

THE FUTURE OF LAW PROFESSORS AND COMPARATIVE LAW

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5

I. INTRODUCTION.

10 Since the beginning of comparative law as an autonomous discipline much intellectual efforts have been devoted to define aims and methodology of the newborn legal science¹. Several positions have emerged over the years. Among the many contributions, a distinction (not the only one, not the most precise one might conceive of) can be drawn between structuralism and functionalism, depending on the ultimate goal of comparative law².

15 Structural approaches consider better knowledge of legal systems as an end in itself, the end that defines comparative law as a science. Comparison, accordingly, is but a tool to understand legal systems more in depth than an observation from inside would allow. Functional approaches consider knowledge of other legal systems as a pre-condition (as such indispensable) for further purposes which is under the reach of comparative legal scholars to achieve.

20 For historical reasons structural approaches played an important role in uncovering the differences of countries and legal systems of a modern world prior to globalization. Major economic changes, entrenchment of human rights, worldwide trade and pervasive information technologies in current societies made the future of law and the future of comparative law scholars dependent not just on sophisticated efforts to explore the legal systems and their dimensions, but on the ability to use the knowledge acquired as a building block for a new legal order.

25 We aim to design a new conceptual framework for comparative legal studies where the goal and the methodology no longer deal with what the law is, but with what the law should be³. This is not a claim to have a role in processes of legislative reforms. If it were just this, there would be nothing new in our approach. We rather try to use comparative knowledge of legal systems to devise norms (at all levels) and interpretations that can lead towards desirable and controllable social and economic results. Such a challenge cannot be left to other social scientists alone or to modern

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¹ A detailed account of the history of comparative law is provided by D.S. Clark, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871 (2001).

² BASIL S. MARKESINIS, *COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM. THE STORY OF THE LAST THIRTY-FIVE YEARS* 54 (2003) summarizes the debate as “elegance” vs. “usefulness”.

³ The fact comparative law «lack[s] theoretical direction» was also an observation of William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?* 143 U. PENN. L. REV. 1889, 1894 (1995), although the author is more concerned with philosophical implications about the use of comparative law. Anxiety about the current situation of comparative legal studies is widespread and it has been expressed, among others, by Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 673 (2002), since comparative law has accumulated «huge amount of valuable knowledge» and yet it has to develop a new agenda «by establishing a canon, defining goals, and committing to cooperations». See also Frank Werro, *Notes on the Purpose and Aims of Comparative Law*, 75 TUL. L. REV. 1125 (2001).

35 techno-bureaucrats. The future of comparative law and of its scholars lies in their ability to regain a role of social engineers (for themselves as well as for law professors at large).

40 The paper is organized as follows. Paragraph II reviews, though cursorily, the main contributions of comparative law scholars to the legal discourse on the aims and methods of comparative law. Paragraph III analyzes the intersection of law and economics and its implications for the future study of law in light of new trends of comparative economics. Paragraph IV considers the use of economic indicators to rank legal systems and will deal with the role of lawyers to govern processes of legal change. In Paragraphs V and VI we provide a new view for comparative lawyers and a conceptual direction to revitalize the legal scholarship and allow the legal discourse to become integral part of any attempt to build the social order of the future. Paragraph VII states a short conclusion.

II. THE STATE OF THE ART.

50 1. What do we stand for?

One of the most recurrent questions in any organization, one defining the role and the identity of those who belong to the organization itself, recalls the title of this paragraph⁴. If the organization is the modern society at large, lawyers should ask themselves: what do we stand for? And, among lawyers,⁵ comparative legal scholars should raise the same question in an even more urgent way and quickly identify a sound answer, because such unanswered question challenges their very *Lebensraum* as scholars⁶.

60 Since the start-up of this intellectual enterprise, the founding fathers have been cyclically involved in the debate about aims and purposes of comparative law and the actual results are still all but encouraging⁷. The history of the first Congress in Paris, can be considered the starting point of a self-conscious movement towards the creation of a well-defined discipline, worth of academic teaching and an integral part of any university curriculum⁸.

⁴ In social psychology, the seminal paper about the identity questions that define organization is Stuart Albert & David A. Whetten, *Organizational Identity*, 7 RESEARCH IN ORGANIZATIONAL BEHAVIOR 263 (1985).

⁵ Of course, each representative of the legal profession could ask the question tailored to his specificity: lawyers as such, as a cultural figure of modern societies (jurists), as professionals (judges or attorneys), and as a class of scientists that populates universities and is mostly responsible for research and education and for developing thoughts about law as a cultural and social product.

⁶ We posit here an issue that will be dealt thoroughly at the end of the paper, that is to say to what extent it makes sense to talk about law if not in a comparative perspective, as the only acceptable. See, on this point, A. von Bodgandy, *Prospettive delle scienza giuridica nell'area giuridica europea. Una riflessione sulla base del caso tedesco*, FORO IT., 2012, V, 54.

⁷ Even meetings of the International Society of Comparative Law and national societies have intensely debated about aims and methods of comparative law.

⁸ See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 61 (Oxford University Press 3rd ed. 1998). See also Marc Ancel, *Les grandes étapes de la recherche comparative au XX^e siècle*, I STUDI IN MEMORIA DI ANDREA TORRENTE 21 (1968). Clark, *supra* note 1, at 875-888, describes in great details the 1900 Paris International Congress of Comparative Law, its antecedents and the initiatives that followed, as well as the various contributions of the lawyers (mostly from continental

65 At the beginning, it was not just a quest for identity; as a matter of fact, comparative
 legal scholars were jurists and, after all, they could have claimed their identity simply as
 legal scholars. In an era of overwhelming positivism, it was rather an issue of
 legitimacy, more than of identity. In the positivist climate of national states, advocating
 the study (or, even worse, the import) of foreign models must have sound as anathema
 70 or heresy⁹. Comparative lawyers were authentically revolutionary in this respect.
 With the consolidation of national legal systems at the end of XIX century, lawyers had
 to reinvent their role in society. Within the Western Legal Tradition, this has been a
 defining (not necessarily positive) moment, since legal scholars could not concur any
 longer with politics in stating the law¹⁰. At some point, the legal science lost the
 75 function of *jus dicere*; the power had passed to parliaments and politics¹¹. Lawyers
 could think of themselves exclusively as tinkering with the black letter rules (*jus
 positivum*) provided by legislators. This process of specialization defined the legal
 profession as strictly dependent on the law as an act, rather than law as an algorithm for
 desirable human behaviors. *Da mihi facta, dabo tibi jus* is the formula that captures the
 80 essence of the role: law pre-exists to facts, and facts are given.
 As a consequence of positivism, the role of the lawyers remains external to society: they
 do not study facts (as economists or sociologists) and do not concur in the creation of
 rules that govern facts¹²; still, they formally remain in the domain of social sciences.
 They cultivate – or at least this have done so far – the art of adjusting *ex post* broken
 85 situations, either applying statutory provisions or legal precedents¹³.
 The exclusion of lawyers from law-making had serious implications; legal scholars
 developed their legal culture and they were isolated from society as a whole¹⁴. Their
 culture was also their domain, their monopoly. Interpretation, not creation, is what they
 practice in their realm¹⁵, and this is obsessively repeated for judges, that represent one
 90 of the branches of the state, and one of the epiphanies of the legal profession. Law
 professors are the wardens of this domain and those responsible for transmitting
 techniques, tools, and beliefs.

Europe) who took part in the program. On the importance of the Congress see also Xavier Blanc-Jouvan, *Centennial World Congress on Comparative Law: Opening Remarks*, 75 TUL. L. REV. 859, 862 (2001).

⁹ Zweigert & Kötz, *supra* note 8, at 12 («At the time of growing nationalism, this legal narcissism led to pride in the national system»).

¹⁰ To borrow the words of the late Rudi Schlesinger, before the age of codification commenced, the role of comparison had been «integrative rather than contrastative»; Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477, 479 (1995).

¹¹ This very moment is epitomized by a conceptual split (that is also evidenced in some languages) between the law (*jus, Recht, droit, derecho*) as a social product, and the law (*lex, Gesetz, loi, ley*) as a legal source and the predominance of the latter meaning over the former.

¹² The most interesting facts jurist were expert of are customs, that lost centrality in the western world after codifications took the scene. According to LUIGI MOCCIA, *COMPARAZIONE GIURIDICA E DIRITTO EUROPEO* 54 (2005), legal scholars, in the new order, have been close to legislators or judges, by time to time depending on needs, interests, and ideals at stake.

¹³ James Gordley, *Why Look Backward*, 50 AM. J. COMP. L. 657, 658 (2002) («Wherever law is a learned profession, jurists are engaged in the same general project: they use authoritative sources in some intellectually coherent way to clarify rules or principles and to resolve particular cases»).

¹⁴ Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469 (1995).

¹⁵ As Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 343, 347 (1991), pointed out, «the person who guides interpretation is, first and foremost, the scholar in his double role as a writer of authoritative works and as a university lecturer».

95 There has been a time when this situation proved to be safe and rewarding for lawyers
 as a sort of equilibrium; they became the trustee of the law towards the powerful settlor
 of the trust, that is, the legislator. Of course, one of the conditions of the equilibrium
 was for lawyers to confine the interpretation to their own national systems, to study and
 justify them from inside¹⁶. Any option to reach outside would inevitably jeopardize the
 internal equilibrium. If law is given and is given as national law, interpretation cannot
 be alike. Legal scholarship and teaching do follow the same path.

100 A sense of dissatisfaction soon spread out among jurists. Legal systems never proved
 enough self-sufficient and impermeable to foreign logics even when national states at
 the beginning of their formation were jealous of their identity and the unity of
 continental *jus commune* was about to be lost¹⁷.

105 At the same time, this new legal scholarship, based on interpretation and nurtured by
 legal dogma, could not exist without rejoining other social phenomena. Mainly within
 national traditions where dogmatic was deeply rooted, comparative legal studies sprang
 out of this general sense of incompleteness, partiality, inconsistency, and from the need
 to regain a role in building society. Where legal culture was less grounded on dogma, as
 it is in common law countries, still law by itself required another discipline to form a
 110 more satisfactory binomial (law and other disciplines)¹⁸. Traditionally, comparative law
 has been the *trait d'union* between those two perspectives, striving with their limits in
 both cases. In the former, the limits were the national boundaries that forced law to a
 merely domestic dimension. In the latter, the limits were disciplinary.

115 Comparative law, as the anti-dogmatic science *par excellence*, moved along the borders
 of (national) law as a self-standing science and has been always responsible for
 exploring new frontiers. It is not by chance that law & economics as a product of import
 from the United States gained momentum in many countries, thanks to the work of
 jurists belonging to the cohort of comparative legal scholars. More than this, it was
 thanks to comparative law that any dialogue with other sciences got legitimacy in the
 120 legal discourse. In this respect, comparative legal knowledge is anthropologic
 knowledge, since it is concerned with limits of the legal continent and not only with the
 inland territories¹⁹. And as far as history is concerned, comparative legal scholars also
 navigated through the origins and the evolution of legal systems as part of their
 endeavor²⁰.

125 As comparative study gained legitimacy, it was clear that a science needs to be aware of
 its function, its aims, its methodology²¹. And if, by definition, any science is committed

¹⁶ The logic of homeward interpretation is now producing risks in Europe, in the process of creation of a harmonized EU private law. See Antonio Gambaro, “*Jura et leges*” nel processo di edificazione di un diritto privato europeo, in EUROPA E DIRITTO PRIVATO, 1998, 997. The choice of homeward interpretation and domestic self-confinement from XIX century is criticized by Gordley, *supra* note 13, at 670.

¹⁷ See James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 556 (1995).

¹⁸ See GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END 79 (1995).

¹⁹ RODOLFO SACCO, ANTROPOLOGIA GIURIDICA. CONTRIBUTO AD UNA MACROSTORIA DEL DIRITTO 22 (2007) («Antropologia giuridica e comparazione giuridica rientrano a pari titolo nella conoscenza comparante»).

²⁰ Remarkable examples are Gino Gorla in Italy and James Gordley in the United States.

²¹ Once gained legitimacy, and «identity crisis» ensued that still puts comparative law at the crossroads (Blanc-Jouvan, *supra* note 8, at 86) and let us ask: what do we stand for?

130 to generating new knowledge for the mankind²², soon the question became whether
 knowledge of the legal phenomena is an end in itself for comparative studies or the pre-
 condition (as such, unavoidable) for further purposes, that have been identified, by time
 135 to time, with legal reform, or the creation of a *droit commune de l'humanité* or, until
 recently, the increase of legal systems' competitiveness. Basil Markesinis has sketched
 such views as elegance vs. usefulness²³. We restate it as the eternal dualism between
 structuralism and functionalism.

135 Although the issue of methodology in comparative law is conceptually distinct from
 that of the aims of this discipline, some considerations are in order before we deal with
 how historically scholars have identified different purposes for comparative law.

140 The inner connection between the method and the aims of comparative law lies on the
 assumption that legal systems at an homogenous level of economic development face
 similar social problems; differences, if any, may occur in the kind of answers
 individually provided. Starting from (general) problems rather than from (specific)
 solutions makes everything comparable. This preliminary conclusion has been at the
 core of one basic and long celebrated methodological principle of comparative law, that
 is functionality²⁴. From a methodological standpoint, functionalism means that,
 145 regardless the pursuit of comparative law and its ultimate aims, «the only things which
 are comparable are those which fulfill the same function»²⁵. Rejecting modern and post-
 modern temptations to indulge to a theory of incommensurability, a strong
 methodological principle enables any intellectual position concerning the aims of
 comparative law, as long as useful in analyzing legal solutions²⁶. This is true in law as
 in any other science; a scientific method is evidence of the scientific nature of a given
 150 intellectual endeavor. Moreover, having a dominant methodology concurs in defining
 the identity of the scientist, for it is intimately connected to the scientific goals. Physics,
 chemistry, economics, sociology and any other discipline would not be ranked as
 scientific were their methods less scientific than their seminal research questions.

²² As THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 160 (3rd 1996), posed it, the issue of science as an endeavor to acquire more knowledge is «semantic» since «[t]o a very large extent the term “science” is reserved for fields that do progress in obvious ways»

²³ Markesinis has also clearly expressed his view that comparative law (and lawyers!) should do more than just listing similarities and differences of legal systems; see Basil Markesinis, *Comparative Law – A Subject in Search of an Audience*, 53 *MOD. L. REV.* 1, 19 (1990).

²⁴ The functional method – still considered one of the few, reliable tools of comparative law – has been originally elaborated by KONRAD ZWEIGERT, *DIE “PRESUMPTIO SIMILITUDINIS” ALS GRUNDSATZVERMUTUNG RECHTSVERGLEICHENDER METHODE*, II *INCHIESTE DI DIRITTO COMPARATO* 737 (Mario Rotondi ed., 1973). For a discussion on the relationship between functionality and goals of comparative law see Antonios E. Platsas, *The Functional and Dysfunctional in Comparative Method of Law: Some Critical Remarks*, 12.3 *ELECTRONIC JOURNAL OF COMPARATIVE LAW* (2003). Criticism has grown over the years by several authors around the principle of functionality «by pointing to its systemic bias in favor of like solutions and to its inherent insensibility towards difference» (Reimann, *supra* note 3, at 681, footnote omitted). A thorough discussion can be found in RALF MICHAELS, *THE FUNCTIONAL METHOD OF COMPARATIVE LAW*, *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006), as well as in MICHELE GRAZIADEI, *THE FUNCTIONAL HERITAGE*, *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 100 (Pierre Legrand & Roderick Munday eds., 2003), 100.

²⁵ Zweigert & Kötz, *supra* note 8, at 34.

²⁶ The suggestions about incommensurability are dealt with and criticized by H. Patrick Glenn, *Are Legal Traditions Incommensurable?* 49 *AM. J. COMP. L.* 133 (2001).

155 **2. Droit commune de l'humanité civilisée**

Occasionally comparative legal scholars have been involved in processes of creation of uniformity in law, whether in cases of harmonization or drafting of uniform laws. After all, the original purpose of Saleilles and Lambert was the discovery of a *droit commune de l'humanité*²⁷. Yet, thus far legal change and uniformity did not materialize because of the role of comparative legal scholar²⁸. In the same vein, it can hardly be said that the participation in projects of legal reform is an acknowledged and absorbing goal of comparative law or that scholars trained in legal comparison have overcome other social scientists and developed a dedicated methodology to improve or achieve legal reform. Yet, as the dream of discovering a common law of the human kind fell apart, jurists were tempted by the idea of contributing to the creation of a new legal order²⁹. Clearly, legal reform as a purpose implies an acceptance of comparative law in its functional dimension, but law reform does not require comparative legal scholars more than any other jurist called by the authority or by the occasion to draft a new law. Even today there are ongoing projects to produce civil codes and European lawyers have been recruited in mass to concur in the creation of a new common law for Europe³⁰. Still, comparative law seems to be but one of the legal disciplines at work in the process, although some of those experimental laboratories hinge on original intuitions of comparative legal scholars, as it is the *Common Core Project*³¹. Interestingly enough, if purposes of legal reform or creation of a *droit commune de l'humanité* were in the agenda of comparative law at its origins, it means that there is a seminal functional dimension and this predates the passage to the idea that the identification of goals for comparative law must be referred exclusively in terms of generation of new knowledge.

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3. From formants to transplants

²⁷ Clark, *supra* note 1, at 876.

²⁸ Sacco, *supra* note 15, at 2 («In any case, history provides no evidence that uniformity is achieved through comparative legal study»).

²⁹ On this evolution in the approach of comparative lawyers after World War I, see RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO 8 (1992) («i comparatisti si proposero non più di trovare le concordanze, ma di crearle»).

³⁰ According to Reimann, *supra* note 3, at 691, the success of comparative lawyers in Europe as active players in the process of creating a common European private law witnesses that comparative scholars are «hungry for something meaningful to do and happy to return to the forefront of legal academia». Obviously, the success of comparative law cannot depend on a regional and contingent occasion; as a matter of fact the creation of a European private law has involved many scholars that have nothing to do with comparative law and will not become comparatist for being involved in such endeavor. Reimann, *supra* note 3, at 693 wrote that comparative law «in the context of private law Europeanization is a soundly positivistic, methodologically simplistic, and amazingly biased enterprise». On the European situation see also Werro, *supra* note 3, at 1227.

³¹ The methodological origin of the Project goes back to the factual approach, originally cultivated in the Cornell Seminars by R. Schlesinger. Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339 (1998). See also Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 779 (2009) («It must be conceded that in terms of influence the common core projects have been far less successful than the legal origins literature»).

185 One of the major contributions to the structural approach in comparative law comes
 from Rodolfo Sacco and the so called Italian School of Comparative Law (even though
 many Italian comparative legal scholars would not be ready to be included in the
 School)³². The tenets of this School have been consecrated into the so called Trento
 Theses, that is five statements about comparative law that capture the most
 distinguishing features of such an approach³³. In the words of its intellectual Father, the
 190 main contention of this position is that «[I]ike other sciences, comparative law remains
 a science as long as it acquires knowledge and regardless of whether or not the
 knowledge is put to any further use»³⁴. Each legal systems is in a continuous change
 and its components (the “formants”) are never aligned. The role of the comparative
 legal scholar is to uncover the «great optical illusion», represented by the dogma that
 195 only one legal rule at any given time exists (and it coincides with the word of the
 legislator)³⁵.

Although the adoption of such perspective is considered compatible with other
 secondary purposes of comparative law, it should be clear that a definition is *per se* an
 exclusion of constructs that remain outside the definition. Hence, under this approach
 each ambition of functionalism for comparative legal studies constitutes a regressive
 200 character³⁶.

Somehow close to the theory of formants is the contribution on legal transplants. In a
 wealth of papers and books, Alan Watson proposed to direct comparative studies
 towards the definition of the complex relationships of law and society. Eventually
 Watson recognized that comparative knowledge is not necessarily an end in itself but it

³² For an account see Pier Giuseppe Monateri & Rodolfo Sacco, *Legal Formants*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 531 (Peter Newman ed., 1998); Pier Giuseppe Monateri, *Legal Formants and Competitive Models: Understanding Comparative Law from Legal Process to Critique in Cross-System Legal Analysis*, available at <<http://ssrn.com/abstract=1317302>> (last visit, May 10th, 2012). Rodolfo Sacco reaffirmed the merits of its teaching also in most recent interviews; see R. Míguez Núñez, *Comparar: Conversaciones con Rodolfo Sacco*, 17 REVISTA CHILENA DE DERECHO PRIVADO 193 (2011).

³³ The Theses can be read in Rodolfo Sacco, Antonio Gambaro & Pier Giuseppe Monateri, *Comparazione giuridica*, III DIGESTO CIV. 48 (1988). For a review of the Theses and a reaffirmation of their scientific validity after a decade, see Antonio Gambaro, *The Trento Theses*, 4 GLOBAL JURIST FRONTIERS 1 (2004). On the Italian school see Elisabetta Grande, *Development of Comparative Law in Italy*, in Reimann & Zimmermann, *supra* note 24, at 117.

³⁴ Sacco, *Legal Formants*, 4. The same position is held in Sacco, *supra* note 29 at 13 («In definitiva, la migliore conoscenza dei modelli deve essere considerata come lo scopo essenziale o primario della comparazione intesa come scienza»). Criticism on this idea has been expressed by Reimann, *supra* note 3, at 697.

³⁵ Sacco, *Legal Formants*, 385. Further arguments on a theory of comparative law to unveil political messages in law can be found in Pier Giuseppe Monateri, *Comparer les comparaisons. Le problème de la légitimité culturelle et le nomos du droit*, 1 OPINIO JURIS 1, 23 (2009), and Id., *Everybody's Talking: The Future of Comparative Law*, 21 HASTINGS INT'L & COMP. L. REV. 825, 841 (1998) («[T]he theory of formants is a *global internal critique* of the legal discourse» (emphasis in original). In somehow similar terms see Edward J. EBERLE, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUDIES L. REV. 451, 471 (2009) («Decoding is an essential part of the work of comparative law: discovering and translating the invisible powers in a legal culture leads to uncovering the patterns of order that actually operate within a society and yield content»).

³⁶ A duplicity of functions is not excluded by Otto Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, 53 REVUE INTERNATIONALE DE DROIT COMPARE 275, 287 (2001), when the author states that comparative law «est dès lors l'instrument le plus puissant pour décrire le droit national», but it can also play «un rôle important dans la technologie de la production normative».

205 must have «some direct and obvious utility», such utility being «the improvement which is made possible in one legal system as a result of the knowledge of the rules and structures in another system»³⁷.

The transition from legal formants to legal transplants has a unifying moment in the idea that acquisition of knowledge is not only an essential feature of comparative
210 studies, but also an end. It can be questioned whether Watson considers knowledge as an exclusive end or not³⁸, but still the definition of linkages between law and legal change as shaped by social forces implies an intellectual effort which is absorbing for comparative lawyers.

It is as though legal systems could be plotted as multilevel buildings, each level being
215 continuously refurbished (levels are formants, in Sacco's terminology). At any time, there is an ongoing change and very rarely and occasionally one level resembles the other(s). Yet, at any time all floors exist and they insist on the same perimeter (that is, some source of legitimacy), for the building otherwise would collapse, or be highly instable and the law would become unpredictable. Now the main challenge for each
220 jurist – and the ultimate challenge for comparative legal scholars – would be to understand whether there is a law that, given any such building, explains that the floors are currently being refurbished to accommodate the needs of those that happen to live in the premises³⁹.

225 4. Beyond formants. Formants as a historical product

Formants and transplants are now part of the consolidated terminology of the comparative legal discourse. Those constructs are among the standard tools of comparative law and are part of a unique heritage for comparative scholars vis-à-vis
230 purely national jurists. Yet, it appears as though the historical function of doctrines aiming at a role of mere generation of knowledge as the defining feature of comparative law as a science is exhausted. In the past few years, legal articles on comparative law journals started again questioning the role of comparative legal scholars and, to some extent, of jurists⁴⁰.

235 Because a new challenge in defining the new identity of comparative law has started, the intellectual heritage of other schools of thought cannot be easily dismissed. The theory of formants must be appreciated in its historical dimension. It must be seen in a continuum of contributions from legal scholarship, as a paradigm that replaced the previous one and it will be repealed by others that will follow the same fate⁴¹.

³⁷ Alan Watson *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 316, 317 (1978).

³⁸ Watson, *supra* note 37, at 318, considers «comparative law as a method valuable for law reform».

³⁹ See Sacco, *supra* note 15, at 378 («The aim of the student of comparative law is to determine whether these instances of disharmony follow predictable and rationally explicable patterns»). Writings of Monateri can be included in this stream of thought. See Pier Giuseppe Monateri, *Black Gaius. A Quest for the Multicultural Origins of the "Western Legal Tradition"*, 51 HASTINGS INT'L & COMP. L. REV. 479, 511 (2000), «[u]ltimately, Comparative Law should aim to produce a general theory about law and legal change and the relationship between legal systems and rules and the society in which they operate» (footnote omitted), recalling Alan Watson (*supra* note 37).

⁴⁰ We interpret those contributions as signals of a new anxiety that typically emerges in the evolution of sciences where old paradigms become unstable, according to Kuhn's theory of scientific revolutions (*supra* note 22).

⁴¹ Kuhn, *supra* note 22, at 144 ff.

240 Before moving to the next paradigm, a point should be clear, one that sometimes goes
 quickly unnoticed or it is deliberately ignored. There cannot be a logical interruption
 between better knowledge of legal data and the use of such knowledge, between a
 purely structural perspective and a functional one, exactly as any distinction between
 245 basic and applied science is more conventional than substantial⁴². As will be seen in
 paragraph V, (we contend that) the new scientific framework of comparative law hinges
 on the absence of discontinuity between knowledge acquired as an end and knowledge
 used to improve a given legal environment.

250 III. LAW AND ...

1. ...the science of economics.

The next paradigm, somebody would immediately object, does not exist: it is the
 illusory by-product of a misconception.

255 If law is intended as a system, the above conclusion is inescapable. In fact, a systematic
 approach, in the words of its true believers, is concerned with *lex lata*, indifferent to the
 law as it has been or as it is in other countries or legal systems and, on the other, from
 the law as it should be (from one perspective or another). The *äußeres System*, in itself a
 260 conceptual oxymoron, is opposed to the *inneres System*: the latter being characterized
 by coherence or consistency, postulates of the idea of justice based on inner unity⁴³. As
 a necessary consequence, a systematic approach⁴⁴, considering the numerous rules to
 constitute a ‘whole’ which follows an ‘inner order’ expressed by the underlying
 principles, is assumed to be indifferent to any kind of external perspective: both
 265 comparative and in the vein of ‘law and ...’. Other disciplines stand simply outside
 the law and thus cannot contribute to finding it⁴⁵: if, for example, a legal rule is
 inefficient from an economic perspective, this does not invalidate the legal rule, simply
 because efficiency is not accepted as a measure of validity in the inner system⁴⁶.

⁴² Specifically on this point see Max Rheinstein, *Comparative Law – Its Functions, Methods and Usages*, 22 ARK. L. REV. 415, 423 (1968).

⁴³ See Karl Riesenhuber, *English common law versus German Systemdenken? Internal versus external approaches*, 7 Utrecht L. Rev. 117 (2011) (the internal perspective tends to be considered systematic, as opposed to the external that means open to the «law and ...» disciplines).

⁴⁴ In a sense, traditional scholarship is concerned with how courts (do and should) decide cases; and courts do not *make* the law, they simply apply it. This is certainly true for the civil law, but even applies with regard to common law jurisdictions, where the judge is considered as a law-finder rather than a law-maker.

⁴⁵ Werro, *supra* note 3, at 1228 («[W]it a few notable Italian and German exceptions, “law and –ism” has not really entered the scene of (comparative) law studies»).

⁴⁶ An attempt to provide an explanation of economic analysis not as external to la, but «comme une réponse à la crise de l’interprétation qui touche la théorie du droit, et notamment la théorie positiviste, depuis un demi-siècle» comes from Bruno Deffains, Samuel Ferey, *Théorie du droit et analyse économique*, 15 DROIT 223, 226 (2007). The authors suggest to use the tools of economic analysis of law (namely the concept of equilibrium) as means of interpretation of norms as «réalité idéale» (*id.*, at 247). On the importance of economic analysis and policy analysis of law in the context of legal education in the U.S. see von Bodgandy, *supra* note 6, at 57. Interestingly enough, there had been sensibility towards economics also during XIX century, as witnessed by the Berlin International Society of Comparative Legal Science and Economics; see Clark, *supra* note 1, at 880 (footnote 33). Also Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897), had blamed the «divorce between the schools of political economy and law».

270 Because of this commitment to the non-instrumental, wherever the dogmatic stance has
 taken over, the legal mainstream has skipped any contamination with economics and
 marginalized as a sheer curiosity (laws in the world...) any comparative view. Most
 comparative scholars, on their own, have been no less skeptical about opening to an
 interdisciplinary effort aiming at some kind of conceptual overlapping of law and
 economics.

275 Yet, law can also be seen as an instrument. Understanding law as a goal-oriented
 instrument implies recognition that it is directed not to measurement against
 hermeneutic standards, but against practical ones. Once it is accepted that law is not
 (just) a text and triggers effects in the world, the economic approach, among the many
 fields of study deserving attention, becomes particularly promising⁴⁷. Economic theory
 has its roots in normal, everyday theory about how people act. Its basic elements are
 280 individual preferences and beliefs, and their relationship: any person aims to get at most
 what he wants, given her perception about the situation she is confronted with. The
 subjective preferences, deemed exogenous, are not amenable to interpersonal
 comparisons. But they can be all aggregated into preference rankings; these preference
 rankings are numerically represented by utility functions. Beliefs about available
 285 actions, in view of the surrounding circumstances, are expressed by subjective
 probability functions. In standard economic accounts, all interests and values of a
 person are reflected in her utility function. Likewise, all her beliefs are reflected in her
 subjective probabilities. Subjective expected utility maximization is seen as determining
 choice of action. Actions, then, are understood as the result of a person's whole mind.

290 This frame reflects common sense and is not exposed to the recurrent charge that uses to
 downplay the whole enterprise of Law and Economics (L&E) as a monolithic
 intellectual enterprise, dominated by a bizarre concept of rationality and by an obsession
 with efficiency. On the contrary, the common sense at the core of economics at large
 helps to explain its influence. Mathematical models do not really interpret or predict
 295 human act action; yet, they retain intuitive appeal because they are a "scientific" version
 of normal psychology.

L&E is generally characterized as being instrumentalist and consequentialist because it
 studies the law in relation to its effects; more specifically, most L&E scholars view the
 law as a system of incentives that, to different degrees, shape people's behavior and
 accordingly may (or may not) achieve certain goals. If only one admits that the nature of
 300 the law is to provide generalized rules to govern human behavior, the conclusion about
 the fruitfulness of the interaction of law and economics comes to no surprise; so that the
 only real questions are why it took so long for the two to find each other, despite
 diffuse premonitions about the opportunity of their matching and, above all, why there
 is still so strong a resistance to recognize an authentically binary dialogue and to harvest
 305 from its utmost consequences.

No doubt that critics and criticisms against the inroad of economics into the legal
 sanctuary have always been abundant; as well as Cassandras, denouncing that the
 edifice's bottom has long since disappeared into the sand (Weinrib), that the movement
 has peaked out (Horwitz), that L&E is sick and spreads sickness (Jaffee), that it is no
 310 edifice at all, just sand (Anita Bernstein). The platoon of those volunteering to sound the
 death knell is a crowded one. The truth is that, despite its intuitive appeal, economic

⁴⁷ In this respect, comparative law is concerned not with legal forms, but with facts (see Sacco, *supra* note 15 at 388), no less than economics or other sciences.

analysis of law is restless, no less than the underlying economic theory. The basic tenet – rational choice, people’s willingness to get what they want, given what they believe about the circumstances – is under attack. A large and growing body of empirical evidence reveals that people often fail to live up to the *homo oeconomicus* paradigm, and adopt actions that conflict with their interests (as predicted by standard economic theory). Why, then, bother with models based on assumptions that do not reflect the main features of reality? The reactions to this kind of objections are threefold. One is complete dismissal: L&E is an aging giant, whose death certificate has already been signed, so that it will disappear; the sooner, the better. Another assumes the form of cooptation strategy: basically, it tries to account for recalcitrant behavior by either finding new inputs into the old models (e.g., sophisticated preferences or beliefs, information asymmetry, signaling, strategic behavior) or, recently, applying old models in new ways (for instance, accommodating for the insights of the Behavioral Economics).

The third reaction, still largely indefinite, might be a compromising attempt to make the best out of it, meaning that something should be rescued and revamped, whilst much stuff should be discarded and dropped. After all, it is still plausible to assert that rational choice theory, in spite of all criticisms, does offer compelling insights into many circumstances, so that it can keep illuminating lawyers in their efforts to design fitting regulations in disparate domains, like environmental and competition law.

What really matters, however, is that the value of positive analysis should be defended and asserted, even though legal technicalities often appear inaccessible and Kafkaesque. The L&E contributed to shed light on many of these black holes, and can still do a lot more to clarify and rationalize legal concepts⁴⁸. Add that, once this trajectory is accepted, the comparative view would offer a series of real world models to be scrutinized and thus contribute to render the laboratory more useful⁴⁹. Precisely the reverse of the orthodox view that would insulate the inner system of law from any external influence.

2. Measuring legal systems.

A paradoxical outcome of the uneasy relationship between economic analysis and comparative scholarship is that one of the traditional devices in the toolkit of the comparatist (the difference between civil and common law) has become the basis for articulating, in the literature starting with La Porta and his co-authors in 1997 and

⁴⁸ The relationship between comparative law and economic analysis is explored and explained by Florian Faust, *Comparative Law and Economic Analysis of Law*, in Reimann & Zimmermann, *supra* note 24, at 837 ff.

⁴⁹ As stressed by Bellantuono, however, though in the nineties “comparative law and economics promised to provide comparative lawyers with the tools for more accurate assessments of similarities and differences and of their economic consequences”, to a large extent “that promise was not kept. The economic methodology took the lead and adopted many simplifying assumptions. Aside from a few important exceptions, it did not come to grips with the demand for a thorough exploration of the institutional context raised by comparative legal research”: Giuseppe Bellantuono, *Comparative Legal Diagnostics* (February 7, 2012), available at SSRN: <http://ssrn.com/abstract=2000608> or <http://dx.doi.org/10.2139/ssrn.2000608>.

featuring Andrei Shleifer as the guru, a celebrated empirical hypothesis, the Legal Origins Theory (hereinafter the LO Theory)⁵⁰.

350 The impact of legal origin of economic variables has led those authors to argue that legal systems originated in the English common law feature superior institutions for economic growth and development than those of French civil law, essentially for two reasons. First, common law provides more adequate institutions for financial markets and business transactions, which in turn fuels more economic growth. Second, French
355 civil law presupposes a greater role for state intervention that is detrimental for economic freedom and market efficiency. However, beyond simply offering a descriptive narrative of what legal choices in the past have prompted the economic consequences of today, the LO Theory, and its progeny, led by the Doing Business project of the World Bank, purports to offer an ex ante prescription of which legal
360 choices will propitiate better future performances.

The new-born Comparative Economics has got enormous success. The case of Doing Business ranking, inaugurated in 2004, has reached extended mass media attention, with spectacular effects in terms of operative influence: we are told that in 2010/11 125 states have adopted regulatory reforms shaped after the recipe of Doing Business⁵¹. In one
365 word, while comparative law scholars (with few remarkable exceptions⁵²) keep leaving in the (no longer ivory) towers, refining their taxonomies and, alternatively, inspecting excruciated technicalities and details of a few legal systems, always in a qualitative and neutral mood, comparative economists undertake large sample, quantitative research, divulge the results, and collect glory. And money.

370 It should come to the surprise of no one that comparative scholars have been fiercely critical towards the reductionism of their unexpected and triumphant rivals⁵³. But their (our) existential angst has surfaced and cannot be concealed any longer.

⁵⁰ The Law & Finance movement can be tracked back to the paper of Rafael La Porta, Florencio López de Silanes, Andrei Shleifer, Robert W. Vishny, *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY 1113 (1998). See also Claude Ménard & Bertrand du Marais, *Can We Rank Legal Systems According to their Economic Efficiency?*, 26 WASH. U.J.L. & POL'Y 55 (2008).

⁵¹ See WORLD BANK, *Business 2012 Report*, Executive Summary, available at <http://www.doingbusiness.org/reports/global-reports/~media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB12-Chapters/Executive-Summary.pdf>.

⁵² See Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765 (2009).

⁵³ Among various contributions to the debate see Mathias L. Siems, *Numerical Comparative Law - Do We Need Statistical Evidence in Order to Reduce Complexity?*, 13 CARDOZO J. INT'L & COMP. L. 521 (2005), Holger Spamann, *Large Sample, Quantitative Research Designs for Comparative Law?* 57 AM. J. COMP. LAW 797 (2009), Pierre Legrand, *Econocentrism*, 59 UNIVERSITY OF TORONTO LAW JOURNAL 215 (2009), G. Hadfield, *The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law*, 59 U. TORONTO L.J. 223 (2009). One stream of criticisms flows directly from the dynamic approach of legal formants that assumes as the specific contribution of comparative law to legal scholarship the revelation of «patterns which are implicit but have outward effects» (Sacco, *supra* note 15, at 385). One of the conclusions of this position «is that models that can be used for understanding and manipulating human orders are either more complex than or equally complex as the phenomenon under study. In this realm of academic knowledge we cannot build a model of how something works that is less complex than the thing itself: the simplified model does not allow us to grasp the thing intellectually» (Pier Giuseppe Monateri, *Legal Formants and Competitive Models: Understanding Comparative Law from Legal Process to Critique in Cross-System Legal Analysis* (December 17, 2008), available at SSRN: <http://ssrn.com/abstract=1317302> or <http://dx.doi.org/10.2139/ssrn.1317302>; emphasis in the original).

Instead of choosing the easy path of joining the chorus of negative voices, which are mostly reasonable⁵⁴, one should plausibly set a few pointers:

- 375 (1) The Law and Finance movement, at the root of the whole story, should be credited for inducing public opinion to recognize that legal rules do matter and deserve careful design: lawyers were already conscious of this inter-relationship, but could not successfully convey the message to the public at large. It remains a blunt paradox the fact that such a strong statement on the
- 380 instrumentalism of law was made by (and gained momentum because of) economists⁵⁵.
- 385 (2) Organizing a ranking for legal systems is neither unworkable nor foolish: it is simply useless. Just look at the most recent entry, the OECD better-life index, , and it will be all too obvious that even the immeasurable can be measured, if one accepts an unlimited degree of candid approximation⁵⁶. The ranking, at its best, will exhibit the same virtues, and drawbacks, of an economic model. Economists build models in order to untangle complex and hard-to-decipher real world interactions and focus attention on the detailed structure of a logic of how processes and systems work. The virtue of building a model is that it
- 390 allows a clear conversation about what is being claimed. The drawback is that what is left outside might be the very core of the matter. In the same vein, a ranking can be established, focusing on some peculiarity of legal systems: but since each system is extremely complicated, there exists no way of keeping the other factors constant; countless circumstances and events can be the antecedents of a desirable social outcome, assuming that a reasonable consensus can be reached about what is desirable. When the ranking is the produce of detached mastery, which is rather unusual, it will give a fragmentary image of the portrayed system. Cherry-picking of proxies, even important and suggestive,
- 395 will not help, simply because it would be easy to organize a different cherry-picking supporting an opposite outcome⁵⁷.
- 400 (3) The efficacy of numbers has been highlighted by the new wave of comparative economics: the genius has come out of the lamp and cannot be put back to rest. Accustomed to the qualitative swing of the case method analysis, the orthodox comparative scholar is tempted to refute any quantitative tool, arguing that

⁵⁴ With the remarkable exception of arguments leading to the conclusion that legal systems are not comparable and that efficiency or economic growth are not useful to understand legal systems, since, as already stressed by Nuno Garoupa and Carlo Gómez Ligüerre, such «an approach does not help understanding the limitations of the legal origin literature and self-defeats any meaningful and tractable efficiency analysis»: Nuno Garoupa & Carlo Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L.J. 287, 292 (2011), complemented by Nuno Garoupa & Andrew Morriss, (September 9, 2011), available at SSRN: <http://ssrn.com/abstract=1925104>. A comprehensive view of the challenges faced by comparative law *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins & Codification Movements* in the ranking of legal systems is provided by the writings collected in *METHODS OF COMPARATIVE LAW* (Pier Giuseppe Monateri ed., 2012).

⁵⁵ There was, according to Curtis Milhaupt, a “fascinating moment”, consisting in the fact that “economists have provided us with some important empirical results on the relationship between legal institutions and economic outcomes that echo theories advanced by past generations of major thinkers”, from Max Weber to Friedrich Hayek: Curtis J. Milhaupt, *Beyond Legal Origin: Rethinking Law's Relationship to the Economy--Implications for Policy*, 57 Am. J. Comp. L. 831 (2009).

⁵⁶ The OECD Better Life Index is available at <<http://oecdbetterlifeindex.org/>> (last visit, May 10th, 2012).

⁵⁷ See Garoupa & Gómez Ligüerre, *supra* note 54.

405 numbers do not fit her realm. But quantitative tools are just tools; they are
 neutral, in the sense that their performance depends on the way they are
 deployed. That the legal universe is not, or is less, compatible with quantitative
 analysis is a widespread feeling, mainly due to lack of familiarity with this
 410 armory. But just find the right dimensions and, needless to say, it will prove
 precious. Ultimately, the real question is not whether ‘leximetrics’ is desirable
 or not, but whether it can be implemented in practice, i.e., whether it is possible
 at reasonable cost to construct measures of the relevant phenomena that are
 sufficiently meaningful to generate convincing results.

415 *Doing Business* as a project may be objectionable per se; yet, it has brought about huge
 attention on the role of law and legal institutions as competitive factors and on their
 intimate relationships with such policy decisions that influence the performance of legal
 systems. Since competition among legal systems implies a variety of legal solutions,
 there is no question about the prominent role it bestows on comparative lawyers and it
 420 compels a revision of lawyers’ identity in contemporary societies.

IV. WHAT THE LAW IS AND WHAT THE LAW SHOULD BE.

1. The role of law in a globalized world

425 Much of the debate on aims and methods of comparative law and all the contributions to
 legal scholarship by comparative legal scholars are basically an unfinished painting
 whose contours and colors seem to change depending on the decade. Eventually, now
 that globalization and other major changes in society got gradually rid of differences
 and made ‘other’ legal systems easily accessible and much more comprehensible than
 430 only fifty years ago, we are left with one fundamental question⁵⁸. Is it still a legitimate
 and genuine issue to talk about the aims and the method of comparative law as if its fate
 were independent with respect to the role of legal studies altogether? Or should we
 rather bring the discussion to a more general level, involving the position of lawyers in
 modern societies and the future of law professors? We advance the position that the
 435 answer for comparative law can be given only in connection with the one concerning
 the role of lawyers in society; from this standpoint the fates of lawyers are inevitably
 intertwined⁵⁹. Furthermore, since legal systems are converging under the sign of the rule

⁵⁸ Clark, *supra* note 1, at 872, highlights social, economic, and cultural changes that marked the timespan between 1900 and 2000, and yet history evolved even more rapidly in the last decade.

⁵⁹ To the extent we assume legal systems are accessible and comprehensible, we implicitly refuse to indulge to post-modern theories of law and to their extreme consequences. We rather tend to show that a methodology of law can exist and it can serve a scientific purpose. We postulate that the legal methodology is scientific even if its immediate aim is not about simply grasping further knowledge or to support the internal process of interpretation, but to concur in the framing of a legal order. For arguments on the legal method as scientific method see Joachim Rückert, *Friederick Carl von Savigny, the Legal Method, and the Modernity of Law*, XI JURIDICA INTERNATIONAL 66 (2006). Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 769 (1987), had been visionary in explaining the reasons for lawyers were losing ground to other disciplines. Other sciences rivaled «the law’s claim to privileged insight into its subject matter». The counterclaim of jurists has been inadequate as law refused to become consistently interdisciplinary. According to Reimann, *supra* note 3, at 685, even comparative law failed in this respect («[D]espite many admonitions and obvious needs, comparative law has still not become interdisciplinary»; footnotes omitted).

of law, we claim that an orientation towards the law as it ought to be is inevitable for jurists, whose identity can only be that of scientists in the science of comparison⁶⁰.

440 The fundamental question: what do we stand for? is not a question only comparative lawyers bear the burden to answer. It is rather an inevitable and ultimate inquiry into the role we expect for the law in the new social order, where complexities of the economies, interconnected markets, globalization of human rights, political and religious conflicts, and pervasive technologies nullify any attempt to conceive of the law as a purely national manifestation of sovereignty while reinforcing its role of dominant technique to govern human relations.

445 There is a much wider role for law in the globalized society; one of the immediate effect of globalization has been the erosion in many legal systems of areas of human life and society that had been governed by the rule of politics or by the rule of tradition⁶¹. In a sense, the new economic order is much more reliant on the rule of law than in the past and the legal change triggered by the *Doing Business* reports and rankings implies a massive recourse to legal tools for the improvement of economic performance of legal systems. In this ‘legal global warming’, law has increased its importance, but other social scientists challenged the exclusivity of lawyers in mastering the legal change; as it has been repeatedly observed, the LO Theory and «the “policy version” of the legal origins literature» (that is to say, the *Doing Business* report⁶²) are originally a suggestion by economists⁶³. Holmes wrote that the man of the future is the man of economics and the master of statistics⁶⁴; but is it true that the future does not belong to lawyers? Or it was rather a suggestion (as it certainly was) that a lawyer of the future must open its discipline to economics and statistics? Was it a proposition about the evolution of the legal profession or just a presage of the end? Undoubtedly, the legal profession as mere professional practice (a technique, more than an applied science) will not disappear; judges and attorneys will remain active players in the legal area. The question we as is rather about law as a science and legal scholarship as an enterprise to advance human well-being by providing efficient solutions for contemporary problems.

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455 If a role can be positively acknowledged for comparative law, and a new direction for comparative legal studies suggested, it depends on the ability to provide a specific contribution to the new social order that other legal (and social) sciences are unable to offer. This contribution relies on the kind of knowledge acquired by comparison of legal systems and its use in connection with projects of legal change⁶⁵.

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⁶⁰ The basic assumption to our position (one comparative law scholars are familiar with) is that «[m]any legal problems are conceptually the same wherever they arise» and «[i]f the same questions arise for jurists of different nations, legal science should be transnational»; Gordley, *supra* note 17, at 560.

⁶¹ As a matter of fact, the stream of legal change and erosion started well before, if even marriage in Hindu law is being influenced by Western models; see Otto Kahn-Freund, *On Uses and Abuses of Comparative Law*, 37 MOD. L. REV. 1, 3 (1974). We should be aware that the Western category of law is a construct that not all societies know; Sacco, *supra* note 19, at 19. The contribution on stateless or lawless societies is one comparative law owes to legal anthropology.

⁶² The definition is provided by Garoupa & Gómez Ligüerre, *supra* note 54, at 289.

⁶³ More sarcastically Michaels, *supra* note 52, at 775, refers to the authors of the legal origin thesis and the *Doing Business* reports as «all economists (and “lawyer wannabes”, as one of them put it) who aim their project at comparative economics, not comparative law».

⁶⁴ Holmes, *supra* note 46, at 469.

⁶⁵ We use the expression “legal change” in broad sense, not just a synonym of law reform. Legal changes occur whenever a given authority (judges, legislators, public officers) enhance the offer of rules in society, either by enacting new bodies of law or solving disputes by stating their interpretation. We agree

2. Laws of nature and human laws

475 All sciences have reflected on their aims and methods; law is no exception. For other
 disciplines the discovery of their very identity based on what they do is relatively easier
 than for legal disciplines. A first and straightforward difference is in that many sciences
 are universal in nature. They formulate rules and principia that are valid and verifiable
 480 regardless the place in which the scientist operates. Law is mostly a national
 phenomenon, at least since the formation of national states, and any discourse about the
 law is inevitably influenced by the experience and the education of individuals that
 elaborate theories and formulate propositions of legal science⁶⁶. To some extent, also
 the debates about aims and methodology of comparative law are biased in this respect,
 as anyone who tried to provide an answer was under the influence, more or less
 485 conscious, of his own origins⁶⁷. Medicine or physics are not national in the sense law
 can be national. This intrinsic characteristic has obvious implications for teaching or
 conducting research or applying medicine or physics⁶⁸.

As far as the method and the aims of such sciences are concerned, the answer is easier
 compared to law as there is an undeniable link between the scientific and practical
 pursuit and the methods. Medical sciences generate knowledge on the way our body
 490 works and how it can be cured in case of disease. Physics as well investigates the laws
 of nature and its teaching can be then applied in other areas, such as mechanics, to
 invent and build machines and tools. Importantly, even if epistemological studies tend
 to conventionally distinguish basic from applied sciences, it is clear that any
 investigation remains scientifically valid, regardless the label it is given; basic
 495 knowledge out of scientific investigation does not lose its scientific dignity because at
 some point it becomes useful⁶⁹. At the same time, none undertakes applied science
 assuming that useful outcomes of her activity will not be worth from a scientific
 standpoint⁷⁰.

with M.A. Eisenberg, *THE NATURE OF THE COMMON LAW* 5 (1988), that courts improve the legal offer of rules in modern societies. On this point see also Reimann, *supra* note 3, at 677.

⁶⁶ There is an inevitable connection with the quite problematic notion of culture. See Eberle, *supra* note 35, at 458 («Law really cannot be understood without understanding the culture on which it sits»). See also Reimann, *supra* note 3, at 677, and Minda, *supra* note 18, at 68.

⁶⁷ This is what Michaels, *supra* note 52, at 786, refers to as «homeward bias». James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 AM. J. COMP. LAW 607, 611 (1998), refers to this as «systematic bias». Eberle, *supra* note 35, at 453, adopts the notion of «cognitive bias» originally proposed by Vivian Curran.

⁶⁸ As a consequence, sciences such as medicine, chemistry, physics, as well as economics, sociology or statistics can be applied and taught, or become the subject-matter of scientific inquiry, without geographical or political limitations.

⁶⁹ We agree with Herbert A. Simon, *Rational Decision Making in Business Organizations*, in 69 AMERICAN ECONOMIC REVIEW 493 (1979), that «[i]t is vulgar fallacy to suppose that scientific inquiry cannot be fundamental if it threatens to become useful, or if it arises in response to problems posed by every day world. The real world, in fact, is perhaps the most fertile of all sources of good research questions calling for basic scientific inquiry».

⁷⁰ Werro, *supra* note 3, at 1229, argues that the opposition between law as a science and law as a practical tool for solving conflicts still illustrates differences in approaches between European and American comparative legal scholars.

500 Despite the many differences between those sciences and law, there are more similarities than one is ready to believe.

505 First of all, in explaining phenomena of nature, those sciences that we sometimes call “exact” or “hard” sciences are no longer deterministic in absolute terms⁷¹. After the formulation of Heisenberg’s principle of indeterminacy, even physics has become probabilistic. And the most important contributions in the life sciences recognize that we know very little in terms of gene expression and recombination, unless we rely on statistical data and models that predict how living matter evolves⁷². Laws that describe the functioning of the matter are true, universal, organic, as any scientific law is expected to be, and yet they can fail in explaining their object⁷³. New laws must then be provided⁷⁴. But, when a scientific law is sufficiently reliable to explain a natural phenomenon, it by no means suffers from geographic or political limitations.

510 It would mean to stretch the similarity too much if one said that the same happens in law. Human laws – those studied and interpreted, sometime drafted, by jurists – do not describe human behavior. They prescribe behaviors that are supposed to ensure peaceful existence in society and welfare of consociates. Law is mostly concerned with responding to actions, rather than inducing actions⁷⁵. Lawyers are not concerned with expected reactions of individuals to law, but with drafting or interpreting laws and precedents for any relevant human behavior must find an answer in a rule. All this

⁷¹ See Kuhn, *retro* note 22, at 145. Ettore Majorana wrote (in an article that Giovanni Gentile jr. published in 1942 on *Scientia* [and Leonardo Sciascia has reproduced a portion of the writing in LA SCOMPARSA DI MAJORANA 63-64 (1997)]: «La disintegrazione di un atomo radioattivo può obbligare un contatore automatico a registrarlo con effetto meccanico, reso possibile da adatta amplificazione. Bastano quindi comuni artifici di laboratorio per preparare una catena comunque complessa e vistosa di fenomeni che sia “comandata” dalla disintegrazione accidentale di un solo atomo radioattivo. Non vi è nulla dal punto di vista strettamente scientifico che impedisca di considerare come plausibile che all’origine di avvenimenti umani possa trovarsi un fatto vitale ugualmente semplice, invisibile e imprevedibile. Se è così, come noi riteniamo, le leggi statistiche delle scienze sociali vedono accresciuto il loro ufficio che non è soltanto quello di stabilire empiricamente la risultante di un gran numero di cause sconosciute, ma soprattutto di dare della realtà una testimonianza immediata e concreta. La cui interpretazione richiede un’arte speciale, non ultimo sussidio dell’arte di governo». Among lawyers, Mario Rotondi, *Technique du droit, dogmatique et droit compare*, 20 REVUE INTERNATIONALE DE DROIT COMPARE 11 (1968).

⁷² Legal scholars interested in the evolution of norms and legal institutions borrowed heavily from other sciences theoretical explanations of the evolution. One major contribution is from philosophy of science (Kuhn’s theory of paradigms and scientific revolutions; see *retro* note 22). Law & economics, traditionally imbued and fascinated by the classical evolutionary model, has also resorted to other theories that were originally elaborated in biology; see Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996). On the complex relationship between law and society and the explanations of legal change based on arguments of history and sociology see Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 113 U. PA. L. REV. 1121, 1136 (1983).

⁷³ Rotondi, *supra* note 71, at 9, considers universal character and organic unity the two criteria to consider whether a doctrine is susceptible of scientific construction.

⁷⁴ See, among lawyers, again Rotondi, *supra* note 71, at 7 (natural laws «représentent le point d’arrivée de la recherche théorique ou expérimentale, et doivent donc être corrigées chaque fois que l’on constate une divergence entre elles et la réalité du phénomène»; footnote omitted).

⁷⁵ Kahn-Freund, *supra* note 61, at 5, also provides examples of the use of foreign legal patterns «for the purpose of producing rather than responding to social change at home». The author considers legal transplantations as those cases where legal change is aimed at a purpose and cautions about the use of comparative law in that respect. Of course, there are laws and decisions by judges that bring about changes directly in society, even if they are originally aimed at solving conflicts among specific litigants. A remarkable example remains *Brown vs. Board of Education of Topeka*, 347 U.S. 493 (1954) and its impact on the educational system in the United States.

520 means that lawyers and the study of law do not have predictive virtues (as we observed, the legal science is mostly concerned with past actions) and this is also one of the reasons policy makers resort to economics if they want to know more in advance about likely reactions of individuals to incentives or punishments. If a reason can be found for the progressive loss of centrality of law among social sciences, lack of predictive capacity can be easily accounted for it⁷⁶. And the same defect also explains the success of law & economics in all fields of law.

525 Needless to say, since the job of practicing lawyers has nothing to do with predicting future behaviors, the law they are concerned with is backward looking; laws impose a conduct and provide a sanction if the individual does not conform to that desired conduct. This aspect should not be overestimated; *ex ante* provisions of rules have an influence on human conduct. When the law is interpreted and applied, it refers to fact of
530 the past and its current application and interpretation do not say anything about the future. The very idea of “normality” that is implied in the concept of “norm” is after all drawn from the past and it is based on what is expressed by the Latin formula of *id quod plerumque accidit*. Note that *plerumque* (the majority) does not mean anyone, under all conditions, in all times. Contract default rules, for instance, are based on an anecdotal
535 assumption that the most part of contracting parties of a given set *will not* contract around the rule because under similar conditions a large part of parties did not so in the past⁷⁷.

540 Even if laws of nature and human laws rely on probabilistic assumptions, the former are in a sense intrinsically predictive. Once accepted as the dominant paradigm, a law of nature (or its codification) can describe the past as well as tell how the matter will react in the future under same or similar conditions. Not because the law is prescribing a given reaction or behavior, but because that law is internal to the observed phenomenon. This, of course, is not the case for laws enacted by legislators or decisions issued by judges.

545 Social scientists accept the idea that they can avail themselves with less descriptive laws of human behavior than descriptive laws of natural phenomena other scientists deal with⁷⁸. Even if physics or other disciplines accept probabilistic explanations of the real, the element that makes the difference with social sciences is the free will of individuals. One of the few accepted laws in the study of human behavior is that $[B = f(P; E)]$,
550 which means that the way humans act (B) depends on their personality (P) and on the external environment (E). In the equation law does not appear, even if none can deny that law is an integral part of the environment. It is the «dependent variable» that concurs in the explanation of how people react to incentives or perspectives of punishment⁷⁹. The equation says that individuals have always a choice and that, once

⁷⁶ As Michaels, *supra* note 52, at 780 (2009), puts it, the success of the legal origins debate and of the *Doing Business* reports is due in part to its «strong normative element».

⁷⁷ Riferimenti alla letteratura sulle default rules maggioritarie

⁷⁸ Interestingly, Thomas Kuhn, in its preface to *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (*supra* note 2222, at X) testifies that, as a scientist not belonging to social sciences, he was struck by the lack of consensus among other disciplines he was exposed during his research work, but about the nature of scientific problems and methods. Kuhn’s surprise should de-emphasize the critics that are brought towards comparative law for its difficulties to find a temporary agreement on goals and methodology among its scholars.

⁷⁹ The idea of law as the dependent variable is expressed by Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be”*, 2005 WIS. L. REV. 365 (2005).

555 the environment changes, their response can be different. The very idea of social engineering is after all premised on this equation. Our strong claim is that the probability that a new rule (when enacted by legislators or framed by judges or imposed by administrative authorities) or its absence will produce a socially desirable result cannot be calculated in a merely municipal perspective⁸⁰.

560 Comparative law scholars have insisted on this, more to reaffirm their role than as a necessity. Yet, there are objective and compelling reasons for a comparative experience. If a legal system is willing to know the impact of a rule, that is, to predict the effect of the rule on human behavior, the only possible option is to introduce the rule and wait. Of course, this option (very much resembling to a trial-and-error pattern) must be

565 weighed against the risk that the experiment fails and the costs associated with the potential postponement of socially desirable goals. But if the risk is too high, for the values at stake are too important, the only other option is to reach outside and to observe others, to learn from their glory or their misery. The observation of what happened in other legal systems far in space or in time helps us

570 gain knowledge of the operation of an observed rule, the external conditions, the reactions of individuals, the level of adherence to its precepts⁸¹. Without any logical discontinuity with respect to the same knowledge acquired about the law observed, the same data can be used to predict not deterministically but probabilistically what would be the result if the same rule or law were applied elsewhere or if the *status quo* option

575 were preferred. The degree of probability is higher or lower depending on how many conditions observed in other systems (or in the past of a same system) exist now or can be reproduced in the present. Other things being equal, same rules or same institutions should produce the same outcomes⁸². What is predictive here is not the introduction of a new rule, or the choice not to regulate a given field; both options would suffer an

580 intrinsic bias due to the limited point of view from which they are adopted. Without external (comparative) knowledge there is no reliable way to select those elements (whether normative or factual) that, among a host of factors, are likely related to the result sought or to the effects desired⁸³. What is really predictive is the experience of similar regulatory options in other legal systems and the ability to identify those

⁸⁰ The bottom line is not providing solutions, but at least putting on the table elements that can be used to assess both the existing and the expected legal setting. On the use of a comparative perspective «to stimulate critical thinking by opening up the mind to other possible outcomes» see Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 543 (2006).

⁸¹ The importance of contexts has been widely reaffirmed, starting from contributions of Rabel; see Markesinis, *supra* note 2, at 38. Raoul de la Grasserie (as recalled by Clark, *supra* note 3, at 881) at the Congress of Comparative Law in 1900 had already considered «foreign legislation like a vast experimental field, in which the legislator can observe the effects of reform that have been attempted within diverse civilized nations» (footnote omitted). Yet, that generation of comparatists was not interested in how the law should be but in how it actually is and how it evolves toward a common law for the mankind (*id.*, at 884).

⁸² One remarkable example of how difficult is to cause a legal change that conforms to the initial purposes is that of products liability in Europe as opposed to United States. After many years – the European directive was passed in 1988 – cases of products liability are still in small figures.

⁸³ It is worth nothing that Sacco, *supra* note 15, at 389, had the intuition that comparative law could be used as a control variable; the lawyer «can search out a correspondence between cause and effect» and can control for several causes «by compiling an inventory of the countries in which such an event has taken place». The problem with Sacco's position is that, in his purely constructivist dimension, comparative law is declared useful to sociology, rather than for law. For legal purposes, comparative law remains a pure intellectual endeavor of knowledge acquisition.

585 conditions that with an acceptable level of probability are conducive to similar results
and such other conditions that will probably frustrate the normative purpose⁸⁴.
We advance the idea that when concerned with what the law should be, comparative
law is for jurists the source of the “controlled variable” of legal change⁸⁵. Knowledge
concerning other legal systems, their laws, their social structure, their institutional
590 attributes is the specific contribution comparative law can bring to the edification of
new social orders⁸⁶, not to suggest legal transplants (this is left to politics), or to just
measure similarities and differences, but to establish positive correlations in terms of
probability between a law and the social desirable goals⁸⁷.
What is desirable is not entirely outside the reach of lawyers, because the relationship
595 within a social goal and the instrument to achieve it is too intimate and too critical for
the two prongs to remain in different worlds⁸⁸. The evaluation of legal solutions
(according to criteria such as efficiency or justice or other values) has been sometime
despised by those schools of thought that considered this kind of intellectual exercise
«incompatible with their main goal of pure knowledge»⁸⁹. This too is a major cause of
600 intellectual isolation for lawyers, not just for those versed in comparative law. A change
of perspective is in order if lawyers are to be called upon to lend their science or art to
determine how the law should be. We state our belief here that there cannot be an
improvement in the social identity of contemporary lawyers if they do not accept the
role of comparative law as defining their intimate scientific methodology and if
605 comparative law does not redirect its intellectual efforts towards a functional dimension
as to the aims of the discipline⁹⁰.
Historical perspective is important as well, as comparative knowledge implies control of
coordinates of a legal system is space *and* in time. If facts concerning a legal system are
posted on a continuum, the knowledge of the past is part of those elements that
610 comparative law should consider in defining the set of conditions that are relevant to a
given socially desirable outcome⁹¹. Thus, historical knowledge is comparative

⁸⁴ To some extent when referring to legal transplants we agree with Kahn-Freund, *supra* note 61, at 6, that the relationship between the use of a foreign model and a stated social goal is also a matter of degree. Transplants can have success or fail, or be successful to some degree.

⁸⁵ Controlled variables are elements that could affect the outcome of an experiment or of an observation.

⁸⁶ Specific attributes of legal systems can be considered as environmental factors in Montesquieu's theory. Yet, environmental factors are not to be interpreted as elements which are specific to a system and prevent the circulation of a model, but as circumstantial factors that concur in the success of a rule or in its failure.

⁸⁷ Rotondi, *supra* note 71, at 18, claimed that the study of law should have as «but de découvrir – si possible – certains moments constants de ce processus évolutif ininterrompu qui, projetés par l'expérience du passé dans l'incertitude de l'avenir, nous donnent aussi la possibilité de deviner avec une précision suffisante les effets de cette évolution qui ne s'arrête pas dans le présent mais se perpétue dans l'avenir».

⁸⁸ This point is clear in Gambaro, *supra* note 16, at 999 («Va da sé che, parallelamente, il ruolo del giurista diviene quello dell'ingegnere sociale, ed i criteri ermeneutici cui è invitato a por mano sono collegati alla comprensione e allo sviluppo degli obiettivi di policy sottesi alle scelte predette»).

⁸⁹ See Michaels, *supra* note 52, at 784. For the School of Trento and the Trento Theses see, *retro*, footnote 33 and accompanying text.

⁹⁰ By no means this is to say that comparative law is a method, rather than a science. It is rather a science that does not lose its identity if it becomes useful to other branches of law, providing valuable data and methodologies to effectuate the kind of legal change that we describe earlier.

⁹¹ This continuum that connects the fact of a legal system is what we call the legal tradition, as «common feature of societies and laws» (H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 3 (4th ed., 2010).

615 knowledge to the same extent as it is economic, or sociological or linguistic, or political
 knowledge⁹². Even with respect to history we are at ease in concluding that there cannot
 be any discontinuity between acquisition of knowledge *per se* and acquisition of
 knowledge for useful purposes (it would be horrifying if we could not learn from the
 past)⁹³; if facts are on a continuum, there is no merit in dividing those that are part of a
 merely intellectual cognitive effort and those that represent the building block of a
 complex algorithm to check the consistency of the law we use and of any proposal of
 legal change.

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V. FOR A NEW COMPARATIVE LAW AND A ROLE FOR LAW PROFESSORS.

625 If we are asked what is the aim of comparative law, we can only provide an answer that
 has the validity of all scientific explanations⁹⁴. It will be explicative and accepted until
 challenged by other paradigms. We claim that in the globalized world comparative law
 is responsible for avoiding the extinction of the species, that is to say, of lawyers as
 social scientists⁹⁵. More than that, comparative law is charged with providing a social
 identity to lawyers in the contemporary legal order, an identity that is about to be lost,
 since legal dogmatic does not grant anymore a position of exclusivity for jurists.

630 The life of people is governed by complex human, social and economic laws.
 Individuals respond to many stimuli. Legal change brought about without comparison
 amount to the attempt of defining a correlation between an event and its presumable
 effects without control variables, which, at best is as naïve as the easy implications that
 can be drawn from the rankings of the *Doing Business* reports⁹⁶. Control variables, as
 far as legal systems are concerned, must be external to the phenomena observed⁹⁷.

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We know that compulsory models created in the domain of law do not have the same
 properties of laws in hard sciences, even if also such laws resort to probabilistic
 elements to explain the complexity. We live in pluralistic contexts, subject to numerous

On the role of tradition as a force that shapes the legal change see also Watson, *supra* note 72, at 1152;
 for its role as source of interpretation, Holmes, *supra* note 46, at 469.

⁹² It was the original dissatisfaction with results of traditional comparative law, legal history and
 sociology of law that moved Watson, *supra* note 72, to a new synthesis of the relationship between law
 and society. The aim of Watson was the explanation of legal change and he concluded that «it is
 necessary to look at a number of legal systems and at the changes in them over a long period of time» (*id.*,
 at 1125). Thus, comparative law was just one of the ingredients of the new methodological framework to
 explain the complex relationship between law and society.

⁹³ I. Stewart, *Critical Approaches in Comparative Law*, (2002) OXFORD U COMPARATIVE L FORUM 4, 29
 («Legal science can be both descriptive and prescriptive. I shall also accept that it ought to be both. That
 is to say: legal science out to be *practical with regard to laws*»; emphasis in the original).

⁹⁴ We agree with Reimann, *supra* note 3, at 697, that if comparative law does not define «a sense of
 direction» and settles on its «ultimate intellectual goals» there will be no progress.

⁹⁵ The legal science is sick as to its methodology and comparative law – according to Zweigert & Kötz,
supra note 8, at 34 – can be its medicine.

⁹⁶ Rheinstein, *supra* note 42, at 424 («Nobody, of course, intends simply to enact a statute that is found to
 work successfully in some other part of the world. But suggestive ideas can be derived from it and equally
 so from foreign experiments that have failed»).

⁹⁷ The observation of external phenomena is the domain of other sciences (economics, sociology,
 anthropology, psychology), at this calls again for interdisciplinary approaches. However, there are
 contextual elements that fall in between law and other disciplines (such as the way legal education is
 organized, the style of courts and many others). Gino Gorla suggested comparative lawyers should also
 study such facts; see G. Gorla, *Diritto comparato*, XII ENCICLOPEDIA DEL DIRITTO 928 (1963).

640 pressures and even if it is not the casualty to produce change and evolution, at the
opposite policy makers and social scientists (including lawyers) should refrain from
naïveté such as believing that human and institutional behavior is governed by
deterministic and simple rules⁹⁸. Laws and standards are not levers that can be
moved mechanically⁹⁹.

645 The creation of new competing legal orders, the definition of policies, the generation of
laws, and the supply of viable interpretations cannot occur without lawyers and yet they
lose ground in scientific debate as well as in institutional processes of legal change.
Omnipotent technologists and economists assumed the intellectual leadership, with a
reason or not. As a matter of fact, jurists indulge too much to the role of technicians
rather than engineers¹⁰⁰. Their intellectual leadership depends on the ability to regain
650 centrality in the debate on legal change and to show that they master the (rather
complex) algorithms that explain the functioning of society¹⁰¹. Here the future of
lawyers becomes dependent on those of comparative law and comparative law's fate is
in the hand of today scholars and law professors. They are responsible to create and
transfer knowledge across generations as well as to frame the kind of social identity that
655 gives them a distinctive place in societies at large.

Knowledge that they can contribute is not just the mere technical knowledge of black
letter rules; the unique added-value knowledge they can provide is comparative¹⁰². And
if it is not comparative, then there is no hope the wind will change again in favor of
jurists.

660 Law professors have a fundamental role, not just in claiming an intellectual hegemony
they have lost, but in avoiding the extinction of the species, because if we do not (i) turn
legal education as such in comparative legal education and (ii) enrich our methodology

⁹⁸ Needless to say, the municipal jurist is tempted by the deterministic view of legal change, as he is influenced by the idea that is the national law to produce a desired effect. Without control of variables that allow to establish a positive and significant correlation between a rule and a consequence, the observation of a lawyers can only indulge to simplistic explanations.

⁹⁹ To believe that rules or institutions are always transplantable is part of those misuses of comparative law described by Kahn-Freund, *supra* note 61, at 27 (« [A]ny attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection»).

¹⁰⁰ So far, even the necessity to investigate other legal systems has been affirmed as an interpretive function, more with respect to a given authoritative text (Gordley, *supra* note 17, at 565) than in a truly predictive dimension, about the law as it should be.

¹⁰¹ Rheinstein, *supra* note 42, at 424 («[T]he most obvious use of comparative law within the framework of national law is in the field of law making, judicial and legislative»). We agree only partially with Michaels, *supra* note 52, at 792, when he states that «[a]t least, comparative law should survive as a necessary basis for the new comparative economics»; comparative law cannot be an ancillary science. The knowledge produced can be useful in many respects even beyond any suggestive economic experiment.

¹⁰² This conclusion has a number of implications about the role of comparative law in legal studies. If the only way to teach law is comparatively, then comparative law scholars cannot be replaced by municipal jurists. See Michael McAuley, *On a Theme by René David: Comparative Law as Technique Indispensable*, 52 J. LEGAL EDUC. 42, 43 (2002). Over the years, many contributions have deal with this particular aspect of comparative law in academic curricula. Among the many contributions on this specific topic, Markesinis, *supra* note 23, at 21; Mathias Reinman, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49 (1996); James Gordley, *Comparative Law and Legal Education*, 75 TUL. L. REV. 1003 (2001), Roscoe Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161 (1934). Werro, *supra* note 3, at 1233, suggests the teaching of a globalized comparative law, detached from positivism and localism.

665 in social sciences, it is to be expected an even more dramatic loss of centrality of
lawyers and a damage to society, for the processes of legal change will be deprived of a
non-substitutable ingredient that only comparative lawyers have the ability to produce
and blend in contemporary societies¹⁰³.

VI. CONCLUSIONS

670 In this Article we review the several positions that over the years emerged about the
goals of comparative law as an autonomous discipline. Asking the question of aims is a
matter of identity not only for comparatists, but for jurists in general. We claim that if
lawyers want to regain a role in society, in building the new social order, they should
not indulge into the dry pulp of dogmatic; they should rather adopt methodologies that
675 help them to concur in the processes of legal change and become uniquely positioned in
defining not what the law is, but what the law should be.

¹⁰³ Posner, *supra* note 59, at 777 («[T]he growth of interdisciplinary legal analysis has been a good thing, which ought to (and will) continue»). On the same path, von Bodgandy, *supra* note 6, at 58.