

Three Patterns of Law: Taxonomy and Change in the World's Legal Systems

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UGO MATTEI

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Taxonomy and Change in the World's  
Legal Systems

Taxonomy is as important in the law as in any other discipline. It provides the intellectual framework of the law and it makes the law's complexity more manageable. Today barely anyone defines law as the mere aggregate of rules that govern society. Taxonomy plays an important role within each legal system. It evolves to accommodate doctrinal, legal, and social changes within itself. Taxonomy allows lawyers to communicate with each other, to discuss homogeneous problems, and to propose so-called "principled" solutions. Taxonomy is the grammar of the legal discourse.

Taxonomy reflects the legal culture of a given legal system, it is the product of the interaction of the legal tradition and of the new sensibilities. Its aging calls for its replacement. As we know from other branches of learning, as well as from our own experience as legal scholars, even if an older hypothesis has lost its explanatory and predictive functions, the task is to develop a new hypothesis in order not to abandon the process of hypothesizing. For example, the classic American formalist notion of contract, based on the idea of the

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UGO MATTEI is Alfred and Hanna Fromm Professor of International and Comparative Law, Hastings College of the Law, University of California and Professor of Civil Law, University of Trento. An early Italian draft of this paper was presented in Rome as a *scintilla iuris* in memory of Gino Gorla. Other versions have been circulated at the "Conference on New Approaches to Comparative Law" at the University of Utah, and discussed at a Faculty Colloquium at Hastings College of Law and at a Legal Theory Workshop at Columbia University. I wish to thank all the participants to those discussions as well as Antonio Gambaro, Rodolfo Sacco, Michele Graziadei, Giannmaria Ajani, Mauro Bussani, Elisabetta Grande, Hillary Josephs, Pier Giuseppe Monateri, Laura Nader, Eric Feldman, James Gordley, Bill Wang, Ashtosh Baghwat, David Feigman, George Fletcher, Frank Upham, Antonino Procida, Stanley Lubman, Mirabelli di Lauro, Alejandro Garro, Andrzej Rapaczynski, Thomas Ulen, and Dan Henderson for their helpful comments on different occasions. Thanks also to Fabio Marino, (Hastings 1996) and Mario Prats (Hastings 1997), for editing, translation and research assistance.

Rudolf B. Schlesinger would have been the first on the thank-you list. A few weeks before his death, I spent an entire afternoon at his home discussing this paper with him. He passed it through the reading machine of which he was so proud and which allowed him to work until the last day of his life. He came out, as usual, with a number of comments that opened my mind. My whole life as a scholar and as a person has benefitted immensely from his teaching, his advice, his example, and his warm friendship. Good-bye Rudi, I will miss Putti and you forever.

"meeting of minds," has been replaced with a taxonomy based on reliance, which seems to better reflect the evolution of private law.<sup>1</sup>

Taxonomy plays an important role in transferring knowledge from one area of the law to another. For example, the German theory of *Rechtsgeschäft*, based on the notion of declaration of will, made lawyers handle different problems within the same framework, such as the promise to marry and the creation of a corporation. Because little knowledge can be usefully transferred between such radically different aspects of social life, the General Part of the New Dutch Civil Code (Book 3) has been limited to patrimonial transactions.<sup>2</sup> Indeed, it is extremely useful to transfer knowledge between such areas of law as contract, tort, and property to handle all of them with a common grammar. It is no surprise that even in America, where the legacy of realism makes legal culture extremely suspicious when faced with broad classifications, some scholars are pursuing unified theories in patrimonial private law.<sup>3</sup>

In the world of legal globalization,<sup>4</sup> transfers of knowledge are needed not only within different areas of a given legal system but also between different legal systems. There is a need for a global taxonomy that will allow legal systems to learn from each other. This taxonomy seems to me a prerequisite to make the knowledge and the problem-solving experience acquired in one system of law understandable and possibly transferable to another. Since the law is remarkably path dependent, one needs tools for at least a *prima facie* informed guess on which aspects of the receiving legal system are likely to modify the received institution. Obviously, comparative lawyers are in a privileged position to develop such a general taxonomy that ultimately could be used as a grammar to understand and discuss each other's problems and, if desired, as a guide for the effective transplantation of law. Since comparison involves history, by means of comparative study, it is possible to identify the deep differences in the path of legal systems that make dependency occur. Path dependency seems to be what determines the success or failure of a legal transplant. Consequently, a taxonomy that works at a sufficiently

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1. See E.A. Farnsworth, *United States Contract Law* 30 ff. (1991).

2. See R.B. Schlesinger, H. Baade, M. Damaska, & P. Herzog, *Comparative Law: Cases, Text Materials* 545 (5th ed. 1988 & Supp. 1994) "The 'General Part' problem was resolved by the draftsmen of the new Dutch Civil Code in an interesting and innovative way. They decided to include a General Part in their Code but to limit its effect to those areas of the law which deal with patrimony, i.e., with rights having a money value. Thus, purely personal rights, especially in the area of family law, are not affected by the rules and principles stated in the General Part of the New Netherlands Code." *Id.*

3. See E.L. Weinrieb, *The Idea of Private Law* (1995); Gordley, "Contract and Delict: Toward a Unified Theory of Liability," *Edinburg L.R.* (forth.). Cooter, "Unity in Tort, Contract and Property: The Model of Precaution," 73 *Cal. L.R.*, 1 (1985).

4. See "Symposium on Globalization," 46 *J. Legal Educ.* 301 (1996).

deep level could eventually make explanations and possibly predictions on legal change.

Comparative lawyers have expended substantial efforts in classifying families of legal systems.<sup>5</sup> At the origin of these efforts lies the conviction that some deep-rooted characteristics shared by a number of legal orders transcend the differences between systems belonging to a particular family.<sup>6</sup> Lawyers communicate and understand each other better within each family of legal systems. Consequently, knowledge is more easily transferable and transplants may and do happen more smoothly because the institutional object of transplantation is received within a compatible legal framework. Hence, the real problems faced by intellectual globalization are found in domains where very different conceptions clash with each other. In such domains transplants take place, but the phenomenon is better captured by the notion of legal imperialism. The transfer of knowledge, rather than being a pattern of communication and exchange between different legal systems, becomes a one-sided exportation of legal rules and concepts that usually end up being rejected, or creating intellectual dependency.<sup>7</sup> The existence of exporting and importing of legal cultures is a fact. It is also a fact, however, that this one-sided attitude winds up with a couple of rather serious problems.

First, exporting legal cultures tend to develop a "nothing to learn attitude" against importing systems. This parochial attitude is extremely evident in modern American academia, as has traditionally been the case with French legal scholarship. A number of scholars have passionately denounced this attitude.<sup>8</sup> Parochialism involves the loss of opportunities to learn well-needed lessons,<sup>9</sup> the avoidance of mistakes due to misunderstandings, or re-inventions of the wheel. The ongoing "great debate" on mediation and alternative dispute resolution further exemplifies these factors.<sup>10</sup>

A second problem, connected with the first one, although more internal to the community of comparativists, has to do with the

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5. "In a sense, classification is the ultimate purpose of any kind of comparative scholarship: comparison implies a statement about the relationship between peculiar objects of study, their resemblances and their differences." Schlesinger et al., *supra* n. 2, at 68 (5th ed. 1988 & Supp. 1994). See also A. Gambaro & R. Sacco, *Sistemi Giuridici Comparati* 21 ff. (1996).

6. See Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," 39 *Am. J. Comp. L.* 1 (1991); Constantinesco, "Introduzione al Diritto Comparato," in *I Sistemi Giuridici Comparati* (A. Procida Mirabelli Di Lauro ed., 1996).

7. See *Transplants, Innovation, and Legal Tradition in the Horn of Africa* (Elisabetta Grande ed., 1995).

8. See in a broader perspective, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991); see also Langbein, "The Influence of Comparative Procedure in the United States," 43 *Am. J. Comp. L.* 545, 547 (1995).

9. See Langbein, "The German Advantage in Civil Procedure," 52 *U. Chi. L. Rev.* 823 (1985).

10. See Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (1990).

marginalization of the "radically different cultures" from the mainstream of comparative legal research.<sup>11</sup> Both of these problems are extremely difficult to handle unless one is ready to rethink the Euro-American centric approach to comparative law.

Comparativists have employed several classifications based on non-homogeneous factors.<sup>12</sup> The most successful of these is the one proposed by René David, which divides the world in four families: a) common law; b) civil law; c) socialist law; and d) other conceptions of law (residual classification).<sup>13</sup> Other classifiers apparently felt a need to add complexity to this simple scheme. Unfortunately their own classifications become more complicated and hard to remember, and end up confirming the very classification they sought to replace.<sup>14</sup>

I begin this article with the often-neglected assumption in comparative law that taxonomy is not an end in itself. Instead it is a means to enrich our comparative understanding of legal systems. Consequently, no taxonomy can claim universality by serving every comparative purpose better than every alternative one. It is quite obvious that, in comparing constitutional orders, the common law vs. civil law opposition may be less useful than the federal vs. unitary one.<sup>15</sup> Different classifications may therefore coexist for different purposes, and any new taxonomy should be evaluated on the basis of whether it serves a given aim better than the previous ones that share the same purpose. Hence, it is important to state clearly at the beginning what is the purpose of the taxonomy that one proposes, rather than engaging in normative judgments on heterogeneous entities.

My aim is twofold: first I wish to discuss a taxonomy that better captures the relative importance of different conceptions of the law in a general introduction to the major legal systems in the world. I wish to incorporate observations about the "radically different conceptions" within the mainstream of comparative law to avoid their marginalization into area studies. For instance, sinologists and Japanese law scholars discuss among themselves, rather than participate in the general enterprise of understanding law in a comparative perspective. I believe that such a marginalization has too high a cost for the comparative law community.

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11. See *infra* nn. 14, 15.

12. See Schlesinger et al., *supra* n. 2, at 311.

13. See R. David & C. Jauffret Spinosi, *Les Grands Systemes de Droit Contemporains* (10th ed. 1992).

14. Cf. K. Zweigert & H. Kötz, *An Introduction to Comparative Law* 62 ff. (T. Weir ed., 1977). More recently, with an emphasis on the systemic peculiarities of Latin-American law, Castan Tobenas, "Contemporary Legal Systems of the Western World," 25 *Comp. Juridical Rev.* 105 (1988).

15. This point is clearly made by Schlesinger et al., *supra* n. 2, at 315.

I have used my proposed taxonomy for several years in the general introduction to Comparative Law at the Faculté Internationale de Droit Comparé, and I have found its use beneficial in making lawyers from different backgrounds communicate with each other for the purpose of understanding and questioning fundamental conceptions that they take for granted in their national legal systems. Although I would not be able to write a book based on my taxonomy alone, I think that my taxonomy could serve the purpose of offering a more balanced and interesting general introduction to the world's legal systems than the ones that excessively reflect the "private law-western legal tradition" background of their authors. I believe that a taxonomy that is able to approach radically different conceptions and to handle them within the same paradigms that we use when approaching Western law, has an incommensurate value in shedding light on the broader jurisprudential issue of the nature of law and our conception thereof.

I also wish to respond to a concern recently expressed by Professor David Gerber<sup>16</sup> that comparative law has been so far incapable of providing the tools to transfer legal knowledge from one system to another and that there is a need for such knowledge transferring devices. I think that the deconstruction of legal orders as the outcome of the coexistence of three competing "patterns of law" in different quantitative ratios<sup>17</sup> may be a first step in the direction of developing the tools to transfer knowledge across the boundaries of legal traditions. The development of an adequate taxonomy may eventually allow us to go "beyond mere taxonomy" and to make explanations (or predictions as economists like to call them) on legal transplants and legal change. These long-overdue explanations are needed not only by comparativists but by the whole scholarly community interested in law and institutions. An adequate taxonomy will be able to answer questions such as: why and how do legal systems change? When can a transplant be considered successful and when not? What are the factors more likely to resist legal change by imitation? How can the structure of the recipient legal system affect and modify a received legal institution? Are there different patterns of legal change that can be observed within or outside the borders of legal system families grouped in a given taxonomic scheme?

The answer to these questions is beyond the scope of this paper. This article seeks to provide a good framework within which to pose them. Accordingly, part two of this article explains why common taxonomies are outdated and should be replaced. Part three discusses the meaning of patterns of law as used herein. Part four introduces

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16. See David Gerber, remarks at the meeting "Comparative Law in the United States. Quo Vadis?," University of Michigan, Ann Arbor 22 Sept. 1996.

17. See *supra* n. 8.

the notion of "macro-comparative revolution" to manage the tension between the dynamic nature of law and taxonomy. Part five employs the notion of "hegemonic pattern" to propose a tripartite dynamic taxonomy of the world legal systems. Parts six, seven, and eight are respectively devoted to briefly outline the main common features and to classify some of the world legal systems into the three families of the *rule of professional law*, the *rule of political law* and the *rule of traditional law*. Finally, part nine is devoted to mixed aspects and subtaxonomies that are necessary to make my taxonomy a useful device to introduce the diversity of legal systems.

## 2. THE NEED FOR NEW, NON EURO-AMERICAN-CENTRIC CLASSIFICATIONS

In a recent passionate article, Professor Langbein points out that "[t]he taxonomic orientation of the founding generation [of comparative lawyers] largely spent itself. . . . once René David has written, once you have Zweigert & Kötz on the shelf, there seems to be less reason to keep doing it."<sup>18</sup> Although I agree that this may be one of the reasons for the unsatisfactory situation of comparative jurisprudence in Europe and in the United States, I believe that taxonomy, when aging, needs upgrading as much as anything else. This is particularly true if one seeks to capture what can be called, following Bruce Ackerman's proposal, "revolutionary transformations."

Current classifications in legal families, in addition to being largely Euro-American centric, need to be revised because the geo-legal map of the world is substantially different from the one charted by René David. The first and most obvious difference is due to the "fall" of Communist ideology in Central and Eastern Europe, an event which called into question the "socialist law" family.<sup>19</sup> The second less obvious, but equally important, difference is due to the "success" of that same political system in China, and the consequently increased importance of legal sinology among comparative disciplines.<sup>20</sup> The third relevant factor is the increased importance and the extraordinary progress of Japanese law in the last thirty years.

18. See Langbein, *supra* n. 9, at 547.

19. The systemic impact of the fall of the Communist system (now limited to Cuba, China, North Korea, Laos and Vietnam) is treated in depth in Schlesinger et al., *supra* n. 2. A short discussion on whether post socialist law is still a family of legal systems can be found in Ajani & Mattei, "Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics," 19 *Hastings Int'l & Comp. L. Rev.* 117 (1995). A more thorough discussion can be found in Italian in Ajani, "Il Modello Post-Socialista," in *Sistemi Giuridici Comparati*, *supra* n. 6, at 19.

20. See Lubman, "Studying Contemporary Chinese Law: Limits, Possibilities, and Strategies," 39 *Am. J. Comp. L.* 293 (1991). Cf. A. Hung Ye Chen, *An Introduction to the Legal System of the People's Republic of China* (1992); "The Emerging Framework of Chinese Civil Law," 52 *L. & Contemp. Probs.* 1 (1989).

The fourth difference is due to the increasing awareness on part of the Islamic world of its cultural, and consequently legal, peculiarities. The independence achieved by the entire African continent represents the fifth historical development which comparative law must take into account. Finally, a number of reasons for rethinking introductory classifications are to be found at a level more closely related to the history of legal thought. The community of comparative lawyers, taking into account both recent developments and historical evidence, has rethought the traditional distinction between common law and civil law by emphasizing similarities rather than differences.<sup>21</sup> Even the sharp contrast of this traditional distinction among legal systems has been fading.<sup>22</sup> Moreover, the same community has been shaken by deep theoretical malaise<sup>23</sup> and it is charged with isolating itself from the most challenging developments in legal scholarship. In recent meetings convened by dissatisfied comparativists at the Universities of Michigan and Utah, the mainstream comparative scholarship has once again been accused of being both Euro-American centric and lacking in cultural content. Its major cultural-criticism potentials are consequently lost.

Similar considerations have influenced the most recent literature that attempts a general classification of legal systems. The African legal scholar Professor J. Vanderlinden has criticized the Euro-American centrism prevalent in comparative law.<sup>24</sup> Following his lead, the introduction of a so-called "pluralistic" family has been proposed<sup>25</sup> in place of the residual family proposed by David, Arminion-Nolde-Wolff,<sup>26</sup> Zweigert-Kötz and Constantinesco, among others.<sup>27</sup> Conse-

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21. See Gordley, "Common Law e Civil Law: una distinzione che stas comparendo," in *Studi in Onore di Rodolfo Sacco* (1994); Gordley, "Common Law und Civil Law: eine überholte Unterscheidung," 3 *Zeitschrift für europäisches privatrecht* 498 (1993); Glenn, "La Civilization de la Common Law," 45 *Rev. Int'l Droit Comp.* 599 (1993); Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe," 43 *Am. J. Comp. L.* 93 (1995); B.S. Markesinis, *The Gradual Convergence* (1995). Whether this global convergence can be confirmed by opening the perspective to the legal process in its procedural complexity may be doubted. See Langbein, *supra* n. 9, at 545. See also Schlesinger, "The Past and The Future of Comparative Law," 42 *Am. J. Comp. L.* 477 (1995).

22. For a recent proposal which does not attempt a rethinking of the traditional conceptual scheme, nor accounting for the aforementioned temporal developments, see P. De Cruz, *A Modern Approach to Comparative Law* (1993).

23. The point is recently made, rather strongly by Ewald, "Comparative Jurisprudence (I): What it is like to try a Rat?," 143 *U. Pa. L. Rev.* 1889 (1995); Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants," 43 *Am. J. Comp. L.* 489 (1995).

24. J. Vanderlinden, "A propos des Familles de Droits en Droit Civil Comparé," in *Hommages A R. Dekkers* 363 (1982). See also the broader theoretical discussion in J. Vanderlinden, *Comparer les droits* (1995), and the book review by Sacco, 48 *Rev. Int'l Droit Comp.* 659 (1996).

25. F. Reyntjens, "Note sur l'Utilité d'Introduire un Système Juridique 'Pluraliste' dans la Macro-comparaison des Droits," *Rev. Droit Int. et Droit Comp.* 41 (1991).

26. *Traité de Droit Comparé* 3 (1951).

27. L.J. Constantinesco, *La Science des Droits Comparés* (1983).



quently, a reorientation of the world map is perceived as a necessity, particularly in those areas that have traditionally been at the outskirts of the European comparativist tradition.<sup>28</sup> In the "manifesto" of a recent multi-volume introduction to comparative legal systems, a number of Italian comparativists have asserted that "in facing an unprecedented pattern of historical acceleration, comparative law needs a radical revision of its modes of thought."<sup>29</sup> According to this view, "Western legal scholarship is facing difficulties to keep up with these changes."<sup>30</sup> These difficulties are evident in the choices of Professors Jauffret Spinosi (editing the latest edition of David's masterpiece) and Hein Kötz (preparing the new edition of Zweigert & Kötz)<sup>31</sup> to give up all efforts to understand current post-socialist law.

Ironically, European scholars, who are more eager than ever to keep an open dialogue with their American colleagues,<sup>32</sup> need to pay attention to all possible cultural contributions that stem from diversity if they wish to offer interesting additions to the most active currents of legal analysis developed in the United States.<sup>33</sup>

### 3. PATTERNS OF LAW

This paper attempts to re-open the discussion of the need to adopt new simple classification criteria in light of the above developments. My classification is based on the role of the law as a tool of social organization in the Weberian sense.<sup>34</sup> The simple idea behind it — not completely new in comparative circles<sup>35</sup> — is that in all societies there are three main sources of social norms or social incentives which affect an individual's behavior: politics, law, and philosophical or religious tradition (hereon I will use the term "tradition" to refer to both). Today, these sources of social constraint are at play in practically *all human organizations*<sup>36</sup> with quantitative variations.

28. See Griffiths, "What is Legal Pluralism?," 24 *J. Leg. Pluralism & Unofficial L.* 1 (1986); Engle-Merry, "Legal Pluralism," 22 *L. & Soc. Rev.* 869 (1988); "Symposium: State Transformation, Legal Pluralism, and Community Justice," 1 *Soc. & Leg. Studies* 131 (1992).

29. See *Sistemi Giuridici Comparati*, supra n. 6. The Manifesto is signed and the volumes authored by Gianmaria Ajani (post-socialist model), Francesco Castro (Islamic model), Marco Guadagni (pluralistic model), Ugo Mattei (Common Law), Pier Giuseppe Monateri (Civil Law).

30. Id.

31. K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* (3d ed. 1996).

32. See Mattei, "Why The Wind Changed: Intellectual Leadership in Western Law," 43 *Am. J. Comp. L.* 199 (1994).

33. See also Mattei, "Etnocentrismo, Neutralita', Discriminazione: tensioni nel diritto occidentale," 146 *Giurisprudenza Italiana IV*, 223 (1994).

34. See the social organizations as defined in *Max Weber on Law in Economy and Society* (M. Rheinstein ed., 1954).

35. See De Sola Canizares, *Introduccion al Derecho Comparado* (1954).

36. This is why I do not consider at this point other sources of social norms such as fashion or advertising. Nor I address here the problem of the origin of these patterns. As to the rule of tradition a line of scholarship claims for example that many

Legal systems may be classified in a tripartite scheme according to the source of social behavior that plays the leading role in them. A basic epistemological assumption of this paper is that not only law in the western sense, but also politics and tradition *are patterns of law*.<sup>37</sup> Using anthropological terminology, any pattern of social control is law.<sup>38</sup>

In the most recent literature produced by leading European comparativists, two important theoretical additions have been offered to comparative knowledge. First, Professors Sacco and Van Der Linden, both with a background in African law, have stressed the need for a major effort to unearth, by comparative study, the hidden assumptions of different legal systems.<sup>39</sup> This teaching has been received by a Japanese scholar who has suggested that such hidden legal rules are at play behind the informal dispute settlements that usually replace adversarial litigation in Japan.<sup>40</sup> Such assumptions are very difficult to detect by lawyers within a particular system, but can be more easily understood by foreign lawyers looking from the outside. Comparative lawyers who are not loaded with the cultural biases and the suppositions of lawyers within the system should not take anything for granted, particularly those legal assumptions that are so obvious that they are never discussed, or even noticed. Such unconscious assumptions may explain a given legal phenomenon better than the explanation usually given by lawyers belonging to that particular system.

Secondly, some scholars have rightly stressed the importance of the distinction between a pattern of law and a legal system for purposes of classification.<sup>41</sup> Indeed, it has been pointed out that each legal system usually assumes a plurality of patterns of law. Legal systems are the result of a layered complexity that stems from the

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rules of social organization that we regard as traditional are in fact of recent origin. According to this interpretation sometimes traditions are not spontaneous and ancient but rather recent and planned. See E. Hobsbawm & T. Ranger (Eds.) *The Invention of Tradition* (3d ed. 1992).

37. I do not wish to enter into the largely sterile and boring discussion of what can be considered law. I assume that for the purpose of macro-comparison, law includes whatever functions in the world's legal systems as law, i.e., whatever gives individuals incentives strong enough to affect their social behavior.

38. Laura Nader introduces for this purpose the notion of "controlling processes." See Nader, *supra* n. 10. For an interesting application of such broad conceptions of law and order, see Weyrauch & Bell, "Autonomous lawmaking: The case of the Gypsies," 103 *Yale L. J.* 323 (1993).

39. See Sacco, "Mute Law," 43 *Am. J. Comp. L.* 455 (1995) (Issue in Honor of Schlesinger); see also Schlesinger et al., *supra* n. 2; more recently, Vanderlinden, *supra* n. 24.

40. See Kitamura, "Brèves réflexions sur la méthode de comparaison franco-japonaise," 47 *Rev. Int. Droit Comp.* 861 (1995); see also Wagatzuma & Rosett, "The Implications of Apology: Law and Culture in Japan and the United States," 20 *L. & Soc. Rev.* 461 (1986).

41. See Gambaro & Sacco, *supra* n. 5.

accidents of legal history and from legal transplants.<sup>42</sup> "We should also consider an even larger difficulty that depends on the dynamic nature of legal systems; on the coexistence within them of different layers and sub-layers; from that of different borrowings and receptions that divide the legal systems into different areas of the law (e.g., public law based on the common law and private law based on the civil law such as in many Latin American countries) and by different legal formants (e.g., case law and legal scholarship of a given system borrowing from sources of different legal systems such as in many modern European countries and such as in the United States during the age of legal formalism)."<sup>43</sup> In simple terms, what is emphasized is that legal systems never *are*. They always *become*. And what determines the becoming is the variable role of different patterns within legal systems. Hence the difference between a pattern and a system of law.

My proposed classification takes into account both of these scholarly acquisitions. I believe that the three patterns of law that I will address can explain many unconscious assumptions and much of the behavior of social actors who perform the role that is given to professional lawyers in Western societies. In each legal system, or family of legal systems, all the three patterns can be seen at play. What changes is the outcome of the competition among the three. Consequently, legal systems can be grouped in families according to the hegemony of one certain pattern. In each legal system, where one pattern is hegemonic, the other two do not disappear. They will play a larger or smaller role depending on the scope of the alternative forms of social control left by the hegemonic pattern. Occasionally non-hegemonic patterns will determine certain legal outcomes in an unofficial, cryptic way, regardless of any official reason.

To offer a recent example, in Italy, a country whose system I classify under the rule of professional law,<sup>44</sup> the public opinion was shaken on August 1, 1996, by the acquittal of the Nazi criminal Eric Priebe by a court of law in Rome. After the innocent verdict was given, the Minister of Justice, Professor Flick (a well known criminal law professor), ordered the police to re-arrest Priebe, legally a free

42. Schlesinger et al., *supra* n. 2, and Alan Watson, *Legal Transplants* (1974).

43. See Gambaro & Sacco, *supra* n. 5, at 20-21. Parenthesis added.

44. In the absence of empirical work to measure the quantitative ratio of each of the three patterns *within* each legal system, the idea of leadership and/or hegemony as an outcome of the internal competition among the three patterns can only be comparative. Whether in absolute terms in the western legal tradition professional law makes the institutional framework of a larger number of transactions than alternative patterns can *only* be answered using sophisticated tools that can allow us to measure the effect of alternative institutions (such as my patterns of law are) on transaction costs. We are very far from there. See D. North, *Institutions, Institutional Change and Economic Performance* (1990). Since the purpose of my taxonomy is comparative I can be happy also with comparative criteria.

man, to stop the riots that ensued. This decision was clearly illegal within the Western notion of "rule of law." Nevertheless, the decision was justified the following day on legal grounds. The Minister claimed that art. 716 of the Code of Criminal Procedure granted him the power to arrest Priebke because a German request for extradition was pending. In fact the extradition request was filed by Germany after the Italian Minister had ordered the arrest. Professor Flick argued that knowledge of the intentions of the German authorities was enough grounds to issue the arrest. But as a matter of law the power of exceptional arrest granted by art. 716 of the Criminal Procedure Code is conferred only on the prosecution office, which in Italy is independent from the Ministry of Justice. For my purposes it is enough to show that such a decision needed an official explanation in terms of "the rule of law." Although politics has obtained a clear advantage in its competition with the law in the decision-making process of the Priebke case, a political decision overruling a verdict is still incompatible with the notion of legality and rule of law that pervades the rhetoric of the Italian legal system.<sup>45</sup>

#### 4. MACRO-COMPARATIVE REVOLUTIONS

The pluralism of legal patterns should not become an excuse to avoid classification. A legal system never corresponds perfectly to a legal pattern. If this correspondence actually happens it may be in a very limited and exceptional historical moment. Nevertheless, the hegemony of a given pattern of law within the system is historically a relatively stable phenomenon. The change of hegemony (or of leadership) of a given pattern of law in each legal system may be considered, borrowing an idea suggested in Constitutional law by Professor Ackerman, as a moment of macro-comparative revolution.<sup>46</sup> Such revolutions compel a revision of our current macro-comparative classifications.

Some scholars would suggest, for example, that colonization was a revolutionary moment in Africa, and that the fall of the Berlin Wall was a revolutionary moment in Eastern Europe. Going back in legal history, the reception of Roman law in Germany may be considered another revolutionary moment. Examples abound. The above-mentioned Priebke case may not suffice to prove that a "rule of political

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45. Such a decision would be on the other hand clearly compatible with a system that grants hegemony to the "rule of political law." See *supra* n. 22. It may be interesting for the reader to know that, after weeks of harsh discussion over the verdict and over the re-arrest, the Court of Cassation annulled the decision of the Priebke case on the ground that the judge had expressed in the media his friendly attitude towards Mr. Priebke before the verdict was given. This decision has arguably re-affirmed the compatibility with the legality of a highly questionable behavior of the Minister of Justice.

46. See B.A. Ackerman, *We the People* (1991).

law" is now hegemonic in Italy. Should it become the rule, however, that ministers of justice illegally arrest acquitted people without constitutional consequences, a scholar in comparative legal systems may detect a revolutionary change of the hegemonic pattern in Italy.

In my proposed classification, systems may belong to the *rule of professional law*, the *rule of political law*, or the *rule of traditional law*. These three patterns of social incentives (or social constraints) are at play in all legal systems simultaneously. The only difference is in terms of quantity, acceptability, and, most importantly, hegemony. Because law in the Western sense is only one of these three patterns of social incentives, all legal systems are entitled to the same standing whatever pattern is hegemonic in them.

*Rule of professional law*, *rule of political law* and *rule of traditional law*, therefore, become useful labels to classify the world's legal systems. In my view, each system *belongs* to the family of legal systems named after its hegemonic pattern. This classification also conveys important messages regarding the worldwide structure of legal development. Legal transplants, for example, impose aspects of the *rule of professional law* in non-western countries, while the "harmony ideology" behind certain schemes of alternative dispute resolution shows the continuous appeal of the *rule of traditional law* in Western societies.<sup>47</sup> Indeed, the endurance of the *rule of political law* in certain areas of the law (such as constitutional law) shows why public lawyers have always asked comparative lawyers for alternative classificatory schemes.<sup>48</sup>

My proposed tripartition, depending on the outcome of a competitive process, is dynamic. Legal transplants may end up changing the equilibrium by shifting legal systems traditionally belonging to one family (e.g., to the *rule of political law* or to the *rule of traditional law*) to another (e.g., to the *rule of professional law*) because of a significant increase in structural characteristics of a different pattern. This change of leadership is a macro-comparative revolution. Also, one legal system may belong to different families according to the area of the law that we are considering. The same system may belong to the *rule of traditional law* if we consider family law, while belonging to the *rule of professional law* as far as commercial law is concerned, and to the *rule of political law* when we look at its criminal justice system. One example is Turkey with its Swiss-fashioned civil law<sup>49</sup> and its political use of the penitentiary system (e.g., the recent hunger strike of the Kurdish inmates). It will be up to the

47. See Nader & Grande, "Current Illusions and Delusions about Conflict Management," in W. Zartman (ed.), *Traditional African Conflict Medicine* (1997 forthcoming).

48. See Schlesinger et al., *supra* n. 2.

49. See T. Ansay & D. Wallace, *Introduction to Turkish Law* (1966).

scholar to choose, according to the legal problem he or she is facing, the framework that better fits his or her needs.

My classification is better equipped to catch yet another crucial characteristic of legal systems approached in the comparative dimension: "the layered complexity of the law," as Professor Schlesinger calls it in discussing Professor Sacco's legal formants.<sup>50</sup> Indeed, a legal system may follow the *rule of professional law* only in theory while allowing full ground to the *rule of political law* or to the *rule of traditional law* as far as law in practice is concerned. This pattern, which is present in Africa and in the "third world," is not absent in the everyday working of some areas of Western law.<sup>51</sup> In a case like this, the macro-comparativist will probably make the substance prevail over the form, detect the hegemonic pattern despite the official truth, and classify the legal system (or a given sector thereof) into either the *rule of political law* and/or the *rule of traditional law*.

My proposed partition in three major legal families, therefore, allows considerable flexibility and clearly recognizes that classifying families of legal systems is a means to a better understanding and not an end in itself. In the final part of this paper, however, I will attempt to make my macro-comparative taxonomic choices and classify most of the world's legal systems under the three families. Of course, I'm merely proposing cardinal points for a map of world legal systems.<sup>52</sup>

Clearly, a proposal to widen our macro-comparative perspective by considering patterns of law rather than law in the Western sense, is faced with two contrasting difficulties. First, some comparativists prefer functional criteria under which comparative distinctions are justified only to the extent they solve concrete research issues. This approach tends to challenge macro-classifications, especially those bringing momentum to non-Western law.<sup>53</sup> The second difficulty is that a comparative approach completely outside the usual and well established borders of the law in the Western sense risks losing any

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50. See Schlesinger et al., *supra* n. 2, at 78 (Sup. 1994). See also Gambaro & Sacco, *supra* n. 5.

51. See for example the opening remarks by the editor in *Transplants, Innovation, and Legal Tradition in the Horn of Africa*, *supra* n. 7.

52. My ignorance forecloses a more detailed exploration and is responsible for many misjudgments on the nature of each legal system that I am attempting to classify. Some of my choices are based mostly on intuition and sensibility rather than on measuring devices unavailable at this point. See *supra* n. 44. Thus, many of my readers may challenge and feel little sympathy for my choices. However, I must clearly state at the outset that the actual content of the taxonomy and the choices I make are aimed mostly to clarify my taxonomy and I am not particularly fond of any one of the dubious ones that I have entered.

53. See Kokkini Iatridou, *Een Inleiding Tot Het Rechtsvergeijkende Onderzoek* (1988).

scholarly and methodological validity so that comparative law becomes an idle exercise in pseudo-comparative sociology.<sup>54</sup>

The best answer to the first, pragmatic objection is that the correct procedure in comparative research is, in fact, the opposite of the one suggested by that sort of literature: legal issues are first analyzed in a general context and it is only at a later stage that the structural characteristics of individual legal systems come into play.<sup>55</sup> The second objection, on the other hand, can only be countered with an appropriate choice of the object to be examined. I am referring to the traditional interrelation between macro-comparative research, private law, and adjudication. As already mentioned, constitutional law is, at least at a textual level, political in origin and does not reveal much about the deep structure of legal systems.<sup>56</sup> At the same time, procedure, capable of offering notable insights when analyzed in the context of the entire legal process,<sup>57</sup> is increasingly the object of continuous, radical changes due to practical organizational needs. Although a broader perspective on procedure is sometimes attained by establishing a correlation between the model of the state and the model of procedure, such connection emphasizes the methodological problems we are talking about because it assumes a necessary link between the law and the State organization.<sup>58</sup> This is also the reason why my proposed taxonomy does not pay special attention to models of bureaucracy, while styles of adjudication and more general sources of law play an important role. Albeit influenced by Weberian analysis, my taxonomy wishes to adapt Weber's famous tripartition to the technical and disciplinary needs of comparative law.<sup>59</sup> Indeed the State as a social institution is much more recent than private law. The relationship between the State and private law is consequently itself variable in history and geography so that any reductionist approach is to be rejected.

It is consequently my intention, in attempting to give concrete content to my taxonomy in the remaining part of this article, to focus on the more developed area of comparative studies, that of private law. This area has no definite or absolute boundaries, and for comparative purposes it should be taken under the broad meaning of legal rules of "right conduct" which in each legal system are not independent, but rather reflect fundamental constitutional choices, the

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54. See, e.g., A.J. Van Der Helm & V.M. Meyer, *Comparer en droit: essai méthodologique* (1991).

55. The point is recently made very clearly by Gordley, "Comparative Legal Research: Its Function in the Development of Harmonized Law," 43 *Am. J. Comp. L.* 555 (1995).

56. See H. Jacob, E. Blankenburg, D.M. Provine & J. Sanders, *Courts, Law and Politics in Comparative Perspective* (1996).

57. See Schlesinger et al., *supra* n. 2, at 337 ff.

58. Mirjan Damaska, *The Faces of Justice and State Authority* (1986).

59. See *supra* n. 8.

deep structure of the legal process, as well as the philosophy of punishment.<sup>60</sup>

### 5. THREE FAMILIES OF LEGAL SYSTEMS

I have assumed that any social structure, even the most primitive, is also a legal structure. The existence of a legal order is therefore independent of the presence of legislators, judges, lawyers, writing, and maybe even verbal communication.<sup>61</sup>

Following my dynamic non-Western-centric classification, legal systems can be divided into three great patterns of law: 1) *rule of professional law*,<sup>62</sup> 2) *rule of political law*, and 3) *rule of traditional law*. These three patterns correspond to the leading systems of social organization (and/or of "social constraint").

In this context the term social organization is used in its broader meaning of the administration of all social interactions taking place in the everyday life of a community. These organized interactions include those among individual members of the society as well as those between the individuals and the institutions. Thus, the "organization" differs from the "government" insofar as the former is in charge of low level rules presiding over everyday life while the latter is in charge of all high level decisions.<sup>63</sup> The organizational rules can be analyzed either at the structural level or through the pathology of their violation.

The first assumption is that Western centrism cannot be the foundation of a classification of legal systems that aims to cover the whole world. In order to serve its scholarly purpose, any classification must take into account the deep-rooted differences between *all* models of social organization. Most classifications proposed so far have placed the Western Legal Tradition in a privileged position. This is in accordance to a pattern now defied by anthropological studies and which should be abandoned.<sup>64</sup>

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60. See Gambaro, "Alcune novità in materia di comparazione," 78 *Rivista Diritto Commerciale* 297 (1980); For this broad definition of private law, see F.A. Hayek, *Law, Legislation, and Liberty* (1973). See also E.J. Weinrib, *The Idea of Private Law* (1995).

61. See Sacco, *supra* n. 39.

62. Western-style rule of law could be an alternative way of expressing what I mean by rule of professional law. See *supra* nn. 46-48 and accompanying text.

63. It is clear, as we shall see below, that the distinction between high level and low level decisions is hardly a clear one and is mainly used as a device for analytical purpose. See on the difference between institutions and organizations D. North, *cit. supra* n. 44.

64. The ultimate critique is due to P. Bohannan, *Justice and Judgement among the Tiv* (1957). For the ambitious attempt of a leading anthropologist, see Falk Moore, "Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Sources," in *Law and the Social Sciences* (L. Lipson & S. Wheeler eds., 1986). For a lawyer's guide to legal anthropological



Moreover, the unitary view of the legal order which could create, on the ground of the autonomy of law, a scholarly legitimization for such central position of the Western Legal Tradition, has been largely discredited.<sup>65</sup> It is now clear to "true" comparativists that any legal observation is void of any analytic value unless the researcher is conscious of the layer of the legal system's structure at which he is conducting his studies. On a methodological ground, therefore, we are moving towards a pluralistic view of legal orders, in opposition to the monistic view which has been rendered paradigmatic by Kelsen, and that still informs the current classifications of legal systems.

Pluralism of legal formants is a characteristic shared by all legal systems, from the most elementary to the most complex. Two conclusions follow from this observation. First, legal pluralism cannot be by itself a ground for distinguishing a macro-comparative family of legal systems on a structural ground.<sup>66</sup> Secondly, systems in which pluralism is more clearly visible deserve a position of equal standing, if not a privileged position with regard to the Western legal tradition. Their study reveals phenomena that are hidden in legal systems belonging to the Western legal tradition<sup>67</sup> but that are nonetheless at play in Western law. It is therefore crucial to detect these phenomena in a serious scholarly effort.<sup>68</sup>

Applying these observations to the area of macro-comparative law, one can see how the ever-increasing phenomenon of legal transplants leads to the adoption of a tripartite classification based on a deeper level than that of the old ones. My classification is based on a level preceding the establishment of formal institutions. This level is immune from short-lived reforms dictated by events. Furthermore, as already observed, my classification is not rigid. Elements borrowed from the western legal tradition are present nowadays in virtually all legal systems.<sup>69</sup> Nonetheless, just as legal sovietology claimed (and continues to claim)<sup>70</sup> its autonomy while acknowledging

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scholarship, see F. Snyder, "Law and Anthropology: A Review," E.U.I. Working Paper Law No. 93/4.

65. See Gambaro & Sacco, *supra* n. 5.

66. See Guadagni, "Legal Pluralism," in *The New Palgrave. A Dictionary of Economics and the Law*, P. Newman (ed.) 1998 (forthcoming).

67. One of such phenomena is the competition among legal layers. See *Transplants, Innovation, and Legal Tradition in the Horn of Africa*, *supra* n. 7. Such relationship of competition is observable also in the making of the "Western" legal rule. See Ugo Mattei, *Comparative Law and Economics* (1997) and especially Grande, "L'apporto dell'antropologia allo conoscenza studio del diritto," *Rivista Critica Diritto Privato* 467-99 (1996).

68. The point is made by Prof. Sacco in Gambaro & Sacco, *supra* n. 5, and Sacco, *supra* n. 39. Professor Sacco defines such hidden rules as "cryptotypes."

69. For a recent study, see *European Expansion and the Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* (W.J. Mommsen & J.A. De Moor eds., 1992).

70. See Feldbrugge, "Russian Law: the End of the Soviet System and the Role of the Law," in *Law in Eastern Europe Series*, No. 45, 202 (1993).

the importance of the Roman substrate, a thorough scholar cannot allow Japanese law to be classified in any subdivision of the Western legal tradition without clarifying that such classification is limited to the modern layer of the Japanese system, with all the resulting limits on the validity of this approach.<sup>71</sup>

My proposed tripartite classification recognizes the impossibility of achieving a satisfactory rigid classification.<sup>72</sup> It is based on an impression of "hegemony," acknowledging that individual characteristics of each legal family can be found in any of the others and thus, in purist's terms, all legal systems are mixed. Thus we can find traces of the *rule of political law* even in England (a country considered the cradle of the rule of professional law) if we look at the career patterns within the judiciary.<sup>73</sup> Furthermore, we can find traces of traditional or religious law even in Western Europe and not only in the context of family law where Christian values still play an important role.<sup>74</sup> In certain contexts (e.g., China, Iran, Brasil, several African countries) it is hard to distinguish between *rule of political law* and *rule of traditional law*.<sup>75</sup> Some influential scholarship has focused on political structure rather than on traditional concepts to discuss Japanese law. The relationship between professional law and traditional law can also be considered quite variable in Islamic countries.<sup>76</sup>

In the course of scholarly research, however, generalizations and classifications prove to be irreplaceable methodological devices. In their absence one may not be able to handle the complexities of the object under examination. Generalizations and classifications should only be used as a means to an end and only to the extent they offer a conceptual scheme capable of increasing our comparative understanding of legal systems.

The main contribution of my classification is found in its analytical framework. Under my classification, systems belonging to each of the great families can be more readily compared due to the lower de-

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71. See Henderson, "The Future of Comparative Law," 1 *Pacific Rim L. Rev.* 1 (1993).

72. See Schlesinger et al., *supra* n. 2, at 310.

73. Appointment to higher courts, as it well known, falls within the powers of the Lord Chancellor, who, at least in theory, should make his determination on the basis of technical and judicial ability alone. English commentators, however, emphasize the role played by political friendships in the selection process. See, most recently, P.S. Atiyah, *Law and Modern Society* 14 (1995).

74. See generally H.J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993).

75. See Mayer, "Islam and the State," 12 *Cardozo L. Rev.* 1015 (1991); see also Clarke, "GATT membership for China?," 17 *U. Puget Sound L. Rev.* 517, 527 & 528 (1994). Rosenn, "Brazil's Legal Culture: The Jeito Revisited," 2 *Florida Int. L.J.* 2-43 (1984).

76. See J.M. Ramseyer, *Japan's Political Marketplace* (1993), as well as much of his other work on Japanese law; see on islamic law the fascinating work of D. Horowitz, "the Qur'am and The Common Law: Islamic Law Reform and The Theory of Legal Change," 42 *Am. J. Comp. L.* 543 (1994).

gree of heterogeneity of their structures. For example, contract law can be compared within the Western legal tradition because its market economies are relatively homogeneous. However, the same assumption cannot be extended across the great families (e.g., German law vs. Chinese law) without first taking into account the underlying political, economic, and cultural conditions. The recognition of the German-inspired concept of "jural act" in Chinese law does not make the Chinese law of contract the same as the German one if one seeks to examine the law in practice. Furthermore, systems belonging to the same legal family share a large number of problems. For example, China and Japan share the problem of adapting the formal German-inspired layer of their legal system to the underlying Confucian notions of order and authority.<sup>77</sup>

A last few words are worth spending on the meaning of "rule of political law." A lot of politics is involved in legal decision-making in Western societies. Issues like abortion or affirmative action are political under every sky. In the United States, as already noticed by Tocqueville, many more political issues involve courts than in France, and by so doing become "legal".<sup>78</sup> But political problems do not change by being resolved through the use of legal narrative and rhetoric. And yet these hot political issues are not the everyday working rule of the law. A whole line of critical historiography has developed to show that American courts, far from being neutral, have been on the side of the rising class of capitalists.<sup>79</sup> But no persuasive evidence has been offered to show a pattern of political alliance between judges and the political power (captured by the economic power) in order to quash the rights of the poor in favor of the rich. While such an alliance could arguably be detected during the *Lochner* era, the confrontation was suddenly re-captured in the political arena by Franklin Roosevelt's Court Packing Plan.<sup>80</sup> In a system where the rule of politics is hegemonic, the customary adjudicatory process is affected by the needs of political expediency. The alliance between the political power and the courts (or the submission of the courts to the political power) is conscious and theorized in the name of some superior interest that can not be affected by the adjudication of idiosyncratic individual rights. Examples abound and will be discussed later. The Ethiopia of the Derg is however an obvious example.<sup>81</sup>

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77. See Luney, "Traditions and Foreign Influences: Systems of Law in China and Japan," 52 *L. & Contemp. Probs.* 129 (1989).

78. This was the classic observation developed in A. De Tocqueville, *Democracy in America* (G. Laurence trans., J.P. Mayer ed., 1969).

79. See M. Horwitz, *The Transformations of American Law* (1992).

80. See generally, C.H. Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947* (1948).

81. See Brietzke, "Administrative Law and Development: The American "Model" Evaluated," 26 *How. L.J.* 645, 647 (1983). P.H. Brietzke, *Law, Development and the Ethiopian Revolution* (1982).

Likewise, the Chicago-inspired economic miracle of Chile makes such arrangement appealing to some observers.<sup>82</sup>

#### 6. RULE OF PROFESSIONAL LAW: THE WESTERN LEGAL TRADITION

Leading comparativists have treated the Western Legal Tradition as a single entity.<sup>83</sup> In my taxonomy, the traditional distinction between common law and civil law is considered a subdivision within a highly homogeneous family of legal systems: the western legal tradition or, more appropriately, the *rule of professional law*.<sup>84</sup>

The homogeneity of the western legal tradition is largely due to two factors: 1) the legal arena is clearly distinguishable from the political arena; and 2) the legal process is largely secularized. In other words, the legitimacy of the law is neither of religious nor of political origin, but rather of a technical nature.<sup>85</sup> The Western legal tradition is based on two "great ideological separations": the separation between law and politics and the separation between law and religious and/or philosophical tradition.

The first separation took place in England at the time of Sir Edward Coke, when the King was denied participation in the adjudication process of *his* Court on the theory that he lacked professional legal training.<sup>86</sup> This separation consisted of the adoption of public decisions based not on politics but on technical and legal merits as interpreted by a professional legal culture. Systems belonging to the *rule of professional law* entrust high-level decisions (e.g., political decisions) to the political world and lower level organizational decisions to the legal world.<sup>87</sup> In the rule of professional law (usually referred to with the value-loaded idea of rule of law in mind) high level (political) decision-making is itself subject to the restraints of the law. This does not mean that the relationship between professional and political decision-making is hierarchical with political decision-making in a subordinate relationship toward techno-professional decision making. But the inverse would not be a fair description of the rela-

82. No surprise that in Chile, as in most Latin American countries, Courts are weak actor in the institutional scenario. See C. Veliz, *The Centralist Tradition in Latin America* (1980).

83. See H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); Gambaro, "Il Successo del Giurista," 5 *Foro Italiano* (1983).

84. Gino Gorla, indeed, was one of the first scholars to express this idea. See Gino Gorla, *Diritto Privato e Diritto Comune Europeo* (1982); Gorla & Moccia, "A Revisiting of the Comparison between Continental Law and English Law (16th-19th Century)," 2 *J. Leg. His.* 143 (1981).

85. See Gambaro, *supra* n. 83; Berman, *supra* n. 83.

86. See J. Baker, *An Introduction to English Legal History* 112-13 (3d ed. 1990) (citing *Case of Prohibitions del Roy* (1608) 12 Co. Rep. 63).

87. This, of course, as a matter of theory. It is easy to observe, in a critical mood, how much politics plays a role also in adjudication. See, Jacob et al., *cit. supra* n. 56. This observation has been developed, in the United States, in much of the work of Cass/Sunstein. It is however a classic of American Legal Realism.

tionship between law and politics in the Western Legal Tradition. The relationship between the two is more complex and can be considered biunivocal. As Professor Michelman has recently stated, political decision making is sovereign on the content of the rules while professional decision making is sovereign once the content is determined (and on the rituality of the means by which it is determined).<sup>88</sup> Clearly, the common law and the civil law did not reach their respective positions in an homogeneous fashion or following similar paths. One of the principal reasons why the common law today occupies a prevalent position in the import-export relationship of legal ideas within the Western legal tradition, is the realization, after World War II, that the separation between political and legal processes — amplified in the common law by the absence of a distinction between private and public law — ensures greater protection of individual rights against governmental interference.<sup>89</sup> In the common law world, in fact, the political process has become more juridical, since the judicial process has proved to be an effective filter for political issues.<sup>90</sup> Judges, even when elected and therefore politically legitimized, clearly distinguish between decisions dictated by public policy and political questions.<sup>91</sup> Civil law countries do not even distinguish terms such as policy and politics.<sup>92</sup>

The separation of law and religion is of ancient origin. It harks back to the institution of universities in the Eleventh Century when theology, philosophy and law became separate and autonomous disciplines.<sup>93</sup> Medieval academic learning was highly textual, and the texts on which lawyers and theologians based their knowledge were different. The latter focused on the Bible while the former focused on the *Corpus Juris Civilis*. Even the canonists developed technical skills closer to those of the lawyers rather than to those of theologians. Their materials were the Papal decrees whose structure was much closer to the *Corpus Juris* than to the Bible.<sup>94</sup> In this context both the civil law and the common law may have followed alternative

88. F.I. Michelman, "Brennan and Democracy, Inaugural Lecture of The Brennan Center Symposium on Constitutional Law," Boalt Hall, U.C. Berkeley, November 4, 1996.

89. For a discussion, see Mattei, *supra* n. 32.

90. See Pritchett, *supra* n. 80.

91. See Hart & Sacks, *The Legal Process* (10th ed. 1958); P.M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* (3rd ed. 1988).

92. On the way in which terminology reflects the underlying philosophy of legal systems and its importance for comparative research see G. Fletcher, *Basic Concepts of Legal Thought* 5 (1986).

93. See Berman, *supra* n. 83. According to some scholars the beginning of the path to this divorce can be traced as back as the third century B.C. in Roman Law. See Corsale, "Ordine Sociale e Mediazione Giuridica," in *Regole e Socializzazione* (1984) 81; see also R. Sacco, *Modelli Notevoli di Societa* 39 (1991).

94. See J. Gordley & A. Thompson, *Gratian, The Treatise on Law with the Ordinary Gloss* (1994). See in general H.J. Berman, *Faith and Order. The reconciliation of Law and Religion* (1993).

paths. It is actually impossible to offer a precise historical date of the separation between law and religion. One can note that clergymen were active in the English Court of Chancery until the time of Henry VIII and in the French Parliaments at the eve of the French Revolution. Whether in these contexts they were acting as lawyers or as priests may be the object of interesting discussion. I tend to believe that the legal tradition was at that point already largely secularized, however.

Even the idea of separating law and ethics, common among Western legal systems, is proof of how the professional legal decision making has been able to achieve an independent and important position in creating the culture of a society.<sup>95</sup> Again, this does not mean that today's lawyers occasionally do not handle in legal form issues that are heavily loaded with ethical or even religious judgments (e.g., issues like abortion or refusal of medical treatment). Suffice it to say again that the purpose of a macro-comparative taxonomy is not to offer clear-cut solutions. Many of the things that I discussed in the domain of the distinction between law and politics in Western societies could be reproduced here in the domain of the role of law and ethics (or religion) in framing social culture. But this is beyond the scope of this article. Professor Schlesinger summarized the essence of the Western legal systems as follows:

"Among the features of law generally taken for granted (to a greater or lesser extent) in the West, but not necessarily found in all systems of law, are the following:

- a) The supposition that law constitutes an autonomous body of rules independent and separate from (although not uninfluenced by) religion, morality, and other social norms.<sup>96</sup>
- b) A view of law as the primary and most important vehicle for ordering society and for resolving disputes<sup>97</sup>.
- c) The idea that law exists to regulate the conduct not only of individuals but of the State as well: that rulers as well as the ruled are subject to law.
- d) A view of dispute settlement as involving the application of preexisting, general, abstract, depersonalized rules, so that only a narrowly defined class of facts falling within the confines of the applicable rule are considered material to the resolution of the dispute. All other events and circum-

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95. See Berman, *supra* n. 83.

96. "In most traditional systems of law outside the West, not only the religious ones, this feature is absent; and the idea of the autonomy of law also is incompatible with most versions of Marxist legal theory." Schlesinger et al., *supra* n. 2, at 80 (Supp. 1994).

97. "In contrast, for instance, to the traditional Chinese (Confucian) view that law as an ordering device is distinctly second rate and litigation something to be avoided if at all possible." *Id.* See *supra* n. 30 for some qualification of this classic view.

stances, all the intricacies of the relationship among the parties, the personal side issues which complicate their controversy, are considered immaterial and are to be ignored.

e) A view of dispute settlement as a zero sum game, a contest calling for a decision by which one party will win and the other lose. The object is to determine right and wrong and to see the right prevail, rather than to reconcile or restore harmony among the parties or promote their future cooperation.<sup>98</sup>

Even in this context, not all systems belonging to the Western Legal Tradition proceed at the same pace. Systems that encompass a plurality of religious beliefs will be more secularized, refusing, for example, the idea of a state religion.<sup>99</sup>

The *rule of professional law* clearly encompasses the common law systems of England, North America and Oceania; the civil law systems of western Europe; the Scandinavian legal systems; and some of the so-called "mixed" systems (Louisiana, Quebec, Scotland, South Africa). We are talking, in other words, of all those systems where the legal process is not significantly influenced by alternative social structures.

More controversial in this context would be the position of the State of Israel, because of the strong political and institutional presence of the *rule of traditional law*. Nevertheless, the principles of Hebrew law regard the secular legal system as binding on the citizens of Israel, thus placing Israel clearly within the boundaries of the rule of professional law.<sup>100</sup> Hebraic law and canonical law are examples of religious legal systems, even though the legal systems which recognize them are not.<sup>101</sup> Similarly, we would consider Native American law to be traditional without excluding United States law from the

98. *Id.* at 81.

99. For the American case, see Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religious Clauses* (1995).

100. Cf. I. England, *Religious Law in the Israel Legal System* (1975); Kirschenbaum & Trafimow, "The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law," 12 *Cardozo L. Rev.* 925, 926 (1991); Frimer, "The Role Of The Lawyer in Jewish Law," 1 *J.L. & Rel.* 297 (1983). On Israel as a mixed Legal System, Barak, "The Tradition and Culture of the Israeli Legal System," in A. Rabello (ed.) *European Legal Traditions and Israel* (1993).

101. This of course may create problems in the case in which the contents of religious law and those of professional law do collide. See the comparative discussion in Artz, "Religious Freedom in a Religious State: The Case of Israel in Comparative Constitutional Perspective," 9 *Wis. Int. L.J.* 1 (1990); Levine, "Abortion in Israel: Community, Right, and the Context of Compromise," 19 *L. & Soc. Inq.* 313 (1994); Artz, "Growing a Constitution: Reconciling Liberty and Community in Israel and United States," 19 *L. & Soc. Inq.* 253 (1994). In comparative work on religious freedom it would probably be better to use some different taxonomy such as systems with state religion or systems without it.

Western legal tradition, even though the latter recognizes (at least in part) the former.<sup>102</sup>

Doubts may further arise with respect to Indian law, with its heavily westernized constitutional and institutional structure. Nonetheless, the large Muslim population, the deeply rooted tradition of Hindu law, and the strong oriental flavor of the Indian culture limit the influence of the modern layer and place Indian law within the *rule of traditional law*.<sup>103</sup>

The *rule of professional law* today bases its legitimization on democracy. This legitimization is largely rhetorical if one considers that the large rule-making power within the *rule of professional law* is given by a corporation of hidden, non-democratically-legitimized law givers: the lawyers.

## 6. RULE OF POLITICAL LAW: THE LAW OF DEVELOPMENT AND TRANSITION

The separation in the Western legal tradition of what I have considered the most important forms of social rule-making (law, politics, and religion) is evidenced by the existence of different actors who perform different roles. In law, the lawyer is the main actor; in politics, the politician is the main actor; and in religion, the priest is the main actor. This separation of roles and of forms of social organization and rule-making is not dictated by necessity but rather it is the result of historical accident. There are legal orders that have not experienced either separation. Some legal systems have experienced one, but not the other. I base my classification on this seemingly innocuous observation.

The second family comprises all systems in which the political process and the legal process cannot be separated, in the sense of having achieved autonomous fields of operation. This is not to say that the political process and the legal process can be sealed off from one another. As already discussed, there is a constant interaction between these two patterns of social control. This interaction is variable and changes from one legal system to the other even within the same family and certainly also in Western countries. A recent interesting piece of comparative work detects such relationship in five industrial nations, four of whose legal systems belong to the *rule of professional law* (United States, England, France, and Germany) and

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102. For an analysis of customary law and its "westernization," see J. Olson & R. Wilson, *Native Americans in the Twentieth Century* (1984); for and institutional discussion of its relation with federal law see D. Getches, D. Rosenfeld & C. Wilkinson, *Cases and Materials on Federal Indian Law* (2d ed. 1986); F. Cohen, *Handbook of Federal Indian Law* (3d ed. 1982).

103. See J.M. Derrett, *Introduction to Modern Hindu Law* (1963).



one that belongs to the *rule of traditional law* (Japan).<sup>104</sup> As these studies show, in systems belonging to the *rule of professional law* the political process may itself be more determined by rules of formal law (it is sufficient to consider how many legal issues are at play in a United States presidential campaign or in a major issue of appointment to a political job). On the other hand, in systems belonging to the *rule of political law*, a Western observer can probably consider the political process to have moved to determine the outcome of the legal process (including the traditional one) rather than the opposite.<sup>105</sup> In other words, law in the professional term of the world is not absent, but it is extremely marginalized and weak before other sources of social rule making (mainly political power).<sup>106</sup> Interestingly, on the normative ground scholars are divided on the role that professional law can play in the development of systems that are located outside the *rule of professional law* family, ranging from optimism to skepticism to outright Western-centrism.<sup>107</sup>

In my taxonomy this recognized pattern of weakness of professional law in developing and transitional countries of Africa, Latin America, and Eastern Europe means that the professional law can not be considered the hegemonic pattern of social rule making in these legal systems. In the pattern called *rule of political law* the legal process is often determined by political relationships. In those social contexts we can not consider a sporadic pathological distortion that the outcome of litigation depends on "who is who" in the political world. This is particularly the case when the clash occurs between the government and individual rights. The very notion of limiting powers by formal law is completely inconsistent with the philosophy of rule making in those countries. In the *rule of political law*, there is not such a thing as formal law binding on government. Governments may make efforts to comply (e.g., in order to pay lip service to the western-centric requirements of international financing institutions), but the surrounding circumstances and the need to keep power (the needs of stability if we want to depict it favorably) do justify the disregard for formal law. In the everyday working rule of the law such a non-formalized model of decision making based on political power

104. See H. Jacob, E. Blankenburg, H.M. Kritzer, D.M. Provine & J. Sanders, cit supra n. 56.

105. See "Debate: *Marxism and the Rule of Law*," 15 *L. & Soc. Equity* 633 (1990); C. Sypnowich, *The Concept of Socialist Law* (1990); O.S. Ioffe & P.B. Maggs, *Soviet Law in Theory and Practice* (1983). See also *Transplants, Innovation, and Legal Tradition in the Horn of Africa*, supra n. 8, at 29 ff.; Ghay, "The Role of Law in Transition of Societies: The African Experience," 35 *J. African L.* (1991); Balcerowicz, "Understanding Post Communist Transition," 5 *J. Dem.* 75 (1994).

106. See Trebilcock, "What Makes Poor Countries Poor?: The Role of Institutional Capital in Economic Development," in *Law and Economics of Development* (E. Buscaglia & R. Cooter eds., 1997).

107. See the debate as discussed by Trebilcock, cit. supra n. 105.

flavors the whole legal system. As it has been pointed out by the late Professor Schlesinger: "when men rather than law govern, people usually find it more prudent to seek a powerful human protector than to stand on legal rights against the State."<sup>108</sup>

In these systems not only high-level decisions are made by the political power, but low level decisions are also heavily influenced by the immediate need not to interfere with the course of social relationships as planned by political action (including the need not to shake social stability).<sup>109</sup> Many aspects of the *rule of political law* can be also be found at play in core systems of the *rule of professional law*. Italy is a good example. However, within the *rule of professional law* many aspects of the *rule of political law* are labeled "corruption," are considered a pathology, and in general are not accepted or regarded by the social actors as structural elements of the social order. In a core country of the *rule of political law*, such as contemporary Russia, a pattern of social intercourse such as, for example, using private "police" in order to evict tenants, is not regarded as being contrary to the law. There is no enforced formal law these actions may contravene. It is accepted (also by Western countries) as a core element of legal order, of stability, and ultimately of development. It is justified and legitimized in political terms given the needs and the circumstances of the "transition." One example occurred when President Yeltzin resolved a constitutional deadlock with the Parliament by bombing it rather than following the constitutional procedures of the case.<sup>110</sup> Other examples abound in less revolutionary-like circumstances. In Bielorussia, for example, a Referendum has been called by the President in order to significantly limit the power of the Constitutional Court. Despite the Western-inspired idea of popular referendum, some Western observers resist the threat to the rule of law in Bielorussia which may come from the popular vote.<sup>111</sup> In the domain of private law, almost the entire process of privatization can not be understood if one limits oneself to reasons in terms compatible with the Western-style rule of law. Labeling certain bureaucracy-lubrica-

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108. See Schlesinger et al., supra n. 2, at 80 (citing the paper, interesting to read now after 1989, by Markowitz, "Law and Glasnost: Some Thoughts About the Future of Judicial Review Under Socialism," 23 *L. & Soc. Rev.* 399 (1989). For a detailed description of the everyday working of the law in such contexts see Rosenn, supra n. 75.

109. Recent literature on the "law of development" points out exactly this phenomenon. See, e.g., *The Law and Economic Development in the Third World* (P. Ebow Bondzi-Simpson ed., 1992); *Law and Crisis in the Third World* (S. Adelman & A. Paliwala eds., 1993).

110. See an interesting article considering however some aspects of the rule of political law as pathologic rather than different, Foster, "Information and the Problem of Democracy: The Russian Experience," 44 *Am. J. Comp. L.* 243 (1996).

111. At a recent Comparative law conference in Salt Lake City, a manifesto for the rule of law in Bielorussia aimed to safeguard the prerogatives of the Constitutional court, was offered for the signature of the participants.

ting practices as "corruption" or certain models of leadership as "antidemocratic" does not help much in understanding the aggregate of the social incentives that are at play in legal systems belonging to the *rule of political law*. Nor does it help to attempt massive transfers of institutional capital and knowledge to those contexts without taking into consideration the institutional change that will affect the imported law, or the process of rejection that will annul the social impact of most of this formal institutional capital. Moreover, the biased attitude of most Western observers towards alternative patterns of law, ends up completely foreclosing the possibility of learning something about our own legal systems by the importation of knowledge and not only by its exportation. Politically determined informal institutions are at play and also affect the working of formal institutions in Western societies.<sup>112</sup>

The *rule of political law* family includes: 1) the majority of the ex-Socialist legal family, with the possible exception of those countries (perhaps Poland, Hungary, and the Czech Republic) where Socialist law had to face a highly sophisticated civilian legal heritage and whose impact has been therefore less deep;<sup>113</sup> and 2) the less developed countries of Africa and Latin America, with the exception of countries (mostly located in north Africa) where Islamic law is strong enough to place them within the *rule of traditional law*. The *rule of political law* family includes Cuba, the only socialist country in the Western hemisphere.

I believe that the comparison between legal orders belonging to the *rule of political law* family is rendered fertile by the large number of common problems and the similarity of institutional solutions.<sup>114</sup> These comprise limited control of state institutions on the society; weak courts; uncontrolled rate of inflation; high level of instability of existing democratic structures, if any; high level of political involve-

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112. On the role of informal institutions in determining behavior see D. North, *supra* n. 44; On the need to understand such imbeddedness in approaching privatization, Rapaczynski, "The Roles of the State and the Market in Establishing Property Rights," 10 *J. Econ. Perspectives* 87 (1996).

113. See Peteri, "The Reception of Soviet Law in Eastern Europe: Similarities and Differences between Soviet and Eastern European Law," 61 *Tulane L. R.* 1397 (1987); see also, Szabo, "La science du droit au cours du dernier siècle: Hongrie, and Grzibowski, La scienza del diritto nell'ultimo secolo: Polonia"; both in *Inchieste di Diritto Comparato* (M. Rotondi ed., 1976); Sacco, "The Romanist Substratum in the Civil Law of the Socialist Countries," 14 *Rev. Socialist L.* 65 (1988). Outside the *rule of political law* family is also, of course, the territory corresponding to the former German Democratic Republic, where the rule of professional law has now been completely restored through an immense economic and political investment.

114. See A. Prezewoski, *Democracy and the Market: Political and Economic Reform in Latin America and Eastern Europe* (1993). A common issue is the introduction of the system of constitutional law. See Brunner, "Development of a Constitutional Judiciary in Eastern Europe," 18 *Rev. Cent. & East Eur. L.* 535 (1993); see also Sokolewicz, "Democracy, Rule of Law and Constitutionality in Post Communist Societies of Eastern Europe," 2 *Droit Pol. Cont.* 522 (1990).

ment in the activity of the judiciary; high levels of police coercion; drastic governmental economic regulatory and deregulatory intervention; continuous attempts at major legal reform; legal culture heavily influenced by foreign models and usually marginalized by the political power; scarcity of legal literature; limited distribution of judicial opinions; scarcity of legally trained personnel; and a highly bureaucratized public decision making process. This model could also be referred to as the "law of development and transition."<sup>115</sup>

In these systems, institutional decisions tend to be centralized following a model of direct regulation, driven by a political class unwilling to allow models of decentralized institutional decision making.<sup>116</sup> These countries aim to a final goal, seen as an end in and of itself, and whose fulfillment shapes the contours of the law (e.g., self sufficiency in the production of food; market economy; multi-partitism; communism). In this last regard, any system aims toward a final goal the moment it lays down its constitutional foundations. For example, in the United States the constitutional rhetoric of economic freedom is a strong player in the constitutional game. However, it has not been able to determine and to justify by itself the outcome of the innumerable conflicts in which the professional legal culture made different (and sometimes opposing) interests prevail. The impact of the constitutional rhetoric has been maintained partly outside the technical everyday decision making despite the use of several doctrines and devices. Constitutional rhetoric remains the province of professional lawyers in Western societies.<sup>117</sup>

An analysis of the structure of the constitutional language and the way constitutional rhetoric has captured the everyday working rule of the law allows one to understand the macro-comparative nature of the systems belonging to the *rule of political law* family. All these systems share a prominent political (or constitutional) layer. The political target, be it free market and privatization, be it self-sufficiency, or be it development, determines, justifies and makes socially acceptable the outcome of most decision-making. This rhetoric conveys the sense of the temporary existence of this family. How long will the transitional phase last? When will the development take place? These are questions that project the work of the scholar into the future. But the neoclassical theory of development that points to convergence as the necessary outcome of an evolutionary process is

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115. For an interesting perspective see Pogany, "Constitutional Reform in Central and Eastern Europe: Hungary's Transition to Democracy," 42 *Int. Comp. L.Q.* 332 (1993). See also C. Clague & G.C. Rausser, *The Emergence of Market Economies in Eastern Europe* (1992).

116. See C. Veliz, *The Centralist Tradition in Latin America* (1980).

117. See A.M. Bickel, *The Least Dangerous Branch* (1962).

now largely discredited in neoinstitutional analysis.<sup>118</sup> Instead of convergence, the economic performance of rich and poor countries has historically shown divergence, with the gap becoming increasingly wider.<sup>119</sup> It is also known that the increase in the gap of economic development is most likely due to long-lasting institutional factors as well as to phenomena of path dependence.<sup>120</sup> This may suffice to consider the common characteristics of the legal systems that are deep and stable enough to make a family of legal systems in the sense used by comparative taxonomies. Since my tripartition aims to offer a framework for drafting the map of the law as it is in the present, one may reject objections based on a future disappearance of this family. A recent authoritative analysis of this legal family clearly explains the reasons at the origins of the term *rule of political law*: "[T]he general objective [of the transition] is . . . to institute a constitutional system in which law trumps political expediency, rather than the other way around."<sup>121</sup> Whether this objective will ever be reached and whether it is desirable to reach it are questions beyond the scope of this article.

In my opinion, the *rule of political law* family does not include the entire Socialist world nor the entire ex-Socialist world. Most importantly, I would exclude from it China, Mongolia, Vietnam, Laos and North Korea although many characters of the *rule of political law* are shared by these countries. On the same rationale, I would also exclude the former Soviet Asian Republics. This exclusion can be best understood in light of the dynamic nature of my taxonomy. As to China (and other Asian socialist systems), there can be no doubt that they share important characteristics of the *rule of political law*.<sup>122</sup> However, as a general matter, I think that the social structures of these countries exhibit closer ties to the Oriental world dominated by the *rule of traditional law*. Furthermore, legal sinology had long achieved a position of independence within the field of sovietology. Without the common denominator of the Soviet Union, the Asian republics have little or nothing in common with their European counterparts when it comes to language, culture, religion, and tradition. Even if the transitional period came to an end, the Western legal tradition would probably find the Urals to the natural

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118. According to such theories of growth, capital intensive developed economies will experience lower marginal products of capital; consequently, investment rates and economic growth will be lower in such countries. To the contrary, developing countries with little capital per unit of labor will grow faster with consequent convergence of growth rate in time. See G.W. Scully, *Constitutional Environments and Economic Growth* (1992).

119. For data see the annual *World Bank Development Reports*.

120. See Trebilcock, *supra* n. 106, and North, *supra* n. 109.

121. See Schlesinger et al., *supra* n. 2, at 71 (mentioning that such objective represents the negation of one of the main features of a communist party state).

122. See Clarke, *supra* n. 75, at 527.

boundary to its expansion. To put it in other terms, among the informal institutions that determine behavior in China and in other Asian countries, those determined by tradition may still be considered hegemonic on those determined by politics. Certainly, both of these patterns (which as will be seen share some common characteristics) clearly prevail on professional law.

In turn, the similarity of problems and substrata between African and Latin American systems is readily apparent.<sup>123</sup> The colonial period and its Western legal models influenced both systems at too early a stage in their legal development.<sup>124</sup>

The substrate of customs (rule of traditional law) is still active in all of Africa where it can certainly be considered prevailing on professional law (with the possible exception of those systems that were exposed to Roman-Dutch Law: Lesotho, Zimbabwe, South Africa, Botswana, and Swaziland). In some Latin American countries (mostly Belize, Guyana, Surinam)<sup>125</sup> the rule of traditional law is still strong and prevailing on professional law. Professional law is rather strong as a pattern of law in some other Latin American countries (e.g., Mexico, Argentina, Chile, Venezuela, Brazil, and perhaps Peru), particularly in the metropolitan context and in certain areas of law. The relative importance of professional law (particularly in the domain of private law) explains the taxonomic tradition, shared by some leading comparativists like Professor Merryman, to consider Latin America within the core of the civil law tradition.<sup>126</sup> I do believe however that *professional law* is not a strong enough competitor of *political law* to justify the general inclusion of the latter group of Latin American countries within the Western legal tradition. Likewise, traditional law is not strong enough in the former group to include these countries within the family of countries where *traditional law* is hegemonic. The cultural development of traditional law in these African and Latin American countries is able to withstand the challenges posed by attempts at modernization. But this does not

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123. On the existence of common issues within the Latin American legal family, see A.S. Golbert & Y. Nun, *Latin American Laws and Institutions* (1982); K. Karst, *Latin American Legal Institutions: Problems for Comparative Studies* (1966); P.J. Eder, *A Comparative Study of Anglo-American and Latin American Law* (1950). For a view favoring the inclusion within the law of development of some systems of Mediterranean Europe, see J.H. Merryman, *Law and Social Change in Mediterranean Europe and Latin America* (1979). On the law of development, see R.B. Seidman, *The State Law and Development* (1978).

124. Some of the common issues and differences among Africa and Latin America in the domain of tort law are explored in Bussani & Mattei, "Making the Other Path Efficient: Economic Analysis and Tort Law in Less Developed Countries," in *Law and Economics of Development*.

125. These are the countries which belong to Reyntjens' "pluralistic" family. See Reyntjens, *supra* n. 25. On legal pluralism the classic is still M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975).

126. See J.H. Merryman et al., *The Civil Law Tradition* (1994).

suffice to create a hegemonic pattern, even in the long term. Basic informal institutions determined by (or made of) local customs will seemingly not be able to compete in the long run with formal, professionally-generated and economically-boosted Western-style law.

More generally, while the North-South division of the world is based on economic realities, the East-West division is based on deeply rooted philosophical and cultural differences.<sup>127</sup> Consequently, the hypothetical end of the transitional period of the *rule of political law* (possibly coinciding with economic growth and development) would naturally bring the countries in the south of the world within the boundaries of the *rule of professional law* with respect to virtually all those relationships which are not purely local in character (property, family, succession, etc.). But on the other hand, the alternative traditional conceptions in the East also seem to characterize the institutions of highly developed countries like Japan.

A substantial quantitative analysis would be appropriate to make different predictions for those systems of sub-Saharan Africa that came into early contact with Islam (Sudan, Somalia, Benin, Burkina Faso, Mauritania, Ivory Coast, Ethiopia, Eritrea, Senegal, Mali, Niger, Nigeria, Guinea, Gambia, Tanzania, Chad, and Togo) or Hindu Law (Kenya, Tanganyika, Uganda, and Zanzibar). In these systems the *rule of traditional law*, represented by the sophisticated sharaitic tradition, could conceivably work as a powerful alternative to western professional law in the hypothetic case in which the *rule of political law* would terminate its hegemony. We are however in the domain of speculations that do not suffice to undermine the present hegemony of the *rule of political law* in the African continent.

The actual location of systems that are not exactly at the core of each family is a matter of judgment for the scholar according to his or her research project. Indeed, the taxonomic location of Africa can be disputed, but the importance of the issue should not be overemphasized given the high degree of legal pluralism that characterizes the whole continent and which is now fully acknowledged by comparativists.<sup>128</sup> The correct approach to African law seems to be the study of the competitive interaction among different layers of the legal system. Translated into my taxonomic scheme, this means that the competition between the *rule of traditional law*, the *rule of professional law*, and the *rule of political law* may not have a definite outcome in

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127. See O. Lee, *Legal and Moral Systems in Asian Customary Law* (1978).

128. See Bussani & Mattei, *supra* n. 124, and Transplants, Innovation, and Legal Tradition in the Horn of Africa, *supra* n. 7; see also Rodolfo Sacco, *Il Diritto Africano* (1995); Guadagni, "Legal Pluralism," in *The New Palgrave: A Dictionary of Economics and the Law* (P. Newman ed., forth.)

Africa as a whole and the struggle for hegemony is still (dramatically) open.<sup>129</sup>

The rhetoric of legitimization in the *rule of political law* may be different from that shared by the *rule of professional law*. Indeed it may even be founded in democracy and in the rule of law, but according to the special needs of the present phase. Such special needs may be those of the transition to democracy, to the market, and to the rule of law, i.e., a pattern of legitimation that makes the *rule of political law* often acceptable to international financing institutions. Of course the rethoric of Legitimation may be still different in socialist countries.

#### 7. RULE OF TRADITIONAL LAW: THE ORIENTAL VIEW OF THE LAW

My third family consists of those systems where the separation between law and religious and/or philosophical tradition has not taken place. Even in the Western world, the *law* can be justified on ethical bases and many of its rules have a religious or traditional origin. As a consequence of the development of reliable institutions to support economic transactions, a division of labor became possible. This division of labor gave birth to a social class of specialized jurists whose rhetoric of legitimation from the supernatural became increasingly professional. For example, Dante located Justinian in Paradise. Likewise, the *Corpus Juris Civilis* enjoyed for a time a supernatural legitimation not different from that of the Bible. In fact the neoinstitutional economic analysis describes the birth of modern formalized legal systems as a function of the degree of specialization of market actors and of the impersonality of transactions.<sup>130</sup> Modern lawyers perform many of the functions that in other societies are usually performed by priests. Many of the issues that are decided by modern Courts are freighted with religious overtones (e.g., abortion or refusal of medical treatment).

It may be appealing to characterize modern lawyers as priests in disguise, but such characterization would not change the fact that the secularization of the law was completed in England by the fifteenth century when Common Lawyers took charge of the Chancery. On the Continent, the clergy, which was strongly represented in the parliaments until the French Revolution, has also been finally excluded from the legal process.<sup>131</sup> Consequently the legal profession (attorneys, judges, and law professors) is clearly distinct from the priest-

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129. See Bootaan, "La Costituzione Somala del 1990," in *Transplants, Innovation, and Legal Tradition in the Horn of Africa*, supra n. 7, at 131; Id., "Somalia. Stato Regionale o Cantonizzazione Clanica?," in *Studi in onore di Rodolfo Sacco*, supra n. 21, at 117.

130. See North, supra n. 44, at 34, 46 ff.

131. See Baker, supra n. 86; J.P. Dawson, *The Oracles of the Law* (1968). See supra n. 93.



hood in the Western legal tradition of today.<sup>132</sup> Roughly speaking, the relationships between individuals, organizations, or institutions in society are the province of the lawyers. The relationship between the individual and his or her internal conscience, and/or between the individual and the transcendental or the supernatural mysteries may be considered the province of the priests.<sup>133</sup> The same cannot be said of the family of the *rule of traditional law*.<sup>134</sup> In the *rule of traditional law* the hegemonic pattern of law is either religion or a transcendental philosophy in which the individual's internal dimension and the societal dimension are not separated.

In contrast to the Western legal tradition, the third family of legal systems could be called the Eastern legal tradition, subject to the same limits that govern the term "Western legal tradition." Just as in the former we find countries which physically are not located in the western hemisphere (e.g., Oceania), so in the latter we find countries that are not part of the eastern hemisphere (Morocco, Tunisia, Algeria, etc.). Rather than using a geographical label, it is more indicative of the system's structural nature to call it *rule of traditional law*. This family includes: 1) Islamic law countries; 2) Indian law and other Hindu law countries; 3) Other Asian and Confucian conceptions of law (China, Japan, etc.).<sup>135</sup>

In these systems, next to the techno-legal structure (lawyers' law, so to speak) we find a very important, hegemonic, sphere of legal relationships governed by informal or non-professional institutions: religion in Islamic countries<sup>136</sup> and traditional philosophic-behavioral rules in the Far East. While the religious nature of the Sharia is not controversial, China and Japan may raise problems for my taxonomy. To begin with, recent scholarship on Chinese and Japanese law<sup>137</sup> feels the need to reconsider a number of stereotypes about

132. See D.R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (1990). See, For early awareness, Foustel de Coulange, *La Cité Antique* (1864) 466 Fr. It.

133. Of course, there may still be some overlapping and, as usual, borders and definitions can not be completely precise. Moreover, there may still be some competition among these and other social actors in certain domains. For example, the priest or the mediator may compete with the attorney in matrimonial matters and the psychoanalyst may compete with the priest in matters of conscience.

134. See Nader, *supra* n. 10.

135. Thailand, Laos, Cambodia, Burma, Indonesia, the Philippines, Malaysia are not Confucian. While Indonesia can be considered an Islamic Law country well into the rule of tradition, some more doubts could be advanced for the Philippines due to the early and deep exposure to the rule of professional law. As to the other mentioned Asian countries, I would without doubt keep them within the rule of tradition although they may tend towards the rule of politics. Of course these are only personal guesses under a veil of ignorance.

136. Islamic legal literature is exceedingly vast. For a brief introduction and an extensive bibliography see Castro, "Diritto Musulmano," in *Digesto IV* (1988); J. Schacht, *An Introduction to Islamic Law* (1981).

137. See F. Upham, *Law and Social Change in Post-War Japan* (1987). This author has resisted the classification of Japan within the rule of tradition in an intense

their object of inquiry. Among those stereotypes some scholars consider the notion that traditional culture disparaged law, that Chinese law was devoid of concepts of rights, and that the domination of law by political considerations was and still is viewed as legitimate in the Confucian tradition.<sup>138</sup> Moreover, the possibility to locate China and Japan (or the other fast growing capitalistic "Eastern Tigers") within the same family of legal systems may be questioned on the ground of too fundamental differences in the political and economic processes. To answer these objections one must focus on the comparative nature of the knowledge that my taxonomy pursues. My taxonomy is not reinforcing the stereotype of the *absence* of law in the Confucian tradition. My taxonomy seeks to understand instead the comparatively *different structural nature* of law in those contexts. It is difficult to challenge that in rural areas of China there is no "professional lawyer," and that his role in dispute resolution is performed by different social actors. It is similarly difficult to find an explanation of the different quantitative ratio of professional lawyers in Japan and in Western countries without considering the competition of different social actors performing the same role, consequently subtracting from the circuit of formal decision-making a number of issues that in the West would be naturally within itself.<sup>139</sup> Certainly the other patterns of law, *political law* and *professional law* are not at all absent in China and Japan. One must therefore focus on comparative hegemony. I believe that in the two countries what may change is the *pattern of law* which would come out second in the competition (possibly professional law in Japan and political law in China) but not the one which would come out first. Despite the impact of the different political and economic conditions on the law of the two countries, one could still detect similar patterns of power relationship in the two (possibly culturally driven) within an arguably weak role of courts in front of the executive power.<sup>140</sup> Moreover, the growth rate in many

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e.mail conversation over this paper. Among other things he has pointed out that as far as the rate of litigation and the number of lawyers per capita, Japan is much more traditional today than before the war. In a paper not yet published Upham shows that dispute resolution in Japan became more informal (hence more traditional) over the last two centuries and that family structures and employment patterns that Japanese people refer to as traditional did not exist in Meiji and Tokugawa Japan. See however supra n. 36.

138. See H.T. Scogin, *Civil Law in Traditional China: History and Theory*, in K. Bernhardt & P.C. Huang, *Civil Law in Qing and Republican China* 13 ff. (1994); most of the papers in *Heritage of China* (P.S. Ropp ed., 1991); W.C. Jones, *The Great Qing Code* (1994).

139. See D.F. Henderson, *The Role of Lawyers in Japan* (unpublished manuscript).

140. As to Japan, see Ramseyer-Rasmusen, "Judicial Independence in Civil Law Regimes: Econo metrics from Japan," Chicago Law and Economics Working Papers No. 37 2d Series (1996). A different position between scholars of Japanese law seems to be taken by J.O. Haley, "Dispute resolution in Japan: lessons in autonomy," 17 *Canada. United States Law Journal* 443 (1991) and his other work, and by D. Henderson in his extensive production. The state of the art in Japanese Legal Studies is

countries of the area is challenging the relationship between democracy and economic growth<sup>141</sup> while showing remarkably similar patterns of development in countries sharing the same "Confucian" tradition within very disparate formal institutions (including the political process).<sup>142</sup> Even in sophisticated areas of the law such as corporate governance, it seems possible to detect an alternative Japanese way, explainable only in terms of *rule of traditional law*, which competes in efficiency with Western-tailored models and which shows the possibilities of informal institutions to supplement formal ones (or even substituting them) in lowering transaction costs also in rather complex settings.<sup>143</sup>

Of course, *professional law* is never absent in systems belonging to the *rule of traditional law*. The presence of a layer of either civil law or of common law in practically every legal system in the world is largely recognized in the comparative literature and it is the justification for traditional focusing in comparing the law on the common law vs. civil law distinction.<sup>144</sup> Moreover, *professional law* in countries belonging to the *rule of traditional law* is more evident than *traditional law* in the western legal tradition. Traditional law in Western societies when still at play is limited to an informal, usually cryptic role. Examples other than in the usual areas of rural property and family law may be found in the way in which office spaces or other resources are allocated among the members of a faculty, or law firm. More traditional law rules can be detected at play in the relationship between the board of directors and the management in corporations. Or in non-formalized though effectively enforced rules of deference and respect to the retired members of a scholarly community by younger (senior) members, or in the judge-attorney relationship. Some of such behavior can certainly be explained by self interest and power, but this would be reductive to explain the whole phenomenon. Particularly when the formal institutional setting may be the opposite such as in the board-management relationship in common law and civil law or in the judge-party relationship in inquisitorial vs. adversary models.

After focusing on the way in which traditional law performs its role in Western societies, one could conclude that there is an equation between what I mean by *rule of traditional law* and informal law. This conclusion would be erroneous. To begin with, one has only to think of how Islamic law is highly formalized or remember that even

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vividly discussed in F. Upham, "The Development of Japanese Legal Studies in American Law Schools," Reischauer Institute Symposium (1996).

141. See Trebilcock, *supra* n. 106.

142. See Pei, "The Puzzle of East Asian Exceptionalism," 5 *J. Dem.* 90 (1994).

143. See Shishido, "Institutional Investors and Corporate Governance in Japan," in *Institutional Investors and Corporate Governance* 665 (T. Baums et al. eds., 1994).

144. See Schlesinger et al., *supra* n. 2.

the informal nature of the Chinese legal tradition (let alone the legists) is under attack. The professional (modern, Western inspired, formalized, etc.) layer of law in countries belonging to the rule of traditional law of course feels the presence and the strong social influence of traditional non-professional law (formal or informal), and the outcome of the competition among patterns may well be a pattern of traditional law similar in its form to Western law.<sup>145</sup> In other words, one should not confuse the *rule of traditional law* with the absence of law or even with the absence of formal legal institutions. In the *rule of traditional law* formal legal institutions do exist, but their working rule is different from what we are used to in Western societies.

Again, without pretenses whatsoever of being complete, some aspects common to these legal systems are: a reduced role played by lawyers with respect to other individuals entrusted with the resolution of social disputes (mediators, wise men, religious authority); forced westernization and consequent hurried incorporation of professional models into legal relationships traditionally regulated through other means; the existence of Western-style codes and statutes lacking the necessary social foundations and therefore limited in their operation to specific areas of law or specific communities; the high legal value of penitence; the importance of the homogeneity of population as a means of preserving a particular social structure; family groups rather than individuals as the building blocks of society; a high level of discretion left to decision makers; a high rate of survival of very diversified local customs; extensive use of judicial coercion; a strongly hierarchical view of society; a high value placed on harmony; a great emphasis on the role of gender in the society; a social order based on duties rather than rights; hierarchical structure of the society counterbalancing egalitarian organization; limited ability of indigenous tradition to absorb (by means of scholarly elaboration) changing social conditions and a consequent need to import western legal models; disparate sources of law in the countryside and in urban contexts. The "democracy" and "hierarchy" dichotomy is probably the easiest way to characterize the profound distinctions between the Eastern and Western legal families.<sup>146</sup> One must add the caveat that hierarchy plays a role in the West, albeit behind the facade of democracy and formal equality.<sup>147</sup>

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145. D.F. Henderson, *Conciliation and Japanese Law* (1965); Zhiping, "Explicating Law: A Comparative Perspective of Chinese and Western Legal Culture," 3 *J. Chinese L.* 55 (1989); J.O. Haley, *Authority Without Power: Law and the Japanese Paradox* (1991).

146. The same contraposition can be also used to characterize the distinction between rule of professional law and rule of political law, where political ideology takes the place of religious tradition. See Nader, *supra* n. 10.

147. See Jacob et al. *cit. supra* n. 56, as well as much of the work of Duncan Kennedy and Laura Nader.

One also should note that the rhetoric of legitimization in the *rule of traditional law* differs from the ones prevailing today in the *rule of professional law* and in the *rule of political law*. We find at play here a rhetoric of supernatural legitimization. It is a strong, very ancient and respected rhetoric, that may successfully compete with both that (recent) of democracy and that (much less symbolic) of the political contingency. As already mentioned above, the same rhetoric was used to legitimize the authority of the *Corpus Iuris Civilis* in the founding phase of the civil law tradition.<sup>148</sup> The same rhetoric has also been used in several countries to support the unlimited power of the charismatic leader (or of the political party). This is therefore another important structural analogy between the *rule of political law* and the *rule of traditional law*.

### 8. FAMILIES, SUB-FAMILIES AND MIXED SYSTEMS

The classification of legal systems that I have attempted by shaping my taxonomy has clear limitations. One must remember that the proposed patterns may fit the core systems while leaving some others in dubious positions. Many systems have several aspects common to more than one pattern. We can however see that the proposed tripartite classification illustrates three cardinal points of the global legal map. Some systems fall squarely within each family and others, even though into one family, tend towards the others.

Chinese and Japanese law, for instance, fall within the same family. And yet they can be seen as far apart as in a map of the whole world, the south-easternmost regions are far apart from the south-westernmost. Japanese law, for example, tends towards the *rule of professional law*,<sup>149</sup> while Chinese law tends towards the *rule of political law*.<sup>150</sup> In fact, as already stated, legal sinology was once considered a branch of sovietology.

Furthermore, not every branch of the law fits squarely within one family or the other. African family and real property laws, where the impact of tradition is more deeply felt, seem to fit more properly within the *rule of traditional law*. Moreover, when looking at contract law, for example, one may say that Latin American countries fall within the Western legal tradition. Finally, with respect to constitutional law, one cannot ignore the close relationship found in some middle eastern countries between religious and political powers, so that, as Professor Sacco has suggested in a private discussion of this paper, the structure (and even the legitimization) of the rule of

148. See Gambaro & Sacco, *supra* n. 5, at 240 ff.

149. See Upham, *supra* n. 137. See also J.H. Moitry, *Le Droit Japonais* (1988).

150. See R.C. Keith, *China's Struggle for the Rule of Law* (1994); T. Jingzhou, *Le Droit Chinois Contemporain* (1991); Cavalieri, "Il virus della legalità: caratteristiche e implicazioni della riforma giuridica cinese," *ISESAO*, Bocconi University (1996).

political law and of the rule of traditional law can overlap a great deal.

One can distinguish several sub-families within these main patterns. Accordingly, the *rule of professional law* could be subdivided into three subsystems: common law, civil law, and mixed systems (including Scandinavian countries). This pragmatic approach may offer a contribution to the ongoing scholarly debate on whether there is or there is not "convergence" between civil law and common law<sup>151</sup> by showing its highly academic and rather pointless nature. In the absence of quantitative tools to measure analogies and differences among legal systems, whether common law or civil law are more or less similar depends only on the terms of comparison and on the problems that one is facing. If we put them in the context of the world's legal systems, the structural analogies (as I have tried to show) outweigh the differences. If the issue is the integration of European private law, there is no question that the coexistence of common law and civil law countries in the Union is a problem if one seeks unification. By considering the common law-civil law distinction as a subdivision of the *rule of professional law*, one can at least use a taxonomy able to capture at the same time analogies (as a family) and differences (as a subfamily). A taxonomy that invites to concrete efforts to compare rather than to abstract discussion about how to compare.

The *rule of political law* can be divided into two subsystems: law of transition (the former Socialist law) and law of development (which can in turn be divided in African law and Latin American studies). In turn, the *rule of traditional law* can be divided in two sub-families: Far Eastern systems on the one hand, and Islamic systems on the other. These sub-families closely follow the result of area studies which already enjoy wide scholarly legitimacy.

Further subdivisions can still be made as necessary. The necessity for such subdivisions is left for the scholar's judgment to be exercised on a case-by-case basis according to his or her methodological approach.

Thus, for example, the common law could be divided into two parts: the English sphere and the United States sphere. The civil law can be subdivided into a German-influenced area and a French-influenced area. One can further distinguish a Scandinavian family and a traditional mixed systems family (comprising Scotland, Louisiana, Quebec, South Africa, etc.). Within the *rule of professional law*, on the other hand, these subdivisions do not seem to preserve much significance (with the possible exception of traditional mixed systems

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151. See Legrand, "European Legal Systems are not Converging," 45 *Int'l & Comp. L. Q.* 52 (1996); De Witte, "The Convergence Debate," 3 *Maastricht J. Eur. Comp. L.* (1996).

being interesting laboratories of integration between civil law and common law) due to the wide circulation and exchange of legal models. In spite of the striking differences between English and American law, splitting the common law does not appear particularly useful. Canada and Australia, for example, share significant characteristics of both systems. It is far more valuable, at this point, to observe the leadership role taken by American law not only within the common law sub-family, but also across all the patterns of the law (possibly with the exception of French law).<sup>152</sup>

The traditional distinction between a Germanic (Germany, Austria, Switzerland) and French civil law can serve certain purposes<sup>153</sup> at a micro-comparative level, but not as a macro-comparative subdivision of legal families. The civil law family has become so homogeneous as a result of the exchange of legal models mentioned earlier, that it would be very problematic to classify the Dutch legal system, for example, within one of the two subfamilies (particularly after the impressive amount of transplants from the common law incorporated in its most recent codification).<sup>154</sup> The problems that have traditionally afflicted lawyers of the so-called mixed systems are now common to the entire *rule of professional law* (consider for example the issue of trusts).

In different contexts further subdivision of these classifications appears otherwise necessary due to the greater dishomogeneity of the political and cultural substrate. Far Eastern law, for example, should be further divided between a Chinese pattern and a Japanese pattern. To the latter would belong all those systems with a high rate of industrial development and where the influence of Western law has been marked (e.g., Taiwan, South Korea, Hong Kong, etc.). To the former would belong systems which have opposed greater resistance to westernization and in which the problems of underdevelopment are still far from being solved (e.g., Mongolia, North Korea, Vietnam, Cambodia, etc.). Quite clearly, just as the case can be made to justify an ad hoc classification for Scandinavian countries, the same can be said for some systems belonging to this family. Indian law can be hardly classified in either of these two systems be-

152. I make the point in Mattei, *supra* n. 32, and in Mattei, "The New Ethiopian Constitution: First Thoughts on Ethnic Federalism and the Reception of Western Law," in *Transplants, Innovation, and Legal Tradition in the Horn of Africa*, *supra* n. 7.

153. Such a distinction is often drawn by Schlesinger et al., *supra* n. 2. This distinction can be further justified in view of the mainly introductory to the civil law purpose of that work.

154. See Drobnig, "Das neue niederländische burgerliche Gesetzbuch aus vergleichender und deutscher Sicht," 1 *Eur. Rev. Priv. L.* 171 (1993); Ioriatti, "Il Nuovo Codice Civile dei Paesi Bassi," in *Rivista di Diritto Civile* 117 (1992); Tallon, "The New Dutch Civil Code in a Comparative Perspective: A French View Point," 1 *Eur. Rev. Priv. L.* 189, (1993); Hartkamp, "Civil Code Revision in the Netherlands," in *Nieuw Nederlands Burgerlijk Wetboek Het Vermogensrecht* 15 (1990).

cause of its inherent complexity and because it exhibits characteristics common not only to the one (Western constitutional system) and the other (great deal of tradition) but also of its own (e.g., cohabitation of Hindu and Muslim communities).

### 9. GRAPHIC PRESENTATION OF DATA

Different sub-families in which the three main patterns can be subdivided tend towards one or the other main patterns in a non homogeneous manner. Within the *rule of professional law*, civil law systems in general and some in particular (e.g., Italy, Spain, Greece) present more of the peculiarities of the *rule of political law* than common law systems do. The traditional distinction between public and private law, and the privileged position of the government within the legal process, is the most striking example of this phenomenon.<sup>155</sup> Furthermore, within the *rule of political law*, the law of development systems (Africa in particular) present more characteristics of the *rule of traditional law* than systems of the law of transition. Similarly, Chinese-style Far Eastern systems exhibit more characteristics of the *rule of political law* whereas Japanese-style systems are more influenced by the *rule of professional law*. Within the same family, moreover, Islamic systems are closer to the *rule of political law* than Indian law which is more exposed to the *rule of professional law*.

This phenomenon, in addition to offering a useful graphical reduction of data for teaching purposes, contains a valuable methodological insight. Systems which are closer to one another allow for more precise comparative analysis and are likely to share a greater number of common problems.

Graphic reduction is very simple and lends itself to varying degrees of complexity. It basically consists of an equilateral triangle with a pattern at each vertex. Let L represent the rule of professional law, P the rule of political law and T the rule of traditional law. Outside the triangle each family, sub-family or individual system can be placed more or less at the core at a distance proportional to its macro-comparative distance from each family. The resulting graph will be:

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155. The French example is recently discussed in the interesting chapter by Provine in Jacob et al., supra n. 56, at 177 ff.



