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### Family Law Exceptionalism in Comparative Law

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## Family Law Exceptionalism in Comparative Law†

*Today, family law is, to a surprising degree, at the center of comparative law inquiries committed to legal unification. Comparative family law projects range from analyzing convergence and harmonization proposals in the West, to law and development schemes in the rest of the world. The most salient reforms of abortion, same-sex marriage, transsexual, and adoption rights are increasingly promoted at the transnational level through international human rights and antidiscrimination principles. Regional and international human rights tribunals in Europe and Latin America are called upon to interpret the right to family life, non-discrimination, and freedom of movement principles to redefine the contours of domestic family, immigration, and employment law regimes. While comparative lawyers are increasingly involved in shaping these transnational family law regimes, they present their choices as reflecting objective scientific knowledge that they have acquired through the comparative law method. This consensus about a single comparative law method is troubling because it allows comparison between abstract family law regimes that bear little relevance to what happens in practice or to the proposal of a “best” family law regime for unification purposes, while obscuring the political and economic implications of adopting one particular family law regime over another.*

*Since the early 1900s, however, two conflicting methodologies have characterized the work of Western comparative lawyers addressing the family: social-purpose and positive-sociology functionalism. These Western comparative lawyers separated the individualist and universal sphere of the market from the altruistic, organic, and traditional sphere of the family. Because of this market/family dichotomy, family law was marginalized by those interested in the harmonization*

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*of the market, while the family remained, by contrast, central to the work of those interested in legal pluralism.*

*Today, the reproduction, and subversion, of the family/market dichotomy has lead toward methodological agreement over social-purpose functionalism for projects committed to unification, convergence, and harmonization of Western family law. In contrast, and in order to address some of the pressing questions arising in comparative family law, I suggest revamping positive-sociology functionalism, especially for those projects committed to the harmonization of European family law. By explaining the meaning of family law exceptionalism in comparative law, my goal is to make explicit the family/market dichotomy so that lawyers will openly assess the economic consequences of family law reforms on the household and the market.*

### I. INTRODUCTION: THE RISE OF UNIFICATION TENDENCIES IN CONTEMPORARY COMPARATIVE FAMILY LAW

Immediately after World War II (WWII), there was no attempt to openly discuss projects of unification and harmonization of family law regimes in the West. This attitude changed dramatically. In the early 1990s, comparative lawyers stopped addressing the family as exceptional, intrinsically diverse and its law as a non-uniform legal field and began to treat it as an integral part of the comparative enterprise, profoundly transformed by individual rights and gender equality notions leading towards greater convergence.

The reluctance of comparative lawyers to undertake unification projects in Western family law until the late 1980s was a byproduct of historical and ideological influences. As Harold Gutteridge pointed out in the late 1940s, the study of comparative family law would allow race, religion, and politics to enter into the study of law; therefore, family law had limited appeal “except for the purpose of propaganda with which lawyers are not concerned.”<sup>1</sup> These words were cogent in a Europe divided by the Iron Curtain. Although it was agreed that in Western Europe, U.S. legal influence ought to predominate in the aftermath of the Marshall Plan, comparative lawyers who were committed to uniformity and harmonization of legal rules for markets nevertheless avoided the area of family law.<sup>2</sup> In dealing with politics, religion, and race, a full-fledged comparative family law analysis would have revealed deep differences between Europe and the United States on civil rights matters,<sup>3</sup> as well as the

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1. HAROLD COOKE GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY* 32 (1946).

2. See David Bradley, *Family Law*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 259 (Jan M. Smits ed., 2006).

3. See David Bradley, *A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics*, Oxford University Comparative Law Forum 4, <http://ouclf>.

presence of egalitarian and innovative family law reforms in the Soviet block.<sup>4</sup>

With these important societal changes and the simultaneous rise of ideologies about gender equality and individual rights, legislatures all over the world had to address the inadequacies of family law with respect to marital breakdowns, children born out of wedlock, and discrimination against non-heterosexual behavior. The rise of individual freedoms in family law matters became a widespread trend furthered by transnational women's and human rights movements.<sup>5</sup>

If family law played a minor role in those comparative law projects that mostly focused on the harmonization of Western markets, this fact changed dramatically with the proliferation of international human rights and feminist movements in the 1990s. Suddenly, family law was no longer exceptional to Western projects of legal harmonization but moved to the center of a discipline now profoundly committed to individual rights and gender equality.<sup>6</sup> The concurrent trends addressing family law problems, not only from a national but also from an international level, and the sharper focus on human rights and non-discrimination principles, created a renewed emphasis on comparative family law projects pursuing harmonization. This renewed interest prompted international tribunals, like the European Court of Human Rights (ECtHR), to modify domestic family law regimes in defining private and family life, the right to marry, the right to create a family, and the prohibition of discrimination based on sex, birth, or status.<sup>7</sup>

Mary Ann Glendon's introduction to Volume IV of the *International Encyclopedia of Comparative Law*, concluding the work started in the 1960s by Max Rheinstein, shows that human rights and gender equality ideas at the transnational level are challenged by family solidarity when translated into individual freedom notions within the family.<sup>8</sup> Because the language of family law has been so profoundly transformed in past decades, and because family law is now revealing

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[iuscomp.org/articles/bradley2.shtml](http://iuscomp.org/articles/bradley2.shtml); see also MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 3 (2000) (showing how the United States was during the Cold War "the presumptive leader of the free world" but at the same time "racism in the nation was a matter of international concern").

4. See JOHN QUIGLEY, *SOVIET LEGAL INNOVATIONS AND THE LAW OF THE WESTERN WORLD* 103 (2007).

5. See Mary Ann Glendon, *Family Law in a Time of Turbulence*, in 4 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 3-5 (2006) [hereinafter *ENCYCLOPEDIA*] ("Family law increasingly emphasizes the individuality of family members, as distinct from the bonds that unite them.").

6. See Maria Rosaria Marella, *The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law*, 12 *EUR. L. J.* 79-81 (2006).

7. See *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, arts. 8, 12, 14, Apr. 11, 1950, 213 U.N.T.S. 22.

8. See Glendon, *supra* note 5, at 5.

important doctrinal convergences. Part I briefly sketches the emerging trends in the field, and the methodological problems they entail.

This newfound reliance upon human rights notions in addressing comparative family law is aptly expressed by Harry Krause's statement:

Worldwide treaties, such as the United Nations' conventions on human rights, on women, and on the rights of the child, as well as certain regional conventions, such as the European Convention on Human Rights and the Organization of American States' American Convention on Human Rights, guarantee fundamental rights relating to family life. Often recognizing rights only in highly abstract terms (consider the European Convention's "right to respect for . . . family life"), these conventions and pronouncements have significant impact in encouraging commonalities in family law principles across national boundaries.<sup>9</sup>

This shift to human rights and fundamental principles enshrined in constitutional regimes has enlisted the family as a fundamental field for comparative and international law projects addressing the possibilities for convergence, unification, and harmonization of family law.

A. *Unification, Harmonization, and Convergence in Contemporary Comparative Family Law*

Since the early 1900s, there has been widespread skepticism about the possibilities for comparative lawyers to unify norms in family law. Lord Justice Kennedy's remarks in advocating unification in the commercial realm depict a common sentiment:

The practical questions still remain, Is the unification of law feasible? What, if anything, has been already done in that direction? I am afraid that in regard to the personal law, so far as regards the most important questions of marriage and divorce, there is no immediate or even near prospect of success. Differences of traditional usage, religious and ecclesiastical discipline, and popular sentiment in regard to the rights and duties which are involved in the family tie, prevail so widely and are so closely cherished that any attempt to unify law in this direction by international agreement has at present a poor prospect of success.<sup>10</sup>

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9. Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends—and Vice Versa*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1099 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

10. Lord Justice Kennedy, *The Unification of Law*, 10 J. SOC'Y. COMP. LEGIS. NEW SERIES 212, 216 (1909).

Despite the initial skepticism regarding the unification of family law, after WWII, some scholars began to address the possibility of unifying family law regimes, especially in Western Europe, with a regional rather than a universal focus.<sup>11</sup> Wolfram Müller Freienfels highlighted that unification was driven by international legal instruments often through conflict-of-laws mechanisms rather than substantive laws:

Unification of conflicts rules affecting family law is a less ambitious undertaking than unification of substantive family law itself. Substantive unification seeks to eliminate diversity between the various legal systems, but conflicts rules presuppose that diversity exists. The only goal of unification of conflicts rules is to determine that any case involving aspects of foreign law will be decided under the same legal rules whatever the court in which it is tried, thus ensuring uniformity in outcome. In other words, it is dedicated to elimination of choice of court as a determining factor in the decision of a case on the merits, thus, eliminating so-called forum shopping. Accordingly, unification of conflicts law has only secondary importance in comparison to the more sweeping aims of unification of substantive law.<sup>12</sup>

In a similar vein, addressing the functional role of conflict-of-laws in the European Union (EU), Dieter Martiny explains that “[t]he harmonisation of European private international law can . . . only be considered as an intermediate step along the path to more integration.”<sup>13</sup>

Today, the very “European” project of family law harmonization is addressing some crucial choices about which divorce, marriage, and property regimes should prevail in EU countries that have already deeply harmonized their market laws.<sup>14</sup> For instance, family law harmonizers have focused on common principles of marriage, di-

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11. See Wolfram Müller-Freienfels, *The Unification of Family Law*, 16 AM. J. COMP. L. 187 (1969).

12. *Id.* at 205.

13. Dieter Martiny, *Is Unification of Family Law Feasible or Even Desirable*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1612157](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612157).

14. See Ingeborg Schwenzer, *Methodological Aspects of Harmonisation of Family Law*, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 156-58 (Katharina Boele-Woelki ed., 2003); see also Masha Antokolskaia, *The “Better Law” Approach and the Harmonisation of Family Law*, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE, *supra*, 161, 169-72. But see Nancy G. Maxwell, *Unification and Harmonization of Family Law Principle: The United States Experience*, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE, *supra*, 249-55 (advancing a more skeptical view on the harmonization of family law in the United States).

voice, and communal property in Europe.<sup>15</sup> In acting independently of the main EU institutions in Brussels, these scholars have adopted an approach similar to that used by the European Commission for the harmonization of contract and tort law, i.e., they have defined family law rules as a matter merely of private law.<sup>16</sup>

By rooting this idea in the traditional law of persons, family law is construed as either a set of human rights, or as a set of conflict-of-laws provisions to deal with marriage and property regimes in transnational legal settings.<sup>17</sup> These projects on the harmonization of family law have flourished and legitimized European governance not only by harmonizing the law of the single market, but also of the family. This contribution by European scholarship is timely because it matches an important shift in adjudication of the European Court of Justice (ECJ) in relation to free movement of workers.<sup>18</sup> While the ECJ was initially hesitant with regard to federalizing family law rules in the common market, some of its recent judgments have openly interpreted domestic marriage as well as immigration law regimes that had previously been considered primarily a matter of Member State competence.<sup>19</sup> Thus, some scholars and judges in the EU favor a harmonizing project that will no longer exclude the family from the Europeanization of the common market.

Like the unification story, the notion of convergence of family law regimes—especially in Western Europe—developed from initial skepticism to great hopes. As John Henry Merryman noted in advocating convergence:

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15. See KATHARINA BOELE-WOELKI ET AL., *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES* (2004).

16. See Katharina Boele-Woelki, *The Principles of European Family Law: Its Aims and Prospects*, 1 *UTRECHT L. REV.* 161-62 (2005); see also Katharina Boele-Woelki, *The Working Method of the Commission on European Family Law*, in *COMMON CORE AND BETTER LAW IN EUROPEAN FAMILY LAW* (Katharina Boele-Woelki ed., 2005) (explaining that the principles are methodologically similar to the approach adopted by the other groups advocating for the harmonization of private law).

17. Compare Dagmar Coester-Waltjen, *Human Rights and the Harmonization of Family Law in Europe*, in *EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW* (Katherina Boele-Woelki ed., 2008) with Anna Horínová, *Property Relations Between Spouses in the Legislation of the Czech Republic and that of Selected Post-Communist Countries*, in *EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW*, *supra*.

18. Compare Case C-370/90, *R. v. Immigration Appeal Tribunal & Surinder Singh*, *ex parte Home Sec'y*, 1992 E.C.R. I-4265 (demonstrating the jurisprudential shift in ECJ jurisprudence on free movement of workers) and Case C-109/01, *Sec'y of State for the Home Dep't v. Akrich*, 2003 E.C.R. I-9607 (illustrating a narrow interpretation of the right to marry and family law) with Case C-60/00 *Carpenter v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-6279 and C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equal. and Law Reform*, 3 *C.M.L.R.* 39 (2008) (showcasing a broader analysis of family law rights and the competence to enter into family matters by the ECJ).

19. See Helen Stalford, *Concepts of Family Under EU Law—Lessons from the ECHR*, 16 *INT. J.L., POLICY & THE FAMILY* 410-13 (2002).

. . . a particularizing force is powerfully at work, opposing uniformity, standardization, and the loss of those characteristics by which people define themselves and establish their unique identities. We see it in the emphasis placed on specific attributes of politics, history, language and culture. People's loyalties are commanded by regional, ethnic, organizational, job, religious, class, sex, age, and other social-political-ideological affiliations.<sup>20</sup>

Thus, according to Merryman, comparative lawyers bear an important task in pursuing convergence and the idea that the drive towards universal regimes is a progressive one has become central to scholars committed to the harmonization of European family law.<sup>21</sup>

In the late 1970s, the groundbreaking work of Mary Ann Glendon challenged the possibility of a full-fledged comparative family law analysis *inter alia* because of the great disparity in abortion regulation throughout Western Europe,<sup>22</sup> but it also opened an important avenue for comparative family law work. In following Glendon's approach, based on the inevitable convergence of family law regimes in the West driven by constitutional and human right courts, today constitutional court decisions all over the world are increasingly shaping family law through concepts of privacy and dignity that regulate intimacy and reproductive rights.<sup>23</sup> Unsurprisingly, critical family law questions have become part of the comparative constitutional law canon. For example, the abortion decisions of the U.S. Supreme Court and the German Constitutional Court appear in most of the comparative constitutional law casebooks.<sup>24</sup> These books have a strong Western geographical focus, which includes France, Canada, and (sometimes) Poland; Latin America, Africa, and Asia are often foreign to these comparative studies.<sup>25</sup>

One casebook expands its family focus to encompass sexuality and marriage by including decisions from Australia, South Africa, and the ECtHR. These cases allow the casebook authors to address the rights of children, parents, and homosexual couples as an expan-

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20. John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 372 (1981).

21. See Schwenzer, *supra* note 14, at 143, x, 148.

22. See MARY ANN GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (1977); see also MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

23. See Rachel Rébouche, *The Limits of Reproductive Rights in Improving Women's Health*, 19 COLUM. J. GENDER & L. (forthcoming 2010).

24. See, e.g., VICKI C. JACKSON & MARK V. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1, 110 (2d ed. 2006).

25. See MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW 871 (3d ed. 2006); see also NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 617, 632, 646 (2d ed. 2010).

sion of family relations.<sup>26</sup> The groundbreaking work of the ECtHR has led scholars to discuss the convergence within Western family law in the areas where the Court did *not* recognize a margin of appreciation for the states, but rather sanctioned a universal principle.<sup>27</sup> For instance, in 2008, the ECtHR decided that a single parent allowed to adopt a child under French law could not be discriminated against on the basis of her sex life, in particular, because of her homosexuality.<sup>28</sup> In its previous 2002 judgment, the ECtHR had held there was no discrimination against a homosexual parent who was refused the right to adopt by French authorities.<sup>29</sup> In contrast, the Court now held that there had been discrimination vis-à-vis a single parent applying for and being denied the right to adopt.<sup>30</sup>

Although the ECtHR jurisprudence can signal where convergence is taking place, it occurs at various rates and through conflicting values. These values are reflected in the tensions arising between local and transnational judicial elites rather than in peaceful compromises.<sup>31</sup> For example, the decision of the French administrative tribunal allowing Ms. E.B. to adopt a minor went much further than the European judgment, which, however, it did not cite. In allowing the lesbian single parent to adopt the child, the French tribunal, rather than citing the human rights convention, found that the lesbian couple familial context in which the child would be raised would be harmonious and suitable to the child's needs.<sup>32</sup>

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26. See DORSEN ET AL., *supra* note 25, at 646 (including the family as “[a]nother aspect of one’s identity” and suggesting that “[t]he term often connotes age-related dependency as well as other hierarchies” so that “fundamental rights may have to be balanced in complex ways”).

27. See Glendon, *supra* note 5, at 6, 16 (citing the fact that despite the increasing number of European countries recognizing same-sex marriages, the European Court of Human Rights has nevertheless limited its definition of “marriage” to the union of a man and a woman).

28. See *E.B. v. France* (App. No. 43546/02) Eur. Cr. H.R., slip op. at ¶ 94 (2008) (“The Court points out that French law allows single persons to adopt a child thereby opening up the possibility of adoption by a single homosexual, which is not disputed. Against the background of the domestic legal provisions, it considers that the reasons put forward by the Government cannot be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorization.”), <http://www.echr.coe.int/ECHR/EN/ECHR+Publications/Information+notes+on+the+Courts+case-law/Information+Note+Home+page/>.

29. See *Frettè v. France*, 2002-I Eur. Ct. H.R. 345 (2002), available at <http://www.echr.coe.int/ECHR/EN/ECHR+Publications/Information+notes+on+the+Courts+case-law/Information+Note+Home+page/>.

30. See Elena Falletti, *The European Court of Human Rights and the Right to Adoption of Homosexual Single Persons*, 6-9 (on file with the author).

31. See Fernanda Nicola, *Liability in the Bedroom: Converging Doctrines and Diverging Ideologies in the United States, France and Italy*, 19 AM. U. J. GENDER SOC. POL’Y & L. (forthcoming 2010) (discussing the underlying conflicts to what appears a doctrinal convergence on no fault divorce regimes).

32. See TA Besançon, Nov. 10, 2009, JurisData n° 2009-013799, 5 (“Le rapport de la psychologue indique que: « Le couple témoigne d’une réelle complémentarité. Si

### B. *The Relevance of Method in Comparative Family Law*

Among the comparative methods, there is still today the widespread use of what we may call a “comparative law by columns” approach, whose main objective is to describe the positive law of different countries. This approach aims to compare positive legal rules, whether in a code or in case law, by dissociating them from their context. A comparison by columns is simply a method of comparing the language of legal norms understood as positive law in specific legal regimes.

Asking a general legal question such as “at what age can individuals get married?”, we can compare the responses in every nation of the world. Thus, comparative law by columns entails a static inquiry limited to specific provisions, requiring a limited (or no) engagement with legal cultures or traditional and informal legal regimes. The task of the comparative lawyer is to draw a chart with several columns, each representing a country. Once the chart is completed and filled with detailed information regarding domestic rules on the books, the comparative lawyer begins to compare and contrast in order to fully describe the status of a particular legal rule or doctrine. Although it presents law in the books rather than law in action, this had long remained the quintessential comparative law methodology. Despite its positivist limitations and global aspirations, comparative law by columns is still widely used as an informative tool in worldwide surveys. An example is the Encyclopaedic Comparison, as Günter Frankenberg calls it,<sup>33</sup> in Volume IV of the *International Encyclopedia of Comparative Law on Persons and Family*. It offers a splendid example of comparative law by columns in its treatment of the Formation of Marriage.<sup>34</sup> This text devotes all of its third chapter to the formation of marriage. There, we see a comparison by columns of age restrictions and parental consent requirements for marriage in France, England, and Algeria, with a tendency towards convergence between the first two nations, though not the last.<sup>35</sup>

Since the first half of the twentieth century, comparative lawyers have sought to overcome the major problems inherent in comparative law by columns. They have objected, first, that this static method is entirely indifferent to what happens in practice and in the implemen-

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elles partagent des valeurs communes, chacune affiche sa singularité . . . Les rôles de chacun s'harmonisent autour d'un projet réfléchi. L'enfant semble véritablement au cœur de leurs préoccupations.”)

33. See Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 427, 429 (1985) (“By contrast, the doctrinal comparatist pursues a less ambitious goal. She takes the law of each society as a body of (potentially) coherent precepts and tries to fill the gaps or to strengthen out inconsistencies in the domestic law by cross cultural comparison.”).

34. See ENCYCLOPEDIA, *supra* note 5.

35. Dagmar Coester-Waltjen & Michale Coester, *Formation of Marriage*, in ENCYCLOPEDIA, *supra* note 5, at 15-23.

tation of legal norms described in each column. Second, they have criticized it for portraying legal systems as isolated legal islands rather than as entities influenced by a broader legal culture or form of rationality. Finally, comparative law by columns came to be regarded as overly selective, admitting limited information while also omitting the socio-economic context, resulting in an inability to consider legal reality.

Mathias Reimann noted:

Today, we understand that when we compare rules, we must take a functional approach, i.e., analyze not only what rules say but also what problems they solve in their respective legal systems. We realize that we need to consider rules in context . . . . [W]e must go way beyond mere rule comparison. These insights may have been novel three generations ago but, today, every self-respecting comparative lawyer can be expected to know them.<sup>36</sup>

Despite this insight, comparative law by columns remains a widespread technique for collecting basic information about different legal systems.

A contemporary example of comparative law by columns is the recent World Bank approach to “gender laws.” The Bank has embraced family law among its reform projects because the field is so relevant to “*Doing Business*” in developing countries.<sup>37</sup> The World Bank has collected a massive amount of positive law on marriage and inheritance rules worldwide through a country-by-country report, mostly driven by the wish to increase efficiency in the marketplace:

. . . the Doing Business Gender Project is identifying laws and regulations that discriminate against women, compiling a database of relevant laws that governments can use as reform tools and singling out reforms that have delivered the biggest benefits for women. The project also intends to publish case studies on women entrepreneurs that describe the reasons for their success and the main obstacles they face in expanding their businesses.<sup>38</sup>

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36. See Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. OF COMP. L. 671, 679-80 (2002).

37. See, e.g., THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT/ THE WORLD BANK, WOMEN, BUSINESS AND THE LAW: MEASURING LEGAL GENDER PARITY FOR ENTREPRENEURS AND WORKERS IN 128 ECONOMIES (2010), available at <http://wbl.worldbank.org/documents/Women-Business-Law.pdf> (focusing on gender differences in legal treatment in 128 economies, using six different indicators).

38. *Gender Action Plan Newsletter—Gender Equality as Smart Economics*, THE WORLD BANK (2008), [http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/0,,contentMDK:21685760~pagePK:210058~piPK:210062~theSitePK:336868,00.html#doing\\_business](http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/0,,contentMDK:21685760~pagePK:210058~piPK:210062~theSitePK:336868,00.html#doing_business) (last visited July 15, 2010).

In addition to comparing by columns, this World Bank collection reflects the overall skepticism of lawyers vis-à-vis comparative family law. In particular, the World Bank report on families highlights the drawbacks of an early age for marriage, which often entails limiting women's ability to enter the marketplace due to childbearing tasks. However, it also warns of the limited impact of reforming family law rules to prevent early marriages because of the overwhelming power of tradition and customary regimes.<sup>39</sup> By thus acknowledging the localized and traditional aspects of family law in different countries, the World Bank supports the idea that family law is special and that attempts to reform it have only limited impact.

## II. FAMILY LAW EXCEPTIONALISM IN COMPARATIVE LAW: AN HISTORICAL ACCOUNT

At the birth of the Western comparative law tradition in the early twentieth century, family law was often a contested field, especially among private lawyers who understood the law of the family to be distinct from the universal and individualistic law of the market because it carried with it a set of highly organic, moral, and localized values.<sup>40</sup> Family law was considered exceptional by comparative lawyers in one of two ways: the family was either marginalized by comparative law projects committed to harmonization, or it was the central focus of comparative inquiries concentrating on legal pluralism in different societies. This chapter traces the genealogy of family law exceptionalism in comparative law, beginning approximately with Montesquieu's *The Spirit of the Laws*,<sup>41</sup> and examining its development up to the ideas put forward in recent World Bank reports—namely that family law regimes, especially beyond the West, are intrinsically hard to reform because they are embedded in local morality, in religion and in traditional values.

### A. *The Market/Family Dichotomy in Western Comparative Law*

The idea that the family is the quintessential entity to display local customs, traditions, and even climatic influences begins with the famous Book 16 of Montesquieu's *The Spirit of the Laws*, in which he explains:

Women are marriageable in hot climates at eight, nine, and ten years of age; thus, childhood and marriage almost

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39. See WORLD BANK GROUP, *DOING BUSINESS: WOMEN IN AFRICA 2* (2008), available at [http://www.doingbusiness.org/documents/Women\\_in\\_Africa.pdf](http://www.doingbusiness.org/documents/Women_in_Africa.pdf) (noting that, in Cameroon, "a husband may still formally object to his wife's exercise of a trade or profession if he judges it is not in the interest of their marriage or children").

40. See Bradley, *supra* note 2, at 259-72.

41. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 264-77 (Anne M. Cohler et al. trans., eds., Cambridge Univ. Press 2009) (1748).

always go together there. They are old at twenty: thus reason in women is never found with beauty there. . . . Therefore, when reason does not oppose it, it is very simple there for a man to leave his wife to take another and for polygamy to be introduced.

In temperate countries, where women's charms are better preserved, where they become marriageable later, and where they have children at a more advanced age, their husbands' old age more or less follows their own; and, as they have more reason and knowledge there when they marry, if only because they have lived longer, a kind of equality between the two sexes has naturally been introduced, and consequently the law permitting only a single wife.

In cold countries, the almost necessary use of strong drink establishes intemperance among the men; so women, who have a natural reserve in this respect because they must always defend themselves, again have the advantage of reason over the men.<sup>42</sup>

As Otto Kahn-Freund explains, the relevance of Montesquieu's analysis for comparative lawyers is the idea of family law exceptionalism:

One would have thought that no subject of legal regulation was more likely to prove the validity of Montesquieu's warning and of his catalogue of determinants than the family, and marriage in particular. What can be closer to the moral and religious convictions, the habits and the mores and also the social structure of a community than the making and unmaking of marriages, and their effect on the legal position of the spouses, including their property?<sup>43</sup>

In the nineteenth century, the ideas put forward by Friedrich Carl von Savigny and Sir Henry Sumner Maine, as well as the experiences of continental codifications and the Japanese Civil Code, strengthened the idea of an intrinsic difference among Western comparative lawyers between the market, comprised of commercial and contractual laws, and family law regimes.

The discourse of Friedrich Carl von Savigny (1779-1861), which appeared in his *System of Modern Roman Law* is analyzed by Duncan Kennedy in this collection.<sup>44</sup> Family law was central to Savigny's system even though it was completely different from the law of

42. *Id.* at 264-65.

43. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 13 (1974).

44. See FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* (William Holloway trans., 1979); see also Duncan Kennedy, *Savigny's Family/Patrimony*

obligations or potentialities, such as contract law, because the family was an organic, irrational, highly moral, and variable institution that enshrined a civilizational hierarchy in which the modern Christian family law was superior to all other forms.<sup>45</sup> In this structure, family law was construed largely as public law and as a field less rational than the private law of obligations, yet more variable and loaded with local and moral traditions determining the identity of each nation.<sup>46</sup>

As Duncan Kennedy explains, this Savignian dichotomy fits perfectly with the colonial enterprise: colonial powers would harmonize the law of the market according to Western liberal values, while deferring to local traditions in family law.<sup>47</sup> For instance, as Otto Kahn-Freund noted: “The British rulers introduced in India and in many colonies the English law of contract, even the criminal law and the law of civil procedure and of evidence: to introduce the English law of marriage, of parent-child relation, or of succession, would have been impossible.”<sup>48</sup>

In *Ancient Law*, Sir Henry Sumner Maine (1822-1888), the well-known Victorian jurist, showed the disintegration of the patriarchal family as a backward and ancient institution based on notions of status, while the corporation, based on contractual and individualized agreements, represented modernity. In Maine’s words: “The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place.”<sup>49</sup> As Janet Halley explains, marriage was not relevant in Maine’s evolutionary history, “[b]ut Maine never said that marriage itself was shifting to contract: rather, he ignored marriage altogether, arguing instead that the replacement of the patriarchal Family as the basic unit of social life and of economic production by contract was definitive of modernity.”<sup>50</sup> Among Western comparative lawyers, Maine’s idea reinforced the notion that, rather than focusing on archaic patriarchal family structures, it was “modern” to look at

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*Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811 (2010) (elucidating the family/patrimony distinction).

45. See Kennedy, *supra* note 44, at 6 (“[A] pervading contrast to family-law here shows itself. In the two parts of potentiality’s-law, the matter does not, as in the family, consist in a natural-moral relation; . . . they belong not to the *ius naturale* and the recognition of their existence appears less necessary, more arbitrary and positive, than in the institutions of family-law.”) (quoting FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW*) *supra* note 44, at 281-82.

46. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000 in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 32-35 (David Trubek & Alvaro Santos eds., 2006).

47. See Kennedy, *supra* note 44, at 3.

48. Kahn-Freund, *supra* note 43, at 16.

49. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 163 (1st ed. New York 1864).

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

contract and commercial law constituted by universal and individualized rights.

With regard to different codification experiences, the *Napoleonic Code* or *Code civil* failed to introduce the term “family law,” and it dispersed family law rules in the various books of the code about persons and property.<sup>51</sup> Because of this dispersion, Wolfram Müller-Freienfels explains that today scholars need to introduce the study of family law in a special way. In fact the study of family law in France is characterized, in contrast to the law of obligations, as an “attempt to convey autonomy and peculiarity, the *particularisme du droit familial*, and its high dependence on social development.”<sup>52</sup>

The most prominent example of family law exceptionalism remains its inclusion in the BGB, the German Civil Code of 1900, as a separate book among five. The division of the family from the rest of private law was based on the elaborated systematization of the *Pandektensystem*, developed by thinkers such as Gustav Hugo, Arnold Heise, and Friedrich Carl von Savigny, who characterized the family as “an integrated, especially codified part of a conceptually constructed, coherent inner legal system—a highly developed cultural product.”<sup>53</sup>

The family law controversy surrounding the Japanese Civil Code in the late nineteenth century became emblematic of family law exceptionalism in comparative law.<sup>54</sup> In the Meiji period, leaders were desperate to compile a modern code of law. In 1873, the Japanese government appointed a French jurist, Gustave Boissonade, to assist in the drafting of the Japanese Civil Code, but did not intend to entrust him with the sections concerning family law.<sup>55</sup> Despite this attempt to ensure that the family law sections were not overly foreign, the draft code presented in 1888 remained highly problematic because it gave individual family members too many rights. For instance, the new draft code proposed that each person should be registered individually, rather than under a family *koseki* (family registry); parental consent was not necessary for marriage between adults; and a wife could independently take a divorce case to court.<sup>56</sup> As a result, in 1890, a draft Civil Code based on the Napoleonic Code was put forth, but met with vehement opposition from powerful conservatives regarding the sections concerning family relations.<sup>57</sup> The

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51. See Wolfram Müller-Freienfels, *The Emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England*, 28 J. FAM. HIST. 34-36 (2003).

52. *Id.* at 36.

53. *Id.* at 38-39.

54. See Fujiko Isono, *The Evolution of Modern Family Law in Japan*, 2 INT'L J.L. & FAM. 183, 185-88 (1988).

55. See *id.* at 186.

56. See *id.*

57. See *id.* at 185.

provisions concerning familial rights were seen as incompatible with the Japanese *ie* system, which expected full obedience of “inferior” members,<sup>58</sup> and was therefore rejected.<sup>59</sup> Thus, family law was the principal area where the “wholesale adoption of a foreign system did not take effect.”<sup>60</sup>

In 1893, under continued pressure to modernize in the eyes of the West, Japan established a committee to prepare a new draft of the Civil Code.<sup>61</sup> One of the selected jurists, Masaki Tomii, was “more sympathetic to German law and thought it would be more suitable for Japanese society.”<sup>62</sup> Although the new draft was still not ideal for traditionalists (i.e., it held that after reaching the age of majority, there was no reason for parental rights to continue), Japan recognized that it had to adopt a Western system of law, so the new draft was finally accepted in 1898.<sup>63</sup> The new Civil Code reflected a compromise between *ie* values and those of “modern law.”<sup>64</sup> So, while it is generally accepted that the Japanese adopted a German-style Civil Code, scholars have shown that the French influence on the Japanese Code still persists.<sup>65</sup>

Finally, an exceptional example of how the market/family dichotomy can be put on its head, and how the family can emerge at the center of the economic structure, comes from traditional China based on Confucianism ideals. As Teemu Ruskola has shown, “[i]ronically, while Confucian officialdom was eager to promote the ritual rather than economic aspects of kinship, its attempts to encourage the maintenance of ancestral worship coincidentally provided the kin group with a means to protect corporate property from dissolution: the institution of ancestral trust.”<sup>66</sup>

With this exceptional role of the family law in comparative studies in mind, and in light of the emerging ideas about the function of law in society characterizing twentieth century comparative law, Western lawyers addressed the market/family divide simultaneously with other dichotomies such as private/public and legal unification/pluralism.<sup>67</sup>

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58. *See id.* at 191-92.

59. *See id.* at 186.

60. Michael Young & Constance Hamilton, *Historical Introduction to the Japanese Legal System*, in *THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY* 27, 33 (Curtis J. Milhaupt et al. eds., 2006).

61. *See* Isono, *supra* note 54, at 188.

62. *Id.*

63. *See id.* at 188-89.

64. *Id.* at 189.

65. *See* Young & Hamilton, *supra* note 60, at 34.

66. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *STAN. L. REV.* 1599, 1630 (2000).

67. *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497, 1498-1520 (1983).

B. *Conflicting Methods in Comparative Law: Social-Purpose v. Positive-Sociology Functionalism*

Since the first half of the twentieth century there has been no consensus in favor of one particular comparative law methodology. At the first *Congrès International de Droit Comparé* held in Paris in 1900, comparative lawyers proclaimed the universalist aspirations of their science.<sup>68</sup> Comparative lawyers exported Western legal ideas into comparative law to mark the emergence of an academic and neutral legal science. Raymond Saleilles declared that the object of comparative law was the discovery of those norms and principles that are common to all “civilized nations,” possibly leading to a “partial unification” of legal regimes.<sup>69</sup> Comparative lawyers were to search for universal rules common to all civilized nations by pursuing an objective and scientific discipline that was critical of the dogmatism of the exegetic school in France.<sup>70</sup> At the Paris Congress, lawyers jettisoned merely descriptive and de-contextualized comparisons, and turned wholeheartedly to a functionalist understanding of law.<sup>71</sup> They embraced functionalism as an anti-formalist methodology that could produce the optimal solutions to legal problems. According to David J. Gerber, Ernst Rabel would later describe this project this way: “Rather than comparing fixed data and isolated paragraphs, we compare the solutions produced by one state for a specific factual situation, and then we ask why they were produced and what success they had.”<sup>72</sup> The functional method offered to comparativists a cure for the ills of a static legal science in the form of comparative law by columns.<sup>73</sup>

With the widespread use of functionalism, two competing versions emerged, which I will label “social-purpose” and “positive-sociology” functionalism.<sup>74</sup> While the first method was committed to

68. See Symposium, *Centennial World Congress on Comparative Law*, 75 TUL. L. REV. 859 (2001).

69. See Raymond Saleilles, *Rapport sur l'utilité, le but et le programme du Congrès*, in CONGRÈS INTERNATIONAL DE DROIT COMPARÉ TENU A PARIS DU 31 JUILLET AU 4 AOUT 1900, PROCÈS-VERBAUX DES SÉANCES ET DOCUMENTS 9, 43 (1905), available at <http://books.google.com/books?id=RIUuAAAAIAAJ>.

70. See Christophe Jamin, *Le vieux rêve de Saleilles et Lambert revisité. A propos du centenaire du Congrès international de droit comparé de Paris*, 4:52 REVUE INTERNATIONALE DE DROIT COMPARÉ 733-51 (2000).

71. See Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 9, at 339; see also Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100 (Pierre Legrand & Roderick Munday eds., 2003).

72. David J. Gerber, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language*, in RETHINKING THE MASTERS OF COMPARATIVE LAW 152, 199 (Annelise Riles ed., 2001).

73. See Arthur von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959).

74. See Michaels, *supra* note 71 (explaining the different concepts and meanings encompassed by the functional method).

legal harmonization, the second was committed to legal pluralism. Social-purpose functionalists marginalized family law because of their interest in harmonizing the law of the market, whereas positive sociologists treated the family as central to their inquiries.

### 1. Social-Purpose Functionalism

Social-purpose functionalism can be traced back to a jurisprudential tradition influenced by scholars on both sides of the Atlantic. It has its origins in the work of Rudolf von Jhering, Raymond Saleilles, and Édouard Lambert in Europe, and of Roscoe Pound in the United States.<sup>75</sup> Despite this transatlantic dialogue, the aims of a comparative science were clearly universal. Scholars like Pound and Lambert played an important role of promoting comparative law studies in post-colonial countries in Asia,<sup>76</sup> Latin America,<sup>77</sup> and Northern Africa.<sup>78</sup>

Social-purpose functionalists promoted solutions guided by purposes that were understood to be neutral and objective, and that purportedly resulted in the “best solution” to factual problems.<sup>79</sup> According to this functionalist method, comparative law provides a universal view of social life calling for modernization via the resolution of essentially the same problems in every society. For social-purpose functionalists, there was no distinction between law and society; law was simply a reflection of social change according to a mirror theory of law and society.<sup>80</sup> Consider, for instance, the contribution by Saleilles to the Paris Congress: “The law is at the same time the foundation and the result of social life,” and the task of the comparative lawyers is to reach “unity in results within the diversity of legal forms” so that “each country will contribute to the formation of a law common to all civilized nations.”<sup>81</sup>

This unifying purpose behind the Western comparative law tradition was overwhelmingly used to compare private law subjects,

75. See THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920 (Mathias Reimann ed., 1993); see also Graziadei, *supra* note 71.

76. See Roscoe Pound, *Law and Courts in China: Progress in the Administration of Justice*, 34 A.B.A. J. 273 (1948); see also Arthur Taylor von Mehren, *Roscoe Pound and Comparative Law*, 13 AM. J. OF COMP. L. 507, 515-16 (1964).

77. See Isabel Jaramillo, *The Social Approach in Family Law: The Treatise Tradition in Latin America*, 58 AM. J. COMP. L. 843 (2010) (discussing the influence of the social-purpose approach on Latin American family law).

78. See Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World*, in RETHINKING THE MASTERS OF COMPARATIVE LAW 152, 163-70 (Annelise Riles ed., 2001).

79. See Michaels, *supra* note 71, at 118-20.

80. See William B. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 492 (1995).

81. See Saleilles, *supra* note 69, at 170, 178, 181 (author trans.).

especially contract and commercial law.<sup>82</sup> The family linked to the public sphere did not trigger the same enthusiasm *for* unification, but rather raised reservations, particularly when juxtaposed with the private law (not to mention commercial law) fields. Instead, the dichotomy between universal private rules and public law regimes embedded in local *mores* resulted in skepticism toward the possibility of a universal family law.<sup>83</sup> For instance, Lambert emphasized the distinctiveness of family law, explaining that because it was public law codifying the customs of each nation, it was highly variable and consequently impossible to harmonize.<sup>84</sup> In a similar vein, as David Bradley explains, English jurists like Sir Frederick Pollock and Frederic William Maitland “were also sceptical that family laws, representing differences between ‘backward’ and ‘more successful races,’ followed similar paths.”<sup>85</sup>

By focusing predominantly on the harmonization of the market and setting aside the family, social-purpose functionalists viewed the family as an intrinsically organic and traditional area of law, and therefore as a field in which unification and convergence were highly unlikely to succeed. It was more plausible to harmonize and achieve a “*droit commun législatif*” in the law of the market because harmonization was strictly a rational and scientific enterprise, rather than a moral and/or political one. Both Saleilles and Lambert used this idea to justify their own institutional projects, namely, to demonstrate that the comparative method allowed for both an objective, scientific investigation of the law of the market in different countries, and for the historical juristic inquiry into the implicit rationalities of each legal field.<sup>86</sup>

In contrast to the universal rationality and individualism of commercial law, family law was still present in their work, although marked by the stage of civilization, morality, and particular social purpose of each individual society. For instance, the family law contribution by Eugène Huber at the Paris Congress did not engage with substantive harmonization, but was rather a conflict of laws survey, demonstrating that the pluralism existing within Switzerland served

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82. *See id.* at 47 (“Dans le cercle du droit comparé, science sociale, science du droit, rentrent au même titre le droit public et le droit privé. Dans le cercle de droit comparé, instrument d’unification or de rapprochement, droit commun législatif, ne rentre que le seul droit privé”).

83. Saleilles, *supra* note 69, at 15; *see also* Bradley, *supra* note 3, at 260.

84. *See* Édouard Lambert, *Comparative Law*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 127-29 (Edwin R.A. Seligman & Alvin Johnson eds., 1931).

85. *See* Bradley, *supra* note 3, at 2.

86. *See* Saleilles, *supra* note 69, at 60-61 (“M. Saleilles appuie la distinction établie par M. Lambert, dans son rapport, de deux domaines du droit comparé: L’un consistant à étudier les institutions anciennes et qui font partie de la sociologie, l’autre étant plutôt le « droit commun législatif » destiné à dégager, dans les droits d’origine ou d’évolution parentes, les notions communes et celles qui se forment peu à peu par l’interprétation du droit”).

the social purpose of matrimonial regimes, “[t]o retain and to conserve the marriage and the family.”<sup>87</sup>

Social-purpose functionalism stemmed from an organic understanding of society entailing an objective vision of legal norms and of what was best for legal reform, regardless of ideological preferences. To social-purpose functionalists, the function of law was to further a particular coherent purpose, such as the healthy social reproduction of the nation in family law, or the security of transactions in contract law.<sup>88</sup> Once identified, there was no “is versus ought” or “facts versus ends” distinction; social-purpose functionalists tailored the best doctrinal solution to the particular social purpose. Thus, no further attention was paid to how the envisaged “best” doctrinal solution would solve social problems in different social contexts. This shortcoming led to criticism, and ultimately to a departure, a second wave: the positive-sociology functionalist approach broke off the parent tradition, proposing a different methodology in comparative law.<sup>89</sup>

## 2. Positive-Sociology Functionalism

A second type of functionalism, both less normative and more descriptive than social-purpose functionalism, was rooted in positive sociology. According to positive-sociology functionalism, law remained relatively autonomous from social reality. Scholars like Karl Llewellyn, Max Rheinstein, and Otto Kahn-Freund portrayed the family as exceptional, inherently distinct, and not harmonizable, but still central to comparative law inquiry.<sup>90</sup> With guidance from the social rather than legal sciences, these scholars attempted to develop a value-neutral approach to understanding the pluralism and diversity of family law regimes.

In sharp contrast to the social-purpose functionalists with their organic understanding of society, positive-sociology functionalists emphasized that law not only reflects, but also cultivates social change.<sup>91</sup> This second type of functionalism was influenced by Max Weber in Europe and by legal realism in the United States. Pursuant

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87. See Eugène Huber, *Les régimes matrimoniaux des cantons suisses*, in 2 CONGRÈS INTERNATIONAL DE DROIT COMPARÉ TENU A PARIS DU 31 JUILLET AU 4 AOUT 1900, PROCÈS-VERBAUX DES SÉANCES ET DOCUMENTS 206, 208 (1905) (author trans.).

88. See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 707 (1930) (“It is just unreal and unjustifiably dogmatic to refuse to recognize the function of the quest for certainty as contributing to the general security.”).

89. See M.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 173-222 (1997) (showing a similar divergence in American Legal thought and detailing the controversy between Roscoe Pound and Karl Llewellyn).

90. See Otto Kahn-Freund, *Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 138 (M. Cappelletti ed., 1978).

91. See Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235-38 (1931).

to this approach, comparativists engaged in the meticulous study of hidden legal regimes and bureaucratic mechanisms that could better explain political results and more general social phenomena.<sup>92</sup> According to them, legal solutions were guided not by the objective choice of the right rule for each social purpose, but by political choices.<sup>93</sup> In criticizing the vagueness of social purposes identified by the prior school of functionalism,<sup>94</sup> these scholars were committed to revealing two new levels of complexity: possible conflicts between opposing social purposes (for example, the goal of the healthy reproduction of a nation might conflict with the goal of marital stability) and ideological disagreements about what social purposes meant for Catholics, Fascists or those aligned with the Right or Left. In this vein, Llewellyn expressed his deep disagreement with social-purpose functionalism in his response to Pound:

“What can be done,” and by whom? I have spoken of law as a means: *whose* means, to *whose* end? Discussions of law, like discussions of “social control,” tend a little lightly to assume “a society” and to assume the antecedent discovery of “social” objectives . . . . There is, amid the welter of self-serving groups, clamoring and struggling over this machine that will give power over others, the recurrent emergence of some wholeness, some sense of responsibility which outruns enlightened self-interest, and results in action apparently headed (often purposefully) for the common good.<sup>95</sup>

Another point of departure from social-purpose functionalism was an unwillingness to accept abstract doctrinal solutions, and instead a desire for pragmatic solutions attuned to different contexts. Thus, a positive-sociology functionalist would not put forth a doctrinal solution before undertaking a very elaborate factual and anthropological inquiry into the social reality in which each rule applies.<sup>96</sup> The comparative lawyer was encouraged to engage with economists, sociologists, and anthropologists who could better inform her about the impact of legal rules on the behavior of individuals, groups, religious communities, and even animals.<sup>97</sup>

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92. See MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* (Edward Shils & Max Rheinstein trans., Max Rheinstein ed., 1967); see also *THE CANON OF AMERICAN LEGAL THOUGHT* (David Kennedy & William W. Fisher III eds., 2006) (discussing Legal Realism in American Legal Thought).

93. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 431-33, 451, 464-65 (1930).

94. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615-16 (1908).

95. See Llewellyn, *supra* note 93, at 461.

96. See K.N. LLEWELLYN & E.A. HOEBEL, *THE CHEYENNE WAY* (1941); see also Max Rheinstein, *The Need for Research in Family Law*, 16 U. CHI. L. REV. 691 (1949).

97. See René Köning, *Sociological Introduction*, in *ENCYCLOPEDIA*, *supra* note 5, at 20:

From this perspective, family law, like the law of the market, was an important, but not unique field, reflecting a rich interchange between legal, kinship, sociological, and moral values. Comparative lawyers in this positive-sociology tradition were highly committed to interdisciplinary perspectives and the social sciences, especially to anthropology.<sup>98</sup>

Family law became the place *par excellence* to study legal pluralism and local *mores*, and this method was committed to showing how different legal norms entail distinct cultural values and diverse forms of rationality. Rheinstein, for instance, argued that family law required not merely *equal* but *special* attention from legal scholars:

Family law has never attracted that concentrated effort of the legal profession which has been lavished upon business law, constitutional law, administrative law, labour law, and other fields connected with burning political issues or the interests of powerful economic groups. Yet family law influences the lives of everybody more deeply than any of these fields.<sup>99</sup>

Both Llewellyn and Rheinstein analyzed how families actually functioned in different societies—the “is,” or the function they performed at the factual level.<sup>100</sup> In addition, they deeply contextualized the legal rules in the complex social reality in which these rules were operating. Only after they were satisfied that they sufficiently understood the function that family rules played in each complex reality would they announce their reform proposals. Such a proposal entailed how legal rules should be reformed so that family law could change according to the desired normative outcomes, and was narrowly tailored for each social reality. According to Rheinstein, family law—more than other private law disciplines—was inherently unstable and in a continuous flux because of its sensitivity to social,

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On a purely formal level a correspondence in the elementary forms of the human and animal families is obvious. We speak of: (a) the parental family, when both parents jointly rear offspring (*e.g.*, Gibbon); (b) the paternal family; (c) the maternal family, when the father (*e.g.*, many fishes) or the mother (*e.g.*, bear) respectively rears the offspring; (d) the youth family, when the progeny, after a more or less long period of adaptation with one or both parents, gets along by itself (*e.g.*, many birds).

98. See Kahn-Freund, *supra* note 43, at 1-2; see also Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615 (1938); Max Rheinstein, *Comparative Law: Its Functions, Methods and Usages*, 22 ARK. L. REV. 415 (1968).

99. Rheinstein, *supra* note 96, at 691.

100. See, *e.g.*, Karl Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1307 (1932); see also Karl Llewellyn, *Behind the Law of Divorce: II*, 33 COLUM. L. REV. 249 (1933); Max Rheinstein, *The Family and the Law*, in ENCYCLOPEDIA, *supra* note 5, at 15 (writing a relatively short but dense legal introduction to the volume that begins with a survey of the place of family law in the world. He then highlights that one of the peculiarities of this field is its constant change, which he describes as “[f]amily law in flux.”).

political, and legal reforms.<sup>101</sup> Family law's exceptionalism required a social science as well as a comparativist inquiry because, as Rheinstein put it, "[t]he family is what sociologists call a primary group. It is a social institution, which simply exists. Its structure is determined pre-legally. It has existed long before Law was invented as a special technique of social ordering."<sup>102</sup>

This interdisciplinary and pluralist approach to comparative law led social-purpose functionalists to look beyond harmony or unification of the law (the goals of social-purpose functionalists) and rather to look for differences characterising legal regimes with the help of social, rather than legal, science.

### C. *Family Law at the Margins and in the Center: David versus Rheinstein*

The conflict between the two types of functionalist methods continued after WWII in the works of two prominent comparative lawyers, René David and Max Rheinstein. This Part explains that while David pursued the social-purpose functionalist method, and placed family law at the margin, consistent with the tradition committed to the unification and harmonization of legal rules in order to serve the social function of Western markets, Rheinstein moved on to positive-sociology functionalism and placed family law at the crux of his comparative law project.

#### 1. René David

The work of René David made a culturally attuned contribution to the field of comparative law in the form of a major study of the different "legal families" in the world.<sup>103</sup> In addition to the Roman-Germanic and Anglo-American families, David identified Socialist, Islamic, Indian, African, Latin American, and Far East legal families. Using this legal families approach, David addressed cultural and legal differences all over the world. Tracing the genealogy of David's contribution to the field is complex. His work also had important ties to Lambert's legacy, and exhibited similarities with social-purpose functionalism in several ways.

First, David's subdivision of the legal families allowed comparative lawyers to talk about the logic of each family in a scientific way, regardless of whether that family was Socialist or Islamic. David's approach thus opened the comparative law inquiry regarding legal

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101. See Glendon, *supra* note 5, at 5 (explaining how Rheinstein's work showed that "the legal images of the family that prevailed in the developed countries were everywhere more in touch with the ideas and practices of the middle classes than the poor or well-to-do").

102. Rheinstein, *supra* note 100, at 4.

103. See RENÉ DAVID, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (John E.C. Brierley trans., 1964).

families beyond the West by introducing a new legal rationality to talk about Indian, Islamic, and African law.<sup>104</sup> David's intuitive transformation of comparative law into a global enterprise has proven to be a fundamental contribution that shaped the discipline.

Second, David's work was not limited to the investigation of different legal families; as a legal practitioner, he was highly committed to the unification of the markets through commercial harmonization projects aimed at selecting the rules that best performed the social function of the respective institution.<sup>105</sup> David's commitment to technical efforts to harmonize legal regimes was marked by his practical engagement in unification projects launched by the Institute for the Unification of Private Law or UNIDROIT.<sup>106</sup> David's work on unification and search for best solutions was highly influenced by the social-purpose functionalist methodology.

Finally, through his notion that it was possible to harmonize the rules of the market but not the rules of the family, David's work reproduced the market/family dichotomy not only in the West, but in each legal family. An example is David's work on Africa in 1954, when he was tasked by the Emperor, S.M. Haile Sellassie, with drafting an entirely new Civil Code for Ethiopia. This work eventually led to his volume on family law in the Ethiopian Civil Code.<sup>107</sup> As he explained in his article on the difficulties of teaching law in Ethiopia, in addition to scant resources, law schools, and professional lawyers, "[a] comparativist needs to bear in mind that the understanding of the rule of law in Ethiopia was minimal and very different from the Western one in the twentieth century."<sup>108</sup>

However, David's initial skepticism about the codification of family law was due not only to his negligible knowledge of Ethiopian traditions and local customs, but also to the reproduction of the market/family dichotomy within the African family; this translated into his belief in the highly local, organic, and variable nature of family law, and the subsequent impossibility and resistance to its codifica-

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104. *See id.*

105. *See* René David, *Le Droit du Commerce International: Une nouvelle tâche pour les législateurs nationaux ou une nouvelle 'lex mercatoria,' in* NEW DIRECTIONS IN INTERNATIONAL TRADE LAW (1977); *see also* RENÉ DAVID, *LE DROIT COMPARÉ: DROITS D'HIER, DROITS DE DEMAIN*, 30-38 (ECONOMICA, Paris 1982).

106. *See* Jorge L. Esquirol, *René David at the Head of the Legal Family*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 212, 235 (Annelise Riles ed., 2001) (explaining that David's spectacular ability was promoting his transnational legal enterprises "through institutionally-entrenched practices presented as neutral, as common sense").

107. *See* RENÉ DAVID, *LE DROIT DE LA FAMILLE DANS LE CODE CIVIL ETHIOPIEN* (1976).

108. *Id.* at 4 (author trans.); *see also* René David, *L'Enseignement du Droit en Ethiopie*, 6 *J. AFR. L.* 96 (1962).

tion.<sup>109</sup> In eventually codifying Ethiopian family law, David aimed to reconcile the values of the different religious traditions predominant in Ethiopia with the secular rules regulating the family in the *Code civil*:

En ce qui concerne Musulmans et Chrétiens mêmes, l'on ne peut s'attendre à ce que les uns et les autres se conforment, touchant leurs relations de famille, à des dispositions qui ne sont pas celles de leurs coutumes. Le code civil cependant n'est pas de ce fait inutile. Il propose un modèle, moins rigide que celui du Fetha Negast, à des juges qui, dans une large mesure, sont appelés aujourd'hui comme hier à statuer selon l'équité. Il n'était guère possible, en ce domaine, de faire plus.<sup>110</sup>

The result was a series of compromises with little hope that the code would lead to a real convergence of the family law regimes deeply embedded in different religious traditions. Therefore, David maintained religious marriage, and while he was aware that customary marriage remained a valid and predominant practice, he nevertheless introduced civil marriage. He also introduced a legal action for divorce into a society where divorce was beginning to spread in practice but was not yet formally recognized by religious authorities.<sup>111</sup>

To mediate the tensions inherent in the introduction of the institution of divorce, David explained that he departed from a widespread Western liberal conception of divorce present in the French Civil Code by introducing a new concept of "*cause grave*."<sup>112</sup> Divorce was possible only if justified by an "aggravated situation," which meant serious misconduct of one of the spouses, who was then pursued criminally for having caused the marital breakdown. As David explained, behind these differences there were deep cultural reasons:

Un incident de la discussion relative au divorce m'est demeuré dans la mémoire. La commission n'avait pas retenu

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109. See John Hazard, *Book Review*, 32 AM. J. COMP. L. 583, 584 (1987) (reviewing RENÉ DAVID, *LES AVATARS D'UN COMPARATISTE*).

110. RENÉ DAVID, *LES AVATARS D'UN COMPARATISTE* 175 (1982) ("With respect to Muslims and Christians alike, it cannot be expected they will comply with some family law precepts that are not consistent with their respective customs. But this does not render the civil code useless. The code offers a less rigid model than the Fetha Negast to judges who are asked today, as they were yesterday, to decide—in significant measure—according to principles of equity. In this field, it was hardly possible to do more.") (author trans.).

111. See DAVID, *supra* note 107.

112. *Id.* at 5 (showing that what David meant by Western liberal conception was the French Civil Code definition of marriage as a contract that could come to an end by voluntary consent of both parties or by aggravated breach).

comme cause suffisante de divorce la condamnation pénale d'un des époux, mais elle avait admis comme telle en revanche la maladie incurable, la lèpre ou la folie. Je m'en étonnai. La raison m'en fut vite donnée: la peine de prison, me dit-on, est prononcée par les hommes, la maladie est envoyée par Dieu. Les Ethiopiens, lorsqu'ils apprennent qu'une personne est malade, disent : « Que Dieu lui pardonne! »<sup>113</sup>

This explains why aggravated breach or “*cause grave*” divorce, which, David clearly thought, closely reflected local moral ideas, was introduced in the Ethiopian Civil Code.

## 2. Max Rheinstein

The positive-sociology intervention in comparative law became central to the rising “divorce crisis” lasting throughout the twentieth century. In the United States, Llewellyn’s famous articles on divorce of 1932-1933 highlighted the idea that law has influenced the changing social and economic attitudes toward divorce. Llewellyn proposed to look “*Behind the Law of Divorce*” and to reassess the ideologies and the functions that marriage performs in a society.<sup>114</sup> This led him to examine the myriad ways in which marriage and divorce influence the division of property and other assets between men and women, the old and young, and a whole array of diversely motivated individuals.

Rheinstein followed Llewellyn by urging a major inquiry into divorce among family law experts in the United States. He showed that, despite the attempt to create more individual rights for women through the Married Women’s Property Law Acts, the family still functioned as a primary social unit. Studying the transformations of family law by separating the “is” from the “ought,” Rheinstein focused on the reality of family law and the existence of opposing ideologies about marriage. In that conflict, a “compromise has been brought about by the coexistence of a strict divorce law of the books and a law of easy divorce in action.”<sup>115</sup> Careful about what rules to reform and what normative goals to achieve, Rheinstein pointed out that updated laws on the books often created unintended effects in

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113. DAVID, *supra* note 110, at 174 (“One anecdote about the debates over divorce remains vivid in my memory. The commission did not consider the criminal conviction of a spouse to constitute grounds for divorce; on the other hand, it did consider an incurable disease, such as leprosy or insanity, to constitute sufficient grounds. I was astonished. The reason was promptly explained: I was told that while a prison sentence is pronounced by men, disease is sent by God. When Ethiopians find out that someone is ill, they say: ‘May God forgive him!’”) (author trans.).

114. See Llewellyn, *Behind the Law of Divorce I and II*, *supra* note 100.

115. Max Rheinstein, *Challenge and Response in Family Law*, 17 VAND. L. REV. 239, 252 (1964).

the relations of married couples vis-à-vis creditors in cases of divorce and bankruptcy.<sup>116</sup>

Rheinstein's introduction to his 1972 book, *Marriage Stability, Divorce and the Law*, opened with the Weberian distinction between Islamic and Judaic traditions, and emphasized how material rationality influenced the rules of law that give expression to religious tenets.<sup>117</sup> In contrast, formal rationality was characteristic of the revived Roman law in both common and civil law. In his comparative enterprise, Rheinstein surveyed how different legal regimes have responded with diverse social, economic, and political outcomes to marital breakdown, and highlighted more or less effective remedies. Rheinstein was ready for paradoxes in his comparative analysis of marital breakdowns:

The breakdown of a home often constitutes a catastrophe for spouses and their children. If it occurs frequently, it can indeed be regarded as a social evil. But the restoration to the freedom of remarriage is by no means necessarily evil. In fact, it can be good for society as it reopens the way for the creation of new homes for ex-spouses and their children, a home which is free from the taint of irregularity and which at least holds the possibility of being more harmonious than that which has broken down.<sup>118</sup>

Rheinstein aimed to show how legal regimes refusing to recognize legal divorce lagged behind modern society, where marital breakdowns were frequent. As he outlined in his detailed research, despite this legislative gap, courts from Japan to Germany and the United States were handling the negotiation between divorcing spouses. In Rheinstein's foreword to Mary Ann Glendon's book in 1977, he stated:

So what prevailed for decades was a contrast between the law in the books and the law in action, a compromise between the forces of conservation oriented to Christian traditions held to be inviolable and "modern" individualism oriented to the right of pursuit of happiness, a compromise that was worked out not in the halls of the legislatures but in the rooms of divorce courts.<sup>119</sup>

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116. Rheinstein, *supra* note 96, at 694-95 (pinpointing where Rheinstein came to this assessment of 1940's patrimonial and marital regimes: "[W]hile fitting well the needs of people in the top brackets of the property and income structure, the present law is ill-suited for the middle classes, the workers and the farm population.").

117. See MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 18-22 (1972).

118. *Id.* at 5.

119. Max Rheinstein, *Foreword* to MARY ANN GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* vii (1977).

Rheinstein's focus on the real functions of family law in society, by looking at the material consequences of marital breakdown, became of great use to family law reformers in the United States.<sup>120</sup>

Rodolfo Sacco contributed to Rheinstein's and Llewellyn's project in an essay that extends the range of positive-sociology functionalism. Sacco's work is fuelled by an anti-dogmatist tendency and is not directed at harmonizing and purifying the law. Rather, Sacco's commitment to legal diversity, pluralism and the social sciences through his idea of legal formants makes him a strong critic of harmonization projects.<sup>121</sup> To be sure, Sacco's focus on family law is surprisingly limited and sporadic. However, in a collection of essays attacking the ideological battleground of divorce in the late 1960s (still forbidden by the Italian legislature), Sacco aimed to recast the debate on the importance of marriage and divorce. He sought a secular, rather than Catholic, perspective on the problem of divorce.<sup>122</sup>

In his Weberian comparison of the status of divorce legislation in Western Europe and Russia, Sacco pointed out that the positions on divorce need to be spread along two axes of comparison characterized by "ideal types," i.e., in Rheinstein's words, "mental constructs meant to serve as categories of thought the use of which will help us to catch the infinite manifoldness of reality by comparing its phenomena with those "pure" types . . ."<sup>123</sup> The first axis portrays those countries that allow "consensual divorce" versus those that allow it only for "proper cause" through the intervention of the State. The second axis differentiates countries that treat divorce as a "remedy" from those that treat it as a "penalty."<sup>124</sup> In reality, most of the examples Sacco offered present hybrids between these categories through different combinations of doctrinal solutions. For instance, Sacco observed that in a minority of countries, the rule of indissolubility of marriage is still in place. While more countries are legalizing divorce, they are also introducing ways for the state to intervene in order to protect third party interests, often those of children, which are harmed by

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120. See also Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956).

121. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991); see also Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991). The structural disjuncture that Sacco finds in legal rules is between their declaratory statements and their operative rules which present gaps that recur throughout the various legal sources of each legal system. In refusing the principle of the unity of the law, Sacco insists that each legal rule becomes the product of the interaction, competition, and struggle among the different legal formants (legislation, case-law, scholarly work, ideology in the Soviet legal system, etc.).

122. See L'ORA DEL DIVORZIO (E. Rovasenda et al. eds., 1969).

123. Max Rheinstein, *Introduction to MAX WEBER, ON LAW IN ECONOMY AND SOCIETY* xvii, xxx (Edward Shils & Max Rheinstein trans., Max Rheinstein ed., 1967).

124. See Rodolfo Sacco, *Il Divorzio Nelle Esperienze Estere, in L'ORA DEL DIVORZIO* 197, 203 (E. Rovasenda et al. eds., 1969).

the marital breakdown.<sup>125</sup> Because of the variety of legal solutions to protect third party interests, which allow the State to intervene in the marriage breakdown, Sacco's plea is to prevent the current Italian debate on divorce from being shaped by merely ideological and religious views. Instead, in allowing divorce with some restrictions, he stresses the need for a precise legal strategy addressing which parties ought to be protected in each particular context.

The centrality of family law in the positive-sociology tradition *à la* Llewellyn, Rheinstein, and Sacco certainly allowed for important research and understanding of different family regimes through comparative law work.<sup>126</sup> Their legacy, however, did not help to establish the centrality of family law in the Western discipline of comparative law, which was mainly driven by unification through legal, rather than social science. Their legal realist turn was not destined to reconfigure Western comparative law, and the idea of family law exceptionalism continued to influence functionalist approaches.

### III. REPRODUCING AND SUBVERTING THE MARKET/ FAMILY DICHOTOMY

Even though the choice between alternative functionalist methodologies is not a recent development, it has acquired new significance since the 1990s. Because of recent reconfigurations of the market/family distinction, the family is at the center of comparative law projects pursuing convergence and harmonization of Western legal regimes.

Today, comparative legal inquiries in family law are widespread but they are marked by a methodological contrast: proponents of harmonization and convergence evoke some elements of social-purpose functionalism by depicting family law as private, scientific, and non-politicized in search of the "best" family law regime within Western models. The diversity proponents addressing the plurality of family regimes, by contrast, evoke some elements of positive-sociology functionalism by adopting structural comparisons in which the family, just like the market, is dependent on sociological patterns and cultural norms which have different distributive implications depending on the social context.

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125. *Id.* at 218.

126. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); see also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

### A. *Convergence and Reproduction of the Dichotomy*

With the rise of international human rights conventions addressing the family and of governance feminism projects,<sup>127</sup> lawyers are increasingly addressing the convergence of family law regimes through the language of universal and individual rights. Mary Ann Glendon's Introduction to the volume on *Persons and Family* in the *International Encyclopedia of Comparative Law* offers an interesting example of this convergence approach, softened by the acknowledgment of the persistent diversity in family law regimes:

When modern comparative law took shape as a discipline in the late 19th century, it was commonly thought that family law was too much the product of each nation's distinctive culture and history to be a promising subject for comparison. By the late 20th century, however, broad similarities had appeared in the family law systems of the liberal democracies of the WEST, and a comparative approach was routinely being employed by law reformers and scholars in most countries . . . . These trends have not proceeded at the same pace everywhere, and they have taken different forms in different places, but almost all the world's legal systems have now been affected by the advance of human rights ideas in general, and women's equality in particular.<sup>128</sup>

Some comparatists explain that family law convergence has happened in the last decades in a spontaneous way, without the need for legislative intervention, but rather through shared legal ideals about the family which are subsequently implemented in a more or less uniform manner among different Western industrialized states.<sup>129</sup> As Maria Rosaria Marella explains, convergence is often used as an argument to legitimize further unification of substantive laws, because "European family-law systems—as the supporters of harmonisation emphasise—are converging along three main paths or trends: liberty, equality and secularity."<sup>130</sup>

Two elements in this convergence thesis can be traced back to social-purpose functionalism and the legacy of René David in comparative law. First, in seeking spontaneous convergence, legal scholars

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127. For a definition of governance feminism, see Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. GENDER 335, 340 (2006) (describing governance feminism as "the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power").

128. Glendon, *supra* note 5, at 6-7.

129. See Schwenzer, *supra* note 14, at 148 (listing among the various converging tendencies in Western Europe the widespread acceptance of no fault divorce and cohabitation regimes).

130. Marella, *supra* note 6, at 79.

present it as a purely legal matter, while they pay very little attention to the underlying conflicting ideologies or the divergence in social practices that survive or are even heightened despite the increasing legal convergence.<sup>131</sup> An example of this doctrinal convergence is Ingeborg Schwenzer's explanation of the increase of consensual divorce:

A fundamental change in values and conceptions beginning in the 1970s has led to a gradual shift of focus from status to the actual relationship regardless of status. In divorce law, this development was first reflected in the abolition of the concept of fault. Nowadays, consensual divorce is at the centre of legal practice. This trend is encouraged on a procedural level through simplified procedures whereby couples agree on divorce and on the inclusion of mediation as an instrument to assist couples in reaching an agreement. The law concerning the consequences of divorce is also characterized by a general withdrawal of the state; again, the primary focus is on the private autonomy of the parties.<sup>132</sup>

In this depoliticized image of reform, every cause of convergence is not only inevitable but legal.

A second element of the convergence thesis that displays a logic similar to David's work in Africa is that legal convergence happens only in the West and not in other legal families. In fact, the market/family dichotomy is nested and reproduced in the "Rest" of the world so that in Africa there is no spontaneous convergence of family law regimes guided by modernization and enlightenment values. An example of the reproduction of the market/family dichotomy beyond the West emerges in Harry Krause's work:

In the "West," relatively recent and liberated answers to many fundamental issues—ranging from individual freedom, to women's equality, to homosexual rights, abortion, even to the proper role of sexuality on television and schools—are now perceived as necessary givens, sometimes as natural, universal human rights. This is not so elsewhere. Western notions, particularly of women's equality, are seen in many traditional cultures as the infidel's attack on millennia-old religious imperatives . . . [T]he West's current moral certainties do not play well in the industrially "developing"

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131. For a description of doctrinal convergence on consensual divorce, see IN-GEBOURG SCHWENZER, MARIEL DIMSEY (Collaborator) *MODEL FAMILY CODE: FROM A GLOBAL PERSPECTIVE* (2006). On the increasing ideological divergences underlying family law doctrinal convergence, see Nicola, *supra* note 31.

132. *Introduction* to SCHWENZER, DIMSEY (Collaborator) *id.*

world—as indeed they would not have played well in the West a mere one hundred years ago.<sup>133</sup>

As Krause demonstrates, the study of spontaneous convergence in family law is a geographically limited phenomenon based on shared values influenced by Christian morality and Western liberalism. When the study of comparative family law comprises the Rest, it entails very limited possibilities of comparison of marriage, divorce, and reproductive laws with Western standards.<sup>134</sup> This comparative law pedagogy focuses mostly on the Western legal tradition, while dismissing the Rest—so that when comparative lawyers deal with these “other” traditions, they emphasize the need to codify commercial codes or draft new constitutions with very little hope to change local family law regimes.<sup>135</sup>

### B. *Harmonizing and Subverting the Dichotomy*

After WWII, the predominant functionalist approach in comparative law bore important resemblances to social-purpose functionalism. It relied on a holistic perspective of law and society and a commitment to harmonization. The important *An Introduction to Comparative Law* by Konrad Zweigert and Hein Kötz is characteristic of this tradition. These German scholars committed to universalizing legal problems by focusing on a strictly un-political private and commercial law.<sup>136</sup> In their work, the market/family dichotomy is relevant as their commitment to the harmonization of the market leads to a focus on the law of obligations while setting aside the family as public, political, and thus difficult to reform. Considering various hot topics in the family law area, they conclude: “So there are areas in comparative law where judgment must be suspended, where the student simply cannot say which solution is better.”<sup>137</sup>

Like social-purpose functionalists, Zweigert and Kötz are committed to objective and scientific legal knowledge aiming for “a truly international comparative law which could form the basis for a universal legal science.”<sup>138</sup> In addition, they are committed to unification, as they seek to make international business easier through comparative law.<sup>139</sup>

133. Krause, *supra* note 9, at 1110.

134. See GLENDON ET AL., *supra* note 25.

135. See DAVID, *supra* note 107.

136. See KONRAD ZWEIFERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., 3d ed. 1998).

137. *Id.* at 40.

138. *Id.* at 46.

139. See *id.* at 16 (stating that “[l]egislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law . . . .”); see also *id.* at 17 (quoting Rudolf von Jhering, stating that “[t]he reception of foreign legal institutions is not a matter of nationality, but of usefulness and need”).

Indeed, a large number of comparative law projects since the mid-1980s addressing the harmonization or the “Common Core” of European private law have been committed to the classic and rigid structure of private law finding common principles in the market, whereas the harmonization of the family was not yet at stake.<sup>140</sup> This is because the context in which these Europeanization projects flourished was presented as a neutral one, through which the EU would harmonize the law of the market while lacking the formal competence to interfere with Member State’s cultural and political traditions embedded in domestic family law regimes. This strategy was successful because at the formal level the EU did not have the competence to undertake the harmonization of family law, even though since the late 1960s it became clear that the European Community had a huge influence on domestic family law regimes by introducing gender equality in the workplace and regulating conflict-of-laws rules about the recognition of foreign marriages and divorces.<sup>141</sup>

This approach strengthened some of the private/public, market/social, and federal/local dichotomies that have pervaded academic and judicial debates on the harmonization of private law. Family law has consistently found itself on the public, social, and local side of the equation, thus leaving it to Member States, rather than the Community institutions, to regulate.<sup>142</sup>

Since the late 1990s, however, a number of scholars have created a Commission on European Family Law (CEFL), aiming at subverting the market/family dichotomy while advancing a European-wide project to harmonize the law of the family.<sup>143</sup> Their project to create common *Principles of European Family Law*<sup>144</sup> resembles social-purpose functionalism in so far as they are committed to the search of “best solutions” based on the social purpose of modernizing the family. Like classic social-purpose functionalists, they collapse

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140. See THE COMMON CORE OF EUROPEAN PRIVATE LAW (Mauro Bussani & Ugo Mattei eds., 2003).

141. See Marella, *supra* note 6, at 83; see also Jürgen Basedow, *La reconnaissance des divorces étrangers: droit positif allemand et politique législative européenne*, 67 REVUE CRITIQUE DE DROIT INTL. PRIVÉ 461-82 (1978) (recognizing early on that the European common market had relevance also for family law, through conflict of laws in the early Rome and Brussels Conventions).

142. See Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 EUR. L.J. 751, 762 (2004); see also Fernanda Nicola, *Another View on European Integration: Distributive Stakes in the Harmonization of European Law*, in PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY 233-60 (Clare Dalton ed., 2007); *Transatlanticism: Constitutional Asymmetry and Selective Reception of U.S. Law and Economics in the Formation of European Private Law*, 16 CARDOZO J. INT’L & COMP. L. 87 (2008); Philomila Tsoukala, *Marrying Family Law to the Nation* 58 AM. J. COMP. L. 873 (2010).

143. See Commission on European Family Law (CEFL), <http://www.ceflonline.net/> (last visited Aug. 18, 2010).

144. See BOELE-WOELKI ET AL., *supra* note 15.

the “is and ought” distinction.<sup>145</sup> In proclaiming their neutrality in method, their universal aspirations, and their commitment to progress and modernization, they are presenting comparative family law as a field in which their methodological choices are unanimously accepted. In the words of Katharina Boele-Woelki: “Irrespective of how we perceive comparative law—as a method or as an autonomous direction in legal research—today it has become a reality; it has acquired a firm standing and won universal application in all legal sciences.”<sup>146</sup>

These scholars have subverted the market/family dichotomy because the family is no longer representative of an organic unity, hierarchy, and local difference, but rather of private and universal rights of each individual that can be harmonized through comparative law just like the law of the market. Their project has sparked a lively controversy between those in favor or against the harmonization of European family law.<sup>147</sup>

#### CONCLUSION: MAKING SENSE OF THE DICHOTOMY

Some of the elements of positive-sociology functionalism *à la* Llewellyn, Rheinstein, Kahn-Freund, and Sacco have re-emerged in the wake of scholars who envisage a critical direction for comparative family law projects. These scholars resist the path towards a necessary convergence of Western family law, and they have thus demonstrated their skepticism vis à vis projects aimed at harmonizing European family law. Instead, they suggest that comparative family law should neither strive for harmonization nor become an impossible task. It should, however, be approached in a critical fashion.<sup>148</sup>

Elements of positive-sociology functionalism appear in projects committed to showing how the family, together with the market, played an important role in the globalization of legal thought.<sup>149</sup> In light of the legal realist legacy, these comparative lawyers are committed to a clear separation of the “is from the ought.” This leads them to favor legal pluralism based on the conviction that legal change happens not because of a single social purpose, but rather through a multiplicity of local and global factors, both internal and

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145. See Antokolskaia, *supra* note 14, at 165.

146. Katharina Boele-Woelki, *What Comparative Family Law Should Entail*, 4 *UTRECHT L. REV.* 1, 6 (2008).

147. See PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE, *supra* note 14.

148. See Marella, *supra* note 6; see also David Bradley, *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE, *supra* note 14, at 65; Tsoukala, *supra* note 142.

149. See Kennedy, *supra* note 46.

external to family law. Finally, in contrast to social-purpose functionalism, these comparative lawyers highlight the cultural specificity of each family law regime situated in the reality of an increasingly global political economy.<sup>150</sup>

To make sense of the market/family dichotomy, rather than overcoming, subverting or reproducing it, scholarly projects should show the interdependence between the law of the family and the market. In contrast to family law initiatives committed to the harmonization and to the ones launched by the World Bank on development with the purpose of modernizing family law according to Western standards, the comparative lawyer is first asked to contextualise and understand the many conflicting functions of legal rules before suggesting a specific reform strategy. In this vein, scholars have highlighted that family law reforms should not be about only moral values and universal rights but, just like reforms of the market, about their economic and distributive consequences as well.

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150. See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: A Report from the Up Against Family Law Exceptionalism Conference*, 58 AM. J. COMP. L. 753 (2010).