

ARTICLES : SPECIAL ISSUE
LAW AND EVOLUTIONARY THEORY

From “Evolutionary Theory and Law” to a “Legal Evolutionary Theory”

By Mauro Zamboni*

A. Introduction

Evolutionary theories have always been treated by legal scholars as a sort of cousin to the legal theoretical family, both in Europe and the United States. They are nice theories, they tell interesting stories, you sometimes listen to what they have to say and when among friends, you may even quote them. However, in the modern mononuclear family, when it is time to tackle important issues and reach important decisions, or simply to celebrate some success stories, these cousins are often left outside the door, being simply “relatives” and not part of the legal family in the proper sense. A former evolutionary scholar strikingly stated in a manner that can be seen as representative of the general skepticism towards the evolutionary approach of a large segment of the legal family, “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.”¹ The main objective of this article is to take the first step towards

* Research Associate at *The Collaborative Research Centre 597 “Transformations of the State”* (University of Bremen-Germany), email: mauro.zamboni@sfb597.uni-bremen.de. I would like to deeply thank Graf-Peter Calliess, Jörg Freiling and Laura Carlson for their many and invaluable comments on earlier drafts. I would also deeply thank Jakob Heidbrink for his very thoughtful criticisms. Finally I also thank all the participants at the joint conference “Law, The State, and Evolutionary Theory” (5 October 2007, University of Bremen -Germany), organized by the *Collaborative Research Centre 597* (Project A4: Transformations of Commercial Law) in collaboration with *The German Law Journal*, and at the “Project A4: Research Seminar” at the *Collaborative Research Centre 597* (10 December 2007) for their comments to earlier drafts of this article.

¹ Michael B. W. Sinclair, *Evolution in Law: Second Thoughts*, 71 UNIVERSITY OF DETROIT MERCY LAW REVIEW 31, 58 (1993). See also Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARVARD LAW REVIEW 443, 447 (1899). See, e.g., Brian Leiter & Michael Weisberg, *Why Evolutionary Biology is (so Far) Irrelevant to Law*, 81 THE UNIVERSITY OF TEXAS SCHOOL OF LAW -PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER 48 (2007), available at: SSRN: <http://ssrn.com/abstract=892881>, last accessed: 15 January 2008; or Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY 265, 265 (1994). But see Donald E. Elliott, *The Evolutionary*

making evolutionary theory “our own discipline,” by elevating evolutionary theory from the status of “cousin” to one of “sibling” (or at least “in-laws”) of the legal family. The focus in particular is to understand why, despite the fact that the evolutionary theory approach to law (or “evolutionary theory and law”) has been present quite a while in the legal scholar’s discussion, the legal world at large has left it at the front step of the legal house.² Based on this analysis, the task is also to evaluate whether it is possible, after certain adjustments, to invite evolutionary theory into the larger family of legal thinking, in particular as part of the legal theories of law-making (as “legal evolutionary theory”).

This article, comprising five parts, starts with a brief clarification of certain concepts used in this work. The second part presents certain essential aspects of how evolutionary theory has a research program similar to the one each legal theoretical approach has to law-making. The centerpiece of this work, the third and fourth parts, proceeds to point out not only how legal theory and evolutionary approach can be functional with respect to each other, but also why evolutionary theory, though having been around for such a long time, has never been fully accepted by the legal world. The reason is found in particular in the tendency of most evolutionary approaches to produce only descriptions of legal evolutions (also including predictions of possible future paths of development), while neglecting one fundamental component essential and invoked by legal actors: the normative component. Finally, the fifth part highlights that the adjustment suggested in this work does not aim at radically changing the very nature of the evolutionary approach. On the contrary, all three steps characterizing the change of the law according to the current evolutionary theory (variation, selection and retention) reserve to the normative proposals a fundamental role.

Before beginning the investigation, a final clarification as to the goal of this article has to be pointed out. As stressed by many critiques, it is possible to detect in most of the evolutionary approaches to the law some hidden normative components.³ For example, when using statements such as “legal uniformity... *should* to a large extent come about in an organic way,” evolutionary scholars implicitly assume a normative proposal (i.e. that “the organic way ought to be pursued”) while, at the

Tradition in Jurisprudence, 85 COLUMBIA LAW REVIEW 38, 38 (1985); or ALLAN C. HUTCHINSON, EVOLUTION AND THE COMMON LAW 10 (2005): “The evolutionary methodology of the common law is defended and celebrated by almost all traditional jurists and lawyers.”

² See PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 69-98 (1980).

³ See, e.g., Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner’s Case For “Reflexive Law”*, 18 LAW AND SOCIETY REVIEW 273, 279, 281, 284-285 (1984). But see Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 LAW AND SOCIETY REVIEW 291, 294 (1984).

same time, they hide the criteria according to which this proposal is preferable to another (if the “organic way” is to be chosen, is it because it is more economically efficient or because it is more just?).⁴ The task of this work is to cut these critiques at their very roots by somehow convincing legal evolutionary scholars to bring such components to the surface of their legal discussion in the form of explicit guidelines for future law-making and law-applying.

B. Some Words as to Terminology

In order to proceed to the analysis, it is necessary to clarify at least two of the fundamental concepts used throughout this work, namely “legal theory” and “law-making.” Following Herbert L. A. Hart’s definition, the concept of *legal theory* is used here in order to indicate that part of the legal discipline (or legal scholarship) aimed at generally seeking (*i.e.* not being bound to any particular legal order or legal culture) “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 Hart, the “internal point of view of a legal system.”⁵ Legal theory as used in this work is therefore that part of jurisprudential studies focusing on and questioning, from the standpoint of rationality typical of Western legal cultures, the “prevailing patterns of argumentation and interpretation,” both in law-making and law-applying.⁶

⁴ Jan M. Smits, *The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory*, 31 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 79, 81 (2002). As other examples of hidden normative proposals, see Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW AND SOCIETY REVIEW 239, 273 (1983); or Teubner, *supra* note 3, 300, where the author promotes the “quality of the legalization process” by making the actors participating in it aware of its specific and differential nature in respect to the social system. However, even assuming that Teubner’s analysis of contemporary law is correct, he fails to indicate the reasons why future law-makers, for example, ought to continue in keeping the legal system’s differential nature.

⁵ Herbert L. A. Hart, *Postscript*, in THE CONCEPT OF LAW 238, 239 (Penelope Bulloch & Joseph Raz eds., 2nd ed., 1994). See also Herbert L. A. Hart, *Problems of the Philosophy of Law*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 88, 103-105 (Herbert L. A. Hart ed., 1983); and NEIL D. MACCORMICK, H. L. A. HART 37-40 (1981). But see, concerning this general and descriptive idea of legal theory, the criticism in RONALD D. DWORKIN, *LAW’S EMPIRE* 32 (1997), claiming in particular that a Hartian legal theory falsely assumes a total agreement among legal actors as to what is law and what is not. See also Hart’s defense by Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART’S POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 1, 27-36 (Jules Coleman ed., 2001); and by Timothy A. O. Endicott, *Herbert Hart and the Semantic Sting*, in HART’S POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 39, 41-47 (Jules Coleman ed., 2001).

⁶ KAARLO TUORI, *CRITICAL LEGAL POSITIVISM* 320 (2002). In this sense, legal theory is part of a broader (legal) culture; see Henry Plotkin, *Culture and Psychological Mechanisms*, in DARWINIZING CULTURE: THE STATUS OF MEMETICS AS A SCIENCE 69, 74 (Robert Aunger ed., 2000).

As to that which legal theory aims to explain and clarify, it has to be pointed out that legal theory can traditionally be categorized as either *descriptive* (or *positive*) legal theory, when explaining what the law is (and the reasons and effects of this definition), or *normative* legal theory, where its main target is that what the law ought to be.⁷ However, this separation has progressively disappeared in recent decades; nowadays, most legal theories comprise a descriptive and normative component. Due in particular to the critiques of the idea of “description” as developed by critical legal theories and Ronald Dworkin, 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*).⁸ Contemporary legal theory varies considerably as to what kinds of ideal-models the law ought to aim for (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 modern versions of legal positivism) or the *prescription* of those proposals (as for Critical Legal Studies).⁹ In any case, normative proposals in general are a necessary

⁷ See RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 7-8 (2005); Veronica Rodriguez Blanco, *The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited*, 19 *RATIO JURIS* 26, 26-27 (2006); and, as a concrete example of the necessity to keep in mind this distinction, Frederick Schauer, *Defining Originalism*, 19 *HARVARD JOURNAL OF LAW AND PUBLIC POLICY* 343, 343-345 (1996). As to the historical roots of this distinction, see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 184-185 (1954 [1832]) and JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* Ch. XVII, § 2, part XXI (1907 [1789]) with their famous distinction between a “censorial” or “normative” jurisprudence (focused on the law as that which ought to be) and an “expository” or “analytical” jurisprudence (studying what the law is). See also Oliver Wendell Holmes, *The Path of the Law*, 10 *HARVARD LAW REVIEW* 457, 457-460 (1897). But see Simon Deakin, *Evolution for Our Time: A Theory of Legal Memetics*, 55 *CURRENT LEGAL PROBLEMS* 1, 36 (2002) as to the different meaning attached to the term “normative” by the evolutionary theory’s scholars, i.e. as purely descriptive of the binding character of the law for its being inserted in a hierarchical system of norms.

⁸ See TUORI, *supra* note 6, 300-304, showing the necessity for each legal-theoretical approach to (explicitly or implicitly) begin with the acceptance of a certain evaluative social theory. See also IREDELL JENKINS, *SOCIAL ORDER AND THE LIMITS OF LAW* 60 (1980); ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* 118 (1997 [1942]); and Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN. ESSAYS IN THE MORALITY OF LAW AND POLITICS* 210, 219-221 (Joseph Raz ed., 1994). As to the criticisms of the distinction, see, e.g., DWORKIN, *supra* note 5, 13-14; and ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 122-123 (1996). 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).

⁹ See Margaret Radin and Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 1019, 1020, 1023-1024 (1991). See, e.g., JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 153 (1990); and Pierre Schlag, *Normativity and the Politics of Form*, 139 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 801, 811 (1991). See also ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* 3 (2nd ed., 2003), where the author

component of every legal theory, either in the form of identifying or sponsoring them, since its object of observation (the law) “is normative in that it [descriptive component] *serves*, and it [normative component] *means to serve*, as a guide for human behavior.”¹⁰

As to the concept of *law-making*, this encompasses the mechanisms and procedures having legal recognition and directed to the production and enforcement of the law. This also includes the institutional actors (hereinafter “actors”) participating in such production and enforcement. In other words, law-making refers to the operational aspects of the legal phenomenon, the mechanisms that make certain moral propositions or political declarations directly relevant, either in legislative or judicial forms, for the legal world and its actors.¹¹

C. Evolutionary Theory and Law: Readjusting The Legal Theoretical Perspective

Mentioning “evolutionary theory” in a legal environment or to a legal audience always creates the same kind of general reaction as mentioning Carl Schmitt’s legal thinking: Most people will raise their eyebrows in skeptical disbelief. In both cases, the skeptical disbelief is somehow based on the presumption of some sort of association of these legal theoretical approaches to the idea of a natural selection as a basic mechanism for explaining and understanding the modern legal world.¹² In

identifies only the description of normative proposals as part of legal theory, while the prescription of such proposals is more part of what he defines as “philosophy of law;” and George Pavlakos, *Normative Knowledge and the Nature of Law*, in JURISPRUDENCE OR LEGAL SCIENCE? A DEBATE ABOUT THE NATURE OF LEGAL THEORY 101, 101-102 (Sean Coyle & George Pavlakos eds., 2005) and his idea of legal theory either as *scientia* (descriptive of normative propositions) or *prudentialia* (prescriptive of normative propositions). But see BLANCO, *supra* note 7, 27, where the author defines the “description of the normative proposals” as part of the descriptive component of a legal theory.

¹⁰ RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 3 (2nd ed., 1980) [*italics added*]. See also Ruth Gavison, *Legal Theory and the Role of Rules*, 14 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 727, 731 (1991). But see Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OXFORD JOURNAL OF LEGAL STUDIES 683, 688-689 (2006); WILFRID J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 15-30 (1994); and Gerald Postema, *The Normativity of Law*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART 81, 85 (Ruth Gavison ed., 1987).

¹¹ See, e.g., RAZ, *supra* note 10, 156-66; and the Hartian idea of legal system as interpreted by MACCORMICK, *supra* note 5, 20-24.

¹² See, e.g., the general idea of evolutionary theory as a rationalizing tool for capitalism during the 19th century and for totalitarianism during the 20th century as in Michael Ruse, *Evolutionary Ethics in the Twentieth Century: Julian Sorell Huxley and George Gaylord Simpson*, in BIOLOGY AND THE FOUNDATIONS OF ETHICS 198, 198 (Jane Maienschein & Michael Ruse eds., 1999). But see Hovenkamp, *Evolutionary Models*

other words, Schmitt and evolutionary theory are not popular among lawyers and legal thinkers because they are conceived of as an attempt to introduce into the legal world a sort of Social Darwinism ideology, just slightly modified superficially in order to satisfy specific formal features of the legal phenomena.¹³

For Schmitt, this skepticism most likely has a foundation. In the case of evolutionary theory, however, at least when dealing with the law and law-making in particular, this association is incorrect. This erroneous perception is mostly due to a deep terminological confusion and vague depiction shared by the legal audience, and therefore, it is necessary to provide certain readjustments as to what an “evolutionary approach to the law” is, especially when viewing it from the legal actors’ perspective in relation to legal theory.¹⁴

The first readjustment a legal theoretical audience needs to consider making is that it is necessary to distinguish between a *theory of legal evolution* and *evolutionary theory and law*.¹⁵ Inside legal scholarship, a *theory of legal evolution* is a general label attached to all legal thinking aimed at discovering and explaining general patterns

in Jurisprudence, 64 TEXAS LAW REVIEW 645, 646 (1985): “Self-consciousness and creativity, and not gene pools or chromosomes, constituted the essential ingredients in ‘evolutionary’ intellectual theories.”

¹³ See JOHN H. BECKSTROM, EVOLUTIONARY JURISPRUDENCE: PROSPECTS AND LIMITATIONS ON THE USE OF MODERN DARWINISM THROUGHOUT THE LEGAL PROCESS 34 (1989). See, e.g., the crude reduction of Holmes’ ideas on the evolution of the law as to the one behind Nazi legal ideology as in Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 AMERICAN BAR ASSOCIATION JOURNAL 569, 571 (1945); or the depiction of Holmes as, among the other things, an amateur prophet of Social Darwinism in Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Text*, 71 IOWA LAW REVIEW 833, 835-836 (1986). See also NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 34-35, 41-46 (1997). But see the critique moved by Holmes himself to the evolutionary approach as intended by the US Supreme Court in the famous decision *Lochner v. New York*, 198 US 45, 75 (1905). See also a list of possible Social Darwinist evolutionary legal thinkers as in Hovenkamp, *supra* note 12, 664-671.

¹⁴ See NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 230 (2004). 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 229, 238-300 (1994). As to the other applications of the evolutionary approach (in particular in economics and social sciences), these are not considered in this work. See, e.g., Hans Haferkamp and Neil J. Smelser, *Introduction*, in SOCIAL CHANGE AND MODERNITY 1, 4-6 (Hans Haferkamp & Neil J. Smelser eds., 1992); and generally Robert Nelson, *Recent Evolutionary Theorizing about Economic Change*, 33 JOURNAL OF ECONOMIC LITERATURE 48, 48-90 (1995).

¹⁵ See Sinclair, *supra* note 1, 32; and Elliott, *supra* note 1, 90-91. As an example of this confusion, see Alan C. Hutchinson, *Work-in-progress: Evolution and Common Law*, 11 TEXAS WESLEYAN LAW REVIEW 253, 254-255 (2005), where the author points out that “almost all traditional jurists and lawyers” operate based on a theory of legal evolution, while he directly afterwards identifies this theory with a (biological) evolutionary approach to the law (*id.*, 256-257).

of continuity and change in the law. In this sense, the works of Henry James Sumner Maine, Oliver Wendell Holmes, or more recently of the economic approach, Peter Stein and Alan Watson, can be considered, for example, as presenting a theory of legal evolution.¹⁶ Among the different theories of legal evolution, one can find an approach defined as *evolutionary theory and law*, to whose scrutiny this work is limited. The approach of *evolutionary theory and law*, under whose roof several schools can be grouped, is characterized in general by its attention to points of change and stability in the law through the centuries and among various legal systems.¹⁷ “Evolutionary theory and law” distinguishes itself also for evaluating these aspects of the legal phenomenon from the point of view that Hart would define as typical of theories external to the law and its system: Luhmann’s sociological theory on law (as in Europe) and biological evolutionary theory as metaphor or analogy for explaining the evolution of the law (as in the United States).¹⁸

A second aspect legal scholars should also take into account, is namely that “evolutionary theory and law” is an evolutionary approach, in the sense of explaining changes in the law and legal system, but not necessarily also an

¹⁶ 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 (2005 [1861]); OLIVER WENDELL HOLMES, THE COMMON LAW 1-2 (1963 [1881]); Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE LAW JOURNAL 1238, 1250-1254, 1257-1258 (1981); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 JOURNAL OF LEGAL STUDIES 51, 51-63 (1977); ALAN WATSON, THE EVOLUTION OF LAW 98-114 (1985); and STEIN, *supra* note 2, 122. See also Deakin, *supra* note 7, 3.

¹⁷ See PETER W. STRAHLENDORF, EVOLUTIONARY JURISPRUDENCE: DARWINIAN THEORY OF JURIDICAL SCIENCE 23-25 (mimeographed copy, 1993), though the author uses the concept of “evolutionary jurisprudence” instead of “evolutionary theory and law.” See also Allan C. Hutchinson and Simon Archer, *Of Bulldogs and Soapy Sams: The Common Law and Evolutionary Theory*, 54 CURRENT LEGAL PROBLEMS 19, 31 (2001); and Hovenkamp, *supra* note 12, 646: “Not every theory of jurisprudence that includes a theory of legal change qualifies as ‘evolutionary.’” However, as pointed out by Michael S. Fried, “the enormous change in sophistication over time suggests that the literature on evolution and the law may itself be as susceptible to an evolutionary analysis as its subject.” Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS JOURNAL 291, 303-304 (1999).

¹⁸ See Michael B. W. Sinclair, *The Use of Evolution Theory in Law*, 64 UNIVERSITY OF DETROIT LAW REVIEW 451, 451 (1987). See also Teubner, *supra* note 4, 241. “What the external point of view cannot reproduce”, Hart tells us nonetheless, “is the way in which rules function as rules in the lives of those who normally are the majority of society.” HERBERT L. A. HART, THE CONCEPT OF LAW 90 (1961) [*italics added*]. In this sense, in this work “evolutionary approaches to the law” is used in a narrower meaning than the one identified by Elliott, *supra* note 1, 40. The evolutionary approaches to the law coincide here with Elliott’s “doctrinal” theories of legal evolution. See *id.*, 50-62. But see SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT AND LEGAL EVOLUTION 28 (2005), stressing how “an evolutionary study of the law requires us to take a dual approach,” i.e. “internal understanding of internal juridical modes of thought” and “external perspective on the law as a social institution or mechanism.”

“evolutionist” way of investigating the legal phenomenon.¹⁹ From an evolutionist perspective, which for instance can be attributed to Marxist legal theory or a majority of Law and Economics scholars, the central points of investigating changes in law are both the mechanisms of legal evolution and the directions to which the law or some of its parts (e.g. torts law) are bound.²⁰ The “evolutionary theory and law” focuses its attention instead exclusively on the explanation of the mechanisms underlying the changes and continuities of a certain legal system (or part of it); this approach does not also explicitly designate the points of arrival to which such a system (or its parts) is somehow obliged to aim.²¹

Finally, there is a third aspect of the idea of an evolutionary approach to the law to which the legal discipline should pay particular attention. This aspect has to do with the very object of the investigation in this approach, namely the evolution of the component of the legal phenomenon under scrutiny. At least if seen from a legal perspective, evolutionary theory applies neither to a single statute, a single judicial decision nor more generally to a single legal rule.²² That actually under the spotlight of an evolutionary approach in general is more “legal concepts.”²³ The

¹⁹ See Geoffrey MacCormack, *Historical Jurisprudence*, 5 LEGAL STUDIES 251, 252-253 (1985). See also Fried, *supra* note 17), 313-315 (as an example of “evolutionary” approach); 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 849, 857 (1996) (as an example, with his “goal of the law... to promote sustainability of the system,” of “evolutionist” approach); and Blankenburg, *supra* note 3, 273, purposely mixing the terms “evolutionary” and “evolutionist.”

²⁰ See Robert W. Gordon, *Critical Legal Histories*, 36 STANFORD LAW REVIEW 57, 103 (1984). See, e.g., Karl Marx, *Communist Manifesto*, in KARL MARX: SELECTED WRITINGS 219, 234 (David McLellan ed., 1977 [1848]); or generally George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 JOURNAL OF LEGAL STUDIES 65, 65-82 (1977); or RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 534-536 (4th ed., 1992) designing the road of an “evolution-toward-efficient” legal rules. See also STEIN, *supra* note 2, 46-50, 67-68; 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 233, 244-247 (1994). But see, e.g., Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARVARD LAW REVIEW 641, 654-658 (1996).

²¹ See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 48-49 (1993), where the author responds to his critics stressing the fact that his evolutionary theory focuses on the “mechanisms of development” rather than “direction” of such developments. The latter, continues Teubner, are more the focus of attention for “evolutionist” functionalist theories. See also *id.*, 54, refusing the modified version of evolutionary theory suggested by Jürgen Habermas since it implies “an inherent developmental logic... [while] the question of which mechanisms... remains unanswered.” As to a similar line of defense for Holmes’ evolutionary approach, see PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* CH. 8 (1949).

²² See, e.g., LUHMANN, *supra* note 14, 250 (focusing on “property” and “contract”); or Simon Deakin, *The Contract of Employment: A Study in Legal Evolution*, 11 HISTORICAL STUDIES IN INDUSTRIAL RELATIONS 1, 29-33 (2001).

²³ See DEAKIN & WILKINSON, *supra* note 18, 31. See also Deakin, *supra* note 7, 19.

law-making cannot be identified by one single process leading to one single legal decision. It is more a question of several and usually chronologically asymmetrical processes leading to the production, often through several statutes and/or judicial law-making decisions, to a legal concept. The latter can be defined as a group (often scattered) of 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.²⁴ Depending on several factors (legal system under consideration, theoretical assumptions of the observer and so on), the legal rationality can demand various requirements in order to be termed a legal concept, to be grouped either according to formal criteria, e.g. with the idea of consistency or coherence, or according to substantive criteria, e.g. economic efficiency or justice.²⁵

This product of the evolution process, namely the rationalized interaction of rules (legal concepts), forms a theoretical matrix with the primary classificatory and normative functions of helping primarily legal actors (but also often all actors dealing with the law) in diagnosing and systematizing legal problems occurring both in the creation and interpretation of the law.²⁶ For example, the legal concept known as joint custody is not composed of one single rule but rather is more a question of a coordinated (either by the same law-making authority or by doctrine) complex of rules imposing several duties and rights on both parents, child and the supervising public authority.²⁷

²⁴ See GEOFFREY SAMUEL, *EPISTEMOLOGY AND METHOD IN LAW* 220-222 (2003) as to the definition of legal concept. See, e.g., JOHN BELL, *POLICY ARGUMENTS IN JUDICIAL DECISIONS* 40-43, 68-77 (1983) (the legal concept of duty of care in negligence); or NEIL D. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 259 (1997) (the duty for public authorities to hear anyone whose interests are affected by a public decision-making process).

²⁵ See, e.g., HANS KELSEN, *THE PURE THEORY OF LAW* 89-91 (1997); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 276 (1980); Aleksander Peczenik, *Why Shall Legal Reasoning Be Coherent?*, XVIII INDIAN SOCIO-LEGAL JOURNAL 103, 105-106 (1992); or RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 182 (5th ed., 1998).

²⁶ See Hart, *supra* note 5, 93; and MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 656-657 (1978). Legal concepts and categories play both a classificatory and a normative function because, as pointed out by Tuori, "[L]egal concepts included in the general doctrines play an important role in systematising surface-level legal material. New statutes issued by the legislator do not function in isolation but are inserted into the legal order's totality. Their location in this totality is determined by legal concepts, which indicate to the newcomers their domicile in the systematics of the legal order." TUORI, *supra* note 6, 218. Compare ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* 84 (1958); and SAMUEL, *supra* note 24, 139-140 as to the distinction between normative and descriptive legal concepts.

²⁷ See, e.g., Kirsti Kurki-Suonio, *Joint custody as an interpretation of the best interests of the child in critical and comparative perspective*, 14 INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY 183, 187-99 (2000). See also Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Juridical Reasoning*, 26

As can be seen from this brief and necessarily rough sketch of the main claims by evolutionary theory and law (at least as perceived from a legal theoretical perspective), the skepticism that this approach encounters in legal theory is largely unfounded, or at least, is founded 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 in a sort of deterministic way, paradoxically neglects the very evolution that the evolutionary theories have gone through.²⁸ As (critically) pointed out by an evolutionary scholar, "...[p]articularly in post-Darwinian views of legal evolution... there is a mixture of reliance on 'invisible hand' forces (economic conditions) and, particularly in later stages of development, a conscious adaptation of law to conditions. The latter is quite unlike the unconscious, mechanical adaptation found in Darwinian theory."²⁹

If one considers the basic ideas behind the modern evolutionary approaches to the legal phenomenon in particular, there are only two things they have in common with 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.³⁰ 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, relations which in the end determine the shape of the law as it does for the animal species.³¹

YALE LAW JOURNAL 710, 712-713 (1916-17); and generally Åke Frändberg, *An Essay on the Systematics of Legal Concepts: A Study of Legal Concept Formation*, 31 SCANDINAVIAN STUDIES IN LAW 81, 81-115 (1987).

²⁸ See, e.g., Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONNECTICUT LAW REVIEW 389, 391 (2004).

²⁹ STRAHLENDORF, *supra* note 17, 591. See also HOVENKAMP, *supra* note 12, 656, where the author identifies actually three versions of evolutionary theory in the legal thinking, all inspired by Darwin's theory: Social Darwinism (e.g. William Graham Sumner), but also Apolitical Darwinism (e.g. John Henry Wigmore) and the dominating Reform Darwinism (e.g. Pound and Holmes).

³⁰ See STEPHEN JAY GOULD, BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY 455 (1991).

³¹ See, e.g., Sinclair, *supra* note 18, 471. But see LUHMANN, *supra* note 14, 233, where the author distances himself (and in general the modern evolutionary approach to law) from the historical antecedents (e.g. Friedrich von Savigny) pointing out that "[e]volution is not a gradual, continuous, seamless increase in complexity but a model... compatible with radical erratic changes... and with long periods of stagnation." See also DEAKIN, *supra* note 7, 39.

The basic feature characterizing the evolutionary approach to the law as “Darwinian” eventually is the same as that characterizing each legal theoretical approach 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 law) are to exist.³² As pointed out by Herbert Hovenkamp, “Jurisprudence was also “evolutionary” long before Darwin, and it continues to be evolutionary. Like most other intellectual disciplines, jurisprudence needs a theory of change.... Today every theory of jurisprudence worth contemplating incorporates a theory of change.”³³ Having this common point with the theory of law-making, it is then worth investigating whether and, if so, what benefits can be derived by using the evolutionary approach to construct a theory of the law-making processes.

D. What Evolutionary Theory Can(t) Do For Legal Actors

The distinguishing feature of evolutionary theories, when applied to the legal phenomenon, is their focus on the various stages of the law-making process, namely variation, selection and retention.³⁴ As pointed out by several scholars, the focus of evolutionary theory is on *legal change*.³⁵ From the perspective of a legal actor, legal change is always identified with law-making, as long as the latter is intended in the broad meaning of the process of creation and implementation of certain legal concepts in legislative or judicial forms.³⁶

³² See DEAKIN & WILKINSON, *supra* note 18, 30.

³³ Hovenkamp, *supra* note 12, 645-646 [footnotes omitted]. See also STEIN, *supra* note 2, ix; JULIUS STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 36 (1966); and Deakin, *supra* note 7, 41-42, talking in particular of “a very tenuous link” between Darwinian thought and established evolutionary approaches to the law.

³⁴ See LUHMANN, *supra* note 14, 230-231; Holmes, *supra* note 1, 448-450; and Clark, *supra* note 16, 1241. See also Sinclair, *supra* note 1, 36; and Donald T. Campbell, *Variation and Selective Retention in Socio-Cultural Evolution*, in *SOCIAL CHANGE IN DEVELOPING AREAS* 19, 27-29 (Herbert Barringer, George Blanksten & Raymond W. Mack eds., 1965).

³⁵ See Gunther Teubner, *Introduction to Autopoietic Law*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 1, 7-9 (Gunther Teubner ed., 1988); and CLARK, *supra* note 16, 1239. See also Hovenkamp, *supra* note 12, 647; and Elliott, *supra* note 1, 41, 46, 49 as to the historical roots of this connection between “legal evolution” and “legal change.”

³⁶ See Smits, *supra* note 4, 81; and JOHN H. BECKSTROM, *SOCIOBIOLOGY AND THE LAW* 3-5 (1985). See also David Jabbari, *From Criticism to Construction in Modern Critical Legal Theory*, 12 *OXFORD JOURNAL OF LEGAL STUDIES* 509, 529 (1992).

For most legal actors in modern times, the very essence of the law and its normative nature can be traced by its being considered as binding by its addressees (or the community at large) regardless of the “empirical” surroundings, *i.e.* in its being perceived as an “Ought” regardless of the surrounding “Being.”³⁷ Consequently, changes in legal systems or categories can only be achieved by producing other (alternative) legal systems or categories, *i.e.* only by making new and different laws. The sources for any legal change can naturally vary, from a changing economic reality pressuring for a better Ought to purely doctrinal developments within a legal system. Moreover, law-making (as legal change) can produce different and sometimes diametrical outcomes to the one planned. In any event, all legal actors agree that to change the law, one always eventually needs a new law or, as stated by Teubner, “[l]aw itself defines the preconditions of a legal act and thus the preconditions of every change in the law.”³⁸

The explanation of how a legal act produces a new law is one of the central axioms of contemporary legal culture, and one of the major contributions of evolutionary theory. The insertion of the evolutionary approach (in its current version) into the world of legal thinking is very desirable in this regard, both as a theory of law-applying and as a theory of law-making. As to the first, evolutionary theory still retains in both its European and American versions one of the fundamental aspects of the evolutionary theory as formulated by Darwin: evolutionary theory is a theory directed at explaining the present by looking at its past or, in other words, directed to answer the question of how we became what we are.³⁹ The basic goal for each evolutionary theory is then to provide legal scholars, law-makers, and last but not least, judges with clearer knowledge as to the background of the actual legal concepts in a certain legal system.⁴⁰ For example, it can explain the content and

³⁷ See, e.g., MACCORMICK, *supra* note 24, 236-238; HART, *supra* note 18, 86-88, 181-182; RICHARD POSNER, *FRONTIERS OF LEGAL THEORY* 158 (2001); HANS Kelsen, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* 15-16 (1996 [1934]); HOLMES, *supra* note 7, 461; Alf Ross, *Tû-tû*, 70 *HARVARD LAW REVIEW* 812, 818-822 (1957); and KARL OLIVECRONA, *LAW AS FACT* 128-129 (1971). See also Roger Cotterrell, *Law and Community: A New Relationship?*, 51 *CURRENT LEGAL PROBLEMS* 367, 372 (1998). But see Note, *'Round and 'Round the Bramble Bush: from Legal Realism To Critical Legal Scholarship*, 95 *HARVARD LAW REVIEW* 1669, 1678 (1982).

³⁸ TEUBNER, *supra* note 21, 59. See also Raz, *supra* note 8, 201.

³⁹ See, e.g., Deakin, *supra* note 7, 35; or Jabbari, *supra* note 36, 530. See also Hutchinson and Archer, *supra* note 17, 24.

⁴⁰ See, e.g., Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 *NORTH CAROLINA LAW REVIEW* 1117, 1157-1158 (1997) and his four stages at which an evolutionary theory can be a useful tool for the law-makers. See also TEUBNER, *supra* note 21, 49, where the author however limits the possible contribution of evolutionary approach to legal theory to a (rather obscure)

extent of a type of contract known as *financial leasing*. Evolutionary theory can show how *financial leasing* has been created, selected and stabilized as the best legal tool in order to promote specific activities inside the economic arena, namely in order to provide commercial actors with a broader range of facilities (e.g. perpetual new cars) for their work. Aware of this basic feature of financial leasing, judges then can, for instance, restrictively apply this legal concept, in particular when consumption is the main reason involved for signing a contract for financial leasing.

As to the second possible contribution to legal theory, the major focus of the evolutionary theory is on changes in the law; therefore it seems natural that this approach should be directed to that part of legal thinking that more than the others investigates the mechanisms and results of shifting from one legal regulation to another, namely the theory of law-making.⁴¹ In other words, the contribution that evolutionary theory can offer to a theory of law-making becomes fundamental since, by its attention to the process of creation, selection and stabilization of a new legal concept, it shows how a certain change has taken place in the legal system. For example, evolutionary theory can visualize the importance of the economic discourse over the legal one in the law-making by showing the modalities through which financial leasing was able to penetrate progressively into many legal systems (in particular in civil law countries), despite the fact that these legal cultures did not originally have a third space between the rigid dichotomy of property rights and loans.⁴²

Despite these contributions that evolutionary theory can offer to legal theory, there is a fundamental problem affecting this approach that keeps it outside the legal theoretical tools each legal actor, from judges to law-drafters, always carries with him or her at work. While evolution theory can offer a better explanation of how past challenges have been solved by the legal system, it does not equip legal actors, as seen from their internal perspective, with criteria to face future challenges. As put by an evolutionary legal scholar, "it would be a fundamental mistake to evaluate evolutionary theories of jurisprudence as *true or false*. Jurisprudential

idea of "discouraging" the faith in a possible "legal progress." But see the critiques in HUTCHINSON, *supra* note 1, 8-9.

⁴¹ See, e.g., Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine Function and Legal Liability for Product Disappointment*, 60 VIRGINIA LAW REVIEW 1109, 1369-1386 (1974) as to the usefulness for the future law-making of understanding the process of creation of legal concepts such as "consumer protection" and "products liability." See also Csaba Varga, *On The Socially Determined Nature of Legal Reasoning*, in LAW AND PHILOSOPHY. SELECTED PAPERS IN LEGAL THEORY 317, 318 (Csaba Varga ed., 1994), as to the importance in modern society of legislative and judicial law-making and their investigation.

⁴² See Ronald C. C. Cuming, *Model Rules for Lease Financing: A Possible Complement to the UNIDROIT Convention on International Financial Leasing*, 3 UNIFORM LAW REVIEW 371, 376 (1998).

theories are not true or false in the same sense that scientific theories are. Instead, we should judge evolutionary jurisprudence as we judge any creation myth, by whether it is *useful*.⁴³ The evolutionary approach to the law in its present form tends to not be so useful for legal actors because it does not take into consideration one of the basic points for a law-making in modern capitalistic society (at least according to Max Weber): its instrumental rationality (*Zweckrationalität*), both in its substantive and more formal meaning.⁴⁴ According to Weber, instrumental rationality can be defined as the criteria leading to obtaining 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.⁴⁵ The very changes in the circumstances (internal or external to the legal system) in which the law operates often force legal, political and social actors to activate the law-making.⁴⁶ Therefore, in order for an evolutionary approach to law-making to be taken to work by legal actors or, in other words, in order for it to become a “legal” evolutionary approach, it needs not only to explain the past but also to be directed into the future, in particular by elaborating a normative theory capable of helping law-making actors create, select and stabilize future legal concepts adapted to changed circumstances.⁴⁷

To summarize, evolutionary theory explains the change in the law and with this, it can 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

⁴³ Elliott, *supra* note 1, 92-93 [*italics added*]. See, e.g., Smits, *supra* note 4, 93; or TEUBNER, *supra* note 21, 49, expelling from the evolutionary approach the possible “normative projections” hidden in them. See also ROE, *supra* note 20, 667. But see STRAHLENDORF, *supra* note 17, 723-735 attempting to sketch a framework of normative component for an evolutionary approach to the law.

⁴⁴ See WEBER, *supra* note 26, 654-658, 866. See also Max Rheinstein, *Preface*, in MAX WEBER ON LAW IN ECONOMY AND SOCIETY i, xlii (Max Rheinstein ed., 1954). But see, e.g., David Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 WISCONSIN LAW REVIEW 720, 746-747 (1972); or ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* 122-128 (1978) as to the criticism of this connection, in particular in consideration of the “England problem.” 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 487, 494-497 (1987).

⁴⁵ See WEBER, *supra* note 26, 636-637. But see the different meanings of “rationality” traceable in Weber’s works as in ANTHONY T. KRONMAN, *MAX WEBER* 73-75 (1983); and the criticisms in JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, VOL. 1, 262 (1984), and in particular the lack of space of “rational justification” in Weber’s idea of rationality in law.

⁴⁶ See, e.g., WEBER, *supra* note 26, 669. But see Gordon, *supra* note 20, 36.

⁴⁷ See BECKSTROM, *supra* note 13, 28-41, where the author develops the same kind of criticisms, though limited to the socio-biological version of the evolutionary approach to the law. See also Donald E. Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 THE JOURNAL OF LEGAL STUDIES 113, 114 (1984): “The absence of a strong sense of its own past is a distinctive feature of legal scholarship... Legal scholars, imitating science, purport to be engaged in a quest for new knowledge which, if successful, would sweep aside the paradigms of their predecessors.”

has happened. At the very moment a lawyer working for a drafting committee needs a general theory for some guidelines, *i.e.* in order to face a legal dilemma caused either by a change of the surrounding environment or by internal development to the legal world (using Luhmann's perspective), evolutionary theory as a possible legal theoretical first-aid kit fails, focusing on explaining what and why the change has happened instead of how to "remedy" it.⁴⁸ After all, one of the earlier scholars applying an evolutionary approach to the law stated, "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."⁴⁹ A major adjustment is therefore required in order to transform the "evolutionary approach to law" into a "legal evolutionary approach to the law" and, in this way, into a complete and legitimized member of the legal family under the forms of a possible legal theory for law-making.

E. Evolutionary Theory and Law: Re-adjusting The Evolutionary Perspective

The adjustment necessary in order for evolutionary theory to become a legal evolutionary theory of the law in general and law-making in particular, is caused by the fact that evolutionary 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.⁵⁰ The evolutionary approach was born 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

⁴⁸ See, e.g., BECKSTROM, *supra* note 36, 58-59, not giving any reason why law-making actors should opt for a conservative line instead of a more liberal orientation on the issue of succession law; or LUHMANN, *supra* note 14, 265, where the author points out the birth and development of a certain legal concept (self defense), at the same time failing to offer to future law-making or law-applying actors possible criteria on where to draw the line where the legal/illegal border ought to be drawn. See also Gordon, *supra* note 20, 68, 71 as to the "hidden" political agenda behind this lack of indication for the future law-making by evolutionary approach to the law.

⁴⁹ See Holmes, *supra* note 7, 474.

⁵⁰ See, e.g., STRAHLENDORF, *supra* note 17 26-27, 574, where the author points out his goal of developing an "evolutionary theory of law" which evaluates changes of the law from an external perspective, *i.e.* a point of observation grounded in socio-biological findings. See also the critique in Michael B. W. Sinclair, *Autopoiesis: Who Needs It?*, XVI LEGAL STUDIES FORUM 81, 81-86 (1992).

sciences (as for the European side of the coin).⁵¹ As a consequence, evolutionary theory when applied to the legal phenomenon tends to disregard both the specific nature of its object of investigation (the law) and 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.⁵²

One feature of the role of the legal discipline in the legal phenomenon in particular, as pointed out by Ross among the others, is its capability of changing the very

⁵¹ See TEUBNER, *supra* note 21, 52-53, pointing out the different roots between the European evolutionary approach (in the socio-cultural theories of evolution) and some fringes of the American evolutionary approach (in the socio-biological theories of evolution). As to the American version of evolutionary approach to the law, see, e.g., Elliott, *supra* note 1, 38-39; or Hutchinson, *supra* note 15, 262-265, where the author uses Darwin's image of species' evolution like a tree in order to explain the legal evolution. See also DUXBURY, *supra* note 13, 25-32. 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, Owen D. Jones, *Proprioception, Non-Law, and Biolegal History: The Dunwoody Distinguished Lecture in Law*, 53 FLORIDA LAW REVIEW 831, 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, 1055-1058 (2004); or Owen D. Jones, *Evolutionary Analysis in Law: Some Objections Considered*, 67 BROOKLYN LAW REVIEW 207, 207 (2001): "Evolutionary analysis in law represents, in large measure, an effort to inform legal thinking with behavioral biology." As to the European version of evolutionary approach, see, e.g., TEUBNER, *supra* note 21, 49, where the author explicitly confines evolutionary theory and its usefulness mainly in the field of legal sociology. See also SMITS, *supra* note 4, 83-88, as a bridge between the two different evolutionary traditions.

⁵² See Teubner, *supra* note 3, 300 (stressing the target of his analysis, i.e. the observation of the regularities in the interaction between law and societies). But see Gunther Teubner, "And God Laughed...": *Indeterminacy, Self-Reference and Paradox in Law*, in PARADOXES OF SELF-REFERENCE IN THE HUMANITIES, LAW AND THE SOCIAL SCIENCE 15, 29 (Jean-Pierre Dupuy & Gunther Teubner eds., 1991). Compare Edward L. Rubin, *Legal Scholarship*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 562, 562-563 (Dennis Patterson ed., 1996), pointing out how the internal perspective of the legal actors is not so much a methodology, but the very subject matter of legal investigation. See also the accusation of "reductionism" as addressed to the evolutionary approach to the law in Blankenburg, *supra* note 3, 381. Another reason behind such lack of normative component can possibly be traced in the fact that evolutionary theory scholars want to clearly mark their distance from Social Darwinism and its "normative hypostasizations." TEUBNER, *supra* note 21, 51. See also SARAH BLAFFER HRDY, THE WOMAN THAT NEVER EVOLVED 12-13 (1981), as to the lack of a normative component as the feature distinguishing in general a Darwinian approach to the evolution from a Social Darwinist perspective. For example, some of the evolutionary approaches to the law stress the idea of "organicity" as underpinning criterion behind legal evolution. See, e.g., Smits, *supra* note 4, 81; or Robert Sugden, *Spontaneous order*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW Vol. III 485, 488 (Peter Newman ed., 1988). This criterion of "organicity" is used in particular in order to promote 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 Smits) 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, either as National assembly or as a conglomerate of business organizations.

object of observation.⁵³ In contrast to most natural sciences, and to a more direct and higher degree than for most social and economic sciences, legal scholars can actually directly influence the choice of patterns of future development of the law. Legal categories such as 'contract', 'tort' and 'criminal' have all, for example, been the objects of intense theoretical writing and this theoretical literature has in turn had important influences on shaping directly or indirectly the functioning of the legal reasoning within each category.⁵⁴

In other words, one can also state that legal theory is not only a "theory of explaining and predicting" but also a "theory for design and action."⁵⁵ For example, by claiming the existence of a certain legal principle of efficiency inside tort law as an established "fact," law professors can actually force future generations of law-makers and law-applying actors to introduce this principle, even if the original claim was false.⁵⁶ 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.⁵⁷

⁵³ See ALF ROSS, *ON LAW AND JUSTICE* 47 (1959). See also 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 875, 894-895 (2002). But see LUHMANN, *supra* note 14, 252, where the author implicitly underestimates the power of "ideologies" on the legal thinking on law by pointing out the lack of a "general project" behind the evolution of the law. See also *id.*, 270. See, e.g., Deakin, *supra* note 7, 26-29.

⁵⁴ SAMUEL, *supra* note 24, 222. See Michael B. W. Sinclair, *The Semantics of Common Law Predicates*, 61 INDIANA LAW JOURNAL 373, 384-386 (1986); and ROSS, *supra* note 53, 50. See also Quentin Skinner, *Introduction: the return of Grand Theory*, in *THE RETURN OF GRAND THEORY IN THE HUMAN SCIENCES* 1, 6 (Quentin Skinner ed., 1990). See, e.g., Stefan Vogenauer, *An Empire of Light? II: Learning and Lawmaking in Germany Today*, 26 OXFORD JOURNAL OF LEGAL STUDIES 627, 630-637 (2006) (as to the different types of influence exercised by the German scholarship on the German law-making).

⁵⁵ Shirley Gregor, *Design Theory in Information Systems*, 10 AUSTRALASIAN JOURNAL OF INFORMATION SYSTEMS 14, 16-20 (2002). See also Richard Posner, *Some Uses and Abuses of Economics in Law*, 46 UNIVERSITY OF CHICAGO LAW REVIEW 281, 285 (1979), pointing out the inevitability of the normative component in (law and economics) legal theory due to the normative nature of the very object to be theorized.

⁵⁶ As to a similar example in family issues, see Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICHIGAN JOURNAL OF GENDER AND LAW 1, 9 (1996). See also MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 14 (1953).

⁵⁷ See Robert K. Merton, *The self-fulfilling prophecy*, 8 ANTIOCH REVIEW 193, 193-210 (1948); and ROSS, *supra* note 53, 47 n. 5. Compare KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 40-41 (1961). See also LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 2-3 (2005); and Hovenkamp, *supra* note 12, 648. But see, as an example of the current trend of evaluating evolutionary works mainly according to Popper's criteria of falsifiability, Clark, *supra* note 16, 1258-1259; or Sinclair, *supra* note 18, 471-474.

This quality of the legal discipline in its turn has to do with the specific nature of the law: law is a human product aiming at regulating the relations of human beings with each other and with the surrounding environment.⁵⁸ 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 kinds of values as criteria for regulating human behaviors.⁵⁹ However, legal reasoning has special requirements, due specifically to its normative and conflict resolution roles.⁶⁰ The regulation of human behaviors then is not based for instance on statements directed at convincing or persuading the addressees (as in politics). Legal reasoning is instead based on the use of specific language which, once it has transformed certain religious, cultural, moral, or economic values into legal concepts, 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.⁶¹

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. This is formed by a

⁵⁸ “[B]y the nineteenth century, at latest, a new kind of society has developed in the West: the society of technology, industry, science, machines... Each advance in science and technology seemed to increase the possibility of control –over nature, over the conditions of life. But control always required regulation, rules, implementation; control was, and had to be, vested in law, legal process, and the state.” LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 42 (1985). See, e.g., LON FULLER, *THE MORALITY OF LAW* 30 (1964).

⁵⁹ See, e.g., NEIL D. MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 114-120 (2005); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 14-17 (1996); and ROBERT ALEXY, *THE ARGUMENT FROM INJUSTICE. A REPLY TO LEGAL POSITIVISM* 77 (2002). But see Lawrence M. Friedman, *On The Interpretation Of Laws*, 3 *RATIO JURIS* 252, 253 (1988).

⁶⁰ See John Bell, *The Acceptability of Legal Arguments*, in *THE LEGAL MIND: ESSAYS FOR TONY HONORE* 45, 55-64 (Neil D. MacCormick & Peter Birks eds., 1986). See also Thomas F. Gordon, *The Importance of Nonmonotonicity for Legal Reasoning*, in *EXPERT SYSTEMS IN LAW: IMPACTS ON LEGAL THEORY AND COMPUTER LAW* 111, 112-120 (Herbert Fiedler, Fritjof Haft, & Roland Traunmüller eds., 1988). As for the meaning of legal reasoning as used in this work, this is the process of deployment of legal argument, *i.e.* of “argument in favor of or against a particular resolution of a gap, conflict, or ambiguity in the system of legal rules.” Duncan Kennedy, *A Semiotics of Legal Argument*, 42 *SYRACUSE LAW REVIEW* 75, 75 (1991).

⁶¹ See KELSEN, *supra* note 25, 4. For this very nature of the law, *i.e.* its “Being” binding as normative system because of and according to its understanding by the human beings (legal culture), one cannot accept the basic assumption of the theory of legal memetic. According to the latter, the evolution of the law is based on a “three parties” relation, where legal concepts (as to the “genotypes” in natural selection or “replicator”) take a middle position between the law (“organism” or the system under consideration or “interactor”) and the surrounding context (“environment” or legal culture). See Deakin, *supra* note 7, 7-8, 30-32.

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.⁶² The indication of the “ought-to-be” goals can then be made by using a descriptive terminology, *i.e.* “by looking at the situation X, the addressee ought to behave as Y” (as for some modern legal positivists), or in prescriptive terms, *i.e.* “value X is good, and therefore the addressee ought always to behave as Y” (as for some critical legal theories).⁶³ In both cases, due to the very normative nature of the law, legal theory is always expected 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 being the one that ought-to-be taken, for instance because they perpetuate 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.⁶⁴

⁶² See JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 178, 199-201 (2001). In particular, Coleman points out how scholars that state that every legal theory is normative, are right as long the term “normative” defines the feature of each theory of being “responsive to the norms governing theory construction.” This meaning of normative, however, is not the (narrower) one that has been used throughout this work nor embraced by Coleman himself, *i.e.* normative theory as a theory defending a specific “ought” of the law. See Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 99, 108 n. 22 (Jules Coleman ed., 2001). See also Edward L. Rubin, *Law And and the Methodology of Law*, 1997 WISCONSIN LAW REVIEW 521, 543 (1997).

⁶³ As an example of “descriptive terminology” of normative components, see COLEMAN, *supra* note 62, 179-186; HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 163-164 (1945); 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 *NORMATIVITY AND NORMS* 69, 70-76 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1998 [1963]). As an example of “prescriptive terminology” of a normative component, see Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 BOSTON UNIVERSITY LAW REVIEW 747, 774-777 (1992); or Caroline Morris, *“Remember the Ladies”: A Feminist Perspective on Bills of Rights*, 33 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 27, 29 (2002). See also Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 413, 414-417 (David Kairys ed., 2nd ed., 1990).

⁶⁴ See Robert Summers, *Judge Richard Posner’s Jurisprudence*, 89 MICHIGAN LAW REVIEW 1302, 1304-1305 (1991). In particular, Summers criticizes a purely predictivist theory of law as having a fundamental flaw: it ignores the fact that legal theory must also deal with the basic criteria (“legal standards”) every legal system has (or ought to have) in order to identify what valid law is. 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 73, 76 (2000). Compare the shifting of Law and Economics from a hard line descriptive legal theory, such as in RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* 14-15 (3rd ed., 1986), to a more mixture of descriptive and normative components, such as in RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 353-374 (1990).

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, where evolutionary theory, by explaining how a certain legal concept has been created, chosen and “stabilized” in a certain legal system, also aims at being able to predict possible alternative patterns of creations of other legal concepts.⁶⁵ In other words, by explaining how a certain legal concept has established itself, evolutionary theory can predict how the latter will probably evolve and/or how it will be substituted.⁶⁶ For example, by looking at the history of financial leasing, evolutionary theory can predict that, in the future, the economic factors (namely the efficiency of a certain legal construction) in similar cases in the end will play a more important role than the formal legal factors (namely the lack of space inside a certain legal system for new types of legal concepts).

However, “predictions” are not “normative propositions,” at least not explicitly.⁶⁷ The directions each legal theory offers 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.⁶⁸ Moreover,

⁶⁵ See Hutchinson and Archer, *supra* note 17, 30. “A theory of legal evolution will be able to explain or even predict general structures of the law.” TEUBNER, *supra* note 21, 49 [*italics added*]. Though in a much more cautious way, see also PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARDS RESPONSIVE LAW 17 (1978). But see LUHMANN, *supra* note 14, 273: “The concept of evolution itself prohibits... prognoses;” and Marie Theres Fögen, *Rechtsgeschichte –Geschichte der Evolution eines sozialen Systems. Ein Vorschlag* 18-19 (2002), available at: http://rg.mpi.uni-frankfurt.de/fileadmin/user_upload/PDF/rg01/rg01_debate_foegen.pdf, last accessed: 15 January 2008. As to the meaning of “predictivist” as used in this work, “predictivist” identifies the feature of a theory of deducing from the theory itself some events that are not known yet or has not yet taken place. See Stephen G. Brush, *Dynamics of Theory Change: The Role of Predictions*, II PROCEEDINGS OF THE BIENNIAL MEETING OF THE PHILOSOPHY OF SCIENCE ASSOCIATION 133, 135 (1994).

⁶⁶ 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 1141, 1194-1195 (2001). But see Ruhl, *supra* note 19, 853.

⁶⁷ See JOHN DEWEY, THEORY OF VALUATION 51-52 (1939). But see, as to the relative nature of this distinction, Rudolf Carnap, *Inductive Logic and Rational Decisions*, in STUDIES IN INDUCTIVE LOGIC AND PROBABILITY 5, 7-9 (Rudolf Carnap & Richard C. Jeffrey eds., 1971), where one of the axioms of a predictivist perspective, namely probability, is ultimately treated as a normative claim. See further DWORKIN, *supra* note 5, 154-155.

⁶⁸ See HART, *supra* note 18, 132-137. See, e.g., ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 123 (1982), where the author points out the often clashing relations between predictivist vision

normative propositions can have a direct performative force.⁶⁹ By taking the suggested normative patterns, and due to the very nature of the law as a human creation, legal actors are ultimately able to shape the law in a certain direction, regardless of all the possible predictions made by the legal scholarship.⁷⁰ A classical example is the concept of “separation based on race as inherently unequal,” not considered a legal concept by legal actors throughout most of American legal history. It suddenly exploded as a legally relevant concept for interpreting the constitutional principle of the prohibition against discrimination (Equal Protection Clause) due to the legal landslide provoked by the Supreme Court’s decision in *Brown vs. Board of Education*.⁷¹

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 the law ought based on economic, political or purely systematic criteria.⁷² For example, the

and normative nature when dealing with the concept of “valid law.” But see Michael Abramowicz, *Predictive Decisionmaking*, 92 VIRGINIA LAW REVIEW 69, 70-73 (2006).

⁶⁹ For instance, “[t]he modern legal discourse of civil rights is as much a cause as an effect of civil rights thinking within liberal ideology at large.” DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* 152 (1997). See also ROGER COTTERRELL, *LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* 250-252 (1995); SUNSTEIN, *supra* note 59, 191; and Niklas Luhmann, *Law as a Social System*, 83 NORTHWESTERN UNIVERSITY LAW REVIEW 136, 140 (1989). But see LUHMANN, *supra* note 14, 252, where the author implicitly underestimates the power of “ideologies” on law. See also *id.*, 270. See, e.g., Deakin, *supra* note 7, 26-29.

⁷⁰ See Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE LAW JOURNAL 2279, 2287 (1999) and his “ten-year test” in order to reclassify what is reconstructed *ex post* “normal evolutionary development” as an actual “juridical revolution.” See also Blankenburg, *supra* note 3, 278-280 as to the historical reasons behind the European evolutionary theories’ distance from the actual developments in legal practice.

⁷¹ See *Plessy v. Ferguson*, 163 US 537, 548-552 (1896) and *Brown v. Board of Education of Topeka*, 347 US 483, 495-495 (1954). See also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 136 (2004). But see, e.g., David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WILLIAM AND MARY LAW REVIEW 845, 862-868 (2007), talking more of *Brown* as a “final step in a common law development” (at 868); or MILTON R. KONVITZ, *A CENTURY OF CIVIL RIGHTS* 70-72 (1961) and the role played by President Truman’s Committee on Civil Rights (1946) in setting the stage for *Brown v. Board of Education*.

⁷² See SUMMERS, *supra* note 68, 134-135. See also Jethro W. Brown, *Law and Evolution*, 29 YALE LAW JOURNAL 394, 398 (1920). “[W]e must not forget that actual law is a human product—made and administered by [legal actors] who are not free from human limitations in intelligence and goodwill.” MORRIS R. COHEN, *LAW AND SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 337 (1933). More in general, as stated by Hutchinson, “any account of legal and biological life that offers an important role for the fact and effects of change will soon itself become a victim of historical change.” Hutchinson, *supra* note 15, 253. See also JÜRGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 113-139 (1971), and his focus on

conditions as to the issue of discrimination of the surrounding environments and of the legal system were roughly (and relatively) the same under *Brown vs. Board of Education* as they were more than fifty years prior under *Plessy v. Ferguson*, where the principle of “separate but equal” was sanctioned.⁷³ Nevertheless, the majority of the justices sitting in the Supreme Courts subjectively considered that the same text (Equal Protection Clause) meant the very opposite of that stated in *Plessy v. Ferguson*.⁷⁴ As a consequence, their normative accounts as to American constitutional law (it ought to prohibit separation) were not “predictable” (*i.e.* it was an uncertain outcome in light of the previous decisions and the factual situation).⁷⁵ Though unpredicted, the Justices’ normative statements also became legal reality (constitutional law actually prohibits separation), setting the agenda for predictions as to future law-making on the legal concept of discrimination based on race.⁷⁶

“inter-subjectivity” instead than on the “objectivity” criterion. But see Deakin, *supra* note 7, 32, 34 as to the limitation of the subjective element due to the constraint of the legal discourse.

⁷³ See Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUMBIA LAW REVIEW 1955, 1977-1978 (2006), pointing as key factor the “reconstruction” by the Court of “‘new’ facts to justify new conclusions about previously settled matters while avoiding mention of an underlying norm shift.” See, e.g., Justice Holmes’ refusal of the concept of “equal protection” in *Buck v. Bell*, 274 US 200, 208 (1927). See also the personal recollection of one of the participant to the process leading eventually to the Supreme Court’s decision in Paul E. Wilson, *Ad Astra per Aspera -Brown v. Board of Education of Topeka*, 68 UNIVERSITY OF MISSOURI-KANSAS CITY LAW REVIEW 623, 633-634 (2000). But see ROBERT J. COTTROL, RAYMOND T. DIAMOND, & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 78 (2003); and MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 364-366, 377, 468 (2004) pointing out a significant change towards discrimination based on race in the attitude of the Court’s past decisions and of the environment surrounding the legal world.

⁷⁴ See, e.g., William E. Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 SAINT LOUIS UNIVERSITY LAW JOURNAL 795, 819-825 (2004) as the importance of the personal ideologies (and even physical conditions) of the Justices in the final outcome of *Brown*. As recently pointed out, “the great *Brown* decision derives from a courageous Court acting alone.” Robert Justin Lipkin, *Which Constitution? Who Decides?*, 28 CARDOZO LAW REVIEW 1055, 1085 (2006). See also generally JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION : A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2002).

⁷⁵ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARVARD LAW REVIEW 1, 32-33 (1959) as reflecting the idea of a political foundation of the decision, more than sociological or legal, an idea shared by many legal actors at that time when *Brown* was decided. But see Michael J. Klarman, *Brown, Racial Change and Civil Rights Movement*, 80 VIRGINIA LAW REVIEW 7, 10 (1994). See further the reply in Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VIRGINIA LAW REVIEW 173, 175-177 (1994).

⁷⁶ See BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 286 (1993); and FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 502 (2002). See also Richard Thompson Ford, *Brown’s Ghost*, 117 HARVARD LAW REVIEW 1305, 1333 (2004): “*Brown’s* relevance is less to our history than to our future” [italics in the text]. As to the “re-constructivist” attitude of evolutionary approach literature when dealing with the unpredictable nature of these type of “revolutions” in legal (and social) history, see Deakin, *supra* note 7,

As pointed out by Hutchinson, “law will always be a relatively open ended and stylized form of politics in which ‘anything might go.’”⁷⁷ For this reason, and almost paradoxically, in order for evolutionary theory to become as predictivist as possible, *i.e.* to foresee which directions the law *will* take, it should itself explicitly provide legal actors with some normative criteria, *i.e.* offering directions that the law *ought to* take. This is actually one of the major goals of every legal theory and, in the end, the measurement of the theory’s 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 to present normative criteria or somehow general analytical tools to face and master the future.⁷⁸

F. The “Ought-to-Be” in the Stages of Legal Evolution

The results and methodologies used by evolutionary theory as discussed above will then greatly benefit by being viewed by legal actors as a legal theory instead of a simple theoretical approach to the law.⁷⁹ Evolutionary theory will then, in particular, start to actually influence legal actors in their decisive role in law-making, and in this way render evolutionary theory’s predictions more reliable. However, there is one step that needs to be taken: the integration of a normative component into evolutionary theory.

It is necessary to point out that this combination of evolutionary theory with normative proposals, rendering this approach also useful for legal reasoning, is not going to totally revolutionize this theoretical approach to the law.⁸⁰ The evolutionary approach to the law, despite its descriptive claims as to the present

14: “The widespread and unavoidable practice of providing after-the-event rationalizations to doctrinal innovations often obscures the historical process by which they were formed.”

⁷⁷ Hutchinson, *supra* note 15, 265.

⁷⁸ See ANTHONY D’AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 50-51 (1984); and MACCORMICK, *supra* note 59, 14-15. “Theories are nets cast to catch what we call ‘the world’; to rationalize, explain and to master it.” POPPER, *supra* note 57, 59.

⁷⁹ See, e.g., Edward S. Corwin, *The Impact of the Idea of Evolution on the American Political and Constitutional Tradition*, in EVOLUTIONARY THOUGHT IN AMERICA 182, 186 (Stow Persons ed., 1950).

⁸⁰ See, e.g., Sward, *supra* note 28, 489-490, where the author develops a (descriptive) evolutionary analysis of the central role played by the very normative component (or “justification” as she names it) in modern legal reasoning.

and future law, already has some passages where the normative proposals play a crucial role. In other words, the need for a clear and explicit normative component of “legal” evolutionary theory is stressed by the fact that legal actors and their idea of what law “ought to be” participate in decisive (though not monopolistic) ways in all three stages through which, according to the evolutionary approach, the law of a certain legal system evolves.⁸¹

Starting with the *variation phase*, i.e. the moment of creation of several possible legal concepts, this stage of the legal evolution is often commenced by factors external to the legal world, e.g. needs or changes occurring in the economic and political environments.⁸² However, legal actors and the legal ideologies in which they are educated can still play a crucial role.⁸³ A classical example in this direction is Weber’s analysis of the birth and growth in Western nations of the part played in capitalistic economic systems by the legal concept of the corporation. Weber’s investigation shows how the legal world can sometimes itself create the various possible legal concepts, based primarily on internal needs of systematic character of the legal world (i.e. the “ought-to-be-done” proposals aiming at maintaining coherence inside the legal system).⁸⁴ Moreover, even if this is a variation induced by the external environment, it is almost always legal actors, due to the complexity of modern law, who create the new legal concept to be tested on the legal market. For example, even if the variation is induced by the request of the executive management of a large corporation for new types of contracts that facilitate the selling of their product in a foreign market, it is still the in-house attorney that

⁸¹ See TEUBNER, *supra* note 21, 56-59, where Teubner implicitly stresses the central role played (via the autopoietic nature of contemporary legal systems) by the legal actors’ normative ideology in order to explain the evolution of the law in all the three stages. See, e.g., Teubner, *supra* note 4, 280 where one of the roles of legal reflexive processes is the construction of value-criteria allowing certain legal measures instead of others.

⁸² See LUHMANN, *supra* note 14, 252; or Elliott, *supra* note 1, 38: “Law is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own.”

⁸³ See, e.g., the history of the French law of torts in the nineteenth and early twentieth centuries as in ANDRE TUNC, *LA RESPONSABILITE CIVILE* 56, 71-72 (2nd ed., 1989); Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Law Making*, 48 *LOUISIANA LAW REV* 1300, 1357-1360 (1988); and FREDERICK H. LAWSON & BASIL S. MARKESINIS, *TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW* vol. I x, 146-152 (1982). See also LUHMANN, *supra* note 14, 247, as to the fundamental role played by the “a few for all people” principle (i.e. the authoritative nature of legal decisions) in the very moment of variation.

⁸⁴ See WEBER, *supra* note 26, 720-725, 855. See also Trubek, *supra* note 44, 751. As to another example of purely legal construction, see the concept of property (*vs.* the factual situation of possession) or the one of contract (*vs.* the factual situation of transaction) as in LUHMANN, *supra* note 14, 251-252.

creates the spectrum of possible legal concepts, e.g. those based on the legal concept of "leasing."⁸⁵

It should be noted that the idea of a certain degree of autonomy of the legal evolution, in particular if one takes a more European (and especially Teubner's) stand on the issue, is strongly underlined by evolutionary theory.⁸⁶ This being the basic idea, one can draw the conclusion that evolutionary theory also tends to attribute to legal thinking a decisive role, not only in better understanding the legal evolution, since it explains the ideas according to which legal actors tend to reason. Evolutionary theory must also recognize that a legal theory, as a fundamental part in shaping legal culture, can decisively contribute to the development of the law into one direction instead of the other, in particular in its normative component. As recently stressed by Sinclair, "[t]hat the variation or selection mechanisms in a developing system involve rational agency does not preclude an evolutionary explanation; however, it may diminish the value of such explanation."⁸⁷

Second, as far as the *selection phase* of the law-making is concerned, even here the ideological apparatus of legal actors has a decisive role, at least in contemporary Western or "Westernized" national, transnational, and international legal systems. As also stressed by the followers of evolutionary theory approach to the law, a fundamental function in determining what the law is, *i.e.* in selecting the "winning" legal concepts among the various proposals, is played by the basic ideas as to the issue of "what is law" and "what is not-law" of the legal actors, such as legal staff working for law-makers or judges of international courts of arbitration or international lawyers of multinational corporations.⁸⁸ As clearly pointed out by

⁸⁵ See STONE, *supra* note 33, 56-62. See also Teubner, *supra* note 4, 249-250. "Generating 'loopholes,' developing new financing techniques, and creating other legal devices involves careful and insightful use of language, communication, and interpretation skills. In these and numerous other ways legal actors generate and capture value through the interpretive process." Robin Paul Malloy, *Framing The Market: Representations of Meaning and Value in Law, Markets, and Culture*, 51 BUFFALO LAW REVIEW 1, 83 (2003). See also DEAKIN & WILKINSON, *supra* note 18, 32, where "the particular stock of precedents available to the draftsman and the courts... [provides] the source of *variation* in the options from which they could choose" [italics in the text]. But see ISRAEL M. KIRZNER, DISCOVERY AND THE CAPITALIST PROCESS 141-144 (1985), as to the inefficiency (at least from an economic perspective) of this legally-based process of "discovery" or variation.

⁸⁶ See, e.g., TEUBNER, *supra* note 21, 59: "[T]he success of external innovations depends on the extent to which they can be formulated in terms of legal doctrine's 'criteria of relevance'" [footnote omitted]. See also Teubner, *supra* note 4, 248; and DEAKIN & WILKINSON, *supra* note 18, 28-29.

⁸⁷ Sinclair, *supra* note 1, 39.

⁸⁸ See Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, in LAW, SOCIETY AND ECONOMY. CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895-1995 149, 165 (Richard Rawlings ed., 1996). See also Hutchinson, *supra* note 15, 260: "[i]t is not so much

Teubner, “[t]he main criteria for selection are whether the innovation fits in with the existing normative structures.”⁸⁹

These normative structures or ideas have the fundamental task of legitimizing certain solutions (instead of others) to legal problems as “legal” and therefore binding the addressees or at least the parties.⁹⁰ Therefore, the recognition of this crucial role of legal culture should also encourage evolutionary theory to take a step further and provide lawyers, judges and legal scholars with normative patterns, *i.e.* with directions as to what road to take and explanations why the proposed directions ought to be taken.⁹¹

As evolutionary theory’s studies constantly point out, lawyers and judges are certainly not the only actors participating in the process of selection. For instance, non-legal actors also play a fundamental role by using a certain concept such as “corporate interest” regardless of whether it is formally sanctioned as legal, simply because it helps to protect “the public interest in profitability of the enterprise.”⁹² However, the very construction of the idea of relevant legal concepts is based on their acceptance as part of the valid law and valid legal system, which, in their turn, are based on two fundamental elements. In case of conflict, *i.e.* when the legal system is facing the selection of the surviving legal concept, one institutional actor (e.g. the court of arbitrators or the law-making authority) is chosen to decide what concept is part of valid law (and therefore binding) and what is not. In other words,

the past that animates the common law, but a selective account of it... [according to] the specific values and commitments that inform the process of distillation” made by the judges and lawyers.”

⁸⁹ TEUBNER, *supra* note 21, 59. See also Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICHIGAN LAW REVIEW 1647, 1662 (1989).

⁹⁰ See KENNEDY, *supra* note 69, 1; and Robert Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARVARD LAW REVIEW 561, 582 (1983). See, e.g., Peter Gabel, *The Mass Psychology of the New Federalism: How the Burger Court’s Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEORGE WASHINGTON LAW REVIEW 263, 265 (1984); or Frances E. Olsen, *The Family and the Market: a Study of Ideology and Legal Reform*, 96 HARVARD LAW REVIEW 1487, 1498-1499 (1983), whose main goal is to point out how, through the legal system, three dichotomies (market/family, state/civil society, male/female) have been established in Western socio-political cultures. See also Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOCIAL PROBLEMS 175, 178 (1967) as to the legitimizing role played by the law-making in general.

⁹¹ See FRIEDMAN, *supra* note 58, 148. But also see STEWART MACAULAY, LAWRENCE M. FRIEDMAN, & JOHN STOOKEY, *THE LAW AND SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* 7 (1995).

⁹² Gunther Teubner, *Company Interest: The Public Interest of the Enterprise “In Itself”*, in REFLEXIVE LABOUR LAW 21, 50 (Ralf Rogowski & Ton Withagen eds., 1994). As another example of central role played by economic actors in the selection phase, see David A. Skeel Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VIRGINIA LAW REVIEW 1325, 1356 (1998).

one actor is assigned with the specific task of selecting which legal proposal, among those promoted by the conflicting parties or group interests, has to be considered valid law (or according to the valid law). The performance of this task also brings with it the (implicit or explicit) consequence of quashing all non-compatible solutions as “not legally valid” and therefore as non-binding for the addressees.⁹³

Moreover, at least in Western or Westernized legal systems, the individuals comprising this institutional actor in charge of the selection are usually educated at law faculties and (most of the time) have certain experience working either as lawyers or judges.⁹⁴ As a consequence, and paralleling the selection taking place in the surrounding environments, there is still a need for the non-legal actors to “win” the crucial selection taking place in the legal arena so that, for example, their economically efficient concept can always be used with binding force against all the parties. This victory can be obtained only by selling their winning products in terms of the culture in which legal actors have been educated for their jobs, either as judges, lawyers or legal staff working for the law-makers.⁹⁵ For instance, the selection taking place in the economic surrounding can certainly choose financial leasing as the most economic efficient tool for both parties. However, in order to become law, the parties need to sell to the legal institutional actors the tool of financial leasing as a legally possible variation (e.g. based the legal criterion of *ex analogia legis*) of the already legally legitimized concept of loan.

Finally, as to the *stabilization (or retention) phase* of the evolution of the law, the normative legal culture, *i.e.* the culture of legal actors as to what ought to be the law, here too plays an important role, though more discrete than during the two other phases. In the stage of retention of a newly formed legal concept, at first bluish the legal ideology as to what is law is not the dominating factor in order to explain how and why a certain selected legal concept becomes a stable part of the body of national, transnational, or international law. Decisive at this stage are the practices

⁹³ See, e.g., Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW AND SOCIETY REVIEW 727, 745 (1989). See also ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 109 (1991) and its stressing the importance of the “sources of law.”

⁹⁴ See COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 84, 203-204 (2nd ed., 1992); and Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS LAW JOURNAL 805, 831-832, 834-839 (1987). See also Robert Summers, *How Law is Formal and Why it Matters*, 82 CORNELL LAW REVIEW 1165, 1204-1207 (1997); and, as to the over-representation of legal profession in the legislative “selecting” agencies (*i.e.* National Assembly), STEVEN VAGO, LAW AND SOCIETY 115-116 (7th ed., 2003).

⁹⁵ See MARIANA VALVERDE, LAW’S DREAM OF A COMMON KNOWLEDGE 5-6 (2003), as to the “constitutive” role played by legal discourse in general against all the other discourses of knowledge that are introduced into the legal world. See also LAWRENCE M. FRIEDMAN & STEWART MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 21 (2nd ed., 1977).

taking place mostly in the surroundings of the legal arena. These can be, for example, the appraisal of a certain type of contract as being “efficient” for the financial market in the economic arena, or a certain idea of human rights as including private property, helping to promote the political liberal ideology in the political arena.

However, though these non-legal assessments are important in order to stabilize certain legal concepts, they all still tend to be paralleled or supported by the legal reasoning. The latter’s use by non-legal actors aims above all at strengthening the non-legal arguments by also pointing out the validity, *i.e.* the very existence as binding law of a certain type of contract or a certain idea of human rights. After all, as pointed out by Luhmann, “[t]he specification of the way in which arguments refer to legal materials in the legal system [*i.e.* the legal reasoning] is the true carrier of the evolution of the legal system and the breakthrough to an autonomous culture.”⁹⁶ In particular the in case of an uncertain situation, *i.e.* circumstances where conflicting non-legal values are at stake, legal arguments are used as decisive factors in promoting the stabilization of value A instead of B not only for being economically efficient but also for being incorporated in the valid law.⁹⁷

The importance of the legal culture at all three stages of the production of new legal concepts is due to one of the features of modern legal systems (even at the transnational level), especially in relation to the surrounding environment: the specialization of law.⁹⁸ As a result of the increasingly detailed “marking out of what counts as legal knowledge, legal reasoning and legal issues,” one can detect the progressive marginalization of all other discourses from the mechanisms of law-making, as well as their substitution by the specific knowledge and discourses provided by specific actors, the legal actors.⁹⁹

⁹⁶ LUHMANN, *supra* note 14, 248. See also TEUBNER, *supra* note 21, 59. See, e.g., Simon Deakin, ‘Enterprise-Risk’: *The Juridical Nature of the Firm Revisited*, 32 INDUSTRIAL LAW JOURNAL 97, 109-110 (2003).

⁹⁷ “[T]he law tends to impose on the members of society a certain vision of their social world, a certain *classificatory and evaluative scheme* for perceiving this world.” Kaarlo Tuori, *Law, Power and Critique*, in LAW AND POWER: CRITICAL AND SOCIO-LEGAL ESSAYS 7, 16 (Kaarlo Tuori, Zenon Bankowski & Jyrki Uusitalo eds., 1997) [*italics added*]. See, e.g., COTTERRELL, *supra* note 94, 203-204; and BELL, *supra* note 24, 60-67, more specifically directed at pointing out the political function legal actors can play in law-making processes.

⁹⁸ See Bourdieu, *supra* note 94, 835-836; Alan Hunt, *The Politics of Law and the Law of Politics*, in LAW AND POWER: CRITICAL AND SOCIO-LEGAL ESSAYS 51, 82-83 (Kaarlo Tuori, Zenon Bankowski & Jyrki Uusitalo eds., 1997); and Niklas Luhmann, *Closure and Openness: On the Reality in the World of Law*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 335, 346 (Gunther Teubner ed., 1988).

⁹⁹ COTTERRELL, *supra* note 69, 12. See also Robert Summers, *Law as a Type of “Machine” Technology*, in ESSAYS IN LEGAL THEORY 43, 49 (Robert Summers ed., 2000); and WEBER, *supra* note 26, 895.

For example, the relations between law and politics are nowadays heavily influenced by one typical feature of the welfare state, namely the increasing use of secondary legislation (or administrative rule-making).¹⁰⁰ This supremacy of delegated law-making, in its turn, tends to distance the legal discourse from the political control exercised by political actors such as national or local assemblies and, instead, promotes the role of (“undemocratic”) actors such as legal experts working for administrative agencies.¹⁰¹ Similarly, the growth at the transnational level of new types of laws (e.g. international labor law or the law of commercial transactions) is characterized by the very domination, in both its law-creation and law-implementation, of legal actors such as international courts of arbitration panels or multinational corporate attorneys.¹⁰²

It is possible to state in general, as put forward by Luhmann, that nowadays a force influences the relations between law and its surrounding environments in such a way that the role of non-legal actors operating in legislative bodies (e.g. political representatives) almost appears no longer to be one of creating law but simply choosing among the bulk of legal concepts already available and produced by legal expertise through the centuries.¹⁰³

Legal reasoning and its normative nature then is not only an important part in all three stages of the legal evolution as presented by evolutionary theory, but it is also a reality of contemporary law and law-making.¹⁰⁴ As pointed out by Dworkin,

¹⁰⁰ See WILLIAM M. EVAN, *SOCIAL STRUCTURE AND LAW: THEORETICAL AND EMPIRICAL PERSPECTIVES* 89-96 (1990); and COTTERRELL, *supra* note 94, 177, as to the abundant use of secondary legislation in the Welfare State system of political organization.

¹⁰¹ See, e.g., LUHMANN, *supra* note 14, 366, 411-412; and JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 430 (1996). See also Peer Zumbansen, *Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements*, in *THE WELFARE STATE IN AN ERA OF GLOBALIZATION* 135, 144-147 (Georg Nolte & Eyal Benvenisti eds., 2003).

¹⁰² See Heba Shams, *Law in the Context of ‘Globalisation’: A Framework of Analysis*, 35 *INTERNATIONAL LAWYER* 1589, 1602-1603 (2001), emphasizing law, in parallel with technology, as the main globalizing force. See also ALAN WATSON, *THE NATURE OF LAW* 91-113 (1977); and Gunther Teubner, *The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy*, 1 *LAW AND SOCIETY REVIEW* 763, 770 (1997).

¹⁰³ See NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* 159-160 (1985).

¹⁰⁴ “Like the technological method of industry, the rational patterns of legal technique to which the law is to give its guaranty must first be ‘invented’ before they can serve an existing economic interests.” WEBER, *supra* note 26, 687. See also *id.*, 655. For a more recent literature on the issue, see Teubner, *supra* note 3, 297 (in particular pointing out the central role of “legal models of the social world”); Deakin, *supra* note 7, 31; and KENNEDY, *supra* note 69, 152.

"[w]e live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things."¹⁰⁵

As every theory ultimately aims to be the one considered as depicting the "real" reality, it then appears natural that evolutionary theory becomes a "legal" evolutionary theory, that is a theory which is able to understand and explain the work of legal actors to the actors themselves from the internal normative perspective or, in the words of Stanley Fish, from the perspective of the same "interpretative community."¹⁰⁶ In order to do so, evolutionary theory should then integrate its predictivist component with ought-statements or normative proposals, *i.e.* the essential element of legal reasoning.¹⁰⁷

As legal actors are so central for modern law and law is a human product, evolutionary theory in the end increases the probabilities of producing *ex post* correct predictions by convincing the crucial legal actors that the predictions are normatively the "right things to do."¹⁰⁸ In short, evolutionary theory will have more success in being the correct theory if it shifts from pure predictivist statements such as "if legal concept *x* is created, then *y* is most likely to happen in the legal system," to predictivist statements integrated with normative proposals, such as "if legal concept *x* is created, then *y* is most likely to happen in the legal system and *y* ought to happen because, in this way, the criterion *C* is fulfilled."

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 C*) according to which lawyers, law-makers and judges can consider solution *y* as "legal" and solution *z* as "non-legal."¹⁰⁹ The incorporation of a normative component is then a necessary step in order to transform the

¹⁰⁵ DWORKIN, *supra* note 5, vii.

¹⁰⁶ See STANLEY FISH, IN THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14 (1980). See also HART, *supra* note 18, 81.

¹⁰⁷ See, e.g., Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 1, 1 (Gunther Teubner ed., 1997); or Wanjiru Njoya, *Employee Ownership and Efficiency: An Evolutionary Perspective*, 33 INDUSTRIAL LAW JOURNAL 211, 239-240 (2004), where the author supports the idea that statutory or state-based legal regulation should intervene directly on the labor market in order to implement codetermination of stockholders and labor, as the latter in its turn promotes a socially "efficient" ownership model.

¹⁰⁸ See Sinclair, *supra* note 53, 385. See, e.g., DWORKIN, *supra* note 5, 225.

¹⁰⁹ See SVEIN ENG, ANALYSIS OF DIS/AGREEMENT - WITH PARTICULAR REFERENCE TO LAW AND LEGAL THEORY 312-326 (2003).

evolutionary approach to the law into a *legal* evolutionary approach.¹¹⁰ 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; as in the previous example, a legal evolutionary theory needs to explicitly state whether and why the criterion C 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.¹¹¹

G. Conclusion

The main purpose of this article has been an attempt to reallocate the evolutionary approach to the law within the family of legal theory and, in this way, render it an instrumental methodological device in order to better understand law-making in modern times. After having briefly sketched in the first part the fundamental terminology used in this work, the second part presented the evolutionary approach from a legal theoretical perspective. The skepticism displayed by the legal audience towards this methodology (especially in its European version) has been shown generally to be unfounded, the evolutionary theory having the same research program as every legal theoretical approach to the law-making process.

The third part identified, however, the main obstacle to complete acceptance of the evolutionary approach to law as a tool for legal actors: 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. In the fourth part, the necessity of normative proposals has been especially highlighted for a theoretical approach such as the evolutionary one, that aims not

¹¹⁰ In the end, as highlighted also by MacCormick, there is always a normative component in the very act of choosing to describe the law from a legal actors’ perspective, i.e. in what in this work has been defined as the perspective of legal theory. See MACCORMICK, *supra* note 24, 63-64, 139-140 (1997); and Neil D. MacCormick, *Institutional Normative Order: A Conception of Law*, 82 CORNELL LAW REVIEW 1051, 1068 (1997). See also Stephen Perry, *Hart’s Methodological Positivism*, in HART’S POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 311, 322 (Jules Coleman ed., 2001); and Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD JOURNAL OF LEGAL STUDIES 1, 2 (2004), pointing out how every legal theory, even those aiming at being merely descriptive of legal practice has in the end a normative component since it shows showing “why the practice is valuable and how it should be conducted so as to protect and enhance that value.” But see Rodriguez Blanco, *supra* note 7), 29-44.

¹¹¹ See Jeremy Waldron, *Legislation and Moral Neutrality*, in LIBERAL RIGHTS. COLLECTED PAPERS 1981-1991 143, 153 (Jeremy Waldron ed., 1993). “Everybody who advances a legal standpoint and wishes this standpoint to be accepted by others, will have to present justifying arguments.” Eveline T. Feteris, *A Survey of 25 Years of Research on Legal Argumentation*, 11 ARGUMENTATION 355, 355 (1997).

only in explaining the past and present of the law, but also in making predictions for its future development. Due to the capacity of legal theories to have a direct performative force by influencing law-makers, it has been shown that the evolutionary approach can reach a higher degree of accuracy in its predictions by becoming a "legal evolutionary theory," *i.e.* by offering also normative criteria the very law-makers can use for taking future decisions.

Finally, the fifth part highlighted that this integration of normative proposals will not revolutionize the evolutionary approach, the "ought-to-be" culture of legal actors already having a central role in all the fundamental mechanisms behind legal change as described by this approach.

To conclude, since law is a human product and human beings do not always act in predictable ways, the goal here is simply to render the evolutionary theory into a theory more appealing to legal actors. In this way, it can be used to understand not only the actual legal reality but also its potential developments by channeling them in more predictable patterns. Regardless which choice of normative components can be considered best, *e.g.* self-produced or borrowed from more established legal theories such as legal positivism, two elements have to be considered for further discussion. First, the passage from an "evolutionary approach to the law" to a "legal evolutionary theory" is essential, due in particular to the fact that by applying a certain theory to the creation of new laws, legal actors can immediately mould the evolution of the legal phenomenon. Second, a necessary step in order to make this transition into "real" legal theory is certainly equipping the evolutionary approach with a normative side, since in the end legal actors search in legal theory not only for a clearer description of their reality, but also for a clearer guidance in face of difficult decisions.¹¹²

At the end of the day, as pointed out by Thomas Kuhn for each theoretical approach in general, the ambition of being "the" theory of law, *i.e.* the one that sets the agenda for the discussions in the house of law, is also a part of the very DNA of the evolutionary theory.¹¹³ Evolutionary theory then needs to first set up a permanent residence in this house by becoming member of the legal family. The easiest way to do this is probably by marrying someone, such as, for example, modern legal positivism, who has already been living there for a long time.

¹¹² See DWORKIN, *supra* note 5, 110; and Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE LAW JOURNAL 1, 57-59 (1984).

¹¹³ See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10 (2nd ed., 1962). See also Stephan Fuchs & Jonathan H. Turner, *What Makes a Science 'Mature'?: Patterns of Organizational Control in Scientific Production*, 4 SOCIOLOGICAL THEORY 143, 148 (1986).