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## Critical Family Law

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# CRITICAL FAMILY LAW

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The family is a powerful instrument of governmentality in the Foucaultian sense. It disciplines interpersonal, sexual, and intergenerational relationships, and in so doing it structures definite relations of power between genders and construes social identities which affect not only individuals and groups but also national communities. Of course, the law plays a critical role within this framework, substantially contributing to the construction of the family as a governmental *dispositif*. It operates primarily as such in *the law of the family* as an intellectual enterprise, namely in the way lawyers create *family law* as an autonomous body of law, ambiguously situated in an area that is neither entirely private nor entirely public. Therefore, family law is exceptional but also peripheral to the heart of the *law*, conceived as the object of legal *science*.

In fact, the legal regulation of domestic relations as a separate legal field,

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\* Professor of Private Law, University of Perugia, Italy. This paper is the product of my participation in a series of conferences held at the Harvard Law School, the Washington College of Law, and the University of Toronto, and of my association with a group of scholars with whom I had the fortune and the honor to interact and discuss for years. I am very grateful to Janet Halley, the “founding mother” of this group, and to Duncan Kennedy, whose work has inspired the whole undertaking. I would also like to thank Brenda Cossman and Kerry Rittich, and Ann Shalleck and Fernanda Nicola for the conferences they organized in Toronto and Washington, D.C., respectively. The Paper has also profited from many helpful exchanges with Philomila Tsoukala, Isabel Jaramillo, and Giovanni Marini. A special thanks to Luca Cruciani for his invaluable research assistance.

both marginal and exceptional to the law of the market, is a relatively recent jural creation. It is the product of the legal consciousness dominating in the era of Classical Legal Thought (CLT), which characterizes the Western legal systems from the second half of the nineteenth century through the beginning of the twentieth century.<sup>1</sup> CLT grounds the exceptionalism of family law in a complex set of legal arguments, including a different paradigm, proper legal techniques, and an autonomous justification for the legitimacy of state regulation in this field. Thus solidarity, altruism, and communitarian motives rule the family, whereas the core of private law, the law of the market, is ruled by the paradigm of individualism. Then different legal forms and techniques are deployed: a hierarchical order for the family, instead of the principle of formal equality between individuals, interpersonal relationships defined by status rather than by contract, the authority of the state rather than the free will of private parties, reciprocal duties (of the spouses) which are not obligations from a technical point of view, and the doctrine of interspousal immunity in place of the general principle of tort liability. The legitimacy of state regulation of the family is alternatively denied and affirmed: denied because the family, as a pre-legal entity, the natural site of love, caring, and affection, does not tolerate the state's intrusions, and affirmed as necessary, because of the crucial role of the family in the foundation of the social order. As to the core of the private domain—the market—the legitimacy of state intervention is, on the contrary, restricted to the recognition of the power of free will, within the framework of a rigid public/private divide. Beyond that primary recognition, any other intervention of the state has to be understood as exceptional.

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1. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 20 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter *Globalizations*].

Chart 1

Core private law	Family law
Individualism ***	Solidarity ***
Formal equality	Hierarchy
Contract	Status
Free Will	State Will
Voluntary obligations	Duties
Tort Liability ***	Immunity ***
Exceptionality of State Intervention	Necessity/Undesirability of State Intervention

The power of persuasion of this picture, in its basic traits, lasts over time beyond the era of CLT.

The pattern of marginality and exceptionalism along which family law is constructed still operates in the mentality of contemporary mainstream jurists. It prevails in the way in which family law is dealt with as a subject of legal analysis within domestic contexts, but also in other scenarios: in the investigation of the dynamics of legal diffusion regarding family law as a distinct field of comparative law, and on the terrain of the harmonization of private law in Europe. Legal diffusion is the phenomenon according to which legal rules and concepts travel beyond national borders, from one legal system to another for a variety of reasons, such as the prestige of the legal artifact imported (e.g., the Code Napoleon), the political influence that one country exerts over another, or the cultural appeal of the legal system the transplant comes from. By the harmonization of private law in Europe, I mean the process that leads progressively towards the uniformity of the legal rules enacted in the different EU Member States.

This Article aims to offer an appraisal of *family law exceptionalism* as a main feature of the governmental power of the family in the perspective of legal diffusion. It moves from the belief that the pattern of marginality and exceptionalism I have briefly described is functional to legitimize the family as the site of unequal distribution of power, wealth, and labor between genders, according to a scheme perfectly sketched out in the feminist analysis of the *production/reproduction* dichotomy.

In my view, the effort to de-marginalize family law is also the main route to enable the search for fairer compromises between women and men as well as between children and parents within the institution of the family. This effort can be traced back to the critical and legal realist tradition that

challenges the core/periphery dichotomy as the basis of family law exceptionalism. In the past decade, I have been part of a network of theorists who have started from that tradition to promote and develop a new discourse on family law as a cultural artifact *and* an instrument of governance at the national, global and transnational level. This Article is about that intellectual experience. It offers a discussion of family law as a term of the core/periphery opposition in two different senses. On the one hand, I refer to the core and the periphery *of the law*, where the core is represented by the law of the market, namely the law of obligations, while the legal regime of the family is confined to the margins of it. On the other hand, a geopolitical understanding of the divide comes into view: here the core of legal diffusion is commonly considered the Western legal tradition—the Empire, in other words—whereas the periphery is represented by the colonial importer of legal thought.

This Article proceeds in three Parts. Part I investigates the way in which the classical divide between the (supposed) core of private law (consisting of the legal structures of the market: contract, property, and torts) and the (supposed) periphery of the system, represented by family law, reproduces itself in the field of comparative law.<sup>2</sup> Core and periphery are associated with different modes of legal diffusion: while in the field of contract, property, and tort, transplants from one legal system to another are described as autonomous from social and political conditions, in the sphere of the family, changes are grounded on political factors and social values. This oppositional approach affects the way in which family law has been tackled thus far as a viable field of comparative law. In Part I, I map and criticize the dominant methods operating in the comparative analysis of family legal topics as patterns of family law exceptionalism. By contrast, I suggest a genealogy of deconstructive approaches to comparative family law as a way out from marginalization.

Part II of the article discusses the dynamics between the core/periphery of law and the core/periphery of the world.<sup>3</sup> It challenges the hierarchical order inherent in both of these dichotomies at two different levels. On the first level, the family plays a key role in constructing legal traditions.<sup>4</sup> Here the opposition between the core and the periphery of law is framed in the context of the formation of postcolonial states, where the core/periphery divide between the family and the market intersects the geopolitical opposition between the core and the periphery of the world under the guise of a conflict between modernity and tradition. Here, I draw in the idea, well settled in comparative law, that the core of the world is identified with

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2. *See infra* Part I.

3. *See infra* Part II.

4. *See infra* Part II.

the Western Legal Tradition (WLT), housing and harmonizing common law and civil law.<sup>5</sup> In this framework, convergences between the common law and the civil law traditions are stressed, while divergences among them are downplayed. Common traits, such as the rule of law and the establishment of a jural elite of professionals, are identified as common roots of a common WLT. In this body of comparative law thinking, the WLT mainly overlaps with modernity in stark contrast with *tradition*, which is commonly represented by local, “traditional” law. The WLT as defined above is clearly a centric construction which marginalizes other legal systems. Part II of the Article shows that the national/traditional character of family law is not nearly as constitutive as it is commonly presented and that, along with the single geopolitical context, it has been either strategically emphasized as the epitome of the local Tradition, or downplayed in favor of a rapid modernization of the system. This part of the paper demonstrates that family law is either deployed in favor of the construction of a legal tradition as an original product or set aside in order to emphasize similarities between the local legal system and a foreign dominant legal culture.

The second level is the level of globalization.<sup>6</sup> According to the prevailing narrative (the “glocal” narrative), in the globalized world the core of private law, contract law, spreads from the core towards the periphery of the planet, whereas the periphery of law, family law, remains inexorably local.<sup>7</sup> However, an opposite progression—from the periphery to the center—may also occur. In fact, sometimes, the periphery of law—family law—as created and enforced at the periphery of the world moves to the center and is capable of influencing it, as in the case of the Muslim legal institution of the Kafalah, a form of custody over minors, which has made its way through the legal systems of several European states.<sup>8</sup> On the other hand, this pattern is sometimes subverted, as in the case of the EU Directive on Family Reunification, where Europe, at the core of the Western Legal Tradition, rejects conjugal unions other than monogamy and pushes back to the periphery of the world its peripheral law.<sup>9</sup> Here I suggest an explanation for the prevalence of one dynamic over the other

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5. On the concept of Western Legal Tradition, see FORMATION OF CONTRACTS (Rudolph Schlesinger ed., 1968); GINO GORLA, *IL CONTRATTO* (1955); ANTONIO GAMBARO & RODOLFO SACCO, *SISTEMI GIURIDICI COMPARATI* (3d ed. 2008).

6. See *infra* Part II.

7. See generally Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (arguing that the current legal framework deprives metropolitan areas of the ability to create solutions to local problems).

8. See INTERNATIONAL REFERENCE CENTER FOR THE RIGHTS OF CHILDREN DEPRIVED OF THEIR FAMILY, <http://www.iss-ssi.org> (last visited July 19, 2010).

9. See Council Directive 2003/86, On the Right to Family Reunification, 2001 O.J. (L 251) 12 (EC).

and vice versa.

In Part III, I critically analyze the current methods of the European harmonization process for reproducing and enforcing the core/periphery divide.<sup>10</sup> I conclude that the harmonization of both the law of the market and the law of the family, as well as the currently dominant approaches in the harmonization process—the common core approach and the “better law” approach—should be submitted to the deconstructive scrutiny of comparative law as both a method of analysis of legal diffusion *and* a powerful instrument of internal critique.

#### I. THE SCIENTIFIC CONTEXT: THE CORE/PERIPHERY DIVIDE IN THE FRAMEWORK OF COMPARATIVE LAW

The distinction between family law (assumed to be the periphery of private law) and the legal structures of the market (representing the core of private law) is generally understood as one of the profound structures of legal science since the mid-nineteenth century.<sup>11</sup>

As such, family law and the core of private law undergo different modes of legal diffusion, shaped, on the side of the family, by the main traits of its exceptionalism a (policy-oriented essence, which makes family law local and contingent), whereas the law of the market claims to be universalistic. Here is how comparative lawyers, following Rodolfo Sacco and Alan Watson, among others, construct this large distinction:

Chart 2

Core private law	Family Law
Technicalities and legal science ↓	Political motives ↓
Universalism	Localism
Continuity (cryptotypes)	Discontinuity
Historical approach and/or Structuralism	Functionalism
Irrelevance of sociology	Sociology
Prestige	Better law

As the chart above shows, family law exceptionalism is connected to and justified by a variety of features. First of all, the political character of

10. See *infra* Part III.

11. Duncan Kennedy, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811 (2010) [hereinafter *Savigny*].

family law, its contiguity to morals and religious beliefs and the subsequent lack of those jural technicalities which, on the contrary, make the law of the market the elective site of legal science. The asserted influence of political motives, moral attitudes, and traditional customs over the legal regime of the family makes it inevitably local, and localism juxtaposes family law to the law of obligations and its universalistic aspiration. The sociological approach emerges at this point as the most appropriate methodology to investigate family law issues, whereas legal science analyzes contract law and the law of obligations on the basis of its own disciplinary paradigm. This set of ideas grounds a sort of skepticism towards the feasibility of the comparative analysis of family law. On the other hand, it prepares to explain the phenomenon of family law's diffusion according to dynamics which are assumed as distinctive to this legal field.

In the chart above, I present discontinuity as characteristic of both development and diffusion of family law, functionalism as the (supposed) most appropriate method in comparing family law regimes, and the so-called better law approach as the leading technique applied in specific processes of legal diffusion/engineering such as the harmonization of law (in EU, for instance). In my view all these features are outcomes of the exceptionalism of family law; it is not by chance, therefore, that they are specular and opposed to the main characters of the diffusion of the core private law.

Rodolfo Sacco<sup>12</sup> and Alan Watson<sup>13</sup>—founding fathers of the most successful and largely converging theories on legal diffusion—construe the diffusion of the core of law, private law, on a legal science paradigm. Unlike the dominant representations of family law's nature and circulation, their interpretations of the core private law's diffusion rely on the relative autonomy of legal change from economic, social, and political conditions. Legal change occurs as a product of interplay of continuity and legal transplants, they claim. The split between society and law which both theories produce leads to the conclusion that a rule or a body of rules does not necessarily circulate on a rational ground. The evolution of law has its own reasons and follows its own paths.<sup>14</sup> Prestige or authority of the model, not (necessarily) its compatibility with the new legal system and its socio-economic background, is the justification of a legal transplant. For instance, there are neither important economic or political similarities nor a

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12. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1, 10 (1991) [hereinafter *Installment I*].

13. Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469, 469 (1995).

14. See Pier Giuseppe Monateri, *The "Weak Law": Contaminations and Legal Cultures*, in ITALIAN NATIONAL REPORTS TO THE XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 83 (1998).



common legal tradition between France in the late XVIII century and Egypt at the beginning of the twentieth century, yet Sanhuri adopted the model of the Code Napoleon for the Egyptian Civil Code. The same can be observed in the borrowing of the Buergerliches Gesetzbuch, the German Civil Code, in Japan at the end of the XIX century.

According to Sacco and Watson, the historical approach is the starting point in analyzing the matrix of legal diffusion, but it is not sufficient to the foundation of these complex theories, structuralist thought has widely contributed. In fact, both Sacco and Watson recall in their analysis the structuralism of Ferdinand de Saussure: law develops not unlike language, according to inherent dynamics which are due to the adaption of its own structures and are therefore detached from social conditions or political directives.<sup>15</sup> In the words of Sacco, "Along with law . . . language provides a typical example of a cultural phenomenon in continuous evolution but the evolution of language is not connected to a class or an axiological or moral choice."<sup>16</sup> Hence, the comparative lawyer, like the linguist, is entitled to discover the causes of this evolution inside the law itself, by exploring its inner structures and dynamics. The similarity between law and language had already been displayed by Karl Friedrich von Savigny, the founder of historical jurisprudence. In his eminent work *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*<sup>17</sup> (On the Vocation of our Age for Legislation and Jurisprudence), Savigny claimed that law is the issue of the *Volksgeist*, the collective genius; like language or manners, it is organically connected to a people and cannot be conceived as the product of the arbitrary will of a lawgiver. Therefore law, and especially private law, which is his main object of interest, is a complex body of rules formed from a spontaneous tradition. Within this genealogy, it is Friedrich von Hayek, infamous theorist of liberalism, who gave to the law/language resemblance an anti-social turn, by insisting on the autonomy of private law from politics and social developments. Just like Savigny, Hayek maintained that both language and law are *not* the products of an intentional project, but, unlike Savigny, he stresses the detachment of private law from politics and society. Hayek claimed that private law governs relationships within the society according to an almost accidental order.<sup>18</sup> Neither linguistic nor legal developments can be wholly planned

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15. See generally FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (1972).

16. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343, 393 (1991) [hereinafter *Installment II*].

17. KARL FRIEDRICH VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (Hildesheim 1967).

18. See F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY: THE MIRAGE OF SOCIAL

or ordered; rather, *they* order social connections.<sup>19</sup> Consequently, extensive projects of legal change cannot succeed. This is very close to what Sacco and Watson think about law reforms. In Sacco's theory of legal diffusion this is explained with the operation of cryptotypes, elements hidden in legal systems that can prevent transplants from being accepted. Specifically, cryptotypes are rules or doctrines in force before a legal reform and then superseded, which survive in a non-verbalized form in the mentality of judges and scholars and influence their interpretation of the new law with the result of obscuring or neutralizing the goal pursued by the reform itself. As an example, Sacco takes the preservation by French courts of the requirement of delivery to transfer ownership despite the Code Napoleon which does not include delivery among the requirements necessary for ownership to be transferred: "The cryptotype that has influenced the French jurists is the solution that prevailed in Roman law,"<sup>20</sup> but it doesn't come out as such in outward explanations. Most of these elements—from universalism to continuity, from structuralism to prestige, etc.—are usually held as strangers to the diffusion of family law. Most significant law reforms that occurred in the twentieth century within the Western Legal Tradition were grounded on political and social changes and aimed at fulfilling projects of modernization. No-fault divorce, equality of children born out of wedlock, and equality between spouses are often outcomes of the democratic constitutions enacted after the Second World War or strictly tied to the advent of the welfare state. The evolution of family law is the outcome of legal transplants which find their legitimacy in stereotypes like modernity, progressivism, etc. In other words, it is a product of functionalist projects and of discontinuity: a foreign model is appealing as long as it is the landmark of a new conception of family relations, which is functional to modernize the whole society and is therefore perceived as a factor of discontinuity with respect to the previous regime. In the words of Sacco: "family law is nowadays very similar among all legal systems in the WLT as a result of strong social urges,"<sup>21</sup> on the contrary, the core of private law is characterized by the strong technicalities of legal texts and science that may vary from country to country, and by subtle and capillary distinctions which are the product of a bi-millenary legal evolution.

In short, in the field of family law, phenomena of convergence among legal systems are mostly seen as the diffusion and inoculation of values and

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JUSTICE 67 (1973). These ideas are already developed in F.A. HAYEK, *THE ROAD TO SERFDOM* (Routledge 1976) (1944).

19. See Pier Giuseppe Monateri, *Cunning Passages: Comparazione e Ideologia nei Rapporti tra Diritto e Linguaggio*, in *RIVISTA CRITICA DEL DIRITTO PRIVATO* 353 (1999) (outlining the political implications of this theory).

20. Sacco, *Installment II*, *supra* note 16, at 391.

21. See RODOLFO SACCO, *INTRODUZIONE AL DIRITTO COMPARATO* 160 (1992).

principles, rather than as transplants of technical rules, such as the mailbox rule in the formation of contracts or the delivery requirement in property transfers.<sup>22</sup> This may help to clarify further the last opposition I have sketched in the chart above: while legal borrowings at the core of law are mostly due to the prestige of the model imported, principally assessed in scientific terms, legal change in family law often relies on the “better law” criterion, i.e. on the choice of the foreign law which is deemed better to modernize the domestic legal regime of the family. We will see this criterion at work in the last part of this paper.

In this subsection I show, first, how the core/periphery opposition incorporates the market/family opposition (Part 1.A), and then I show how this opposition has been deconstructed (Part 1.B).

#### *A. Constructing the Core/Periphery Divide*

As a result of these basic constructs of comparative law, family law is not only marginalized by and/or from legal science at the national level but also rendered peripheral as a subject of comparative law analysis. As long as comparative law relies on a scientific paradigm, there is no scientific way to compare family legal regimes, which appear inescapably local, sociological, and anthropological, hence the so-far limited interest of comparative law scholars for family related issues.

The marginality of family law as a scientific subject was not even overcome in the era of Functionalism (from the 1950s onward). According to the methodological approach which has been dominant for decades in comparative law and is known as Social Purpose Functionalism, comparative law works on facts and solutions. In every legal system, law faces the same problems and, through different conceptualizations, comes to a solution.<sup>23</sup> Because problems—the underlying social facts and social purposes—are similar, solutions are almost by definition comparable. Therefore, the comparativist moves from facts to solutions, which in his view are *functional equivalents*.

However, history, mores, and ethics—all associated with family law—heavily interfere with and eventually disrupt the objectivity of the functionalist method. As a result, most comparative law scholars have left family law on one side; because there are no functional equivalents that jurists can compare scientifically, comparative law scholars cannot compare family laws.<sup>24</sup> In the end, functionalism thus maintains the

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22. See generally Ronald Dworkin, *Liberalism and the Concept of Equality*, in DEMOCRACY, DIFFERENCE & SOCIAL JUSTICE 310 (Gurpreet Mahajan ed., 1998).

23. On this issue see Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777 (2010).

24. See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L.

exceptionality of family law, consequently reinforcing the core/periphery divide within private law.

However, even those few authors who do not follow the functionalist approach in producing comparative analysis of family law related issues do not seem interested in bridging the “scientific” gap between family law and the core of private law. Professor Mary Ann Glendon, certainly one of the most renowned family law scholars in the international academia, applies a text-and-context methodology in analyzing the transformation of family law in the United States and Western Europe.<sup>25</sup> She speaks about borrowings and context, and in so doing she stresses the bi-directional interplay of law and society, according to which legal change is engendered by social instances of transformation and also affects the way in which people imagine and project their family relations. Nevertheless, she depicts the family *as a legal field* as exceptional, for “families . . . give rise to tension between love and duty, reason and passion, immediate and long-range objectives, egoism, and altruism,”<sup>26</sup> and context eventually prevails on legal borrowings in defining the actual legal regime of the family in a given country.

Family law’s exceptionalism is not even challenged by the more sophisticated approaches to comparative law. For instance, a prominent representative of the Sacco School, Professor Silvia Ferreri,<sup>27</sup> discussing the influence of foreign legislation on the Italian family law reform of 1975, concludes that the convergence of family law regimes that occurred in the past decades all over the West and beyond is due to a widespread changes in social habits and material conditions of life rather than to the scientific prestige of any legal model.

Another European scholar, Harry Willekens, opposes an elaborated version of the functionalist method to the dominant approach focused on the *ideological factor* and to René David’s explanation of legal diffusion through families of law.<sup>28</sup> David’s classification comprises the Romano-Germanic family of law, characterized by the unifying effect of the codifications, the Common Law family, which revolves around the binding force of judicial decisions, the Socialist family of law, where the law is deeply affected by the power of the political party, and a residual group,

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REV. 1, 13 (1974).

25. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 291 (1989).

26. *See id.* at 313.

27. Silvia Ferreri, *Retorica e Sostanza: Leggi Straniere sul Regime Patrimoniale Della Famiglia*, in 2 *FAMILIA* (2009).

28. H. Willekens, *Explaining Two Hundred Years of Family Law in Western Europe*, in *HET GEZINSCRECHT IN DE SOCIALE WETENSCHAPPEN* 59 (H. Willekens ed., 1997).

formed by Muslim Law, Hindu Law, African Law, Extreme East Law.<sup>29</sup> According to Willekens, David's scheme only has a descriptive value, since it highlights the use of the same legal methods and concepts among the systems forming one family of law, but it is incapable of explaining differences in the content of family laws.<sup>30</sup> This way he resists, on the one hand, a representation of family law's political insights as merely contingent and, on the other, David's *scientific* approach, which justifies similarities and differences among legal systems on a "neutral" basis, that is on their being member of a legal family (the Romano-Germanic family, the Common Law family, and so on) or of another. As to the accounts of family law evolution based on ideology, Willekens deems them trivial or false. According to this author, the ideological approach can escape triviality only insofar there is a causal distance between the norms and the ideology invoked to explain them. While this causal connection clearly links the liberalization of divorce and the widespread opinion that divorce should be easier, there is no such relationship between liberalization of divorce and liberal ideology. This is clearly demonstrated by the fact that a liberalization of divorce took place in the Scandinavian countries, where liberalism has been strongly limited by a State-driven welfare system.<sup>31</sup> On the contrary, Willekens explains the transformation and diffusion of family law over the last two centuries by showing the interconnections between family legal regimes and economic dynamics as well as the interconnections between the structures of the family and given social policies inherent to the politics of the welfare state. In this way he does not resist family law's exceptionalism, but rather he justifies it on an articulated basis which emphasizes the complementary character of the family in relation to the development of capitalism in Western European countries.

To sum up: none of these comparative analyses contains a refutation of the claim that family law is peripheral to the law of the market.

This suggests that the purpose of de-marginalizing family law has to be pursued by challenging the core/periphery divide and the assumptions underlying the theories on legal diffusion that strengthen it. The seminal works of some scholars enable a critical understanding of family law and the possibility of a valuable comparative analysis in this field.

### *B. Deconstructing the Core/Periphery Divide*

On the side of comparative law, Professor Pier Giuseppe Monateri,

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29. RENÉ DAVID, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ: INTRODUCTION À L'ÉTUDE DES DROITS ÉTRANGERS ET À LA MÉTHODE COMPARATIVE* (1950).

30. Willekens, *supra* note 28, at 75.

31. *Id.* at 77.

another prominent member of Sacco's School, arguing from a critical perspective, challenges the law/society split devised by masters of comparative law such as Sacco and Watson. He stresses the importance of social, political, and economic needs, which underpin the very same legal borrowings that Sacco and Watson present as archetypical examples in their theories, for instance the adoption of the Code Napoleon model in Egypt, and the borrowing of the German civil code, *Bürgerliches Gesetzbuch* in Japan. In both cases, although the social and historical contexts are different from the originating systems, strong similarities emerge in the way the social ruling class within each given context identified, in the Code, its own main instrument of governance.<sup>32</sup> By undermining the conceptual heart of Sacco's and Watson's theories of (the core) private law's diffusion, i.e. the law/society split, this critique represents an important step towards the deconstruction of the core/periphery of law divide. In fact, Monateri's argument adds a comparative law flavour and new insights to the deconstructive efforts put forth within the unitedstatesean scholarship by the Critical Legal Studies movement. In the following paragraphs, I will mention just two crucial critical works that mostly contributed to collapse the market/family, core/periphery dichotomy. In his seminal work on form and substance of adjudication in private law, Professor Duncan Kennedy greatly contributes to the deconstruction of the bipolar structure of the core/periphery opposition in private law by showing the inconsistency of widespread legal assumptions like the individualism of contract law and the mere technical character of its rules.<sup>33</sup> In particular, Professor Kennedy demonstrates that even the law of contracts, i.e. the very core of private law, is crossed by a tension between two opposite paradigms, individualism *and* altruism. Kennedy thus makes the way to disrupting the presumed opposition between the main patterns underpinning the family and the market.

Professor Frances Olsen, arguing against feminist reform strategies based on a perception of social life as divided between the two separate spheres of market and family, demonstrates that the supposed distinction between the family and the market does not rely on contrasting paradigms like solidarity versus individualism, or state intervention versus *laissez-faire*. Rather, both the family and the market systematically affect solidarity and individualism, state intervention and *laissez-faire*. As both domains went across different stages—feudalism, liberalism, and the

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32. Pier Giuseppe Monateri, *Critica dell'ideologia e Analisi Antagonista: il Pensiero di Marx e le Strategie della Comparazione*, in RIVISTA CRITICA DEL DIRITTO PRIVATO 703 (2000).

33. See, e.g., Duncan Kennedy, *The Political Stakes in "Merely Technical" Issues of Contract Law*, 1 EUR. REV. PRIVATE L. 7, 13 (2001); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713 (1976).

welfare state—and evolved along the same path, although their own developments sometimes parallel but other times follow inverse patterns. For example, the crucial changes that occurred in family law in the era of the welfare state, like equality between spouses and acknowledgement of children's rights, testify to the evolution of family law from a hierarchical ideology towards individualism, the same evolution that had concerned the core of private law during the rise of individualism. By contrast, welfare state reforms in the market reduced individualism and promoted a new kind of hierarchy between social groups.<sup>34</sup>

On these premises, a new understanding of family law and new perspectives for the second wave of comparative family law have developed. In this renewed theoretical framework, the implications of family law's exceptionalism are furtherly investigated and the critique of the market/family dichotomy unfolds from Kennedy's and Olsen's texts towards other analytical settings.

In a recent work translated and newly published in Italian, Professor Janet Halley offers a legal realist view of the marriage system in the United States and in European countries. This view aims to demonstrate that marriage and other legal forms for adult-to-adult relationships operate within a bipolar tension between status and contract. Hence, marriage is not based on either status or contract per se, but is constantly open both to status-like and to contract-like interpretations according to the political intent of public actors (legislators or judges).<sup>35</sup> Then in a forthcoming paper,<sup>36</sup> Professor Halley proposes a thorough reconstruction of the genealogy of American family law, which she portrays as a relatively recent development in legal science. The exceptionalism of family law emerges in this picture not only as a primary character of the discipline but even as the fundamental reason of the construction of family law as a distinct legal topic. The resulting family/market distinction persists in the legal order and also in the legal curriculum as a structural element. Halley argues that the "mystique" generated by this distinction has negatively affected theory, scholarship, pedagogy, and legal change concerning family law and should be overcome. Working on the genealogy of family law exceptionalism from the perspective of the globalization of legal consciousness, Professor Duncan Kennedy has recently provided a picture of the nesting of distinct dualities such as family law/patrimonial law, necessity/arbitrariness (of legal rules), state law/private law,

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34. See generally Francis E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1528 (1983).

35. Janet Halley, *Note sulla Costruzione del Sistema delle Relazioni di Coppia: un Saggio di Realismo Giuridico*, in RIVISTA CRITICA DEL DIRITTO PRIVATO 515 (2009).

36. Janet Halley, *What is Family Law? A Genealogy*, 22 YALE J.L. & HUMAN (forthcoming 2010).

international/national, individual/organic whole, liberalism/reaction, etc. in Friederich Carl von Savigny's *System of the Modern Roman Law*.<sup>37</sup> From such a picture, Kennedy finds that family law, as an autonomous and coherent legal field within private law, is a creation of classical legal thought, in the genealogy of which Savigny represents a prominent figure. CLT construes family law as a sanctuary of Romanticism and even of reaction within a context dominated by individualistic liberalism, epitomized by the doctrine of free will. Hence, the exceptionalism of family law is not only set up, but it will also be maintained by the CLT rationalist successors of Savigny. Still, *this* family law, especially in Savigny's version, is at the core of another genealogy of modern law, the sociological one, that—just like the legal order of the family in the *System*—impinges on the organic side of law and on its reference to a spontaneous moral order. In this way, it subverts the very idea that family law is exceptional.

Reasoning from within the European legal context, I myself have challenged family law exceptionalism under several points of view. In one of my works on the topic,<sup>38</sup> I argued that the tension between individualism and solidarity underlies both contract law and family law so that it is possible to deconstruct the opposition between contract-like and status-like remedies that legal systems alternatively extend to cohabitation arrangements. This makes possible as well a deconstruction of the traditional opposition between individualism-oriented (common law) and solidarity-oriented (civil law) legal traditions. In another work devoted to the process of family law harmonization in Europe,<sup>39</sup> I questioned the dominant idea according to which the EU should not interfere with national choices concerning the regime of the family, because that domain is highly political and the object of member States' sovereignty, whereas EU interventions in the law of the market are totally plausible, because they are politically neutral and merely technical. I tried to show, on the contrary, that the harmonization of contract law may be a strugglefield between national sovereignty and European integration as long as sensitive questions such as the harmonization of the limits to freedom of contract are concerned.

The critical, legal realist approach to family law proves crucial in defeating its marginalization. An international network of (mostly young)

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37. Kennedy, *Savigny*, *supra* note 11, at 811. See generally FRIEDRICH KARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* (1867).

38. Maria Rosaria Marella, *Il Diritto di Famiglia fra Status e Contratto*, in STARE INSIEME. I REGIMI GIURIDICI DELLA CONVIVENZA TRA STATUS E CONTRATTO 3 (Franco Grillini & Maria Rosaria Marella eds., 2001).

39. Maria Rosaria Marella, *The NON-Subversive Function of European Private Law: The Case of Harmonization of Family Law*, 12 EURO. L.J. 78 (2006).



family law scholars from all over the world, who regularly gather to stand Up Against Family Law Exceptionalism (UAFLE) has developed new possibilities for resisting the exceptional framing of the family and its law.<sup>40</sup> Their efforts led to the disclosure of a still undisclosed centrality of the regime of the family, whose legal complexity results from the stratification of different areas of private law, i.e. family law plus contract law and tort law, and affects and is affected by different legal fields outside of private law, such as welfare law, taxation law, labor law, immigration law, and the like.<sup>41</sup> Most importantly, this achievement sheds new light on the role played by the core/periphery dichotomy in different legal systems, especially in post-colonial systems, and gives rise to new possibilities for *comparative family law*.

### III. THE GEOPOLITICAL DIMENSION: THE CORE/PERIPHERY OF LAW AND THE CORE/PERIPHERY OF THE WORLD

In this Part, I compare the core/periphery divide within private law with the idea of a core and a periphery of the world assumed respectively as the source and the destination of legal diffusion. In this framework, the WLT represents the core of the world.<sup>42</sup>

In this understanding, the globalization of law, as well as the modernization of non-Western legal systems, has proceeded through the wholesale transplantation of Western laws, in particular the Western laws of the market. In the contemporary world, the core of private law, the law of contract, moves from the WLT, particularly the law of the United States, the very core of the world, to the periphery of the world.

The question is: how does the diffusion of the core/periphery of law work in relation to the core/periphery of the world?

I confront this question at two different levels. The first level is the one of different phases of globalization of legal consciousness and regards the family as an instrument of government in the formation of the national identity of post-colonial states. The second level is the so-called multicultural dimension, affecting most societies in the West. Multiculturalism is producing a phenomenon of dislocation of the

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40. Chantal Thomas, *The Economic Family in Global Context: A Case Study of Migrant Domestic Workers in Egypt*, 58 AM. J. COMP. L. 987 (2010); see also *Family Law Exceptionalism—Toronto*, LEGALSCHOLARSHIPBLOG.COM, <http://legalscholarshipblog.com/2007/10/11/family-law-exceptionalism-toronto-2/> (Oct. 11, 2007) (advertising a conference held by legal scholars in opposition to family law exceptionalism).

41. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism—Introduction to the Special Issue on Comparative Family Law*, 58 AM. J. COMP. L. 753, 761 (2010).

42. See *supra* note 5.

peripheral law from the “periphery” to the “core” of the world, which takes place precisely when European courts enforce non-European legal rules in deciding family law disputes within their own jurisdictions.

### *A. Family Law in the Construction of Legal Traditions*

It has been pointed out above that CLT construed family law as exceptional and different from the law of obligations, that is, the periphery of private law, the core of which is represented by contract law.<sup>43</sup> From this narrative, emerge the ideas that the legal family is politically oriented, national, and strongly influenced by local traditions, religion, beliefs, and social values shared in a certain community. In spite of the transformations that have occurred in legal consciousness over time, this ideological construction persists in the so-called WLT and beyond.

Several research studies have recently unveiled the mystifying nature of those narratives, which conceal beneath the veil of localism *and* marginality the role that family law plays in the construction of legal traditions. Taking Duncan Kennedy’s *Three Globalizations* as background,<sup>44</sup> a group of UAFLE scholars have explored the way in which the presumed national character of family law in different geopolitical contexts has been strategically deployed, as an original product, or set aside in order to emphasize similarities between the local legal system and a foreign dominant legal culture.

The classically presumed localism of family law does not explain how the same modes of legal consciousness have spread out over time, and throughout the world, from the core to the periphery, and produced legal change in many fields, including common trends in conceptualizing the family and its legal regime. Projects of modernization of family law are embraced in many nation states, almost simultaneously with national strategies aiming to reinforce the traditional character of the family.<sup>45</sup>

In fact, the globalization of given rationales concerning family law is often mediated by the stereotype of its national character, which implies a concern for State sovereignty every time legal change occurs in the field.

Scholars and institutions committed to the problems of European integration have struggled with this pattern. However, the transformation of family law is assisted by different narratives, depending on where it

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43. See DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006), available at [http://duncankennedy.net/legal\\_history/essays.html#R&F](http://duncankennedy.net/legal_history/essays.html#R&F); Kennedy, *Globalizations*, *supra* note 1.

44. Kennedy, *Globalizations*, *supra* note 1, at 63-73.

45. See *id.* at 69-71 (noting how local elites mediated between neo-formalistic ideologies of sexual and family legal codes and local, traditional ideologies in the third, post-1945 wave of globalization).

takes place—whether at the core or in the peripheral corners of the world.

The “modernization” of family law in Europe and the West—at the core—is presented as the product of an internal political struggle—the compromise reached within the national parliament by conflicting political forces or, alternatively, an original issue of that legal tradition—rather than as the reception of developments occurring at a transnational level.

At the periphery, decolonization processes are frequently interwoven with the complex dynamics of “modernization.” It was common for peripheral elites engaged in the modernization of the local legal system to consider a foreign dominant legal culture “per field.” As a result, a modern market develops and a parallel system preserves a traditional family within the same legal system. The preservation of local traditions in family law represents the “price” for modernizing the law of obligations.

However, the tradition/modernization dialectics may be more complex than that. An extremely important critical development in this direction is represented by Professor Lama Abu-Odeh’s seminal article on the modernization of Muslim family law in Egypt.<sup>46</sup> In this article Abu-Odeh takes into law the analysis developed in Partha Chatterjee’s *The Nation and Its Fragments*, which argued that the nationalist Bengali elite split the world by accepting modernization for western science and the like, but rejecting it for the family.<sup>47</sup> Abu-Odeh shows how nationalist legislation in modern Egypt had to compromise between modernizing women for development and keeping them constrained for national cultural autonomy. She further highlights that Egyptian feminism, pushing for liberal reforms, meets the male nationalist reforming elite that has to compromise with conservative religious authorities. This analysis offers basic insights into the intricacies characterizing modernization/tradition dynamics in postcolonial contexts.

In former British colonies in Africa such as Kenya, Nigeria, and Ghana, the modernization of the family had been pursued by the colonizer mainly through the positivization and bureaucratization of law, and the definition of the legality of the family. Interestingly, post-colonial States, which bear a responsibility to the international community to pursue the modern family, continue and sustain the same project.<sup>48</sup> According to Yun-Ru Chen,<sup>49</sup> in late nineteenth century Taiwan, which was colonized by Japan,

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46. Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT’L L. 1043-46 (2004).

47. PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* (1993).

48. See S. Wairimu Kang’ara, *A Critical Overview of the Creation and Development of British Colonial Family Law in Africa* (unpublished manuscript) (on file with author).

49. See Yun-Ru Chen, *Ally with the West: The Politics of Identity in*

the Taiwanese male elites fought a national identity struggle just on the terrain of the legal regime of the family. The Japanese justified the extension to Taiwan of Japanese family law by presenting it as more modern. This matched the Japanese narrative that Taiwanese traditional custom was inferior to Japanese modern law. On the other side, the Taiwanese resisted this assimilation project by opposing the patriarchal character of some Japanese rules (for example, primogeniture) with the more “civilized” Taiwanese customs (equality among all sons in succession) and electing the West as the “true” modern against Japan’s incomplete westernization and reform. In sum, this is not the story of an opposition between tradition and modernity; it is the story of a competition between two different projects of modernizing Taiwanese family law.

In Europe, the Greek case, as analyzed by Philomila Tsoukala,<sup>50</sup> is an interesting example of this phenomenon, with family law playing a crucial role within the civilization versus barbarism rhetoric, and providing a primary means by which Greek nationalists could claim that the ethnic Greeks preserved their “Greekness” through the years of the Ottoman domination. During the initial phases of the creation of the Greek State, the emphasis on the law enacted by the Christian Orthodox Church, in particular the law of marriage, allowed the elites of the time to repel any possible “barbaric” inheritance from the Ottoman years. This narrative masked in fact a harsh rivalry between distinct institutions and elites, with the Orthodox Church competing with the Ottoman kadis on the one hand, and with local civil authorities, on the other. In this way, the newborn Greek nation constructed its Western identity. This representation, as scholars have suggested, combines modernity, civilization, national identity, and the relationship between the State and the Church as pieces of a mosaic that could have been put together in many other ways.<sup>51</sup>

### *B. The Core/Periphery Divide in Globalized Societies.*

The contemporary process of globalization of law (the third globalization, in Duncan Kennedy’s scheme)<sup>52</sup> exhibits a flipping of the paradigms supporting the family and the market, if compared with the previous phases of legal globalization. Modernization of family law relies nowadays on principles deriving from an old legal consciousness. Whereas today solidarity is considered a principle upon which a fair, modern market

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Modernization of Taiwanese Family Law Under the Oriental Empire in Japan (1895-1945) (unpublished manuscript) (on file with author).

50. Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 AM. J. COMP. L. 873 (2010).

51. *Id.* at 873.

52. Kennedy, *Globalizations*, *supra* note 1, at 63.

ought to be erected, solidarity was once deemed a major tool in the construction of the old, hierarchical family.<sup>53</sup> The old-fashioned, typical classical-legal-thought-paradigm of individualism, which enforced free will and individual rights, represents an updated rationale in family law modernization. In the framework of globalization, this pattern reproduces the mutual dialectics between the family and the market that Olsen described in reference to American law.<sup>54</sup> This picture helps us to understand the dynamics supporting the creation of a global family law in Western and, particularly, European societies.

Let us go back to our starting point. We have seen that the legal community generally depicts family law as the periphery of private law because it is supposed to be inexorably local, intrinsically policy-oriented, influenced by local traditions, and moulded on particular social needs. In brief, localism and marginality are its main features. Nevertheless, family law travels, and its travelling is restricted neither to the colonial/postcolonial context, nor to the phenomenon of the harmonization of law in Europe.

In the Austro-Hungarian Empire, for instance, Muslims followed the Islamic family regime; therefore, polygamy and other Muslim institutions were enforced within the core of the world.<sup>55</sup> In today's globalized societies, diffusion of family law is sometimes indirectly achieved through the vehicle of private international law. In this Part, I will focus on a mode of legal diffusion which basically differs from the phenomena of legal transplants I have tackled above. In fact, I will address the dynamics assisting the enforcement of private international law in family law matters, i.e., a context within which courts operating in domestic jurisdictions test the compatibility of non-domestic family law with the principles of their own legal systems in order to adjudicate family law disputes between foreign citizens. Thus, non-western family law can travel from the periphery to the core of the world thanks to the machinery of private international law. Nevertheless, in moving from the periphery to the core of the world, there are pieces of the peripheral legal package that are left behind. Here the third globalization scheme helps out.<sup>56</sup> I am arguing that non-westernized law (law from the periphery) can travel to the core as long as it is compatible with the rhetoric and politics of the core's human rights

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53. Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 EURO. L.J. 653 (2004).

54. Olsen, *supra* note 34, at 1497.

55. Irmgard Marboe, *Islamic Religious Education in Austria: A Model for Teaching and Learning Islamic Law?*, available at [http://www2.warwick.ac.uk/fac/soc/law/events/globalsharia/i\\_marboe\\_paper.pdf](http://www2.warwick.ac.uk/fac/soc/law/events/globalsharia/i_marboe_paper.pdf) (last visited Aug. 17, 2010).

56. Kennedy, *Globalizations*, *supra* note 1, at 19-20.

(that is, with the individualist paradigm). On the contrary, the core rejects such peripheral law as long as the non-westernized law enforces the communitarian value of solidarity, evoking a patriarchal (or “non-civilized”) image, as in polygamy. As to the first phenomenon just described (the core accepting law from the periphery), we have the tendency of German courts to adjust family law rules originating from third world countries to German law in order to preserve the original goals and the resulting balance of interests in favour of third world nationals living in Germany. In 1996, the German Karlsruhe Court of Appeals enforced the *kafalah*, a Muslim legal institution according to which a minor is taken care of without being adopted—adoption being forbidden by the Sharia. The court held that *kafalah* is not contrary to internal—that is, German—public policy.<sup>57</sup> Other European legal systems, such as Spain and Italy, have also recognized *kafalah* as enforceable in the domestic jurisdiction. Specifically, Spain endorsed a *kafalah* in 1995 in a Granada Court of Appeals decision,<sup>58</sup> and recently Italy’s Court of Cassation recognized *kafalah* as a legitimate form of custody over minors for purposes of family reunification.<sup>59</sup>

In these examples, the periphery of law originating at the periphery of the world moved toward the center of the WLT. According to Professor Erik Jayme, this is not just a case of tolerance: through the enforcement of the 1989 U.N. Convention on Children’s Rights (Article 20 of which explicitly mentions *kafalah* as a form of assistance worthy of being recognized), the Muslim rule indirectly triggers a legal change within western legal systems which are now encouraged to make their adoption regimes more flexible and diverse (such as in Spain and France).<sup>60</sup> Still, in reference to the Muslim law of marital relationships, French courts interpret repudiation of the spouse as a divorce suit, notwithstanding its distance from the no-fault divorce of the western egalitarian family, when a wife accepts the repudiation or a husband assumes an obligation of financial support.<sup>61</sup> However the geometric perfection of the pattern I have

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57. See Oberlandesgericht Karlsruhe [OLG] [Appellate Court of Karlsruhe] Nov. 25, 1996, Zeitschrift für Familienrecht [FamRZ] ¶ 6, 10, 1996 (Ger.) (finding in this case that the child’s living arrangements were more favourable than the German adoption, and upholding the *kafalah* living arrangement).

58. A.P. Granada, April 25, 1995 (47 *Revista Española de Derecho Internacional*, p. 415) (Spain).

59. Cass., sez. un., 20 marzo 2008, n. 7472, 7 *Famiglia e Diritto* 674 (2008) (It.).

60. See Erik Jayme, *Osservazioni per una Teoria Postmoderna della Comparazione Giuridica*, in *RIVISTA DI DIRITTO CIVILE*, 813 (1997). An Italian translation of the paper presented on June 5, 1997 in Osnabrück, is now published in *JAHRESHEFTE DER INTERNATIONALEN VEREINIGUNG OSNABRÜCK* (1997/1998); see also G.A. Res. 44/25, Art.20, ¶ 3, U.N. Doc. A/RES/44/25 (Dec. 12, 1989).

61. See Jayme, *supra* note 60, at 819.

sketched above (the symmetric dynamics of inclusion into/exclusion from the legal systems at the core of the world) can be broken up by other considerations. In particular, recent developments in Italian case law on *kafalah* show a disagreement within the Supreme Court itself as to the compatibility of *kafalah* with the principles of Italian law of custody over minors. On the one hand the recognition of *kafalah*, even for limited purposes of family reunification, is no longer uncontested: in a recent case the Italian Court of Cassation<sup>62</sup> has stated that a *kafalah* which entitled an Italian citizen to custody over a minor from Morocco does not entitle to family reunification for it is not in line with the principles of domestic and international law of adoption. On the other hand, Professor Jayme's hypothesis of a mutual influence and integration between western and non-western models of children's custody through private international law has not taken place in Italian law at least: a local court<sup>63</sup> has recently rejected the assimilation of a Moroccan *kafalah* to the Italian "adoption in special cases"—a kind of open adoption which represents the most flexible form of adoption in Italian law—arguing that the respective legal effects (according to Italian law the appellants would have assumed the parenting for the minor, while the minor would have become Italian citizen in contrast with Moroccan public policy) are not compatible with one another.

In the background, more general questions arise: to what extent is the recognition of non-western law within western jurisdictions marked by the ends western courts want to achieve in relation to the non-western legal means available? And to what extent is non-western law culturally transformed through this recognition?<sup>64</sup> The complexity of this theme cannot be addressed in this Article. In principle I believe that such questions are not distinctive of the core/periphery, west/non-west encounter, as they draw on a conflict between competing paradigms, which generally affects legal adjudication in the context I am discussing here as well as in domestic adjudication or in the context of the harmonization of law, to which the last part of this Article is devoted.

As to the second tendency mentioned above (the core rejecting peripheral law which enforces the solidarity paradigm), again the system of private international law plays a role. In fact, the enforcement of private international law by European courts generally involves a public policy test, which may counter the recognition of non-westernized foreign

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62. Cass., sez. Un., 1 marzo 2010, n. 4868, 8-9 *Famiglia e Diritto* 780 (2010) (It.).

63. Trib. per i minorenni di Brescia, sentenza 12 marzo 2010, 3 *RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 760 (2010).

64. Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 *INT'L J.L. POL'Y & FAM.* 67 (2010).

marriages.<sup>65</sup> Traditionally, public policy arguments have aimed to protect monogamy and genuine consent to marry; therefore, recognition has constantly been denied to polygamous and bigamous marriages, as well as to forced and arranged marriages. At a different level, namely at the transnational level of E.U. law, the recent E.U. Directive on Family Reunification, approved on September 22, 2003,<sup>66</sup> reproduces the same pattern that has traditionally characterized the enforcement of private international law rules by European courts in reference to the validity of marriage; the Directive does not refrain from imposing the conventional notion of the nuclear family on the citizens of developing nations who engaged in polygamy. The Directive's rationale (seeming to draw on a CLT individualistic paradigm) requires nations to reject any family law institution not in line with the "modern" family. Here, polygamy is the occasion for Europe, the original core of the WLT, to push back to the periphery of the world its law. However, the challenge that polygamy issues to the law of the West is much more complex than that. In some western countries, such as Canada and the United States, for instance, there are communities of nationals (that is, respectively, Canadian and U.S. citizens) that commonly engage in polygamous marriages.<sup>67</sup> Here the threat to the modern family does not come from outside—from the periphery of the world—but from inside. And, although the prevalent perception of these habits is one of extraneity, of exotism, in respect to the identity of the Nation, the defence of monogamy as the epitome of the modern family relies on national criminal law banning polygamy and bigamy rather than on private international law.<sup>68</sup>

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65. Mark Bell, *Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships Within the European Union*, 5 EUR. REV. PRIV. L. 613 (2004); Richard Frimston, *Marriage and Non-Marital Registered Partnerships: A European Perspective of Private International Law*, available at [http://www.ccbe.eu/fileadmin/user\\_upload/doc](http://www.ccbe.eu/fileadmin/user_upload/doc) (last visited Dec. 4, 2010). With specific reference to the operation of the public policy principle in this field, see Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 J. PRIV. INT'L L. 201 (2008); Haris P. Meidanis, *Public Policy and Ordre Public in the Private International Law of the EC/EU: Traditional Positions of the Member States and Modern Trends*, 30 E. L. REV. 95 (2005).

66. See Council Directive 2003/86, On the Right to Family Reunification, 2001 O.J. (L 251) 12, 15 (EC) (not authorizing Member States to allow family reunification (immigration) of an additional spouse where the sponsoring individual already lives with a spouse in the territory of a Member State).

67. Angela Campbell, *Bountiful's Plural Marriages*, INT'L J.L. IN CONTEXT (2010) (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1671611](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1671611); Angela Campbell, *Bountiful Voices*, 47 OSGOODE HALL L.J. 183-234 (2009); Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287 (2010).

68. The criminalization of polygamy does not just involve marriage, it involves living in a conjugal union with more than one person. Now, those people who live in a polyamorous ménage are also polygamists in the eyes of the law. Brenda Cossman,



To sum up, the fate of the periphery of law is *not* to remain local both at the periphery and the center of the world. We have evidence of a trend that may reproduce the pattern that Olsen highlights with respect to the relation core/periphery of law in the developing American law.<sup>69</sup> The principles of western family law may diffuse to the periphery, although more slowly<sup>70</sup> than the core of private law, namely the law of contracts, does. Even when modernization of family law is not on the agenda of post-colonial states, and even where it has been totally rejected, the rhetoric of human rights that supports (and is increasingly reinforced by) the emerging individualism of westernized family laws might play a role. Human rights are central in contemporary legal consciousness, representing a kind of universal legal linguistic units.<sup>71</sup> As such, they tend to be projected in a transnational dimension. Values like women's and children's rights are likely to diffuse (and/or be imposed by international institutions like the U.N.) all over the world at the expenses of the hierarchical family, which may resist in the periphery as an option in favour of Tradition and national identity. This way, the implementation of human rights becomes a powerful instrument for the diffusion of western values in family law beyond the West. In fact, all the major human rights treaties require the adoption of western-style modes of relations between parents and children and husbands and wives, and, in so doing, they turn into a global force for the harmonization of family law.<sup>72</sup> Therefore their influence might produce

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*Polygamy*, UNIVERSITY OF TORONTO (Sept. 25, 2009) <http://www.utoronto.ca/content/view/775/2666>. In this light the last challenge of polygamy does not issue from the "old fashioned" paradigm and does not threaten modernity, the way it is epitomized by the monogamous and nuclear family; on the contrary, it comes from the very core of (post)modern western societies and stands up against the modern family, which is seen as the sanctuary of Sex's normalization. See BRENDA COSSMAN, *SEXUAL CITIZENS, THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* (2007); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 340–54 (2004).

69. See Olsen, *supra* note 34, at 1497.

70. See Abu-Odeh, *supra* note 46, at 1043. According to Abu-Odeh, in reforming its family law, Tunisia definitely received the ideas of individualism and companionate marriage.

71. See Kennedy, *supra* note 1, at 66.

72. The International Community has always devoted a great deal of attention to the protection of human rights within the family. This effort has resulted in several major international instruments focused on family law issues: the United Nations Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318 (XXIX), 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9631, at 146 (Dec. 14, 1974); Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13; International Labour Organisation (ILO) Convention No. 156 Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, June 23, 1981, 1331 U.N.T.S. 295; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S.

a phenomenon of gradual legal change of peripheral law at the periphery. Finally an extraordinary factor of uniformization of the socio-economic role the family plays at the core and at the periphery is to be identified in the neoliberal economic policy which the international financial institutions are imposing on nations all over the world. Both at the core and at the periphery, the institutions of globalization are paying a so far unknown attention to “sex, sexuality, gender, reproduction, and the family as central to the making of the global legal order and, indeed, of the global political

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In particular, the United Nations and the Hague Conference on Private International Law created a movement to harmonize some aspects of family law across national regimes and to avoid the harmful human consequences of conflicts of law in this area. *See* United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231; *see also* Hague Convention Relating to the Settlement of the Conflict of the Laws Concerning Marriage, June 12, 1902, Hague A; Hague Convention Relating to the Settlement of the Conflict of Laws and Jurisdictions as Regards Divorce and Separation, June 12, 1902, Hague B; Hague Convention Relating to Conflicts of Laws with Regard to the Effects of Marriage on the Rights and Duties of the Spouses in Their Personal Relationship and with Regard to Their Estates, July 17, 1905, Hague E; Hague Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, Hague 18; Hague Convention on the Law Applicable to Matrimonial Property Regimes, March 14, 1978, Hague 25, *available at* [www.hcch.net](http://www.hcch.net).

As to family maintenance and support, *see* Hague Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, April 15, 1958, Hague 9; Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, October 2, 1973, Hague 23; Hague Convention on the Law Applicable to Maintenance Obligations, October 2, 1973, Hague 24, *available at* [www.hcch.net](http://www.hcch.net).

As to child custody and abduction, the main international conventions are: Hague Convention Relating to the Settlement of Guardianship of Minors, June 12, 1902, Hague C; Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, Hague 28; Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, October 19, 1996, Hague 34, *available at* [www.hcch.net](http://www.hcch.net).

As to the issue of inter-country adoption, *see* Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, U.N. Doc. A/RES/41/85 (Dec. 3, 1986); Council of Europe, European Convention on the Adoption of Children, April 24, 1967, C.E.T.S. No. 58. *See also* Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Nov. 15, 1965, Hague 13; Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, Hague 33, *available at* [www.hcch.net](http://www.hcch.net).

The most important international instruments concerning the rights of the child are: Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354, at 19 (Nov. 20, 1959); United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227; Council of Europe, European Convention on the Exercise of Children’s Rights, Jan. 25, 1996, C.E.T.S. No. 160. *See also* Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors, Oct. 5, 1961, Hague 10, *available at* [www.hcch.net](http://www.hcch.net).

economy.”<sup>73</sup> Households as sites of social production are finally recognized in global projects as contiguous to the market, for they supply human reproduction, welfare provisions and consumption. In spite of family law exceptionalism, this is actually nothing new, rather a constant in the family/market relationship from the rise of capitalism. Nevertheless this makes today necessary to provide a critical analysis of family law within globalized societies that enables us to explore the way in which the market and the family are moving along *together*.

As a matter of fact, the World Bank, whose influential role in the developing world is undeniable although censurable, has recently decided to functionalize the family to market purposes.<sup>74</sup> The family is of interest because it impinges on whether and how its members participate in markets. In turn policies aiming at increasing the level of labor market participation affect the structure and the functioning of the family. Initiatives on gender equality draw on the acknowledgement that the distribution of resources within the household is a function of the bargaining power held by different family members, which in turn is influenced by the economic opportunities each of them holds outside of the household. A greater participation by women in the market is supposed to change the gendered division of household labor to women’s benefit. At the same time a major concern in the World Bank’s agenda are those laws (statutory or customary) which grant “unequal rights between husbands and wives in respect of marriage, divorce, reproductive decisions, child custody, marital property, and inheritance.”<sup>75</sup>

More generally, human rights politics, affecting—as we have seen above—family relations, are deemed as factors of economic growth as long as they promote social inclusion.

Nevertheless the World Bank’s project cannot succeed as long as it fails to address most of the problems that are systemically reported as structural elements in the labor markets all over the world: i.e. lower income and worse market opportunities for women. Very similar patterns are to be noticed today in industrialized countries at the core of the world where neoliberal economic policies are disempowering distinct social groups—women above all—both in the market and within the family, as increasing flexibility and precariousness in the labor market, on the one hand, and the retreat of welfare state from elderly and children care, on the other, all

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73. Halley & Rittich, *supra* note 41, at 755.

74. WORLD BANK, *ENGENDERING DEVELOPMENT: THROUGH RIGHTS, RESOURCES AND VOICE* (2003). For an analysis see Kerry Rittich, *Black Sites: Locating the Family and Family Law in Development*, 58 AM. J. COMP. L. 1023 (2010).

75. Rittich, *supra* note 74, at 1038.

contribute to expropriate social production from those who make it.<sup>76</sup>

### III. THE METHODOLOGICAL DIMENSION: THE HARMONIZATION PROCESS, FROM LEGAL DIFFUSION TO UNIFORM LAW

European countries are now facing the challenge of harmonization of law. In a harmonization framework, legal diffusion is no longer an occasional and fragmented experience. On the contrary, the science of legal borrowings, comparative law, is now used in constructing a uniform law for the European Union. In the field of private law, different techniques are being used to achieve this goal, including harmonization and competition among legal systems, as well as the finding of common principles for the creation of uniform legal regimes.<sup>77</sup> The core/periphery divide in private law, which has been a central preoccupation in this article, has profoundly affected the harmonization process. In this respect, the aim of the present part is threefold: firstly, I assume the harmonizing process, as the case for showing that the same comparative law method, can be embraced both at the core and at the periphery of the law; secondly, this comparative approach, relying on legal formants, will make it possible to identify the distributive outcomes of a certain legal regime, because it uncovers the law in action and the ways in which it reallocates material resources; and thirdly, the methodology of comparative law, by means of the theory of cryptotypes, will prove useful to reveal the cultural genealogy of legal rules, by unveiling the multiple layers which are in the background of legal principles and produce potential tensions and contradictions within a given legal system.

As to the harmonization of the core of law, the prevailing methodology still relies upon continuity, the search for spontaneously converging rules, and the finding of a common core. In the words of Hein Kötz, one of the most prominent advocates of the harmonization process in Europe, “National legal systems need to be treated as mere local variations of a European theme, which is in principle unitary.”<sup>78</sup> When uniformity is pursued (such as the Principles of European Contract Law formulated by the Lando Commission),<sup>79</sup> the project requires the selection of existing

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76. ANTONIO NEGRI & MICHAEL HARDT, *COMMONWEALTH* (2009).

77. See Marella, *supra* note 39, at 90-91.

78. See KONRAD ZWIEGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 29 (Tony Weir trans., Oxford Univ. Press 3d ed. 1996). See generally James Gordley, *Comparative Law and Legal History*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 753 (Mathias Reimann & Reinhard Zimmerman eds., 2007).

79. COMM’N ON EUROPEAN CONTRACT LAW, *THE PRINCIPLES OF EUROPEAN CONTRACT LAW* (1998), available at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/Skabelon/pecl\\_engelsk.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/Skabelon/pecl_engelsk.htm).

legal rules and may even imply the creation of new legal rules according to an ideal of internal rationality, coherence, and harmony of the system.

Typically, harmonizing action to develop a common European market is uncontroversial, while harmonizing action in family law is decried as impossible. Even if recognized as feasible, proposals for the harmonization of family law<sup>80</sup> are ruled by another approach. The same factors that make family law the periphery of private law counter the very idea of harmonizing family law: the influence of religious factors and local traditions, and the dependence on political choices make family law inherently and inexorably national.<sup>81</sup> Paradoxically, the same commonplaces have played a major role in producing the most effective harmonization project. Unlike many projects concerning the harmonization of the core, the harmonization of family law is pursued according to a striking functionalist inspiration. The prevailing methodology is the so-called “better law” approach. Given a certain legal problem, for instance the division of marital property at divorce, the “better law” approach requires finding the most progressive rule among all the Member States. Here the basic idea is that *some* European legal systems show a more progressive attitude in regulating family law topics than others do. Thus, the harmonization of family law proceeds through discontinuity,<sup>82</sup> although the “better law” model is usually presented as non-antagonistic to the common core idea, since progressive legislators are supposed to be capable of anticipating policy tendencies that conservative legal systems will later follow, thus starting an irresistible process of convergence. While the creation of a European (core) private law pursues an ideal of rationality that is *inside* the law, the making of European family law aims at fulfilling values that are overtly *outside* the law.

But is the more progressive rule actually that easy to identify? As a

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80. The harmonization of Family Law in Europe is the aim of The Commission on European Family Law (CEFL), which was established in 2001. This network of jurists published, in 2004, the Principles Regarding Divorce and Maintenance Between Former Spouses, K. BOELE-WOELKI ET AL., PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES (2004), and, in 2007, the Principles Regarding Parental Responsibilities. K. BOELE-WOELKI ET AL., PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PARENTAL RESPONSIBILITIES (2007)). The Principles on matrimonial property law are to be expected in 2010. For an overview see Katharina Boele-Woelki & Dieter Martiny, *The Commission on European Family Law (CEFL) and its Principles of European Family Law Regarding Parental Responsibilities*, 8 ERA FORUM 125-43 (2007). For a historical account see MASHA ANTOKOLSKAIA, HARMONISATION OF FAMILY LAW IN EUROPE: A HISTORICAL PERSPECTIVE: A TALE OF TWO MILLENNIA (2006).

81. David Bradley, *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, in 4 PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 65, 73 (Katharina Boele-Woelki ed., 2003). For a discussion, see Marella, *supra* note 39, at 78; Tsoukala, *supra* note 50, at 873.

82. See *supra* Chart 2.

matter of fact, the political instances at stake are not likely to produce a coherent and progressive body of rules. Any single European national family law shows progressive developments but also unexpected regressions. Therefore, it is naïve to believe that the “better law” can be selected among a number of alternatives by focusing on the apparently most progressive legal system (very often identified with Scandinavian countries).

For example, the emancipation of women and the subsequent recasting of family legal regimes around the paradigm of spousal equality are central to the progressive project in family law. But these goals can be and actually *are* achieved through different strategies, sometimes through formal equality and other times through substantive equality. For instance, Swedish family law, assumed by the harmonizers to be *the* progressive legislation *par excellence*, sometimes aims to enhance women’s equality within the family by adopting a formal equality strategy (e.g. Sweden’s 1970s divorce reform with a sharp reduction of financial support to wives)<sup>83</sup> and sometimes by endorsing a substantive equality strategy (the Cohabitees (Joint) Homes Act of 1987 automatically extending marital obligations and entitlements on marital property to unmarried couples involved in a stable union or raising children).<sup>84</sup> In accordance with a formal equality paradigm, the German civil code recognizes freedom of contract between spouses and the enforceability of support waivers in contemplation of divorce.<sup>85</sup> By contrast, Italian law holds prenuptial agreements void in the light of a substantive equality strategy.<sup>86</sup> Which strategy is the most progressive? Which represents the “better law?” The so-called “difference dilemma,” which dominated the feminist debate for years, proves the frustration and weariness involved in such a choice.<sup>87</sup>

As a matter of fact, the progressive character of a certain family legal regime should be detected through an attentive analysis of the distributive consequences associated to the legal rules, but both the better law and the common core approach fail to consider this. Is the periphery of law destined to be governed by this simplistic version of functionalism? Isn’t it the time to get rid of Family Law Exceptionalism in comparative law

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83. See Bradley, *supra* note 81, at 65.

84. 1 § LAG OM SAMBORS GEMENSAMMA HEM (Svensk författningssamling [SFS] 1987:232, 1987:814) (Swed.).

85. See ZWIEGERT & KÖTZ, *supra* note 78, at 152.

86. See Maria Rosaria Marella, *The Old and the New Limits to Freedom of Contract in Europe*, 2 EUR. REV. CONT. L. 257, 263-64 (2006) [hereinafter *Old and New*]. See generally GLENDON, *supra* note 25, at 89-97 (discussing German marriage and divorce law over time).

87. See Brenda Cossman, *A Matter of Difference: Domestic Contracts and Gender Equality*, 28 OSGOODE HALL L.J. 303, 309-14 (1990). See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990).

methodology? As I have shown in Parts I and II of this Article, more sophisticated approaches have already been successfully deployed in the comparative analysis of family law issues. It is time to import them into the debates about family law harmonization.

In my own view, the harmonization of both the core and the periphery of private law, as well as the currently dominant approaches in the harmonization process—the common core approach and the “better law” approach—should be submitted to the deconstructive scrutiny of comparative law as both a method of analysis of legal diffusion *and* a powerful instrument of internal critique. This change of perspective, which leads to recognize the operational rules through the formants analysis, will make possible a distributive analysis of family law aimed at identifying the real impact a legal rule has on the bargaining power of different social groups.

First, the theory of legal formants should be taken into account in understanding and mastering the dynamics of legal diffusion and legal change within Europe in the light of the harmonization enterprise. The theory of legal formants triggers the so called “dynamic approach” to comparative law by focusing on law as a social activity. According to this view, a legal formant is represented by a group or a community whose institutional task is to create law. In every legal system, there are at least three legal actors involved in the activity of creating law: judges, legislators, and legal theorists. These subjects all produce different kinds of rules enshrined in different texts, such as, opinions, holdings, statutes, articles, and so on.

The resulting picture is that in a given legal system we find many different elements such as statutory rules, the formulations of scholars, the decisions of judges, the praxis of legal professionals and the like: these components of a legal system are defined as “legal formants.” Since the rules produced by one formant can contrast those produced by another formant, “[w]ithin a given legal system with multiple “legal formants” there is no guarantee that they will be in harmony rather than in conflict.”<sup>88</sup> This formants dissonance has to be highlighted by a method aimed at uncovering, separating and explaining the materials used to create the various texts. The ultimate achievement of this approach is to “substitute the model of the law as a more or less consistent system of interrelated, hierarchically connected propositions, by a model of competing formants within the unique setting and constraints of one legal tradition.”<sup>89</sup> Viewed in this light, the harmonization of the core of private law is not flawless

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88. Sacco, *Installment I*, *supra* note 12, at 23.

89. Pier Giuseppe Monateri & Rodolfo Sacco, *Legal Formants*, in *THE PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* II 531 (Peter Newman ed., 1998).

either: the focus on convergence among legal systems is based on a sharp distinction between what the *rule* is and what the *exception* is within a legal system. For example, according to Article 1321 of the Italian Civil Code, a contract is an agreement, that is, it consists of two wills (rule). On the contrary, Article 1333 states that, in certain cases, a contract can be formed even when the offeree remains silent, that is, without an agreement (exception).<sup>90</sup> But the theory of legal formants denies the legitimacy of this hierarchy, because any formant within a legal system is likely to produce its own rule and its own exceptions with reference to the same legal matter. If one looks at the previous example using the theory of legal formants, it becomes clear that the Article 1333 doesn't state an exception to the agreement rule. In fact, unilateral contracts (Art. 1333) were in the past marginalized by some legal scholars emphasizing the essential requirement of bilateral consent, whereas the courts have always enforced unilateral contracts, recognizing as dominant (*and* general) the doctrinal ground of their validity: the consent of the promisor ("the party who is obliged" in the words of Article 1108 of the Code Napoleon) rather than bilateral consent.

The supposed political character of family law does not prevent it from being dealt within the same way. As to the choice of the "better law" with reference to the enforceability of spousal agreements in contemplation of divorce, for instance, the seemingly vast difference between German and Italian law fades into insignificance because it does not consider the plurality of formants within each legal system. Notwithstanding the black letter rule of the Bürgerliches Gesetzbuch, the German Federal Constitutional Court holds prenuptial agreements void, insofar as freedom of contract is denied by the inequality of the socioeconomic conditions of the parties.<sup>91</sup> Meanwhile, Italian courts are aware that an agreement in contemplation of divorce does not necessarily make the weaker spouse worse off and so they deem such an agreement null or void only when it does harm the disadvantaged party.<sup>92</sup> Legal formants are often dissonant to one another as they introduce contrasting paradigms—here formal versus substantive equality—in relation to the same provision within the same legal system. As long as the "better law" approach proceeds without taking these multiple contingencies into account, it is not able to produce any

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90. See Sacco, *Installment I*, *supra* note 12, at 32.

91. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 29, 2001, 92 ENTSCHEIDUNGEN DES BUNDEDSVERFASSUNGSGERICHTS [BVerfGE] 1766 (¶ 3), 2001 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 6, 2001, 92 ENTSCHEIDUNGEN DES BUNDEDSVERFASSUNGSGERICHTS [BVerfGE] 12 (¶ 18-21), 2001 (Ger.).

92. Maria Rosaria Marella, *The Family Economy Versus the Labour Market (or Housework as a Legal Issue)*, in *LABOUR LAW, WORK, AND FAMILY* 161-62 (Joanne Conaghan & Kerry Rittich eds., 2005).



useful outcome for the harmonization of law and runs immense risks of unintended consequences. The example of the equality strategy in the European Union family law harmonization shows that the option for a given national solution, the German black letter rule for instance, disregards the simple fact that the rule effectively enforced in the originating system does not match the Bürgerliches Gesetzbuch provision, hypothetically selected as the better law.<sup>93</sup>

Second, the hypothesis of formant dissonance can present the chance for an internal critique of family legal rules. Let's examine the case of abortion law. The Italian legal regime, as represented by the legislature's intent, aims at reaching a fair balance between the protection of women's health and the interest of the State in protecting human life. The black letter rule does not mention the principle requiring respect for women's self-determination among the interests enforced by the law on abortion.<sup>94</sup> But, in the practice of Italian public hospitals, the principle of women's self-determination has constantly been enforced in the same terms as in *Roe v. Wade*,<sup>95</sup> although it is highly unlikely that this outcome is the product of a legal transplant, namely the borrowing of the privacy principle enforced by the U.S. Supreme Court's decisions. To be sure, this variance in the enforcement of Italian abortion law is currently under violent attack by conservative forces, who see it as the betrayal of legislature's original intent. However, if we adopt the language of legal science, namely the language of the comparative analysis of the core of the law even in such a matter we are ready to understand the case as an ordinary episode of formants' dissonance and to consider the coexistence of the two conflicting considerations absolutely tolerable and even normal. All the examples just provided clearly demonstrate that if we don't take legal formants into account, we will focus on the law in the books and entirely miss the law in action. This will in turn make us act like formalists, and ignore the distributive outcomes of a certain legal regime.

The theory of cryptotypes is a significant means of internal critique as well. It makes it possible to reveal ruptures and conflicts in the genealogy of a given legal regime and, more generally, to understand modern legal models or ideas as constituted by the confluence, the combination and the

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93. Marella, *Old and New*, *supra* note 86, at 264 (noting a decision of the German Federal Constitutional Court to abrogate a contract as unconstitutional because of the unfair bargaining power between the lender and lendee despite the provision guaranteeing the fundamental freedom to contract within the Bürgerliches Gesetzbuch).

94. See GLENDON, *supra* note 25, at 3 n.2.

95. 410 U.S. 113, 154 (1973) (basing the right to an abortion on the fundamental right of privacy but qualifying that right through consideration of "important state interests").

mutual transformation of a variety of earlier ideas.<sup>96</sup> Both the coexistence of a plurality of formants and the operation of cryptotypes shed light on the stratification a legal system consists of. Law reforms and legal transplants are implanted in a terrain that is the complex product of a progressing sedimentation of different elements with distinctive origins and inspirations. This is true to the same degree for both the core and the periphery of private law. The contingent political motives underpinning legal change might or might not be defeated by other elements prevailing in a particular context. In family law, the legal change promoted everywhere by emerging individualist (*progressive*) motives is at some points in relation to some legal topics neutralized or diminished by the persistence of a patriarchal paradigm in the form of a cryptotype enacting the previous regime.

In Italian law, this phenomenon operates, for instance, in reference to succession law and specifically with respect to agreements concerning future inheritances.<sup>97</sup> The Civil Code provision (Art. 458) holds these agreements as void. Normally Italian courts implement instead the “post mortem act” doctrine that acknowledges the validity of such agreements under certain circumstances, and treats them as enforceable. In doing so, courts make some exceptions, which have apparently no sound doctrinal basis, and return to the enforcement of the black letter rule. Such an exception comes into view, for instance, when a mother seeks to transfer to her future heirs any family asset through a hereditary agreement. This case law may be explained on the basis of the theory of cryptotypes. In fact the previous Italian regime of the family excluded the widow from the ownership of the husband’s inheritance assets: by annulling the mother’s transfer Italian courts prove to be under the influence of the old rule.

In France, motherhood, as a legal status, had been determined until the 1970s by a legitimate marriage rather than from a biological birth.<sup>98</sup> As a matter of fact, legal fictions informed the legal regime of motherhood until World War I, when the interest of the French state to increase birth rates prevailed. Then new statutes were passed that aimed to ameliorate the legal conditions of illegitimate children and unmarried mothers. From this moment on marriage as the legal fiction housing parentage and the biological fact of parenthood through sexual intercourse alone were

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96. For the concept of “Legal Genealogy” see Kennedy, *Savigny*, *supra* note 11, at 831.

97. Maria Rosaria Marella, *Il Divieto dei Patti Successori e le Alternative Convenzionali al Testamento*, II, GIURISPRUDENZA SISTEMATICA DI DIRITTO CIVILE E COMMERCIALE fondata da Walter Bigiavi, *I CONTRATTI IN GENERALE, Appendice di Aggiornamento 1991-1998*, 1707-28 (G. Alpa & M. Bessone eds., 1999).

98. See MARCELA IACUB, *L’EMPIRE DU VENTRE: POUR UNE AUTRE HISTOIRE DE LA MATERNITE* 15 (2004).

engaged in a war at the end of which biology became the dominant paradigm of parental status both outside *and* inside of marriage. According to the legal historian Marcela Iacub, with the new law enacted in 1972 the womb becomes a legal institution and takes the place of marriage.<sup>99</sup> Notwithstanding this, the old rationale returns in the regulation of adoption. Here, a legal fiction makes it possible for the adoptive child to be born again in his/her new legitimate family, denying his/her biological origins.<sup>100</sup> Thus the primacy of biology is defeated once again, although in a restricted area of the law of filiation, and another legal fiction of the kind meant in the 70's as the legacy of outdated ideas on legal status in family law is deployed to fulfil new ideas about parenthood as a social and legal relation valuable beyond biological bonds.

Controversial and unstable relationships between biology and legal fiction in the legal regimes of parenthood as well as patriarchal pop-ups in the regime of the egalitarian family prove a persisting tension between old and new motives, between communitarian and individualist paradigms, within the law of family relations in Europe. The idea of discontinuity as the blueprint of legal change in family law is definitely defeated by this evidence.

In respect to both the core and the periphery of law, the goal of a critical approach, which the comparative analysis embraces, is not to overcome these tensions, rather to sustain and highlight the contradictions they produce.<sup>101</sup> If our aim is to address the real progressive character of legal change, the right way to pursue it is to move within the methodological perspective I have illustrated so far, always sustained by an appropriate distributional analysis. Only through this praxis can new fairer distributive equilibriums among social groups, in the marketplace as well as in the family, be achieved.

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99. Loi 72-3 du 3 janvier 1972 sur la filiation [Law 72-3 of January 3, 1972 on Filiation], available at <http://www.legifrance.gouv.fr>.

100. The adoption provisions in the French law are codified in part VIII of the Civil Code, entitled "Of Adoption" (Articles 343 to 370-5, last amended by Act n° 2002-304 of 4th March, 2002 and by Act n° 2003-516 of 18th June, 2003). There are two forms of adoption under the French law: plenary adoption ("*adoption plénière*," Articles 343–59) and ordinary adoption ("*adoption simple*," articles 360 to 370-2). The text refers to the plenary adoption, which terminates the relationship between birth parent and child (see Article 356: "Adoption confers on the child a parentage which substitutes for his original parentage: the adoptee ceases to belong to his blood family . . ."). Thus, all rights and status which the child may have had from the birth family are revoked and replaced with the rights and status granted by the adopting family (see Article 357, which states that the adoptive child bears the family name of his adoptive parents). On the contrary, according to the ordinary adoption, the adopted child becomes a member of his new family, but he keeps some legal bonds with his original family (e.g. the name of the adoptive parents is added to the adoptee's original name—Article 363; the adoptee preserves inheritance rights within his original family—Article 364).

101. Kennedy, *Savigny*, *supra* note 11, at 811.