes, will do nicely.

<sup>8</sup> Between the first and second editions, Glenn decided to award Asian law the dignity of a capital letter. I prefer his first thoughts. In the second edition, upper case 'Asian law' sticks out rather awkwardly from the stark 'e.e. cummings' typography applied to the other six.

<sup>9</sup> See Gordon Woodman's contribution in this issue at 123.

and chthonic.<sup>10</sup> Clifford Geertz' *Local Knowledge* (one of the outstanding recent works on comparative law in Asia) could have disabused him of this over-simplification and might have steered him towards thinking of traditions as the ingredients of a cocktail.<sup>11</sup> But Glenn drinks his traditions neat. The Sumatra-Borneo-Java gap in Glenn's world map needs plugging with a dollop of Geertz. The gap in Eurasia's Altiplano needs Tibetan Buddhist law. And, in the monsoon river valleys of Southeast Asia, we need Pali Buddhist law.

Glenn has failed to identify a set of legal and ethical attitudes that are common to Istanbul, Benares, Seoul and Hanoi. I cannot resist the opportunity to say 'I told you so': 'Can we keep adding other Asian legal cultures until we have a *genus* of Asian law? Considering the obvious differences between the laws of King Hammurabi, the maritime laws of Malacca, and the oral customs of slash-and-burn Laotian *montagnards*, this last proposal seems overambitious'.<sup>12</sup> And, I must further admit that his failure gladdens me. Those who seek to essentialise Asian law do so because they think European law is special. If everything east of St Petersburg and Cyprus is Asia, then everything west (all the way to the International Date Line) must be Europe.<sup>13</sup> This is too much of an 'East is East and West is West' polarisation for my taste. I would prefer a different approach. First, we should break down Asian law into more categories, by finding room for, among others, Japanese and Buddhist legal traditions. Secondly, we should collapse the categories of Europe and Asia by exploring their common history. I will deal with the second proposal in my final section and with the first proposal now.

Along with most of my fellow reviewers, I applaud Glenn's analysis of tradition. Put chapters one, two, six, seven and ten on your iPod, and don't bother with the rest.<sup>14</sup> When examining legal tradition at the general level, Glenn asks the right questions and supplies enough plausible answers to get a discussion going. Until this point, my review has been critical, carping about Glenn's approach to Buddhism and Asia. Hereafter, my review turns positive, as I add my views to the discussion initiated by Glenn.

If comparative law is ever to regain its lost prestige, it must do more theorising about the transnational level. What exactly does it mean to talk of a civil law tradition, an Islamic law tradition, and so on? Glenn offers some pragmatic answers, but avoids discussing other theorists of tradition. If we join his conversation, we will have to bring our own theory along with us. Mine is derived from two German scholars: from David Daube (who taught me) and from Hans-Georg Gadamer (whose works I read only in translation). Daube was an expert in Jewish law, Greek law and Roman law, and was well read in Mesopotamian law, Islamic law and Jacobean English law. Most of his articles pursue a particular legal motif as it spread across these various traditions. He never elaborated his theory of tradition in print,<sup>15</sup> but all of his pupils have picked

<sup>10</sup> He claims that its indigenous legal traditions (known generically by the Arabic term *adat*) are all chthonic. At least one of them — the Minangkabau — has spawned its own law texts of considerable theoretical sophistication. Can it be coincidental that the Minangkabau have a reputation as the canniest businessmen in Southeast Asia?

<sup>11</sup> Geertz, C (1983) *Local Knowledge* New York: Basic Books.

<sup>12</sup> Huxley, A (1997) 'Golden Yoke, Silken Text' (106) *Yale Law Journal* 1885 at 1886-87.

<sup>13</sup> The Americas are not distinct on Glenn's map of the world; presumably they follow a civil or common law tradition.

<sup>14</sup> Older readers can achieve the same end by razor-blading chapters 3, 4, 5, 8 and 9.

<sup>15</sup> In tutorials, Daube frequently delivered methodological advice, though usually at a self-parodic level



up his sense of what it is that makes an issue interesting and fruitful to investigate. Gadamer devoted several hundred pages to theorising tradition. He favours writing over language (and law, in my view, is fundamentally written rather than spoken). His terminology — ‘fusion of horizons’ and ‘history at work’, for example — emphasises the diachronic over the synchronic (and comparative law, in my view, goes nowhere unless accompanied by legal history). Although Gadamer is mainly concerned with the tradition of Platonic interpretation, he offers a detailed example of how his methods can be applied to legal history.<sup>16</sup>

Daube’s most fruitful questions were about sociology of knowledge and the specialist scribes who first wrote down the law. How were they trained? How did they work? How did they copy and distribute their law-texts? Gadamer treats these scribes as the first cohort of the tradition-bearers. A tradition survives as long as its core texts are preserved by a specialist group, be they Chinese civil service examinees, or *madrassa* students from Baghdad, or Pandits from Benares, or law students from Bologna. The interpretations that these tradition-bearers apply to the core texts necessarily change through time: we map the history of the tradition by mapping the changing ‘fusion of horizons’. Glenn’s failure to identify a single Asian legal tradition poses the question: how many separate Asian legal traditions are there? Adopting the motto *solve*, we differentiate between traditions promiscuously wherever we find significant change. I have referred to a single Pali Buddhist legal tradition, but I can just as happily contrast the Laotian and Burmese Buddhist traditions. Indeed, what I’m presently writing for my specialist audience argues that there are three different Burmese sub-regional traditions. Adopting the motto *coagula*, we lump different things together into larger categories, so as to serve some explanatory purpose. Glenn’s attempt to amalgamate Asian law into one super-category owed too much to *coagula*: we’ll have to swing the pendulum back towards *solve*. But how far back? Are there three Asian legal traditions? Or seven? Or 30? We shall only reach an answer to this through dialogue — that is, through proposal, discussion and counterproposal. Here’s a proposal suggested by reflection on Daube and Gadamer.

I start with the observation that different writing systems act as a barrier to tradition-bridging. For most Londoners, it’s easier to guess what a headline in German means than one in Greek. Texts written in our alphabet are closer to us than those that are not. And, texts written in a non-alphabetic system, or an Indian-style two-dimensionally-ordered alphabetic system, are even further from our comprehension. Across Asia two cultural phenomena (legal traditions and writing technologies) appear to cut nature at the same joints. There is not a member of the Pali Buddhist legal tradition who doesn’t work in an alphabet derived from the South Indian *Pallava Grantha* alphabet. This alphabet is optimised for cutting into palm-leaf manuscripts, while north India’s *Devanagari* script is for writing on clay. There are no shari’a experts who don’t use the Arabic alphabet (optimised for writing on vellum), no Chinese lawyers who don’t prefer to read their sources in the Chinese writing system (optimised for brushing onto bamboo). Six Asian legal traditions employ their own writing system, as follows:

of generalisation. I could never determine when he was being serious. Two of his pupils have recently offered summaries of the Daube method: Lord Rodger of Earlsferry (2001) ‘Law for All Times: The Work and Contribution of David Daube’, presented as the Cameron McKenna Lecture at the University of Aberdeen’s Civil Law Centre; Carmichael, C (2004) *Ideas and the Man: Remembering David Daube* Frankfurt: Klostermann.

<sup>16</sup> Gadamer, H-G (1975) *Truth and Method* Glen-Doepl, W (trans) London: Sheed and Ward 284-87.

Chinese law:	<i>Chinese ideographs</i>
Hindu law:	<i>Devanagari alphabets</i>
Pali Buddhist law:	<i>Pallava grantha alphabets</i>
Jewish law:	<i>Hebrew alphabet</i>
Byzantine/Slav law:	<i>Greek/Cyrillic alphabets</i>
Islamic law:	<i>Arabic alphabet</i>

From time to time, bridges are built between these traditions. These tradition-bridgers always have a greater inertia to overcome than when transplanting from Burmese to Laotian law, or from Baghdad to Maghrebi law, or from the Australian High Court to the English House of Lords.

My proposal that there are six Asian legal traditions may have to be tweaked. Maybe the Japanese writing system (and thus Japanese law) is distinguishable from Chinese. Maybe the Kawi script of island Southeast Asia differs enough from the mainland scripts to support an island Southeast Asian legal tradition. At most, we will end up with about ten Asian legal systems. Six to ten pigeonholes into which to sort Asian law seems like the right order of magnitude. At this depth of focus, some significant questions stand out. For instance, given China's technological lead over the rest of the world for most of the last three thousand years, why did China only influence its immediate neighbours, Korea, Japan and Vietnam? In particular, why have Burma, Laos, Thailand and Cambodia been so resistant to Chinese influence, despite their proximity? We can begin to answer this once we realise that Southeast Asia made a deliberate choice between the Indian writing system and the Chinese. At the birth of its literacy, it chose an alliance with distant India so as to separate itself from the soft power of nearby China.

## EURASIAN LAW

Glenn's approach, reduced to five words, is 'Comparative Law via Legal History'. I suggest in this final section that Glenn's categories of Europe and Asia tend to collapse as legal history pushes back towards the first urbanisation, the first settled agriculture and the last Ice Age. Most parts of Eurasia share a commitment to written law that was rarely matched in Africa or the Americas and never in Oceania or Antarctica. Written law has spread across Eurasia in all directions from the city of Uruk in Iraq. Spreading west, it flowered in the third century CE along the Tiber, forming the roots of Europe's legal tradition. Spreading east, it flowered along the Ganges during the last three centuries BCE, and along the Mekong and Irrawadi a millennium later. Since some Babylonian astronomical observations are preserved in the Chinese tradition, it is not beyond possibility that Mesopotamian written law influenced north China. How does this Eurasian preference for written law tie in with Eurasia's distinctive crops, livestock, diseases and technology?

Recently, geneticists and historians have been collaborating on a history of humans in Eurasia. Jared Diamond, William McNeill, Luigi Cavalli-Sforza and Steve Jones see Eurasia as the naturally-given object of study, and Europe merely as an ill-defined region within it.<sup>17</sup> Eurasia derived its strong competitive advantage over Oceania, Africa

<sup>17</sup> Jones, S (1996) *In the Blood: God, Genes and Destiny* London: HarperCollins; Diamond, J (1997) *Guns, Germs and Steel: The Fates of Human Societies* New York: Norton; Cavalli-Sforza, LL (2000) *Genes, People and Language* Seielstad, M (trans) New York: Farrar, Straus & Giroux; McNeill, WH (2000) 'A Short History of Humanity' (29 June 2000) *New York Review of Books* 9.

and the Americas from its distinctive resources, technologies and diseases. Diamond tracks the spread of technologies, such as writing and gunpowder, through Eurasia as a whole, not exclusively within Europe or Asia. He compares the epidemiological reach of German measles and Asian flu, and the consequences of introducing such germs to a non-immunised population. Cavalli-Sforza offers a genetic answer to the question of who Europeans are. Primarily, Europeans are the product of an interbreeding that started when Iraqi farmers, expanding northwestwards out of the fertile crescent from 6,000 BCE onwards, had children with the hunter-gatherers they met in Europe's forests. He maps four further levels of genetic diversity onto this basic model.

Epidemiology, linguistics and genetics provide appropriate models for comparative law. All three disciplines must shift focus from the individual to the population (that is, from facts about individuals to generalisations about populations) and back again. The whole village speaks Yiddish and Polish, but one member also speaks Hebrew and German. Nearly all the adult villagers carry antibodies for chicken-pox, but only one is resistant to measles. Two villagers are rhesus-negative, the rest rhesus-positive. In traditional comparative law the individual becomes the state legal system and the population the tradition to which it belongs. The Texan legal system, we might say, is an individual within the common law population, though in certain respects it speaks a different language from the Isle of Man legal system, and has been exposed to different germs than has the English legal system. If we prefer our comparative law postmodern, we can adopt Jacques Vanderlinden's radical legal pluralism.<sup>18</sup> Then we can speak of individual and population just as we do in linguistics and genetics. Everyone in the village is bound by the laws of Texas; some of them are also bound by different systems. One is a postman, subject to certain Federal regulations. One is a Buddhist monk, bound by the Vinaya. Another is a chartered accountant, subject to the discipline of his profession. A fourth recognises the ethical authority of a Rabbi based in far-off Brooklyn.

Certain patterns remain invisible unless we look at Eurasia as a whole. For example, Glenn apologises for the wholesale destruction by European colonists of those pre-literate cultures he calls 'chthonic'. If we limit ourselves to what Europeans have done to the rest of the world since the 17th century, that is all we see. Deepening the focus to Eurasia over the last two millennia, we see an endless war between ecosystems. Throughout Chinese, Indian and Southeast Asian history, the literate intensive farmers on the plain have tried to domesticate the pre-literate, slash-and-burn, dry-rice-and-millet cultivators of the mountains. This is called 'Sanskritisation' in India, 'civilising the barbarian tribes' in China, and 'spreading the dharma' in Buddhist Southeast Asia. The impact of this struggle on the *montagnards* (especially now that helicopter gunships have given the plains people the overwhelming advantage) seems no less than that of European colonialism on the Congo, on Papua-New Guinea, or on northwest Brazil. Through our wide-angle lens, it looks as if settled farmers have always tried to dispossess slash-and-burners and hunter-gatherers. The Europeans applied rather more guns and steel to the problem than their predecessors could spare.

My naïve dream is that once someone has written this *History of Early Law in Eurasia*, we will then be able to link the different forms which post-Uruk written law has taken throughout Eurasia to factors which are ecological, linguistic and perhaps even genetic. If we ever reached that stage, we could stop blushing whenever someone utters the phrase 'science of comparative law'.

<sup>18</sup> Vanderlinden, J (2002) 'Religious Laws as Systems of Law — A Comparatist's View' in Huxley, A (ed) *Religion, Law and Tradition: Comparative Studies in Religious Law* London: RoutledgeCurzon 165 at 178.

## On Galloping Horses and Picking Flowers: China, Chinese Law and the 'Asian Legal Tradition'

MICHAEL PALMER\*

Patrick Glenn's *Legal Traditions of the World* provides both a statement of general principles, focused primarily on the concept of tradition and its place in comparative analysis, and a series of characterisations of what the author sees as the major legal traditions of the world. In terms of population and geographical spread, the Asian tradition is the most substantial of these. At the centre of Professor Glenn's characterisation of that tradition is China. In introducing his readers to China and its traditions, the author offers a range of bold, provocative statements, useful references to current thinking about the role of Confucianism, and an interesting characterisation of imperial China's dominant ideology of Confucianism. But it is not clear to me that the analysis proffered by Professor Glenn adds *significant* value to our understanding of the Chinese legal tradition for the discourses of comparative law. Indeed, it may even detract, for reasons suggested below.

The central analytical concept in the comparative examination provided by the author is 'tradition', although the title of the book specifically refers to 'legal traditions'. Chinese society, both on the mainland and in its diaspora (not dealt with at all by Glenn, yet surely significant in the analysis of an 'Asian' legal tradition), certainly possesses both: it has much *tradition* and within that tradition there is a great deal of *legal tradition*. Indeed, many familiar with Chinese society and history are concerned that in China there is too much tradition, and that there is also an excessive concern with tradition — both general and specifically legal. Perhaps the most rigorously argued recent analysis in this mould is William Jenner's *The Tyranny of History*.<sup>1</sup> Writing in the wake of the brutal suppression of the pro-democracy demonstrators in June 1989, Jenner argues that China's history and sense of tradition have helped to create a profound general crisis in Chinese society:

today's objective problems, like the subjective ones that make their solution even more difficult than they would be otherwise, were created under two thousand years of bureaucratic absolutism. The history of tyranny is matched by a tyranny of history: perceptions and thought patterns from the past bind living minds [...]. China is caught in a prison from which there is no obvious escape, a prison continually improved over thousands of years, a prison of history — a prison of history both as a literary creation and as the accumulated consequences of the past. The essence of this prison is that there is no easy escape from pasts and the ways they are perceived, which restrict the present to a greater extent than most other cultures of the world are restricted by their pasts<sup>2</sup> [...]. Thus] Chinese high culture generally, and the Chinese written language in particular, have had an amazing power to standardize or to play down quirkiness, unorthodoxy and difference [...]. The main historiographic tradition has been one of impersonally

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<sup>1</sup> Jenner, W (1992) *The Tyranny of History* Allen Lane, The Penguin Press.

<sup>2</sup> Ibid at 1.

written history compiled by officials through processes that were essentially bureaucratic.<sup>3</sup>

Nowhere has the prison of history and historical consciousness been more imperative in Chinese society than in respect of China's law and legal institutions, where the written script was crucial for the operation of a 'formidable legal tradition that developed unbroken for some 2,300 years until the early twentieth century', and from which today's 'China has inherited the worst of the past' as well as 'losing the main defences against the abuse of judicial powers under successive dynasties: a judge's ability to be seriously punished if he fails to ascertain all the relevant facts in a case and the [obligatory] review of all sentences by higher judicial authorities' (129). All this historical consciousness and practice is reasonably congruent with Professor Glenn's understanding of a 'tradition' — and with reference to the modern period, to a corrupted tradition — but without the positive gloss that he tends to put on the concept. China shows that tradition possesses a dark side.

The characterisation by Jenner of the Chinese approach to tradition, including legal tradition, also points to a serious problem created by Professor Glenn's failure to tell the reader what it is that he understands to be the nature of a specifically 'legal' tradition.<sup>4</sup> The failure is particularly surprising in view of the title that has been chosen for the book. It is a title that proclaims that the focus of comparison is *legal* traditions. But the characterisation of the 'Asian (legal) tradition' lacks an effective distinction between tradition and legal tradition, and this results in an inadequate treatment of the key features of the Chinese legal tradition (or traditions). It is my view that this set of local difficulties has its foundations in the author's decision not to tell his readers what he understands to be law, either generally or in specific tradition contexts.

Professor Glenn primarily characterises the Chinese (legal) tradition in terms of Confucianism, even though he also reminds his readers of the existence of Legalist thought (especially at 304-18).<sup>5</sup> The historical reality is that after the fall of the Qin dynasty in 206 BC, a dynasty which had adopted Legalist ideas and institutions, Confucianism became the official ideology of the state and remained so through to 1911. From a political point of view, Confucianism was indeed the dominant tradition in the Middle Kingdom, and the characterisation that the author offers is ideologically sound when looked at from the point of view of successive Chinese emperors. But, as Professor Glenn himself acknowledges, a (perhaps *the*) core feature of China's *legal* tradition was the fusion of, and relationship between, Confucianism and Legalism. The Legalist institutions that China's post-Qin leaders chose to rely on heavily were often infused with Confucian values, but key Legalist norms also continued to play an important role.<sup>6</sup> And, for that reason, formal law, expressed though a number of distinctive Chinese terms including *fa*, *lü* and *xing*, was able to evolve into a clearly identifiable set of values, norms and institutions. It

<sup>3</sup> Ibid at 5.

<sup>4</sup> For example, in the case of 'chthonic traditions', we learn that law is often no more than a kind of undifferentiated social glue.

<sup>5</sup> On the nature of and the distinction between Confucianism and Legalism see, for example, Bodde, D and Morris, C (1967) *Law in Imperial China* Harvard University Press.

<sup>6</sup> It is also possible to identify various important so-called chthonic elements in this legal tradition, including, eg, scheduling important legal events such as trials, executions and amnesties in terms of Chinese beliefs and understandings of the natural world.

seems to me only to mislead the student of comparative law to characterise Confucianism as *the* Chinese (legal) tradition. Confucian values were pervasive in Chinese society, and constituted the official ideology of the imperial Chinese state, but they did not therefore amount to a specifically legal tradition. A tradition oriented towards a certain kind of socio-political order perhaps, but not a legal tradition per se.

Any exposition of the Chinese *legal* tradition surely has to take into account much more than does Professor Glenn the fact that for a pre-urban and pre-industrial society, imperial China developed a particularly sophisticated formal legal system. It was, as Jenner indicates above, the tool of an authoritarian state, and essentially punitive in ethos. But it possessed courts; regularly published and revised codes (which, in the distinction between statutes and sub-statutes, were more amenable to change than Professor Glenn perhaps allows); employed constables, legal specialists (working in the Board of Punishments, or as legal secretaries to local magistrates, or as 'litigation tricksters' whose activities in assisting parties were officially frowned upon but nevertheless tolerated); had a method of case law based on analogical reasoning;<sup>7</sup> developed a system for the obligatory review of cases to make sure that they had been handled correctly; allowed the publication of leading cases (at both the national and provincial levels); and possessed perhaps more civil law in the codes than allowed for by Professor Glenn — the main dynastic codes of law are often characterised as 'criminal' codes, with civil matters left to custom, but in reality what the codes did was to provide penalties for deviant conduct (including misconduct in civil matters such as marriage, divorce, loans, bailment and so on) so that it would be better to describe such law as 'penal' rather than criminal.

Moreover, much civil law could also be found outside imperial statutory law, in the form of customary norms governing such matters as the family (including family partition), marriage and polygyny, children, adoption, ritual succession and inheritance, land tenure, traditional organisations and their property, and commercial and financial transactions. Although customary law was significantly influenced by Confucianism, the author's acknowledgement of the importance of such law is tucked away in note 24 at 307, where can also be found an acceptance that archival evidence, as revealed and analysed in the work of Philip Huang, Katheryn Bernhardt, Mark Allee and others, indicates that 'resort to courts in family matters was more frequent, at least in recent centuries, than confucian theory would suggest'. Thus, the status and role of customary law as part of the Asian legal tradition as manifested in China are underemphasised in *Legal Traditions of the World*. The substantive rules, and the institutions — lineage councils, guild arbitration courts, and so on — that primarily administered them clearly represent a layer of ordering that comparativists would ordinarily think of as law. And China's strong literary tradition meant that such customary law was often expressed in writing. Although not the law of the state, the authorities nevertheless encouraged development of customary law and appreciated the benefits that such a system offered to the people and to the Chinese government.

It is in this apparent determination to characterise Confucianism as constituting the

<sup>7</sup> Analogical reasoning is nevertheless considered in the context of a number of other traditions, and is characterised as being 'fundamental and explicit in traditions which seek to limit, subtly, judicial creativity (as in talmudic, islamic and common laws)' (346). Its omission from Professor Glenn's China account is disappointing.



essence of China's (legal) tradition that we also find problems with Professor Glenn's attempt to rely on the Chinese case for identifying the core characteristics of an 'Asian Legal Tradition' — Asia being depicted as one of the three key players in the race to globalise (the West and Islam being the other two (51)). For it is assumed that China influenced other parts of East Asia and to a significant degree is 'representative' of Asia because of the spread of Confucian ideology way beyond its Chinese heartland.

The geographical location of this tradition is apparently very wide, at least in the tradition's 'default mode' (that is, the lowest common denominator of core characteristics). It includes more than one half of the world's population and stretches 'from Moscow (say) in the west (and, further south, Turkey, Israel and Saudi Arabia), through Pakistan and India, to Japan and the Philippines in the east' (301). So we end up with a vast category, one that includes half the world, but with little attempt made to justify the steady inflation of the role and importance of Confucianism such that it becomes the defining characteristic of the Asian (legal) tradition. The historical and social reality is, however, that Confucianism simply may not be characterised as China's *legal* tradition, and while Chinese Confucianism has certainly been influential beyond the boundaries of the imperial Chinese state, so too has Chinese Legalism, at least in the sense of codified law. For the Tang Code of seventh-century China not only had a great impact on subsequent Chinese statutory law, but also significantly shaped legal development in other East Asian societies:

both the *Code* and the *Statutes* were adopted by Japanese emperors intent on the reorganization of their government. Later, in the tenth century, Korean law was also influenced by the *Code*. And even as late as the fifteenth century, a large part of the *Code* was taken over either without alteration or only slightly modified by the Vietnamese Le dynasty. Indeed, it can be safely asserted that the *Code* has been the most single most influential piece of legislation to appear in East Asia [...]. Thus for some 1,300 years *The T'ang Code* has played the dominant role in East Asian law, a period of time rivalled only by the *Corpus Juris Civilis* in Western Europe.<sup>8</sup>

Great though the impact of China's codified law has been, the widest appropriate geographical unit within which this impact might be analysed is not more than 'East Asia'.

By failing to give sufficient attention to the specifically legal values, rules and institutions of the imperial Chinese state, the processes of legal reform initiated in China at the beginning of the 20th century are misunderstood. In the discussion of change, suddenly the principal geographical focus shifts to Japan,<sup>9</sup> only to revert to China for a brief paragraph<sup>10</sup> — a passage that overlooks, for example, the often highly technical work of the Supreme Court in reinterpreting Chinese law, in particular in the period between its establishment in the last decade of imperial rule and the introduction of the Republican Six Codes in the late 1920s and early 1930s.

The efforts at formal legal regulation — and to fuse socialist legality with Chinese

<sup>8</sup> Johnson, W (1979) *The T'ang Code, Volume 1, General Principles* Princeton University Press at 9 and 13.

<sup>9</sup> At 328. On the other hand, Japan is completely overlooked in the discussion on 'Rights and the Asian Tradition' (336-37).

<sup>10</sup> At 329.

cultural values — in the socialist liberated areas during the 1930s and 1940s by Judge Ma Xiwu and others are also overlooked as Professor Glenn rushes to emphasise the resistance of Chinese communism to ‘formal normativity’ (329). The post-1949 development of a socialist legal system is also dealt with clumsily. In effect, a distinction is drawn between socialist law per se — bluntly characterised as ‘a system with a hyper-inflated public law sector’ (330) — and Asian socialist law: ‘Asian communism is different because Asia is different, and there is less place for formal law in it, whether of socialist or capitalist tendency’ (331). In the case of China, ‘the Chinese communists originally followed Soviet models, for about a decade from 1949, until they realised how different things were and how they just couldn’t make Soviet institutions work in Chinese society’ (331). This confuses the short-lived political triumph of a faction within the Chinese Communist Party with cultural continuity, and overlooks the earlier experiments to adjust Soviet law to Chinese society. Indeed, the bureaucratism inherent in the Chinese ‘legal tradition’, as I would understand that concept, was one of the key problems that Mao railed against in his sponsorship of the Great Proletarian Cultural Revolution. The post-Mao legal reforms are characterised by Professor Glenn in largely negative terms, with an emphasis on the manner in which formal laws and legal institutions are ineffective and their application bedevilled by the continuing influence of the Chinese Communist Party. There is much truth in this characterisation, but the reader will notice that the ground has shifted, and that the author is now discussing specifically *legal* institutions. This is confirmed by the concluding observations made: ‘confucianism is meant to provide justice without laws; communist fa gives rise to discussion of laws without justice. You also can’t forget about corruption’ (336).

In a grand sweep of tradition and legal traditions of the kind so bravely attempted in *Legal Traditions of the World*, the comparative analyst will inevitably encounter some blind spots. Even China specialists often find it difficult to characterise Chinese law adequately for a comparative readership, as Victor H Li readily admitted in his study, *Law without Lawyers*:<sup>11</sup>

I will [necessarily] often oversimplify and overstate my case [...]. The Chinese have a very appropriate term to describe short surveys of the type attempted here: ‘looking at flowers from a galloping horse.’<sup>12</sup> That is, one cannot see the flowers very carefully from a galloping horse, and one would do much better getting off the horse for a closer look. Yet, fleeting as the view may be, to see flowers from horseback is better than seeing no flowers at all.<sup>13</sup>

While there is much to admire in the presentation of the Chinese (legal) tradition for the readership of this work, there is surely a point at which bold analysis and broad characterisation distort rather than inform, and in the Chinese case the analysis may well have reached that point. In the preface to the first edition, as reprinted in the second, Professor Glenn too offers advice to his readers:

<sup>11</sup> Li, VH (1977) *Law without Lawyers* Westview Press.

<sup>12</sup> In Chinese, *zouma kanhua* and often translated as ‘gaining a superficial understanding through cursory observation’.

<sup>13</sup> Li, VH *Law without Lawyers* supra note 11 at 1.

Since people may come to this book with different objectives, it can be read in a number of ways. If you are not so much interested in law, but interested in tradition and its relation to society, you can read only the first two chapters and the last chapter. You will pick up some law even in this process, particularly in the last chapter. If your interests are strictly legal (as you understand these things) you can read only the middle seven chapters, and if you are interested only in specific legal traditions, only the chapters relating to them (xxv-xxvi).

The problem for the reader interested in the Chinese legal tradition is that despite this advice, she or he will in fact get too much tradition and not enough law in the case of one of those middle chapters, namely the Asian (legal) tradition. More generally, Professor Glenn offers conceptual ambiguity and a concern with typology that undermines his attempt to introduce the student of comparative law to the 'Asian legal tradition', whatever that conceptual juggernaut might turn out to be, if indeed it has any meaning at all.

## Where Does Japan Belong?

SIAN STICKINGS\*

A puzzle for students of Japanese law is trying to identify just what is Japanese about it. Over the centuries, successive waves of foreign laws and legal systems have swept over what was there before. Has each wave (or any one of them) obliterated the past? Or are the pre-existing layers somehow preserved beneath for the canny legal explorer to identify?

Glenn's approach, seeking to compare legal traditions rather than laws or legal systems, generously allows a scope broad enough to include areas otherwise relegated to the category of cultural factors, such as the concept of Japanese legal consciousness, first articulated by Kawashima<sup>1</sup> and much debated since. This breadth of scope is liberating. It means that the answer to the question: 'where [among the world's legal traditions] does Japan belong?' is not necessarily to be determined either by the parentage of its laws and legal system, or by geography. Where, then, does Japan belong in Glenn's overview?

Glenn covers Japan in chapter nine, 'An Asian Legal Tradition', fashioning a niche for it within his discussion of China. In doing so, he follows the lead of most comparativists from David onwards; although this categorisation has been strongly rejected as 'meaningless' by Oda.<sup>2</sup> Glenn presents Japan within the Asian (essentially Chinese confucianist) legal tradition as an example of 'Western law in Asia'. Summarising the 19th-century reception of Western law into Japan, he concludes that 'two phenomena became visible. The first was the making-over ("Japanisierung") of western models in their actual operation; the second was the nesting of the entire concept of formal, civil law in the larger context of informal Japanese normativity. So you have today a civil code in Japan with very few lawyers, very few judges, and very few lawsuits, comparatively speaking. The restraint is clearly informal' (328).

Scholarly debate as to the significance of the 'very few' has continued for almost half a century. Are the Japanese in fact, 'comparatively speaking', unusually reluctant to litigate and, if so, why? Some parts of this debate are touched upon in Glenn's footnotes (though the name of Kawashima, usually credited as the founding father of the Japanese legal consciousness debate, is absent). Haley<sup>3</sup> challenged the assumption that Japanese litigation rates were extraordinary in an international (rather than a bipolar Japan-US) context, and he produced figures which demonstrated a lower rate for civil cases per head of population in Sweden, Finland, Norway and South Korea than in Japan. Haley and Upham<sup>4</sup> identified structural barriers (formal rather than informal, in Glenn's terms) to litigation in Japan; and Ramseyer<sup>5</sup> and others have since identified factors in the Japanese system which make it easier to predict the likely outcome of litigation, and thus provide an entirely rational basis for a decision not to litigate.

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<sup>1</sup> Kawashima, T (1963) 'Dispute Resolution in Contemporary Japan' in von Mehren, AT (ed) *Law in Japan: The Legal Order in a Changing Society* Harvard University Press 41.

<sup>2</sup> Oda, H (1999) *Japanese Law* (2nd ed) Oxford University Press.

<sup>3</sup> Haley, JO (1978) 'The Myth of the Reluctant Litigant' (4) *Journal of Japanese Studies* 359.

<sup>4</sup> Upham, FK (1987) *Law & Social Change in Postwar Japan* Harvard University Press.

<sup>5</sup> Ramseyer, JM (1988) 'Reluctant Litigant Revisited. Rationality and Disputes in Japan' (14) *Journal of Japanese Studies* 111.

A page or so earlier, and still within the chapter on 'An Asian Legal Tradition', Glenn describes the process of receptions of legal traditions more generally:

What is remarkable here is not the coming together or encounter of traditions, but their simultaneous preservation, layered in time but without prejudice to the survival of all. Receptions here don't end, don't become history. There have been many of them, and they just keep going on. The most recent in time have been those of western law and of socialist law. As in all receptions, however, the process is never a linear and unidirectional one (327).

It is difficult to apply this to the Japanese case. Nothing, or almost nothing, remains of the substantive or procedural law which existed in Japan prior to the 19th-century reforms. The formal Chinese legal imports — substantive, procedural and structural — of earlier centuries have not been preserved. They have indeed become history: a fascinating area of history, but history nevertheless. Whether a specifically Japanese (or perhaps East Asian) 'legal consciousness' persists in Japan is part of the debate I have referred to above. Layering is an insufficient image here: mapping on to different legal functions within a system or tradition might provide a way towards more meaningful comparisons. A difficulty for Glenn in exploring these important questions is a lack of clarity as to precisely what constitutes a 'legal tradition' for the purposes of this book, and whether it can or ought to be distinguished from a 'tradition' in general.

Japanese lawyers work within — and see themselves as working within — a legal system of Western European parentage. Glenn's explicit basis for placing Japan within the Asian legal tradition is what he calls the 'default position' (316) of an 'underlying common theme, that persuasion and models are the only viable means of social cohesion'. Rather than any aspect of the legal system itself, then, he relies for categorisation upon cultural assumptions which might motivate a Japanese individual not to consult one of those Japanese lawyers. Glenn asserts that this 'common theme' is 'reflected in the manner of expression of the law which exists' (not so, as far as this writer can see, in the case of Japan), 'and in the informal norms which are expected to dominate the formal law' (317) (arguably so in the Japanese case, in terms of the culturally determined preference for consensus rather than confrontation, elaborated by Kawashima). Other contributors comment elsewhere on the audacity of wrapping up the whole of Asia from Moscow to the Philippines in a single legal tradition; but even if only East Asia is included, how is 'legal tradition' to be defined in a way which is meaningful and allows us to privilege cultural assumptions above substantive and procedural law and legal structures?

In search of an answer to this question, one has to look to the opening and closing chapters of the book. The first two chapters contain some challenging arguments as to what constitutes 'tradition' and how we can consider and compare traditions. In the first chapter on a 'major legal tradition' (chthonic), Glenn makes clear his disdain for the question 'Does everything within the tradition constitute law?' (69): at least in chthonic tradition, he concludes, 'It just doesn't matter'. In the final chapter, Glenn explores his reasons for selecting as 'major' the seven legal traditions, which are the subjects of the central chapters. Of course, any attempt to parcel the world up into neatly identifiable segments is open to challenge, but the description of the 'major legal traditions' (355) as those which are 'internally complex [but] nevertheless maintain [...] some form of external coherence' does not take the argument very far as applied to the Asian legal tradition described in chapter nine. Thus, Asian normativity involves multivalent thinking which recognises that 'sub-traditions are not either right or wrong but may

be right in different, multiple (inconsistent) ways' (350). It is hard to apply this to the Japanese case.

The four issues to be explored with regard to each major tradition are listed in Glenn's Preface: the nature of the particular tradition, its underlying justification, its concept of change, and its relation to other traditions. These provide a robust framework for an analysis of the Japanese legal tradition. However, the 'big bundle' approach to Asian legal tradition almost totally excludes consideration of these questions as applied specifically to Japan, as space is found for Japan only within the fourth part of the chapter (in relation to other — ie non-Asian — traditions), with passing mentions elsewhere — some fascinating — to tie the Japanese situation into parallel with the Chinese. Because of this placing, we lose (with regret) the opportunity to consider, for example, the historical relation between Japanese legal tradition and the legal codes imported from China in the seventh and eighth centuries, explored by Steenstrup.<sup>6</sup> As already noted, these codes have not survived into present day Japanese law: but at the time they were received into Japan, to what extent did 'Japanisierung' take place? Did these imported concepts, too, 'nest within' informal Japanese normativity?

The last century-plus of Japanese legal history provides at least an arguable case for considering Japanese legal tradition within the chapter on civil law tradition. However, Glenn barely grants it a mention here — just a footnote, and once again at the very end of the fourth and final part of the chapter under the relation of the civil law to other legal traditions: 'So the civil laws of Europe [...] exercised more limited but still important influence in Japan, China and south-east Asia'. It seems that the structure of the book dictates that a legal tradition like the Japanese, which does not fit neatly within any one of the identified major legal traditions, can only be considered in the context of one of the four 'big questions' to be applied to each. Moreover, the generalist reader will be left (particularly from the past tense of the footnote just quoted) with the impression that Japanese legal tradition has survived essentially intact from some non-time specific age of Chinese influence, carrying along in its flow like a piece of flotsam a 'preserved' set of 19th and 20th-century imports from the West. This belies both the complexity and the continuing development of Japanese legal tradition.

Reading an all-encompassing overview like *Legal Traditions of the World*, every specialist will hope to find a place in the sun for her own particular field of interest, and will be disappointed if the allotted place is not the one she would have chosen. A place has been found for Japan, and a framework of powerful questions posed, but some remain unanswered.

<sup>6</sup> Steenstrup, C (1991) *A History of Law in Japan until 1868* Brill.



## Kindling the Debate on Diversity: Chapter Ten of *Legal Traditions of the World*

NICHOLAS HD FOSTER\*

The final chapter, 'Reconciling Legal Traditions: Sustainable Diversity in Law', is divided into three parts, dealing with the multiplicity of traditions, their reconciliation and their 'sustainable diversity'.

The argument set out in the first two sections runs as follows:

Identifying one tradition from another is difficult, but a common feature is their multiplicity (traditions have sub-traditions within them, such as the Islamic schools, and lateral traditions which 'run across' other traditions, such as casuistry).

Traditions are more or less imperialistic. Differences in degrees of imperialism derive from differences in internal normativity and the way in which normativity is reconciled with other traditions.

Normativity is 'a constant feature of [major] legal traditions' (348).

Major traditions are major because they are complex but deal successfully with that complexity. They 'achieve complexity because of their proven ability to hold together mutually inconsistent sub-traditions' (350).

The key to that success is multivalence. (Briefly, multivalence is the opposite of bivalence: bivalence divides the world into discrete categories; multivalence merges categories into each other.)<sup>1</sup>

A multivalent attitude allows not only the acceptance of internal traditions but other traditions as well. 'Complexity and interdependence necessarily characterise the relations between complex traditions as well [as between internal traditions]'. So: 'The larger and more complex the tradition, the less dangerous it is for others' (356). Indeed, 'they build real bridges. They don't just tolerate, they accept, in spite of difference'.<sup>2</sup>

In addition, complex traditions have no 'universalizable core' which would enable them to supplant 'all the law of the rest of them'.

Which leads to the third section, on sustainable diversity in law. Glenn states that multivalence provides stability for a tradition, but is also a limit on its expansion, because

\* Of the Editorial Board. Many thanks to Andrew Halpin for his helpful comments. The usual caveat applies.

<sup>1</sup> For a precise description of the concepts, see Andrew Halpin's contribution to this collective review at 120-21.

<sup>2</sup> In an interesting discussion, the author criticises tolerance, and advocates acceptance in its stead. He may go too far in his criticism of tolerance (it is a lot better, after all, than many other possibilities), but at least Glenn is directing us to a crucial issue.

the internal acceptance of conflicting sub-traditions leads to doubts about what should be expanded and why, and a recognition of the value which other traditions bring to the world. More importantly, and more plausibly, 'they each contribute to necessary diversity' (358).

This is a convenient point at which to pause for a moment and consider the validity of the arguments. One problem is that there seems to be a significant divergence between the author's claims and this reviewer's experience of reality. To take the example of the identification of major traditions, we have seen that the author's categorisation is problematic, to say the least,<sup>3</sup> but perhaps the gap is a result of difficulties in application rather than in the arguments themselves. Another problem is that to anyone with knowledge of a field such as colonial law reception, law and development or Islamic finance, or indeed to anyone who has ever done a transaction with a major US law firm, the idea of a non-imperialist, multivalent and accepting Western law tradition seems unrealistically rosy.

Some of these points are dealt with, albeit in a rather abstract way, in the section dealing with the sustaining of diversity. Two arguments are advanced. First, even a successful attempt to dominate is unduly expensive in terms of resources and suffering. Secondly, it is ultimately unsustainable, ie it isn't possible anyway. It is argued in addition that a policy which ensures the survival of different legal traditions also ensures the survival and potential enrichment of one's own. All these points are correct, but none of these arguments stop people from trying to impose their way on others if they are in a position to do so. The European Civil Code project is a good, and ironic, example. Europeans complain bitterly about United States hegemony, then try to ride roughshod over the common law.<sup>4</sup>

The third and final section of the chapter, and of the book, examines some examples: (i) the Rome Convention on the Law Applicable to Contractual Obligations; (ii) the case law of the European Court of Human Rights together with, in particular, the idea of proportionality; (iii) international development in the neo-liberal world order together with, in particular, the interaction between market freedom and governmental control; and (iv) the conflict between personal and state laws. The author argues that multivalence is the key to dealing with reconciling, accepting or, indeed, benefiting from, different traditions and concepts.

The same criticism can be applied to this section as to the first two. It is all very optimistic. Many would argue, including this reviewer, that it is unrealistically so. As with many other parts of the book, a stronger connection to the real world would have been useful in order to ground the more theoretical and general discussions. And, if Andrew Halpin is correct, on the technical philosophical front Glenn's approach is not credible.

The way forward may well, therefore, not be via mutual acceptance of tradition in the form suggested, or perhaps via tradition at all. Indeed, for this reviewer, the most promising part of the reasoning is not the approach to multivalence but the recognition of the ultimate cost and unsustainability of attempts at domination.

However, the issue of whether the author is right or wrong in his chosen solutions is much less important than the fact that, in a serious, sustained argument, rich in

<sup>3</sup> See the contributions to this collective review in this issue of Andrew Huxley at 158; Michael Palmer at 165; Sian Stickings at 171.

<sup>4</sup> See Legrand, P 'Antivonbar' in this issue at 13.

conceptual tools, he has addressed the potential contribution of comparative law to world peace. Regularly cited in introductions to the subject as one of the reasons for studying comparative law, then just as regularly neglected (in embarrassment?) as a topic for serious study, Glenn has had the courage and the originality to make this vital issue a central goal of his work, demonstrating a liberality of spirit which is heartening in today's post-Thatcher, uniformity-seeking and hegemonic environment. It is a spirit to which all comparatists will relate, but also one which is too easy to take for granted when working day in, day out with like-minded colleagues and students. We should not do so, for we need to convince those outside the relatively restricted circle of comparatists that a more open-minded attitude is not only laudable, but of great practical utility, and that comparative law is an essential part of that attitude. In this chapter, Patrick Glenn has taken the first step of starting the debate, providing an essential starting point for the attempt to persuade that wider audience.

# Internal and External Comparisons of Religious Law: Reflections from Jewish Law

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BERNARD S JACKSON\*

## 1 Religious Law in Comparative Law and Comparative Religion

The form which this contribution takes reflects the fact that I have already offered some comments on the significance of Glenn's work, in the context of a congress held in Bologna in July 2001 on the theme *Religioni, Diritti, Comparazione*.<sup>1</sup> That congress was divided into two parts. The first dealt with comparative law and posed the questions whether, how and to what extent insights from the comparison of secular law may be applied to the comparison of religious systems of law. The second part sought to address such issues from the standpoint of comparative religionists. It asked about the role of the study of religious law for the purposes of comparative religion. The combination of these two themes is, in my view, an important element in any study of religious systems of law. It is fully compatible with the concept of law as tradition; indeed, I would suggest, the very notion of tradition demands an interdisciplinary approach going beyond even that of a non-positivistic<sup>2</sup> comparative lawyer.<sup>3</sup>

As I approached the Bologna 2001 congress, I had on my desk both the first edition of Glenn's *Legal Traditions of the World* and Jacob Neusner and Tamara Sonn's *Comparing Religions through Law, Judaism and Islam*.<sup>4</sup> The very titles of the two books indicate the differences between their respective agendas. Glenn is a comparative lawyer, not concerned primarily with religion. Neusner and Sonn have an agenda of comparing

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<sup>1</sup> Published as Jackson, BS (2002) 'Comparazioni interne ed esterne di ordinamenti giuridici religiosi: la prospettiva del diritto ebraico' (2) *Daimon. Annuario di diritto comparato della religioni* 257. The present version adds to the text further general evaluation, and supplements the footnotes with comments on particular issues where I would dissent from Glenn's formulations.

<sup>2</sup> As where Glenn argues, at 53, that a state or national legal 'system' is only an institutionalised recognition of the ascendancy of a particular tradition at a particular time, which is unlikely to have obliterated other, competing traditions even within its territory.

<sup>3</sup> Despite the analytic difficulties in defining the object of study, as discussed by Twining in his contribution to the collective review of Glenn in this issue at 107.

<sup>4</sup> Neusner, J and Sonn, T (1999) *Comparing Religions through Law, Judaism and Islam* Routledge. See also Neusner, J, Sonn, T and Brockopp, JE (2000) *Judaism and Islam in Practice. A Sourcebook* Routledge.

religions — Judaism and Islam — but choose to do it through the treatment by these two religions of ‘law’. It is certainly the case that Neusner and Sonn’s interest in law is far more substantial (it centrally defines their project) than is Glenn’s interest in religion. For despite the fact that the legal systems which Glenn compares include Jewish, Islamic and Hindu laws, the religious character of these legal systems is far from central;<sup>5</sup> rather, the theoretical framework which he uses is that of a theory of traditions, defined in such a way<sup>6</sup> as to make the very notion of a ‘religious tradition’ somewhat problematic.<sup>7</sup> We might wonder whether there is anything structural in this imbalance (a claim that law is more central to comparative religion than religion is central to comparative law), or whether these emphases simply represent choices made by the respective authors.

In fact, Glenn aspires to a particular methodological advantage through his use of a theory of traditions. He wants to be able to transcend the basic methodological dilemma which, in his view (and probably rightly), afflicts comparative law, and which others might judge may be relevant equally to the comparison of religions: namely, the tension between internal and external points of view.<sup>8</sup> That dilemma may be summarised thus: if we adopt an external point of view in comparing phenomena from each system, we may fail the test of authenticity;<sup>9</sup> our claims may turn out to be meaningful in terms of the external criteria we choose to apply, but may lack meaning for those internal to the system being described. On the other hand, if we choose to describe each system exclusively in

<sup>5</sup> For Jewish law (87), the religion manifests itself in the traditional perception of the law’s source in divine revelation, which transformed the Jewish legal tradition (from its assumed chthonic roots) and may have an effect on exegesis: see notes 39-40 below.

<sup>6</sup> I do not enter here into consideration of the role which pluralist ideological preferences play in Glenn’s theoretical structure.

<sup>7</sup> His conception of religion appears to focus on institutional power structures rather than belief systems, and therefore to fall outside his conception of law as tradition: as a force towards domination, religion operates essentially against the nature of tradition. At 50, Glenn asks whether some types of tradition lend themselves more easily to intolerance and domination, and in particular whether religious traditions do so, in that they ‘teach one large truth’ (even though ‘many religions appear to be tolerant ones’). Tradition, on the other hand, represents (merely) persuasive authority; in itself it lacks authoritativeness. Tradition is information, and information itself ‘as distinct from how it is used’ is not dominating (45, 49). But can one really identify tradition with the semantics, to the exclusion of the pragmatics, of a culture? Glenn concedes that ‘tradition as information cannot be entirely divorced from the way it is used’, but within the context of a binary opposition between conceptions of tradition as ‘a major contribution to domination in the world’ or as ‘entirely innocent’ (Glenn favours the latter: ‘So the essential nature of tradition should mean that it is innocent of domination, since it is tolerant of different views’). The notion of a ‘religious tradition’ is thus problematic in that ‘The major question appears to be the extent to which a tradition teaches truths, or a truth, which must be respected, and by everyone. If it teaches this, it will also teach, explicitly or implicitly, that its truth should dominate. Now, there may be traditions which have such teachings, or (and this appears more likely) there may be such teachings within traditions, but there is something in this idea which is not entirely compatible with tradition as we have been discussing it’. In this context, the absence in the Jewish law chapter of an account of the modalities used within the halakhah (see note 16 below) is unfortunate. See also Andrew Halpin on multivalent logic in the collective review of Glenn in this issue at 120-21.

<sup>8</sup> On whether he succeeds in doing so, see Gordon Woodman’s contribution at 123 and Werner Menski’s contribution at 153 in this issue.

<sup>9</sup> For Glenn’s notion of authenticity, see 38ff: ‘So the identity of a tradition is an elusive concept, and is perhaps best thought if in triptych form. There is the overall identity of the tradition, that which constitutes its total information base and which includes both internal dissenting and external contrasting elements. There is what has been earlier described as the “leading” or “primary” version of the tradition, that which, at any given time, appears accepted as its truest version. And there is finally the “underlying”

terms internal to it, it may turn out that there is no *tertium comparationis*.<sup>10</sup> We may end up juxtaposing authentic views from each tradition, but such a juxtaposition may lack comparative value. Indeed, a particular aspect of this problem is explicitly addressed by Glenn. He rejects the view that legal traditions are 'incommensurable' or 'untranslatable' (47f) one into another (while conceding particular difficulties in relation to the religious character of Jewish law),<sup>11</sup> but denies that there is some objective external viewpoint.<sup>12</sup> Rather, he wants to claim, it is the common working out of the processes of tradition, within each tradition, which provides the basis of comparison. I think that we can agree with Glenn's strategy, even if we do not accept his particular manner of implementation. That strategy, broadly, is to seek (what his theoretical position claims<sup>13</sup> are) common processes within all cultures, and then to compare the particular manifestations of those processes within particular cultures.<sup>14</sup> Those common processes are understood in terms of information flow. But, there is no reason to exclude from the information which flows within each tradition information of a normative character<sup>15</sup> (information which makes normative claims).<sup>16</sup> Glenn could, therefore, have had his positivist cake and eaten it, had he wished. In this paper, I shall outline a different, and seemingly more inclusivist version of such a strategy, based upon semiotics.

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or "basic" elements of tradition, those without which no other elements of the tradition could stand'. At note 21, he accepts a qualification on the notion of 'truest': 'There will always be questions, however, of whether there is any such true version at a given time, and the adherents or participants may disagree profoundly as to the content of the true version. As a defence against this, traditions may expressly adopt a notion of the tradition as presently defined by an agency of the tradition itself'.

<sup>10</sup> Cf William Twining in this issue at 113.

<sup>11</sup> Thus, at 102: 'If you want to learn a little more of the talmudic legal tradition, however, you will begin to experience its particularity and the profound ongoing role which Jewish faith continues to play in its operation. It doesn't (for example) have the same role as western law, it doesn't read like western law, it isn't studied like western law and ultimately it is not structured like western law. So we have to look beyond some immediate similarities and try to understand some profound differences. This might not be easy, in what is here an inevitably cursory way. It might be better off spending 20 or 30 years at it, or more, from inside'.

<sup>12</sup> At 44-48. Whether he is consistent here, even at the theoretical level, may be questioned. At 34, he writes: 'Since tradition is best defined as information, however, the (slightest) contact with another tradition implies a variation in the information base of the initial tradition. Its overall identity is no longer what it was, in the sense that the totality of information available to it has expanded. The bran tub is larger'. And at 38: 'The conclusion that tradition is the controlling element determining social identity means that there are no fundamentally different, totally irreconcilable social identities in the world'. These formulations imply a totally external criterion, irrespective of internal conceptions of the construction of identity, even if we accept (at 15) that the pool of information captured by the adherents of a particular tradition cannot be entirely controlled by the tradition itself.

<sup>13</sup> 'The conclusion that tradition is the controlling element in determining social identity means that there are no fundamentally different, totally irreconcilable social identities in the world. Each is constituted by tradition and all traditions contain elements of the others' (35).

<sup>14</sup> This is William Twining's 'different reading' (in this issue at 108) that 'the chapters on particular traditions should be viewed as concrete illustrations and elaborations of a central argument that presents a radical — and potentially controversial — vision of law in the world and of the enterprise of comparative law' (rather than a superior form of 'Cook's tour').

<sup>15</sup> Including information relating to legal institutions, whose omission is noted also by John Bell in this issue at 130; William Twining in this issue at 107.

<sup>16</sup> Of particular interest here are the differences between legal traditions as regards the construction of their normative categories. On the modalities of Western, Jewish and Islamic law, see Jackson, BS (2002) 'Judaism as a Religious Legal System' in Huxley, A (ed) *Religion, Laws and Tradition. Comparative Studies in Religious Law* RoutledgeCurzon 34 at 43f. Glenn adopts an entirely non-juridical conception of the



Yet despite the overall merits<sup>17</sup> of Glenn's general strategy, its implementation in relation to the 'talmudic legal tradition'<sup>18</sup> is severely flawed — inevitably so, given the author's apparent lack of access to the primary sources. Despite his (or his team's) wide reading in the (English-language) secondary literature, what emerges is a 'tertiary' account,<sup>19</sup> in which material, sometimes dubious<sup>20</sup> or not properly understood,<sup>21</sup> is mined from secondary writers, irrespective of their own particular agendas, and given a spin to fit with the overall thesis here proposed, namely the transition from a chthonic to a revelational system.<sup>22</sup> Indeed, the very distinction between internal ('traditional') and external (academic) accounts of the history of the system gets elided in the process. Thus, the revelation to Moses is treated as a historic, datable event (93), and the Talmud is described as a 'repository of almost two millennia of legal discussion' (96). Glenn is far from unaware of the problem. He writes: 'revelation may or may not have occurred, the important thing is whether a lot of people, in an ongoing manner, have taken it as occurring. Talmudic law can therefore be studied as, say, sociology, or as a somewhat looser form of positive law, even as economics' (103). Yet Glenn seeks to derive strong *historical* claims from the tradition: even that 'the law of the Jewish people may be seen as originally chthonic, in its form prior to Moses' (92), despite the fact that not even the tradition, let alone modern historical scholarship, provides any substantial basis for any 'law of the Jewish people' in the pre-Mosaic period. In some respects, Glenn's overall thesis might have been better served by recourse to modern scholarship, which stresses the historical development of Jewish law,<sup>23</sup> as well as by greater familiarity with the

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normativity of information (despite his terminology), when he writes (at 40): 'If tradition is information, then the tradition which attracts the most adherence will be the one whose information is the most persuasive'.

<sup>17</sup> I concur, however, with others in this collective review who complain at the lack of precision in Glenn's formulation of his theory of traditions.

<sup>18</sup> On the choice of 'talmudic' as the adjective identifying the Jewish legal tradition, see note 27 below.

<sup>19</sup> Cf Werner Menski's critique of his account of Hindu law in this issue at 153.

<sup>20</sup> Thus, on the continuity of tradition, he claims (94) that throughout the whole period from Moses to the destruction of the First Temple 'people studied the written Torah, talked about it and remembered its teaching'. But the Hebrew Bible itself denies such continuity. See, for example, *Jeremiah* 34, and many other criticisms of significant lapses in both knowledge and observance of the tradition. There are also some gross errors: at 94 we are told that after the emergence of the Oral Torah, 'we now have three Torahs altogether, an all-encompassing Torah, a written Torah, and an oral Torah', and that the Jewish people lost sovereignty in the sixth century BCE to the Babylonians and did not recover it until 1948 CE (ignoring completely the Hasmonean dynasty of the Second Commonwealth period).

<sup>21</sup> Thus, at 97 'the talmudic tradition is thus one which is defined by its sources, which are both divine and written and in no way dependent on what is called elsewhere decisional law or case law or jurisprudence'. But the Talmud itself records instances of decisional law and often attributes authority to them.

<sup>22</sup> An *a priori* claim at 61 ('Since all people of the earth are descended from people who were chthonic, all other traditions have emerged in contrast to chthonic tradition'), with which Gordon Woodman also finds difficulty (see his contribution to this volume at 123).

<sup>23</sup> His stress on orality as a feature of chthonic law (at 61-65) would have been better pursued in the context of the movement from orality to literacy within the biblical period: see Jackson, BS (2000) *Studies in the Semiotics of Biblical Law* Sheffield Academic Press passim, and Jackson, BS (2006) *Wisdom-Laws: A Study of the Mishpatim of Exodus 21:1-22:16* Oxford University Press, where support will be found in the biblical context for Glenn's conception of chthonic orality as (i) transmitted through 'oral education, in daily life, and the dialogical character of the tradition is a matter of daily practice' (63); (ii) not lending itself to complex institutions (63); and (iii) characterised by informal processes of dispute resolution (64) in which the law 'is immediately applicable, by adjudicators and preferably the parties themselves' (65).

primary texts of the tradition itself.<sup>24</sup>

The approach of Neusner and Sonn is far less theory-driven, but also seeks to use internal viewpoints in support of an external agenda. But here the methodological problems are less substantial: Neusner and Sonn are not constrained to a single-chapter summary, and they do have access to the primary sources. The Jewish side is written by a leading Jewish scholar (Neusner), the Islamic side by a prominent Islamicist (Sonn). They each seek to speak as far as possible from the texts of their respective traditions; indeed, Neusner is well known for his insistence on the identification of the philosophical voice not simply of different traditions, but of individual texts within those traditions. The topics which Neusner and Sonn address might indeed be derived from some conception of the common processes of legal systems: 'The Authoritative Legal Documents of Judaism and Islam', 'The Intellectual Sources of the Law', 'The Working of the Law: Institutions', and 'The Working of the Law: Personnel'. In these chapters, the emerging picture is largely one of similarities. They then go on to consider differences under two headings: 'Disproportions' and 'Unique Categories'. Under 'Disproportions', they ask about centres of emphases, topics on the agenda of religious legal systems which are particularly stressed. They find that such stress in Judaism rests upon temple law and sacrifice, but in Islam on slave laws. The notion of sacred time in Judaism provokes an emphasis on the sabbath, in Islam on pilgrimage. Then, under the heading of 'Unique Categories', they stress the significance of the land in Judaism, as against that of *jihad* in Islam. They maintain, problematically in my view, that it is in these differences that 'religions find their definitions, their distinctive qualities' (viii).<sup>25</sup>

One might, perhaps, seek a theoretical explanation, even justification, for the combined approaches of these two books, in which the comparative lawyer tends to privilege similarities in process (de-emphasising or even excluding religion from consideration), while the comparative religionist, even when focusing on law, is more attentive to differences. It could be argued (and has been argued by some) that legal systems are fundamentally similar to each other, and indeed admit of systemic historical

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On the other hand, any imposition of the 'cosmic' aspects of chthonic law on the early Jewish tradition appears to derive entirely from the universalism Glenn claims for the concept (see *supra* note 22). See also Gordon Woodman at 123 and Andrew Huxley at 158, both in this issue, for a critique of this and the post-colonial aspects of Glenn's definition of 'chthonic law'. Glenn's invocation of a concept of 'natural obligation' in talmudic law, designed to link the talmudic tradition to a chthonic predecessor (102), is highly dubious. There is an extensive literature on Jewish attitudes to natural law, much of it rejecting the concept entirely. On the chthonic concern with land, see note 84 below.

<sup>24</sup> See the famous account of the 'chain of tradition' in *Mishnah Avot* 1:1 (using the verb *kibel*) and the institution of *kabbalah* (in its original, non-mystical sense), as discussed by Elon, M (1994) *Jewish Law, History, Sources, Principles* (Vol I) Jewish Publication Society at 238 (where it is treated as fundamentally different from other sources of Jewish law, as 'inherently not amenable to development').

<sup>25</sup> See further Jackson, BS (2003) 'Comparing Jewish and Islamic Law' (48) *Journal of Semitic Studies* 109. Glenn devotes little attention to substantive legal institutions in his account of the talmudic legal tradition, and commits himself, whether from conciseness or misunderstanding, to some misleading statements. Thus, we read that: 'Family law is largely consensual in character, the religion exercising no formal or bureaucratic control over familial relations' (100). See, however, S3 below. At 100, we read that the law of inheritance does not recognise a principle of free testamentary disposition. See, however, *Mishnah Baba Bathra* 8:5 'If a man assigned his goods to others and passed over his sons, what he has done is done, but the Sages have no pleasure in him. Rabban Simeon b. Gamaliel says: Yet if his sons had not behaved aright, it should be accounted to his credit'. Greater attention to the post-talmudic history of Jewish law would reveal the processes by which gifts in contemplation of death became, in effect, barely distinguishable from modern wills.

inter-relationship. I am thinking here of a theory such as that of Alan Watson in his book, *Legal Transplants*,<sup>26</sup> and later works (a theory, as it happens, to which I do not subscribe). Law, it may be argued, is the regulation of conduct in the public sphere whereas religion takes more account of the experience of the individual, including that sphere which may be regarded as the most private of all: the spiritual. When, therefore, law is addressed from the viewpoint of the comparative religionist, rather than the comparative lawyer, we may expect a stress upon those aspects of law which address particularly this intimate, spiritual sphere.

However, the very use of terms such as 'Jewish law'<sup>27</sup> and 'Islamic law', even of the notion of 'religious systems of law', simply begs the vital questions. Judaism is a culture encompassing both a public sphere and a private sphere. Islam is the same. Judaism has the halakhah. Islam has the shari'a. There is struggle within each of these cultures over the appropriation of the halakhah/shari'a to the spheres of the public or the private. Should they be viewed as law or as religion? Are these categories mutually exclusive? Clearly not. Are particular aspects of the halakhah and shari'a exclusively attributable to one or the other? Probably not. Are there tensions regarding the significance (public or private) to be attributed to particular rules within each tradition? Almost certainly, yes. A major instance of this is manifest today in the debate over the incorporation of the halakhah within the law of the modern state of Israel.<sup>28</sup> There are those who say that, even though the halakhah contains major sections corresponding to the agenda of modern secular legal systems (that which we refer to as *mishpat ivri*), the very attempt to give them the authorisation of a secular state and to administer them through agencies so authorised, and even more so the attempt to make them subject to forms of public

<sup>26</sup> Watson, A (1974) *Legal Transplants* Scottish Academic Press.

<sup>27</sup> Glenn's use of 'talmudic' to characterise the Jewish legal tradition (the halakhah) reflects a number of choices which are problematic, both for his own and other purposes. The Talmud is indeed emblematic of Jewish law, and commonly the centrepiece of study in *yeshivot* (rabbinic academies). But it is neither the beginning nor the end of Jewish law. Glenn (here adopting an internal Orthodox viewpoint) views the Bible through talmudic eyes, as where (at 98) *Exodus* 18:26 is cited for the proposition that talmudic law 'has thus long known formal courts'. Conversely, little if any attention is paid to the post-talmudic development of Jewish law, in the periods of the Geonim, Rishonim and Aharonim (*responsa* are mentioned — and treated as a singular noun). Moreover, though the Talmud may be the most famous literary source of Jewish law (hence its usefulness for a theory of tradition based on information), it is also an important legal source — a distinction overlooked by Glenn, despite its centrality to the leading modern treatise on Jewish law, that of Elon, M (*Jewish Law* supra note 24). On its significance within the authority structure of the halakhah, see note 67 below.

<sup>28</sup> Glenn writes (at 115 note 102): 'Talmudic teaching includes a notion of apostasy, without apparent discussion of sanction for the act of apostasy itself, though the Supreme Court of Israel has determined, in a majority opinion, that the apostate can no longer benefit as a Jew from the Law of Return, 1950'. In fact, post-talmudic sources do set out the sanctions for apostasy. Glenn cites the *Rufeisen* ('Brother Daniel') case of 1962 in a manner which may mislead readers to believe that the Supreme Court of Israel was seeking in that case to apply talmudic (rather than secular, Israeli) law. In fact, the later jurisprudence of the Israel Supreme Court on this matter does cite and seek to rely upon post-talmudic sources. See Elon, DP (1987) in *Beresford and Another v Minister of the Interior* PD 43(4) 793, translated in Sinclair, DB (ed) (2000) *Law, Judicial Policy and Jewish Identity in the State of Israel* Global Publications (Jewish Law Association Studies XI) 27, and Sinclair, DB (1992) 'Messianic Jews and the Law of Return' (X) *The Jewish Law Annual* 259. On the *Rufeisen* case, see Jackson, BS (1993) 'Who is a Jew?: Some Semiotic Observations on a Judgment of the Israel Supreme Court' (VI) *International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique* 115; Jackson, BS (2005) 'Secular and Religious Constructions of Jewish Identity and Jewish Politics in the Law of the Modern State of Israel' in Filoramo, G (ed) *Teologie Politiche. Modelli e confronto* Morcelliana 263.

accountability deriving from a secular ideology of the Rule of Law, is tantamount to desacralisation. This theory of desacralisation has been much criticised by modern orthodoxy. I do not think we need to see it in metaphysical terms. We can reduce it, if that is an appropriate term, to the proposition that the halakhah, even in these spheres, cannot be separated from private religious experience.

Of course, both Judaism and Islam provide institutions which, from a Western point of view, might appear to be 'public'. I have myself commented on this issue in respect of the Jewish *Bet Din*, which I maintain does *not* function like a Western court of law, and exists essentially in the sphere of the private, rather than the public.<sup>29</sup> Public institutions — other, perhaps, than those of education, which commence informally, in the home — are required only when things go wrong. We might ask how should we conceive of the rules of civil law in both Judaism and Islam, when things do not go wrong, but rather when the observer, with knowledge of his or her halakhic obligations, fulfils them? The halakhah, for example, has an elaborate body of property and commercial law. Suppose that property is transferred through an ordinary transaction of sale, involving transfer of title by one of the processes known as *kinyan*. From a comparative law point of view, we might say that there is nothing particularly religious about this. The individual has fulfilled the conditions of a rule, which, should the matter ever be disputed, will be recognised and applied by the public institutions of that system. But, put that proposition to the observant Jew not versed in law or legal philosophy, what might he or she say? 'I have performed a *mitsvah*: I have done God's will, and I thereby derive an inner religious satisfaction from so doing.'<sup>30</sup> In short, there is a private religious experience bound up with this very mundane secular act. That might, indeed, lead to interesting questions within comparative religion: is the inner satisfaction of performance of a divine command a religious experience in itself, or is the satisfaction, which is part of that religious experience, necessarily bound up with questions of (further) reward?<sup>31</sup> The classical issue of justification by faith or works may be inserted into such a debate.

But all this may be regarded as far too simple. I have been trying to understand why religion appears as a minor category for some comparative lawyers (notably, Glenn), for whom commonalities of process seem the dominant theme, and why law — though seemingly a major concern of at least Judaism and Islam — ought nevertheless to be viewed as a problematic concept for the comparison of religion, insofar as the distinctive features of religion are those which address the private religious experience of the individual. Or, to put the same point a little differently, to what extent does the study of 'religious systems of law', even when concentrating on their 'public' aspects, reflect an 'external' rather than an 'internal' point of view, involving the imposition of categories derived from Western, secular systems, with very different ideological presuppositions?

I maintain that it does commonly involve such an external point of view. I shall try

<sup>29</sup> Jackson, BS (2001) 'L'ebraismo come ordinamento giuridico religioso' (1) *Daimon. Annuario di diritto comparato della religioni* 165 at 175.

<sup>30</sup> Cf Schleiermacher's understanding of piety: 'The piety which forms the basis for all ecclesiastical communions is considered purely in itself, neither a Knowing, nor a Doing, but a modification of Feeling, of immediate self-consciousness' — quoted by Rasmussen, DM (1971) in *Mythic-Symbolic Language and Philosophical Anthropology. A Constructive Interpretation of the Thought of Paul Ricoeur* Nijhoff at 129, from Schleiermacher, F (1928) *The Christian Faith* T and T Clark at 5.

<sup>31</sup> The issue, of course, is more complex than depicted here. See S4 below for Soloveitchik's insight on this.

to illustrate this, primarily from two case studies in Jewish law: first, its approach to analogy (reflecting its conception of the language of religious law); secondly, the problem of the 'chained wife' (reflecting Jewish law's approach to the resolution of disputes on the basis of halakhic rules).<sup>32</sup> In the course of these case studies, I shall stress not the methodological problems in the comparison of religious systems of law, but rather some methodological opportunities presented by both semiotics and legal philosophy. I shall then offer a taste of a very different discourse, that which addresses the religious meaning of (observance of) the halakhah — an 'internal' approach, in more senses than one.<sup>33</sup>

## 2 Analogical Reasoning

Theories of argumentation may be regarded as a sphere in which we might anticipate a more direct engagement between law and religion at the comparative level. They exist in the public sphere and they are manifest in the decisions of courts and the writing of jurists in justification of decisions, particularly when things do go wrong. We might ask whether there is any essential difference between legal argumentation in religious and secular legal systems. At the same time, we must be aware of the methodological problem, as elaborated above: can we identify some *tertium comparationis*, which is both universal and capable of articulation in neutral terms?

In a recent paper,<sup>34</sup> I have addressed this issue in relation to the notion of analogy. My starting point was the distinction drawn between (Roman-based) Western law and Islamic law by Joseph Schacht, who described the former as 'analytical' and the latter as 'analogical'.<sup>35</sup> Some have suggested that such a distinction can be correlated more generally with that between secular and religious legal systems, the former tending to the analytical, the latter to the analogical. Indeed, in the 19th century, a particular developmental spin was put on this by Sir Henry Maine, in his famous *Ancient Law*, where he wrote:

Unhappily there is a law of development which ever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that usage

<sup>32</sup> An area where Glenn's account is particularly weak.

<sup>33</sup> The very meaning of the title of my paper changed, somewhat, in my own mind, in the course of writing. By the contrast between 'internal' and 'external' comparisons, I had intended simply to refer to differences imposed by the external agenda of an academic (perhaps imposing a *tertium comparationis*) and the sense of the system as constructed from the inside. However, the very juxtaposition, in the programme of the Bologna meeting of July 2001, of comparative law and comparative religion perhaps gives this very distinction between the internal and the external a slightly different sense. A 'legal' approach is predominately 'external', insofar as it is concerned with the regulation of external behaviour. An 'internal' approach, by contrast, is closer to the concerns of religion, insofar as the latter deals with the internal religious experience of the believer.

<sup>34</sup> Jackson, BS (2001) 'A Semiotic Perspective on the Comparison of Analogical Reasoning in Secular and Religious Legal Systems' in Soeteman, A (ed) *Pluralism in Law* Kluwer 295.

<sup>35</sup> Schacht, J (1966) *An Introduction to Islamic Law* The Clarendon Press at 208; Schacht, J (1974) 'Law and the State — (a) Islamic Religious Law' in Schacht, J and Bosworth, CE (eds) (1974) *The Legacy of Islam* (2nd ed) Oxford University Press at 397.



which is reasonable generates usage which is unreasonable. Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy. Prohibitions and ordinances, originally confined, for good reasons, to a single description of acts, are made to apply to all acts of the same class, because a man menaced with the anger of the gods for doing one thing, feels a natural terror in doing any other thing which is remotely like it. After one kind of food has been interdicted for sanitary reasons, the prohibition is extended to all food resembling it, though the resemblance occasionally depends on analogies the most fanciful.<sup>36</sup>

It is clear that Maine was thinking of dietary and purity laws like those in *Leviticus* (though his primary context here is Hindu law), and that he took analogy ‘in the infancy of society’ (a state at which he believed that law and religion were inextricably intertwined) to be particularly prone to the misguided application of analogy in the definition of behaviour subject to divine punishment. In making a distinction between the role of analogy at the ‘infancy’ and the ‘maturity’ of society, he perhaps anticipated some aspects of the 20th-century theory of cognitive development, which, I shall suggest, may prove to be of assistance to us. But, in common with much 19th-century evolutionary jurisprudence, Maine erred not in the concept of development, but rather in its application.<sup>37</sup>

The thesis that there is a correlation between secular and religious legal systems on the one hand, and forms of argumentation on the other, can, in my view, be based on much firmer ground. Western legal systems are dominated by the ideology of the Rule of Law, one of whose supreme values is public accountability. Public accountability depends upon the demonstrability of the human forms of reasoning employed in it. By contrast, religious systems of law, and particularly that of Judaism, are justified ideologically not on the basis of the Rule of Law, but rather the Rule of God, mediated through inspired texts and inspired people.<sup>38</sup> If God is the draftsman of the sacred texts,<sup>39</sup> and the interpreters of that text are authorised by, if not inspired by, God, then there is no need

<sup>36</sup> Maine, HJS (1906) [1861] *Ancient Law* (10th ed by Pollock, F) Murray at 16-17. For his views on law and religion in the wider context of his evolutionary thought, see Jackson, BS (1991) ‘Law and Language: A Metaphor for Maine, A Model for his Successors?’ in Diamond, A (ed) *The Victorian Achievement of Sir Henry Maine* Cambridge University Press 256.

<sup>37</sup> Glenn’s work, which William Twining rightly associates with this tradition (in this issue at 108), also requires evaluation in this respect. Despite some universal claims which he appears to be prepared to make *a priori* (see *supra* note 22), his generalisations derived from his theory of traditions are often subject to local variation, as where he writes (at 21f): ‘In any theoretical statement of the nature of tradition it therefore seems impossible to state that some forms of information have necessary priority over others, in all traditions, or that some actors in the exchange necessarily have more influence than others. There is no necessary hierarchy in tradition, either in terms of information or in terms of adherents. The informational exchange of tradition is in principle horizontal; deviations towards the vertical will be the product of particular traditions and the reasons which have prevailed in that tradition’. Theory can, indeed, generate useful hypotheses for the interpretation of particular systems. But at what point do ‘local exceptions’ challenge the general theory? See also the observations of Gordon Woodman on Glenn’s generalisations, at 125 in this issue.

<sup>38</sup> For an example of the tension between those two concepts, see S3 below, and see further Jackson, BS ‘L’ebraismo come ordinamento giuridico religioso’ *supra* note 29 at 170-75.

<sup>39</sup> Glenn recognises, at 104, that revelation cannot be read out of the picture by the ongoing force of tradition, since the tradition ‘has been scripted by the Perfect Author. Indeed, ‘Revelation trumps tradition’.



to be restricted to the forms of demonstrability which may appeal to the conventions of Western logic.<sup>40</sup> In particular, I argued, Jewish law makes use of forms of analogy which are not based upon substantive similarity between the comparanda, nor upon the possibility of articulating common propositions within which each instance may be subsumed, but rather upon similarities in expression, encompassing both common terminology and features of the arrangement of sacred texts (for example, chiasmus in the Bible) which would have no significance in secular legal reasoning.<sup>41</sup> In the world of divine draftsmanship, it is argued (from the internal point of view), such phenomena are intended by God to possess meaning, and meaning which is communicable in human terms.

Yet this 'correlation thesis', I argued, admits of significant qualification. On the one hand, the forms of reasoning in both Jewish and Islamic law are not confined to non-propositional<sup>42</sup> forms of analogy. Forms of argumentation which would be quite at home in the West are also found; indeed, there are arguments which rely upon a combination of propositional and non-propositional elements. Conversely, not only is propositional analogy found in Western law (it is widely accepted that forms of argumentation designed to resolve difficulties in 'hard' cases — cases where there is no previous precedent — widely rely upon analogy, and that there is a close connection between such analogy and argumentation from 'principle'); more controversially, some (including myself) have argued that processes of perceived similarity, often where the basis of that similarity is not explicitly or consciously articulated, underlie much of the 'logical' argumentation which is designed to satisfy the criteria of the (secular) concept of the Rule of Law.<sup>43</sup> This comparison, I may add, prompts a further question, which might be addressed on a further occasion, namely whether the very distinction between 'hard' and 'easy' cases, much used (though not without criticism) in Western jurisprudence, is itself applicable to systems of religious law.

In seeking to evaluate the 'correlation thesis', in terms of the arguments and evidence which may be adduced both in its support and against it, I argued that we may profitably use semiotic criteria, and it is these criteria which, I would suggest, may have a contribution to make, more generally, to the analysis of the problems of comparative methodology. These semiotic considerations may be divided into three types: synchronic, diachronic and pragmatic.

Synchronic factors are those elements of semiosis which are claimed to be involved universally in sense construction. I have argued elsewhere that narrative is one such factor.<sup>44</sup> We have a tendency to make sense in terms of both narrative structure (claimed

<sup>40</sup> This may well be the significance of the famous passage (*Erubin* 13b) from the Babylonian Talmud where a heavenly voice descends in order to mediate between the contradictory views of the schools of Hillel and Shammai on a disputed point of law, by saying: 'these and these are the words of the living God'. Glenn observes at 112 that this does not prevent the ongoing exercise of judgment within the tradition, but he fails to indicate that this very source goes on to say that as a matter of (practical?) halakhah, the views of the School of Hillel are to be followed.

<sup>41</sup> See further Jackson, BS (1994) 'On the Nature of Analogical Argument in Early Jewish Law' (XI) *The Jewish Law Annual* 137.

<sup>42</sup> An analogy is propositional when it involves *substantive* propositional foundations as the justification for making the link between the two phenomena analogised.

<sup>43</sup> Jackson, BS (1988) *Law, Fact and Narrative Coherence* Deborah Charles Publications; Jackson, BS (1996) *Making Sense in Jurisprudence* Deborah Charles Publications chapter 9.

<sup>44</sup> Jackson, BS (1995) *Making Sense in Law. Linguistic, Psychological and Semiotic Perspectives* Deborah Charles Publications.

to be universal) and those narrative images which are internalised, learned from a very early age, and whose status is largely conventional. Indeed, I have suggested that we need to replace an approach which privileges 'literal meaning' with one favouring 'narrative sense' in our approach to the early texts of biblical law.<sup>45</sup> This is relevant to the role of analogy in thinking in the following way. When we use a narrative schema as a means of attributing sense to data presented to us, we do so not by applying logical definitions, with elements accorded the status of necessary and sufficient conditions. Rather, we take a broad view regarding 'relative similarity'. This 'relative similarity' may itself be regarded as the intuitive application of analogy. And, in the legal context, I have argued, this is a vital component of decision-making at the psychological level, even though professional conventions may inhibit the expression of this process in discourse. Hence, accounts of argumentation in legal cases (here: 'easy cases') tend towards deductive models within the positivist tradition, but towards narrative/analogical models the more the scholar is oriented towards 'legal realism'. This, I may add, well illustrates the proposition that the theory of comparative law ignores legal philosophy at its peril: if it does not grapple with its own philosophical presuppositions explicitly, it remains captive to their implicit operation. What the present argument suggests is that a 'realist' comparative lawyer is more likely to attend to the psychological universals which inform sense construction in law than a 'positivist' comparative lawyer, whose concern is directed exclusively to the law's own ideological constructions. Glenn's information-based account places him within the realist camp, but that does not exempt him from providing a (realist) account of those ideological constructions within legal systems on which positivists place their emphasis, such as authority structures<sup>46</sup> and secondary rules of adjudication.<sup>47</sup>

The second aspect of a semiotic approach is diachronic. I have tried to formulate a synthesis of linguistic and cognitive development, including studies of child language acquisition (Bruner) and orality/literacy (Ong), within a semiotic framework, in order to identify typical developments in legal thinking,<sup>48</sup> and to apply this to aspects of the history of the drafting of legal materials in the Hebrew Bible.<sup>49</sup> It will come as little surprise that increasing conceptualisation and grammatical complexity are important factors here. Moreover, the very movement from analogical to logical thinking also finds a place within this context. The infant, Bruner tells us,<sup>50</sup> uses iconic representation before symbolic representation, and iconic representation is based upon perceived (often visual) similarity. There is also some correlation between such developmental patterns and the distinction between orality and literacy. Literacy depends upon — and no doubt contributes to — the achievement of particular levels of cognitive advance.

<sup>45</sup> Jackson, BS (1999) 'Significato letterale. Semantica e narrativa nel diritto biblico e nella teoria contemporanea del diritto' (12) *Ragion Pratica* 153; English version: Jackson, BS (2000) 'Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence' (13) *International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique* 433.

<sup>46</sup> Cf at supra notes 15 and 16, and S4 below in the Jewish context.

<sup>47</sup> To say this is to endorse the 'moderate external point of view', on which see Jackson, BS 'Comparing Jewish and Islamic Law' supra note 25.

<sup>48</sup> Jackson, BS *Making Sense in Law* supra note 44 chapters 7-8.

<sup>49</sup> Jackson, BS (1980) 'Historical Aspects of Legal Drafting in the Light of Modern Theories of Cognitive Development' (3) *International Journal of Law and Psychiatry* 349; Jackson, BS (1982) 'Legal Drafting in the Ancient Near East in the Light of Modern Theories of Cognitive Development' in *Mélanges à la mémoire de Marcel-Henri Prévost* PUF 49; Jackson, BS *Studies in the Semiotics of Biblical Law* supra note 23 chapter 4.

<sup>50</sup> Bruner, J et al (1966) *Studies in Cognitive Growth* John Wiley & Sons.

Basil Bernstein made a distinction between 'restricted' and 'elaborated' code,<sup>51</sup> and others have seen a close correlation here with the distinction between orality and literacy: in oral cultures, people do not have to say everything they mean, since they may rely upon shared social knowledge; the culture of literacy — and particularly that of legal literacy, where contesting parties may be assumed to be 'non-cooperative' — is one which favours 'elaborated code', since there can be no (cooperative) reliance upon shared social knowledge.<sup>52</sup> The i's have to be dotted, the t's crossed, since otherwise the opponent may attribute precisely the opposite meaning to that intended by the author. Against such considerations, it is not difficult to suggest a developmental relationship between non-propositional and propositional analogy, in respect of both the capacity to formulate the basis of analogy in oppositional terms, and the impetus explicitly to state such formulations.

Such a claim might be taken to support a correlation of religion with 'primitive' thinking: if my 'correlation thesis' is correct, so that there is a particular association of non-propositional analogy with religious, as opposed to secular legal systems, and if the use of non-propositional analogy is developmentally earlier than the use of propositional analogy, it may then be inferred that religious systems of law are, to that extent, developmentally earlier than secular systems. We are back, perhaps, to something like Maine's observations about the dangers (as he saw them) of the use of analogy in religious legal systems 'in the infancy of society'.

However, any such argument would neglect the third aspect of a semiotic approach, on which I would wish to insist: the pragmatic aspect. As Hallpike has argued in a more general context, the fact that a higher level of cognitive advance is not manifested does not prove that the people concerned are incapable of that degree of cognitive advance; it may simply indicate that they have no need or opportunity to develop it.<sup>53</sup> Thus, just as communication systems in general are adapted to the needs of particular communicational contexts, so the cognitive aspects of those communication systems are equally so adapted.

Here, I would maintain, we have the opportunity to offer a good explanation of the persistence of non-propositional analogy in religious, as opposed to secular, legal systems: it is not that the religious legal systems are incapable of propositional analogy (indeed, my earlier paper had a section demonstrating the contrary). Rather, it is that the communicational context in religious systems of law is very different to that in secular systems of law, in two respects. First, the ideological basis is quite different (as argued above): the context is perceived not as one defined by the operation of human power,

<sup>51</sup> Bernstein, B (1971) *Class, Codes and Control* (Vol I) Routledge and Kegan Paul chapters 5-7, especially at 108f; 123-37. On the relationship of Bernstein's theory to the distinction between orality and literacy as developed by Ong, W (1982) *Orality and Literacy* Methuen, and its usefulness for the study of biblical law, see Jackson, BS (2000) 'The Original Oral Law' in Brooke, GW (ed) *Jewish Ways of Reading the Bible* Oxford University Press (*Journal of Semitic Studies* Supplement X) at 3-19.

<sup>52</sup> The Talmud, however, is a special case, in that its restricted code is that of its learned initiates. Glenn is thus quite misleading when he writes (at 106) that the Talmud 'is open to all. It follows that its language is not intimidating, that its categories and concepts are those of everyday life, that it appears deliberately to avoid abstraction in expression. If all of life is to be ruled by law, for adherents to the tradition, the law must be immediately accessible'. The use of concrete as opposed to abstract language hardly makes the Talmud accessible to all, when it constantly uses shorthands and allusions to known exegetical moves. To read it unaided requires years of study. Justinian's *Digest* is far more accessible! Glenn may have been misled by a translation which supplies the necessary elaborations.

<sup>53</sup> Hallpike, CR (1979) *The Foundations of Primitive Thought* Clarendon Press at 39f; see further Jackson, BS *Making Sense in Jurisprudence* supra note 43 at 77-82.

and the need to restrain it in publicly accountable ways; rather, it is the operation of divine power, with assumptions regarding divine omniscience and justice. Secondly, religious legal systems (certainly that of Judaism and probably Islam) do not address themselves primarily (as do modern Western systems of law) to the professionals: the lawyers and the judges. They address the people in general, and largely with the assumption of a cooperative communicational context, rather than a polemical one.<sup>54</sup> Their methods of expression will therefore be adapted to this communicational context, and, I would suggest, this favours the use of popular rather than professionalised forms. Or, to put the matter in slightly more conventional terms (at least, in respect of Judaism): *torah*, even *halakhah*, are conceived as didactic at least as much as regulatory.<sup>55</sup> And their forms of expression reflect such an emphasis.

### 3 Authority Systems: The Problem of the *Agunah*<sup>56</sup>

In principle, Jewish Law requires, as part of the divorce (*get*) procedure, the voluntary participation of both husband and wife: divorce in Jewish law is an act of the parties, authorised by the religious court (*Bet Din*), not an act of the court itself. It is particularly difficult to effect a divorce where the husband refuses to participate: the wife is then termed '*agunah*' ('chained'), and is unable to enter into a subsequent religious marriage during the lifetime of the husband refusing her a divorce. If she obtains a civil divorce, and remarries civilly, that latter marriage is not recognised by the *halakhah*; indeed, that subsequent union is regarded as adulterous, and involves substantial disabilities in religious law for any children (who have the status of '*mamzerim*').

Over the centuries, halakhic authorities have attempted to grapple with this problem. A number of broad approaches may be distinguished: the use of conditions in the marriage contract or other pre-marital agreement; coercion (sometimes physical) of the husband by the *Bet Din*; annulment of the marriage by the *Bet Din*. Against each of these approaches, however, substantial objections have been raised on halakhic grounds. Nevertheless, each one has its own particular history, including periods and Jewish communities within which it was more favoured than at other times and places. These — and other — approaches continue to be discussed by contemporary halakhic authorities, but none of them commands a consensus.

This situation results primarily from uncertainties within the very authority structure of the *halakhah*. But the very existence, and nature, of such uncertainties should themselves serve as a warning against too facile an application to the *halakhah* of secular models of legal systems. That which unites different extant versions of (the dominant) legal positivism is what has been called 'the tenet [...] of the social sources of law', that is, the claim that 'the existence of laws depends upon their being established

<sup>54</sup> For this difference in linguistics, based on Grice's 'Co-operative Principle', and its relevance to legal language, see Jackson, BS *Making Sense in Law* *supra* note 44 at 70-73; 131; 404.

<sup>55</sup> Glenn's presentation, on the other hand, appears to go too far in privileging the didactic over the regulatory: see *supra* note 7.

<sup>56</sup> This section is based upon Jackson, BS (2002) '*Mishpat Ivri, Halakhah and Legal Philosophy: Agunah and the Theory of "Legal Sources"*' (1) *JSIJ — Jewish Studies, an Internet Journal* 69, available at: <<http://www.biu.ac.il/JS/JSIJ/1-2002/Jackson.pdf>>. See also Jackson, BS (2004) '*Agunah and the Problem of Authority: Directions for Future Research*' (1) *Melilah* 1, available at: <<http://www.mucjs.org/MELILAH/articles.htm>> (for Word and Acrobat versions).

through the decisions of human beings in society'.<sup>57</sup> One of the most influential versions of that theory is that of HLA Hart, based upon what he called the 'union of primary and secondary rules'.<sup>58</sup> Primary rules are rules of behaviour ('rules of obligation'), secondary rules are rules of competence — rules about rules, including rules of recognition, providing criteria whereby the existence of primary rules may be ascertained. Hart does not claim that the presence of such secondary rules is a necessary condition for the existence of primary rules; rather, he regards them as a mark of a (developed) 'legal system', as contrasted with a (simple society's) 'set of separate standards'.<sup>59</sup>

Hart is clear about the value of the more advanced model. It is needed in order to give effect to liberal values in the law, specifically the values of certainty and predictability inherent in the notion of the Rule of Law, which itself manifests the values of freedom and autonomy: the citizen is entitled to be able to know in advance the law applicable to him, so that he may freely choose a course of action confident in his knowledge of the legal consequences of such a contemplated action. For this reason, Hart originally described his rules of recognition as providing a 'conclusive affirmative indication' of the presence or absence of primary rules.<sup>60</sup> This came to be known as the 'demonstrability thesis': primary rules exist only if they can be demonstrated to exist, by the criteria of the secondary rules. It follows from this that these secondary rules must be fashioned in such a way as to be capable of generating (if not, he later conceded, guaranteeing) such demonstrable results.

An analysis of the problem of the *agunah* suggests that Jewish law lacks a coherent set of secondary rules which meet that criterion. From Hart's perspective — the external perspective of secular positivism — the conclusion would seem to follow that Jewish law should be viewed as, at best, a 'defective'<sup>61</sup> legal system, if indeed as a legal system (rather than a 'set of rules') at all. However, when we examine the character of these 'defects' from an internal point of view, we may find that they reflect the operation of specifically religious forms of thinking — elements which may contribute to the construction of what I have called a 'jurisprudence of revelation'. This is a crucial part of the Jewish legal tradition which Glenn overlooks.

Traditionally, matters of halakhic dispute are resolved by majority decision, but this is difficult to implement in the absence of a supreme authoritative body (comparable to the ancient *Sanhedrin*) with a defined membership within which a majority may be ascertained. That is one reason why, today, we hear much of 'consensus' rather than majority decision. However, both the historical roots<sup>62</sup> and normative status of 'consensus'

<sup>57</sup> MacCormick, DN (1981) 'Law, Morality and Positivism' (1) *Legal Studies* 133, citing Raz and Hart. See further Jackson, BS (1982-83) 'Structuralism and the Notion of Religious Law' (2) *Investigaciones Semióticas* 1 at 1-6.

<sup>58</sup> Hart, HLA (1994) *The Concept of Law* (2nd ed) Clarendon Press chapter 5 'Law as the Union of Primary and Secondary Rules'; see further Jackson, BS *Making Sense in Jurisprudence* supra note 43 at 181-84.

<sup>59</sup> Hart, HLA *The Concept of Law* supra note 58 at 92.

<sup>60</sup> Ibid at 94; see further Jackson, BS *Making Sense in Jurisprudence* supra note 43 at 181f.

<sup>61</sup> See the Preface to Hart, HLA *The Concept of Law* supra note 58; further, Jackson, BS (1985) *Semiotics and Legal Theory* Routledge & Kegan Paul at 152-55.

<sup>62</sup> Some, indeed, attribute it to influence from the Islamic *ijma*, thus making particularly questionable Glenn's contrast, to which Nick Foster draws attention in this issue at 147, between the Islamic institution and the 'ongoing conversation, or argument, of the Talmud'. This also illustrates the dangers of identifying Jewish law with the Talmud, to the exclusion of post-talmudic developments (cf supra note 27).



are unclear. Consensus is *not* listed as a source by Menachem Elon in his four-volume *magnum opus* on the sources of Jewish law;<sup>63</sup> indeed, it does not even appear in his subject index! It would appear that ‘consensus’ is not regarded as an independent source of law, but rather as a condition upon the operation of any established source of law (a ‘meta-source’, perhaps). One indication regarding its origin — and certainly its use in the context of marital law — occurs in a 14th-century responsum in which Ribash<sup>64</sup> was asked to authorise a communal enactment which would have annulled any purported marriage entered into without the presence of a *minyan* (10 adult males) and of the communal officials. He accepted that such a communal enactment was valid according to the (theoretical) halakhah, but refused to give his authority to it as a matter of practise (*ma’aseh*), in the absence of the agreement of ‘all the halakhic authorities of the region concerned’. He justified this requirement of consensus on the grounds that ‘I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred, so that only a “chip of the beam” [cf *Sanh* 7b] should reach me’. In other words, Ribash was unwilling to take upon himself the full responsibility for such a decision, only part of it. Clearly, he would not have been content with any secular notion of the powers, responsibilities and competence of a legal authority, according to which any decision is valid if given within his jurisdiction and if made in good faith. The religious judge or jurist cannot escape his personal religious responsibility, despite the formal rules of competence of the system.

In other, more specific respects, too, the *agunah* problem reveals issues within the authority structure of Jewish law which are difficult to reconcile with the (positivist) model of a secular legal system.

First, there is the status of arguments based upon the talmudic text, in the light of later manuscript evidence suggesting the existence of variant versions of that text. Whereas the Geonim had been prepared to coerce the husband of a wife who could no longer bear living with him to give her a *get*, Rabbenu Tam<sup>65</sup> (followed by later authorities) rejected such coercion on the grounds that there was no talmudic precedent for it. The traditional text of the Talmud (*Ketubot* 63b) has Amemar say, in such a case: ‘she is not coerced’ (into marital compliance). But, we now know of a talmudic manuscript where Amemar’s view is given as: ‘he is coerced (to give her a *get*)’. However, rabbinic authorities are extremely reluctant to adopt a historical approach to talmudic text criticism.<sup>66</sup> The traditional text is accorded a *de facto* sanctity. Why? There is a strong providential undercurrent: even if the traditional text is not historically accurate, that is the text God intended to be used.

Secondly, there are issues regarding the authority of later authorities to depart from the views of their predecessors. While the broad principle is that the authority of the Talmud is supreme,<sup>67</sup> as between post-talmudic authorities ‘the law is in accordance

<sup>63</sup> Elon, M *Jewish Law* supra note 24.

<sup>64</sup> Rabbi Isaac ben Sheshet Perfet (Spain and North Africa, 1326-1408) *Resp* #399.

<sup>65</sup> Rabbi Jacob ben Meir (France, 1100-1171).

<sup>66</sup> Bleich, M (1993) ‘The Role of Manuscripts in Halakhic Decision-Making: Hazon Ish, his Precursors and Contemporaries’ (27) *Tradition* 22 especially at 45.

<sup>67</sup> Glenn appears oblivious to this. For him, ‘the Talmud is never finished’ (97, cf 116). However, Jewish sources speak of the ‘sealing’ of the Talmud (*hatimat haTalmud*), and there is a clear view within the halakhah that nothing subsequent to the Talmud is capable of overriding its authority. Glenn fails to distinguish between the Talmud as a learning process, and as a source of halakhic authority. In his (very legitimate) desire to avoid imposing a Western positivist model on the material, he seeks to downplay the dogmatic element within the tradition itself, contenting himself with the observation (at 106): ‘There’s



with the later generations' (the principle of *hilketa kebatra'i*), provided that the views of the earlier authorities are recorded and well known, so that they have been taken into account by the later authorities. Thus, the principle would not apply where the earlier opinion is in a previously unpublished responsum (no theory of providential concealment here, apparently). What is unclear is the intermediate case (of which the sources relating to conditions in a marriage contract provide an example): the earlier opinion was indeed published, but has fallen into neglect — it is simply overlooked, not cited. Whether such an ambiguity in the 'rules of recognition' would fall within the 'penumbra of uncertainty' accepted by Hart may here be debated. What is clear is that the operation of the rules is affected by a rabbinic perception of the 'decline of the generations' ('pygmies standing on the shoulders of giants') which itself has theological, rather than jurisprudential roots. Such factors should play a part in any account of Jewish law in terms of 'tradition'.

That perception may also underlie a third example of difficulties in resolving the problem of the *agunah*: the question of 'emergency powers'. The enactments of the Geonim allowing coercion took account of the unacceptable consequences of failure to adopt such measures: 'Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands' (Sherira Gaon), an application of the principle of 'the needs of the time' (*tsorekh hash'a'ah*). The question thus arises as to whether that principle survives today, who can apply it and in what circumstances? In particular, are current authorities confined to applying that principle to those circumstances of emergency which have been accepted in the past? Is there a *numerus clausus* of such emergencies, or may new emergencies be defined in accordance with new circumstances?

Similar issues arise with the institution of annulment of marriage (*hafka'at kiddushin*). A number of such cases are recorded in the Talmud. Many authorities hold that annulment of marriage is no longer available today, or at least that it should be strictly confined to the cases mentioned in the Talmud. Nevertheless, a post-talmudic doctrine of annulment on the basis of mistake has developed, and although no consensus exists regarding its exact parameters, authority is accorded to a number of cases where it was applied by a leading 20th-century authority, Rabbi Moshe Feinstein, on the grounds that he is regarded as a *gadol hador* (great sage of the generation). It is difficult to locate the authority thus accorded to a *gadol hador* (and its relationship to the demand for consensus) within any conventionally understood 'rules of competence' of the halakhic legal system. Rather, I would suggest, we need to understand it within a 'jurisprudence of revelation', which accords authority not only to inspired texts but also to the inspired judge.<sup>68</sup>

Of course, theological presuppositions are not confined to the 'secondary' rules of the halakhah. A notable example occurs, in our context, in the primary rules relating to the institution of coercion of a divorce. That institution is already well established in the Mishnah, though confined there to cases where the wife is entitled to a divorce (for one of a number of specified 'causes'). Yet how could this be reconciled with the basic principle that divorce requires the *voluntary* participation of both husband and wife? The classic explanation was provided by Maimonides:

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lots of law, but we also have to decide'. Werner Menski, in his contribution in this issue at 157, notes Glenn's ambivalence on a parallel issue in Islamic law: 'the closure of the gate of *ijtihad*' (independent reasoning).

<sup>68</sup> Jackson, BS 'L'ebraismo come ordinamento giuridico religioso' supra note 29 at 170-75.

duress applies only to him who is compelled and pressed to do something which the Torah does not obligate him to do, for example, one who is lashed until he consents to sell something or give it away as a gift. On the other hand, he whose evil inclination (*yetser hara*) induces him to violate a commandment or commit a transgression, and who is lashed until he does what he is obligated to do, or refrains from what he is forbidden to do, cannot be regarded as a victim of duress;<sup>69</sup> rather, he has brought duress upon himself by submitting to his evil intention.

It may be tempting to translate the doctrine of the *yetser hara* ('evil inclination') into Freudian terms. Whether, in Jewish theology, it is to be regarded as a genuine part of the self, or as an external 'test' placed there by God, would take us far beyond the scope of this paper. Suffice it to say that in his account of what the husband here 'really' intends to do, Maimonides incorporates this aspect of his understanding of divine creation.

#### 4 An 'Internal' Point of View: The Religious Significance of Halakhic Observance

I turn, by contrast, to one of the most prominent modern accounts of the philosophy of the halakhah to emerge from rabbinic circles, Rabbi JB Soloveitchik's classic *Halakhic Man*.<sup>70</sup> Soloveitchik does not eschew external resources: he is well versed in Western philosophy, and is sympathetic to modern phenomenological approaches. That in itself, perhaps, is revealing: his concern is to explore the *experience* of halakhah, and this not from the ('public') vantage point of the judge, but rather from the ('private') vantage point of the ordinary Orthodox Jew, who is observant of the halakhah: he seeks 'to penetrate deep into the structure of halakhic man's consciousness' (4).

What does such observance of the halakhah mean to 'halakhic man'? Such a person, Soloveitchik argues, combines within him 'two opposing selves': on the one hand, 'cognitive man', the model of modern Western (secular) rationality, seeking optimistically to explore and control his mundane, earthly environment with the resources of reason (including law); on the other hand, *homo religiosus*, the man of God who 'sees the world as saturated with the Divine Presence' and who suffers, in his soul, from 'the pangs of self-contradiction and self-negation' (3):

while cognitive man discharges his obligation by establishing the reign of a causal structure of lawfulness in nature [...] *homo religiosus* is not satisfied with the perfection of the world under the dominion of the law. For to him the concept of lawfulness is in itself the deepest of mysteries. Cognition, according to the world view of the man of God, consists in the discovery of the wondrous and miraculous quality of the very laws of nature themselves (7).

Thus, whereas cognitive man 'does not tolerate any obscurity, any oblique allusions and undeciphered secrets in existence' (5), *homo religiosus* 'is intrigued by the mystery of existence [...] and wants to emphasise that mystery' (7).<sup>71</sup> Reality for *homo religiosus* is 'not

<sup>69</sup> Maimonides *Laws of Divorce* (*Mishneh Torah, Hilkhot Gerushin*) 2:21.

<sup>70</sup> Soloveitchik, JB (1983) *Halakhic Man* Kaplan, L (trans) The Jewish Publication Society of America.

<sup>71</sup> '*Homo religiosus* sees the entire ordered world, the entire creation which is delimited and bound by the law as a cryptic text whose content cannot be deciphered, as a conundrum that the most resourceful of men cannot solve' (8) 'The riddle of riddles is the very nature of the law itself. In a word, the cognitive act of *homo religiosus* is one of concealment and hiding [...] knowledge itself for him is the greatest and

uniform and monochromatic but rather pluralistic and multilayered [...] he attempts to find in this concrete and physical world the traces of higher worlds, all of which are only good and eternal' (13). But, *homo religiosus* is frustrated, dissatisfied, not possessing the key to the mysteries. His aspiration is to find that key elsewhere. He therefore 'searches for an existence that is above empirical reality. This world is a pale image of another world'.

For Soloveitchik, halakhic man differs in his worldview from such a model of the *homo religiosus*:

Halakhic man's approach to reality, is, at the outset, devoid of any element of transcendence. Indeed, his entire attitude to the world stands out by virtue of its originality and uniqueness. All of the frames of reference constructed by the philosophers and psychologists of religion for explaining the varieties of religious experience cannot accommodate halakhic man as far as his reaction to empirical reality is concerned. Halakhic man studies reality not because he is motivated by plain curiosity the way theoretical man is, nor is he driven to explore the world by any fear of being or anxiety of nonbeing [...] Halakhic man orients himself to reality through a priori images of the world which he bears in the deep recesses of his personality (17).

What are these 'a priori images' and what is halakhic man supposed to do with them? For Soloveitchik, they are the teachings of halakhah, and the role of halakhic man is to impose them on the empirical reality encountered in this world:

His approach begins with an ideal creation and concludes with a real one. To whom may he be compared? To a mathematician who fashions an ideal world and then uses it for the purpose of establishing a relationship between it and the real world, as was explained above. The essence of the Halakhah, which was received from God, consists in creating an ideal world and cognizing the relationship between that ideal world and our concrete environment in all its visible manifestations and underlying structures. There is no phenomenon, entity, or object in this concrete world which the a priori Halakhah does not approach with its ideal standard [when halakhic man encounters something in concrete reality, he is not] overly curious [as to the physical characteristics of such a thing in themselves, but rather] he desires to co-ordinate the a priori concept with the a posteriori phenomenon. [...] Halakhic man explores every nook and cranny of physical-biological existence. He determines the character of all of the animal functions of man — eating, sex, and all the bodily necessities — by means of halakhic principles and standards (19f; 22).

Halakhic man is thus engaged in more than a cognitive activity of applying a pre-existent model to an independent reality. His role is constructive, to fashion that reality in accordance with the model, and this creative activity has an emotional (or spiritual) as well as a cognitive dimension: 'Both the halakhist and the mathematician live in an ideal

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most difficult riddle of all. Knowledge and wonder, cognition and mystery, understanding and secrecy, the law and the unknown, these constitute a unified phenomenon which reveals itself to us in a twofold fashion, all in accordance with one's perspective and point of view' (11).

realm and enjoy the radiance of their own creations' (25). This applies, as suggested above, even to the mundane transactions of commercial life.

It follows that halakhic man, unlike *homo religiosus*, is not frustrated or dissatisfied with this earthly world, and desirous of ascending to a higher realm.<sup>72</sup> His task is to do his best to apply the halakhic template to what he encounters,<sup>73</sup> and this world is the only place<sup>74</sup> in which he can do that:

Halakhic man's relationship to transcendence differs from that of the universal *homo religiosus*. Halakhic man does not long for a transcendent world, for 'supernal' levels of pure, pristine existence, for was not the ideal world — halakhic man's deepest desire, his darling child — created only for the purpose of being actualized in our real world? It is this world which constitutes the stage for the Halakhah, the setting for halakhic man's life. It is here that the Halakhah can be implemented to a greater or lesser degree. It is here that it can pass from potentiality into actuality. It is here, in this world, that halakhic man acquires eternal life! (30).

Indeed, this world is, from this vantage-point, more desirable than the world-to-come:

The Halakhah is not at all concerned with a transcendent world. The world to come is a tranquil, quiet world that is wholly good, wholly everlasting, and wholly eternal, wherein a man will receive the reward for the commandments which he performed in this world. However, the receiving of a reward is not a religious act; therefore, halakhic man prefers the real world to a transcendent existence because here, in this world, man is given the opportunity to create, act, accomplish, while there, in the world to come, he is powerless to change anything at all (32).

The reward for observance of the halakhah is conceived by Soloveitchik as the capacity (merely) to *contemplate* the application (in the empirical world) of halakhah from the (non-empirical) domain of the world-to-come:

When the righteous sit in the world to come, where there is neither eating nor drinking, with their crowns on their heads, and enjoy the radiance of the divine presence [...] they occupy themselves with the study of the Torah, which treats of bodily life in our lowly world [...]. The Creator of worlds, revealed and unrevealed, the heavenly hosts, the souls of the righteous all grapple with halakhic problems that are bound up with the empirical world — the red cow, the heifer whose

<sup>72</sup> 'Many religions view the phenomenon of death as a positive spectacle [...] it is here that we find ourselves at the threshold of transcendence, at the portal of the world to come [...] Judaism abhors death, organic decay, and dissolution. It bids one to choose life and sanctify it. Authentic Judaism as reflected in halakhic thought sees in death a terrifying contradiction to the whole of religious life. Death negates the entire magnificent experience of halakhic man' (31; see also the family story he tells at 36).

<sup>73</sup> 'Halakhic man's ideal is to subject reality to the yoke of the Halakhah. However, as long as this desire cannot be implemented, halakhic man does not despair, nor does he reflect at all concerning the clash of the real and the ideal, the opposition which exists between the theoretical Halakhah and the actual deed, between law and life. He goes his own way and does not kick against his lot and fate' (29).

<sup>74</sup> 'Holiness means the holiness of the earthly, here-and-now life' (33).

neck is to be broken, leprosy, and similar issues. They do not concern themselves with transcendence, with questions that are above space and time, but with the problems of earthly life in all its details and particulars (38f).

The reward is thus less satisfying than the act by which the reward is merited, for it is the latter which *transforms*, which is *creative*. The world in which the halakhic legal system operates is not simply the factual context within which justice is to be sought: it is itself the object of a desired transformation,<sup>75</sup> a continuation of the original act of creation in which humanity and the *torah* play crucial roles:

The ideal of halakhic man is the redemption of the world not via a higher world but via the world itself, via the adaptation of empirical reality to the ideal patterns of Halakhah. If a Jew lives in accordance with the Halakhah [...] then he shall find redemption. A lowly world is elevated through the Halakhah to the level of a divine world (37f).

Is it really possible to compare religious systems of law (even less, to compare them with secular systems by the tacit application to them of secular, positivist models) without taking account of their most basic ontological and deontological presuppositions?

## 5 Some Methodological Conclusions

Neither a theory of information flow within a tradition nor a more general semiotic approach has any theoretical justification for excluding issues such as those addressed in the last section. We may legitimately ask whether such semiotic considerations as those developed in the context of the semiotics of law (and outlined in the context of the comparison of analogical reasoning above) can provide any assistance also in the context of comparative religion. Can it help us to answer the question how we compare law from the viewpoint of the private religious experience of the believer?<sup>76</sup> Insofar as semiotics makes claims to be a universally applicable discipline, and has indeed been widely applied in the context of the study of religions (where, of course, the very terminology originated), an affirmative answer to these questions may be anticipated.

For the moment, I confine myself to a few observations. Just as the methodology of comparative law reflects the legal philosophical presuppositions of those engaged in it, so must the methodology of comparative religion (and the approach to religious law adopted by it) necessarily reflect the philosophical presuppositions of those engaged in it. A 'positivist' comparative lawyer will compare the authoritative documents of the respective systems; a 'realist' comparative lawyer will not be satisfied with this, but will

<sup>75</sup> Cf Ricoeur, P (1995) *Figuring the Sacred. Religion, Narrative, and Imagination* Pellauer, D (trans) Fortress Press at 49f (from Ricoeur, P (1978) 'Manifestation and Proclamation' (11) *Blaisdell Institute Journal* 13): 'That a stone or a tree may manifest the sacred means that this profane reality becomes something other than itself while still remaining itself. It is transformed into something supernatural — or, to avoid using a theological term, we may say that it is transformed into something surreal (surreal), in the sense of being superefficacious while still remaining a part of common reality'.

<sup>76</sup> Of course, some may argue that the whole assumption of such an argument, that religion is (for these purposes) to be defined as, or at least to pay very serious attention to, the private religious experience of the individual believer, is wrong. Well, it is neither right nor wrong. It is a matter of choice, a matter of perspective. Comparison is always a function of the objectives of the comparatist.

want access to the behaviour and attitudes of the participants (including the subjects) of the system. But that distinction between the 'positivist' and the 'realist' is surely not unique to legal studies. May we not say that a 'positivist' comparative religionist will compare the authoritative documents of the respective religions, while a 'realist' comparative religionist will seek access to the behaviour and attitudes of the adherents ('professional' and lay) of the system?

In this context, we have to ask questions about the nature of a discourse like that of Soloveitchik, before we can use it for comparative purposes. Should we view it in 'positivist' terms — an elegant and stimulating account, based on classical sources, of how the Jew *ought to feel* about observance of the halakhah — rather than a descriptive account of the actual religious experience of the halakhically-observant Jew? Though *Halakhic Man* could certainly be read in such a positivist manner, to do so would hardly do justice to Soloveitchik's debt to the phenomenological tradition. Soloveitchik, it may be argued, presents a theological reflection upon the pre-reflexive experience of halakhic man. Such an account may not be descriptive in any conventional empirical sense, but it is not simply prescriptive either. It is a constructive account of an internalised sense of obligation. How far Soloveitchik's account of the *a priori* status of halakhic concepts, thus internalised, conforms to the *a priori* of experience as conceived by phenomenologists is a question into which I shall not enter.

It may be thought that the methodology of comparing actual religious experience will necessarily be more difficult than that of comparing official statements about it. If we are to look to a semiotic methodology (religion, like law, being viewed as a cultural process in which messages are transferred),<sup>77</sup> it may be objected that since semiotics cannot function without what is sometimes called the 'level of manifestation', and if the private religious experience of the observer does not lead to any manifestable behaviour, the semiotician will have nothing on which to work. To what extent, then, does private religious experience express itself in manifestable behaviour?<sup>78</sup> Not directly, perhaps, but in many indirect ways, verbal and non-verbal,<sup>79</sup> including the expression of emotions.<sup>80</sup>

<sup>77</sup> From a semiotic perspective (distinguishing *actant* and *acteur*), the communication may be internal (with the self) and may be with a supposed (as opposed to an empirical) receiver.

<sup>78</sup> Ricoeur, P *Figuring the Sacred* supra note 75 at 49 adopts Eliade's conception of 'hierophany': 'although we cannot directly describe the numinous element as such, we can at least describe how it manifests itself'. Cf Rasmussen, DM *Mythic-Symbolic Language and Philosophical Anthropology* supra note 30 at 129: 'it is not consciousness, but consciousness as it is presented in the context of language that functions as the pre-reflexive basis for philosophical reflection. Consonant with that redefinition, we may define the philosophy of religion as that discipline which reflects upon mythic-symbolic language'.

<sup>79</sup> The latter is particularly stressed by Ricoeur, P in 'Manifestation and Proclamation' supra note 75 at 1995:49-51 ('a phenomenology of the sacred is possible because these manifestations have a form, a structure, an articulation. However, and to me this is essential, this articulation is not originally a verbal one, even though the expressions "to manifest" or "to show" may suggest this. Here no privilege is conferred on speech. The sacred can manifest itself in rocks or in trees that the believer venerates; hence not just in speech, but also in cultural forms of behavior [...]. Here we must take into account not just the amplitude of the field of hierophanies but also its belonging to an aesthetic level of experience rather than to a verbal one [...]. A third trait of the sacred underscores its essential "nonlinguisticity". It concerns the close tie between the symbolism of the sacred and ritual. The sacred does not reveal itself just in signs that are to be contemplated, but also in significant behavior. The ritual is one modality of acting (*faire*). It is "to do something with this power or powers") — despite his earlier observation that 'whatever ultimately may be the nature of the so-called religious experience, it comes to language, it is articulated in a language, and the most appropriate place to interpret it on its own terms is to inquire into its linguistic expression' (Ricoeur, P *Figuring the Sacred* supra note 75 at 35, from (1974) 'Philosophy and



This, assuredly, is a well-rehearsed methodological issue in religious studies. Reference may be made, in particular, to the work of Ricoeur,<sup>81</sup> and his approach to the 'mythic-symbolic' forms of expression.<sup>82</sup> How far, we may ask, may we apply such approaches to the seemingly more mundane spheres of religious law, here particularly those of the halakhah? Speaking of the signification of time and space through ritual, Ricoeur discerns a correlation:

between the sacrality of time and the rituals that make it sacred, the more so since rites practically organize the alternation of strong times and weak times, the rhythm of eating and drinking, of love and work, of the time for debate and the time of a festival. In this way not only the activities around the house or the temple are sacralized, but every act of life, especially the working of the ground that repeats the activity of the gods. The work of agriculture, in other words, more than any other expresses this relation between ritual and the cosmic paradigms.<sup>83</sup>

This could have been written with the halakhah specifically in mind: one of the six 'Orders' of the Talmud is devoted to agricultural regulation.<sup>84</sup> If, indeed, the halakhah is concerned with 'the problems of earthly life in all its details and particulars',<sup>85</sup> and we seek to avoid any purely rationalist reduction,<sup>86</sup> then even the laws of the goring ox<sup>87</sup> may come to be viewed as more than a simple paradigm of rules for allocating economic risk. Of course, the sign 'goring ox' is not, in itself, one kind of sign or another. Everything depends upon how the sign is used,<sup>88</sup> and that use in itself may vary according to historical circumstances. We have little indication of how a law like that

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Religious Language' (54) *Journal of Religion* 71-85).

<sup>80</sup> On the semiotic analysis of emotions, comparing Greimassian semiotics and narrative psychology, see Jackson, BS *Making Sense in Law* supra note 44 chapter 9.

<sup>81</sup> Ricoeur, P *Figuring the Sacred* supra note 75.

<sup>82</sup> For this, see particularly Rasmussen, DM *Mythic-Symbolic Language and Philosophical Anthropology* supra note 30, especially at 129-32. He warns, in particular, against any purely rationalist reduction of such forms: 'the purpose of reflection is not to reduce mythic-symbolic forms to a secondary, but supposedly, more adequate language. Reflection begins with the symbol and myth and it proceeds from them [...]. Philosophic reflection on symbolic and mythic forms introduces a principle of rationality into the process of analysis. The introduction of this principle involves both a risk and a possibility in the sense that the risk involved in reflection on symbol and myth is reductionism, while rationality reduces the plurality of meaning present in a mythic-symbolic form by making it into a single meaning. The possibility that is presented by reflection upon symbolic and mythic forms is that the philosophic understanding is enriched by the process [...]. The value of the philosophic quest for total rational explanation of symbolic structures and forms is undeniable. It represents the philosopher's nostalgia for complete clarity. The principle of clarity and rationality, however, can also reach its limitation'.

<sup>83</sup> Ricoeur, P *Figuring the Sacred* supra note 75 at 49 (a 'chthonic' account? On the importance of religion in the chthonic world, see Glenn at 69-70; and Gordon Woodman's contribution to this volume at 123).

<sup>84</sup> On the regulation of land in chthonic law, see Glenn at 66f; 85. The extent to which, in the Jewish tradition, the *mishnaic* elaboration can be read back into the Bible, however, is debatable. At the very least we may observe that interest in these matters did not abate with the reduction of the oral tradition to writing.

<sup>85</sup> Soloveitchik, JB *Halakhic Man* supra note 70 at 38f, as quoted in S4 above.

<sup>86</sup> See Rasmussen, DM *Mythic-Symbolic Language and Philosophical Anthropology* as quoted, supra note 82.

<sup>87</sup> *Exodus* 21:28-32; 35-36, as developed particularly in tractate *Baba Kamma* of the Mishnah and Talmud. See, eg, Jackson, BS (1978) "'Maimonides' Definitions of *Tam* and *Mu'ad*' (1) *The Jewish Law Annual* 168.

<sup>88</sup> Cf Ricoeur, P *Figuring the Sacred* supra note 75 at 51 on myth: 'The function of the myth is to fix the paradigms of the ritual that sacralize action. Today we read myths, transforming them into literature, but

of the goring ox was experienced in biblical times;<sup>89</sup> its symbolic function and affective import, however, are likely to have been quite different from those experienced by the student in the *yeshivah*, or even the politician arguing for or against the incorporation of halakhah within the law of the contemporary state of Israel.

## 6 And Finally, Glenn ... ?

In seeking to apply a non-legal conceptual framework to the problems of comparative law, Glenn appears to be heading in the right direction. But his information-based concept is deployed, in my view, in too limited a fashion, both in respect of the type of information he chooses to consider and the methods by which it is to be deployed. Such limitations of subject matter have been noted in the preceding sections in relation to both institutional aspects of legal systems in general,<sup>90</sup> and 'internal' aspects of religious systems in particular.<sup>91</sup> As for methodology, it is difficult to discern what, from the brantub of information in the modern traditions of semiotics and communication studies, has actually been extracted.<sup>92</sup>

As for the 'talmudic legal tradition' (for whose inclusion, at least, we must be grateful<sup>93</sup>), we may conclude in terms of Twining's question whether Glenn has adequately applied to the various traditions considered the four central issues he derives from his theory of traditions, namely the nature of the core that constitutes its identity; its underlying justification; its conception of change; and how the tradition relates to other traditions. Within the immense limitations which inevitably derive from the 'tertiary' methodology which Glenn has adopted,<sup>94</sup> I see some merit in respect of his approach to the first and second issue. Here, at least, useful hypotheses may be derived, deserving of further investigation.

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we have previously uprooted them from the act of recitation that had bound them to ritual action. Thus the creation myth *Enuma Elish* was a part of the great New Year's festival in Babylon where the whole ceremony was intended to reactualize the original combat between the god Marduk and the sea monster Tiamat; in short, the primordial cosmogonic act. Here speech is part of the ritual, and this in turn makes sense only as the actualization of the cosmogony. In this way myth as recited and inserted in the ritual of renewal makes *homo religiosus* participate in the efficacy of the sacred'.

<sup>89</sup> Though I incline to the view that it originated in practical (popular) wisdom and was only later appropriated into a divinely-validated literary structure. See Jackson, *BS Studies in the Semiotics of Biblical Law* supra note 23 at 77-80; 83; 187-93. See also chapter 10 for such a transformation of use in the context of talion. On the movement from practical to literary wisdom, see more generally Jackson, *BS* (1992) 'Practical Wisdom and Literary Artifice in the Covenant Code' in Jackson, *BS* and Passamaneck, *SM* (eds) *The Jerusalem 1990 Conference Volume* Scholars Press and (VI) Jewish Law Association Studies 65, and Jackson, *BS* (2000) 'Law, Wisdom and Narrative' in Brooke, *GW* and Kaestli, *J-D* (eds) *Narrativity in Biblical and Related Texts/La Narrativité dans la Bible et les textes apparentés* Peeters 31 (Bibliotheca Ephemeridum Theologicarum Lovaniensium 149).

<sup>90</sup> Exemplified in S3 above.

<sup>91</sup> Exemplified in S4-5 above.

<sup>92</sup> Exemplified in outline in S2 above. Glenn is right in observing, in the context of his discussion of the concept of an epistemic community (at 42), that not everything here is new. Nor is my own preferred formulation, in terms of 'semiotic groups'. But such reformulations do present both a challenge and an opportunity (variously implemented) to make such concepts more operational.

<sup>93</sup> In a previous draft of his contribution to this issue, Andrew Huxley asked: 'And while we're at it, how significant has talmudic law been globally?' If the measure of significance is purely quantitative (in terms of subjects of the law), he may, of course, be correct.

<sup>94</sup> See my observations at notes 19-21 above. It follows that, like Nick Foster in relation to Islamic law, I have to conclude that the chapter cannot be recommended to novices as an introduction to the subject.