How to Expand Evolutionary Theory with Legal Positivism (for the Benefit of Transnational Corporate Law-Making)

MAURO ZAMBONI*

Even if the combination of two (or more) theoretical approaches can be helpful in order to better understand a certain legal phenomenon, the very idea of combining one legal theory with some components of another approach usually gives rise to a kind of conflicting feelings among the followers of each of the schools or movements involved.[1] Beside the usual conservative tendency typical for most legal scholars, clashing thoughts tend to hunt the legal scholars engaged in the process.[2] On one hand, both parties are well aware of, or at least they perceive the possible advantages arising from combining forces and respective strengths. This combination is usually complementary to the fact that the weakness of a theory in one area can be covered by the

* I would like to deeply thank Laura Carlson, Fredric B. Korling, Torben Spaak, Gralf-Peter Calliess, and Jakob Heidbrink for their many helpful and invaluable comments on this article. I also thank all the colleagues at the *Collaborative Research Centre 597* (Transformations of Commercial Law) in Bremen (Germany) and at the Harvard Law School in Cambridge (USA) for their comments to earlier drafts. This article reports research carried out under the auspices of the *Söderbergs Foundation* and the *Royal Swedish Academy of Sciences*.

1 *See*, *e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harvard Civil Rights-Civil Liberties Law Review 306 (1987). *See also* Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 California Law Review 743 (1994). *But see* Joseph Raz, *Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment*, 4 Legal Theory 1 (1998).

2 As to the tendency of legal scholars of being path-dependent, *see*, *e.g.*, Philip M. Nichols, *Forgotten Linkages – Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 University of Pennsylvania Journal of International Economic Law 500 (1998); and Thomas Green, The Activities of Teaching 47 (New York: McGraw-Hill, 1971).

strengths of the other school in the same area and vice versa. On the other hand, both parties are afraid that, the necessary compromises which come along with inserting some "foreign" components into one legal theoretical approach, can somehow modify in a fundamental way its being what it is. The compromises can go so long that, in the end, the legal theoretical stream will loose its identity, i.e. the qualities that make it what it is, and it will therefore become weak on all fronts.[3]

The basic idea of this work is to arrange a possible combination of the evolutionary theory (or, synonymously, evolutionary approach to the law) with some parts of legal positivism, in particular in order to reinforce the position of the evolutionary theory within the legal world and, at the same time, to keep the features that made this approach what it is. While the general focus is on what the evolutionary theory can gain by adopting certain aspects of the legal positivism, the underpinning goal is to demonstrate how, by combining certain aspects of these two theoretical movements, it is possible to overcome some of the difficulties that, in different areas, both movements have suffered.

In particular, the evolutionary approach to the law, once integrated with some of legal positivism's basic ideas, can fill its structural lacking of a normative side as to the law-making, i.e. its missing a clear message explaining to the addressees why and how the law should change (or not).[4] This lack, in its turn, offers also a partial explanation of the fact that the use and debate around evolutionary theory has usually been confined to the legal scholarship, while being ignored by the vast majority of the practicing legal world.[5]

[3] See William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 University of Pennsylvania Law Review 1955–1956 (1995). *See also* Dennis Gioia and Evelyn Pitre, *Multiparadigm perspectives on theory building*, 15 Academy of Management Review 588 (1990); Robert S. Summers, Instrumentalism and American Legal Theory 281 (Ithaca, N.Y.: Cornell University Press, 1982). *But see* Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 Cornell Law Review 1010–1013 (1984); and Peter Goodrich, Reading the Law: A Critical Introduction to Legal Method and Techniques 112 (London: Blackwell, 1986).

[4] *See*, *e.g.*, Hasso Hofmann, *From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism*, *in* E. Pattaro, D. Canale, P. Grossi, H. Hofmann, and P. Riley (eds.), A Treatise of Legal Philosophy and General Jurisprudence, Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600–1900 310–315 (Berlin: Springer, 2009).

[5] *See*, *e.g.*, Brian Leiter and Michael Weisberg, *Why Evolutionary Biology is (so Far) Irrelevant to Law*, 89 The University of Texas School of Law –Public Law and Legal Theory Research Paper 48–49 (2006); or Neil Duxbury, *Evolutionary Jurisprudence: Prospects and*

At the same time and though not being the main focus of this work, the expansion of the evolutionary approach can possibly offer to legal positivism some elements of a well-established and functioning theory of change in the legal system, a theory which is also compatible with the basic positivistic hypotheses as to the nature of law and legal thinking.[6]

In order to reach this goal, the article will start in Part One with some clarifications as to the definition of the main target of the investigation, namely the evolutionary approach to the law. This part will aim at explaining what an evolutionary is from a legal perspective, in particular in terms of contribution for a better understanding of how and why legal changes take place. Part Two will then move on in identifying the lack in the evolutionary approach of an explicit normative component. It will also be seen how this absence has most likely contributed to the marginalization of the evolutionary theory from the modern legal discourse, which always requires both a descriptive and a normative component. In order to fill this gap, Part Three will suggest to explore well-established contemporary legal theories in order to retrieve a normative message compatible with the basic hypotheses of an evolutionary approach to the law. Based on their ideas as to how and why the law changes through time, a distinction will be made of contemporary legal theories into two ideal-typical groups: "Creationist" and "Darwinist" legal theories. Once pointed out how only "Darwinist" legal theories as legal positivism and procedural natural law can offer some contributions which are compatible with an evolutionary approach to law, Part Four will focus in particular on the legal positivism (and its stress on the sources of law) as the theory whose normative component can better help the expansion of evolutionary theory into normative territories. In the final Part Five, the transnational corporate law and its making will be investigated as a possible field of concrete legal investigation by the "newly expanded" evolutionary approach, i.e. the one integrated with the normative side imported from legal positivism.

Limitations on the Use of Modern Darwinism throughout the Legal Process. By John H. Beckstrom (Book review), 50 Cambridge Law Journal 574 (1991). *But see* Jan M. Smits, *The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory*, 31 Georgia Journal of International and Comparative Law 81 (2002); Donald E. Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 Columbia Law Review 38 (1985); or Allan C. Hutchinson, Evolution and The Common Law 10 (Cambridge: Cambridge University Press, 2005).

6 As to the meaning of "legal system" in this work, *see* Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of Law*, 78 Boston University Law Review 749–755. *Cf.* Neil D. MacCormick, H. L. A. Hart 20–24 (Stanford: Stanford University Press, 1981).

Since this work aims then in integrating one quite "strong" approach to the law (evolutionary theory) with elements coming from another robust and well-established legal movement (legal positivism), some preliminary clarifications are required in order to clear the field of possible misunderstandings. First, the goal of this work is to expand the evolutionary approach with the help of legal positivism, not to create a sort of legal theoretical Frankenstein's monster, which will generate more problems than solve them. With this metaphorical expression, it is meant that the task of the article is definitely not the creation of a sort of "evolutionary legal positivism" or "legal positivistic evolutionary theory," i.e. a new hybrid legal theory made of parts of different legal theoretical movements.[7] Instead, the goal is to improve the evolutionary theory by filling certain weaknesses and without loosing its identity as a specific way to understand and describe the law and its making. In computer science terminology, the goal of this work is to simply "extend" a theory more than to "merge" two theories: the finish line is not the creation of something new, but more modestly the rendering the evolutionary theory a better approach usable by legal actors, an improvement which is mainly done by inserting some of the normative claims offered by legal positivism.[8]

The second clarification required has to do with the very labeling of "evolutionary theory of law." As it will also be pointed out in the following Part One (*The Evolutionary Theory of Law-making*), many established legal theories (*e.g.* Law and Economics) have been defined as evolutionary in their description of changes in law.[9] In this work, however, the definition of "evolutionary theory of law" (or synonymously, "evolutionary approach to law") has been attached to those different theories based more on how the schools and legal scholars define their positions on the changes in law issues than on

[7] *See*, *e.g.*, Olufemi Taiwo, Legal Naturalism: A Marxist Theory of Law 45–62 (Ithaca: Cornell University Press, 1996). *But see* Robert Justin Lipkin, *Olufemi Taiwo, Legal Naturalism: A Marxist Theory of Law (Book Review)*, 107 Mind 902–903 (1998).

[8] *See* Lawrence C. Paulson, Isabelle: A Generic Theorem Prover 118 (Berlin: Springer, 1994); and Cliff B. Jones and Peter A. Lindsay, *A Support System for Formal Reasoning: Requirements and Status*, *in* R. Bloomfield, L. Marshall, and R. Jones (Eds.), VDM '88: VDM- The Way Ahead 147 (Berlin: Springer, 1988).

[9] *See* J. B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 Vanderbilt Law Review 1419–1437 (1996). *See*, *e.g.*, Anthony J. Sebok, Legal Positivism in American Jurisprudence 37 (Cambridge: Cambridge University Press, 1998); or Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 62–71.

how they have been categorized by their critics.[10] In other words, while many legal theories have strips of evolutionary thinking in their pictures of law and its making, when talking about an "evolutionary theory of law" this work focuses on those theories which explicitly set at the center of their paintings the explanation of changes and stability in the legal phenomenon according to different stages of variation, selection, and retention.[11]

The third term in need of clarification before proceeding into the discussion, is the one of "legal positivism." The legal positivism taken into consideration in this work is the one that can be defined as "modern legal positivism," i.e. the one developed after Herbert L. A. Hart departure from his predecessors and founding fathers of classical legal positivism, namely Jeremy Bentham and John Austin.[12] Modern legal positivism (hereinafter simply legal positivism) is then, as described by John Gardner, that theoretical movement whose followers advance and endorse the proposition that "[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)."[13]

Obviously this definition (as those of all the other legal theories presented in this work) is quite restrictive and limited, since legal positivism is actually an extremely articulated movement and probably it is more correct the ex-

[10] *See*, *e.g.*, Anthony J. Sebok, *Misunderstanding Positivism*, 93 Michigan Law Review 2073–2074 (1995).

[11] *See* Michael B. W. Sinclair, *Evolution in Law: Second Thoughts*, 71 University of Detroit Mercy Law Review 36 (1993); and Donald T. Campbell, *Variation and Selective Retention in Socio-Cultural Evolution*, *in* H. Barringer, G. Blanksten, and R. Mack (eds.), Social Change in Developing Areas 27–29 (Cambridge, Mass.: Harvard University Press, 1965). *But see* Donald T. Hornstein, *Complexity Theory, Adaptation and Administrative Law*, 54 Duke Law Journal 919–920 (2005).

[12] *See* Herbert L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harvard Law Review 600–606 (1958). *Compare* Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 Columbia Law Review 238 (1927). *See also* Raymond Wacks, Understanding Jurisprudence: An Introduction to Legal Theory 46, 68–70 (Oxford: Oxford University Press, 2005).

[13] *See* John Gardner, *Legal Positivism: 5½ Myths*, 46 American Journal of Jurisprudence 201 (2001). *See also* Neil D. MacCormick, Legal Reasoning and Legal Theory 239–240 (1st ed., Oxford: Oxford University Press, 1978). In this way, like for Gardner, this work also implicitly rejects the misconception that the common denominator for all the modern legal positivists is the idea that there is no necessary connection between law and morality. *See* Gardner, *Legal Positivism*, *supra* at 222–223.

pression "legal positivisms."[14] As stated some years ago by Andrei Marmor, "[t]here are many versions of legal positivism; perhaps as many as there are legal positivists around."[15] However, this restriction in the meaning of legal positivism is first due to the fact that the focus of this investigation is not upon this legal theory (or all the other legal theories touched during the discussion). The focus is instead on relating evolutionary theory to legal positivism (or contemporary legal theory in general); therefore this choice of perspective implies that, by axiomatically assuming that a certain legal theory has a unique and "stable" meaning, is then possible to position evolutionary theory in relation to such "fixed" legal theory, to stress the points of strength and weakness of the evolutionary approach, and, hopefully, to improve the latter.[16]

This methodological choice of fixing the definition of legal positivism into a very narrow range of meanings is also reinforced by the observation of the ideas that most contemporary legal theories have when it comes to the law-making, i.e. the center of attention for the evolutionary approach to law. If it is true that internal variations can become quite broad when dealing with other aspects of the legal phenomenon, it is also true that the different streams of each legal theory tend to unify themselves around some basic propositions when it comes to the creation of law.[17] For instance, as to the

[14] *See* Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, *in* R. P. George (ed.), The Autonomy of Law: Essays on Legal Positivism 19, 24 (Oxford: Oxford University Press, 1999); Wilfred J. Waluchow, *The Many Faces of Legal Positivism*, 48 University of Toronto Law Journal 391–400 (1998); and Robert S. Summers, *Legal Philosophy Today –An Introduction*, *in* R. S. Summers (ed.), Essays in Legal Philosophy 15–16 (Oxford: Blackwell, 1968). *See*, *e.g.*, Joseph Raz, The Authority of Law: Essays on Law and Morality 37 (Oxford: Oxford University Press, 1979); or Stephen R. Perry, *The Varieties of Legal Positivism (book review)*, 9 Canadian Journal of Law and Jurisprudence 361 (1996).

[15] Andrei Marmor, *The Separation Thesis and the Limits of Interpretation*, 12 Canadian Journal of Law and Jurisprudence 135 (1999).

[16] This methodology is loosely based on Max Weber, The Methodology of the Social Sciences 95–108 (Glencoe, Ill.: Free Press, 1949). *See*, *e.g.*, Alf Ross, Why Democracy? 87 (Cambridge, Mass.: Harvard University Press, 1952); and Oliver Brand, *Conceptual Comparisons: Towards A Coherent Methodology of Comparative Legal Studies*, 32 Brooklyn Journal of International Law 438–439 (2007).

[17] *See*, *e.g.*, Karl N. Llewellyn, Bramble Bush: On Our Law and its Study (Dobbs Ferry: Oceana Publications, 1996 [1930]); and Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 Yale Law Journal 219 (1931). *But see* Brian Leiter, *Positivism, Formalism, Realism: Legal Positivism in American Jurisprudence by Anthony Sebok*, 99 Columbia Law

issue of the role of morals, the positions of legal positivists space between soft-liners ("inclusive legal positivists"), allowing moral considerations into the law if permitted (explicitly or implicitly) by the social conventions, and hard-liners ("exclusive legal positivists"), where a certain moral norm can acquire a status of being legally valid only through the sources of law and never because of its (moral) content.[18] However, when it comes to the law-making, the vast majority of legal positivists join around a vision of a law-making operated by its own rules and mechanisms, i.e. an idea of a law-making tending to closedness towards non-legal discourses.[19]

As forth clarification, the basic task of the evolutionary theory is to offer a *middle-range theory* concerning the law-making process leading to the creation of *legal categories*. As far as it concerns the "middle-range" nature of the evolutionary theory of law, this expression means that it is a theory that takes

Review 1148 (1999) [book review]; and Neil Duxbury, Patterns of American Jurisprudence 68–71 (Oxford: Clarendon Press, 1995). *See*, *e.g.*, Richard A. Posner, The Problems of Jurisprudence 442 (Cambridge, Mass.: Harvard University Press, 1990), in comparison with Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* D. Kaiyris (ed.), The Politics of Law: A Progressive Critique 46–48 (3rd ed., New York: Basic Books, 1998).

18 *See* Andrei Marmor, Positive Law and Objective Values 50–51 (Oxford: Oxford University Press, 2001); and Jules L. Coleman, The Practice of Principle: in Defence of a Pragmatist Approach to Legal Theory xv, 107–108 (Oxford: Oxford University Press, 2001). *See also* Andrei Marmor, *Exclusive Legal Positivism*, *in* Coleman and Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law, *supra* at 104–124; Wilfrid J. Waluchow, Inclusive Legal Positivism 2, 81–82 (Oxford: Oxford University Press, 1994); Joseph Raz, *Authority, Law, and Morality*, *in* J. Raz, Ethics in The Public Domain: Essays in the Morality of Law and Politics. Revised Edition 210–211 (Oxford: Oxford University Press, 2001); Matthew H. Kramer, In Defense of Legal Positivism: Law Without Trimmings 197–199 (Oxford: Oxford University Press, 1999); and Kenneth Einar Himma, *Inclusive Legal Positivism*, *in* Coleman and Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law, *supra* at 125–165.

19 *See*, *e.g.*, Hans Kelsen, General Theory of Law and State 114, 132–133 (Cambridge, Mass.: Harvard University Press, 1949); Hart, *Positivism and the Separation of Law and Morals*, *supra* at 612. *See also* Joseph Raz, *Kelsen's Theory of the Basic Norm*, 19 American Journal of Jurisprudence 105–106 (1974); Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 202 (Cambridge, Mass.: The MIT Press, 1998); Aulis Aarnio, Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics 53–54 (Cambridge, Mass.: Harvard University Press, 1997); Roger Cotterrell, The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy 100–101, 104 (2nd ed., Oxford: Oxford University Press, 2003); and Mauro Zamboni, Law and Politics: A Dilemma for Contemporary Legal Theory 30–39 (Berlin: Springer Verlag, 2008).

its start from the assumption that the entirety of a phenomenon cannot be explained by recourse to *one* theoretical system giving (or assuming) *one* specific definition.[20] Therefore, the efforts of the evolutionary scholars are mainly directed at the explanation and analysis of only segments of the legal phenomenon, namely the making of law, leaving aside (at least explicitly) the macro-dimensions of the legal phenomenon (*e.g.* the nature of law in general).[21]

As to the final result of the law-making, the evolutionary approach focus its attention neither on the single rules, nor juridical decisions, nor statutes; instead the target are the "legal categories" (or synonymously legal concepts) such as, for instance, "good faith" or "the best interest of the child." Legal category is a group of (often scattered) rules and normative regulations that aim, through their coordination and combination, at building an interaction responding to the criteria required by the rationality of the law.[22] This product of the evolution process, namely the legal category, forms a theoretical matrix

[20] *See* Robert K. Merton, *The Role-Set: Problems in Sociological Theory*, 28 British Journal of Sociology 108 (1957). *See also* William Twining, *A Post-Westphalian Conception of Law*, 37 Law and Society Review 224 (2003).

[21] *See*, *e.g.*, Donald E. Elliott, Bruce A. Ackerman, and John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 2 Journal of Law, Economics, and Organizations 313 (1985). *But see* Kornhauser, *A World Apart?*, *supra* at 748 and Philip P. Wiener, Evolution and the Founders of Pragmatism 172–179 (Cambridge: Harvard University Press, 1949).

[22] *See* Simon Deakin and Frank Wilkinson, The Law of The Labour Market: Industrialization, Employment and Legal Evolution 31 (Oxford: Oxford University Press, 2005). *See also* Simon Deakin, *Evolution for Our Time: A Theory of Legal Memetics*, 55 Current Legal Problems 19 (2002). *See*, *e.g.*, Niklas Luhmann, Law As A Social System 250 (Oxford: Oxford University Press, 2004) (focusing on "property" and "contract"); or Simon Deakin, *The Contract of Employment: A Study in Legal Evolution*, 11 Historical Studies in Industrial Relations 29–33 (2001). As to the definition of "legal category" (or legal concept) *see* Geoffrey Samuel, Epistemology and Method in Law 220–222 (Aldershot: Ashgate Publishing, 2003). *See also* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Juridical Reasoning*, 26 Yale Law Journal 712–713 (1916–1917); and Åke Frändberg, *An Essay on the Systematics of Legal Concepts: A Study of Legal Concept Formation*, 31 Scandinavian Studies in Law 81–115 (1987). *See*, *e.g.*, John Bell, Policy Arguments in Judicial Decisions 40–43 (Oxford: Clarendon Press, 1983). *But see* Roy L. Brooks, *The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After Bush v. Gore*, 13 Stanford Law and Policy Review 36 n. 20 (2002). As to the different criteria for determining the legal rationality around which to construct the various legal categories, *see*, *e.g.*, Hans Kelsen, The Pure Theory of Law 89–91 (2nd ed., Berkeley: University of California Press, 1970); John Finnis, Natural Law and Natural Rights 276 (Oxford: Clarendon Press, 1980); or Richard A. Posner, Economic Analysis of Law 182 (5th ed., New York: Aspen Publishers, 1998).

with the primary classificatory and normative functions of helping mostly legal actors in diagnosing and systematizing legal problems occurring in both the creation and interpretation of the law.[23] For example, hypothetical target of an evolutionary approach is neither the investigation of the function of corporate law in the US nor the backgrounds and outcomes of one single decision by the US Supreme Court as to "what a corporation is."[24] Instead, the target of evolutionary scholars are the highly intricate chronological and diachronical processes producing a coordinated complex of rules, defined as "corporation" and which imposes several duties and rights on both shareholders, board of directors, executive managers, and supervising public agencies.[25]

Finally, as to the term "legal theory" as used in this work, the position is adopted of considering it as part of a broader "jurisprudence."[26] The term jurisprudence has a very broad meaning; in this work, however, jurisprudence is used as identifying that part of the legal discipline which investigates the nature of law, its production, and its working.[27] Consequently, legal theory is that part of the jurisprudential studies which focuses on and questions, from the standpoint of rationality typical of Western legal cultures, the "pre-

[23] *See* Herbert L. A. Hart, *Problems of the Philosophy of Law*, *in* H. L. A. Hart, Essays in Jurisprudence and Philosophy 93 (Oxford: Clarendon Press, 1983); and Max Weber, Economy and Society: An Outline of Interpretative Sociology 656–657 (Berkeley: University of California Press, 1978). As to the double function (classificatory and normative) played by legal categories, *see* Kaarlo Tuori, Critical Legal Positivism 218 (Aldershot: Ashgate Publishing, 2002).

[24] *See*, *e.g.*, the seminal work by Ronald H. Coase, *The Nature of the Firm*, 4 Economica 390–392 (1937); or Morton J. Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy 74–78 (1992).

[25] *See*, *e.g.*, David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 Vanderbilt Law Review 1350–1353 (1998); or Richard S. Whitt, *Adaptive Policymaking: Evolving and Applying Emergent Solutions for U.S. Communications Policy*, 61 Federal Communications Law Journal 528–530 (2009).

[26] *See* Ralf Dreier and Robert Alexy, *The Concept of Jurisprudence*, 3 Ratio Juris 1–3 (1990).

[27] *See* Roscoe Pound, Jurisprudence 16 (St. Paul, Minn.: West Publishing, 1959); William Twining, Law in Context: Enlarging A Discipline 110 (Oxford: Oxford University Press, 1997); Jeffrie G. Murphy and Jules L. Coleman, The Philosophy of Law: An Introduction to Jurisprudence 1 (Boulder, CO: Westview Press, 1984); Mark Van Hoecke, *Jurisprudence*, *in* C. B. Gray (ed.), The Philosophy of Law: An Encyclopedia 459 (London: Garland Publishing Inc., 1999); Hilaire McCoubrey and Nigel D. White, Textbook on Jurisprudence 1 (3rd ed., London: Blackstone Press, 1999); and Michael D. A. Freeman, Lloyd's Introduction to Jurisprudence 3 (7th ed., London: Sweet & Maxwell, 2001).

vailing patterns of argumentation and interpretation" both in law-making and law-applying.[28]

1. The Evolutionary Theory of Law-making

If one considers the evolutionary approach to the legal phenomenon, he or she can observe how this theory is characterized for being surrounded by a general attitude of skepticism by the legal actors, both as legal practitioners and (though to a lesser extent) as legal scholars.[29] Such a feeling is mainly based on the misperception that having an evolutionary approach to the law means to have a deterministic underpinning ideology to what the law is and what the law will be, i.e. an idea that the law necessarily has come into existence in order to fulfill certain goals and, despite all the contrary efforts, the law will in the end accomplish them.[30] This erroneous perception is mostly due to some fundamental terminological confusion by the legal audience.[31]

[28] Tuori, Critical Legal Positivism, *supra* at 320. It should be also pointed out that, in general, this work has its focus on the Western legal systems, due to the fact that, as pointed out by Katharina Pistor and Philip A. Wellons, the evolutionary approach is typical of Western legal cultures. *See* Katharina Pistor and Philip A. Wellons, The Role of Law and Legal Institutions in Asian Economic Development 1960–1995 34–35 (Oxford: Oxford University Press, 1998).

[29] *See*, *e.g.*, Michael Ruse, *Evolutionary Ethics in the Twentieth Century: Julian Sorell Huxley and George Gaylord Simpson*, *in* J. Maienschein and M. Ruse (eds.), Biology and The Foundations of Ethics 198 (Cambridge: Cambridge University Press, 1999). *But see* Herbert J. Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 Texas Law Review 646 (1985).

[30] *See* John H. Beckstrom, Evolutionary Jurisprudence: Prospects And imitations On The Use of Modern Darwinism Throughout The Legal Process 34 (Urbana, Ill: University of Illinois Press 1989); and Robert W. Gordon, *Critical Legal Histories*, 36 Stanford Law Review 61–63 (1984). *See*, *e.g.*, Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 American Bar Association Journal 571 (1945); or Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Text*, 71 Iowa Law Review 835–836 (1986). *But see* Justice Holmes' opinion in *Lochner v. New York*, 198 U.S. 75 (1905) (Holmes dissentig). *See also* Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 664–671.

[31] *See* Luhmann, Law As A Social System, *supra* at 230. As to the political roots behind the use of metaphors in contemporary legal discourse in general and in particular from a "visual" (i.e. as figurative help in the legal debate) to an "aural" use of them (i.e. constitutive of the very legal debate), *see* Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 Cardozo Law Review 238–300 (1994).

First, it is necessary to distinguish between a general *theory of legal evolution* and a more specific *evolutionary theory of the law*.[32] From a legal actors' perspective, a *theory of legal evolution* is a general label attached to all legal thinking aimed at discovering and explaining general patterns of continuity and change in the law. The works of Henry James Sumner Maine, Oliver Wendell Holmes, or more recently of the economic approach, and Alan Watson can be considered, for example, as presenting a theory of legal evolution.[33] Among the different theories of legal evolution, one can find a specific subgroup that can be defined as an *evolutionary theory of law*. The evolutionary theory of the law is a specific way of perceiving the law-making and it is characterized for offering more than a theory about the evolution of law, i.e. more than a simple attention to points of change and stability in the law through the centuries and among various legal systems.[34] The evolutionary theory of the law distinguishes itself because it evaluates these aspects of change and stability in the legal phenomenon from a point of view that can be defined, in an Hartian terminology, as typical of theories external to the law and its system: Luhmann's sociological theory on law (in Europe) and biological evolutionary theory as a metaphor for explaining the evolution of the law (in the United States).[35]

[32] *See* Sinclair, *Evolution in Law*, *supra* at 32; and Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 90–91. As an example of this confusion, *see* Alan C. Hutchinson, *Work-in-progress: Evolution and Common Law*, 11 Texas Wesleyan Law Review 254–257 (2005).

[33] *See*, *e.g.*, Henry James Sumner Maine, Ancient Law: Its Connection With the Early History of Society, and Its Relation to Modern Ideas ch. 2 (Ann Arbor, MI: University of Michigan Library, 2005 [1861]); Oliver Wendell Holmes, The Common Law 1–2 (Cambridge, Mass.: The Belknap Press, 1963 [1881]); Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 Yale Law Journal 1250–1254, 1257–1258 (1981); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 Journal of Legal Studies 51–63 (1977); and Alan Watson, The Evolution of Law 98–114 (Baltimore: The Johns Hopkins University Press, 1985).

[34] *See* Peter W. Strahlendorf, Evolutionary Jurisprudence: Darwinian Theory of Juridical Science 23–25 (mimeographed copy, 1993). *See also* Allan C. Hutchinson and Simon Archer, *Of Bulldogs and Soapy Sams: The Common Law and Evolutionary Theory*, 54 Current Legal Problems 31 (2001); and Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 646.

[35] *See* Michael B. W. Sinclair, *The Use of Evolution Theory in Law*, 64 University of Detroit Law Review 451 (1987); and Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 Law and Society Review 241 (1983). *See also* Herbert L. H. Hart, The Concept of Law 90 (Oxford: Clarendon Press, 1961). In this sense, in this work "evolutionary theory of law" is used in a narrower meaning than the one identified by Elliott,

The second misperception generally shared by the legal actors is the confusion between "evolutionary" and "evolutionistic" theories of law-making.[36] From an evolutionist perspective, as can be attributed to Marxist legal theory or certain instances of Law and Economics scholars, the central point of investigating changes in law is both in the mechanisms of legal evolution and the directions to which the law or some of its parts are unavoidably bound.[37] For instance, some Law and economics scholars not only put under scrutiny the process of changes of torts law in the modern times, but also they attempt to figure it out what kind of goals this branch of law is (more or less) necessarily going to fulfill.[38]

At least explicitly, the evolutionary theory of the law proclaims instead to focus its attention exclusively on the explanation of the mechanisms underlying the changes and continuities of a certain legal system (or part of it). As recognized by one critique, evolutionary theories typically involve nothing more than "a set of developmental stages and a mechanism for moving from

The Evolutionary Tradition in Jurisprudence, *supra* at 40. *But see* Deakin and Wilkinson, The Law of the Labour Market, *supra* at 28.

[36] *See* Geoffrey MacCormack, *Historical Jurisprudence*, 5 Legal Studies 252–253 (1985). *See also* Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 Jurimetrics Journal 313–315 (1999); J. B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 Duke Law Journal 857 (1996); and Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner's Case for "Reflexive Law"*, 18 Law and Society Review 273 (1984).

[37] *See* Gordon, *Critical Legal Histories*, *supra* at 103. *See*, *e.g.*, Karl Marx, *Communist Manifesto*, *in* D. McLellan (ed.), Karl Marx: Selected Writings 234 (Oxford: Oxford University Press, 1977 [1848]); or *generally* George L. Priest, *The Common Law Process and the Selection of Efficient Legal Rules*, 6 Journal of Legal Studies 65–82 (1977). *See also* Peter Stein, Legal Evolution: The Story of An Idea 46–50, 67–68 (Cambridge: Cambridge University Press, 1980); and Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 American Journal of Comparative Law 244–247 (1994). Among the "evolutionistic" theory of law one should also count the Friedrich Carl von Savigny's Historical School. *See* Stein, Legal Evolution, *supra* at 122.

[38] *See* Richard A. Posner, *A Theory of Negligence*, 1 The Journal of Legal Studies 30 (1972); and George L. Priest, *Introduction: The Problem and Efforts to Understand It*, *in* C. R. Sunstein, R. Hastie, J. W. Payne, D. A. Schkade, and W. Kip Viscusi (eds.), Punitive Damages: How Juries Decide 15 (Chicago: University Of Chicago Press, 2002). *See also* Richard A. Posner, Economic Analysis of Law 534–536 (4th ed., Boston: Little, Brown and Company, 1992). *But see*, *e.g.*, Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harvard Law Review 654–658 (1996).

one to another."[39] In other words, while being focus on the "how" and "why" the law evolves, this approach does not also explicitly designate the points of arrival to which such a system (or its parts) is somehow obliged to aim. As repeatedly stressed by Gunther Teubner, (his) evolutionary theory focuses on the "mechanisms of development" rather than "direction" of such developments, being the latter more the focus of attention for evolutionist functionalist theories.[40]

Once cleared the sky from possible terminological confusions, the attention can now move to identifying what characterizes an evolutionary theory of law-making: the very possibility to organize the creation of legal concepts or categories around the three fundamental moments of the process of *variation*, the process of *selection*, and the process of *stabilization or retention*.[41] The process of *variation* is the moment in the life of a legal system when new and alternative legal categories are created. The reasons for this variation can be several. Niklas Luhmann, for instance, stresses the importance (though not monopoly) of the "ambivalence of a norm" as an endogenous factor allowing legal actors to produce different (and often opposite) meanings.[42] The American versions of the evolutionary theory of the law underlines instead the importance of exogenous pressures coming directly from the surrounding environments and forcing the body of law to offer alternatives to "out-dated" existing regulations.[43] Regardless of which position is taken (endogenous or exogenous), the results are similar for both the European and American evolutionary theories: due to an interaction of external (social)

[39] Marc Galanter, *A World Without Trials?*, 2006 Journal of Dispute Resolution 32 (2006).

[40] *See* Gunther Teubner, Law as an Autopoietic System 48–49 (Oxford: Blackwell, 1993). *See also* Philip P. Wiener, Evolution and The Founders of Pragmatism ch. 8 (1949). *See*, *e.g.*, Carlo Garbarino, *An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research*, 57 The American Journal of Comparative Law 690 (2009). *But see* Horowitz, *The Qur'an and the Common Law*, *supra* at 246. For a further development on this issue, *see* Mauro Zamboni, *From "Evolutionary Theory and Law" to a "Legal Evolutionary Theory"*, 9 German Law Journal 524–527 (2008).

[41] *See* Donald E. Elliott, *Law and Biology: The New Synthesis?*, 41 Saint Louis University Law Journal 600 (1997); and Gralf-Peter Calliess, Jorg Freiling, and Moritz Renner, *Law, the State, and Private Ordering: Evolutionary Explanations of Institutional Change*, 9 German Law Journal 401–402 (2008). *See*, *e.g.*, Luhmann, Law as a Social System, *supra* at 230–231; and Clark, *The Interdisciplinary Study of Legal Evolution*, *supra* at 1241.

[42] *See*, *e.g.*, Luhmann, Law as a Social System, *supra* at 252, 243.

[43] *See*, *e.g.*, Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 38.

conditions and internal (legal) structures, the legal system have now produced several possible legal concepts available.[44]

However, all these legal concepts tend to be by and large mutually exclusive, due to the very nature of the legal phenomenon: since the latter reasons in terms of "either-or," the co-existence in the same legal system of a legal concept stating A and, simultaneously and for the same situation, a legal concept stating non-A, is often impossible.[45] For example, due to the increasing importance of multinational corporations in the host countries, a group of NGOs develops the legal concept of corporate social responsibility as a legal duty (i.e. a possible base for future liability actions) embedded in each form of economic organization that falls under the definition of "public corporation." At the same time, the in-house attorneys of large corporations produce standard contracts to be used in host countries where corporate social responsibility is excluded unless for the cases explicitly accepted by both parties.[46]

A process of *selection* is therefore required, either mainly according to criteria determined by the very legal system (as for Luhmann and Teubner) or by the actors using the legal system (as for the American versions of evolutionary theory).[47] In both cases, legal and non-legal actors are suggested, mostly through the pressure coming from the surrounding environments (*e.g.* the business world), which legal concept is to prevail and, implicitly, which is to disappear.[48] For example, there is a formation within the interna-

[44] *See*, *e.g.*, Luhmann, Law as a Social System, *supra* at 244–245; and Deakin and Wilkinson, The Law of the Labour Market, *supra* at 32. The dualism American/exogenous vs. European/endogenous sketched in this work should however be considered as a pretty rough and ideal-typical (and therefore relative) categorization.

[45] *See* Luhmann, Law as a Social System, *supra* at 244; and Oliver W. Holmes, *Law in Science and Science in Law*, 12 Harvard Law Review 448 (1899).

[46] *See*, *e.g.*, Jennifer A. Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law 17–20 (Cambridge: Cambridge University Press, 2006). As to another example coming from the evolutionary approach to the law, *see*, *e.g.*, Robert C. Clark, *Abstract Rights versus Paper Rights under Article 9 of the Uniform Commercial Code*, 84 Yale Law Journal 449–464 (1975).

[47] *See*, *e.g.*, Deakin and Wilkinson, The Law of the Labour Market, *supra* at 277; and Luhmann, Law as a Social System, *supra* at 248. *But see* Donald E. Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, XIII Journal of Legal Studies 140–142 (1984). *See also* Ruhl, *The Fitness of Law*, *supra* at 1434–1435; Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 30–31, and Sinclair, *Evolution in Law*, *supra* at 57.

[48] *See*, *e.g.*, Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, *supra* at 1356; and Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, *in* R. Rawlings (ed.), Law, Society and Economy: Centenary Essays for The London

tional community (also due to UN documents) of a "shared-by-all" basic value: corporations have to exercise their economic activities in the spirit of promoting the general welfare of the community of the host country and not only of their shareholders. Therefore, the major corporations adopt a series of standard code of conducts considering the concept of social responsibility as an essential part of the corporate activities.[49]

After this selection, a process of *stabilization* or *retention* takes place: the surviving legal concepts are then embedded in the legal system as fully operative, or, in legal theoretical terms, they become the law valid and in force since the addressees perceive them as binding and (in the vast majority of cases) operate accordingly.[50] This process of embodiment into the legal system can, for instance, take place through an hypothetical convention of the World Trade Organization, ratified by the required number of its members in order to become binding. As consequence of such ratified convention, a series of constant and uniform practices take place both by state-based authorities (*e.g.* courts) and non-state based organizations (*e.g.* international professional associations); all these practices are then directed in considering as beneficiary of the legal status of "corporation" only those forms of organizations that promote their economic activities in the full respect and fulfillment of the stakeholders' rights.

One can immediately notice how this very process of stabilization is what can be defined as the proper law-making process, at least from a Hartian legal actors' perspective, since this phase is the one coinciding with either the legislative measures or judicial activism imposing upon the entire (international) legal system the "surviving" legal concept.[51] In order to stress this co-

School of Economics and Political Science 1895–1995 165 (Oxford: Clarendon Press, 1997). *But see* Marc Amstutz, Andreas Abegg, and Vaios Karavas, *Civil Society Constitutionalism: The Power of Contract Law*, 14 Indiana Journal of Global Legal Studies 257 (2007).

[49] *See*, *e.g.*, Peter Muchlinski, Multinational Enterprises and The Law 100–102 (2nd ed., Oxford: Oxford University Press, 2007). *See also* Gunther Teubner, *Company Interest: The Public Interest of the Enterprise "In Itself"*, *in* R. Rogowski and T. Withagen (eds.), Reflexive Labour Law –Studies in Industrial Relations and Employment Regulation 50 (Deventer: Kluwer, 1994).

[50] *See*, *e.g.*, Deakin and Wilkinson, The Law of the Labour Market, *supra* at 32. *See also* Sinclair, *The Use of Evolution Theory in Law*, *supra* at 453; Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 26; and Luhmann, Law as a Social System, *supra* at 232, 247.

[51] *See* Martina Eckardt, *Explaining Legal Change from an Evolutionary Economics Perspective*, 9 German Law Journal 440–449 (2008).

incidence between the process of retention and the proper "law-making," one should consider the fact that in the evolutionary literature the retention phase goes sometimes under the name of "selective retention." This terminology is used in order to stress the very fact that legal concepts are retained not spontaneously by the legal system but through an explicit and planned act such as the (either legislative or judicial) law-making.[52]

Moreover, this identification of the selection phase with the first step of a "real" law-making, at least from a legal perspective, is also confirmed by the fact that the new legal concept to be stabilized is often constructed by actors (*e.g.* in-house attorneys) who are located outside the traditional institutional channels enjoying the law-making authority.[53] In the end, the effect of this process of stabilization is that a new category, such as a new type of corporation "inclusive *per default* of social responsibilities," becomes fully binding for an entire community. This authoritative character is given to the concept by those legal actors to which traditionally are attributed the legal power and legitimization of imprinting certain models of behavior as legal (*e.g.* national and international assemblies).[54]

As it can be seen from this brief and necessarily rough sketch that the skepticism that the evolutionary approach encounters in large sectors of legal world is largely unfounded, or at least, is grounded on the wrong ideas. To immediately connect evolutionary theory to a sort of social Darwinism explanation of the law and its making, *i.e.* an explanation justifying the dominant legal cultures and their paradigms (or principles) as being *per se* the best

[52] *See*, *e.g.*, Suri Ratnapala, *Eighteenth-Century Evolutionary Thought and its Relevance in the Age of Legislation*, 12 Constitutional Political Economy 54 (2001). *See also* Sinclair, *The Use of Evolution Theory in Law*, *supra* at 455, 467–468; Hutchinson, *Work-in-progress*, *supra* at 254; and Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harvard Law Review 1118 (1997). *But see* Luhmann, Law as a Social System, *supra* at 259; and Teubner, Law as an Autopoietic System, *supra* at 51.

[53] *See* Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 35 Stanford Journal of International Law 70 (1996). *See also* Martin Shapiro and Alec Stone Sweet, *Judges and Company*, *in* M. Shapiro and A. Stone Sweet, On Law, Politics, and Judicialization 294 (Oxford: Oxford University Press, 2002). *See*, *e.g.*, Gregory C. Shaffer, *How Business Shapes Law: A Socio-legal Framework*, 42 Connecticut Law Review 172–176 (2009); or Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 Law and Society Review 795–801 (2008).

[54] *See*, *e.g.*, Elliott, *Holmes and Evolution*, *supra* at 133. *See also* Sinclair, *The Use of Evolution Theory in Law*, *supra* at 457–458; and Luhmann, Law as a Social System, *supra* at 256–257.

in a sort of deterministic way, paradoxically neglects the very evolution that the evolutionary theories have gone through.[55]

If one considers the basic ideas behind the modern evolutionary approaches to the legal phenomenon, there are only two things they still have in common with Charles Darwin's original evolution theory and its subsequent distortions as a social theory. They both aim at finding some general explanatory model to clarify how complex phenomena, such as an animal species or a legal system, change.[56] Moreover, both Darwin and contemporary evolutionary approaches to law aim at pointing out that such changes always occur in multiple phases. The law and its parts, like the animal species and its parts, have continuous relations both with the surrounding environments and with their internal structures and these interplays between environment and structures is in the end the one determining the shape of the law as it does for the animal species.[57]

The basic feature characterizing the evolutionary approach to the law as "Darwinian" eventually is the same as that characterizing many legal theoretical approaches to the law-making process: the attempt to explain the processes of law-making by taking into consideration not only the internal structures and different parts of a legal system, but also how these internal aspects relate and somehow "survive" the confrontation with the external realities in which the results of the evolution (*e.g.* a new statute) are to exist.[58] As pointed out by Herbert J. Hovenkamp:

> "Jurisprudence was also "evolutionary" long before Darwin, and it continues to be evolutionary. Like most other intellectual disciplines, jurisprudence needs a

[55] *See* Fried, *The Evolution of Legal Concepts*, *supra* at 303–304. *See also* Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 656.

[56] *See* Stephen Jay Gould, Bully for Brontosaurus: Reflections in Natural History 455 (New York: W. W. Norton & Company, 1991).

[57] *See*, *e.g.*, Sinclair, *The Use of Evolution Theory in Law*, *supra* at 471; or Jan M. Smits, *Scotland as a Mixed Jurisdiction and The Development of European Private Law: Is There Something to Learn from Evolutionary Theory?*, 7 Electronic Journal of Comparative Law 5 (2003), available at http://www.ejcl.org/75/art75-1.html (last accessed: April 30, 2010). *But see* Luhmann, Law as a Social System, *supra* at 233. *See also* Deakin, *Evolution for Our Time*, *supra* at 39.

[58] *See* Deakin and Wilkinson, The Law of The Labour Market, *supra* at 30. *See also* David Jabbari, *From Criticism to Construction in Modern Critical Legal Theory*, Oxford Journal of Legal Studies 526–530 (1992); and Holmes' evolutionary model of judicial law-making as reconstructed by Elliott, *Holmes and Evolution*, *supra* at 139–145. *But see* Gordon, *Critical Legal Histories*, *supra* at 60–61.

> theory of change…. Today every theory of jurisprudence worth contemplating incorporates a theory of change."[59]

These being the major features of the evolutionary theory and its idea of legal evolution, the relevance and potential this approach can have in becoming a theory of law-making turns out to be quite evident. One should in particular pay attention to Hart's idea of *legal theory* as that part of the legal discipline aimed at generally seeking "to give an explanatory and clarifying account of law as a complex of social and political institutions" from the perspective of the legal actors or, as expressed by the English legal philosopher, the "internal point of view of a legal system."[60] To reduce the changes of the law into the three major ideal-typical phases of variation, selection, and retention can help the legal scholar in the typical task of legal theory: the *clarification* and *explanation* of how and why the law-making has taken place, i.e. how and why a certain concept has become the prevailing one (i.e. the "only and true" legal) within a certain legal system.[61]

The evolutionary approach can help the legal scholar in clarifying the evolution of a certain legal concept by not dismissing, based on an *ex ante* theoretical assumption, the complexity of the law-making. Instead, the evolutionary theory offers a way to approach legal changes that takes into consideration, all with the same level of attention at least *ab initio*, the possible factors (both legal and non-legal) that participate in the creation, selection, and

[59] Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 645–646 [footnotes omitted]. *See also* Stein, Legal Evolution, *supra* at ix; Julius Stone, Social Dimensions of Law And Justice 36 (Stanford: Stanford University Press, 1966); and Deakin, *Evolution for Our Time*, *supra* at 41–42.

[60] Herbert L. A. Hart, *Postscript*, *in* H. L. A. Hart, The Concept of Law 239 (2nd ed., Oxford: Clarendon Press, 1994). *See also* Joseph Raz, Practical Reason and Norms 53–54 (Oxford: Oxford University Press, 1990). *But see* Robert N. Moles, Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition 10–106 (Oxford: Basil Blackwell, 1987). *See also* Christiane C. Wendehorst, *The State as a Foundation of Private Law Reasoning*, 56 American Journal of Comparative Law 569–571 (2008).

[61] *See* Herbert L. A. Hart, *Problems of the Philosophy of Law*, *in* H. L. A. Hart, Essays in Jurisprudence and Philosophy 103–105 (Oxford: Clarendon Press, 1983); Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, *in* J. Coleman (ed.), Hart's Postscript: Essays on the Postscript to the Concept of Law 30–31 (Oxford: Oxford University Press, 2001); and Robert S. Summers, *On Identifying and Reconstructing a General Legal Theory –Some Thoughts Prompted By Professor Moore's Critique*, 69 Cornell Law Review 1024–1025 (1984). *See also* Brian Burge-Hendrix, Epistemic Uncertainty and Legal Theory 58–65 (Aldershot: Ashgate, 2008).

retention through time of a certain legal concept.[62] In other words, the evolutionary theory helps the legal scholar to avoid falling into offering too plain and general, and therefore useless, clarifying stances, where legal changes are reduced to either purely non-legal factors (such as "it is all politics") or merely mechanisms internal to the legal system under consideration.[63] For example, the establishment at international level of a form of corporation which legally incorporates some responsibilities towards the community, can be ascribed neither to a "pure" technical construction by some law professors nor exclusively to the lobbying work by some powerful NGOs. Instead, an evolutionary approach can help legal scholars to find the solution in the complex interaction between the dominant idea of what a corporation is among the legal actors and the fact that the latter live and work in an environment affected by also the political, economic, and social discourses.[64]

From an explanatory perspective, the evolutionary approach and its focus on processes (rather than results or actors) allows simplifying, to a certain extent, the whole picture of the course of creation of a new legal category.[65] The legal scholar using an evolutionary approach can articulate the explanation of the process of change and stabilization around three main phases, in each of which legal and non-legal factors can simultaneously play a more (or less)

[62] *See*, *e.g.*, Smits, *The Harmonisation of Private Law in Europe*, *supra* at 89–90; Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, *supra* at 1350–1353. *See also* Kornhauser, *A World Apart?*, *supra* at 770–771.

[63] *See*, *e.g.*, Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harvard Law Review 570 (1982); and Kelsen, The Pure Theory of Law, *supra* at 6, 8–10. *See also* Kornhauser, *A World Apart?*, *supra* at 756. *But see*, *e.g.*, Curtis J. Milhaupt and Katharina Pistor Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development around the World 200 (Chicago: University of Chicago Press, 2008). As to the necessity in legal theory of avoiding over-simplification at the expenses of the clarifying task, *see* Robert Alexy, The Argument from Injustice: A Reply to Legal Positivism 43 (Oxford: Oxford University Press, 2002).

[64] *See*, *e.g.*, Gunther Teubner, *Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility*, *in* K. J. Hopt and G. Teubner (eds.), Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses on Corporate Social Responsibility 149–177 (Berlin: Walter de Gruyter, 1985); or Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 Cornell International Law Journal 176–183 (2007).

[65] *See*, *e.g.*, Robert C. Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 Yale Law Journal 92–93 (1977). *See also* Elliott Sober, Philosophy of Biology 119 (Oxford: Oxford University Press, 1993). *But see* Smits, *The Harmonisation of Private Law in Europe*, *supra* at 89; and Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System*, *supra* at 893–916.

important role. In this way, and fulfilling the fundamental postulate for a middle-range theory in order to be useful, the explanation can simplify (in three phases) the process of creation of legal concepts taking place in reality, but without losing the capacity of showing its articulate nature (i.e. the mixed role of legal and non-legal factors).[66]

For example, the evolutionary approach can show how the creation of the legal concept of "corporation with social responsibilities" binding multinational corporations is neither the product of an unique planning master mind (*e.g.* a sort of Multinational NGO) nor the unexpected fruit of a chaotic series of independent and separate micro-creative processes, both of legal and non-legal nature. Instead, the legal scholar using the evolutionary approach can explain the birth of the legal concept as the result of a process where different actors have interacted in a more or less rational way and have followed, more or less, certain patterns in creating alternative possible solutions and in "selling" these solutions as the best fitting for improving the relations between the multinational corporations and the environments in which the corporations operate.[67]

Being the potential contributions that an evolutionary theory fruitful both in clarifying and explaining the law and its processes of change, it appears quite difficult to understand why legal theories, and the legal discourses shared by the legal actors in general, have somehow left this kind of approach at the borders of their attention. However, this is not a "miss" by all contemporary legal theories and all legal actors, but, as the following part will show, this choice of somehow ignoring the evolutionary theory and all its possible

[66] *See* Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 5 University of Pennsylvania Law Review 961–962, 972–974 (1957); Waluchow, Inclusive Legal Positivism, *supra* at 19–21; and Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 University of Chicago Law Review 1448 (1990). *See also* Robert K. Merton, Social Theory and Social Structure 151–153 (2nd ed., New York: Free Press, 1968); and a recent empirical study by Ronald J. Allen and Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 Chicago-Kent Law Review 683 (2002).

[67] *See*, *e.g.*, Faith Stevelman, *Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law*, 53 New York Law School Law Review 823–827 (2009). *Compare* Harwell C.A. Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 University of Kansas Law Review 83–134 (2002); or Kimberly Ann Elliott and Richard B. Freeman, Can Labor Standards Improve Under Globalization? 147–150 (Washington, DC: Institute for International Economics, 2003).

contributions can be traced back to a fundamental lack characterizing this very approach.

2. Evolutionary Theory of Law-making And Its Missing The Normative Component

Once accepted that the evolutionary approach can potentially contribute in several ways to the major tasks required to a theoretical investigation of the law-making, the question remains open as why the evolutionary theory needs to be expanded and cannot enter as it is as full legitimized member within the category of legal theory dealing with the creation of law. As seen right above in Part One (*The Evolutionary Theory of Law-making*), legal theory is an intellectual enterprise with clarifying and explicatory purposes; therefore the first step is to point out *what* an evolutionary approach has to clarify and explain if it aims in becoming a legal theory.

Traditionally a legal theory can be categorized as either *descriptive* legal theory, when directed at explaining what the law is (and the reasons and effects of this definition), or *normative* legal theory, in case it has as its main target what the law ought to be.[68] However, this separation has progressively disappeared in recent decades, due in particular to the critiques of the idea of "description" as developed by legal realists, critical legal theories, and Ronald Dworkin.[69] For instance, Dworkin points out how all legal theories present

[68] *See* Raymond Wacks, Understanding Jurisprudence: An Introduction To Legal Theory 7–8 (2005); Joseph Raz, Practical Reason and Norms 11 (Princeton, NJ: Princeton University Press, 1990); Veronica Rodriguez Blanco, *The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited*, 19 Ratio Juris 26–27 (2006); Gerald J. Postema, Bentham and the Common Law Tradition 332 (Oxford: Clarendon Press, 1986); and Frederick Schauer, *Defining Originalism*, 19 Harvard Journal of Law and Public Policy 343–345 (1996). *See also* Oliver Wendell Holmes, *The Path of the Law*, 10 Harvard Law Review 457–460 (1897). *Compare* Michael Moore, Placing Blaime: A General Theory of the Criminal Law ch. 1 (Oxford: Oxford University Press, 1998). More specifically as to the legal positivism, *see* David Dyzenhaus, *The Genealogy of Legal Positivism*, 24 Oxford Journal of Legal Studies 52 (2004). *Compare* Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 Oxford Journal of Legal Studies 688–689 (2006); Samuel I. Shuman, Legal Positivism: Its Scope and Limitations 35 (Detroit: Wayne State University Press, 1963); and Gardner, *Legal Positivism*, *supra* at 202–203, 222, and 225. *But see* Deakin, *Evolution for Our Time*, *supra* at 36.

[69] *See*, *e.g.*, Ronald Dworkin, *A Reply*, *in* M. Cohen (ed.), Ronald Dworkin and Contemporary Jurisprudence 254 (London: Gerald Duckworth & Co., 1984); Ronald

in the end a normative component since all legal scholars carry in their purposively neutral depictions of law an ideal model of society they want to force upon the addressees, implicitly or explicitly.[70]

Nowadays, at least all the major legal schools incorporate in their theoretical frameworks both a description of what law is (*descriptive component*) and a prescription of what law ought to be (*normative component*).[71] Contemporary legal theory varies considerably of course as to what kinds of ideal-models the law ought aim to (*e.g.* economic efficiency, consistency, justice); moreover, differences remain as to the goal of legal theory being the *description of the "normative" proposals* legal actors ought to follow (as for the exclusivist legal positivism or Hart's legal theory) or the *prescription* of those proposals (as for Critical Legal Studies).[72] In any case, normative proposals in general are a necessary component of every legal theory, either in the form of identifying them or in order of sponsoring them since, as admitted by Gardner, lawyers and law teachers "expect the philosophy of law to be the backroom activity of telling front-line practitioners how to do it well, with their heads held high."[73]

Dworkin, Law's Empire 13–14 (Cambridge, Mass.: Harvard University Press, 1997); and Roberto Mangabeira Unger, What Should Legal Analysis Become? 122–123 (Oxford: Oxford University Press, 1996). *See also* Joseph Raz, The Morality of Freedom 63–64 (Oxford: Clarendon Press, 1986); Dyzenhaus, *The Genealogy of Legal Positivism*, *supra* at 53; and Gardner, *Legal Positivism*, *supra* at 208–210. *See also* Patricia Werhane, *The Normative/Descriptive Distinction in Methodologies of Business Ethics*, 4 Business Ethics Quarterly 175, 175–179 (1994), as for a similar criticism as to the investigation of another normative system (business ethics).

70 *See* Ronald Dworkin, *Law's Ambitions for Itself*, 71 Virginia Law Review 173 (1985). *See also* Tuori, Critical Legal Positivism, *supra* at 300–304.

71 *See* Waluchow, Inclusive Legal Positivism, *supra* at 29–30; Roscoe Pound, Social Control Through Law 118 (New Brunswick: Transaction Publishers, 1997); Raz, *Authority, Law, and Morality*, *supra* at 219–221; and Timothy A. O. Endicott, *Herbert Hart and the Semantic Sting*, *in* Coleman (ed.), Hart's Postscript, *supra* at 41–47.

72 *See* Margaret Radin and Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 University of Pennsylvania Law Review 1020, 1023–1024 (1991); Joseph Raz, Practical Reason and Norms 153 (Oxford: Oxford University Press, 1990); and Pierre J. Schlag, *Normativity and the Politics of Form*, 139 University of Pennsylvania Law Review 811 (1991). *See also* Cotterrell, The Politics of Jurisprudence, *supra* at 3; and George Pavlakos, *Normative Knowledge and the Nature of Law*, *in* S. Coyle and G. Pavlakos (eds.), Jurisprudence or Legal Science? A Debate About The Nature of Legal Theory 101–102 (Oxford: Hart Publishing, 2005). *But see* Blanco, *The Methodological Problem in Legal Theory*, *supra* at 27.

73 Gardner, *Legal Positivism*, *supra* at 203. *See also* Dworkin, Law's Empire, *supra* at 110; and Schlag, *Normativity and the Politics of Form*, *supra* at 808; Brian Bix, *Joseph Raz and*

Being this the situation, one can see that the evolutionary approach, though as seen above being a suitable instrument for better understanding the evolution of a legal concept, it lacks a fundamental component in order to be used inside a broader legal theoretical investigation: an explicit normative component.[74] By "normative component" is then meant the second step of a legal theoretical investigation where, once it has been understood how and why a certain legal concept has evolved, the legal scholar is also able to offer to legal actors (either in descriptive or prescriptive terminology) criteria according to which decide the future hard cases or law-making in general on the issue.[75] For example, it is not enough for the legal actors the explanation and clarification of both the reasons (*why*) and the modalities (*how*) through which the concept of corporation has come to not include among its basic features the one of operating according to social responsibility standards. The inhabitants of the legal world always expect from a certain theory also an explanation, *e.g.* in terms of justice or economic efficiency, as to why and how social responsibility should be included (or not) in future law-making and decision-making as a fundamental (and therefore *per default* embedded)

Conceptual Analysis, 6 American Philosophical Association: Newsletter on Philosophy and Law 3 (2007); Neil D. MacCormick, Legal Reasoning and Legal Theory 63–64, 139–140 (2nd ed., Oxford: Clarendon Press, 1994); Fredrik Schauer, *Positivism as Pariah*, *in* George (ed.), The Autonomy of Law, *supra* at 34; and Dyzenhaus, *The Genealogy of Legal Positivism*, *supra* at 50. *Cf.* Raz, The Authority of Law, *supra* at chaps. 12–13.

74 *See*, *e.g.*, Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 Michigan Law Review 1652 (1989); or Hutchinson, *Work-in-Progress*, *supra* at 260. As stressed by many critiques, it is possible however to detect in most of the evolutionary approaches to the law some hidden normative components. *See*, *e.g.*, Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner's Case For "Reflexive Law"*, 18 Law and Society Review 279, 281, 284–285 (1984). *See also* Smits, *The Harmonisation of Private Law in Europe*, *supra* at 81; Luhmann, Law as a Social System, *supra* at 233; Stein, Legal Evolution, *supra* at 122; Teubner, *Substantive and Reflexive Elements in Modern Law*, *supra* at 273; or Teubner, *Autopoiesis in Law and Society*, *supra* at 330. *But see* Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 Law and Society Review 294 (1984).

75 *See* Holmes, *The Path of the Law*, *supra* at 474. *See also* Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 Journal of Contemporary Health Law and Policy 272–273 (1993). In this sense, the evolutionary approach to law becomes in the end what David Lyons describes as a "genetic" theory of law. *See* David Lyons, Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility 214 (Cambridge: Cambridge University Press, 1993).

component in the legal concept of corporation.[76] As stressed by an evolutionary scholar,

> "[I]f law is to be more than the record of commands backed by superior force, a jurisprudential theory is needed which explains why there is an obligation to obey law, and which gives meaning to arguments that law is right or wrong (rather than simply *is*)."[77]

If one looks at the evolutionary theory of law in its present form, it appears that evolutionary theory explains the changes in the law and can therefore be useful for lawyers, judges, and scholars. However, this use by legal actors is heavily restricted by the fact that this approach tends to limit its attention to what has happened. At the very moment a lawyer working for a drafting committee would need a general theory for some guidelines, *i.e.* in order to face a legal dilemma caused either by change of the surrounding environment or by internal development to the legal world, evolutionary theory as a possible legal theoretical first-aid kit fails, being focused on explaining what and why the change has happened instead of how to "remedy" to it.[78]

As a critique of the evolutionary approach has pointed out,

> "[L]aw ultimately is driven not solely by impersonal pressures to achieve greater functionality, but at least to some degree also by the intelligent design of human creators. In that fundamental respect, the analogy to evolutionary theory breaks down."[79]

An evolutionary approach to law-making, therefore, in order to become an approach useful for legal actors, needs not only to explain the past but also to somehow influence the design the law-making actors has in mind for the

[76] *See* Kellye Y. Testy, *Capitalism and Freedom – For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 Law and Contemporary Problems 89 (2004).

[77] Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 92 [italics in the text].

[78] *See* Ratnapala, *Eighteenth-Century Evolutionary Thought and its Relevance in the Age of Legislation*, *supra* at 71; and Herbert J. Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 Vanderbilt Law Review 344 (1993). *See*, *e.g.*, John H. Beckstrom, Sociobiology and the Law: The Biology of Altruism in the Courtroom of the Future 58–59 (Urbana, Ill.: University of Illinois Press, 1985); or Luhmann, Law as a Social System, *supra* at 265. *See also* Duxbury, *Evolutionary Jurisprudence*, *supra* at 575; and Gordon, *Critical Legal Histories*, *supra* at 68, 71.

[79] John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 Texas Law Review 5 (2007).

law that "ought-to-be." In the end of the day, "[l]egal innovations require legal innovators. No theory of legal change can afford to neglect the forces that animate lawyers."[80] The evolutionary studies must be then directed into the future of possible laws, in particular by elaborating a normative theory capable of helping law-making actors to create, select, and stabilize future legal concepts adapted to changed circumstances.[81]

As to the historical reason for such limitation of the evolutionary theory to investigating only the why and how a certain legal concept has become the dominating one, one should start by considering that this theory was born in order to explain phenomena different from the law, or at least to explain the legal phenomenon from a non-legal perspective.[82] The evolutionary approach started as a metaphorical or analogical reproduction of the results reached in the natural sciences and biology (as to some American versions of evolutionary theory) or as a (more or less) direct transposition into legal analysis of methodologies created for social and economic sciences (as for the European side of the story).[83] As stressed for instance by Luhmann,

[80] Horowitz, *The Qur'an and the Common Law*, *supra* at 250–251.

[81] *See* Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 93; and, more generally, Schlag, *Normativity and the Politics of Form*, *supra* at 843–852. *See also*, as to an ontological gap between descriptive statements and normative statements (the so-called *Hume's guillotine*), David Hume, A Treatise of Human Nature 469–470 (2nd ed., Oxford: Clarendon Press, 1978 [1739–1740]).

[82] *See*, *e.g.*, Strahlendorf, Evolutionary Jurisprudence, *supra* at 26–27, 574. *See also* Michael B. W. Sinclair, *Autopoiesis: Who Needs It?*, XVI Legal Studies Forum 81–86 (1992).

[83] *See* Teubner, Law as an Autopoietic System, *supra* at 52–53. As to the American version of evolutionary approach to the law, *see*, *e.g.*, Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 38–39; or Hutchinson, *Work-in-Progress*, *supra* at 262–265. *But see*, as representative of a direct application (i.e. not metaphorical) of biology and behaviorist sciences in the understanding of the evolution of the law ("sociobiological theories of law"), Beckstrom, Evolutionary Jurisprudence, *supra* at 76–95; Wojciech Zaluski, Evolutionary Theory and Legal Philosophy 69–74, 79–81, 102–105 (Cheltenham: Edward Elgar, 2009); Owen D. Jones, *Proprioception, Non-Law, and Biolegal History: The Dunwody Distinguished Lecture in Law*, 53 Florida Law Review 872–873 (2001); Erin Ann O'Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 Chicago-Kent Law Review 1055–1058 (2004); and Owen D. Jones, *Evolutionary Analysis in Law: Some Objections Considered*, 67 Brooklyn Law Review 207 (2001). As to the European version of evolutionary approach, *see*, *e.g.*, Teubner, Law as an Autopoietic System, *supra* at 21, 49. *See also* Smits, *The Harmonisation of Private Law in Europe*, *supra* at 83–88.

> "Legal knowledge is concerned with a normative order. Sociology is concerned with… social behaviour, institutions, social systems –that is, with something that is what it is, and which, at best, calls for a prognosis or an explanation."[84]

As a consequence, evolutionary theory tends to disregard, when applied to the legal phenomenon, both the specific nature of its object of investigation (the law), and especially the fundamental role played in the very formation of this object by the (internal) perspective adopted by the legal players, among which legal scholars should be included.[85]

For example, some of the evolutionary approaches to the law stress the idea of "organicity" as underpinning criterion behind the description of legal evolution in the Western legal systems.[86] This criterion of organicity is used in particular in order to stress the importance in the legal development of the "spontaneous" judicial law-making (as to the American version of the evolutionary theory approach) or the non-state based law-making (as in the case of the European version) against the "creationist" legislative law-making. However, this idea tends to disregard the fact that there is never a spontaneous law-making, being the latter always the creation by institutional actors with their own ideas and plans as to "what is best" for the law and the community at large, either as national assembly, as a judicial body, or as a conglomerate of business organizations.[87]

[84] Luhmann, Law as a Social System, *supra* at 57. *See also* Linda Hamilton Krieger and Susan Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 California Law Review 1007 (2006).

[85] *See* Teubner, *Autopoiesis in Law and Society*, *supra* at 300. *But see* Gunther Teubner, *"And God Laughed…": Indeterminacy, Self-Reference and Paradox in Law*, *in* J.-P. Dupuy and G. Teubner (eds.), Paradoxes of Self-reference in The Humanities, Law and The Social Science 29 (Stanford: Anma Libri, 1991). *Compare* Edward L. Rubin, *Legal Scholarship*, *in* D. Patterson (ed.), A Companion to Philosophy of Law and Legal Theory 562–563 (Oxford: Blackwell Publishing, 1996). *See also* the accusation of "reductionism" as addressed to the evolutionary approach to the law in Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner's Case For "Reflexive Law"*, 18 Law and Society Review 381 (1984).

[86] *See*, *e.g.*, Smits, *The Harmonisation of Private Law in Europe*, *supra* at 81; or Robert Sugden, *Spontaneous Order*, *in* P. Newman (ed.), The New Palgrave Dictionary of Economics and the Law Vol. III 488 (London: Palgrave Macmillan, 1988).

[87] *See* Sinclair, *Evolution in Law*, *supra* at 39; and Jeff L. Lewin, *The Genesis and Evolution of Legal Uncertainty about "Reasonable Medical Certainty"*, 57 Maryland Law Review 391 (1998).

In other words, the evolutionary approach does not take into consideration one of the basic points for a law-making in modern capitalistic society: its instrumental rationality (in German, *Zweckrationalität*), both in its substantive or more formal meaning.[88] According to Max Weber, instrumental rationality can be defined as the criteria leading to getting the result one is aiming to achieve by using the best means available, *i.e.* relative to the circumstances in a certain time and space.[89] It is often the very changes in the circumstances (internal or external to the legal system) in which the law operates that force legal, political, and social actors to activate the law-making.[90]

One feature of legal discipline in the legal phenomenon, as pointed out by Alf Ross among the others, is its capability of changing (either intentionally or unintentionally) the very object of observation, i.e. the law.[91] In contrast to most natural sciences, and to a more direct and higher degree than for most of the social and economic sciences, legal scholars can actually influence in a direct way the choice of patterns of future development of the law.[92] For example, law professors, by claiming the existence of a certain legal principle of efficiency inside family law as an established "fact," can actually

[88] *See* Weber, Economy and Society, *supra* at 654–658, 866. *See also* Max Rheinstein, *Preface*, *in* M. Rheinstein (ed.), Max Weber On Law in Economy and Society i, xlii (1954). *But see*, *e.g.*, David Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 Wisconsin Law Review 746–747 (1972); or Alan Hunt, The Sociological Movement in Law 122–128 (London: Palgrave Macmillan, 1978). *Compare* Weber's defense in Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 Law and Society Review 494–497 (1987).

[89] *See* Weber, Economy and Society, *supra* at 636–637. *But see* Anthony T. Kronman, Max Weber 73–75 (London: Edward Arnold, 1983); and Jürgen Habermas, The Theory of Communicative Action, Vol. 1: Reason and the Rationalization of Society 262 (Boston: Beacon Press, 1984).

[90] *See*, *e.g.*, Weber, Economy and Society, *supra* at 669. *But see* Gordon, *Critical Legal Histories*, *supra* at 36.

[91] *See* Alf Ross, On Law And Justice 47 (London: Stevens & Sons, 1959). *See also* Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 University of Chicago Law Review 285 (1979); and Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 University of Illinois Law Review 894–895 (2002). *But see* Luhmann, Law as A Social System, *supra* at 252 and 270. *See*, *e.g.*, Deakin, *Evolution for Our Time*, *supra* at 26–29.

[92] *See* Fredrik Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 Oxford Journal of Legal Studies 495–500 (2005). *See also* Stephen W. Hawking, A Brief History of Time: From the Big Bang to Black Holes 54–56 (New York: Bantam Books, 1988).

force future generations of law-makers and law-applying actors to introduce this principle, even if the original claim was false.[93] Using an epistemological vocabulary, it can be said that Karl Popper's criteria of falsification, at least when applied to legal theories, can (and often tends to) leave room for Robert K. Merton's idea of theory as capable of being a self-fulfilling (or a self-destroying) prophecy.[94]

This quality of the legal discipline in its turn has to do with the specific nature of the law in the modern Western societies: Law is a human product aiming at regulating the relations of human beings with each other and with the surrounding environment.[95] As many legal scholars have pointed out, legal reasoning most of the time is a type of common sense reasoning, *i.e.* it often incorporates and uses moral, political, economic, or other kind of values as criteria for regulating human behaviors.[96] However, legal reasoning has special requirements, due specifically to its normative and conflict resolution

[93] *See* Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 Michigan Journal of Gender and Law 9 (1996). *Cf.* Coleman, The Practice of Principle, *supra* at 27. *See also* Milton Friedman, Essays in Positive Economics 14 (Chicago: University of Chicago Press, 1953); Samuel, Epistemology and Method in Law, *supra* at 222; Michael B. W. Sinclair, *The Semantics of Common Law Predicates*, 61 Indiana Law Journal 384–386 (1986); Ross, On Law And Justice, *supra* at 50; and Quentin Skinner, *Introduction: The Return of Grand Theory, in* Q. Skinner (ed.), The Return of Grand Theory in The Human Sciences 6 (Cambridge: Cambridge University Press, 1990). *See*, *e.g.*, Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 Law and Contemporary Problems 73 (1986). *But see* Stanley Fish, *Theory Minimalism*, 37 San Diego Law Review 763 (2000).

[94] *See* Robert K. Merton, *The self-fulfilling prophecy*, 8 Antioch Review 193–210 (1948); and Ross, On Law And Justice, *supra* at 47 n. 5. *Compare* Karl Popper, The Logic of Scientific Discovery 40–41 (New York: Science Editions, 1961). *See also* Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument 2–3 (Cambridge: Cambridge University Press, 2005); and Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 648. *But see* Clark, *The Interdisciplinary Study of Legal Evolution*, *supra* at 1268.

[95] *See* Lawrence M. Friedman, Total Justice 42 (New York: Russell Sage Foundation, 1985). *See*, *e.g.*, Lon L. Fuller, The Morality of Law: Revised Edition 30–31 (New Heaven, CT: Yale University Press, 1969).

[96] *See*, *e.g.*, Neil D. MacCormick, Rhetoric and The Rule of Law: A Theory of Legal Reasoning 114–120 (Oxford: Oxford University Press, 2005); Cass R. Sunstein, Legal Reasoning and Political Conflict 14–17 (Oxford: Oxford University Press, 1996); Gerald J. Postema, *Jurisprudence as Practical Philosophy*, 4 Legal Theory 332 (1998); and Robert Alexy, The Argument From Injustice: A Replay To Legal Positivism 77 (Oxford: Oxford University Press, 2002). *But see* Lawrence M. Friedman, *On The Interpretation Of Laws*, 3 Ratio Juris 253 (1988).

roles.[97] The regulation of human behaviors is not based for instance on statements directed at convincing the addressees (as in politics). Legal reasoning is based instead on the use of specific language which, once it has transformed certain religious, cultural, moral, or economic values into legal categories, indicates to the addressees (legal actors and/or the community at large) not models of behaviors they will "probably" embrace, but model of behaviors that the addressees "ought" to embrace.[98]

As seen already above, if one considers legal theory as that part of the legal discipline directed at explaining the law and the functioning of a legal system, legal theory necessarily carries with it a normative component, i.e. a complex of statements made by the legal theoretician in which the latter indicates the direction in which legal actors "ought" to proceed in order to fulfill certain goals that "ought to be" in the legal system.[99] The indication of the "ought-to-be" goals can then be made by using a descriptive terminology, *i.e.* "by looking at the situation *A*, the addressee ought to behave as *y*" (as for some modern legal positivists).[100] The normative component can also be expressed in prescriptive terms, *i.e.* "value *á* is good, and therefore the addressee ought always to behave as *y*" (as for some critical legal theories).[101]

[97] *See* John Bell, *The Acceptability of Legal Arguments*, *in* N. D. MacCormick and P. Birks (eds.), The Legal Mind: Essays for Tony Honoré 55–64 (Oxford: Oxford University Press, 1986). *See also* Thomas F. Gordon. *The Importance of Nonmonotonicity for Legal Reasoning*, *in* H. Fiedler et al. (eds.), Expert Systems in Law: Impacts On Legal Theory and Computer Law 112–120 (Tübingen: Attempto Verlag, 1988).

[98] *See* Kelsen, The Pure Theory of Law, *supra* at 4. *See*, *e.g.*, Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 University of Pennsylvania Law Review 51–53 (2001).

[99] *See* Coleman, The Practice of Principle, *supra* at 178, 199–201. *See also* Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *in* Coleman (ed.), Hart's Postscript, *supra* at 108 n. 22; and Edward L. Rubin, *Law And and the Methodology of Law*, 1997 Wisconsin Law Review 543 (1997).

[100] As an example of "descriptive terminology" of normative components, *see* Coleman, The Practice of Principle, *supra* at 179–186; Kelsen, General Theory of Law and State, *supra* at 163–164; or Hans Kelsen, *What is the Pure Theory of Law?*, 34 Tulane Law Review 269, 270 (1960). *See also* the criticisms in Herbert L. A. Hart, *Kelsen Visited*, *in* S. L. Paulson and B. Litschewski Paulson (eds.), Normativity and Norms: Critical Perspectives on Kelsenian Themes 70–76 (Oxford: Oxford University Press, 1998 [1963]).

[101] As an example of "prescriptive terminology" of a normative component, *see* Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 Boston University Law Review 774–777 (1992); or Caroline Morris, *"Remember the Ladies": A Feminist Perspective on Bills of Rights*, 33 Victoria University of Wellington Law Review 29 (2002). *See also* Robert W. Gordon, *New Developments in Legal Theory, in* D. Kairys (ed.), The

In both cases, due to the very normative nature of the law, legal theory is always expected not only to contribute through its descriptive component to a better understanding of the past and present law. Modern legal theory is expected to always offer a normative component, *i.e.* a part in which the directions to be used for future law and law-making not only are indicated, but are also "justified" as to be the one that "ought-to-be" taken, for instance because they save the consistency and therefore the legitimacy of the legal system or because by following it, welfare will be maximized or gender discrimination will be eliminated.[102]

Some followers of the evolutionary theory at this point could reply that the evolutionary approach, based on the investigations of how the law became what it is, actually devotes a relevant part of its analysis to future law and law-making. One fundamental component of evolutionary theory is its predictivist component: by explaining how a certain legal category has been created, chosen, and "stabilized" in a certain legal system, evolutionary theory aims to be able to also predict possible alternative patterns of creations of other legal categories.[103] In other words, by explaining how a certain legal category has established itself, evolutionary theory can predict how the latter will probably evolve and/or how it will be substituted.[104] For example, by

Politics of Law: A Progressive Critique 414–417 (2nd ed., New York: Pantheon Books, 1990).

[102] *See* Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 Michigan Law Review 1304–1305 (1991). *See also* Peter M. Cicchino, *Building on Foundational Myths: Feminism and the Recovery of Human Nature: A Response to Martha Fineman*, 8 American University Journal of Gender, Social Policy and The Law 76 (2000). *Compare* the shifting of Law and Economics as in Richard A. Posner, Economic Analysis of Law 14–15 (3rd ed., Boston: Little Brown & Co., 1986), to Posner, The Problems of Jurisprudence, *supra* at 353–374.

[103] *See* Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 30; and Teubner, Law as An Autopoietic System, *supra* at 49. Though in a much more cautious way, *see also* Philippe Nonet and Philip Selznick, Law And Society In Transition: Towards Responsive Law 17 (New York: Harper and Row, 1978). *But see* Luhmann, Law As A Social System, *supra* at 14, 273; and Marie Theres Fögen, Rechtsgeschichte – Geschichte der Evolution eines sozialen Systems: Ein Vorschlag 18–19, available at: http://rg.mpier.unifrankfurt.de/fileadmin/user_upload/PDF/rg01/rg01_debatte_foegen.pdf (last accessed: April 30, 2010). As to the meaning of "predictivist" as used in this work, *see* Stephen G. Brush, *Dynamics of Theory Change: The Role of Predictions*, II Proceedings of The Biennial Meeting of The Philosophy of Science Association 135 (1994).

[104] *See*, *e.g.*, Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 Northwestern University Law Review 1194–

looking at the history of corporate law and its economic underpinnings, evolutionary theory can predict that, in the future, the economic factors (*in primis* the idea of corporation as an organization to increase the wealth of the shareholders) in the end will always weight more over other types of considerations (*e.g.* the respect of the environment). However, predictions are not normative propositions, or at least not explicitly.[105] The directions each legal theory is to offer to legal actors are not predictions (at least not directly) of what will happen; they are normative directions, i.e. patterns that lawyers, judges and law-makers ought to take because they are (morally, politically, culturally, legally, and so on) "the right thing" to do, often regardless of the surrounding legal, political, social, or economic environment.[106]

Moreover, normative propositions can have a direct performative force.[107] By taking the suggested normative patterns and due to the very nature of the law as human creation, legal actors in the end are able to shape the law in a certain direction, regardless of all the possible predictions made by the legal scholarship.[108] A classical example is the concept of "corporate personality" in the modern history of US corporate law. Corporations were not considered as a "person" throughout most of American legal history when, due to the legal landslide provoked in 1886 by the Supreme Court's decision in *Santa Clara v. Southern Pacific Railroad*, corporate personality suddenly exploded within the legal discourse as a binding legal concept allowing the pro-

1195 (2001); Jan M. Smits, *Applied Evolutionary Theory: Explaining Legal Change in Transnational and European Private Law*, 9 German Law Journal 482 (2008); or the classical statement in Oliver W. Holmes, *The Path Of The Law*, 10 Harvard Law Review 461 (1897). *But see* Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System*, *supra* at 853.

105 *See* John Dewey, Theory of Valuation 51–52 (Chicago: University of Chicago Press, 1939). *But see* Rudolf Carnap, *Inductive Logic and Rational Decisions*, *in* R. Carnap and R. C. Jeffrey (eds.), Studies in Inductive Logic and Probability 7–9 (Berkeley: University of California Press, 1971). *See also* Dworkin, Law's Empire, *supra* at 154–155.

106 *See* Hart, The Concept of Law, *supra* at 132–137. *See*, *e.g.*, Summers, Instrumentalism and American Legal Theory, *supra* at 12. *But see* Michael Abramowicz, *Predictive Decisionmaking*, 92 Virginia Law Review 70–73 (2006).

107 *See*, *e.g.*, Duncan Kennedy, A Critique Of Adjudication (Fin de siecle) 152 (Cambridge, Mass.: Harvard University Press, 1997). *See also* Roger Cotterrell, Law's Community: Legal Theory In Sociological Perspective 250–252 (Oxford: Clarendon Press, 1995); Sunstein, Legal Reasoning and Political Conflict, *supra* at 191; and Niklas Luhmann, *Law as a Social System*, 83 Northwestern University Law Review 140 (1989). *But see* Luhmann, Law As a Social System, *supra* at 252.

108 *See* Bruce Ackerman, *Revolution on a Human Scale*, 108 Yale Law Journal 2287 (1999). *See also* Blankenburg, *The Poverty of Evolutionism*, *supra* at 278–280.

tection entitled by the Fourteenth Amendment of the US Constitution and originally thought only for physical persons.[109]

In other words, being predictivist in the legal world, *i.e.* the idea of being able to "objectively" determine possible evolutions of the law, can be quite a risky business: Law and its evolution (especially in its decisive moments) takes into serious consideration that which legal actors subjectively consider what the law ought to be from economic, political, or purely systematic criteria.[110] For example, the objective positions of the surrounding environments and of the legal system as to the issue of what "person" means in the Fourteenth Amendment were roughly the same under *Santa Clara v. Southern Pacific Railroad* as they were no more than thirteen years prior under *Slaughter-house Cases*, where (though with a tight 5–4 majority) the equal protection clause was limited not only to physical persons but, among them, mostly only to recently freed slaves.[111]

During both decision one could observe how the surrounding environment presented the same features of large corporations pressuring upon Jus-

[109] *See County of Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 396 (1886). *See also* Herbert J. Hovenkamp, Enterprise and American Law 1836–1937 43–46 (Cambridge, Mass.: Harvard University Press 1991). As to the revolutionary consequences of the Supreme Court decision in *Santa Clara v. Southern Pacific Railroad*, *see* Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 Yale Law Journal 853 (1943); James W. Hurst, The Legitimacy Of The Business Corporation In The Law Of The United States, 1780–1970 66–69 (Charlottesville, Vi.: The University Press of Virginia, 1970); Herbert J. Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Georgia Law Journal 1643 (1988); Thom Hartmann, Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights 5–6, 208–219 (San Francisco: Berret-Koehler, 2004); Justice Hugo Black in *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 85 (1938) (Black dissenting); and Justice William O. Douglas in *Wheeling Steel Corp. v. Glander*, 337 U.S. 576–80 (1949) (Douglas dissenting). *But see*, *e.g.*, Horwitz, The Transformation of American Law 1870–1960, *supra* at 69–70; or Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 University of Chicago Law Review 1463 (1987).

[110] *See* Summers, Instrumentalism and American Legal Theory, *supra* at 134–135. *See also* Jethro W. Brown, *Law and Evolution*, 29 Yale Law Journal 398 (1920); Morris R. Cohen, Law and Social Order: Essays in Legal Philosophy 337 (1933); Hutchinson, *Work-in-progress*, *supra* at 253; and Jürgen Habermas, Knowledge and Human Interests 113–139 (Boston: Beacon Press, 1971). *But see* Deakin, *Evolution for Our Time*, *supra* at 32–34.

[111] *See The Slaughter-House Cases*, 83 U.S. 68–69, 72 (1873). *See also* Horwitz, The Transformation of American Law 1870–1960, *supra* at 69; and Allen K. Easley, *Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns*, 17 Georgia Law Review 697–698 (1983).

tices and law-makers in general in order to be safeguarded from state interferences. Looking at the legal system, one could also notice how the situation was more or less the same, being the Fourteenth Amendment in force already from 1868 and having neither the Supreme Court nor the legislatives marked a clear shift in interpretation of this Constitutional article in the short period between 1873 and 1886. Nevertheless, in the 1886 the majority of the justices sitting in the Supreme Courts subjectively considered that the same text ("person" under the Equal Protection Clause) meant a substantially different thing (having legal personality) from that stated previously in 1873 in *Slaughter-house Cases* (being a US citizen).[112] As consequence, their normative accounts as to American constitutional law (it ought to protect all persons, both physical and legal) not only was unpredictable at that time of *Santa Clara*, i.e. not expected considering the previous decisions and the surrounding environment.[113] Though unpredicted, the Justices' normative statements also became legal reality (constitutional law actually protects corporations against state and federal actions), setting the agenda for predictions as to future corporate law-making and, in particular, as to the constitutional status of the legal entity known as "corporation."[114]

As pointed out by Alan C. Hutchinson, "law will always be a relatively open ended and stylized form of politics in which 'anything might go'."[115] For this reason, and almost paradoxically, the evolutionary theory, in order to become as predictivist as possible, i.e. to foresee which directions the law *will* take, should itself explicitly provide legal actors with some normative criteria, i.e. to offer directions that the law *ought to* take. This actually is one of

[112] It is argued that a central role in this legal revolution has been played by very unpredictable and subjective factors, *e.g.* lawyers and Justices involved. *See* Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale Law Journal 371–378 (1938); and Charles Fairman, Reconstruction and Reunion 1864–88. Part Two 725–728 (New York: Macmillan, 1987); and Lawrence M. Friedman, A History of American Law 343–344 (2nd ed., New York: Simon and Schuster, 1985).

[113] *See* Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell us About its Interpretation*, 39 Akron Law Review 307–308 (2006). *But see* Mark, *The Personification of the Business Corporation in American Law*, supra at 1457. *See also* Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-based Adjudication*, 106 Columbia Law Review 1958–1961 (2006). *But see* Deakin, *Evolution for Our Time*, *supra* at 14.

[114] *See*, *e.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979). *See also* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings Law Journal 580 (1990); and Horwitz, The Transformation of American Law 1870–1960, *supra* at 70–107.

[115] Hutchinson, *Work-in-progress*, *supra* at 265.

the major goals of each legal theory and, in the end, the measurement of its success or failure as such: the capacity to provide law-makers (when facing new realities) and law-appliers (when facing "hard cases") not only with a better picture of the present, but also with criteria or somehow general analytical tools to face, tackle, and change the future.[116] As strikingly expressed by Popper, "[t]heories are nets cast to catch what we call 'the world'; to rationalize, explain and to master it."[117]

As seen at the beginning of this Part, each theory claiming to be legal not only aims at explaining the legal phenomenon but also seeks to help legal actors to work "better" by offering some evaluative cornerstones (criterion *á*) according to which lawyers, law-makers and judges can consider solution *y* as "legal" and solution *z* as "non-legal." The incorporation of a normative component then is a necessary step in order to transform the evolutionary approach to the law into a more popular legal theory, i.e. a theory that is immediately recognizable and used by the legal actors as appropriate in their daily work.[118] This integration means that evolutionary scholars must explicitly offer to legal actors the evaluative cornerstone to be chosen as an axiomatic term in the normative reasoning. A legal evolutionary theory needs to explicitly state whether and why the criterion *á* separating law from non-law, for instance, is the one of "justice," or the one of "economic efficiency," or the one of "formal consistency within the legal system."[119] In order to do so, the evolutionary scholars have then two possible paths to take: either they remain single (i.e. by developing their own normative side) or they expand by absorbing normative elements from a well-established legal theory.

[116] *See* Anthony D'Amato, Jurisprudence: A Descriptive and Normative Analysis of Law 50–51 (1984); and MacCormick, Rhetoric and The Rule of Law, *supra* at 14–15. *See also* Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 50. *Cf.* Richard Dawkins, The Blind Watchmaker 5 (New York: W.W. Norton & Co., 1987). *But see* Julie Dickson, Evaluation and Legal Theory 17 (Oxford: Hart Publishing, 2001).

[117] Karl Popper, The Logic of Scientific Discovery 59 (1961).

[118] *See* David S. Law, *Positive Political Theory and the Law. Introduction: Positive Political Theory and The Law*, 15 Journal of Contemporary Legal Issues 2 (2006); and Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System 3 (2nd ed., Oxford: Clarendon Press, 1980).

[119] *See*, *e.g.*, Steven Walt, *Hart and the Claims of Analytic Jurisprudence*, 15 Law and Philosophy 388 (1996). *See also* Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 42 and 55. *Compare* Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 93.

3. "Creationist" vs. "Darwinist" Legal Theory

Several considerations seem to discourage somehow the evolutionary scholars to remain single among the theories explaining the changes in the legal systems, that is to go alone down the path in developing their own normative component. Generally speaking, as pointed out by a former evolutionary scholar,

> "Legal scholarship should not be so timid as to depend on others for its theoretical models. We might take our inspiration where we find it, but we should build our theories within our own discipline, constrained only by the data that defines it and the criteria of quality appropriate to it."[120]

Therefore, in order to become a theoretical approach useful and used by legal actors, the evolutionary theory should avoid searching to develop its own normative apparatus which, in the end, it will tend to mirror the normative elements developed within the field of knowledge which have inspired the evolutionary approach to law (*e.g.* sociology or biology).[121] Instead, evolutionary scholars should attempt to find within the legal world the normative components which, once added to the already present descriptive part, could

[120] Sinclair, *Evolution in Law*, *supra* at 58. *See also* Niklas Luhmann, Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie 306–307 [Differentiation of Law: Contributions to Legal Sociology and Legal Theory] (Frankfurt a.M.: Suhrkamp, 1981); Hans Kelsen, Über Grenzen zwischen juristicher und soziologischer Methode 52–55 [On the Borders between Legal and Sociological Methods] (Aalen: Scentia Verlag, 1970); Hart, *Definition and Theory in Jurisprudence*, 70 Law Quarterly Review 3–7 (1954); and Brian Bix, *Law as an Autonomous Discipline*, *in* P. Cane and M. Tushnet (eds.), The Oxford Handbook of Legal Studies 975–978 (Oxford: Oxford University Press, 2003). Among the endless literature sponsoring instead an interdisciplinary legal discipline, *see*, *e.g.*, John Dewey, *Logical Method and Law*, *in* L. A. Hickman and T. M. Alexander (eds.), The Essential Dewey. Volume I: Pragmatism, Education, Democracy 361 (Bloomington: Indiana University Press, 1998 [1924]); Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harvard Law Review 867–887 (1990); or Richard A. Posner, *The Deprofessionalization of Legal Training and Scholarship*, 91 Michigan Law Review 1925–1826 (1993).

[121] *See*, *e.g.*, Douglas A. Terry, *Don't Forget About Reciprocal Altruism: Critical Review of the Evolutionary Jurisprudence Movement*, 34 Connecticut Law Review 50–508 (2002). *See also* the critiques in Duncan Kennedy, *Cost-Reduction Theory as Legitimation*, 90 Yale Law Journal 1278–1281 (1281); Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 47; and Jeffrey J. Rachlinski, *Is Evolutionary Analysis of Law Science or Storytelling?*, 41 Jurimetrics 368–369 (2001). *But see* Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 54.

make the acceptance by the inhabitants of the legal worlds, such as judges or lawyers, smoother.[122]

In particular, there are two main reasons for opting to borrow a normative component constructed by a more established legal theory: one of economic nature, the other of theoretical character. As to the economic reason, one must consider that the theoretical thinking as to the law and its making has taken place for more than 2400 years (at least in the Western legal systems).[123] Due to this chronological length, which has resulted in a huge amount of possible explanations and normative messages, it is conceivable that there is "out there" a legal theory which has gained a certain degree of legitimacy among the legal actors and which, at the same time, has come forward with normative messages compatible to or at least very similar to those normative results an evolutionary scholar would come forward if he or she had reached them on his or her own. In short, legal theories with normative components have been on the market for a much longer period so it can possibly be practical to (try to) use their well-oiled system of distribution of normative messages among the legal actors.[124]

Shifting the attention to the theoretical reason favoring a borrowing of the normative component from well-established legal theory, this is based on the consideration that evolutionary theory is not a "complete" theory of law, not even in a descriptive meaning.[125] If one accepts the Hartian definition of legal theory as presented before (clarification of a legal system from an internal perspective), evolutionary theory cannot fits into it since it describes the elements and mechanisms of change and stability in the legal system from an

[122] *See* Holmes, *Law in Science and Science in Law*, *supra* at 447. *See*, *e.g.*, Leiter and Weisberg, *Why Evolutionary Biology is (so Far) Irrelevant to Law*, *supra* at 48; or Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 Journal of Contemporary Health Law and Policy 265 (1994). *See also* Jack M. Balkin and Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 Yale Journal of Law and the Humanities 173 (2006).

[123] *See* Eric Heinze, *Epinomia: Plato and the First Legal Theory*, 20 Ratio Juris 97–98 (2007). *See also* Donald R. Kelley, The Human Measure: Social Thought in the Western Legal Tradition xi (Cambridge, Mass.: Harvard University Press, 1990); Roscoe Pound, An Introduction to the Philosophy of Law 15 (Clark, NJ: The Lawbook Exchange Ltd., 2003 [1922]); and Posner, The Problems of Jurisprudence, *supra* at 10.

[124] *See* Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 International Review of Law and Economics 8–9 (1994).

[125] *See* Raz, The Concept of a Legal System, *supra* at 1–2. *But see* Gardner, *Legal Positivism*, *supra* at 210.

external perspective, either of sociological nature (as in the European version) or of a more natural sciences origins (as for the American counterpart).[126] As consequence, the evolutionary approach lacks several descriptive components which are necessary from an internal perspective of the legal actors and which, at the same time, are essential underpinning for having normative messages directed to these very actors creating the law.[127] One classical example of an element which is present in all contemporary reflections about the law from an internal perspective and which is, at the same time, *conditio sine qua* for their normative component is a discussion as to the nature of law, i.e. a theory on the fundamental elements characterizing the binding character of the law as different from the one of other normative systems.[128]

A descriptive theory of the nature of law is an essential background for having a normative component because it is by characterizing what makes the law different from other normative systems that it is possible to offer to the legal actors indications as to what "ought to be done" by law in order to unravel conflict which are not solvable (or are not wanted to be solved) by non-legal standards.[129] For instance, in an hard case where there is a conflict

[126] *See* Robert Wai, *The Interlegality of Transnational Private Law*, 71 Law and Contemporary Problems 112 (2008); and Terry, *Don't Forget About Reciprocal Altruism*, *supra* at 502. *See also* Hart, *Postscript*, *supra* at 255–257. *But see* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 Harvard Law Review 779 (1987).

[127] *See*, *e.g.*, Robert S. Summers, *On Identifying and Reconstructing a General Legal Theory*, *in* R. S. Summers, Essays in Legal Theory 62 (Dordrecht: Kluwer Academic Publishers, 2000).

[128] *See* Andrei Marmor, *The Nature of Law*, *in* Stanford Encyclopedia of Philosophy, available at http://plato.stanford.edu/entries/lawphil-nature/ (last accessed: April 30, 2010); and Joseph Raz, *The Problem about the Nature of Law*, *in* Raz, Ethics in The Public Domain, *supra* at 195–196. *See*, *e.g.*, Dworkin, Law's Empire, *supra* at 85–86; Hart, The Concept of Law, *supra* at 21–23; Ngaire Naffine, *In Praise of Legal Feminism*, 22 Legal Studies 73–74 (2002); or Habermas, Between Facts and Norms, *supra* at 79–81. *See also* Alf Ross, On Law and Justice 24–27 (London: Stevens & Sons, 1958); Torben Spaak, *Legal Positivism*, *Law's Normativity, and the Normative Force of Legal Justification*, 16 Ratio Juris 470 (2003); and Ernest Weinrib, *Legal Formality: On the Immanent Rationality of Law*, 97 Yale Law Journal 952 (1988). *But see* James Penner, David Schiff, and Richard Nobles, *Approaches to Jurisprudence, Legal Theory, and the Philosophy of Law*, *in* J. Penner, D. Schiff, and R. Nobles (eds.), Introduction to Jurisprudence and Legal Theory: Commentary and Materials 4 (Oxford: Oxford University Press, 2005).

[129] *See* Hart, *Postscript*, *supra* at 240; Finnis, Natural Law and Natural Rights, *supra* at 276; Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 Yale Law Journal 204 (1931); and Jules L. Coleman, *Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence*, 27 Oxford Journal of Legal Studies 607–608 (2007). *But see*, *e.g.*, Hans

between the principles of legal certainty and justice, a legal scholar can indicate to the judge what he or she "ought to decide," only by having a general theory on what is part of the law (and therefore to be protected) and what is not.[130]

When it comes to the evolutionary approach, it is possible to see how the latter does not provide a theory as to the nature of law (at least not explicitly) since it falls outside its cone of view. As it has been seen above, the origins of the evolutionary approach to law lay outside the legal discourse and therefore evolutionary scholars are "by birth" not so involved in philosophical discussions such as on "what is the law." In Merton's terminology, one can say that the evolutionary theory of law aims at tackling issues concerning the mechanisms of law-making from a middle-range theoretical standing, i.e. by leaving at the periphery (or better, at the background) of their attention more general questions as to the nature or ontology of the law.[131]

Since it is necessary for the evolutionary theory to have a normative part to offer to the legal actors and since it is not advisable (for the two main reasons just mentioned) to start to construct from scratch a specific evolutionary normative component, the remaining available option is to take advantage of the long tradition inside legal theory of discussing which criteria legal actors ought to use (or not) in order to establish what is and what is not law.[132] It can be particularly helpful to evaluate whether it is possible to bring generally

A. Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale Law Journal 252 (1972); Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 Virginia Law Review 1219–1221 (2002); or John Finnis, *On the Incoherence of Legal Positivism*, 75 Notre Dame Law Review 1604 (2000).

130 *See*, *e.g.*, Ronald Dworkin, Taking Rights Seriously ch. 2–3 (Cambridge, Mass.: Harvard University Press, 1978); Catharine A. MacKinnon, *Graduation Address: Yale Law School, June 1989*, 2 Yale Journal of Law and Feminism 299–300 (1990); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 Boston University Law Review 804–806 (1991); or MacCormick, Legal Reasoning and Legal Theory, *supra* at xiv–xv, 54, 61–62 [2nd ed.].

131 *See* Clark, *The Interdisciplinary Study of Legal Evolution*, *supra* at 1265; and Merton, *The Role-Set: Problems in Sociological Theory*, *supra* at 108–110. *See also* Coleman, The Practice of Principle, *supra* at 5–6; Roger Cotterrell, *Sociological Interpretations of Legal Development*, 2 European Journal of Law and Economics 352 (1995); and Mathias M. Siems, *Legal Originality*, 28 Oxford Journal of Legal Studies 152–153 (2008).

132 *See*, *e.g.*, the classical Hart *vs.* Fuller debate as in Hart, *Positivism and the Separation of Law and Morals*, *supra* at 618–619, 627–629 and Lon L. Fuller, *Positivism and Fidelity to Law –A Reply to Professor Hart*, 71 Harvard Law Review 648–657 (1958). *See also* Posner, The Problems of Jurisprudence, *supra* at 10–23.

into play as the normative component for the evolutionary approach the one already developed by some of the well-established contemporary legal theories.

It is true, as stated by J. B. Ruhl, that

> "Whether law evolves through some definable internal process or merely changes in response to events around it depends on our understanding of the why, how, and to where of the changes that take place. Much of legal theory has been devoted to the ambitious undertaking of answering those questions."[133]

However not all legal theory seems to be suitable field where the evolutionary theory can expand into; in other words, the first step to be taken is to see whether a normative component as developed by different schools of contemporary legal thinking can contain normative proposals compatible with the basic research program and methodologies endorsed by the evolutionary approach.[134]

One possible criterion in order to evaluate the compatibility between evolutionary theory and legal theory consists in loosely applying Hutchinson and Archer's analytical distinction of contemporary legal theoretical movements between "Creationists" and "Darwinians," according to their fundamental ideas as to the driving forces behind the legal evolution.[135] For the

[133] Ruhl, *The Fitness of Law, supra* at 1408–1409. *See also* Roscoe Pound, *Theories of Law*, 22 Yale Law Journal 149–150 (1912); Summers, Instrumentalism and American Legal Theory, *supra* at ch. 3; Cynthia Grant Bowman and Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 Fordham Law Review 250–254 (1998); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harvard Law Review 570 (1982); and Maksymilian Del Mar, *Legal Norms and Normativity*, 27 Oxford Journal of Legal Studies 363 (2007). *But see* Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 Emory Law Journal 676–677 (2009).

[134] *See*, *e.g.*, Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 University of Pennsylvania Journal of Constitutional Law 394–395 (2008). As to similar enterprises of inserting normative components originated in other legal movements in a descriptive legal theory, *see*, *e.g.*, Tuori, Critical Legal Positivism, *supra* at 1–17; or Paul B. Cliteur, *Spontaneous Order, Natural Law, and Legal Positivism in the Work of F.A. Hayek*, *in* B. Bouckaert and A. Godart-van der Kroon (eds.), Spontaneous Order, Natural Law, and Legal Positivism in the Work of F. A. Hayek 14–32 (Northhamton: Edward Elgar, 2000).

[135] *See* Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 31. *Compare* to Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 648–649, and George L. Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 Yale Law Journal 1288 (1981).

movements belonging to the *Creationist* legal theory, in general it is possible to identify certain unique and "hidden designer behind law's development and direction."[136] Leaving Hutchinson and Archer's grouping, it is possible to ascertain that among the creationist legal theories, one can place for instance Marxist legal theory, classic natural law (John Finnis), Dworkin, Law and Economics, Critical Legal Studies, and their spin-off schools (*e.g.* feminist jurisprudence and Critical Race Theory).[137] All these very different legal theories can be described as creationist in relation to the evolution of the law as they all adopt a linear model of law-making: to a larger or narrower extent, they all presuppose some unique force behind the evolution of the law, a sort of Intelligent Designer, operating from the origins of the law until the end of time and pushing the legal system (or parts of it) in one specific direction.[138] For example, the economy system pushes the law towards the construction of an efficient system regulating the structures of corporations; or the gender

[136] Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 36. *See also* Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 39; Hutchinson, Evolution and The Common Law, *supra* at 57–59; and Adrian Varmeule, *The Invisible Hand in Legal Theory*, 09–43 Harvard Public Law Working Paper 2–5, available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1498547_code231075.pdf?abstractid=1483846&mirid=1 (last accessed: April 30, 2010). *But see* Hutchinson, *Work-in-progress*, *supra* at 261.

[137] *See*, *e.g.*, Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 39. *See also* Hutchinson, Evolution and Common Law, *supra* at 70–76. *But see*, *e.g.*, Varmeule, *The Invisible Hand in Legal Theory (October 6, 2009)*, *supra* at 3; Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 36; and Hutchinson, Evolution and Common Law, *supra* at 99.

[138] *See* Allan C. Hutchinson and Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 Stanford Law Review 206 (1984); Laura W. Stein, *Living With the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 Minnesota Law Review 1188–1190 (1993); Brian Leiter, *Positivism, Formalism, Realism*, 99 Columbia Law Review 1146 (1999); Jack M. Balkin, *Too Good To Be True: the Positive Economic Theory of Law*, 87 Columbia Law Review, 1485–1487 (1987); Paul E. Sigmund, Natural Law in Political Thought viii (Washington, D.C: University Press of America, 1982); and Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 Columbia Law Review 707 (1951). *But see* Leslie Green, *The Political Content of Legal Theory*, 17 Philosophy of the Social Sciences 4–5 (1987); Catherine Valcke, *Hercules Revisited: An Evolutionary Model of Judicial Reasoning*, 59 Mississippi Law Journal 12 (1989); Mustafa K. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 Wisconsin Women's Law Journal 42–46 (1996); Ruhl, *The Fitness of Law*, *supra* at 1432–1433; Bailey Kuklin, *Evolution, Politics and Law*, 38 Valparaiso University Law Review 1225–1227 (2004); and Ronald Dworkin, *Darwin's New Bulldog*, 111 Harvard Law Review 1735–1738 (1998).

system pressures labor law into a position of being discriminatory towards women.[139]

It is understood that all these legal theoretical movements differ greatly when it comes to the identification of what this creationist force is and of which direction this force is pushing the legal system.[140] The Intelligent Designer can be the evil God of patriarchy pushing the law towards gender discrimination (as for feminist jurisprudence); or the class stratification determining the content of the legal superstructure (as for Marxists); or, finally, the dominating political ideologies deciding where the law ought to head to (as for Critical Legal Studies).[141] However, it can also be the good God of reasonability aiming at the common good for the community (as for Finnis) or the good God of economy carrying the legal system towards the land of efficiency (as for Law and Economics).[142] Nevertheless, all these theories have a basic idea in common which sets them on a plane incompatible with the basic assumptions of the evolutionary approach: there is always an underlying and unique force (patriarchy, class interests, common good, economic efficiency) which, regardless of the environmental changes and independent of the development of the internal structure of the legal system, keeps molding the evolution of the law.[143]

[139] *See*, *e.g.*, Frank H. Easterbrook and Daniel R. Fischel, The Economic Structure of Corporate Law 35–36 (Cambridge, MA: Harvard University Press, 1991); or Marion G. Crain, *Feminizing unions: Challenging the Gendered Structure of Wage Labor*, 89 Michigan Law Review 1160–1171 (1991). *See also* Evgeny B. Pashukanis, Law and Marxism: A General Theory 130–133 (London: Pluto Press, 1983 [1929]); Finnis, Natural Law and Natural Rights, *supra* at 219–225; Posner, Economic Analysis of Law, *supra* at 26–29 [5th ed.]; Dworkin, Law's Empire, *supra* at 229–230, 400; Unger, *The Critical Legal Studies Movement*, *supra* at 578, 582; and Patricia Smith, *Feminist Jurisprudence*, *in* D. Patterson (ed.), A Companion to the Philosophy of Law and Legal Theory 305–307 (Oxford: Basil Blackwell, 1996).

[140] *See*, *e.g.*, Varmeule, *The Invisible Hand in Legal Theory*, *supra* at 6–11.

[141] *See*, *e.g.*, Catherine McKinnon, Toward a Feminist Theory of the State 114 (Cambridge, Mass.: Harvard University Press, 1989); Karl Marx, Communist Manifesto 23–27 (Chicago: Henry Regnery Company, 1950 [1848]); or Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harvard Law Review 1685 (1976).

[142] *See*, *e.g.*, Finnis, Natural Law and Natural Rights, *supra* at 100–126, 276–282; Robert P. George, *Human Flourishing as a Criterion of Morality: a Critique of Perry's Naturalism*, 16 Tulane Law Review 1462 (1989); Rubin, *Why is the Common Law Efficient?*, *supra* at 52–56; or Posner, Economic Analysis of Law, *supra* at 14–15 [3rd ed.]. *See also* Mark J. Roe, *Chaos and Evolution in Law and Economics*, *supra* at 641; and Robert P. George, *Holmes on Natural Law*, 48 Villanova Law Review 5–6 (2003).

[143] *See* Varmeule, *The Invisible Hand in Legal Theory*, *supra* at 4; and Scott Dodson, *A Darwinist View of the Living Constitution*, 61 Vanderbilt Law Review 1335–1336 (2008). *See*

For this group of legal theories, the normative component focuses not so much on modifying the mechanisms of evolution, but rather on modifying the *deus ex machina* (and consequently, the final results of the legal evolution). Their normative component can be roughly summarized as indicating as a leading cornerstone that legal actors ought to operate in all possible ways, as long as in the end they are able to introduce a gender perspective in the law and, in this way, shift a patriarchal legal system into a really "gender neutral" law; or as long as in the end judges and law-makers succeed in having an *homo œconomicus* view of legal matters and, in this way, move from an economic inefficient law into an economic efficient one.[144]

These creationist legal theories can then hardly be invoked for the normative component lacking in the evolutionary approach to the law. The evolutionary theory's methodology is based instead on searching for constant elements in the mechanisms of changes in the law, where in particular the interaction between changing internal structures of the legal system (*e.g.* as to the production of new legal categories) and changing surrounding environmental conditions (*e.g.* as to the selection phase) play a decisive role.[145] For this reason, and also in order to move away from falling into the evolutionist trap, it is most likely that the normative proposals coming from a possible legal evolutionary theory necessarily need to consist of "ought-to-be" messages centered around the idea of making such processes of creation, selection, and retention work better, rather than in offering criteria according to which one can evaluate the "inner goodness" of their final results. For example, a normative component of a legal evolutionary theory should be in the

also Kornhauser, *A World Apart? An Essay on The Autonomy Of The Law*, 78 Boston University Law Review 768 (1998). *See*, *e.g.*, Horowitz, *The Qur'an and the Common Law*, *supra* at 248; or Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 Journal of Legal Studies 382 (1997). *But see* Kornhauser, *A World Apart?*, *supra* at 764–766.

144 *See*, *e.g.*, Gary S. Becker, A Treatise on the Family 21–22 (Cambridge: Harvard University Press, 1981), in comparison to Naomi Cahn, *The Power of Caretaking*, 12 Yale Journal of Law and Feminism 202–209 (2000). *See also* Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 Hofstra Law Review 1024–1046, 1101–1104 (1992).

145 *See*, *e.g.*, Smits, *Applied Evolutionary Theory*, *supra* at 481; Elliott, Ackerman, and Millian, *Toward a Theory of Statutory Evolution*, *supra* at 315; or Holmes, *Law in Science and Science in Law*, *supra* at 448–450. *But see* Lawrence M. Friedman, *On Legal Development*, 24 Rutgers Law Review 22 (1970).

direction of offering to the legal actors the procedural criterion according to which a legal category can be defined as "better fitting" into a certain environment, regardless whether this environment (and consequently the fitting category) is patriarchal or economically efficient.[146]

Shifting now the attention to the other group of possible contributors to the normative component of the evolutionary theory, Lon L. Fuller's procedural natural law and modern legal positivism can be counted as *Darwinist* in respect of the issue of legal changes.[147] For these legal theoretical streams the law tends to evolve according to non-linear-models where a "hidden" creating factor, creator, or agenda is absent. As for Darwin's theory of natural selection, Fuller and modern legal positivists produce an "explanation of evolution [which does] not require the active participation of God or the Zeitgeist or Natural Law."[148] Instead, determinative for the functioning of the ev-

[146] *See*, *e.g.*, Smits, *The Harmonisation of Private Law in Europe*, *supra* at 99; Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, *supra* at 1394–1397; or Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 630 (1919). *See also* Luhmann, Law as a Social System, *supra* at 271. As to some other possible evolutionary procedural criteria for statutory and judicial law-making, *see*, *e.g.*, Whitt, *Adaptive Policy-making*, *supra* at 567–589; Michael B. W. Sinclair, 46 Drake Law Review 376–379 (1997); and Bruce Ackerman, We the People. Volume II: Transformations 409 (Cambridge, Mass: Harvard University Press, 2000). This distinction between "procedural" normative criteria and "substantive" normative criteria is of course of ideal-typical and relative nature. *See*, *e.g.*, Fried, *The Evolution of Legal Concepts*, *supra* at 314; or Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas' Proceduralist Paradigm of Law*, 17 Cardozo Law Review 793 (1996) *But see*, *e.g.*, Lawrence Lessig, Code and Other Laws of Cyberspace 7–8 (New York: Basic Books, 1999).

[147] Another possible Darwinist legal theory is the Legal Process movement, due in particular to their attention both to the modalities of legal evolution and the central role played in the law-making by the complex interactions of the legal world with the surrounding environment. *See*, *e.g.*, William N. Eskridge, Jr., Dynamic Statutory Interpretation 141–142 (Cambridge, Mass: Harvard University Press, 1994); and William N. Eskridge and Philip P. Frickey, *The Making of the Legal Process*, 107 Harvard Law Review 2034–2035 (1994).

[148] Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 647. *See also* Hutchinson, Evolution and The Common Law, *supra* at 42–44; and Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality: Or, Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 Hastings Law Journal 1059 (2004). *Compare* with Justice Holmes opinion in *Southern Pacific Co. v. Jensen*, 244 U.S. 222 (1917) (Holmes dissenting). *See also* Richard Dawkins, Climbing Mount Improbable 4–5 (New York: W.W. Norton & Co., 1996). *Compare* Teubner, Law as an Autopoietic System, *supra* at 47–63.

olution are the interactions between the environment in which the evolution is taking place and the internal development of the legal world.[149]

It is true that for procedural natural law and modern legal positivism, there are certain constant processes of change or evolution of the law on which these scholars focus their attention. However, these recurring ways of evolving the law are neither in the hands of a unique creating force (such as the Marxist economic ruling class) nor tend to follow a deterministic cause-effect relations (such as the feministic legal idea of the drafting of laws by men and discrimination for women). For all Darwinist legal theories, the evolution of the law is a very complex phenomenon and does not abide by a single formula (*e.g.* change of the power structure equals change in law). Instead, legal changes are based on broader interactions of different formulas (*e.g.* doctrinal evolution of a certain legal category and, at the same time, changing of the surrounding environment), in which moreover the power relations can change over time and place.[150]

Though being extremely different theoretical approaches, both procedural natural law and modern legal positivism tend then to assume a more Darwinist approach as to the normative component of legal evolution. The normative proposals of both theoretical movements do not focus on directly offering normative substantive models (i.e. which kind of behaviors law ought to promote or forbid) for either the legal arena or its surrounding en-

[149] *See*, *e.g.*, Kelsen, The Pure Theory of Law, *supra* at 63; Kelsen, *The Function of a Constitution*, *in* R. Tur and W. Twining (eds.), Essays on Kelsen 112–115 (Oxford: Clarendon Press, 1986); Raz, The Concept of a Legal System, *supra* at 199–200; Hart, The Concept of Law, *supra* at 50–53, 92; Fuller, *Positivism and Fidelity to Law*, *supra* at 642; Fuller, The Morality of Law, *supra* at 33–38, 106; and David Lyons, Ethics and the Rule of Law 194–207 (Cambridge: Cambridge University Press, 1984). *See also* Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 31–34. *But see* Laurence Claus, *The Empty Idea of Authority*, 2009 University of Illinois Law Review 1310–1315 (2009).

[150] *See*, *e.g.*, Kelsen, General Theory of Law And State, *supra* at 120, in particular in relation to *id.*, 135 and to Kelsen, The Pure Theory of Law, *supra* at 238–240, 242–245; Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 Oxford Journal of Legal Studies 131 (1984); Hart, The Concept of Law, *supra* at 103; Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 76; Hart, *Postscript*, *supra* at 256–257; MacCormick, Legal Reasoning and Legal Theory, *supra* at 139–140 [2nd ed.]; Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 Harvard Law Review 1626–1627 (1966); Fuller, The Morality of Law, *supra* at 91, 145–151; or Lyons, Ethics and the Rule of Law, *supra* at 75–78. *Compare* Teubner, *Autopoiesis in Law and Society*, *supra* at 292–293. *See also* Habermas, Between Facts and Norms, *supra* at 152; and Cotterrell, Law's Community, *supra* at 277–278, 319.

vironments. Leaving aside the desirable ultimate goals of a legal system, procedural natural law and modern legal positivism aim instead at indicating the "desirable ultimate procedures" of the law-making, i.e. the ways to improve the functioning of the processes of interactions between internal mechanisms of the legal world and the environmental constrictions as to what can (and cannot) become law.[151] Based on the procedural focus in their descriptive parts, *e.g.* stressing the existence of "reciprocity of expectations between lawgiver and subject" (Fuller) or a concrete obedience by the addressees "as a whole" (Hart) in order to speak of a valid legal system, both procedural natural law and legal positivism tend to offer normative messages which are of procedural nature.[152]

For instance, in order to facilitate the interactions of the legal world with the surrounding environment, both legal movements repeatedly stress the fact that each legal system ought to adopt a "thin" (or procedural version of the) rule of law.[153] Though for different reasons, the rule of law is "thin" because is intended by both procedural natural law theoreticians and legal positivists as a way of structuring the relations between the internal functioning of the legal system (*e.g.* a new statute) and the limits imposed by the social and political environments (*e.g.* as to the question of legitimacy of the new

[151] *See* Fuller, The Morality of Law, *supra* at 97; and H. L. A. Hart, *The Morality of Law. By Lon L. Fuller (Book Review)*, 78 Harvard Law Review 1285–1286 (1961). *See*, *e.g.*, Fuller, The Morality of Law, *supra* at 165–166; or Hart, The Concept of Law, *supra* at 156–157. *See also* Tom Campbell, Prescriptive Legal Positivism: Law, Rights and Democracy 31 (London: Routledge-Cavendish, 2004); MacCormick, Legal Reasoning and Legal Theory, *supra* at 62 [2nd ed.]; and Deryck Beyleveld and Roger Brownsword, Law as a Moral Judgement 100 n. 43 (London: Sweet & Maxwell, 1986). *But see* Brian H. Bix, *Natural Law: The Modern Tradition*, *in* Coleman and Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law, *supra* at 77–78 (Oxford: Oxford University Press, 2002).

[152] Fuller, The Morality of Law, *supra* at 209; and Hart, The Concept of Law, *supra* at 55. As to the considerations of substantive nature upon which the procedural normative components of procedural natural law theory and legal positivism are ultimately based, *see*, *e.g.*, Hart, The Concept of Law, *supra* at 80, 206; and Hart, *Postscript*, *supra* at 240. *See also* Sylvie Delacroix, *Hart's and Kelsen's Concepts of Normativity Contrasted*, 4 Ratio Juris 504–510 (2004). *Compare* Fuller, *Positivism and Fidelity to Law*, *supra* at 636; and Fuller, The Morality of Law, *supra* at 204.

[153] *See* William, Lucy, *Abstraction and the Rule of Law*, 29 Oxford Journal of Legal Studies 493–497 (2009). *See also* Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory 60–72 (Cambridge: Cambridge University Press, 2004); and Randall P. Peerenboom, China's Long March toward Rule of Law 70–71 (Cambridge: Cambridge University Press, 2002).

statute), regardless of the substantive consequences (*e.g.* as whether the new statute actually promotes a morally good or bad behavior).[154]

The foundational ideas of procedural natural law and modern legal positivism as to where to address the normative proposals concerning legal evolution, seem then to be compatible with the basic assumptions of an evolutionary approach to the law. For the latter, as seen above in Part One (*The Evolutionary Theory of Law-making*), the primary target of investigation (and therefore of possible normative propositions) is also the legal evolution intended as interconnection and mutual influences between internal developments of the legal system and *stimuli* coming from the surrounding political, economic, and social environments. Based on this non-contradictory relation between their fundamental ideas, it is then possible to limit to procedural natural law and modern legal positivism the range of the legal theoretical movements in which a normative theory suitable to integrate the evolutionary approach to the law can be found.[155]

4. Evolutionary Theory of Law-making and Legal Positivism

In the previous Part Three (*"Creationist" vs. "Darwinist" Legal Theory*) it has been seen how it is possible to reduce to procedural natural law and modern positivisms the spectrum of possible brides that can offer a normative component compatible to the evolutionary approach, *i.e.* a component providing

[154] *See*, *e.g.*, Raz, The Authority Of Law, *supra* at 211–219; and Joseph Raz, *The Rule of Law and its Virtue*, 93 Law Quarterly Review 195–196 (1997). *Compare* Fuller, The Morality of Law, *supra* at 39. *See also* Kramer, In Defense of Legal Positivism, *supra* at 67; Kenneth Einar Himma, *Natural Law*, *in* The Internet Encyclopedia of Philosophy, available at http://www.iep.utm.edu/natlaw/#H4 (last accessed: April 30, 2010); and Brian Z. Tamanaha, *The Tension Between Legal Instrumentalism And The Rule Of Law*, 33 Syracuse Journal of International Law and Commerce 132–133 (2005). *But see* Cotterrell, The Politics of Jurisprudence, *supra* at 129–130.

[155] Beside the question of compatibility, it is worth to point out that procedural natural law and legal positivism can integrate better the evolutionary approach also because, as seen above, the latter is lacking a normative message which is "usable" by the legal actors and, on the other hand, these two legal movements have been characterized more than others for their very being the legal actors' perspective on law. *See*, *e.g.*, Denis J. Galligan, Law in Modern Society 125–127 (Oxford: Oxford University Press, 2007); Frederick Schauer, *Fuller's Internal Point of View*, 13 Law and Philosophy 304–305 (1994); and Tim Kaye, *Natural Law Theory and Legal Positivism: Two Sides of the Same Practical Coin?*, 14 Journal of Law and Society 312–314 (1987).

legal actors with some guiding criteria to be used in the creation of new laws. The following step then is to choose between these two legal theoretical movements the one whose fundamental methodology and results, in particular in the normative component, can better be incorporated into the research program of the evolutionary theory. In particular, as seen in Part Two (*Evolutionary Theory of Law-making And Its Missing The Normative Component*), from a legal theoretical perspective the evolutionary theory focuses its attention on two components of the life of the law: the factors triggering a certain change in the law (*i.e.* the *why* of the evolution of law) and the processes through which the law changes (*i.e.* the *how* of the evolution of law). It is then reasonable to expect that normative proposals coming from the procedural natural law theory and legal positivism will also have as their target both the activating forces and the routes through which law changes.

Starting with procedural natural law theory, this movement is considered as part of natural law theory since it is rooted in the idea of an existing natural law according to whose criteria the "wannabe-legal" categories are measured and defined as law or not. Similarly, for Fuller's legal theory the essential point in order to understand and evaluate a certain legal system and its changes are the "ideal" (procedural) models to which each legal system, in order to be considered as such, should strive.[156] Despite being known for being a "procedural" natural law, when it comes to the investigation of the evolution of the law, Fuller's natural law theory pays somehow the price to his idea of law as "purposive enterprise." The procedural natural law tends then to focus its investigative attention and its normative proposals only on one of the components of the life of the law, which is also of interest to the evolutionary approach: the *why* (or purposes) of the legal evolution.[157]

[156] *See* Fuller, The Morality of Law, *supra* at 186, 96–97. *See also* Bix, Jurisprudence, *supra* at 74; Robert C. L. Moffat, *Lon Fuller: Natural Lawyer After all!*, 26 American Journal of Jurisprudence 190–201 (1981); Anthony J. Lisska, Aquinas's Theory of Natural Law: An Analytical Reconstruction 22–25 (Oxford: Oxford University Press, 1996); and James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 Cornell Law Review 375–376 (1993).

[157] *See* Fuller, The Morality of Law, *supra* at 30, 145–146; Lon L. Fuller, Problems of Jurisprudence 711 (temporary edition, Brooklyn: The Foundation Press, 1949); and Lon L. Fuller, The Law in Quest of Itself 3 (Union, NJ: The Lawbook Exchange, 1999 [1940]). *See also* Robert S. Summers, Lon L. Fuller 37 (Stanford: Stanford University Press, 1984); and Robert P. George, *Natural Law and Positive Law*, *in* George (ed.), The Autonomy of Law, *supra* at 321.

Procedural natural law scholars primarily focus on identifying the triggering factor that "ought to be" behind legal change, namely the construction of an ideal legal procedure according to eight fundamental rules.[158] The normative indication of the paths legal actors ought to follow in order to implement such procedural desiderata, i.e. the message on *how* law ought to evolve, is left at the borders of Fuller's normative component. For example, one of the eight procedural requirements states that legal actors ought to strive for changing a legal system in such a way that, in the end, there is congruence between what the law says and its application.[159] However, Fuller gives no normative indication of how to reach such congruence: whether legal reforms should operate in the direction of making the law more open to its application by being, for instance, simply a loose legal framework for the discretion of administrative agencies; or whether the latter should be placed under tighter control of legality by administrative judicial bodies.[160]

The basic idea of the normative component of procedural natural law theory is the desire to see a certain ideal model of legal system be fulfilled, in particular in its procedural aspects. The possible patterns to be chosen by legal actors in order of reach such model, though sometimes sketched, are not an essential component of the normative solutions offered to legal actors by natural law theory.[161] For example, Fuller carefully indicates some ideal requirements aiming at the "optimum realization of the notion of duty" to obey the law, *e.g.* reversibility in roles between rulers and ruled ("the same duty you owe me today, I may owe you tomorrow").[162] However, he does not explicitly indicate the "best" way in order to achieve (or guarantee) such roles' reversibility. For instance, which legal mechanisms should guarantee more the roles' reversibility between judges and population (and therefore better promote the duty to obey the law)? By operating on the constitutional

[158] *See*, *e.g.*, Fuller, The Morality of Law, *supra* at 186.

[159] *See* Fuller, The Morality of Law, *supra* at 33 and 81. *See also* Fuller, The Morality of Law, *supra* at 209–210; and Lon L. Fuller, The Principles of Social Order: Selected Essays of Lon L. Fuller 158 (Durham, N.C.: Duke University Press, 1981).

[160] *See*, *e.g.*, Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 Columbia Law Review 398–403 (1989); or Jaye Ellis and Alison FitzGerald, *The Precautionary Principle in International Law: Lessons from Fuller's Internal Morality*, 49 McGill Law Journal 793 (2004). *Cf.* Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form*," 100 Columbia Law Review 170 (2000).

[161] *See*, *e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harvard Law Review 388–391 (1978).

[162] Fuller, The Morality of Law, *supra* at 23–24.

field and increasing the control of the political power in the selection procedures of the judicial body? Or by broadening instead the legal concept of "misconduct" for which the judges are considered liable? In other words, while indicating that a legal system must adopt "equal-value-of-contributions" procedures which favors a good interplay between ruled and authority, Fuller seems not to point out the modalities on how to structure such procedures.[163] In short, procedural natural law offers legal actors the reasons why a change in the law triggered in the direction of a "good" procedural system ought to be taken, but not how this change ought to take place.[164]

In contrast with procedural natural law theory, it is possible in modern legal positivism to trace law-making normative proposals that are well-matched to the research program of the evolutionary approach, since they focus their attention on both the factors that ought to trigger legal change (why) and the mechanisms through which the law ought to evolve (how). From the perspective of the evolutionary approach, legal positivism then becomes a very helpful tool in order to provide the absent normative component and, through it, directly penetrate and influence legal thinking.[165]

The modern legal positivism is often characterized (and criticized) for having under their spotlights primarily two (interrelated) aspects of the legal phenomenon: the definition of what belongs to legal reasoning and, related thereto, the emphasis given to the discussion on the sources of law.[166] Starting with legal reasoning, this is a form of practical reasoning and entails ar-

[163] *See also* Rubin, *Law and Legislation in the Administrative State*, *supra* at 387; and Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 New York University Law Review 1210 (2008).

[164] *See*, *e.g.*, Matthew Kramer, *Scrupulousness without Scruples: a Critique of Lon Fuller and his Defenders*, 18 Oxford Journal Legal Studies 241 (1998).

[165] *See* Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 Vanderbilt Law Review 1416, 1420 (1997) and Keith Culver, *Leaving the Hart-Dworkin Debate*, 51 University of Toronto Law Journal 372 (2001). *Compare* Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, 9 Journal of Libertarian Studies 5, 12 (1989).

[166] *See* Jules L. Coleman, *Rules and Social Facts*, 14 Harvard Journal of Law and Public Policy 716–717 (1991); Raz, The Authority of Law, *supra* at 37–52; Wilfred J. Waluchow, *The Many Faces of Legal Positivism*, 48 University of Toronto Law. Journal 387 (1998); Neil D. MacCormick, *The Concept of Law and 'The Concept of Law'*, 14 Oxford Journal of Legal Studies 6–7 (1994); Fernando Atria, *Legal Reasoning and Legal Theory Revisited*, 18 Law and Philosophy 549–576 (1999); and Dworkin, Taking Rights Seriously, *supra* at 17 and 41. *See also* Gardner, *Legal Positivism*, *supra* at 206; and Kornhauser, *A World Apart?*, *supra* at 758–759.

guing for or against certain directions to be given to a decision (in the law-applying moment) or to a new legal category (at least in the judicial law-making) with the fundamental help of legally relevant material, *i.e.* material somehow traceable in the sources of the law.[167] This idea of legal reasoning as mainly grounded on legal material not only is a fundamental component in the concept of law (and its creation) as depicted by legal positivism, but it is also the essence of the normative proposals produced by modern legal positivist scholars, in particular those belonging to what Jeremy Waldron has defined as "normative legal positivism."[168] This group of legal positivists is sometimes defined as "normative" because it maintains that the separation in general of law from other types of reasoning is a value the legal actors ought to pursue *per se*. In other words, this version of legal positivism is "normative" in the sense that it promotes a *normative approach about legal positivism*, in the sense that it promotes as "intrinsically good" the idea of a legal positivistic (normative) program of dividing law from other types of reasoning.[169]

In this work, however, normative legal positivism is not considered only as a normative approach on how law ought to be studied; as suggested by Waldron, normative legal positivism is also a *normative approach about law in itself*, i.e. it is a legal scholarship aiming at offering the legal actors with the best normative proposals in order to maintain the specific character of the

[167] *See* MacCormick, Legal Reasoning and Legal Theory, *supra* at 21–24 and 105–106 [2nd ed.]. *See also* Neil D. MacCormick and Robert S. Summers, *Introduction*, *in* N. D. MacCormick and R. S. Summers (eds.), Interpreting Precedents: a Comparative Study 5–6 (Ashgate: Dartmouth, 1997); and MacCormick, Legal Reasoning and Legal Theory, *supra* at 238 [2nd ed.]. *Compare* Gardner, *Legal Positivism*, *supra* at 217. *Cf.* Joseph Raz, *On The Autonomy of Legal Reasoning*, *in* Raz, Ethics in The Public Domain, *supra* at 330–331. *See also* Gardner, *Legal Positivism*, *supra* at 227 [italics in the text]; Torben Spaak, *Legal Positivism and the Objectivity of Law*, *in* R. Guastini and P. Comanducci (eds.), Analisi e diritto 2004: ricerche di giurisprudenza analitica 259–260 (Turin: G. Giappichelli Editore, 2005); and (though critical) Alan D. Hornstein, *The Myth of Legal Reasoning*, 40 Modern Law Review 339 (1981).

[168] *See* Jeremy Waldron, Law and Disagreement 166–168 (Oxford: Oxford University Press, 1999); and Jeremy Waldron, *Normative (or Ethical) Positivism*, *in* Coleman (ed.), Hart's Postscript, *supra* at 411–412. *See*, *e.g.*, Neil D. MacCormick, *A Moralistic Case for A-Moralistic Law*, 20 Valparaiso University Law Review 30 (1985). *But see* Jules L. Coleman, *Negative and Positive Positivism*, 11 Journal of Legal Studies 147 (1982); and Marmor, *Legal Positivism*, *supra* at 684–685.

[169] *See*, *e.g.*, Tom Campbell, The Legal Theory of Ethical Positivism 71 (Aldershot: Dartmouth, 1996); Gardner, *Legal Positivism*, *supra* at 204–205; or Jules L. Coleman, *Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence*, 27 Oxford Journal of Legal Studies 600 (2007).

law.[170] The ultimate goal of this group of legal positivists is then to offer to legal actors normative criteria ensuring the maintenance of the specific nature of the legal reasoning, as different from other types of reasoning, *e.g.* morals, politics, or economics.[171] In this enlarged sense, normative legal positivism aims in offering normative criteria as to "what law ought to be, not with respect to its content but with respect to its form."[172]

For example, it can be the normative criterion of making laws or deciding cases in such a way that the consistency within the legal system is retained, regardless of whether new statutory laws or judicial decisions fulfill the requirements posed by the moral reasoning (*e.g.* in terms of substantive justice).[173] Or, in case of contrasting interpretation of a certain rule, it can be the normative criterion that forces the legal actors to apply the interpretative norms that were applicable to the rule in question at the time when the rule

[170] *See* Waldron, *Normative (or Ethical) Positivism*, *supra* at 419–422.

[171] *See* Waldron, *Normative (or Ethical) Positivism*, *supra* at 430. *See*, *e.g.*, Neil D. MacCormick, *The Ethics of Legalism*, 2 Ratio Juris 184–193 (1989); Campbell, Prescriptive Legal Positivism, *supra* at 55, 303; Frederick Schauer, *Rules and the Rule of Law*, 14 Harvard Journal of Law and Public Policy 679–680 (1991); or, though in a more hidden form, Hart, *Positivism and the Separation of Law and Morals*, *supra* at 620. *See also* Raz, The Authority of Law, *supra* at 45; and Fredrik Schauer, *Positivism as Pariah*, *in* George (ed.), The Autonomy of Law, *supra* at 38–41; Zipursky, *Practical Positivism Versus Practical Perfectionism*, *supra* at 1209; Kent Greenawalt, *How Persuasive Is Natural Law Theory?*, 75 Notre Dame Law Review 1651–1652 (2000); and Liam Murphy, *The Concept of Law*, 36 Australian Journal of Legal Philosophy 10 (2005). *But see*, *e.g.*, Robin West, Narrative, Authority, and Law (Law, Meaning, and Violence) 3–4 (Ann Arbor: University of Michigan Press. 1993); or Brian H. Bix, *Legal Positivism*, *in* M. P. Golding and W. A. Edmundson (eds.), The Blackwell Guide to the Philosophy of Law and Legal Theory 31 (Oxford: Blackwell, 2005).

[172] Campbell, Prescriptive Legal Positivism, *supra* at 21.

[173] *See*, *e.g.*, Hart, *Positivism and the Separation of Law and Morals*, *supra* at 623; Herbert L. A. Hart, Essays on Bentham: Jurisprudence and Political Theory 152 (Oxford: Oxford University Press, 2001 [1982]); Campbell, Prescriptive Legal Positivism, *supra* at 4, 137, 205, 305; or Marmor, *Exclusive Legal Positivism*, *supra* at 124; or Kramer, In Defense of Legal Positivism, *supra* at 142–146. *But see*, e.g., David Dyzenhaus, *The Genealogy of Legal Positivism*, 24 Oxford Journal of Legal Studies 40–41 (2004). *Compare* Niklas Luhmann, A Sociological theory of law 141–142, 156 (London: Routledge & Kegan Paul, 1985); Marc Amstutz, *Global (Non-)Law: The Perspective of Evolutionary Jurisprudence*, 9 German Law Journal 474 (2008); Clark, *The Interdisciplinary Study of Legal Evolution*, *supra* at 1258–1259; or Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 Hastings Law Journal 118–119, 124 (2003). *Cf.* Oliver W. Holmes, The Common Law 32 (Cambridge, Mass: Harvard University Press, 1963).

was created, regardless if these norms of interpretation can be considered as leading the issue at stake to an "unjust" or "inefficient" outcome.[174]

These normative proposals as to how to use legal reasoning as a sort of codifying mechanism for entering into the legal world of non-legal instances are not only central for modern legal positivism.[175] The legal reasoning-based normative criteria of modern legal positivism can also be useful once integrated, for instance, into Luhmann and Teubner's evolutionary findings of legal systems as evolving by using the selecting criteria of a binary code, in essence "legal/illegal."[176] If one accepts as correct the description offered by Luhmann and Teubner of an evolution of the law based on operative closure and the consequential coding of inputs coming from outside the legal system, the need to have an explicit normative component following these findings becomes urgent, at least if one wants to see evolutionary theory also used inside the legal world. Legal actors still need for doing their work, *i.e.* for their future decisions and law-making, normative criteria helping them to both position the code legal/illegal and shift it every time in order to be adapted to the changing social conditions.[177]

[174] *See* Gardner, *Legal Positivism*, *supra* at 218–220. *See*, *e.g.*, Gerald C. MacCallum, Jr., *Legislative Intent*, 75 Yale Law Journal 758–759 (1966). *Compare* Avery W. Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 Columbia Law Review 530 (2004).

[175] *See*, *e.g.*, Hart, The Concept of Law, *supra* at 90–92; or Raz, *The Problem about the Nature of Law*, *supra* at 208. *See also* José Juan Moreso and Pablo E. Navarro, *The Reception of Norms, and Open Legal Systems*, *in* S. L. Paulson and B. Litschewski Paulson (eds.), Normativity and Norms: Critical Perspectives on Kelsenian Themes 273–275 (Oxford: Clarendon Press, 1998); Coleman, *Beyond the Separability Thesis*, *supra* at 597; Marmor, *Exclusive Legal Positivism*, *supra* at 104; Habermas, Between Facts and Norms, *supra* at 201–202; and Fuller, The Morality of Law, *supra* at 192–193.

[176] *See* Luhmann, Law As a Social System, *supra* at 233–234; Niklas Luhmann, Essays on Self-Reference 229–232 (New York: Columbia University Press, 1990); Teubner, *And God Laughed*, *supra* at 27; and Teubner, *Substantive and Reflexive Elements in Modern Law*, *supra* at 249. *See also* Gunther Teubner, Richard Nobles, and David Schiff, *The Autonomy of Law: An Introduction of Legal Autopoiesis*, *in* James Penner, David Schiff, and Richard Nobles (eds.), Jurisprudence & Legal Theory: Commentary and Materials 900 (Oxford: Oxford University Press, 2005); Teubner, *And God Laughed*, *supra* at 24; Adrian L. James, *An Open or Shut Case? Law as an Autopoietic System*, 19 Journal of Law and Society 282 (1992); and Drucilla Cornell, *Time, Deconstruction, and the Challenge of Legal Positivism: The Call for Judicial Responsibility*, *in* J. D. Leonard (ed.), Legal Studies as Cultural Studies: A Reader in (Post) Modern Critical Theory 234 (New York: SUNY Press, 1995).

[177] *See* Habermas, Between Facts and Norms, *supra* at 56; and Michael B. W. Sinclair, *Statutory Reasoning*, 46 Drake Law Review 315 (1997). *See also* Duffy, *Inventing Inven-*

For example, the law-making actors need normative criteria in order to decide as to one fundamental legal question of corporate governance: ought the corporate law to be focused around the wealth of shareholders or ought stakeholders and their interests also to be taken into the consideration?[178] Moreover, it is necessary to have some normative guidelines in order to answer to the question brought up in particular by the business ethics community as to the stakeholder identity: ought stakeholders to be intended, from a legal perspective, in a narrow sense (*e.g.* only the professional figures attached to the corporate activities) or in a broader meaning (*e.g.* including also the communities at large where the corporate activities take place)?[179]

Legal positivism can then directly offer a contribution in one of the major areas of the research programs of the evolutionary approach to the law: the modalities (the *how*) through which the legal system changes. By incorporating the criteria modern legal positivism prescribes as to be observed by legal actors in applying but also in producing new law (*e.g.* "like cases should be treated alike" or "the judge cannot create a new norm entirely on non-legal grounds"), the evolutionary theory can offer to legal actors not only a *description* of *how* a certain legal reality has come to existence.[180] The evolutionary

tion, *supra* at 6. *Compare* John H. Beckstrom, Darwinism Applied: Evolutionary Paths to Social Goals 1–2 (Westport, CT: Greenwood Press, 1993). *Cf.* Jon Elster, *When Rationality Fails*, *in* K. Schweers Cook and M. Levi (eds.), The Limits of Rationality 20 (Chicago: Chicago University Press, 1990).

178 *See*, *e.g.*, Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 George Washington Law Review 123–133 (1992); Sarah Kiarie, *At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?*, 17 International Company and Commercial Law Review 331–335 (2006); Lynda J. Oswald, *Shareholders v. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause*, 24 Journal of Corporation Law 27 (1998); or David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 Washington and Lee Law Review 1377–1381 (1993).

179 *See* Ronald K. Mitchell, Bradley R. Agle, and Donna J. Wood, *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 Academy of Management Review 857 (1997). *See also* Robert Phillips, *Stakeholder Legitimacy*, 13 Business Ethics Quarterly 29–34 (2003); and Edward R. Freeman, Strategic Management: A Stakeholder Approach 55 (Boston: Pitman Publishing, 1984).

180 *See*, *e.g.*, Hart, *Positivism and the Separation of Law and Morals*, *supra* at 623–624; Andrei Marmor, *Should Like Cases Be Treated Alike?*, *in* A. Marmor, Law in the Age of Pluralism 183–184 (Oxford: Oxford University Press, 2007); or Gardner, *Legal Positivism*, *supra* at 215–218. As to other possible normative messages sent out by the legal positivist, *see*, *e.g.*, Hart, The Concept of Law, *supra* at 127; John Gardner, *Concerning Permissive Sources and Gaps*, 8 Oxford Journal of Legal Studies 457–458 (1988); Raz, *On the*

theory of law-making can also *prescribe* to the legal actors *how* a change in the law ought to take place and, in this way, help the legal actors in choosing "the legally right" answer (at least from an evolutionary perspective) in future hard cases.

An evolutionary theory cannot only describe for instance how the legal concept of corporation has developed around the goal of pursuing primarily the interests of the shareholders, *e.g.* by organizing the way their control rights are allocated between minority and majority.[181] Once borrowed the normative components produced within legal positivism, among which the one of a "general duty of obeying the positively enacted law" should be counted, the evolutionary scholar can also advise the legal actors that, unless in the meantime a fundamental shift of paradigm has taken place in the sources of law (*e.g.* with a new general and encompassing legislation or a watershed decision by the highest court), the center stage of corporate legal regulation has to be considered as "per default" occupied by the shareholders and their rights.[182]

In absorbing the legal positivism's normative components, evolutionary theory can then become a theory of law-making that directly influences the positioning of the code legal/illegal in corporate law and, indirectly, determine how corporate law evolves (*e.g.* in the direction of being shareholders centered).[183] Moreover, far from being of conservative nature, the evolution-

Autonomy of Legal Reasoning, *supra* at 316–317. *But see*, *e.g.*, Hans Kelsen, Introduction to the Problems of Legal Theory 85 (2nd ed., Oxford: Clarendon Press, 1992 [1934]). *See also* Dyzenhaus, *The Genealogy of Legal Positivism*, *supra* at 60–61; and both Finnis, Natural Law and Natural Rights, *supra* at 12, and Perry, *Hart's Methodological Positivism*, *in* Coleman, Hart's Postscript, *supra* at 342–346.

181 *See* Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp and Mark West, *The Evolution of Corporate Law: a Cross-Country Comparison*, 23 University of Pennsylvania Journal of International Economic Law 805–828 (2002); and John Armour, Simon Deakin, Simon, Priya Lele, Mathias Siems, *How Do Legal Rules Evolve? Evidence From a Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, 57 American Journal of Comparative Law 627–628 (2009). *See also* Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 The American Journal of Comparative Law 42–64 (2000); and Simon Deakin and Giles Slinger, *Hostile Takeovers, Corporate Law, and the Theory of the Firm*, 24 Journal of Law and Society 134–135 (1997).

182 *See* Joseph Raz, *The Obligation to Obey: Revision and Tradition*, *in* W. A. Edmundson (ed.), The Duty to Obey the Law: Selected Philosophical Readings 169, 173–174 (Lanham, Md.: Rowman & Littlefield, 1999).

183 As to other possible examples of impact of normative components of legal theory on the law-making, *see*, *e.g.*, Stefan Vogenauer, *An Empire of Light? II: Learning and Lawmaking in Germany Today*, 26 Oxford Journal of Legal Studies 630–637 (2006); George P.

ary theory, once integrated with legal positivist normative components, can promote legal reforms.

One should keep in mind that, as the matter of facts, the legal positivist normative criteria are *relative* by nature. This idea of relativity of the normative criteria means that, according to normative legal positivists (as for most of legal positivists in general), the law-makers, while following the criteria of consistency or of "treat like cases alike" in shaping a new statute or a new law-making judicial decision, must always take also into fundamental consideration the social, political, and historical context in which such legal tools and their outputs are going to operate.[184] Therefore, in contrast with the absolute criteria offered by the Creationist legal theory such as "abolition of gender discriminatory procedures" or "structuring of an economic efficient legal system" (whose validity is somehow beyond time and space), the normative proposals offered by modern legal positivism are modifiable according to the descriptive findings reached by the evolutionary approach as to the social, political, and historical context ("external environment") in which the evolution of a certain legal concept has taken place.[185] For instance, as strikingly

Fletcher, *Two Modes of Legal Thought*, 90 Yale Law Journal 990 (1981); or David B. Wilkins, *Legal Realism for Lawyers*, 104 Harvard Law Review 474–478, 505–523 (1990). *But see* Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies 321 (Oxford: Clarendon Press, 1989).

[184] *See* Hart, The Concept of Law, *supra* at 68–69; and Neil D. MacCormick, *Natural Law and the Separation of Law and Morals*, *in* R. P. George (ed.), Natural Law Theory: Contemporary Essays 110–113 (Oxford: Clarendon Press, 1992). *See*, *e.g.*, Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 New Zealand Journal of Public and International Law 56 (2003). *See also* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 University of Chicago Law Review 501–504, 507–519, 573 (1948). As to the source of this relativist attitude by legal positivists towards what the law ought to be, *see* Herbert L. A. Hart, *Social Solidarity, in* Hart, Essays in Jurisprudence and Philosophy, *supra* at 248; and Kelsen, General Theory of Law and State, *supra* at 5–8. *See also* Robin West, *Three Positivisms*, 78 Boston University Law Review 792–794 (1998).

[185] *See*, *e.g.*, J. B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 Stanford Environmental Law Journal 63–64 (1999). As to the absolute nature of the normative criteria offered by the Creationist legal theoretical schools, *see*, *e.g.*, Paul H. Rubin, Business Firms and the Common Law: The Evolution of Efficient Rules 178–180 (New York: Praeger Publishers, 1983); Dworkin, Taking Rights Seriously, *supra* at 105–118; Richard A. Posner, The Economics of Justice 75 (Cambridge: Harvard University Press, 1981); or Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 Berkeley Women's Law Journal 1–2 (1988).

pointed out by Joseph Raz, "there is no closed list of duties which correspond to the right… *A change of circumstances may lead to the creation of new duties based on the old right.*"[186]

Using the previous hypothetical example, the evolutionary scholar can come forward in finding that the legal category of corporation has evolved considerably in the last century in order to adjust to (or survive in) mutated social, economic, and political environment. Now the corporation is generally perceived as something more than an economic organization with the goal of maximizing the interests of the shareholders, *e.g.* as an economic organization operating in the respect of figures other than the shareholders but directly affected by its activities. In this way, the law-making actors ought to consider at least as possibility the fact that the mismanagement of a corporation can raise liability for violations of interests of a local community directly affected by the corporate activities. For instance, it can be the case of the mismanagement of the corporation which has led to the dismissal of a number of employees which represents the majority of the force of labor and the economic back-bone of a local community.[187]

Shifting now the attention to the other focal point of the evolutionary research program (the *why* of legal changes), the evolutionary scholars can also here find in legal positivism some helpful contributions for becoming a theory of law-making useful to legal actors. In particular, the evolutionary approach can use some normative components as developed by the modern legal positivism's discussion on the sources of law and the reasons why a certain legal system (or parts of it) ought to evolve.

One of the major focuses of modern legal positivism, or one of the obsessions of legal positivism as some would certainly say, are the sources of law.[188]

[186] Raz, The Morality of Freedom, *supra* at 171 [*italics added*]. *See also* Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 Minnesota Law Review 1010–1011 (2006).

[187] As to an actual example of a similar evolutionary process (though within criminal law), *see* the evolution in English law of the definition of "rape" as described by Richard H. S. Tur, *Time and Law*, 22 Oxford Journal of Legal Studies 465 (2002).

[188] *See*, *e.g.*, Raz, The Authority of Law, *supra* at 38; Waluchow, Inclusive Legal Positivism, *supra* at 81; Raz, *Authority, Law, and Morality*, *supra* at 231; Frederick Schauer and Virginia J. Wise, *Legal Positivism as Legal Information*, 82 Cornell Law Review 1093 (1997); Gardner, *Legal Positivism*, *supra* at 201; and Andrei Marmor, Interpretation and Legal Theory 7 (2nd ed., Oxford: Hart Publishing, 2005). *See also* Gerald J. Postema, *Law's Autonomy and Public Practical Reason*, *in* George (ed.), The Autonomy of Law, *supra* at 82; and Leslie Green, *General Jurisprudence: A 25th Anniversary Essay*, 25 Oxford Journal of Legal Studies 570 (2005). Similarly, for evolutionary theory the very

As seen above, legal reasoning is for this legal theoretical movement a central codifying mechanism determining what is acceptable as law and how law evolves, in particular by justifying the exclusion of non-legally relevant statements and principles.[189] Therefore, it has been quite natural that modern legal positivism has paid quite a bit of attention to indicating the fundamental (and often ultimate) normative criterion according to which legal actors should be able to separate statements that ought to be part of legal reasoning and statements that ought to be part of other types of reasoning: the possibility (or not) of tracing back the statements to "conventionally identified" (usually by the majority of the legal actors) sources of law.[190]

This being the ultimate criterion for determining what the law is, it is possible to see how according to modern legal positivists all changes that ought to take place in a legal system should start with changes in (or at least should be "legalized" by) the conventionally identified sources of law.[191] If the behavior-imposing or competence-assigning category *y* is now to be considered as a "legal" category, this mutation necessarily has to do with the fact that the conventionally identified sources of law, while before refusing the legal nature of such a construction, have now changed their position, either through a legislative process (*e.g.* statutory reform), or through a judicial law-

element characterizing the legal system is its autonomy in the modalities of its organization. *See* Teubner, *Autopoiesis in Law and Society*, *supra* at 295; and Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 39.

189 *See* Brian Leiter, *Why Legal Positivism?*, University of Chicago, Public Law Working 4, available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1521761_code119223.pdf?abstractid=1521761&mirid=1 (last accessed: April 30, 2010). *See*, *e.g.*, MacCormick, Rhetoric and the Rule of Law, *supra* at 121–142. *See also* Coleman, The Practice of Principle, *supra* at 152–153 and Spaak, *Legal Positivism and the Objectivity of Law*, *supra* at 258. *But see* Lyons, Moral Aspects of Legal Theory, *supra* at 77.

190 *See*, *e.g.*, MacCormick, H. L. A. Hart, *supra* at 110; Raz, *Hart on Moral Rights and Legal Duties*, 4 Oxford Journal of Legal Studies 129–131 (1984); and Marmor, *Exclusive Legal Positivism*, *supra* at 105. *See also* James Allan, *Internal and Engaged or External and Detached?*, 12 Canadian Journal of Law and Jurisprudence 15 (1999); Hart, *Postscript*, *supra* at 269; Alfred W. B. Simpson, *The Common Law and Legal Theory*, *in* A. W. B. Simpson, (ed.), Oxford Essays in Jurisprudence. 2nd series 81 (Oxford: Clarendon Press, 1973); Raz, The Authority of Law, *supra* at 47–48; and Scott J. Shapiro, *On Hart's Way Out*, *in* Coleman (ed.), Hart's Postscript, *supra* 175–177.

191 *See* Jeremy Waldron, *Who Needs Rules of Recognition?*, *in* M. Adler and K. Einar Himma (eds.), The Rule of Recognition and the U.S. Constitution 327–350 (New York: Oxford University Press, 2009). *See*, *e.g.*, Hart, The Concept of Law, *supra* at 35–43, 93–94. *Cf.* Kelsen, The Pure Theory of Law, *supra* at 214–217, 336–339. *But see* Dworkin, Law's Empire, *supra* at 136–137.

making (*e.g.* a new interpretation of an old statutory provision by the Supreme Court).[192]

For example, the evolutionary scholar can explain how the responsibility for preserving the equilibrium in the natural environment, has gone from being only a morally or economically relevant category, to being legally applicable to the operations of multinational corporations. This shift has been the consequence of a recent series of soft-law decisions by various private actors (arbitration tribunals or professional associations) or of a hard-law provision by public actors (United Nation). Pressured by NGOs and world public opinion, these sources of transnational law have now pointed out that one of the basic principles of corporate law is to consider as guiding normative criterion for all economic enterprises the respect of the environment in the areas of operation.

While the traditional evolutionary approach would stop here, i.e. to the mere description to what has happened (a change in the sources of law), the evolutionary scholar, once expanded to the legal positivism and its normative criterion, can take a step further, a step that can be decisive in being accepted as an authentic theoretical tool usable by the legal actors. He o she can suggest that the legal actors operating in the transnational context, due to a change in the conventionally identified sources of transnational law (arbitration tribunals), ought now to consider that the category *y* (corporate environmental responsibility) has moved from the group of "non-relevant-for-legal-reasoning" statements to the group of "relevant-for-legal-reasoning" statements.[193]

[192] *See*, *e.g.*, Hart, The Concept of Law, *supra* at 92; Marmor, *Exclusive Legal Positivism*, *supra* at 106–108; Kelsen, The Pure Theory of Law, *supra* at 2–4. *See also* Raz, *Kelsen's Theory of the Basic Norm*, *in* S. L. Paulson and B. Litschewski Paulson (eds.), Normativity and Norms. Critical Perspectives on Kelsenian Themes 50 (Oxford: Clarendon Press, 1998); and Waldron, Law and Disagreement, *supra* at 35–36. *Compare* to Teubner, *Autopoiesis in Law and Society*, *supra* at 296. *See also* Teubner, Law as an Autopoietic System, *supra* at 59; and Luhmann, Law as a Social System, *supra* at 242–243.

[193] *See*, *e.g.*, Gralf-Peter Calliess and Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 Ratio Juris 271–276 (2009). *See also* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Social Responsibility in International Law*, 37 Columbia Human Rights Law Review 101–102 (2006); and Claire A. Cutler, *The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force*, 8 Socio-Economic Review 169–172 (2010). *But see* Craig Scott,

This particular focus on the sources of law in order to explain legal changes is extremely helpful in signaling a common pattern, or at least compatibility, between the evolutionary approach to the law and the modern legal positivism. In both cases, as seen in the previous Part Three (*"Creationist" vs. "Darwinist" Legal Theory*), the basic idea is that the triggering of a legal change (i.e. the *why* of the evolution of the law) is neither a quality that is (as for evolutionary theory) nor ought to be (as for legal positivism) built in the very nature of law, as it is for instance for Critical Legal Studies, natural law theories, or Law and economics. For both evolutionary scholars and legal positivists legal change is the effect of a complex relation between pressures coming from the surrounding environments, features of the legal system, and, last but not least, legal withinputs produced by the very legal actors.[194]

The complexity of the relations among such different (and often unstable) sources makes, on one side, both the legal positivist and the evolutionary theory's law-makings different from the Creationist legal scholarships in the fact that they are relatively *open-ended* as to where to go: legal actors have at their disposal different venues in which to channel the creation of new laws. On the other side, the evolutionary and positivistic law-makings are only *relatively* open-ended since, either by referring to the sources of law (as for legal positivism) or by pointing out the history of a certain legal category (as for evolutionary theory), both theoretical approaches somehow "restrict" the possible patterns which the law-making actors could take.[195]

"Transnational Law" as ProtoConcept: Three Conceptions, 10 German Law Journal 868–869 (2009).

[194] *See*, *e.g.*, Waluchow, Inclusive Legal Positivism, *supra* at 33–46; and Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System 188–189 (2nd ed., Oxford: Clarendon Press, 1980). *Compare* to Teubner, Law as an Autopoietic System, *supra* at 58; and Luhmann, Law as a Social System, *supra* at 265. *See also* Clark, *The Interdisciplinary Study of Legal Evolution*, *supra* at 1241–1242; and Simon Deakin, *Evolution for Our Time*, *supra* at 2.

[195] *See*, *e.g.*, Hart, The Concept of Law, *supra* at 64–76 (as to the institutional constraints to the law-makers); Neil D. MacCormick, *Coherence in Justification*, *in* H. Schelsky, W. Krawietz, G. Winkler, and A. Schramm (eds.), Theorie der Normen: Festgabe fur Ota Weinberger zum 65. Geburtstag 37 (Berlin: Duncker & Humblot, 1984); Joseph Raz, *Intention in Interpretation*, *in* George (ed.), The Autonomy of Law, *supra* at 267–268; Luhmann, Law as a Social System, *supra* at 257–258; and *id.* 235–236; and Teubner, Law as an Autopoietic System, *supra* at 56. *But see* Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 649 n. 19. *Compare* Lewis Kornhauser, *L'Analyse Economique du Droit* [Economic Analysis of Law], 16 Materiali per una storia della cultura giuridica 244–245 (1986).

For example, by making reference to a necessary connection in the sources of law between someone's rights and somebody else's duties, legal positivism can point out the necessity of having certain legal duties upon a corporation whose activities have violated rights of individuals other than the shareholders.[196] Reaching the same result, evolutionary theory can show the legal actors that the liability of a corporation towards a local community is not a concept foreign to the corporate law, but the historical product of a certain evolution of the law into the direction of attributing more "social responsibility" also to economic actors.[197]

Taking in this direction a step further than evolutionary scholars, modern legal positivism not only describe where the legal change is aiming to but also why it ought to take this direction: legal positivists also point out some normative criteria suggesting the reasons why legal actors ought to choose one direction instead of the other. As to the previous example, modern legal positivism explicitly indicates that, if the law guarantees in the Constitution certain basic rights to individuals (*e.g.* living in a clean environment), the legal actors (both in judicial and legislative form) ought always to find the corresponding duty-holder, either among the public agencies or among the private actors (*e.g.* in terms of corporate social responsibility).[198]

The "hard" or "exclusivist" version of modern legal positivism (as represented by Raz) is the version of legal positivism which is more suitable according to Waldron to be (or become) normative in their mission, and therefore to be more helpful to integrate the evolutionary approach.[199] In particular, the exclusivist legal positivists have pointed out one fundamental normative criterion legal actors ought to follow in determining which source of law is to be taken into consideration: the "Social Fact Thesis" or, synonymously, the "Sources Thesis."[200]

[196] *See*, *e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale Law Journal 468 (2001).

[197] *See*, *e.g.*, Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 Georgia Law Review 112–122, 164 n. 277 (1988).

[198] *See* Raz, The Morality of Freedom, *supra* at 184–186. *See*, *e.g.*, Neil D. MacCormick, *Children's Rights: A Test-Case for Theories of Right*, *in* N. D. MacCormick, Legal Right and Social Democracy: Essays in Legal and Political Philosophy 161–183 (Oxford: Oxford University Press 1984).

[199] *See* Waldron, *Normative (or Ethical) Positivism*, *supra* at 412–414.

[200] *See* Raz, *Authority, Law, and Morality*, *supra* at 195. As to a definition of what does it means to be an "exclusivist" legal positivist, in particular in the approach to the sources of law, *see*, *e.g.*, Raz, The Authority of Law, *supra* at 38, 47; Scott J. Shapiro, *The Difference*

According to this thesis, law, as for all legal positivists, acquire its legal nature for being source-based and not, for instance, for having a specific content.[201] However, and here comes the original contribution of the exclusivist legal positivism, the law is a social phenomenon and the fundamental sources of law for each legal system are social facts or social conventions, *i.e.* "conventionally established social practices" directed at determining which political, moral, or economic values have legal status and which not.[202] In other words, the normative proposal offered by exclusivist legal positivists is that, in case of doubt as to which road to take during the (either legislative or judicial) law-making, legal actors should not to rely on a-social and a-historical criteria such as the abstract idea of "morals" or "good faith."[203] Since the law is a social fact which originates in and aims to authoritatively changing social reality, legal actors ought always choose the legal solution which can be considered more in line with the patterns of expectations and understanding latent either among the addressees in the society (as for Gerald Postema) or

That Rules Make, *in* B. Bix (ed.), Analyzing Law: New Essays in Legal Theory 56–62 (Oxford: Clarendon Press, 1998); Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 Legal Theory 127–170 (2000). *See also* Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* Coleman, Hart's Postscript, *supra* at 356–357.

[201] *See* Jules L. Coleman, *Incorporationism, Conventionality and the Practical Difference Thesis*, *in* Coleman (ed.), Hart's Postscript, *supra* at 116. *See also* Himma, *Inclusive Legal Positivism*, *supra* at 125; and Coleman, The Practice of Principle, *supra* at 161. As to the idea of legal norms as content-independent reasons for action, *see* Herbert L. A. Hart, Essays on Bentham: Jurisprudence and Political Theory 261 (Oxford: Oxford University Press, 1982); Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* Coleman (ed.), Hart's Postscript, *supra* at 363; and Raz, The Authority of Law, *supra* at 30–33.

[202] *See* Raz, *Authority, Law, and Morality*, *supra* at 195; Marmor, Positive Law and Objective Values, *supra* at 139; and Kenneth Einar Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 Oklahoma City University Law Review 68–69 (2002). *See also* Brian Z. Tamanaha, A General Jurisprudence of Law and Society 148 and 166 (Oxford: Oxford University Press, 2001); and Himma, *Inclusive Legal Positivism*, *supra* at 126. *But see* Matthew Noah Smith, *The Law as a Social Practice: Are Shared Activities at the Foundations of Law?*, 12 Legal Theory 265–292 (2006).

[203] *See*, *e.g.*, Joseph Raz, *About Morality and the Nature of Law*, 48 American Journal of Jurisprudence 13 (2003); Joseph Raz, *Disagreement in Politics*, 43 American Journal of Jurisprudence 48–49 (1998); or Marmor, *The Separation Thesis and the Limits of Interpretation*, *supra* at 149.

more specifically among legal actors (as for Hart and for most exclusivist legal positivists).[204]

It is however not only the evolutionary approach that can benefit from a possible expansion with legal positivist elements. Paradoxically enough, considering their attack to the "abstractness" of natural law theories, legal positivists are often been themselves characterized for their a-historical and a-contextual approach to the changes in law. Movements like Critical Legal Studies or Law and Economics have sometimes attacked legal positivist works for their lack of investigation on how in history and in social context certain normative propositions have acquired the legal status while others have remained, for instance, merely moral or religious norms.[205] In particular, due to their focus on positive law and its legitimacy, one of the major criticisms advanced against the modern legal positivism is their lack of attention to the processes through which positive law has become as such.[206] Being the focus of legal positivism on the *lex positiva*, i.e. on the already established law, it comes almost natural a certain disregard to the historical and social processes somehow prior to the transformation, for instance, of moral norms into positive law.[207]

However, as once stated by Holmes, "if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why

[204] *See* Gerald Postema, *Coordination and Convention at the Foundations of Law*, 11 Journal of Legal Studies 189 (1982); Scott J. Shapiro, *Law, Plans, and Practical Reason*, 8 Legal Theory 418, 426 (2002); Andrei Marmor, *Legal Conventionalism*, 4 Legal Theory 524–525 (1998); and Hart, The Concept of Law, *supra* at 111. *But see* Dworkin, Law's Empire, *supra* at 136–139 and the answer to him by Kramer, In Defense of Legal Positivism, *supra* at 146–151. *Compare* Smits, *The Harmonisation of Private Law in Europe*, *supra* at 80.

[205] *See* Morton J. Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 17 Oxford Journal of Legal Studies 551–586. *See*, *e.g.*, Posner, The Problems of Jurisprudence, *supra* at 462; Cotterrell, The Politics Of Jurisprudence, *supra* at 100–101; or William E Conklin, The Invisible Origins of Legal Positivism: A Re-reading of A Tradition 289 (Dordrecht: Kluwer, 2001).

[206] *See* Cotterrell, The Politics of Jurisprudence, *supra* at 122. *See*, *e.g.*, Jules L. Coleman, *Rules and Social Facts*, 14 Harvard Journal of Law and Public Policy 707 (1991).

[207] *See* Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 California Law Review 781 (1988). *See also* Jeremy Waldron, *Legislation, Authority, and Voting*, 84 Georgia Law Journal 2189 (1996). *See*, *e.g.*, Waluchow, Inclusive Legal Positivism, *supra* at 15–30; or Gerald J. Postema, *The Normativity of Law*, *in* R. Gavinson (ed.), Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart 85 (Oxford: Oxford University Press, 1987).

it exists at all, we go to tradition."[208] In this respect, a legal evolutionary theory can provide such a *genealogical* investigations.[209] These are investigations directed to explain the present by looking into its history and, in this case, they can define in a clearer way which are the "conventionally established social practices" behind the regulation of a certain legal issue, social practices legal actors ought always to consider during law-making, regardless if the latter is aimed to maintain the *status quo* of the legal regulation or to change it.[210]

For example, a legal evolutionary analysis can build a more stable ground for the normative proposal that the legal organization known as corporation "ought to" be held liable for damages to the stakeholders in a broad meaning. This securing in the legal discourse of the idea of corporate social responsibility can be done by showing in the welfare state a pattern of reinforcing, by the use of the law, a general social convention which guarantees citizens against the risks of the modern economy, even if this means diminishing the possibility of the very citizens to make larger profits (*e.g.* by not putting their interests as shareholders in the first row when discussing of strategies for corporate activities).

As another example, evolutionary approach can show how corporations have been created as a legal product in order to answer both to a certain environmental demand (*e.g.* to encourage financial investment) and, at the same time, to a certain logical requirement coming from the legal system itself (*e.g.* around the definition of "legal person"). As a result, the evolutionary investigation can provide legal positivism analysis with a clearer picture of what the legal concept of corporation contained, whether the idea of corporate social responsibility is in there, and, if not, whether its insertion (due to mutated social environment) is allowed by the fundamental elements which characterize corporation as a distinct legal personality.

[208] Holmes, *The Path of the Law*, *supra* at 469.

[209] *See* Paul A. David, *Why are institutions the 'carriers of history'?: Path dependence and the evolution of conventions, organizations and institutions*, 5 Structural Change and Economic Dynamics 206 (1994). *See also* Deakin and Wilkinson, The Law of the Labour Market, *supra* at 33.

[210] *See* Deakin and Wilkinson, The Law of the Labour Market, *supra* at 35. *See*, *e.g.*, Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 North Carolina Law Review 1157–1158 (1997). *See also* Luhmann, Law as a Social System, *supra* at 261; and Teubner, Law As An Autopoietic System, *supra* at 49. *But see* the critiques in Hutchinson, Evolution and The Common Law, *supra* at 8–9.

To sum up, an expanded evolutionary approach in the direction to legal positivism seems to provide for benefits to both parties. On one side, the evolutionary approach to the law requires a normative component in order to become a theory of law-making whose findings not only are better understood but also directly used by legal actors. It seems then quite natural to search for these normative proposals in the modern legal positivism, this school more than others having focused its descriptive and normative enterprises on the modalities and reasons behind legal changes, *i.e.* two aspects central also for the evolutionary approach to the law. On the other side, legal positivism can also benefit from the evolutionary approach and its historical and social explanation on why and how the "law is what it is" and on which to build an analytical investigation of what the binding law nowadays ought to be.[211] In this way, the evolutionary approach can provide the legal positivist scholars with an element lacking in large part of contemporary legal theory, as pointed out by Alfred W. B. Simpson: an historical and socially contextualized study of the birth and development of legal concepts.[212]

5. Transnational Corporate Law-making and the "Expanded" Evolutionary Theory

It is always very difficult to predict whether and how a new legal theory, or (as in this case) a modified legal approach will function in practice. However, the insertion of the evolutionary approach in the world of legal thinking, once expanded with the normative components offered by the legal positivism, is still very much desirable, in particular in the perspective of using it as a theory of law-making.[213] Since the major focus of the evolutionary approach is on the changes in the law, its contributions should (at least initially) be directed towards the construction of a theory of law-making of positive

[211] *See*, *e.g.*, Eric A. Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan*, 27 Michigan Journal of International Law 769–786 (2006).

[212] *See* Alfred B. W. Simpson, Legal Theory and Legal History: Essays in the Common Law ix (London: The Hambledon Press, 1987); and Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 Yale Law Journal 1654 and 1655 n. 8 (1994). *See also* Holmes, The Common Law 1 (New York: Dover Publications, 1991).

[213] *See*, *e.g.*, Deakin and Wilkinson, The Law of the Labour Market, *supra* at 26. *See also* Katerina Sideri, Law's Practical Wisdom: The Theory and Practice of Law Making in The New Governance Structures in the European Union 4 (Aldershot: Ashgate, 2007).

law. For example, a possible starting point of a "expanded" evolutionary theory of law-making is the stress that many evolutionary scholars have placed on showing how the evolution of the law does not necessarily mean the "progress" or "development" of the law. Particularly in the recent decades, a large part of the evolutionary theory approach has pointed out how the use of this methodology does not necessarily imply an idea of always having a legal system that "tries to adjust to increasing complexity" (as originally stated by Luhmann).[214]

In this sense, an expanded evolutionary theory can keep emphasizing this anti-evolutionist attitude without dismissing its new normative component. In particular, it can do so by employing one of the most successful normative assumptions of the legal positivistic theory of law-making: the explanation of the law-making, *i.e.* how changes in a legal system take place, ought not to presuppose or sponsor (at least in the descriptive phase) the existence of an "inner value" or "final goal" to which the law-making ought to aim to.[215] This initial absence of inner goals in the descriptive component of a reformed evolutionary theory of law-making does not absolutely mean the rebuttal of a normative component. Like for most modern legal positivists, it simply means that the sponsoring of certain models of "good" law, more belong to a second, separate but still necessary phase of the evolutionary investigations, namely the normative one.[216]

[214] Luhmann, Law as a Social System, *supra* at 267. *See also*, Elliott, *The Evolutionary Tradition in Jurisprudence*, *supra* at 41; and, reaching more or less the same conclusion as Luhmann, Hart, The Concept Of Law, *supra* at 116. *Compare* Deakin, *Evolution for our Time*, *supra* at 25. *Cf.* Roe, *Chaos and Evolution in Law and Economics*, *supra* at 663–664; Smits, *Applied Evolutionary Theory*, *supra* at 487; and, more in general against the idea of evolution towards complexity, Stephen Jay Gould, Full House: The Spread of Excellence from Plato to Darwin 135–230 (New York: Three Rivers Press 1996). As to the historical roots of this moving away from the progress idea when speaking about the evolution of the law, *see* Albert Kocourek and John Henry Wigmore, Evolution of Law: Select Readings on the Origin and Development of Legal Institutions. Vol. III: Formative Influences of Legal Development 533 (Boston: Little, Brown, and Co., 1918); and Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory And Affirmative Action's Destiny*, 59 Ohio State Law Journal 833 (1988).

[215] *See*, *e.g.*, Hart, The Concept of Law, *supra* at 17, 54, in particular in relation to 206. This programmatic statement of a temporary division between analysis of "ought" and "is", typical of legal positivists, is the consequence of the endorsement of another basic assumption (the so-called "Separation Thesis"). *See* Marmor, *Legal Positivism*, *supra* at 686.

[216] *See* Hart, The Concept of Law, *supra* at 205–206 and Hart, *Positivism and the Separation of Law and Morals*, *supra* at 594–599. *See also* Karl N. Llewellyn, *Some Realism about Realism*, 44 Harvard Law Review 1235 (1931). As to a similar tendency already hidden

For instance, it is possible to descriptively trace, as done by Luhmann, a tendency of legal systems to match the increasing complexity of the surrounding social environment.[217] Nevertheless, a theory of law-making using an evolutionary approach still needs to offer legal actors a value-based answer to the following question: Ought judges to always aim at contributing to a "higher" complexity of the legal system? Or ought judges to instead opt for a more "de-regularized" or less complex legal system? Moreover, regardless which answer is given to this dilemma, which are the evaluative criteria making one solution better than the other?[218]

A descriptive evolutionary approach with a normative (legal positivist) component can be extremely valuable in the legal discussion and this potential can be detected particularly by looking at one emerging field for legal scholarship: transnational corporate law. Transnational corporate law is the regulation of both the corporate governance (the rules governing the exercise of power within the corporation), and corporate finance (the rules concerning the use of the capital in a corporation) of multinational enterprises and their cross-bordering structures (*e.g.* the relations between parent company and the subsidiaries around the globe).[219] However, differently from the international or domestic legal regulations of similar corporate matters, the transnational regulation of corporations is characterized for being an hybrid

within the nowadays evolutionary approach, *see*, *e.g.*, Elliot, *The Evolutionary Tradition in Jurisprudence*, *supra* at 94; Hovenkamp, *Evolutionary Models in Jurisprudence*, *supra* at 671; and Teubner, Law as an Autopoietic System, *supra* at 54. *See also* Luhmann, Law as a Social System, *supra* at 231; and Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 35.

217 *See*, *e.g.*, Luhmann, A Sociological theory of law, *supra* at 106–107; and Luhmann, Law as a Social System, *supra* at 266. *See also* Clark, *The Morphogenesis of Subchapter C*, *supra* at 92.

218 *See*, *e.g.*, Wolfgang Kerber, *Institutional Change in Globalization: Transnational Commercial Law from an Evolutionary Economics Perspective*, 9 German Law Journal 422 (2008) (in particular under point 1); or Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, *supra* at 1390–1392.

219 As to definition of what corporate law is about, *see*, *e.g.*, Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp, and Mark D. West, *The Evolution of Corporate Law: A Cross-country Comparison*, 23 University of Pennsylvania Journal of International Economic Law 796 (2002); and Henry Hansmann and Reiner Kraakman, *The End of History for Corporate Law*, 89 Georgia Law Journal 439–440 (2001). As to the areas covered by transnational corporate law, *see* Muchlinski, Multinational Enterprises and The Law, *supra* at chapter 1.

of private actors' and state-based regulations.[220] Transnational corporate law is then the mixed legal regime applicable to the cross-bordering structures and activities of multinational corporations and it can be considered as the best field where to put into test the mutual exchanges between legal positivism and evolutionary theory for two main reasons, one concerning the *transnational* feature of this legal field, the other due to its targeting the *corporate* activities.

Starting with the *transnational* aspect of corporate law, the potential importance of an evolutionary theory of law-making has particularly increased as the legal positivism in recent decades has started to face the problems that the rising and spreading of the transnationalization of the law has created to its basic assumptions.[221] The transnationalization of the law is characterized by the absence of a "normative agency," i.e. a single central authority typical of the nation state (or a state-based international organization), which produces or somehow legitimizes those legal concepts which should or should not be considered valid. At the transnational level, for example, there is usually no unique assembly absorbing in a statute the legal concepts "invented" by a law professor, a judge, or a law firm.[222]

As consequence, the legal positivism has found itself in the difficult position of investigating the transnationalization of the law, i.e. a phenomenon

[220] As to the definition of transnational law, *see*, *e.g.*, Gralf-Peter Calliess, *Reflexive Transnational Law The Privatisation of Civil Law and the Civilisation of Private Law*, 23 Zeitschrift für Rechtssoziologie 188 (2002); and Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn State International Law Review 745–746 (2006). *See also* Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law*, 13 Indiana Journal of Global Legal Studies 261 (2006).

[221] *See* Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation 89–90 (2nd ed., London: LexisNexis Butterworths, 2002). *See*, *e.g.*, Bruno Caruso, *Changes in the Workplace and the Dialogue of Labor Scholars in the "Global Village"*, 28 Comparative Labor Law and Policy Journal 503 (2007). *See also* John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 Penn State Law Review 195–213 (2009).

[222] *See* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 Columbia Journal of Transnational Law 500–507 (2005). *See*, *e.g.*, Maria McFarland Sánchez-Moreno and Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 Fordham International Law Journal 1668–1669 (2004); or John King Gamble and Charlotte Ku, *International Law – New Actors and New Technologies: Center Stage for NGOs?*, 31 Law and Policy of International Business 237 (2000).

which appears to be legal in all their aspects, except for one fundamental aspect (at least for the legal positivists): the sources of law. In transnational law it is difficult for the legal positivist scholars to trace back the origin of the law to clearly legitimized sources of law. Centralized legitimizing agencies like national assemblies or supreme courts actually have a quite weak position within the transnational community, being the law-making instead scattered among a broad and blurring spectrum of actors, both quantitatively (*e.g.* several judicial and third-parties bodies in competition with each other and without an over-covering supreme court) and qualitatively (*e.g.* law-making actors both of public, private, and mixed nature).[223]

Shifting the attention to the second reason encouraging the choice of the transnational corporate law as a test-field, two are the major motives that indicate how *corporate* law is the field where an application of an evolutionary theory completed with some parts of legal positivism can offer rather interesting results. First, corporate law, and in particular the legal concept of corporation, is traditionally an area which has attracted the attention of several and most prominent legal thinkers. Answering the question of "what is a corporation" and how the legal concept of corporation has come to existence, it is a task that has attracted the attention of many legal scholars, from Weber to Holmes, from American legal realists to representatives of Critical Legal Studies, from Kelsen to Hart or Posner, all of whom have applied (or built upon) their theories of law to this very field of legal regulation.[224]

[223] *See* Michel van de Kerchove and François Ost, Le droit ou les paradoxes du jeu 180 (Paris: Presses Universitaires de France, 1992); Gunther Teubner, *'Global Bukowina': Legal Pluralism in the World Society, in* G. Teubner (ed.), Global Law Without a State 7–8 (Aldershot: Dartmouth, 1997), in particular points 1 and 2; and Gunther Teubner, *Breaking Frames Economic Globalization and the Emergence of 'lex mercatoria,'* 5 European Journal of Social Theory 199–200 (2002). *See also* Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy 3–15 (Cambridge: Cambridge University Press, 1996); de Sousa Santos, Toward a New Legal Common Sense, *supra* at 89–90; Saskia Sassen, *De-Nationalized State Agendas and Privatized Norm-Making*, *in* K.-H. Ladeur (ed.), Public Governance in the Age of Globalization 51–67 (Aldershot: Ashgate Publishing, 2004); and Ralf Michaels and Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 American Journal of Comparative Law 890 (2006). *But see* Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 Connecticut Law Review 1773 (2007).

[224] *See*, *e.g.*, Weber, Economy and Society, *supra* at 720–725; Wesley Newcomb Hohfeld, *Nature Of Stockholders' Individual Liability For Corporation Debts*, 4 Columbia Law Review 291 (1909); Hart, *Definition and Theory in Jurisprudence*, *supra* at 3–7; Holmes' def-

Second, it is possible to see how the legal regulation of multinational corporations is not only a passive recipient but also one of the main active sources for the globalization of law, i.e. for the spread around the globe of legal models.[225] In contrast to other globalizing and globalized transnational legal fields (*e.g. lex mercatoria*, *lex maritima*, *lex sportiva*, or *lex informatica*), the globalization of corporate law, as pointed out by Larry Catá Backer, is however characterized by having a transnational aspiration but starting from a structural state-based status quo, i.e. from state-based legal constructions

inition in the Supreme Court's decision *Klein v. Board of Tax Supervisors*, 282 U.S. 24 (1930); Posner, Economic Analysis of Law, *supra* at 419–420 [4th ed.]; Max Radin, *The Endless Problem of Corporate Personality*, 32 Columbia Law Review 643 (1932); Richard L. Abel, *Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability*, 80 Texas Law Review 1554–1564, 1572 (2002); and Kelsen, General Theory of Law and State, *supra* at 96–97. As to the reason for such interest of legal theory to corporate law and the notion of corporation, *see* Jeffrey Nesteruk, *Conceptions of the Corporation and the Prospects of Sustainable Peace*, 35 Vanderbilt Journal of Transnational Law 441 (2002). It should be pointed out that also the evolutionary scholars seem to share this particular theoretical interest in the legal nature of a corporation. *See*, *e.g.*, Teubner, *Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person*, 36 American Journal of Comparative Law 145–152 (1988); Marc Amstutz, Kollektive Marktbeherrschung im europäischen Wettbewerbsrecht: Eine evolutorische Perspektive 35–37 [Collective Market Dominance under European Competition Law: An Evolutionary Perspective] (Tübingen: J.C.B Mohr, 1999); Clark, *The Interdisciplinary Study of Legal Evolution*, *supra* at 1242–1247; Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, *supra* at 1330; and Henry Hansmann and Reinier Kraakman, *What is Corporate Law?*, *in* R. Kraakman, P. Davies, H. Hansmann, G. Hertig, K. Hopt, H. Kanda, and E. Rock (eds.), The Anatomy of Corporate Law: A Comparative and Functional Approach 3–4 (Oxford: Oxford University Press, 2004).

225 *See* Robert Gilpin, The Challenge of Global Capitalism: The World Economy in the 21st Century 163–192 (Princeton: Princeton University Press, 2000). *See also* Strange, The Retreat of the State, *supra* at 16–43; de Sousa Santos, Toward a New Legal Common Sense, *supra* at 167–168; and Peter A. Hall and David Soskice, *An Introduction to Varieties of Capitalism*, *in* P. A. Hall and D. Soskice (eds.), Varieties of Capitalism: The Institutional Foundations of Comparative Advantage 55–59 (Oxford: Oxford University Press, 2001). As to definition adopted in this work of globalization of the law, *see* William Twining, Globalisation and Legal Theory ch. 1 (London: Butterworths, 2000); and Elizabeth Heger Boyle and John Meyer, *Modern Law as a Secularized and Global Model: Implications for the Sociology of Law*, *in* Y. Dezalay and B. G. Garth (eds.), Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy 66–69 (Ann Arbor, MI: University of Michigan Press, 2002).

and paradigms.[226] On one side, it appears then that this phenomenon of transnationalization of corporate law perfectly suits an analytical goal of the evolutionary approach to the law: the explanation of which evolution a legal paradigm (as can be the legal definition of what a corporation is) goes through while moving from one environment (state-based) to another (non-state based), but while still keeping its fundamental legal shape and nature, i.e. its being perceived as binding by the vast majority of its addressees.[227]

On the other side, when facing the transnationalization of the corporate law, the evolutionary approach scholars need more than ever the normative sticks offered by a legal positivistic analysis. Namely, due to the structural deficiency of a central normativizing agency, the transnational corporate law is characterized of "blurred borders" to a higher degree than the corporate regulations valid in a national or state-based legal system. With this expression is meant that the lack of a legislative agency or a court legitimized clearly as the "highest and ultimate" law-maker, leaves more space in the transnational regulation of corporations to the penumbral areas around the meaning of the legal concepts.[228] This feature of the legal discourse taking place at the tran-

[226] Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law*, 37 Columbia Human Rights Law Review 308–309 (2006). *See also* Muchlinski, Multinational Enterprises and The Law, *supra* at 86–89, and 114; Peter Dicken, *Placing Firms-Firming Places: Grounding the Debate on the Global Corporation* 12 (Paper presented at the Conference on *Responding to Globalization: Societies, Groups, and Individuals*, Boulder: University of Colorado, 2002), available at http://www.colorado.edu/ibs/pec/gadconf/papers/dicken.html (last accessed: April 30, 2010); and Peter Dicken, *Transnational corporations and nation-states*, 49 International Social Science Journal 87 (1997). *But see* Amstutz, *Global (Non-)Law*, *supra* 476.

[227] *See* Twining, *A Post-Westphalian Conception of Law*, *supra* at 200; and Milena Sterio, *The Evolution of International Law*, 31 Boston College International and Comparative Law Review 214–225 (2008). *See also* Saskia Sassen, Losing Control? Sovereignty in an Age of Globalization 5 (New York: Columbia University Press, 1995); William Twining, General Jurisprudence: Understanding Law from a Global Perspective 269–275 (Cambridge: Cambridge University Press, 2009); Hart, The Concept of Law, *supra* at 55–60; and Bruce L. Benson, The Enterprise of Law: Justice Without the State 21 (San Francisco: Pacific Research Institute, 1990).

[228] *See* Dan Danielsen, *How Corporations Govern: Taking Power Seriously in Transnational Regulation and Governance*, 46 Harvard International Law Journal 412 (2005). *See*, *e.g.*, Jutta Brunnée, Hugh M. Kindred, and Phillip Martin Saunders, International law: Chiefly As Interpreted and Applied in Canada 524–539 (7th ed., Toronto: Emond Montgomery Publications, 2006). *See also* Teubner, *'Global Bukowina'*, *supra* at 4. As to the idea of penumbra of uncertain meanings surrounding each legal concept in general, *see* Hart, *Positivism and the Separation of Law and Morals*, *supra* at 607–608.

snational level, allows then a broader room of maneuver for the legal thinking, *e.g.* for the evolutionary theory, in order to affect its development, or, in other words, to determine how and in which direction to point the spotlights enlightening the legal concepts' penumbral areas.[229]

Due to this specific blurred nature of the transnational legal concepts, the evolutionary approach is particularly needed in a transnational legal discourse but, at the same time, it has necessarily to be able to offer to the legal actors operating in such a discourse, *e.g.* arbitrators or in-house attorneys, not only the history and actual content of a certain legal concept, but also some clear normative guide-lines or firms sticks in the magma of transnational law. For example, the evolutionary theory can affect the development of the transnational corporate law if, and only if, it is able to offer not only a description of what a corporation is for from a transnational legal perspective. The ecolutionary scholars must also offer some answers as to a fundamental question as to what a corporation ought to do (and why, from a legal reasoning perspective) when facing the issue of corporate social responsibility: ought the latter to be considered by the CEOs and boards of directors as simply "morally" or "marketing" binding or as an integral part of the legal genome of a multinational corporation?[230]

In other words, an evolutionary theory of law-making, if integrated with the necessary normative components, can explain not only how certain legal concepts are created and become dominate in the transnational legal context, despite lacking support or formal sanctioning of a unique legally legitimizing agency.[231] As pointed out by Teubner, transnational law is actually "one of the rare cases in which practical legal decision-making becomes directly dependent on legal theory."[232] Therefore, the evolutionary theory can offer a decisive contribution to law-makers and decision-makers, which lack cen-

[229] *See* Harry W. Arthurs, *Where Have You Gone, John R. Commons, Now That We Need You So?*, 21 Comparative Labor Law and Policy Journal 389 (2000). *See also* Michael Abramowicz, *Speeding Up the Crawl to the Top*, 20 Yale Journal on Regulation 183–204 (2003); and Roberta Romano, *After The Revolution in Corporate Law*, 55 Journal of Legal Education 348–351 (2005).

[230] *See*, *e.g.*, Reuven Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 Delaware Journal of Corporate Law 813–818 (2005).

[231] *See*, *e.g.*, Wolfgang Kerber, *Institutional Change in Globalization – Transnational Commercial Law from an Evolutionary Economics Perspective*, 9 German Law Journal 423–426 (2008); or Roderick A. Macdonald, *Three Metaphors of Norm Migration in International Context*, 34 Brooklyn Journal of International Law 635–649 (2009).

[232] Teubner, *'Global Bukowina'*, *supra* at 9.

tralized authoritative signals of direction (*e.g.* preparatory works by the national assembly, fundamental documents such as a Bill of Rights, classical judicial decisions in the legal history of a country), in taking the "right" decisions or the "right" legal measures in hard cases according to whatever criteria the evolutionary theoreticians decide to provide.[233]

To these aspects, one should also add that the application of the evolutionary theory to transnational (corporate) law could somehow have a positive back-effect on the very structure of the evolutionary approach itself. In particular, it is most likely that some basic points of differentiation between American evolutionary theory, in which legislating actors play a relevant (though often negative) role, and the European evolutionary theory, more focused on the evolution made by private actors and courts as opposed to legislative codification, will tend to dissolve in the legal evolutionary theory of transnational law-making.[234] The transnational production of legal regulations is characterized by the very law-making roles played, on a peer-to-peer basis, not only by public actors such as legislative assemblies (both at national, supranational and international levels) but also by private actors such as practitioners, arbitration tribunals, and think-tanks.[235]

An evolutionary theory can offer a major contribution in building a middle range theory of law-making above all in the area of transnational corporate law mainly due to the coexistence of two conditions specific for this legal field. First, on a more practical level, the evolutionary approach had already devoted specific attention to the analysis of the evolution of transnational law in general (and its economic branches in specific). In recent decades, many

[233] As an example of possible combination of descriptive and normative component in evolutionary approach to the law, *see* Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 Connecticut Law Review 489–490 (2004). *But see* Joseph Kohler, *Evolution of Law*, *in* A. Kocourek and J. H. Wigmore, Evolution of Law: Select Readings on the Origin and Development of Legal Institutions. Vol. II: Evolution of Law 6, 9 (Boston: Little, Brown, and Co., 1915).

[234] *See*, *e.g.*, Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, *supra* at 1329–1330, in comparison to Amstutz, Abegg, and Karavas, *Civil Society Constitutionalism*, *supra* at 245–249.

[235] *See* Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, *in* Y. Dezalay and B. G. Garth (eds.), Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy 16–17 (Ann Arbor, MI: University of Michigan Press, 2002). *See*, *e.g.*, Muchlinski, Multinational Enterprises and The Law, *supra* at 82–85; or Peer Zumbansen, *The Privatization of Corporate Law? Corporate Governance Codes and. Commercial Self-Regulation*, Juridikum 32–37 (2002).

works have applied evolutionary theoretical analytical tools specifically in order to explain the birth and diffusion of new legal commercial categories at a new level, *i.e.* the transnational level, and how these changes affect both the national and international legal systems.[236] Therefore, at this level of law in particular it is possible to utilize the fundamental contributions evolutionary studies have offered and are still offering for a better understanding of how and why certain legal categories have come to be dominating in the cross-bordering commercial legal world.

Second, legal evolutionary theory can play a decisive role in building a theory for transnational corporate law-making because of the specific structural features of the latter. The legal regulation of transnational activities and structures of multinational corporations is characterized for being an area, more than others, where the old paradigms typical for state based law-making (both national and international) appear to be under heavy scrutiny.[237] As consequence, corporate law-making at the transnational level tend to challenge some of the assumptions traditionally embraced without so much questioning by contemporary legal theory.[238]

[236] *See*, *e.g.*, Smits, *Applied Evolutionary Theory*, *supra* at 477–478; or Bryan H. Druzin, Law Without The State: The Theory of High Engagement and The Emergence of Spontaneous Legal Order Within Commercial Systems 68–72, available at: http://works.bepress.com/bryan_druzin/3 (last accessed: April 30, 2010). *See also* Clive Schmitthoff, *The Unification of the Law of International Trade*, 1968 Journal of Business Law 105–106 (1968). As to a possible reason for such interest in transnational law by the followers of an evolutionary approach to legal change, *see* Jan H. Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 Berkeley Journal of International Law 166–167 (2006); and, more generally, James N. Rosenau, Distant Proximities: Dynamics beyond Globalization 20 (Princeton: Princeton University Press, 2003).

[237] *See* Danielsen, *How Corporations Govern*, *supra* at 413–416; and Delissa A. Ridgway and Mariya A. Talib, *Globalization and Development –Free Trade, Foreign Aid, Investment and the Rule of Law*, 33 California Western International Law Journal 328–331 (2003). *See also* de Sousa Santos, Toward a New Legal Common Sense, *supra* at 212. *See*, *e.g.*, Susan K. Sell, *Structures, Agents and Institutions: Private Corporate Power and the Globalisation of Intellectual Property Rights*, *in* R. A. Higgott, G. R. D. Underhill, and A. Bieler (eds.), Non-State Actors and Authority in the Global System 91–92 (London: Routledge, 2000).

[238] *See*, *e.g.*, Charles F. Sabel and William H. Simon, *Epilogue: Accountability without Sovereignty*, *in* G. de Búrca and J. Scott (eds.), New Governance and Constitutionalism in Europe and the US 395 (Oxford: Hart Publishing, 2006). *See also* Victoria Nourse and Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 Cornell Law Review 127–132 (2009); and Thomas L. Friedman, The

In particular, some parts of practitioners and some parts of legal positivism, having their roots in the ideology of the nation state and separation of powers, still retain in both their descriptive and normative components the idea that usually the law-making phase and the dispute-resolving phase are separated (which, mostly but not exclusively in the civil law systems, implies also clearly differentiated actors empowered to supersede such phases).[239] This looking back to the past, i.e. to the golden age of the nation state, is strengthened by the fact that lawyers (and among them also legal theoreticians), when faced with the actual complexity of the law-making in a globalized world, find illusory comfort by directing "themselves to a hierarchical solution to the problem, which, whilst not least wholly reproducing the ideal of legal hierarchies of the nation-state, at least comes somewhere close to it."[240] However, if a legal positivistic theory is to investigate the reality of transnational corporate law-making, it then needs to at least question paradigms such as the one of an existing hierarchical structure of legal rules and regimes where some actors usually have the monopoly of creating the law, while others tend only to apply it.[241]

World is Flat: A Brief History of the Twenty-First Century 181 (New York: Farrar, Straus and Giroux, 2005).

239 *See*, *e.g.*, John Henry Merryman, The Civil Law Tradition: An Introduction To The Legal Systems of Western Europe and Latin America 35–37 (2nd ed., Stanford: Stanford University Press, 1985); Hart, The Concept of Law, *supra* at 132–133; and Herbert L. A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, *in* H. L. A. Hart, Essays in Jurisprudence and Philosophy 128 (Oxford: Oxford University Press, 1983). *See also* Gabriel A. Almond, *Introduction*, *in* G. A. Almond and J. S. Coleman, The Politics of the Developing Areas 18 (Princeton, NJ: Princeton University Press, 1960). As to the same streams in common law cultures, *see*, *e.g.*, Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 23 (Princeton, NJ: Princeton University Press, 1997); or Neil D. MacCormick, *Why Cases have Rationes and What These Are*, *in* L. Goldstein (ed.), Precedent in Law 167–169 (Oxford: Clarendon Press, 1987).

240 Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Research for Legal Unity in the Fragmentation of Global Law*, 25 Michigan Journal of International Law 1002 (2004). *See also* Larry Catá Backer, *Reifying Law –Government, Law and the Rule of Law in Governance Systems*, 26 Penn State International Law Review 551–560 (2008). *But see* Alexandra Kemmerer, *Conference Report – Global Fragmentations: A Note on the Biennial Conference of the European Society of International Law (Paris, la Sorbonne, 18–20 May 2006)*, 7 German Law Journal 729 (2005).

241 *See* Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, *in* Teubner, Global Law Without a State, *supra* at 49–56; Roger Cotterrell, *Transnational Communities and the Concept of Law*, 21 Ratio Juris 15 (2008); and Michaels and Jansen, *Private Law Beyond the State?*, *supra* at 879. *See also* Linarelli, *Analytical*

Cross-bordering corporate structuring and activities is characterized by the lack of an established monopoly governing its legal regulation, but at the same time, there is an urgent need for certain normative standards according to which to resolve legal conflicts and (even more importantly) to program economic cross-bordering transactions.[242] Not having at their disposal clear and fixed rules produced by well-established law-making agencies, the actors operating at the transnational level have turned their attention to the actors of the law-applying moment for authoritative indications:

> "Transnational law predominantly emerges in the very peculiar setting of international arbitration and is shaped by the international arbitrators' specific perspectives and methods of decision-making."[243]

In other words, in the transnational context it often is the very application of what is "thought to be law" that "creates" the law.[244] Following this general

Jurisprudence and the Concept of Commercial Law, *supra* at 197–198; and Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 Modern Law Review 4 (2007).

[242] *See* Guido Palazzo and Andreas Georg Scherer, *Corporate Legitimacy as Deliberation: A Communicative Framework*, 66 Journal of Business Ethics 74–78 (2006); and Horst Steinmann and Andreas Georg Scherer, *Corporate Ethics and Global Business: Philosophical Considerations on Intercultural Management*, *in* B. N. Kumar and H. Steinmann (eds.), Ethics in International Business: 13–46 (Berlin: De Gruyter, 1998). *See*, *e.g.*, Yvonne C. L. Lee, *A Reversal of Neo-Colonialism: The Pitfalls and Prospects of Sovereign Wealth Funds*, 40 Georgetown Journal of International Law 1148–1149 (2009). As to a similar problem of lacking of normative standards within transnational health law, *see* Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, 96 Georgetown Law Journal 424 (2008). As to a more general lack of widely accepted legal (and moral) standards in the globalized world, *see* Jürgen Habermas, The Postnational Constellation: Political Essays ch. 4 (Cambridge, Mass.: MIT Press, 2001); and Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order 21–28 (New York: Simon & Schuster, 1998).

[243] Gralf-Peter Calliess and Moritz Renner, *Transnationalizing Private Law – The Public and the Private Dimensions of Transnational Commercial Law*, 10 German Law Journal 1344 (2009). *See also* Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision-Making?*, *in* K. P. Berger (ed.), The Practice of International Law 56–59 (London: Kluwer International Law, 2001); Michael W. Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair 138–139 (Durham, NC: Duke University Press, 1992); and Philip Allott, Eunomia: New Order for a New World 296–339 (Oxford: Oxford University Press, 1991). *See*, *e.g.*, John Braithwaite and Peter Drahos, Global Business Regulation 488 (Cambridge: Cambridge University Press, 2000).

[244] *See*, *e.g.*, Catherine A. Rogers, *The Vocation of The International Arbitrator*, 20 American University International Law Review 1002–1004 (2005); Charles N. Brower and Jer-

path, it is possible to see how, despite that legislated by the scarce designated law-maker actors (*e.g.* international organizations regulating international commerce), also in many parts of transnational corporate law the work of judicial bodies or arbitrators can shift certain rules from the status of mere recommendations, *i.e.* almost not existing for the legal order, to those "felt as binding" by and therefore existing for the legal system.[245]

A possible contribution can here come from the evolutionary studies which, in particular in recent decades and based on their findings as to transnational law in general, have broadened the very idea of the law-making moment in the life of a legal system and questioned the need, in order to have a better understanding of the functioning of a legal system, of a clear separation between the law-making and the dispute-resolution phase.[246] For instance, the evolutionary studies conducted both by European and American scholars have shown the importance of considering the creation of legal categories as a process where the different phases are based upon what the actors does (*e.g.* create, select, and retain) rather than upon the institutional role which is assigned *a priori* to them (*e.g.* statutory law-makers vs. judicial dispute-solvers).[247]

emy K. Sharpe, *The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective*, 45 Virginia Journal of International Law 205–220 (2004); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 Georgetown Law Journal 1089–1090, 1100–1101(2004); or Hari M. Osofsky, *Climate Change Litigation As Pluralist Legal Dialogue?*, 43A Stanford Journal of International Law 223–224 (2007).

245 *See* Jason Webb Yackee, *Toward a Minimalist System of International Investment Law?*, 32 Suffolk Transnational Law Review 314 (2009). *See*, *e.g.*, Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 Harvard International Law Journal 532–533 (2009); or Muchlinski, Multinational Enterprises and The Law, *supra* at 728–729.

246 *See*, *e.g.*, Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 International Review of Law and Economics 226–227 (1994); or Amstutz, *Global (Non-)Law*, *supra* at 471. As to a similar need in modern legal positivism of dissolving the borders between clearly defined law-making and dispute-resolution phases, *see*, *e.g.*, Gardner, *Legal Positivism*, *supra* at 217. *See also* Raz, The Authority of Law, *supra* at 90.

247 *See*, *e.g.*, Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harvard Law Review 644–646 (1996); Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, *supra* at 1355–1357; Amstutz, *Global (Non-)Law*, *supra* at 472–473; Smits, *The Harmonisation of Private Law in Europe*, *supra* at 83–88. On this path, *see also* Clark, *The Interdisciplinary Study of legal Evolution*, *supra* at 1241; and Teubner, *'Global Bukowina'*, *supra* at 20–21.

Another example of a possible innovative input an expanded evolutionary approach can offer to a theory of transnational corporate law-making has to do with the very way the law-making process takes place at the transnational level. Most contemporary legal theory (with few exceptions such as certain feminist legal studies and legal sociologists) when speaking of law-making at the transnational level tend to have a linear conception of it. Legal theory tends to see one actor (either international, transnational, national or local) as starting the process while the others, working successively, operate on the legal category the original actor has produced, influencing each other but only in terms of results and not in the very process leading to such results.[248] For instance, John Braithwaite and Peter Drahos on one side point out the preeminence of the business world as primary law-making agency for the transnational law; on the other side, they perceive the relations between the state-based law and the privately made law in terms of phases where "state regulation *follows* industry self-regulatory practice more than the reverse."[249]

The origins of this idea of a linear law-making in the globalization of legal categories can be traced back to the older vision of law-making, typical in Western national democracies, where the highest legitimized agency (mostly national assemblies) produce law which then is "tested" and eventually "refined" by other legitimized agencies (*e.g.* supreme courts or local assemblies) in successive stages (*e.g.* control of constitutionality, referendum or practices).[250] This linear perception is also reinforced by a more general idea of

[248] *See* William Twining, *Diffusion of Law: A Global Perspective* 18–19, available at http://www.ucl.ac.uk/laws/academics/profiles/twining/diffusion.pdf (last accessed: April 30, 2010). *See*, *e.g.*, the idea of "legal transplants" as developed in Alan Watson, Legal Transplants: An Approach to Comparative Law 22–24 (2nd ed., Athens, GA: University of Georgia Press, 1993). Also the theoretical approach known as legal pluralism has stressed this idea of "linear" law-making by emphasizing the "semi-autonomous" nature of the different legal actors participating in the creation of law(s). *See*, *e.g.*, Sally Falk Moore, Law as Process: An Anthropological Approach 55–57 (London: Routledge & Kegan Paul, 1978). *See also* Twining, Globalisation and Legal Theory, *supra* at 85–86. Among the feminist and critical race feminist legal studies not endorsing a linear vision of law-making, *see*, *e.g.*, Penelope Andrews, *Globalization, Human Rights and Critical Race Feminism: Voices from the Margins*, 3 Journal of Gender, Race, and Justice 395–399 (2000).

[249] Braithwaite and Drahos, Global Business Regulation, *supra* at 481.

[250] For an example of reproducing this traditional idea of how law-making works in a nation state at the globalized level, *see* Jost Delbrück, *Prospects for a "World (Internal) Law?": Legal Developments in a Changing International System*, 9 Indiana Journal of Global Legal Studies 429–438 (2002). *See also* Ann-Marie Slaughter, *The Real New World Order*, 76

the international system labeled as the "Westphalian system," where the monopolizing legal actors are the sovereign territorial national states and the only possible legal relations are either as among states (*international law*) or within states (*domestic law*).[251]

Many legal scholars seem to have paid less attention to the fact that globalization of the law, and especially transnational corporate law, is a "new" phenomenon not only because it gives new content to the law, but also because it changes the way the very law is created, by questioning both the linear nature of law-making and its monopoly by state or state-based actors.[252] The lack of attention by modern legal thinking to this novelty then further stresses the need to make use of the results and methodologies of the evolutionary theory as a fundamental underpinning upon which to build a systematic and specialized investigation of law-making in transnational corporate law. As the matter of facts, the evolutionary approach is certainly suitable to face such new forms of legal regulations because it has adopted, at least when dealing with law-making in transnational law, both a non-state based approach (in this way dismissing the supremacy of the Westphalian model) and a non-linear model.

As to the first, in particular the European version of the evolutionary theory tends to dismiss the traditional state-based perspective as to the law-making. The evolutionary approach promotes a move in the very way the legal discourse needs to perceive the structure of transnational law-making: from a pyramidal idea of the law-making (with at the top state and state-based law-

Foreign Affairs 184 (1997); and Johan Hart Ely, Democracy and Distrust: A Theory of Judicial Review 4–7 (Cambridge, Mass.: Harvard University Press, 1980).

[251] *See* Paul Street, *Stabilizing flows in the legal field: illusions of permanence, intellectual property rights and the transnationalization of law*, 3 Global Networks 13–14 (2003). *See also* Twining, *A Post-Westphalian Conception of Law*, *supra* at 200; and Eric Allen Engle, *The Transformation of the International Legal System: The Post Westphalian Legal Order*, 23 Quinnipiac Law Review 23–26 (2004).

[252] *See* Anna di Robilant, *Genealogies of Soft Law*, 54 American Journal of Comparative Law 551 (2006). *See also* Twining, Globalisation and Legal Theory, *supra* at 7, 252; and Street, *Stabilizing Flows in the Legal Field*, *supra* at 7–8. As to the changes globalization produces in the law-making of globalizing agencies, *see*, *e.g.*, Bruno Simma and Andreas L. Paulus, *The 'International Community': Facing the Challenge of Globalization*, 9 European Journal of International Law 274–276 (1998); or the idea of "regime-shifting" in Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Yale Journal of International Law 14 (2004). *But see* Benjamin R. Barber, *Global Democracy or Global Law: Which Comes First?*, 1 Indiana Journal of Global Legal Studies 121–127 (1993).

makers) to a more network based relations, where the various private and public law-making agencies operate on the same level of legitimacy and authority.[253]

As to the second novelty introduced by the globalization in the transnational corporate law, this is particularly tackled by the American version of the evolutionary approach: a non-linear model can be useful for updating the theory of law-making to the new complex reality of the globalized world, a reality where transnational law is created through "a fluid, constantly changing set of interactions in a complex struggle between a large number of groups and institutions."[254] The non-linear modality of the law-making as proposed by the evolutionary theory is especially traceable in the idea of "contingency" as an important factor triggering evolution in one direction instead of another.[255]

From a legal theoretical perspective, the concept of contingency can be defined as that analytical approach which takes into consideration that the effect of one factor [*X*] on another [*Y*] can depend upon some third variable

[253] *See*, *e.g.*, Gunther Teubner, *Un droit spontané dans la société mondiale?*, *in* C.-A. Morand (ed.), Le droit saisi par la mondialisation 197 (Bruxelles: Bruylant, 2001); and Francois Ost and Michael van de Kerchove, De la pyramide au réseau? Pour une théorie dialectique du droit 14 (Bruxelles: Publications des Facultés Universitaires Saint-Louis, 2002).

[254] Charles J. G. Sampford, The Disorder of Law: A Critique of Legal Theory 203 (Oxford: Basil Blackwell, 1989). *See also* Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 *Duke Law Journal* 928–934 (2005). *See*, *e.g.*, Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System*, *supra* at 862–875; Ruhl, *The Fitness of Law*, *supra* at 1437–1467; Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 65 Tennessee Law Review 190–216 (1998); Smits, *The Harmonisation of Private Law in Europe*, *supra* at 87; or Amstutz, Abegg, and Karavas, *Civil Society Constitutionalism*, *supra* at 250–251. As to the definition of non-linearity used in this work, *see* Ralph D. Stacey, Complexity and Creativity in Organizations 288 (San Francisco, CA: Berrett-Koehler Publishers, 1996).

[255] *See* Deborah S. Tussey, *Music at the Edge of Chaos: A Complex Systems Perspective on File Sharing*, 37 Loyola University Chicago Law Journal 158 (2005). *See*, *e.g.*, Fried, *The Evolution of Legal Concepts*, *supra* at 315–316; or Eckardt, *Explaining Legal Change from an Evolutionary Economics Perspective*, *supra* at 454. *See also* Stephen Jay Gould, Wonderful Life: The Burgess Shale and the Nature of History 288 (New York: W. W. Norton & Company, 1990); Jeremy Waldron, *Lucky in Your Judge*, 9 Theoretical Inquiries in Law 193 (2008); or Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* Kairys (ed.), The Politics of Law: A Progressive Critique, *supra* at 23 [3rd ed.]. *But see* Gordon, *Critical Legal Histories*, *supra* at 81–87; and Sinclair, *Statutory Reasoning*, *supra* at 370–372.

[*z*] which, despite the influence on the two, tends to somehow be positioned outside the environment under investigation.[256] In an evolutionary theory of law-making, the idea of contingency means that the reciprocal relations between the environment and legal systems can be affected by a "third player" *z*, usually of an ideological nature (*e.g.* a political party or a legal scholarship), which tends to operate relatively independent (or "arbitrarily") in relation to both the environment *X* and the legal system *Y*.[257]

For example, the formation and diffusion of a legal construction of corporate governance where stakeholders are less protected, cannot be explained by looking exclusively to the interrelations between a legal system (*X*) and the existing economic and financial environment (*Y*). In some cases, as stressed by Mark J. Roe, in order to explain the evolution of a certain legal category of corporation as excluding the stakeholders, it is also necessary to make reference to the "model of the perfect citizen" the party in power has as its basic ideal (*z*).[258]

As it can be easily understood, this very evolutionary concept of contingency can help in sketching a framework of transnational corporate law-making closer to the reality. The transnational corporate law-making, due in particular to the lack of centralized law-making actors with a monopolizing legitimacy and jurisdiction as to the creation of new corporate legal rules,

[256] This definition of "contingency" as to the legal discourse is derived (though slightly modified) from the original definition in organizational studies as, for instance, in Lex Donaldson, The Contingency Theory of Organizations 5 (London: Sage Publications Ltd., 2001). *See also* Waldron, *Lucky in Your Judge*, *supra* at 193–194. *But see* Roberto Mangabeira Unger, Politics: A Work in Constructive Social Theory. Volume I. Social Theory: Its Situation and Its Task 173–174 (Cambridge: Cambridge University Press, 1987).

[257] As to this use of the term "contingency" within the evolutionary scholarship, *see*, *e.g.*, Richard H. McAdams, *Cultural Contingency and Economic Function: Bridge-Building from the Law & Economics Side*, 38 Law and Society Review 222–225 (2004); Luhmann, Law as a Social System, *supra* at 145; or Hutchinson and Archer, *Of Bulldogs and Soapy Sams*, *supra* at 47–48. *See also* Deakin and Wilkinson, The Law of the Labour Market, *supra* at 29.

[258] *See* Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, *Law and Finance*, 106 Journal of Political Economy 1145–1151 (1998), in combination with Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 Stanford Law Review 561–566 (2000). *See also* Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, *supra* at 1346–1347; and Henry N. Butler, *The Smith v. Van Gorkom Symposium: Jurisdictional Competition, and the Role of Random Mutations in the Evolution of Corporate Law*, 45 Washburn Law Journal 267–268 (2006).

tends to be more sensitive to "arbitrary" factors, *e.g.* a change of leadership in the Popular Republic of China (*z*), which can affect the interplay between the transnational corporate legal community (*X*) and the surrounding international economic environment where the multinational corporations operates (*Y*).[259]

To conclude, some parts of the law have gone through a process of accelerating transnationalization in the last decades and corporate law should be certainly counted among them. This process has implied such a radical level of changes in the traditional idea of law-making, with the loss of monopoly by the state and the restructuring according to non-linear modalities, that the traditional legal theory seems to present some difficulties in fully grasping how transnational law is created. It is maybe the time to explore a possible way out for these difficulties by introducing a new approach to the transnational law-making, i.e. an evolutionary approach integrated with normative components offered by legal positivism.

On one side, the evolutionary perspective allows, with its three phases explanation, to give some order in describing what appears to be a chaotic process where private and public actors participate in creating the transnational corporate law. On the other side, being equipped with the normative messages produced by legal positivist, the evolutionary approach and its descriptions as to how and why a certain legal category is what it is, can become useful also for the transnational legal actors. In the end of the day, while the evolutionary approach is most likely not the best theory of law in general, if there would ever be one, one should to start to consider whether, once expanded with normative components offered by legal positivism, it may nevertheless become the best theory explaining and clarifying the transnational law-making.

6. Conclusion

The main purpose of this article has been the re-making of the evolutionary theory of law-making in order to render it more useful for the players that actually create the law, i.e. the legal actors. This re-modeling has been done by expanding the evolutionary approach with some components coming

[259] *See*, *e.g.*, Muchlinski, Multinational Enterprises and The Law, *supra* at 196–201. *See also* Roger P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 Virginia Journal of International Law 62–65 (2008).

from the legal actors' theory *par excellences*, i.e. legal positivism. After having in Part One presented some clarification as to what an evolutionary theory of law-making is, Part Two pointed out how this approach has encountered some difficulties in being accepted among the legal actors. In particular, it has been seen that one of the main reason which has contributed to such a "rebuttal" is the lack of an explicit normative side, where lawyers, law-makers and judges can retrieve "ought" criteria to be used for deciding in which directions future law-making should proceed.

Parts Three and Four proposed the integration of the normative component of already well-established legal theories into the evolutionary approach. After having categorized the latter in two larger groups, namely "Creationist" and "Darwinians," only those belonging to the second group (procedural natural law theory and modern legal positivism) have been shown to present messages compatible with the basic ideas of the evolutionary research program. Moreover, among the "Darwinist" legal theories, the normative message of modern legal positivism, because of its focus on both legal reasoning and sources of law, is probably the most appropriate to be integrated into the evolutionary approach. Finally, Part Five has pointed out the possible contribution a legal evolutionary theory can offer to the construction of a theory of transnational corporate law-making, *e.g.* with its idea of contingency or its non-linear model.

To conclude, it should be once again highlighted that the adjustment described in this work does not aim at changing the very nature of the evolutionary approach, *i.e.* in making evolutionary theory something else. Since law is a human product and human beings do not always act in predictable ways, the goal is simply to make the evolutionary theory into a theory of law-making more appealing to legal actors. In this way, this approach can be used to understand not only actual realities which are highly complicated for the legal actors (*e.g.* transnational corporate law). An evolutionary theory expanded with the normative components borrowed from legal positivism, can also help the legal actors to influence the evolution of "unsecure" fields (at least from a traditional legal perspective) such as transnational corporate law and to channel them in more predictable patterns of legal development.

Författarförteckning

Mia Carlsson, jur. dr i civilrätt vid Stockholms universitet, verksam som forskare vid Stockholm Centre for Commercial Law. Uppsatsen *Skadeståndsrättslig sambandsvärdering – en kursändring* har, med undantag för några smärre tilllägg och ändringar, tidigare publicerats i JT 2009–10 nr 2 s. 259 ff.

Lars Gorton, professor emeritus. Gästprofessor vid Center of Credit Law and Capital Market Law, Copenhagen Business School samt verksam vid Stockholm Centre for Commercial Law. Uppsatsen ännu inte publicerad på annat håll.

Lars Heuman, professor i processrätt vid Stockholms universitet, verksam vid Stockholm Centre for Commercial Law. Uppsatsen *Processuell senfärdighet – en kåserande framställning* är inte publicerad tidigare och uppsatsen *Skyldighet för en part att lämna en förteckning över de skriftliga bevis han innehar* har tidigare publicerats i Vänbok till Bertil Södermark, Norstedts Juridik, 2009, s. 213–226.

Jan Kleineman, professor i civilrätt vid Stockholms universitet, verksam vid Stockholm Centre for Commercial Law. Uppsatsen *Europakonventionen och den svenska skadeståndsrättens utveckling* har sin utgångspunkt i ett föredrag som hölls den 11 februari 2008 inför ledamöterna av Vetenskapliga rådet vid Stockholm Centre for Commercial Law. Har tidigare publicerats i JT 2008–09 s. 546–563. Uppsatsen *Principen jura novit curia – särskilt i skiljeförfaranden* har tidigare publicerats i Vänbok till Bertil Södermark, Norstedts Juridik, 2009, s. 93–124.

Fredric Korling, jur. dr i civilrätt, verksam vid Stockholm Centre for Commercial Law. Disputerade våren 2010 på avhandlingen Rådgivningsansvar –

särskilt avseende finansiell rådgivning och investeringsrådgivning. För närvarande innehar Fredric en post doc-tjänst finansierad av Torsten och Ragnar Söderbergs stiftelser vid Stockholm Centre for Commercial Law för projektet ”Intressekonflikter på den finansiella marknaden – rättsliga krav på hantering av intressekonflikter”.

Göran Millqvist, professor i civilrätt vid Stockholms universitet, verksam vid Stockholm Centre for Commercial Law. Uppsatsen har tidigare publicerats i Festskrift till Suzanne Wennberg, Norstedts Juridik, Stockholm 2009, s. 255–267.

Jori Munukka, docent i civilrätt och gästlektor vid Stockholms universitet, verksam som forskare vid Stockholm Centre for Commercial Law och ledare för centrets avdelning i fastighetsrätt. Uppsatsen *Avtalsfrihet i hyresrätten. Om betydelsen av hyresgästs dispositioner* har tidigare publicerats i Skrifter till Anders Victorins minne, Iustus Förlag, Uppsala 2009, s. 397–425 och uppsatsen *Civil Law Consequences of Corruption in Sweden* i Olaf Meyer (ed.), Civil Law Consequences of Corruption, Schriftenreihe des Zentrums für Europäische Rechtspolitik an der Universität Bremen (ZERP), vol. 53, Nomos Verlag, Baden-Baden 2009, s. 117–144. Båda uppsatserna har genomgått viss uppdatering.

Mårten Schultz, docent i civilrätt, verksam som forskare vid Stockholm Centre for Commercial Law. Uppsatsen *Europeiska civilrättsprinciper* baserar sig på ett anförande vid de Nordiska förmögenhetsdagarna i Helsingfors, 6–8 maj 2009, och har tidigare publicerats i Tidskrift, utgiven av Juridiska föreningen i Finland 2009, s. 762 ff. Uppsatsen *Obehörig vinst rediviva* har tidigare publicerats i Svensk Juristtidning 2009, s. 946 ff.

Teresa Simon Almendal, jur. dr och universitetslektor i finansrätt vid Stockholms universitet, verksam som forskare vid Stockholm Centre for Commercial Law. Uppsatsen har tidigare publicerats i Svensk Skattetidning nr 1 2010, s. 9 ff.

Gustaf Sjöberg, jur. dr och docent, verksam som forskare vid Stockholm Centre for Commercial Law och som lärare vid juridiska fakulteten, Stockholms universitet. Uppsatsen är tidigare publicerad i JT 2008–09 s. 576.

Jessika van der Sluijs, jur. dr i civilrätt, verksam som forskare vid Stockholm Centre for Commercial Law. Uppsatsen är en omarbetning av rättsfallsanalyserna *Avstående om preskriptionsinvändning och direktkrav* som publicerats i JT nr 1 2009/2010 samt *Förlikning medförde att ansvarsförsäkringsersättning uteblev* som publicerats i JT nr 3 2009/2010.

Fabian Walla, doktorand och tidigare gästforskare vid Stockholm Centre for Commercial Law. En modifierad version av uppsatsen kommer att publiceras i European Business Law Review (EBLR).

Mauro Zamboni, jur. dr och docent i allmän rättslära vid Stockholms universitet, verksam som forskare vid Stockholm Centre for Commercial Law. För närvarande innehar Mauro en forskartjänst inom rättsvetenskap vid Kungliga Vetenskapsakademien finansierad av Torsten och Ragnar Söderbergs stiftelser. Uppsatsen har ej publicerats tidigare.