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National Italian American Bar Association Law Journal

## ARTICLES



## CASE COMMENTS




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# *THE DIGEST*

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# *THE DIGEST*

## *Two-Thousand and Thirteen*

### ARTICLES



### CASE COMMENTS

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# The Future of Law Professors and Comparative Law

ROBERTO PARDOLESI - MASSIMILIANO GRANIERI*

## I. INTRODUCTION

Since the beginning of comparative law as an autonomous discipline many intellectual efforts have been devoted to define aims and methodology of the newborn legal science.[1] Several positions have emerged over the years. Among the many contributions, a distinction (not the only one, nor the most precise one, one might conceive of) can be drawn between structuralism and functionalism, depending on the ultimate goal of comparative law.[2]

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

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

We aim to design a new conceptual framework for comparative legal studies where the goal and the methodology no longer deal with what the law is, but with what the law should be.[3] This is not a claim to have a role in processes of

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

2. *See* BASIL S. MARKESINIS, COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM 56-57 (2003) (summarizing the debate as the "elegant" vs. the "utilitarian").

3. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1894 (1995) (comparative law "lacks theoretical direction"). Anxiety about the current situation of comparative legal studies is widespread and has been expressed, among others, by Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 673 (2002) (comparative law has accumulated a "huge amount of valuable

legislative reforms. If it were just this, there would be nothing new in our approach. We rather try to use comparative knowledge of legal systems to devise norms (at all levels) and interpretations that can lead towards desirable and controllable social and economic results. Such a challenge cannot be left to other social scientists alone or to modern techno-bureaucrats. The future of comparative law and of its scholars lies in their ability to regain a role of social engineers (for themselves as well as for law professors at large).

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

## II. THE STATE OF THE ART

### 1. WHAT DO WE STAND FOR?

One of the most recurrent questions in any organization, one defining the role and the identity of those who belong to the organization itself, recalls the title of this paragraph.[4] If the organization is the modern society at large, lawyers should ask themselves: what do we stand for? And, among lawyers[5], comparative legal scholars should raise the same question in an even more urgent way and quickly identify a sound answer, because such an unanswered question challenges their very *Lebensraum* as scholars.[6]

Since the start-up of this intellectual enterprise, the founding fathers have been cyclically involved in the debate about aims and purposes of comparative

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knowledge" and yet it has to develop a new agenda "by establishing a canon, defining goals, and committing to cooperation."). *See also* Frank Werro, *Notes on the Purpose and Aims of Comparative Law*, 75 TUL. L. REV. 1125 (2001).

4. *See generally* Stuart Albert & David A. Whetten, *Organizational Identity*, *in* 7 RES. ORG. BEHAV. 263 (1985) (about the identity questions that define organization).

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

6. We posit here an issue that will be dealt with thoroughly at the end of the paper, that is to say to what extent it makes sense to talk about law if not in a comparative perspective, as the only acceptable way. *See* Armin von Bogdandy, *Prospettive delle scienza giuridica nell'area giuridica europea. Una riflessione sulla base del caso tedesco*, 5 FORO IT. 54 (2012) (It.).

law and the actual results are still all but encouraging.[7] The history of the first Congress in Paris, can be considered the starting point of a self-conscious movement towards the creation of a well-defined discipline of academic teaching and an integral part of any university curriculum.[8]

At the beginning, it was not just a quest for identity; as a matter of fact, comparative legal scholars were jurists and, after all, they could have claimed their identity simply as legal scholars. In an era of overwhelming positivism, it was rather an issue of legitimacy, more than of identity. In the positivist climate of national states, advocating the study (or, even worse, the import) of foreign models must have sounded like anathema or heresy.[9] Comparative lawyers were authentically revolutionary in this respect.

With the consolidation of national legal systems at the end of the nineteenth century, lawyers had to reinvent their role in society. Within the Western Legal Tradition, this has been a defining (not necessarily positive) moment, since legal scholars could not concur any longer with politics in stating the law.[10] At some point, the legal science lost the function of *jus dicere*; the power had passed to parliaments and politics.[11] Lawyers could think of themselves exclusively as tinkering with the black letter rules (*jus positivum*) provided by legislators. This process of specialization defined the legal profession as strictly dependent on the law as an act, rather than law as an algorithm for desirable human behaviors. *Da mihi facto, dabo tibi jus* is the formula that captures the essence of the role: law pre-exists to facts, and facts are given.

As a consequence of positivism, the role of the lawyers remains external to society: they do not study facts (as economists or sociologists) and do not concur in the creation of rules that govern facts;[12] still, they formally remain in the

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

8. *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 61 (Oxford Univ. Press 3d ed. 1998). *See also* Marc Ancel, *Les grande setapes de la recherche comparative au XX siecle*, *in* I STUDI IN MEMORIA DI ANDREA TORRENTE 21 (Dott. A. Giuffrè ed.,1968) (Fr.); Clark, *supra* note 1, at 875-88 (describing in great detail the 1900 Paris International Congress of Comparative Law, its antecedents and the initiatives that followed, as well as the various contributions of the lawyers (mostly from continental Europe) who took part in the program); Xavier Blanc-Jouvan, *Centennial World Congress on Comparative Law: Opening Remarks*, 75 TUL. L. REV. 859, 862 (2001).

9. ZWEIGERT & KÖTZ, *supra* note 8, at 12 ("At the time of growing nationalism, this legal narcissism led to pride in the national system.").

10. *See* Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477, 479 (1995) (discussing that before the age of codification commenced, the role of comparison had been "integrative rather than contrastive").

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

12. Jurists were experts of customs that lost centrality in the western world after codifications took the scene. *See* LUIGI MOCCIA, COMPARAZIONE GIURIDICA E DIRITTO EUROPEO 54 (Giuffrè ed., 2005) (legal scholars, in the new order, have been close to legislators or judges from time to time, depending on needs, interests, and ideals at stake).

domain of social sciences. They cultivate – or at least they have so far – the art of adjusting *ex post* broken situations, either applying statutory provisions or legal precedents.[13]

The exclusion of lawyers from law-making had serious implications; legal scholars developed their legal culture and they were isolated from society as a whole.[14] Their culture was also their domain, their monopoly. Interpretation, not creation, is what they practice in their realm,[15] and this is obsessively repeated for judges, that represent one of the branches of the state, and one of the epiphanies of the legal profession. Law professors are the wardens of this domain and those responsible for transmitting techniques, tools, and beliefs.

There was a time when this situation proved to be safe and rewarding for lawyers as a sort of equilibrium; they became the trustee of the law towards the powerful settlor of the trust, that is, the legislator. Of course, one of the conditions of the equilibrium was for lawyers to confine the interpretation to their own national systems, to study and justify them from inside.[16] Any option to reach outside would inevitably jeopardize the internal equilibrium. If law is given and is given as national law, interpretation cannot be alike. Legal scholarship and teaching do follow the same path.

A sense of dissatisfaction soon spread among jurists. Legal systems never proved to be self-sufficient and impermeable to foreign logics even when national states at the beginning of their formation were jealous of their identity and the unity of continental *jus commune* was about to be lost.[17]

At the same time, this new legal scholarship, based on interpretation and nurtured by legal dogma, could not exist without rejoining other social phenomena. Mainly within national traditions where dogmatic law was deeply rooted, comparative legal studies sprang out of this general sense of incompleteness, partiality, inconsistence, and from the need to regain a role in building society. Where legal culture was less grounded on dogma, as it is in common law countries, still law by itself required another discipline to form a more satisfactory

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

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

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

16. The logic of homeward interpretation is now producing risks in Europe, in the process of creating a harmonized EU private law. *See* Antonio Gambaro, *"Jura et Leges" nel processo di edificazione di un diritto privato europeo*, *in* EUROPA E DIRITTO PRIVATO 997 (1998). *Cf.* Gordley, *supra* note 13, at 670 (criticism of the choice of homeward interpretation and domestic self-confinement in the 19th century).

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

binomial (law and other disciplines).[18] Traditionally, comparative law has been the *trait d'union* between those two perspectives, striving with their limits in both cases. In the former, the limits were the national boundaries that forced law to a merely domestic dimension. In the latter, the limits were disciplinary.

Comparative law, as the anti-dogmatic science *par excellence*, moved along the borders of (national) law as a self-standing science and has always been responsible for exploring new frontiers. It is not by chance that law and economics as a product of import from the United States gained momentum in many countries, thanks to the work of jurists belonging to the cohort of comparative legal scholars. More than this, it was thanks to comparative law that any dialogue with other sciences got legitimacy in the legal discourse. In this respect, comparative legal knowledge is anthropologic knowledge, since it is concerned with limits of the legal continent and not only with the inland territories.[19] And as far as history is concerned, comparative legal scholars also navigated through the origins and the evolution of legal systems as part of their endeavor.[20]

As comparative study gained legitimacy, it was clear that a science needs to be aware of its function, its aims, and its methodology.[21] And if, by definition, any science is committed to generating new knowledge for mankind,[22] soon the question became whether knowledge of the legal phenomena is an end in itself for comparative studies or the pre-condition (as such, unavoidable) for further purposes, that have been identified, from time to time, with legal reform, or the creation of a *droit commune de l'humanité* or, until recently, the increase of legal systems' competitiveness. Basil Markesinis has sketched such views as elegance versus usefulness.[23] We restate it as the eternal dualism between structuralism and functionalism.

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

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

19. RODOLFO SACCO, ANTROPOLOGIA GIURIDICA 22-23 (Società editrice il Mulino 2007) ("Antropologia giuridica e comparazione giuridica rientrano a pari titolo nella conoscenza comparante.").

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

21. Blanc-Jouvan, *supra* note 8, at 863. Once legitimacy was gained, an "identity crisis" ensued that still puts comparative law at the crossroads.

22. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 160 (The Univ. of Chicago Press 3d ed. 1996) (The issue of science as an endeavor to acquire more knowledge is "semantic" since "[t]o a very great extent the term 'science' is reserved for fields that do progress in obvious ways.").

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

The inner connection between the method and the aims of comparative law lies on the assumption that legal systems at a homogenous level of economic development face similar social problems; differences, if any, may occur in the kind of answers individually provided. Starting from (general) problems rather than from (specific) solutions makes everything comparable. This preliminary conclusion has been at the core of one basic and long celebrated methodological principle of comparative law: that is functionality.[24] From a methodological standpoint, functionalism means that, regardless of the pursuit of comparative law and its ultimate aims, "the only things which are comparable are those which fulfill the same function."[25] Rejecting modern and post-modern temptations to indulge in a theory of incommensurability, a strong methodological principle enables any intellectual position concerning the aims of comparative law, as long as it is useful in analyzing legal solutions.[26] This is true in law as in any other science; a scientific method is evidence of the scientific nature of a given intellectual endeavor. Moreover, having a dominant methodology concurs in defining the identity of the scientist, for it is intimately connected to the scientific goals. Physics, chemistry, economics, sociology, and any other discipline would not be ranked as scientific if their methods were less scientific than their seminal research questions.

### 2. DROIT COMMUNE DE L'HUMANITÉ CIVILISÉE

Occasionally comparative legal scholars have been involved in processes of creation of uniformity in law, whether in cases of harmonization or drafting of uniform laws. After all, the original purpose of Saleilles and Lambert was the discovery of a *droit commune de l'humanité*.[27] Yet, thus far, legal change and uniformity did not materialize because of the role of the comparative legal

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24. The functional method – still considered one of the few, reliable tools of comparative law – was originally elaborated by KONRAD ZWEIGERT, DIE "PRESUMPTIO SIMILITUDINIS" ALS GRUNDSATZVERMUTUNG RECHTSVERGLEICHENDER METHODE, II INCHIESTE DI DIRITTO COMPARATO 737 (Mario Rotondi ed., 1973). *See* Antonios E. Platsas, *The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks*, 12.3 ELEC. J. COMP. L. (2003) (for a discussion on the relationship between the functionality and goals of comparative law). *See* Reimann, *supra* note 3, at 681 (criticism has grown over the years by several authors around the principle of functionality "by pointing to its systemic bias in favor of like solutions and to its inherent insensitivity towards difference."). *See also* RALF MICHAELS, THE FUNCTIONAL METHOD OF COMPARATIVE LAW, THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (for a thorough discussion of functionalism). *See also* Michele Graziadei, *The Functional Heritage*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100 (Pierre Legrand & Roderick Munday eds., 2003).

25. ZWEIGERT & KÖTZ, *supra* note 8, at 34.

26. *See* H. Patrick Glenn, *Are Legal Traditions Incommensurable?*, 49 AM. J. COMP. L. 133 (2001) (dealing with and criticizing the suggestions about incommensurability).

27. Clark, *supra* note 1, at 876.

scholar.[28] In the same vein, it can hardly be said that the participation in projects of legal reform is an acknowledged and absorbing goal of comparative law or that scholars trained in legal comparison have overcome other social scientists and developed a dedicated methodology to improve or achieve legal reform. Yet, as the dream of discovering a common law of the human kind fell apart, jurists were tempted by the idea of contributing to the creation of a new legal order.[29]

Clearly, legal reform as a purpose implies an acceptance of comparative law in its functional dimension, but law reform does not require comparative legal scholars more than any other jurist called by the authority or by the occasion to draft a new law.

Even today there are ongoing projects to produce civil codes, and European lawyers have been recruited in masses to concur in the creation of a new common law for Europe.[30] Still, comparative law seems to be but one of the legal disciplines at work in the process, although some of those experimental laboratories hinge on original intuitions of comparative legal scholars, as it is the *Common Core Project.*[31]

Interestingly enough, if purposes of legal reform or creation of a *droit commune de l'humanité* were in the agenda of comparative law at its origins, it means that there is a seminal functional dimension which predates the passage to the idea that the identification of goals for comparative law must be referred to exclusively in terms of generation of new knowledge.

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28. Radolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1, 2 (1991) ("In any case, history provides no evidence that uniformity is achieved through comparative legal study.").

29. *See* RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO 8 (1992) (on the evolution in the approach of comparative lawyers after World War I) ("[I] comparatisti si proposero non più di trovare le concordanze, ma di crearle.").

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

31. *See generally* Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339 (1998) (describing the methodological origin or the Project going back to the factual approach, originally cultivated in the Cornell Seminars by R. Schlesinger). *See also* Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 779-80 (2009) ("It must be conceded that in terms of influence the common core projects have been far less successful than the legal origins literature.").

### 3. FROM FORMANTS TO TRANSPLANTS

One of the major contributions to the structural approach in comparative law comes from Rodolfo Sacco and the so-called Italian School of Comparative Law (even though many Italian comparative legal scholars would not be ready to be included in the School).[32] The tenets of this School have been consecrated into the so-called Trento Theses, which are five statements about comparative law that capture the most distinguishing features of such an approach.[33] In the words of its intellectual father, the main contention of this position is that "[l]ike other sciences, comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use."[34] Each legal system is in a continuous change and its components (the "formants") are never aligned. The role of the comparative legal scholar is to uncover the "great optical illusion," represented by the dogma that only one legal rule at any given time exists (and it coincides with the word of the legislator).[35]

Although the adoption of such perspective is considered compatible with other secondary purposes of comparative law, it should be clear that a definition is *per se* an exclusion of constructs that remain outside the definition. Hence, under this approach each ambition of functionalism for comparative legal studies constitutes a regressive character.[36]

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32. *See* Pier Giuseppe Monateri & Rodolfo Sacco, *Legal Formants*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 531 (Peter Newman ed., 1998); *see also* Pier Giuseppe Monateri, *Legal Formants and Competitive Models, Understanding Comparative Law from Legal Process to Critique in Cross-System Legal Analysis* (2008) (hereinafter "Monateri, *Cross-System*"), *available at* http://ssrn.com/abstract=1317302. *See* Rodrigo Míguez Núòez, *Comparar: Conversaciones con Rodolfo Sacco*, 17 REVISTA CHILENA DE DERECHO PRIVADO 193 (2011) (Chile) (Rodolfo Sacco reaffirmed the merits of its teaching in most recent interviews).

33. *See* Rodolfo Sacco, Antonio Gambaro & Pier Giuseppe Monateri, *Comparazione giuridica*, 3 DIGESTO CIV. 48 (1988) (It.); Antonio Gambaro, *The Trento Theses*, 4 GLOBAL JURIST FRONTIERS 1 (2004) (for a review of the Theses and a reaffirmation of their scientific validity after a decade); Elisabetta Grande, *Development of Comparative Law in Italy*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 117 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (on the Italian school).

34. Sacco, *supra* note 28, at 4. *See also* SACCO, *supra* note 29, at 13 ("In definitiva, la migliore conoscenza dei modelli deve essere considerata come lo scopo essenziale o primario della comparazione intesa come scienza."). *But see* Reimann, *supra* note 3, at 697.

35. Sacco, *supra* note 15, at 385. *See also* Pier Giuseppe Monateri, *Comparer les comparaisons, Le problèm de la legitimité culturelle et le* nomos *du droit*, 1 OPINIO JURIS 1, 23 (2009) (Fr.) (for further arguments on a theory of comparative law to unveil political messages in law); Pier Giuseppe Monateri, "*Everybody's Talking": The Future of Comparative Law*, 21 HASTINGS INT'L & COMP. L. REV. 825, 843 (1998) ("[T]he theory of formants is a *global internal critique* of legal discourse.") (emphasis added); Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451, 471 (2009) ("Decoding is an essential part of the work of comparative law: discovering and translating the invisible powers in a legal culture leads to uncovering the patterns of order that actually operate within a society and yield content.").

36. A duplicity of functions is not excluded by Otto Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, 53 REVUE INTERNATIONALE DE DROIT COMPARÉ 275, 287-88 (2001) (Fr.), when the author states that comparative law "est dès lors l'instrument le plus puissant pour décrir

Somehow close to the theory of formants is the contribution on legal transplants. In a wealth of papers and books, Alan Watson proposed to direct comparative studies towards the definition of the complex relationships of law and society. Eventually, Watson recognized that comparative knowledge is not necessarily an end in itself but it must have "some direct and obvious utility," such utility being "the improvement which is made possible in one legal system as a result of the knowledge of the rules and structures in another system."[37]

The transition from legal formants to legal transplants has a unifying moment in the idea that acquisition of knowledge is not only an essential feature of comparative studies, but also an end. It can be questioned whether Watson considers knowledge as an exclusive end or not,[38] but still the definition of linkages between law and legal change as shaped by social forces implies an intellectual effort which is absorbing for comparative lawyers.

It is as though legal systems could be plotted as multilevel buildings, each level being continuously refurbished (levels are formants, in Sacco's terminology). At any time, there is an ongoing change and occasionally one level resembles the other(s). Yet, at any time, all floors exist and they insist on the same perimeter (that is, some source of legitimacy), for the building otherwise would collapse, or be highly instable and the law would become unpredictable. Now the main challenge for each jurist – and the ultimate challenge for comparative legal scholars – would be to understand whether there is a law that, given any such building, explains that the floors are currently being refurbished to accommodate the needs of those that happen to live in the premises.[39]

### 4. BEYOND FORMANTS. FORMANTS AS A HISTORICAL PRODUCT

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

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le droit national," but it can also play "un rôle important dans la technologie de la production normative."

37. Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 317 (1978).

38. Watson, *supra* note 37, at 318 (considering "comparative law as a method valuable in law reform").

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

legal articles on comparative law journals started again questioning the role of comparative legal scholars and, to some extent, of jurists.[40]

Because a new challenge in defining the new identity of comparative law has started, the intellectual heritage of other schools of thought cannot be easily dismissed. The theory of formants must be appreciated in its historical dimension. It must be seen in a continuum of contributions from legal scholarship, as a paradigm that replaced the previous one and it will be repealed by others that will follow the same fate.[41]

Before moving to the next paradigm, a point should be clear, one that sometimes goes quickly unnoticed or it is deliberately ignored. There cannot be a logical interruption between better knowledge of legal data and the use of such knowledge, between a purely structural perspective and a functional one, exactly as any distinction between basic and applied science is more conventional than substantial.[42] As will be seen in paragraph V, (we contend that) the new scientific framework of comparative law hinges on the absence of discontinuity between knowledge acquired as an end and knowledge used to improve a given legal environment.

## III. LAW AND . . .

### 1. . . . THE SCIENCE OF ECONOMICS.

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

If law is intended as a system, the above conclusion is inescapable. In fact, a systematic approach, in the words of its true believers, is concerned with *lex lata,* indifferent to the law as it has been or as it is in other countries or legal systems and, on the other hand, from the law as it should be (from one perspective or another). The *äußeres System*, in itself a conceptual oxymoron, is opposed to the *inneres System*: the latter being characterized by coherence or consistency, postulates of the idea of justice based on inner unity.[43] As a necessary consequence, a systematic approach,[44] considering the numerous rules to constitute a 'whole' which follows an 'inner order' expressed by the underlying

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

41. *Id.* at 144 ff.

42. *See* Max Rheinstein, *Comparative Law – Its Functions, Methods and Usages*, 22 ARK. L. REV. 415, 423 (1968).

43. *See generally* Karl Riesenhuber, *English common law versus German* Systemdenken*? Internal versus external approaches*, 7 UTRECHT L. REV. 117 (2011) (explaining that the internal perspective tends to be considered systematic, as opposed to the external that means open to the "'law and . . .' disciplines.").

44. In a sense, traditional scholarship is concerned with how courts (do and should) decide cases; courts do not *make* the law, they simply apply it. This is certainly true for civil law, but even applies

principles, is assumed to be indifferent to any kind of external perspective: both comparative and in the vein of 'law and . . . .' Other disciplines stand simply outside the law and thus cannot contribute to finding it.[45] If, for example, a legal rule is inefficient from an economic perspective, this does not invalidate the legal rule, simply because efficiency is not accepted as a measure of validity in the inner system.[46]

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

Yet, law can also be seen as an instrument. Understanding law as a goal-oriented instrument implies recognition that it is directed not to measurement against hermeneutic standards, but against practical ones. Once it is accepted that law is not (just) a text and triggers effects in the world, the economic approach, among the many fields of study deserving attention, becomes particularly promising.[47] Economic theory has its roots in normal, everyday theory about how people act. Its basic elements are individual preferences and beliefs, and their relationship: any person aims to get at most what he wants, given her perception about the situation she is confronted with. The subjective preferences, deemed exogenous, are not amenable to interpersonal comparisons. But they can be all aggregated into preference rankings; these preference rankings are numerically represented by utility functions. Beliefs about available actions, in view of the surrounding circumstances, are expressed by subjective probability functions. In standard economic accounts, all interests and values of a person are reflected in her utility function. Likewise, all her beliefs are reflected in her subjective probabilities. Subjective expected utility maximization

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with regard to common law jurisdictions, where the judge is considered a law-finder rather than a law-maker.

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

46. An attempt to provide an explanation of economic analysis not as external to law, but "comme une réponse à la crise de l'interprétation qui touche la théorie du droit, et notamment la théorie positiviste, depuis un demi-siècle" comes from Bruno Deffains & Samuel Ferey, *Théorie du droit et analyse économique*, 45 DROITS 223, 226 (2007) (Fr.). The authors suggest using the tools of economic analysis of law (namely the concept of equilibrium) as means of interpretation of norms as "réalité idéelle." *Id*. at 247. On the importance of economic analysis and policy analysis of law in the context of legal education in the U.S., *see* von Bogdandy, *supra* note 6, at 57. Interestingly enough, there had been sensibility towards economics also during the 19th century, as witnessed by the Berlin International Society of Comparative Legal Science and Economics; *see* Clark, *supra* note 1, at 880 n. 33; *see also* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897) (blaming the "divorce between the schools of political economy and law").

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

is seen as determining choice of action. Actions, then, are understood as the result of a person's whole mind.

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

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

No doubt that critics and criticisms against the inroad of economics into the legal sanctuary have always been abundant; as well as Cassandras, denouncing that the edifice's bottom has long since disappeared into the sand (Weinrib), that the movement has peaked out (Horwitz), that L&E is sick and spreads sickness (Jaffee), and that it is no edifice at all, just sand (Anita Bernstein). The platoon of those volunteering to sound the death knell is a crowded one. The truth is that, despite its intuitive appeal, economic analysis of law is restless, no less than the underlying economic theory. The basic tenet – rational choice, people's willingness to get what they want, given what they believe about the circumstances – is under attack. A large and growing body of empirical evidence reveals that people often fail to live up to the *homo oeconomicus* paradigm, and adopt actions that conflict with their interests (as predicted by standard economic theory). Why then, bother with models based on assumptions that do not reflect the main features of reality? The reactions to this kind of objections are threefold. One is complete dismissal: L&E is an aging giant, whose death certificate has already been signed, so that it will disappear; the sooner, the better. Another assumes the form of cooptation strategy: basically, it tries to account for recalcitrant behavior by either finding new inputs into the old models (e.g., sophisticated preferences or beliefs, information asymmetry, signaling, strategic behavior) or, recently, applying old models in new ways (for instance, accommodating for the insights of the Behavioral Economics).

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

What really matters, however, is that the value of positive analysis should be defended and asserted, even though legal technicalities often appear inaccessible and Kafkaesque. The L&E contributed to shedding light on many of these black holes, and can still do a lot more to clarify and rationalize legal concepts.[48] Add that, once this trajectory is accepted, the comparative view would offer a series of real world models to be scrutinized and thus contribute to render the laboratory more useful.[49] This is precisely the reverse of the orthodox view that would insulate the inner system of law from any external influence.

### 2. MEASURING LEGAL SYSTEMS.

A paradoxical outcome of the uneasy relationship between economic analysis and comparative scholarship is that one of the traditional devices in the toolkit of the comparatist (the difference between civil and common law) has become the basis for articulating a celebrated empirical hypothesis, first, in the literature starting with La Porta and his co-authors in 1997 and featuring Andrei Shleifer as the guru, known as the Legal Origins Theory (hereinafter the LO Theory).[50]

The impact of legal origin of economic variables has led those authors to argue that legal systems originated in the English common law feature superior institutions for economic growth and development than those of French civil law, essentially for two reasons. First, common law provides more adequate institutions for financial markets and business transactions, which in turn fuels

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48. *See generally* Florian Faust, *Comparative Law and Economic Analysis of Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 837 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (explaining and exploring the relationship between comparative law and economic analysis).

49. *But see* Giuseppe Bellantuono, *Comparative Legal Diagnostics* 7 (Working Paper JEL Classification K00, K12, 2012), *available at* http://dx.doi.org/10.2139/ssrn.2000608:

> In the nineties comparative law and economics promised to provide comparative lawyers with the tools for more accurate assessments of similarities and differences and of their economic consequences. To a large extent, that promise was not kept. The economic methodology took the lead and adopted many simplifying assumptions. Aside from a few important exceptions, it did not come to grips with the demand for a thorough exploration of the institutional context raised by comparative legal research.

50. The Law & Finance movement can be traced back to the paper of Rafael La Porta et al., *Law and Finance*, 106 J. OF POL. ECON. 1113 (1998). *See also* Claude Ménard & Bertrand du Marais, *Can We Rank Legal Systems According to their Economic Efficiency?*, 26 WASH. U. J.L. & POL'Y 55 (2008).

more economic growth. Second, French civil law presupposes a greater role for state intervention that is detrimental for economic freedom and market efficiency. However, beyond simply offering a descriptive narrative of what legal choices in the past have prompted the economic consequences of today, the LO Theory, and its progeny, led by the Doing Business project of the World Bank, purports to offer an ex ante prescription of which legal choices will propitiate better future performances.

The new-born Comparative Economics has achieved enormous success. The case of Doing Business ranking, inaugurated in 2004, has reached extended mass media attention, with spectacular effects in terms of operative influence: we are told that in November 2010, 125 states have adopted regulatory reforms shaped after the recipe of Doing Business.[51] In one word, while comparative law scholars (with few remarkable exceptions)[52] keep living in the (no longer ivory) towers, refining their taxonomies and, alternatively, inspecting excruciated technicalities and details of a few legal systems, always in a qualitative and neutral mood, comparative economists undertake large sample, quantitative research, divulge the results, and collect glory. And money.

It should come to the surprise of no one that comparative scholars have been fiercely critical towards the reductionism of their unexpected and triumphant rivals.[53] But their (our) existential angst has surfaced and cannot be concealed any longer.

Instead of choosing the easy path of joining the chorus of negative voices, which are mostly reasonable,[54] one should plausibly set a few pointers:

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51. *See* WORLD BANK, BUSINESS 2012 REPORT, EXECUTIVE SUMMARY (2012), *available at* http://www.doingbusiness.org/reports/global-reports/~/media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB12-Chapters/Executive-Summary.pdf.

52. *See* Michaels, *supra* note 31, at 765.

53. *See* Mathias L. Siems, *Numerical Comparative Law - Do We Need Statistical Evidence in Order to Reduce Complexity?*, 13 CARDOZO J. INT'L & COMP. L. 521 (2005); Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?,* 57 AM. J. COMP. LAW 797 (2009); Pierre Legrand, *Econocentrism*, 59 U. TORONTO L.J. 215 (2009); Gillian Hadfield, *The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law*, 59 U. TORONTO L.J. 223 (2009). One stream of criticisms flows directly from the dynamic approach of legal formants that assumes as the specific contribution of comparative law to legal scholarship the revelation of "patterns which are implicit but have outward effects." Sacco, *supra* note 15, at 385. One of the conclusions of this position "is that models that can be used for understanding and manipulating human orders are either more complex than or equally complex as the phenomenon under study. In this realm of academic knowledge we *cannot* build a model of how something works that is less complex that the thing itself: the simplified model does not allow us to grasp the thing intellectually." Monateri, *Cross-System*, *supra* note 32.

54. There exists the remarkable exception of arguments leading to the conclusion that legal systems are not comparable and that efficiency or economic growth are not useful to understand legal systems, since such "an approach does not help with understanding the limitations of the legal origin literature and self-defeats any meaningful and tractable efficiency analysis." Nuno Garoupa & Carlo Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L.J. 287, 292 (2011); *see also* Nuno M. Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common*

(1) The Law and Finance movement, at the root of the whole story, should be credited for inducing public opinion to recognize that legal rules do matter and deserve careful design: lawyers were already conscious of this inter-relationship, but could not successfully convey the message to the public at large. It remains a blunt paradox the fact that such a strong statement on the instrumentalism of law was made by (and gained momentum because of) economists.[55]

(2) Organizing a ranking for legal systems is neither unworkable nor foolish: it is simply useless. Just look at the most recent entry, the OECD better-life index, and it will be all too obvious that even the immeasurable can be measured, if one accepts an unlimited degree of candid approximation.[56] The ranking, at its best, will exhibit the same virtues, and drawbacks, of an economic model. Economists build models in order to untangle complex and hard-to-decipher real world interactions and focus attention on the detailed structure of a logic of how processes and systems work. The virtue of building a model is that it allows a clear conversation about what is being claimed. The drawback is that what is left outside might be the very core of the matter. In the same vein, a ranking can be established, focusing on some peculiarity of legal systems: but since each system is extremely complicated, there exists no way of keeping the other factors constant; countless circumstances and events can be the antecedents of a desirable social outcome, assuming that a reasonable consensus can be reached about what is desirable. When the ranking is the produce of detached mastery, which is rather unusual, it will give a fragmentary image of the portrayed system. Cherry-picking of proxies, even important and suggestive, will not help, simply because it would be easy to organize a different cherry-picking supporting an opposite outcome.[57]

(3) The efficacy of numbers has been highlighted by the new wave of comparative economics: the genie has come out of the lamp and cannot be put back to rest. Accustomed to the qualitative swing of the case method analysis, the orthodox comparative scholar is tempted to refute any quan-

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*Law, Legal Origins & Codification Movements* (Ill. Program in Law, Behav. & Soc. Sci., Paper No. LBSS11-32, 2011), *available at* http://ssrn.com/abstract=1925104.

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

56. THE OECD BETTER LIFE INDEX, *available at* http://oecdbetterlifeindex.org/ (last visited May 10, 2012).

57. *See* Garoupa & Gómez Ligüerre, *supra* note 54, at 321-24.

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

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

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

### 1. THE ROLE OF LAW IN A GLOBALIZED WORLD

Much of the debate on aims and methods of comparative law and all of the contributions to legal scholarship by comparative legal scholars are basically an unfinished painting whose contours and colors seem to change depending on the decade. Eventually, now that globalization and other major changes in society gradually got rid of differences and made 'other' legal systems easily accessible and much more comprehensible than only fifty years ago, we are left with one fundamental question:[58] Is it still a legitimate and genuine issue to talk about the aims and the method of comparative law as if its fate were independent with respect to the role of legal studies altogether? Or should we rather bring the discussion to a more general level, involving the position of lawyers in modern societies and the future of law professors? We advance the position that the answer for comparative law can be given only in connection with the one concerning the role of lawyers in society; from this standpoint the fates of lawyers are inevitably intertwined.[59] Furthermore, since legal systems are con-

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58. *See* Clark, *supra* note 1, at 872 (highlighting social, economic, and cultural changes that marked the time span between 1900 and 2000, and yet history evolved even more rapidly in the last decade).

59. To the extent we assume legal systems are accessible and comprehensible, we implicitly refuse to indulge in post-modern theories of law and to their extreme consequences. We rather tend to show that a methodology of law can exist and it can serve a scientific purpose. We postulate that the legal methodology is scientific even if its immediate aim is not about simply grasping further knowledge or to support the internal process of interpretation, but to concur in the framing of a legal order. *See*

verging under the sign of the rule of law, we claim that an orientation towards the law as it ought to be is inevitable for jurists, whose identity can only be that of scientists in the science of comparison.[60]

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

There is a much wider role for law in the globalized society; one of the immediate effect of globalization has been the erosion in many legal systems of areas of human life and society that had been governed by the rule of politics or by the rule of tradition.[61] In a sense, the new economic order is much more reliant on the rule of law than in the past and the legal change triggered by the *Doing Business* reports and rankings implies a massive recourse to legal tools for the improvement of economic performance of legal systems. In this 'legal global warming,' law has increased its importance, but other social scientists challenged the exclusivity of lawyers in mastering the legal change; as it has been repeatedly observed, the LO Theory and "the 'policy version' of the legal origins literature" (that is to say, the *Doing Business* report)[62] are originally a suggestion by economists.[63] Holmes wrote that the man of the future is the man of economics and the master of statistics;[64] but is it true that the future does not belong to lawyers? Or it was rather a suggestion (as it certainly was) that a

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Joachim Rückert, *Friederick Carl von Savigny, the Legal Method, and the Modernity of Law*, 11 JURIDICA INT'L 55, 66 (2006) (for arguments on the legal method as scientific method); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 769 (1987) (explaining the reasons for lawyers were losing ground to other disciplines). Other sciences rivaled "the law's claim to privileged insight into its subject matter." The counterclaim of jurists has been inadequate as law refused to become consistently interdisciplinary. *See also* Reimann, *supra* note 3, at 685 (even comparative law failed in this respect because, "despite many admonitions and obvious needs, comparative law has still not become interdisciplinary.") (footnotes omitted).

60. The basic assumption of our position is that "many legal problems are conceptually the same wherever they arise" and "[i]f the same questions arise for jurists of different nations, legal science should be transnational." Gordley, *supra* note 17, at 560.

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

62. For the definition, *see* Garoupa & Gómez Ligüerre, *supra* note 54, at 289.

63. More sarcastically, Michaels, *supra* note 31, at 775-76, refers to the authors of the legal origin thesis and the *Doing Business* reports as "all economists (and 'lawyer wannabes,' as one of them put it) who aim their project at comparative economics, not comparative law."

64. *See* Holmes, *supra* note 46, at 469.

lawyer of the future must open her discipline to economics and statistics? Was it a proposition about the evolution of the legal profession or just a presage of the end? Undoubtedly, the legal profession as mere professional practice (a technique, more than an applied science) will not disappear; judges and attorneys will remain active players in the legal arena. The question is rather about law as a science and legal scholarship as an enterprise to advance human well-being by providing efficient solutions for contemporary problems.

If a role can be positively acknowledged for comparative law, and a new direction for comparative legal studies suggested, it depends on the ability to provide a specific contribution to the new social order that other legal (and social) sciences are unable to offer. This contribution relies on the kind of knowledge acquired by comparison of legal systems and its use in connection with projects of legal change.[65]

### 2. LAWS OF NATURE AND HUMAN LAWS

All sciences have reflected on their aims and methods; law is no exception. For other disciplines the discovery of their very identity based on what they do is relatively easier than for legal disciplines. A first and straightforward difference is that many sciences are universal in nature. They formulate rules and principals that are valid and verifiable regardless of the place in which the scientist operates. Law is mostly a national phenomenon, at least since the formation of national states, and any discourse about the law is inevitably influenced by the experience and the education of individuals that elaborate theories and formulate propositions of legal science.[66] To some extent, the debates about aims and methodology of comparative law are biased in this respect, as anyone who tried to provide an answer was under the influence, more or less conscious, of her own origins.[67] Medicine or physics are not national in the sense law can be national. This intrinsic characteristic has obvious implications for teaching or conducting research or applying medicine or physics.[68]

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65. We use the expression "legal change" in a broad sense, not just a synonym of law reform. Legal changes occur whenever a given authority (judges, legislators, public officers) enhances the offer of rules in society, either by enacting new bodies of law or solving disputes by stating their interpretation. We agree with MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 5 (1988), that courts improve the legal offer of rules in modern societies. *See also* Reimann, *supra* note 3, at 677.

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

67. Michaels, *supra* note 31, at 786, refers to this as "homeward bias"; James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 AM. J. COMP. L. 607, 611 (1998), refers to this as "systematic bias"; Eberle, *supra* note 35, at 453, adopts the notion of "cognitive lock-in" originally proposed by Vivian Curran.

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

As far as the method and the aims of such sciences are concerned, the answer is easier compared to law as there is an undeniable link between the scientific and practical pursuit and the methods. Medical sciences generate knowledge on the way our body works and how it can be cured in case of disease. Physics as well investigates the laws of nature and its teaching can then be applied in other areas, such as mechanics, to invent and build machines and tools. Importantly, even if epistemological studies tend to conventionally distinguish basic from applied sciences, it is clear that any investigation remains scientifically valid, regardless of the label it is given; basic knowledge out of scientific investigation does not lose its scientific dignity because at some point is becomes useful.[69] At the same time, no one undertakes applied science assuming that useful outcomes of her activity will not be worth from a scientific standpoint.[70]

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

First of all, in explaining phenomena of nature, those sciences that we sometimes call "exact" or "hard" sciences are no longer deterministic in absolute terms.[71] After the formulation of Heisenberg's principle of indeterminacy, even physics has become probabilistic. And the most important contributions in the life sciences recognize that we know very little in terms of gene expression and recombination, unless we rely on statistical data and models that predict how

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69. We agree with Herbert A. Simon, *Rational Decision Making in Business Organizations*, *in* 69 AM. ECON. REV. 493, 494 (1979), that "[i]t is a vulgar fallacy to suppose that scientific inquiry cannot be fundamental if it threatens to become useful, or if it arises in response to problems posed by the everyday world. The real world, in fact, is perhaps the most fertile of all sources of good research questions calling for basic scientific inquiry."

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

71. *See* KUHN, *supra* note 22, at 145. *See also* Ettore Majorana, *Il valore delle Leggi Statistiche nella Fisica e nelle Scienze Sociali,* 36 SCIENTIA 58, 66 (1942) (It.), *reprinted in* LEONARDO SCIASCIA, LA SCOMPARSA DI MAJORANA 63-64 (1997):

> La disintegrazione di un atomo radioattivo può obbligare un contatore automatico a registrarlo con effetto meccanico, reso possibile da adatta amplificazione. Bastano quindi comuni artifici di laboratorio per preparare una catena comunque complessa e vistosa di fenomeni che sia *comandata* dalla disintegrazione accidentale di un solo atomo radioattivo. Non vi è nulla dal punto di vista strettamente scientifico che impedisca di considerare come plausibile che all'origine di avvenimenti umani possa trovarsi un fatto vitale egualmente semplice, invisibile e imprevedibile. Se è così, come noi riteniamo, le leggi statistiche delle scienze sociali vedono accresciuto il loro ufficio che non è soltanto quello di stabilire empiricamente la risultante di un gran numero di cause sconosciute, ma sopratutto di dare della realtà una testimonianza immediata e concreta. La cui interpretazione richiede un'arte speciale, non ultimo sussidio dell'arte di governo.

*See also* Mario Rotondi, *Technique du droit, dogmatique et droit comparé*, 20 REVUE INTERNATIONALE DE DROIT COMPARÉ 11 (1968) (Fr.).

living matter evolves.[72] Laws that describe the functioning of the matter are true, universal, organic, as any scientific law is expected to be, and yet they can fail in explaining their object.[73] New laws must then be provided.[74] But, when a scientific law is sufficiently reliable to explain a natural phenomenon, it by no means suffers from geographic or political limitations.

It would mean to stretch the similarity too much if one said that the same happens in law. Human laws – those studied, interpreted, and sometimes drafted by jurists – do not describe human behavior. They prescribe behaviors that are supposed to ensure peaceful existence in society and welfare of consociates. Law is mostly concerned with responding to actions, rather than inducing actions.[75] Lawyers are not concerned with expected reactions of individuals to law, but with drafting or interpreting laws and precedents for any relevant human behavior must find an answer in a rule. All of this means that lawyers and the study of law do not have predictive virtues (as we observed, the legal science is mostly concerned with past actions) and this is also one of the reasons policy makers resort to economics if they want to know more in advance about likely reactions of individuals to incentives or punishments. If a reason can be found for the progressive loss of centrality of law among social sciences, lack of predictive capacity can be easily accounted for it.[76] And the same defect also explains the success of law and economics in all fields of law.

Needless to say, since the job of practicing lawyers has nothing to do with predicting future behaviors, the law they are concerned with is backward looking; laws impose a conduct and provide a sanction if the individual does not

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72. Legal scholars interested in the evolution of norms and legal institutions borrowed heavily from other sciences' theoretical explanations of the evolution. One major contribution is from philosophy of science. *See* KUHN, *supra* note 22 (discussing theory of paradigms and scientific revolutions). Law and economics, traditionally imbued and fascinated by the classical evolutionary model, has also resorted to other theories that were originally elaborated in biology. *See generally* Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996). *See also* Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1136 (1983) (discussing the complex relationship between law and society and the explanations of legal change based on arguments of history and sociology).

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

74. *See id.* at 7 (natural laws "représentent le point d'arrivée de la recherche théorique ou expérimentale, et doivent donc être corrigées chaque fois que l'on constate une divergence entre elles et la réalité du phénomène.") (footnote omitted).

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

76. *See* Michaels, *supra* note 31, at 780 (saying the success of the legal origins debate and of the *Doing Business* reports is due in part to its "strong normative element.").

conform to that desired conduct. This aspect should not be overestimated; *ex ante* provisions of rules have an influence on human conduct. When the law is interpreted and applied, it refers to facts of the past and its current application and interpretation do not say anything about the future. The very idea of "normality" that is implied in the concept of "norm" is after all drawn from the past and it is based on what is expressed by the Latin formula of *id quod plerumque accidit*. Note that *plerumque* (the majority) does not mean anyone, under all conditions, in all times. Contract default rules, for instance, are based on an anecdotal assumption that for the most part, contracting parties of a given set *will not* contract around the rule because under similar conditions a large part of parties did not do so in the past.[77]

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

Social scientists accept the idea that they can avail themselves with less descriptive laws of human behavior than descriptive laws of natural phenomena other scientists deal with.[78] Even if physics or other disciplines accept probabilistic explanations of the real, the element that makes the difference with social sciences is the free will of individuals. One of the few accepted laws in the study of human behavior is that [B = $f$ (P; E)], which means that the way humans act (B) depends on their personality (P) and on the external environment (E). In the equation law does not appear, even if no one can deny that law is an integral part of the environment. It is the "dependent variable" that concurs in the explanation of how people react to incentives or perspectives of punishment.[79] The equation says that individuals always have a choice and that, once the environment changes, their response can be different. The very idea of social engineering is after all premised on this equation.

Our strong claim is that the probability that a new rule (when enacted by legislators or framed by judges or imposed by administrative authorities) or its

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77. *See* Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999) (on default rules that are preferred by the majority of a set of contractors).

78. Interestingly, the preface to THE STRUCTURE OF SCIENTIFIC REVOLUTIONS testifies that, as a scientist not belonging to social sciences, he was struck by the lack of consensus among other disciplines he was exposed to during his research work, not about the nature of scientific problems and methods. KUHN, *supra* note 22, at X. His surprise should de-emphasize the critics that are brought towards comparative law for its difficulties to find a temporary agreement on goals and methodology among its scholars.

79. *See* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be"*, 2005 WIS. L. REV. 365 (2005) (for the idea of law as the dependent variable).

absence will produce a socially desirable result cannot be calculated in a merely municipal perspective.[80] Comparative law scholars have insisted on this, more to reaffirm their role than as a necessity. Yet, there are objective and compelling reasons for a comparative experience. If a legal system is willing to know the impact of a rule, that is, to predict the effect of the rule on human behavior, the only possible option is to introduce the rule and wait. Of course, this option (very much resembling to a trial-and-error pattern) must be weighed against the risk that the experiment fails and the costs associated with the potential postponement of socially desirable goals.

But if the risk is too high, where the values at stake are too important, the only other option is to reach outside and to observe others, to learn from their glory or their misery.

The observation of what happened in other legal systems far in space or in time helps us gain knowledge of the operation of an observed rule, the external conditions, the reactions of individuals, and the level of adherence to its precepts.[81] Without any logical discontinuity with respect to the same knowledge acquired about the law observed, the same data can be used to predict, not deterministically but probabilistically, what would be the result if the same rule or law were applied elsewhere or if the *status quo* option were preferred. The degree of probability is higher or lower depending on how many conditions observed in other systems (or in the past of a same system) exist now or can be reproduced in the present. Other things being equal, same rules or same institutions should produce the same outcomes.[82] What is predictive here is not the introduction of a new rule, or the choice not to regulate a given field; both options would suffer an intrinsic bias due to the limited point of view from which they are adopted. Without external (comparative) knowledge there is no reliable way to select those elements (whether normative or factual) that, among a host of factors, are likely related to the result sought or to the effects desired.[83]

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

81. The importance of contexts has been widely reaffirmed, starting from contributions of Rabel; *see* MARKESINIS, *supra* note 2, at 38. Raoul de la Grasserie (as recalled by Clark, *supra* note 1, at 881), at the Congress of Comparative Law in 1900, had already considered "foreign legislation like a vast experimental field, in which the legislator can observe the effects of reform that have been attempted within diverse civilized nations" (footnote omitted). Yet, that generation of comparatists was not interested in how the law should be, but in how it actually is and how it evolves toward a common law for mankind (*Id.* at 884).

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

83. It is worth noting that Sacco, *supra* note 15, at 389, had the intuition that comparative law could be used as a control variable; the lawyer "can search out a correspondence between cause and effect"

What is really predictive is the experience of similar regulatory options in other legal systems and the ability to identify those conditions that with an acceptable level of probability are conducive to similar results and such other conditions that will probably frustrate the normative purpose.[84]

We advance the idea that when concerned with what the law should be, comparative law is for jurists the source of the "controlled variable" of legal change.[85] Knowledge concerning other legal systems, their laws, their social structure, and their institutional attributes is the specific contribution comparative law can bring to the edification of new social orders,[86] not to suggest legal transplants (this is left to politics), or to just measure similarities and differences, but to establish positive correlations in terms of probability between a law and the social desirable goals.[87]

What is desirable is not entirely outside the reach of lawyers, because the relationship between a social goal and the instrument to achieve it is too intimate and too critical for the two prongs to remain in different worlds.[88] The evaluation of legal solutions (according to criteria such as efficiency or justice or other values) has been sometimes despised by those schools of thought that considered this kind of intellectual exercise "incompatible with their main goal of pure knowledge."[89] This too is a major cause of intellectual isolation for lawyers, not just for those versed in comparative law. A change of perspective is in order if lawyers are to be called upon to lend their science or art to determine how the law should be. We state our belief here that there cannot be an improvement in the social identity of contemporary lawyers if they do not ac-

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and can control for several causes "by compiling an inventory of the countries in which such an event has taken place." The problem with Sacco's position is that, in his purely constructivist dimension, comparative law is declared useful to sociology, rather than to law. For legal purposes, comparative law remains a purely intellectual endeavor of knowledge acquisition.

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

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

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

87. Rotondi, *supra* note 71, at 13, claimed that the study of law should have as "but de découvrir – si possible – certains moments constants de ce processus évolutif ininterrompu qui, projetés par l'expérience du passé dans l'incertitude de l'avenir, nous donnent aussi la possibilité de deviner avec une précision suffisante les effets de cette évolution qui ne s'arrête pas dans le présent mais se perpétue dans l'avenir."

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

89. *See* Michaels, *supra* note 31, at 784. For the School of Trento and the Trento Theses, *see* Gambaro, *supra* note 33.

cept the role of comparative law as defining their intimate scientific methodology and if comparative law does not redirect its intellectual efforts towards a functional dimension as to the aims of the discipline.[90]

Historical perspective is important as well, as comparative knowledge implies control of coordinates of a legal system is space *and* in time. If facts concerning a legal system are posted on a continuum, the knowledge of the past is part of those elements that comparative law should consider in defining the set of conditions that are relevant to a given socially desirable outcome.[91] Thus, historical knowledge is comparative knowledge to the same extent as it is economic, or sociological or linguistic, or political knowledge.[92] Even with respect to history, we are at ease in concluding that there cannot be any discontinuity between acquisition of knowledge *per se* and acquisition of knowledge for useful purposes (it would be horrifying if we could not learn from the past);[93] if facts are on a continuum, there is no merit in dividing those that are part of a merely intellectual cognitive effort and those that represent the building block of a complex algorithm to check the consistency of the law we use and of any proposal of legal change.

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

If we are asked what is the aim of comparative law, we can only provide an answer that has the validity of all scientific explanations.[94] It will be explicative and accepted until challenged by other paradigms. We claim that in the globalized world comparative law is responsible for avoiding the extinction of the species, that is to say, of lawyers as social scientists.[95] More than that, comparative law is charged with providing a social identity to lawyers in the

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

91. This continuum that connects the fact of a legal system is what we call the legal tradition, as "common feature of societies and of laws." H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 3 (4th ed. 2010). On the role of tradition as a force that shapes the legal change see Watson, *supra* note 72, at 1152; Holmes, *supra* note 46, at 469 (for its role as source of interpretation).

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

93. Iain Stewart, *Critical Approaches in Comparative Law*, 4 OXFORD U. COMP. L. FORUM 4, 29 (2002) ("[L]egal science *can* be both descriptive and prescriptive. I shall also accept that it *ought* to be both. That is to say: legal science ought to be practical *with regard to law*.").

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

95. *See* ZWEIGERT & KÖTZ, *supra* note 8, at 34 (arguing that the legal science is sick as to its methodology and comparative law can be its medicine).

contemporary legal order, an identity that is about to be lost, since legal dogma does not grant anymore a position of exclusivity for jurists.

The life of people is governed by complex human, social and economic laws. Individuals respond to many stimuli. Legal change brought about without comparison amount to the attempt of defining a correlation between an event and its presumable effects without control variables, which, at best is as naïve as the easy implications that can be drawn from the rankings of the *Doing Business* reports.[96] Control variables, as far as legal systems are concerned, must be external to the phenomena observed.[97]

We know that compulsory models created in the domain of law do not have the same properties of laws in hard sciences, even if such laws also resort to probabilistic elements to explain the complexity. We live in pluralistic contexts, subject to numerous pressures and even if it is not the casualty to produce change and evolution, at the opposite policy makers and social scientists (including lawyers) should refrain from naïveté such as believing that human and institutional behavior is governed by deterministic and simplistic rules.[98] Laws and standards are not leverages that can be moved mechanically.[99]

The creation of new competing legal orders, the definition of policies, the generation of laws, and the supply of viable interpretations cannot occur without lawyers and yet they lose ground in scientific debate as well as in institutional processes of legal change. Omnipotent technologists and economists assumed the intellectual leadership, with a reason or not. As a matter of fact, jurists indulge too much to the role of technicians rather than engineers.[100] Their intellectual leadership depends on the ability to regain centrality in the debate on legal change and to show that they master the (rather complex) algorithms that explain the functioning of society.[101] Here the future of lawyers

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

97. The observation of external phenomena is the domain of other sciences (economics, sociology, anthropology, psychology), and this calls again for interdisciplinary approaches. However, there are contextual elements that fall in between law and other disciplines (such as the way legal education is organized, the style of courts, and many others). Gino Gorla suggested comparative lawyers should also study such facts. *See* Gino Gorla, *Diritto comparato*, *in* 12 ENCICLOPEDIA DEL DIRITTO 928 (1963).

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

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

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

101. Rheinstein, *supra* note 42, at 424 ("[T]he most obvious use of comparative law within the framework of national law is in the field of law making, judicial and legislative."). We agree only

becomes dependent on that of comparative law and comparative law's fate is in the hand of today's scholars and law professors. They are responsible to create and transfer knowledge across generations as well as to frame the kind of social identity that gives them a distinctive place in societies at large.

Knowledge that they can contribute is not just the mere technical knowledge of black letter rules; the unique added-value knowledge they can provide is comparative.[102] And if it is not comparative, then there is no hope the wind will change again in favor of jurists.

Law professors have a fundamental role, not just in claiming an intellectual hegemony they have lost, but in avoiding the extinction of the species, because if we do not (i) turn legal education as such in comparative legal education, and (ii) enrich our methodology in social sciences, it is to be expected an even more dramatic loss of centrality of lawyers and a damage to society, for the processes of legal change will be deprived of a non-substitutable ingredient that only comparative lawyers have the ability to produce and blend in contemporary societies.[103]

## VI. CONCLUSIONS

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

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partially with Michaels, *supra* note 31, at 792, when he states that "[a]t least, comparative law should survive as a necessary basis for the new comparative economics." Comparative law cannot be an ancillary science. The knowledge produced can be useful in many respects even beyond any suggestive economic experiment.

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

103. Posner, *supra* note 59, at 777 ("[T]he growth of interdisciplinary legal analysis has been a good thing, which ought to (and will) continue."). *See also* von Bogdandy, *supra* note 6, at 58.

# Santi Romano, Neoinstitutionalism and Legal Pluralism*

Mauro Barberis**

**Abstract:** Santi Romano's (1875-1947) theory of legal order (It ordinamento giuridico) is known, in Continental legal culture, as an institutionalist one, essentially opposed to a normativist legal theory. However, if institutionalism can be reduced to a more sophisticated form of normativism, based on power conferring norms, then the most important legacy of Romano's work is elsewhere. Romano's institutionalism could be interpreted as a form of legal evolutionism - the idea that legal phenomena are unintended effects of intentional human acts - and this, in turn, as a sort of legal pluralism: the actual theory of legal sources best capturing the networks of national, international and EU legal norms.

**Keywords:** (neo)institutionalism, legal evolutionism, legal pluralism

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Law has indeed no separated existence: its essence is human life itself.

—Friedrich Carl von Savigny, *Vom Beruf unserer Zeit*

In legal positivist tradition, law is conceived of as a normative system, a sanctioned and institutionalized one. Different forms of legal positivism, such as Hans Kelsen's normativism and Santi Romano's institutionalism, have insisted on the systematic, coercive, and institutionalized nature of legal norms.

Of the three sections of this essay, the first focuses on Romano's theory of legal order as representing an institutionalist and evolutionist line of thought that has remained a minor one in the positivist tradition. The second section deals with contemporary, mainly Anglo-American developments of neo-institutionalism; a legal theory often coinciding with, though unaware of, Romano's positions. The third part of the essay highlights a form of neo-institutionalism largely present in constitutional, international, and European Union ("EU") legal studies, occasionally referred to as legal pluralism.

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## 1. METAPHORS OF ORDER

Santi Romano was a complex Italian legal thinker,[1] who belongs to the legal positivist tradition because of his evident acceptance of its two basic tenets: the Separation Thesis, in which law and morals have no necessary connection,[2] as well as the Social Sources Thesis, where law is a man-made phenomenon. In the legal positivist tradition, however, the second thesis takes two forms: usually law is referred to as a phenomenon either normative or institutional, but such a difference appears superficial, if institutionalism, as we shall soon see, can turn into a more sophisticated form of normativism. A deeper distinction between the two versions of the Social Sources Thesis is perhaps drawn between two strands of positivist tradition: a constructivist and an evolutionist one.

Three aspects must be pointed out. The first concerns terminology: the term 'contructivism' is used here in Friedrich Hayek's sense and not in John Rawls's.[3] The second regards evolutionism: a term not implying any naturalistic philosophy, but a social science methodology, insisting on unintended effects of purposeful human action. The third point is that Hayek's evolutionism, often totally unknown to legal theorists, implies contructivism: the unintended effects are referring to human acts, which are intentional by definition. In other terms, evolutionism does not disclaim that men build their institutions. It only claims that nobody is in total control of what he does.

According to the constructivist majority of legal positivists—from Thomas Hobbes to Jeremy Bentham, up to Hans Kelsen—law is not simply man-made, but is also the sole result of human reason or intention. Also, for the evolutionist minority of legal positivists—ranging from Scotch enlightenment to Friedrich von Savigny, including Hayek himself and extending to Neil MacCormick and today's legal pluralists—law is produced by intentional action of the constituent, the legislator, and the judges. The meaning of such actions, however, escapes their authors: it sorts out of the impersonal mechanism of unintended effects descending from the very intentional action.

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1. *See generally* Aldo Sandulli, *Santi Romano and the Perception of the Public Law Complexity*, 1 ITALIAN JOURNAL OF PUBLIC LAW 25-51 (2009), *available at* http://www.ijpl.eu/archive/2009/issues-1/santi-romano-and-the-perception-of-the-public-law-complexity (for a useful introduction to the life and scientific production of Santi Romano). A challenging interpretation of Santi Romano's pluralism, connecting it to the same roots of Italian culture, has been recently offered by Gianfrancesco Zanetti, *Italian Normative Pluralism: What is Unique about the Future of Italy*, 2 CALIFORNIA ITALIAN STUDIES 1-11 (2011), *available at* http://escholarship.org/uc/item/16c8282p#page-3.

2. *See* Santi Romano, *Diritto e morale (1944)*, *in* SANTI ROMANO, FRAMMENTI DI UN DIZIONARIO GIURIDICO 64-78 (1947, reissued in 1983).

3. *Cf.* FRIEDRICH VON HAYEK, LAW, LEGISLATION AND LIBERTY (1982); MAURO BARBERIS, L'EVOLUZIONE DEL DIRITTO 238-48 (1998); Mauro Barberis, *Knowledge, Evaluation and Interpretation in an Evolutionary Theory of Law*, 13 ANALISI E DIRITTO 257-69 (2010).

In fact, law is not an outcome of reason or will only, but also of human interests and passions: those who make the law do not know all the law they are making. The main unintended mechanism at work in the law more than in any other social practice is interpretation; the meanings of normative acts eventually escape their very authors, partially or totally. They may escape only partially, even if one subscribes to the various forms of interpretive intentionalism or—according to a doctrine of Constitutional interpretation highly debated in the United States—originalism.[4] Here, in fact, reference to the actual historical legislator's intentions masks the ascription of new meanings to the law: what intention could one possibly ascribe to a collective actor as a legislator? But often, norms, the meanings of constitutions, statutes, or judge's decisions escape their authors totally, as recognized by all the numberless forms of interpretive nonintentionalism, as opposed to interpretive intentionalism.

Romano can well be ascribed to the evolutionist strand of legal positivism: he is, so to speak, an Hayekian evolutionist *ante litteram.* Lacking the very constructivism/evolutionism opposition, his hostility to constructivism can find expression in generally anti-voluntarist terms. In his essay 'Diritto e morale' ('Law and Morality'), for instance, Romano criticizes the role commonly attributed to will: just as a full-fledged evolutionist would object to the reduction of any human institution to somebody's intention or project. To him at least, customs, fundamental norms, and such organizations as State and the international community, cannot be reduced to will; as he writes of customs, but could as well do so of the law in general, "the specific facts or acts they spring from may be voluntary, but this does not mean that they should be considered voluntary on the whole."[5]

Romano's major contribution to the theory of law is his concept of legal order: a new term used by him, and which can be considered one of the system's many metaphors.[6] Through a first metaphor, the seventeenth through eighteenth century natural law, as the positivist legal dogmatics and general theory of nineteenth century, described law as a system *stricto sensu*:[7] an ordered set of norms logically connected. In fact, 'legal system' connotes law and legal reasoning attributing them to a basic deductive structure; however, only

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4. *See generally* Lawrence Solum, What is Originalism? The Evolution of Contemporary Originalist Theory, Working Paper (April 28, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1825543&download=yes.

5. Romano, *supra* note 2, at 66.

6. *See generally* Giovanni Tarello, *Prospetto per la voce "Ordinamento giuridico" di una enciclopedia*, 5 POLITICA DEL DIRITTO 73 (1975), now *Ordinamento giuridico, reprinted in* GIOVANNI TARELLO, CULTURA GIURIDICA E POLITICA DEL DIRITTO 173-204 (1988); GIOVANNI BATTISTA RATTI, SISTEMA GIURIDICO E SISTEMAZIONE DEL DIRITTO (2008); MAURO BARBERIS, MANUALE DI FILOSOFIA DEL DIRITTO § 4.2 (2011).

7. *See* JUAN MANUEL PÉREZ BERMEJO, COHERENCIA Y SISTEMA JURÍDICO 35-37 (2006).

nineteenth century private law, with its Roman concepts and principles, has been able to conform to such a deductive representation.[8]

The development of public law between the nineteenth and the twentieth centuries, instead, produced a plurality of autonomous legal systems: constitutional law, administrative law, labour law, international law, ecclesiastical law, regional law, and so on. The first metaphor gave way to a second one: just legal order. This English word is in fact a poor translation of Romano's title, 'Ordinamento giuridico' (1917); in no language other than Italian have expressions different from generic 'ordre', 'order', 'Ordnung', been used, all simply meaning order.[9] Adolf Merkl and Hans Kelsen too have used German 'System' and 'Ordnung' as synonyms, to indicate an order of norms connected by a common origin and based on a chain of normative powers, delegating to inferior ones to the production of other norms.[10] Romano, on the contrary, opposed Italian 'ordinamento' to 'sistema,' the former suggesting a social institution in which the main role would not be played by norms but by the powers producing and using them.[11]

As we shall see in the last section, however, a distinction between system and order relies less on the institutional character of the second than on its plural quality: I refer here to Romano's thesis of a plurality of legal orders, allowing the birth of a specifically legal pluralism.[12] Especially in order to describe relationships among internal, international and EU law, today a third metaphor is used by legal theorists: the metaphor of the web, characterized by at least two distinctive traits.[13] The first is based on the idea that relations among legal orders are not exclusive, but overlapping and integrating themselves. The second relies upon the idea that hierarchy of norms does not depend on formal provisions but on the effectiveness of law-applying powers: normative hierarchical relationships ultimately rest on the choices of the main national, international and European Courts.[14]

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8. *See generally* FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1840-1849).

9. *See* SANTI ROMANO, L'ORDINAMENTO GIURIDICO (1917-1918).

10. *See* HANS KELSEN, REINE RECHTSLEHRE (1960).

11. *See* CARLOS ALCHOURRÓN & EUGENIO BULYGIN, SOBRE EL CONCEPTO DE ORDEN JURÍDICO (1976), *reprinted in* CARLOS ALCHOURRÓN & EUGENIO BULYGIN, ANÁLISIS LÓGICO Y DERECHO 393-407 (1991).

12. *See* Mauro Barberis, *Pluralismi*, 23 TEORIA POLITICA 5-18 (2007).

13. *See, e.g.*, FRANÇOIS OST, MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT (2002); Nicholas Barber, *Legal Pluralism and the European Union*, 12 EUR. L. J. 306 (2006).

14. *See* PIERRE BRUNET, PLURALISMES DES ORDRES JURIDIQUES ET HIERARCHIE DES NORMES, QUESTIONS CONTEMPORAINES DE THÉORIE ANALYTIQUE DU DROIT 58-62 (Pierre Brunet & Federico Arena eds., 2011).

## 2. LEGAL NEOINSTITUTIONALISM

We shall go back, in the last section, to the pluralist aspects of Romano's theory of legal order mentioned here above; in order to properly do that, however, we must briefly consider now how his ideas have been received in recent international debate. Of course, the reception has been limited; in a global culture in which nobody speaks Italian any more, translations of Santi Romano's 'Ordinamento giuridico' and studies of it have lagged behind: what is remarkable, no English translations of any of his works exist yet.[15] International reference to Romano's work is so rare that today he could hardly pass the scientific production evaluation tests based on the Impact Factor – though this is not an argument against Romano, but rather against the IF.

Yet, to explain the apparent disappearance of an author who still has much to say, linguistic reasons are not enough; it is also necessary to consider aspects concerning the discipline as he conceived of it: that is, as Kelsen did, as an *allgemeine Rechtslehre*. Unlike Kelsen, however, he never met Anglo-Saxon jurisprudence. Kelsen resigned from the Austrian Constitutional Court and was then forced to leave Germany; his pure theory of law has thus been exported into the United States and has become a kind of general jurisprudence, a study of concepts virtually common to all legal systems. Romano, instead, was for President of the Fascist State Council for a long time, while continuing his study of concepts common to all sectors of Italian law.

He thus played a role only on a national scale, working on public, administrative, ecclesiastical, and international law, but exerting also an important influence on many Italian referential law scholars devoted to different disciplines, such as Giuseppe Capograssi (law philosophy), Riccardo Orestano (Roman law), Paolo Grossi (legal history), Gino Giugni (labour law), and many others (today mainly focused on EU law). Outside Italy, Romano seems to have attracted only Carl Schmitt's dubious homage: in fact, in one of his most famous writings Schmitt seems mainly to refer to Romano in order to confer an institutionalist form to his prior "decisionist" theory.[16] As a consequence, Romano's role in international debate has been played by others: partly by Norberto Bobbio, but mainly by Herbert Hart and Neil MacCormick.

That legal norms are institutionalized, namely produced and enforced by normative powers, has been conclusively pointed out by Hart, an author belonging

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15. *See* Alberto Romano, *Presentazione, in* ROMANO, *supra* note 2, at iii-vii. Main translations of Santi Romano's works have been made in German and French. *Cf.* DIE RECHTSORDNUNG (1975); L'ORDRE JURIDIQUE (2002). *See* MAXIMILIAN FUCHS, DIE ALLGEMEINE RECHTSTHEORIE SANTI ROMANOS (1979) (an interesting study dedicated to Santi Romano out of Italian legal literature).

16. *See* CARL SCHMITT, ÜBER DREI ARTEN DES RECHTSWISSENSCHATLICHEN DENKENS (3d ed. 1993). *See also* Mariano Croce, *Does legal institutionalism rule out legal pluralism? Schmitt's institutional theory and the problem of the concrete order*, 7 UTRECHT L. REV. 42 (2011), *available at* http://www.utrechtlawreview.org/index.php/ulr/issue/view/16.

to a generation of European clerks, like Schmitt, who still read Italian, but to whom Romano was utterly unknown. Yet Hart's central thesis, that (modern) law is the union of primary, duty-imposing norms, and secondary, conferring-powers ones, just answers to Romano's anti-normativist objection.[17]

In recent jurisprudence, in fact, institutionalism is commonly turned into a more sophisticated kind of normativism, apt to include power-conferring norms: this happens in particular with neo-institutionalism. Legal neo-institutionalism sprang from a combination of Hart's Scotch pupil, McCormick with Kelsen's Czech indirect pupil, Ota Weinberger,[18] and from the re-formulation of early twentieth century institutionalism (in particular Maurice Hauriou's) occurred in John Searle's well known theory of constitutive norms. Institutions are power-conferring systems of norms, and these norms are in turn constitutive ones, establishing cultural, not natural entities.[19] Here again we are not far away from Santi Romano's vision, as he wrote that, "Law indeed creates actual realities that could not exist outside it, realities that the law does not appropriate from a world other than its own [. . .], exclusively originating in it."[20]

It was mainly MacCormick who extended the neo-institutionalist approach, based on power-conferring constitutive norms, to European Union law. He also has dispensed with the notion of State sovereignty, already criticized by Kelsen in the Twenties but still presupposed by many influential theories, such as Jeremy Waldron's normative legal positivism; MacCormick has rather translated into neo-institutional and evolutionist terms the idea of a European Union as a sovereign-less commonwealth, an institution in which the most important decisions pertain the Court of Justice.[21] The evolutionist implications of this theory on the European Union have been pointed out by an Massimo La Torre, perhaps the only Italian legal theorist who – also as MacCormick's pupil – still quotes Romano as an author not less actual than the many normativist proponents of

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17. *See* NORBERTO BOBBIO, ANCORA SULLE NORME PRIMARIE E NORME SECONDARIE (1968), *reprinted in* NORBERTO BOBBIO, STUDI PER UNA TEORIA GENERALE DEL DIRITTO 196-97 (1970). *Cf.* Riccardo Guastini, *Contribución a la teoría del ordinamento jurídico*, *in* EL REALISMO JURÍDICO GENOVÉS 83-84 (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2011).

18. *See* OTA WEINBERGER, NORM UND INSTITUTION. EINE EINFUHRUNG IN DIE THEORIE DES RECHTS (1988); NEIL MACCORMICK & OTA WEINBERGER, AN INSTITUTIONAL THEORY OF LAW (1986); NEIL MACCORMICK, INSTITUTIONS OF LAW. AN ESSAY IN LEGAL THEORY (2007). On neo-institutionalism *see* Massimo La Torre, *Institutionalism Old and New*, 6 RATIO JURIS 190 (1993); Massimo La Torre, *Institutionalist Theories of Law*, IVR ENCYCLOPAEDIA OF JURISPRUDENCE, LEGAL THEORY AND PHILOSOPHY OF LAW (2011), *available at* http://ivr-enc.info/index.php?title=Institutionalist_theories_of_law.

19. *See generally* MARIANO CROCE, CHE COS'È UN'ISTITUZIONE (2010) (for a quick introduction to institutionalism).

20. Romano, *supra* note 2, at 209.

21. *See* NEIL MACCORMICK, QUESTIONING SOVEREIGNTY, LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH (1999); Massimo La Torre, *Legal Pluralism as Evolutionary Achievement of Community Law*, 12 RATIO JURIS 182 (1999).

the Kelsen-Hart school.[22] La Torre, in particular, can be referred to for the theoretical and not only historical relations between neo-institutionalism, evolutionism, criticism of sovereignty, and European integration, only hinted at here.[23]

## 3. NEO-INSTITUTIONALISM AND LEGAL PLURALISM

The final section of this contribution will be devoted to evoke three ideas current today: ideas that, though somehow relating to Romano, go well beyond his thought. It is in particular for three theses – one directly belonging to him, the others descending from him – that he can be considered as one of the founding fathers of contemporary legal pluralism: a varied movement, deriving from different philosophical antecedents and heterogeneous disciplinary belongings,[24] that has often produced (alas, it must be said) barely readable studies, not to be compared with their predecessors'.[25]

As for philosophical ascendancies, they are often North-American versions of continental philosophies, such as post-modernism and post-structuralism; as for their fields of studies, they often, either overtly or implicitly, reject legal dogmatics and legal theory – the disciplines always referred to by Santi Romano – and rather choose to place themselves at the intersection between sociology, legal anthropology and comparative law.

Romano's first legal pluralist thesis is, obviously, the theory of the plurality of legal orders, and in particular the problematic relationship between law and institution: in this regard, it is the same word 'institution' that is problematic in itself when compared with 'law,' as it is both under-inclusive, as not referring to all that is normally called law, and over-inclusive, as referring also to what is not normally called so. Romano bypasses the dogma of a state-based law with the thesis that state law is only a species of the legal genus, and acknowledging forms of infra-, over-, and even anti-state forms of law. Infra-state law: acknowledgement of a partial autonomy of entities such as the triad Town Councils-District Councils-Regions. Over-state law: the legal nature of international, transnational and EU law is pacifically accepted too, in order to give legal form to supra-national organizations. Anti-state law: Romano him-

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22. *Cf.* MASSIMO LA TORRE, NORME, ISTITUZIONI, VALORI. LA TEORIA ISTITUZIONALISTICA DEL DIRITTO (1999).

23. *See* Massimo La Torre, *Autunno della sovranità. Comunità europea e pluralismo giuridico*, 12 RAGION PRATICA 187 (1999); MAURO BARBERIS, EUROPA DEL DIRITTO. SULL'IDENTITÀ GIURIDICA EUROPEA (2008).

24. *See, e.g.*, H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2d ed. 2004).

25. *See generally* Mauro Barberis, *Deconstructing Gary*, *in* GARY MINDA, TEORIE POSTMODERNE DEL DIRITTO VII-XIX (2001); MAURO BARBERIS, GIURISTI E FILOSOFI: UNA STORIA DELLA FILOSOFIA DEL DIRITTO 80-85 (2011) (for further criticisms of contemporary legal pluralism).

self or his followers have coherently connoted legally self-organizing aspects of the mafia or Barbaricine vengeance.

The second legal pluralist thesis – which, to be sure, cannot be ascribed to Romano, but to his theoretical offspring – is the rejection of the principle of the exclusiveness of the legal order,[26] accepted instead by monism and internationalist dualism; this rejection is substantially equivalent to the option for a *tertium quid* between monism and dualism: internationalist pluralism itself. The theory of legal order confirms itself as a product not only of the proliferation of law systems, but also of the need to solve legally the various problems deriving from their relationships. Romano himself, in fact, still inclines to respect the principles of state sovereignty and their exclusiveness. As for the law-morality relationship, Romano speaks of a non-receptive link between different orders:[27] a solution that can today seem *naïve*,[28] yet remains subtler than other ones proposed by contemporary inclusive and exclusive legal positivism.

The third legal pluralist thesis to be considered as an offspring of Romano's theory is the conception of law as a web rather than as legal order, allowing that relationships among the sources be not fixed with formal hierarchies but only by the prevalence of one of the sources in case of conflict before a Court. Prevalence of a source not because superior, but superior because prevailing in a judge's application, can appear thrice subversive. First, it appears subversive with respect to the Westfalian state tradition, in which competence is strictly divided among the States. The same idea also appears subversive with regard to positivist legalism: law can be produced only by those who are formally entitled/competent to do so. Finally, the idea contrasts with the democratic tradition of the legal State law: of which positivist legalism is only the specifically legal form.[29] In practice if not in theory, the national, international or EU's hierarchy of norms, including power-conferring norms, is no longer established by statutes, constitutions or treaties, but by the very judges who should apply norms: it is they who re-define the competence of normative powers and along with them their own. This, and no other, is the hierarchy of sources European jurists teach their students.

In fact, not only according to a realist theory of law, but according to legal dogmatics too, a source can be considered hierarchically superior to another one not if so expected according to dispositions on the sources, but if, in case of conflict, judges apply the former or the latter.[30] This is, by the way, a beautiful example of that realistic kind of philosophical argument – in the sense of the

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26. *See* CESARE PINELLI, COSTITUZIONE E PRINCIPIO DI ESCLUSIVITÀ (1990); ROBERTO BIN, GIOVANNI PITRUZZELLA, DIRITTO COSTITUZIONALE (2011).

27. Romano, *supra* note 2, at 75.

28. *See* Tarello, *supra* note 6, at 173 ff.

29. *But see* FRANCISCO LAPORTA, EL IMPERIO DE LA LEY. UNA VISIÓN ACTUAL (2007).

30. *See* RICCARDO GUASTINI, LE FONTI DEL DIRITTO. FONDAMENTI TEORICI 248-49 (2010).

opposition of reality to appearance – that Saul Kripke calls inverted conditional.[31] According to the so-called hierarchical principle for the solution of conflicts between norms, a legal norm hierarchically superior should with no doubt prevail on an inferior one; but if reformulated by reversing this condition, the principle is inverted: it is the norm that national, international or EU Courts consider as prevailing in case of conflict that is hierarchically superior, whatever its formal pedigree.

This has happened in French law too, as Michel Troper noticed time ago: the highest Courts, with a final power of decision, continually redefine their own competence and that of the other constitutional organs.[32] But the same process is even more evident in the relationships among internal, international, EU law, as well as regards the Convention for the Protection of Human Rights and Fundamental Freedoms and further protocols adopted by the Council of Europe ("CE")[33]: a relationship established by an institutional and evolutionary process of intentional delegation and unintended dislocation of powers, emerging out of no plan or project. Here, again, we have unintended effects of intentional acts by many different institutional entities: no longer internal constituents, legislators and judges only, but also international or European Union organs. It is by such a process that in Europe internal, international, EU and CE laws are no longer separated but integrated, like overlapping webs.

I do not know whether Romano – only apparently opposing state control – would have considered this process favorably; perhaps so, but only in so much as a central role could here be played not by political decisions, often shortsighted or dangerous, but by legal reasoning. The evolutionary legal process is, so to say, entrusted to the superior wisdom of the law and its interpreters, the jurists. What is certain is only that Romano's legal theory has more than diagnosed the origin and the direction of these processes: as it often happens in legal history, it did help produce them.

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31. *See* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982).

32. *See* Michel Troper, *Le problème de l'interprétation et la théorie de la supralegalité constitutionnelle*, *in* MICHEL TROPER, POUR UNE THÉORIE JURIDIQUE DE L'ÉTAT 293 ff. (1994).

33. *See* BRUNET, *supra* note 14, at 53-74.

# Ex Aequo et Bono. Three Cases of Arbitration, and Some Remarks About Equity

GIOVANNI IUDICA*

## 1. EMPOWERING THE ARBITRATORS TO DECIDE *EX AEQUO ET BONO*, I.E. IN EQUITY OR AS AMIABLES COMPOSITEURS

The parties may agree to resolve existing or future disputes by invoking equity rather than any positive right. The decision to resort to the principles of equity may be appropriate, among others, when the litigation involves parties from different States who do not have the negotiating power to impose on the other the right that suits them best, or when both parties — engaged in complex and long-term relationships — fear that the law could be too harsh or be applied too rigidly,[1] risking thus to deteriorate, jeopardize or prejudice the business relations they wish to maintain despite the dispute.[2] In such cases the parties can agree to grant the arbitrators the power to judge as amiables compositeurs, i.e. in equity, rather than applying the predefined and well known rules of a positive legal order.

It seems beyond doubt that judgments according to the principle of equity as opposed to judgments according to the law, have been for centuries the most common and widespread way of settling disputes.[3] Indeed, next to the civil justice officially administered in the courts on behalf of the king, the emperor, or the people, expressions of alternative justice started to flourish — without robes nor Pandects, outside of the courts. Disputes between siblings or couples, within the families, in the villages, countryside, towns, among the poor, the ignorant and the illiterate, were all settled according to common sense by the *pater familias*, i.e. the head of household, the grandfather or the priest. No sane individual would ever have dared to rebel against the decisions of the elderly, nor imagined defying the advice of the priest, going to the nearest town to turn to the Justice of the Courts. At the time no one ever left the village, the farm-

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1. Francesco Galgano, *Dialogo sull'equità (fra il filosofo del diritto e il giurista positivo)*, *in* L'ARBITRATO. PROFILI SOSTANZIALI 384 (Guido Alpa ed., 1999) (justifying the frequent resort to amiable composition as a judgment criterion in the arbitration clauses by the "deep distrust of the economic operators in the law").

2. *See* Romano Vaccarella, *Il difensore e il giudizio di equità*, 42 GIUSTIZIA CIVILE 465 (1992) ("The arbitration clause according to equity arises from a special 'feeling' between the contracting parties who are convinced that their future disputes can only be the result of misunderstandings and will, therefore, be settled adequately - on the basis of their mutual good faith - by amiable composition rather than by the rigid application of the written law.").

3. Giovanni Iudica, *Arbitrato di diritto e arbitrato d'equità*, *in* APPUNTI DI DIRITTO DELL'ARBITRATO 79 ff. (Giovanni Iudica ed., 2d ed. 2012).

house, the quarter where they were born and had spent their entire lives, except to go to war or flee an epidemic.

The mere idea of turning to a lawyer made people shiver. Besides, the legal fees were inaccessible to ordinary mortals, and the trials — usually long, tortuous, and full of unknowns — were considered an experience to avoid. In the Jewish communities the disputes arising among the faithful used to be attributed to the Rabbi who settled them in a "Solomonic" judgment. Anyone owning a business, merchants, shopkeepers, labourers, and craftsmen could rely on the guilds and on their arbitrators' Colleges (*Collegi dei Probiviri*) that would hold courts to solve problems and settle the disputes involving their members or going against their interests.

For centuries, until the era of modern industry, the European economy growth was deeply rooted in the guild system. The tensions, disputes, and rivalries between traders were born and placated mainly within the guilds or through them. Thus, in the past, people only turned to the judges to settle the most complicated issues, the most difficult and hard to unravel disputes, and cases with a great economic impact or those opposing nobles and wealthy citizens. However, for most cases they did not rely on law but on common sense, wisdom, on the strength of tradition, and on the principles of equity.

The ability to resolve a dispute according to equity is expressly provided in Article 822 of the Italian Code of Civil Procedure, according to which, "The arbitrators shall rule according to the rules of law except in cases where the parties explicitly decide that the arbitrators will judge in equity." In this regard it should be noted that if the arbitration clause does not specify the law which is applicable to the resolution of the dispute, arbitration should be considered in law and the applicable law must be common to the parties. To obtain a settlement according to equity the parties must clearly state, in the arbitration clause or in the compromise, that they do not wish to rely on legal rules and must specifically confer to the arbitrators — no matter whether the arbitration is ritual or not — the mandate to decide the dispute in amiable composition (and not according to the law). There is no need to adopt sacramental[4] formulas, the parties just have to clearly express their wish to recur to amiable composition. Formulas like "judging *ex aequo et bono,*" or qualifying the arbitrators as "amiables compositeurs" express the will of the parties to opt for an arbitration in equity. If the parties wish the arbitrators to decide "under the law and in equity" the arbitration must be *ex aequo et bono*.

It should be observed that a ritual arbitration may be exercised under the law or according to equity, as a non-ritual arbitration may be exercised according to equity or under the law. The ritual or non-ritual character of the arbitration

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4. *Cf.* Giuseppe Ruffini & Salvatore Boccagna, *Commento sub. art. 822, in* COMMENTARIO BREVE AL DIRITTO DELL'ARBITRATO 294 (Massimo Benedettelli et al. eds., 2010).

regards its nature, or its legal structure, while equity considers the different profile of the types of rules to be applied to decide the dispute. It is almost superfluous to say that amiable composition is not an alternative method to resolve a dispute such as Alternative Dispute Resolution (normally referred to as "ADR"), but it is a true arbitration in the sense that the arbitrators do not play the (different) role of the mediator, i.e. the conciliator, but do settle the dispute, adopting rules of equity and saying who/what is wrong and who/what is right.

## 2. THE CONTROVERSIAL CONCEPT EX AEQUO ET BONO DISPUTE SETTLEMENT

An old problem which, however, keeps re-emerging, regards the definition of equity.[5] This issue is neither abstract nor purely theoretical nor academic; on the contrary, it is rather practical, since the dispute will be settled precisely according to the rules of said equity. Several theories co-exist: the main ones are reported below.

The oldest and perhaps the most widely used definition of equity goes back as far as Aristotle. According to the great Greek philosopher, equity would be a way to temper the law, a means at the disposal of the judge to mitigate, soften, or refine the extent of the law. The old Latin brocard *Summum ius summum iniuria* is indeed true sometimes! Thus, to avoid an extremely rigorous interpretation of *ius* and iniquitous consequences, unfair or excessively severe results, it may be wise to carefully temper the right to bring it back into the field of Justice. According to equity the arbitrators could, for example, interfere with the exercise of a creditor's right, although the prescription period has not yet elapsed, if the creditor has maliciously lead the debtor to legitimately believe that, because of the elapsed time, this right will not be exercised any more (*Verwirkung*, according to the German term used for referring to this case). Another example: the arbitrators could decide, according to equity, that a right can still be exercised, despite the raised plea of prescription, if the inaction of the right's holder is due to the incorrect behaviour of the counterpart that has induced him not to exercise the right in time (*Exceptio temporis* et *replicatio doli* of the defendant).

In such cases one can speak of "substitutive equity," because the rule of equity, diverging from the rule of law eventually replaces it. We speak of "integrative equity" when the arbitration rule only completes, introduces corrections to, or enables a decision that the strict rule of law cannot obtain (e.g. in cases in which it is not possible to accurately quantify the damage).

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5. *See* CHIARA TENELLA SILLANI, L'ARBITRATO DI EQUITÀ. MODELLI, REGOLE E PRASSI 1 ff. (2006) (presenting the topic of vast reconstruction). The author reaches the conclusion that the distinction between amiable composition and the arbitration conducted according to law would actually lack in consistency. *Cf.* Chiara Tenella Sillani, *L'arbitrato di equità tra regole e prassi, in* 25 NUOVA GIURISPRUDENZA CIVILE COMMENTATA 167 ff. (2009).

The thesis developed above has often been criticized. It has been observed that equity, in the general sense of an expression of good feelings, an invitation to a moderate, kind and balanced behaviour, may have unacceptable consequences for an orderly social life and, despite its name, could even lead to unfair solutions. If, for example, the arbitrators decided in equity to reduce the compensation owed to the counterpart by the party who does not fulfill its obligations, they would end up causing unjust damage to the injured party who would receive less than what it would have *secundum ius*.[6] So that a too "do-gooding" interpretation of equity could benefit the party who does not fulfill its obligations, i.e. the incorrect party, to the detriment and disadvantage of the one who behaved properly, making even more blurred the weak contours of legal certainty.

According to another theory, sensitive to the fact that feelings of moderation and kindness are too vague, evanescent, elusive and unknown to the parties when they agree to the arbitration or to the compromise, it is essential that the arbitrators refer to rules which, although not of positive law, cannot be ignored or at least imagined by the arguing parties at the beginning of the dispute. Thus, for some people, the arbitrators should refer to rules that are the expression of "common feelings in the state of development of the civil society," i.e. of "objective values that have already appeared in the social context but have not yet been translated in terms of written law." Others mention the "sense of ethics and legality diffused in society," while others speak of "the economic and social culture of the environment" to which the parties belong, and so on.[7]

However, even formulas like "common feelings," "objective values," or "sense of ethics and legality diffused in society" do not seem convincing.[8] Let us be sincere and put aside any illusions created by a magic lantern's play of shadow and light, these are only pathetic attempts to give the arbitral award a character, a varnish it does not have. The truth is quite different: the parties agree to give the arbitrator the power to judge in equity because, rather than relying on the law, they prefer to rely on the general wisdom, the professional competence, the life experience, the sensitivity, the ability to understand the facts of economy and business, the virtue, the sense of balance, prudence and, *sensu lato*, the culture of the adjudicator. If the arbitrator is a jurist, his way of reasoning and his personal and professional experience are obviously soaked in

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6. For a similar range of ideas *see Fiorenzo Festi, L'arbitrario di equità*, *in* 21 CONTRATTO E IMPRESA 145 ff. (2006); Francesco Benatti, *Arbitrato d'equità ed equilibrio contrattuale, in* 52 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 837 (1999).

7. *Cf.* Francesco Galgano, *Diritto ed equità nel giudizio arbitrale*, *in* 6 CONTRATTO E IMPRESA 475 (1991); *see also* Francesco Galgano, *L'equità degli arbitri*, *in* 44 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 413 ff. (1991) ("Judging according to equity means to translate in rules the economic and social culture of the time.").

8. *Edoardo Ricci, Note sul giudizio di equità*, *in* 47 RIVISTA DIRITTO PROCESSUALE 391 ff. (1993) ("The reference to ethics, morality, the social conscience can only have an optative meaning.").

legal culture. However, this aspect will only be one element — albeit important — of the spirit of fairness the parties agreed to in order to settle their dispute.

### 3. EX AEQUO ET BONO VS. CONTRADICTORY ARBITRATION BETWEEN THE PARTIES

The arbitration in equity carries some risk. A legal system, despite the uncertainties of the jurisprudence and the hesitations of the doctrine, nevertheless represents a complete system of rules known to the parties when they agree to the arbitration or to the compromise, and when the arbitration is initiated. Thanks to this system of rules the parties can confront each other's reasons with full knowledge of the facts. They may also discuss and criticize the directions of the jurisprudence or of the doctrine which might be unfavorable to their case, proposing to the judge a more persuasive interpretation of the legal rule in question. In brief, in arbitration according to the rule of law, the debate can take place in its fullness.

On the other hand, in an arbitration in equity it will mainly be the parties' care to represent the facts in a comprehensive way. The statement of facts is a crucial moment, it might even be the most important moment of the defense. In an arbitration according to the law the judge will ask the parties as well to present relevant facts in a complete and accurate way, even before he will expound legal issues: *da mihi factum dabo tibi ius*. In amiable composition, after illustrating adequately the facts that have given rise to the dispute, the parties will not present to the judge the most convincing legal arguments but rather the most compelling arguments according to substantial justice. In this way, the discussion will follow a different path with respect to the arbitration according to the law. The parties may also discuss the right, but use it as an instrument to outline equity, with the aim to convince the arbitrator that the solution offered by the law is also the most consistent with an assessment according to justice, i.e. to "common feelings," and the "sense of ethics and legality diffused in society," according to one of the many meanings of equity as seen here above.

However, the argument according to which the arbitrator, in an arbitration in equity, should indicate beforehand to the parties the rules of equity which will be the basis for the development of the discussion,[9] does not convince either. The arbitrator will want to know the facts first, will then listen to the parties and only after that, he will get an idea of what might be the most equitable solution to settle the dispute.

It should be noted that in the arbitration in equity the arbitrator may also decide the dispute by adopting a legal rule, but in that case, he must give clear

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9. *But see* Ricci, *supra* note 8, at 395, who does not conceal the difficulty to apply such a rule, recognizing that "[t]he drawback of a defensive activity by the parties, which is not supported by the knowledge of the applicable rules, cannot be completely eliminated."

reasons for the award, stating how the adopted legal rule is the most consistent with equity.[10] Indeed, the prevailing jurisprudence does not require that the arbitrator expressly justify his choice and considers it sufficient that the correspondence with equity implicitly appears in the award.[11] That being said, one must observe that if the arbitrators are empowered to judge *ex aequo et bono* and decide, however, applying the pure law, the award is vitiated by abuse of power, due to the violation of the limits set by the arbitration clause or by the compromise, and can therefore be impugned as a nullity.[12]

## 4. DECISION ACCORDING TO THE *IUS STRICTUM* VS DECISION ACCORDING TO EQUITY: THREE EXEMPLARY CASES

Let us conclude this essay by referring to some exemplary cases, where many of the topics discussed above find their own practical fulfillment.

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10. *See* Francesco Luiso, *L'impugnazione del lodo di equità*, *in* 12 RIVISTA DELL'ARBITRATO 456 ff. (2002) (explaining that it is necessary that the arbitrators "formally acknowledge" to have decided on the basis of equity, following the law, however without having to illustrate the reasons of their choice, i.e. "*why* equity, in that case, coincides with the law").

11. *Cf.* Cass., sez. un., 25 maggio 2007, n. 12319, Gist. Civ. II 2008, I, 1, 763 (Giovanni Iudica trans.) (It.):

> The arbitrators who are empowered to judge in equity according to art. 822 of the [Italian] c.c.p. can decide according to the law if they consider that equity and law coincide, without having to assert and explain the coincidence, which may be thought existing in general and can therefore be inferred even implicitly, while there can be a vice referable to the violation of the limits of the compromise in a ritual arbitration only if the arbitrators deny *a priori* to have exercised equity powers, even if they had been granted these powers, or if, after noting and pointing out a difference between the judgment according to equity and the judgment according to the law, they decide according to the law.

*Cf. also,* Cass., sez. un., 7 maggio 2003, n. 6933, Foro it. 2003, 1, 3023 (It.). *See* Italian Supreme Court, 7 May 2003, no. 6933, as reported by 128 FORO ITALIANO 3023 (2003). *See* Sillani, *regole e prassi*, *supra* note 5, at 202.

12. According to one commentator, the arbitration award pronounced according to the law by arbitrators with powers of amiable compositeurs can be judicially challenged, at least if it diverges from the results of a decision based on equity. *Cf.* LUCA RADICATI DI BROZOLO, COMMENTARIO BREVE AL DIRITTO DELL'ARBITRATO 269 (Massimo Benedettelli et al. eds., 2010). *See* Cass., sez. un., 24 giugno 2011, n. 13698, 1, (It.):

> When the compromise empowers the arbitrators with the mission to decide according to equity, the award pronounced according to the law includes an error *in procedendo*, and as such can be impugned as a nullity, according to article 829, section 1, no. 4, C.p.c. [Italian Civil Procedural Code], without obliging the accuser to deduce and demonstrate that the judgment is different from the judgment which would have been adopted using the parameter of equity.

Other commentators, however, took a different view, considering that the award would not be challenged by the judiciary as void neither according to article 829, section 1, no. 7, C.p.c., nor according to no. 4 of the same article, but only in case of contrariety to public order. *Cf.* Ferruccio Auletta, *Commentario sub art. 822*, *in* 30 LE NUOVE LEGGI CIVILI COMMENTATE 1384 (2007).

A. Company Alpha had committed itself to transform in its premises the raw materials supplied by Company Beta for a period of three years. The compensation agreed upon should have been measurable in units of finished product referred to an annual production "roughly supposed equal to about 6,000 tons" — to use the wording of the contract. When the contract was executed, in virtue of its non-ritual arbitration clause, Alpha summoned Beta to court, asserting that the total production over the three years had been equal to about one third of the production foreseen in the agreement and claimed to Beta, damages related to the unrecovered fixed costs due to the minor (commissioned and carried out) production and to the lost profits. Alpha further argued that, during the difficult negotiations, Beta had explicitly assured an annual production of about 6,000 tons.

The Arbitral College, having ruled that the production forecast mentioned above — having clearly an indicative value — did not impose specific obligations on Beta to order at least 6,000 tons of product per year, however, observed that because of this forecast Beta had led Alpha to rely on a firm order of this amount per year and to consider this estimate as the premise for the definition of the obligations expressed in the contract. As a consequence, the College estimated it had to apply to this case, according to equity, the principle of good faith (bona fide) during the negotiations in accordance with Art. 1337 of the Italian Civil Code, although the negotiations had been followed by the actual conclusion of the contract, and condemned B to compensate A for having led them to expect orders of 6000 tons a year, having subsequently placed noticeably lower orders. The damages were roughly determined by the mere loss suffered by Alpha, excluding the loss of profit that Beta would have had to indemnify only if they had been blamed for a real breach of contract.

If this case had been tried under the law, the arbitrators would have declared that the obligations between the parties are only those generated by the contract. Everything that was said, mentioned, advanced, and proposed during the pre-negotiations is no longer important at the time of the contractual agreement. The only thing that counts and matters is what is written in the contract. Once the contract is stipulated, it is the only source of obligations for the contracting parties, contrarily to what is outside of or prior to the contract itself. In our case, however, the power to decide in equity allowed the College to apply Article 1337 of the Italian Civil Code, even in a case in which the negotiations had led to the conclusion of a contract, disregarding the negative solution prevailing in the doctrine and jurisprudence. This solution would eventually be admitted by the jurisprudence only ten years later.

B. For the purpose of participating in a call for tenders aiming at the conclusion of a contract with adjudicator company Gamma, having as an object the construction of a sewer system including a wastewater treatment plant, the com-

panies Delta and Gamma had agreed to prepare a project and its relative offer, which were due to be presented by Delta only. In case of positive outcome, Delta would have subcontracted to Gamma the engineering work, while Delta would have dealt with the project of the industrial components and the electromechanical installations. However, the project underlying the offer was a draft, and was still such when the tender was won and the subcontract was concluded. The compensation had, thus, been calculated in an approximate way, on the basis of a plan that had numerous deficiencies at different levels. In addition, Delta had not taken into account the fact that passing from the draft to the operational project, as a consequence of the geological surveys that had proved to be necessary, the costs would have been higher than what had been planned both in the main contract and in the subcontract. Due to lack of time, the alternative was giving up or participating in the tender on the basis of a preliminary draft; Delta opted for the latter.

Having made the necessary investigations only after the conclusion of the subcontract, Delta and Gamma realized that the sum proposed as part of their offer was completely disproportionate to the costs, but — while having noted the inability to perform the works of civil engineering at the price indicated in the outsourcing contract — both sides decided not to give up the execution of the work and declared to be ready to cope with even important losses not to lose the business. They agreed on a plan to address the major costs, dividing between them the total economic burden for the realization of the works of civil engineering. Long before the completion of the work foreseen in the main contract Delta would have had to pay Gamma their share of participation in the additional costs; between Delta and adjudicator company Gamma nothing would have changed. Work went on according to the content and spirit of the private writing and Gamma continued to face the major operating costs, relying on the joint participation of Delta. The latter, however, did not honor the agreements made at the time of the allocation of costs, giving as a reason the nullity of the writing privately stipulated with Gamma.

Gamma summoned the counterpart to a non-ritual arbitration in equity to obtain the termination of the subcontract, payment of damages and payment for the work that had already been done. The defendant Delta, in its turn, pretended that Gamma had not exactly met its obligations and requested, in particular, to pronounce the termination of the subcontract due to the fault or negligence ("per fatto e colpa") of Gamma, and a conviction of Gamma to pay for the damages. According to the College, the mutual accusations of the parties had no independent significance and were actually a consequence of the difficulties and cost increases that emerged during the execution of the original project, which had proved inadequate. Reciprocal termination requests were therefore rejected.

However, having considered the fact that neither of the contracting parties had fulfilled its obligations, the College considered that both parties had determined the crisis in the relationship regulated by the outsourcing contract. Thus the College declared the termination of the subcontract due to negligence of both parties, i.e. on the one hand, the missing payment by Delta in Gamma's favor as a joint participation in the major costs resulting from the subcontracted work; on the other hand, the erroneous project choices made by Gamma, which contributed to the increased costs.

It is known that our positive right admits cancellation for non-fulfillment due to the negligence of the party who does not meet its obligations. If the arbitrators had decided the above case according to law, they would not have been able to declare the resolution of the contract due to the negligence of both contracting parties, but they would have had to rebuild the sequence of non-fulfillments in order to charge *one* party (not both), and specifically the first party who would not have honored their obligations, and would therefore have been unable to use the principle *inadimplenti inadimplendum*. In our case, the College decided to go beyond the prevailing opinion, which does not admit the cancellation due to the negligence of both contracting parties and, in case of bilateral noncompliance of equal importance, rejects the reciprocal cancellation requests.

C. A bank, which had taken the decision to transfer its central services - including the *vault* and the main safe deposit box — in a multifunctional complex of recent construction, stipulated with an electronic automation company a contract, the object of which was the design, delivery and implementation of a computerized security system. Payment was to be made gradually in installments (the first part on signature of the contract, the second at the end of the hardware installation, another part on the successful completion of specific intermediate tests, and the rest on the successful completion of the final test). However, in the course of the intermediate inspections, while expressing an overall basically positive judgment, the tester had identified several defects in the installation, which did not always work perfectly. In addition, the bank, following the partial implementation of the facility, had contested to the company some blockings as well as serious malfunctions and anomalies of the system. The company responded that the reported defects did not invalidate the basic functioning of the system. After a while the bank gave the company warning to remove the anomalies and make the facility fully functional within fifteen days. The contracting company, meanwhile, rejected the counterpart's warning, noting that the partial invoices they had issued had not been paid yet, that there had always been little collaboration and that the bank's behaviour of bad faith had hindered their work.

The bank finally summoned the company to a ritual arbitration in equity. The College declared the absolute ineffectiveness of the bank's warning because of the obvious inadequacy of the period granted with respect to the nature and extent of the defects to eliminate, but decided, nevertheless to cancel the contract. If the arbitrators in charge of this case had made a judgment according to the law, they would certainly not have been able to waive the inflexible rule of equivalence between damages and injury. The victim is, of course, entitled to full compensation for the suffered damage, but who ever caused it cannot be condemned to pay, in compensation, a sum greater than the caused (and proven) harm. In our system, both the trial courts and the legitimacy Court's jurisprudence have always renounced punitive damages. In this case, however, given the extraordinary gravity of the failure, the College estimated that it was fair to recognize to the adjudicator bank damages that exceed the damages suffered.

# Fred Moore: Renegade Defense Attorney for Sacco and Vanzetti

Susan Tejada*

*Two Italian immigrants, Nicola Sacco and Bartolomeo Vanzetti, were arrested in May 1920 in Brockton, Massachusetts. They were charged with murdering two guards in nearby South Braintree one month earlier, and escaping with fifteen thousand dollars in payroll cash that the guards had been delivering to a shoe factory. Sacco, a skilled worker at another shoe factory, and Vanzetti, a self-employed fish peddler, went on trial a year later, at a time when their beliefs in labor activism and anarchism were unpopular, as was their record of draft evasion during World War I. Fred Moore, former counsel for the Industrial Workers of the World, a militant labor union, led the defense team, and was its only member from out of state. The enormous and unfortunate impact he had on the case is examined here.*

In August 1920, Fred Moore jumped into a car in New York and started driving north. His destination: Boston, where he was scheduled to meet with a printer named Aldino Felicani.

Felicani had recently set up a legal defense committee for Nick Sacco and Bartolomeo Vanzetti, his fellow anarchists and imprisoned friends. The immediate task facing the committee was to find lawyers to defend the prisoners at their upcoming joint trial.

Carlo Tresca, a well-known anarchist journalist then based in New York, had urged Felicani to hire a radical lawyer—Moore, to be specific. In Boston, Felicani gave Moore a five-hundred-dollar retainer, and that made it official. The radical lawyer was now on the case.

## Background: Defending the Wobblies

The story of Fred Moore parallels the story of the American labor movement "at its fighting front."[1]

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* Susan Tejada, a former editor for the National Geographic Society, has written a new book about the case, In Search of Sacco and Vanzetti: Double Lives, Troubled Times, and the Massachusetts Murder Case That Shook the World (Northeastern University Press 2012). In this article for The Digest, she summarizes what she learned about Moore, and about his influence on the controversial case. In Search of Sacco and Vanzetti is, according to a starred review in Booklist, a "terrific reexamination" of the case with "the suspense and engagement of a good thriller. . ., [as well as a] perceptive history of early twentieth-century radicalism." More information is available at www.susantejada.com.

1. Eugene Lyons, The Life and Death of Sacco and Vanzetti 66 (DaCapo Press, 1970) (1927).

Born in Detroit in 1882, Moore was a "brilliant lawyer," said his friend Eugene Lyons, but he was "handicapped by a genius for non-conformity."[2]

For more than a decade, from 1909 to 1920, Moore had traveled the country as counsel to the Industrial Workers of the World (I.W.W.), defending the miners, timber beasts, migrant workers, and other roustabouts and itinerants who made up the union's core.[3]

In Spokane in 1909 and 1910, Moore represented hundreds of Wobblies, or I.W.W. members, who had been arrested for disorderly conduct when they defied a city council ban and took to the streets to speak out against exploitative employment agencies. Eventually, Spokane reached an agreement with the I.W.W. that allowed the Wobblies to hold peaceful outdoor meetings. The settlement was seen as a major victory for Moore.

The lawyer's next big I.W.W. case was on the other side of the country, in Lawrence, Massachusetts. Moore was part of the winning legal team in the 1912 trial of Joseph Ettor and Arturo Giovannitti, who had been charged with inciting a riot during an I.W.W.-led strike of textile workers. Moore shared in the credit for courtroom success in Lawrence, despite disagreement about the importance of his role there.

In 1916, when seventy-four Wobblies were charged with murder in the death of a deputized officer in Everett, Washington, Moore took up the I.W.W. banner once again. (In the incident behind the trial, which became known as the Everett Massacre, vigilantes on the docks in Everett had attacked Wobblies arriving by boat for a pro-union, free speech rally.) After the first Everett defendant was acquitted, the state released the remaining seventy-three defendants.

It was another triumph for Moore, but in the victory lay hidden warning signs for future defendants Sacco and Vanzetti. Moore did not pinch pennies; the budget-busting cost of the Everett case was thirty-eight thousand dollars. Also, according to his own co-counsel at the trial, George Vanderveer, Moore was more interested in politicizing the case than in winning it.

The fortunes of the I.W.W. plummeted in 1917 and 1918, when the United States went to war, labor strikes threatened the provisioning of American troops, and I.W.W. officials, including leader Bill Haywood, were tried and convicted on charges related to hindering the war effort.

Nevertheless, Moore stayed active on the I.W.W. stage for a while. In 1919, he headed to Oklahoma to defend Wobbly Charles Krieger, charged with conspiracy in the the 1917 bombing of the home of an oil company official in

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2. EUGENE LYONS, ASSIGNMENT IN UTOPIA 13 (Transaction Publishers, 1991) (1937).

3. Moore's career with the I.W.W., outlined in this article, is described in greater detail, with citations, in SUSAN TEJADA, IN SEARCH OF SACCO AND VANZETTI: DOUBLE LIVES, TROUBLED TIMES, AND THE MASSACHUSETTS MURDER CASE THAT SHOOK THE WORLD 87-90 (Northeastern University Press 2012).

Tulsa. Moore focused on proving that Krieger had been out of the city when the conspiracy was planned. The jury deadlocked, and the case was dismissed.

It was victory of a sort, but there was no time to savor it. Moore promptly headed for Kansas to defend twenty-eight Wobblies charged with seditious conspiracy, each facing four counts related to impeding the war effort. For whatever reason—exhaustion perhaps, or frustration that the local lawyer he had hired to do pre-trial work had resigned—Moore was off his game in the Wichita courtroom. He botched cross-examinations, actually bringing information to light that damaged his own case. More surprisingly, after the prosecution rested, Moore decided not to offer a defense. On December 18, 1919, a jury found the Wichita defendants guilty.

The I.W.W. wanted to appeal the Wichita verdicts. Moore requested and was granted ninety days to pursue an appeal. The time came and went. He failed to file the appeal. Bill Haywood accused him of criminal negligence.

In April 1920, Moore was summoned to I.W.W. headquarters in Chicago. The Wobblies would have no more work for him. He was 37 years old, and unemployed.

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Moore lost his job with the I.W.W. one month before Sacco and Vanzetti were arrested. By the time he met with members of the Sacco-Vanzetti Defense Committee in Boston, his reputation was seriously damaged. But no one passed that news on to the committee.

Labor organizer Elizabeth Gurley Flynn, longtime companion of Carlo Tresca, notes in her autobiography only that Moore "was not involved in any big case elsewhere" at the time. Surely she and Tresca knew about the Wichita fiasco. But they told Felicani, he later recalled, that Moore "was the best man to hire . . . . We had no misgivings about it . . . ."[4]

The honeymoon period would be short-lived.

## FREEDOM FOR SALE?

As the year 1920 came to an end, with Sacco and Vanzetti behind bars and the prosecution and defense conducting pre-trial investigations, one of the strangest episodes of the case was just beginning.[5]

On January 2, 1921, a young woman named Angelina DeFalco visited Aldino Felicani at work. She was an Italian-English interpreter in the Dedham court-

4. ELIZABETH GURLEY FLYNN, THE REBEL GIRL: AN AUTOBIOGRAPHY, MY FIRST LIFE (1906–1926) 303 (International Publishers 1973); ALDINO FELICANI, REMINISCENCES OF ALDINO FELICANI 70 (Columbia University Oral History Research Office Collection [hereinafter CUOHROC: AF], 1954).

5. CUOHROC: AF, *supra* note 4, at 73-79; BOSTON GLOBE AND BOSTON EVENING TRANSCRIPT, January 28-February 4, 1921, *cited in* TEJADA, IN SEARCH OF SACCO AND VANZETTI 331.

house. According to witnesses, she said that for fifty thousand dollars, with ten thousand down, she could fix it so that Sacco would be acquitted in his upcoming trial. It would be harder to fix the verdict for Vanzetti, she said, because he had a prior conviction on his record; after his arrest for the Braintree crime, he had been tried and convicted for an earlier attempted robbery.

A "ring" existed in the county, according to DeFalco. If defendants paid off lawyers in the ring, they would be acquitted. Otherwise, they would be convicted, regardless of guilt or innocence. She invited Felicani to dinner at her house in Dedham to talk the deal over with Francis Squires, clerk of the Norfolk County Superior Court, and others.

When Fred Moore heard about this, he insisted that Felicani avoid the dinner. Felicani agreed, but went to Dedham later in the evening to investigate. He took down the license plate numbers of cars parked in front of DeFalco's house. Checking them in the morning, he found that the cars belonged to District Attorney Fred Katzmann, his brother, Attorney Percy Katzmann, and Squires.

The next time DeFalco showed up at the defense committee office, Moore made up his mind to have her arrested.

Since no money had yet changed hands, DeFalco was charged with soliciting law business while not an attorney. After a six-day trial, the judge dismissed the charges.

Was DeFalco's offer real? Court interpreters of the day did sometimes act as "runners," procuring immigrant clients for lawyers. Runners did sometimes promise freedom for a fee, and the number of runners was significant enough to warrant their description as "infesting" Boston courtrooms of the day.[6] DeFalco herself was convicted of grand larceny in 1931 and sentenced to six months in jail for accepting money to arrange a prisoner's release.[7]

Confronted with DeFalco's offer, Moore could have ignored the demand to pay a bribe, paid it, taken it public, or tried to use it as a springboard to negotiate a plea bargain and get the charges against his clients reduced. He chose the riskiest option. By going public, he secured a few days of sensational headlines alleging corruption in high places, but he openly denigrated the district attorney who would be prosecuting his clients and attacked the system that would be deciding their fate. It was as if the former defender of Wobblies was still strategizing for the I.W.W., as if he thought that making the system look bad would make his clients look good.

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6. KATE HOLLADAY CLAGHORN, THE IMMIGRANT'S DAY IN COURT 123, 129-133, 206. (Arno Press 1969) (1923).

7. FRANCIS RUSSELL, TRAGEDY IN DEDHAM: THE STORY OF THE SACCO-VANZETTI CASE 121 (McGraw–Hill 1962).

The decision backfired. We "put the Massachusetts court on trial in a Massachusetts court," Felicani said later. "Judge Thayer never forgave us. We sealed, at [Mrs. DeFalco's] trial, the fate of Sacco and Vanzetti."[8]

## DOCKET NOS. 5545 AND 5546

The joint trial of Sacco and Vanzetti got underway in the midst of a blistering heat wave on May 31, 1921, in Norfolk County Superior Court in Dedham.

In the first few days of the trial, before a single syllable of opening statements was uttered, Judge Webster Thayer revealed such a visceral antipathy to Fred Moore that it would become the stuff of legend.

According to Aldino Felicani, Moore originally was supposed to take charge of pre-trial preparation only; local lawyers (and brothers) Jeremiah and Thomas McAnarney were going to handle the courtroom work. "But when the trial started," Felicani said, " . . . the McAnarneys were pushed into [the background]."[9]

The McAnarneys were immediately troubled by "the pronounced difficulty of Judge Thayer and Mr. Moore getting along together." It seemed, Tom McAnarney later recalled, that whenever Moore addressed the court, "it was quite similar to waving a red flag in the face of a [bull . . . . His remarks] got under Judge Thayer's skin. Judge Thayer would respond by telling him that he might be practicing law outside in the West or in California, but not in Massachusetts." The McAnarneys consulted their brother John, and asked him to take over the case. John McAnarney was not available to do that, but he asked William Thompson, a highly respected Boston attorney, to do so. Tom and Jeremiah McAnarney told Thompson they would give him the fees they had already received and would stay on the case pro bono, if he could persuade Moore to withdraw.[10]

But Moore refused. The case "was his baby"; he would not relinquish it, lawyer Herbert Ehrmann later explained. "He was going to make a great name for himself . . . ."[11]

Observing the Thayer-Moore interplay in court, Thompson summed up his impressions for John McAnarney: "Your goose is cooked."[12]

During the trial it was the custom of reporters, lawyers, and the judge to walk to the Dedham Inn when court recessed for lunch. On these midday breaks

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8. CUOHROC: AF, *supra* note 4, at 78.

9. *Id.* at 91.

10. THE SACCO-VANZETTI CASE, TRANSCRIPT OF THE TRIAL OF NICOLA SACCO AND BARTOLOMEO VANZETTI IN THE COURTS OF MASSACHUSETTS AND SUBSEQUENT PROCEEDINGS, 1920-1927, vol. 5, 4992, 5047-49 [hereinafter TRANSCRIPT].

11. Interview by Livia Baker with Herbert Ehrmann (June 3, 1968) (Harvard Law School Library, Herbert B. Ehrmann Papers, Box 7, Folder 11).

12. TRANSCRIPT, vol. 5, *supra* note 10, at 4992.

Thayer often spoke about the case to reporters. Walking back to the courthouse after lunch one day during the first week of the trial, he "proceeded to discuss Attorney Moore," *Boston Globe* reporter Frank Sibley later recalled. "This subject seemed to excite him considerably and . . . he exclaimed, 'I'll show them that no long-haired anarchist from California can run this court!'" Reporter (and defense supporter) John Nicholas Beffel also recalled Thayer expressing his anger during the first week—at the Italian government for sending a diplomatic offical to observe the trial, at Moore for objecting to the method of enlarging the jury pool, and at the defense in general for claiming a fair trial was impossible. According to Beffel, Thayer told the reporters in the restaurant, "You wait till I give my charge to the jury. I'll show 'em!"[13]

Why did the attorney annoy the judge so profoundly?

Moore was an unconventional, radical lawyer from out of state whose previous professional experience had been with a controversial, militant labor union, an organization that the conservative Thayer surely despised. Now, on the judge's home turf, Moore was defending lawbreakers—if not murderers, then draft dodgers and anarchists. (The Anarchist Exclusion Act of 1918 had prohibited anarchists from coming to the United States and authorized the deportation of those already here.)

Moore's personal life was also controversial. "He was an unstable man," said Roger Baldwin, founder of the American Civil Liberties Union. "He had plenty of women," recalled Aldino Felicani, who also thought Moore "was using morphine, or something like that." In court Moore defied propriety, occasionally shedding his suit jacket, his vest, even his shoes because of the heat. Moore was, in the words of Herbert Ehrmann, "singularly inept at accommodating himself to local conditions and procedures."[14]

Perhaps more than anything else, the antipathy was based on Thayer's wounded professional pride. Moore had been working to create a pro-defense buzz before the trial in Dedham even began. It was Moore who was behind a magazine article criticizing the conduct of Vanzetti's prior trial, as well as a pamphlet specifically attacking Thayer for his conduct there. In addition it was Moore who, by his actions in the Angelina DeFalco case, publicly challenged the integrity of the system that Thayer represented.

Tom McAnarney, who was at the trial every day and who later became a judge himself, came to believe that Thayer simply "couldn't conduct a trial fairly with Attorney Moore on the other side."[15]

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13. *Id.* at 4924, 4929-30.

14. PEGGY LAMSON, ROGER BALDWIN: FOUNDER OF THE AMERICAN CIVIL LIBERTIES UNION 171 (Houghton Mifflin 1976); CUOHROC: AF, *supra* note 4, at 109; HERBERT EHRMANN, THE CASE THAT WILL NOT DIE: COMMONWEALTH VS. SACCO AND VANZETTI 154 (Little Brown 1969).

15. TRANSCRIPT, vol. 5, *supra* note 10, at 5061.

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The trial of Sacco and Vanzetti lasted seven weeks. Fred Moore was unofficially in charge of the defense team, which also included William Callahan and Tom and Jeremiah McAnarney.

Moore stumbled into an unforced error early on. Lola Andrews was a witness for the prosecution who had placed Sacco in South Braintree a few hours before the crime. Moore, oblivious to what he was doing, led her into describing an earlier promise she said he had made to give her a new job and a vacation, apparently as a bribe for favorable testimony (a claim he ridiculed in his closing statement).

Over the defense's objections, the defendants' ethnicity, labor activism, draft dodging, and especially their radical political views were brought up repeatedly. Moore tried to mitigate the negative impact in his summation. He emphasized that, while the defendants' beliefs may have been "foreign" to most Americans, those beliefs were not evidence of guilt in South Braintree. He reminded jurors that many witnesses who had *not* identified Sacco or Vanzetti were "solid, substantial" American witnesses, witnesses of "English stock and Anglo-Saxon stock." He barely touched on the important ballistics evidence, mentioning it chiefly to regret that "the time has come when a microscope must be used to determine whether a human life is going to continue to function or not and when the users of the microscope themselves can't agree."[16]

On July 14, 1921, after deliberating for five hours, jurors found Sacco and Vanzetti each guilty of two counts of murder in the first degree.

Three months later, Frank Sibley sent a confidential letter to the Attorney General of Massachusetts, laying out examples of what he saw as Judge Thayer's bias and objectionable behavior. One of the examples Sibley cited was Thayer's attempt to belittle defense lawyers by speaking to them every day with an "intonation of contempt."[17]

## INFIGHTING

After the trial, Fred Moore remained a busy man. He hired investigators, collected affidavits, generated publicity, drummed up donations, and sought two new trials, one for both defendants and one for Vanzetti alone on his earlier conviction.

Yet the defense committee, especially Founder and Treasurer Aldino Felicani, was becoming increasingly dissatisfied with the erstwhile labor lawyer. The disagreements mostly concerned money.

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16. TRANSCRIPT, vol. 2, *supra* note 10, at 2124, 2128-29, 2147.

17. Letter from Frank Sibley to J. Weston Allen, Massachusetts Attorney General (Oct. 27, 1921) (on file in the Massachusetts Archives, AG1/Series 2062X, Attorney General's Office, Sacco and Vanzetti Case File, 1919-1976).

Early contributions to the defense committee had arrived in small amounts from Italian anarchists. With Moore's arrival, labor activists joined the cause, and money began coming in from union locals and workmen's circles. More contributions came from Elizabeth Glendower Evans, a well-connected Boston activist and staunch supporter of Sacco and Vanzetti, and other liberals in her orbit. A total of more than half a million dollars was collected from all sources during the seven years of the case, 1920–1927.[18]

Felicani controlled the purse strings. He kept meticulously itemized records of contributions and expenses, and was adamant about making them public. Moore opposed such transparency. Sacco, Vanzetti, and Rosina Sacco, Nick's wife, trusted Felicani implicitly. They sided with him on most matters, and the records were published.

Felicani believed that Moore was basically honest but wanted open access to funds to support a possible drug habit and to employ his friends as investigators or propagandists, and he insisted that Moore turn in expense accounts regularly. Felicani knew that Moore was working on motions for a new trial, yet he balked at bankrolling the investigations. For his part, Moore believed that members of the defense committee were honest but unimaginative, lacking the vision to see the broader implications of the case and to diversify their base of support.

In July 1922, after filing the first three supplementary motions for a new trial, Moore urged Felicani and the committee to form a policy for the future. In response, the committee told Moore that the "enormous sum of money" spent to date was a scandal, and that it was "time to come to a conclusion."[19]

It was the beginning of the end of Moore's tenure, but the long goodbye would drag on for two more years.

## TIME FOR A CHANGE

Fred Moore and William Thompson were both lawyers, but any similarity ended there. Moore was an outsider's outsider; Thompson, the ultimate insider: graduate of Harvard College and Harvard Law School, lecturer at the law school and member of the Harvard Club, senior partner in his law firm, and vice president of the Boston Bar Association. He was, in short, as Sacco put it, "a nice old Mayflower."[20]

Thompson had had a glancing familiarity with the Sacco-Vanzetti case from the start. As relations between Moore and the defense committee deteriorated,

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18. GARDNER JACKSON, REMINISCENCES OF GARDNER JACKSON 232, 255 (Columbia University Oral History Research Office Collection [hereinafter CUOHROC: GJ], 1955).

19. Letter from Emilio Coda to Fred Moore, Attorney (Aug. 11, 1922) (on file in the Boston Public Library, Felicani Collection, Ser. 4, Box 34, Folder 27).

20. CUOHROC: GJ, *supra* note 18, at 245.

Thompson was prevailed upon to assume more responsibilities. He did so cautiously, agreeing to work only on some motions.

Under state law, the judge who would rule on supplementary motions would be the same judge who had presided at the original trial. Hearings on a total of five motions got underway before Judge Webster Thayer on October 1, 1923.

Sacco, who was incarcerated at Dedham Jail, and Vanzetti, at Charlestown State Prison, were reunited in the courtroom for the duration of the hearing. Thompson's arguments impressed them. Vanzetti believed that he would have been a free man if Thompson had been in charge of the case from the start.

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Friction between Moore and the defense committee continued growing like a bad case of fungus. By one estimate Moore had personally raised at least one third of the defense money. Yet he had little control over how it was spent, and he thought the committee was wasting it by financing protest demonstrations instead of hunting for new evidence. For their part, committee members distrusted the "hocus-pocus of motions and affidavits."[21] They blamed Moore for all of the delays, unwilling to recognize that some were beyond his control.

In April 1924, Moore thought he had come up with a way to sidestep the conflict. He simply formed an alternative defense committee, dubbing it the Sacco-Vanzetti New Trial League. Stalwarts Elizabeth Glendower Evans and Alice Stone Blackwell supported it. A small group of Irish-American socialists, new to the cause, invigorated it. Other members came from several union locals, the New England Civil Liberties Committee, and the Communist Party of Boston.

Felice Guadagni, a member of the original defense committee, was a liaison to the New Trial League. He promised cooperation, but he couldn't deliver. The existence of two committees was an "impossible situation" for Aldino Felicani. Moore "had to go," he said. "I wouldn't tolerate anything like that . . . . [W]e [on the original committee] knew Sacco and Vanzetti and they didn't."[22]

For Sacco, Moore's perceived duplicity was the last straw. In August 1924, the prisoner erupted in a bitter blast of anger and threats, firing off a letter to demand that Moore stop using Sacco's name in association with the New Trial League, and charging the lawyer with dragging out the case to make more money.

The battle of the dueling committees was brief. The New Trial League dissolved after a few months, and its members joined or rejoined the original defense committee.

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21. LYONS, *supra* note 2, at 35.
22. CUOHROC: AF, *supra* note 4, at 106-07.

## DENIALS AND REPRIMANDS

On October 1, 1924, one year to the day after the start of hearings on the five supplementary motions, Judge Thayer denied all of them. Then he went further, and reprimanded Moore.

One of the motions for a new trial argued that eyewitness Carlos Goodridge's identification of Sacco should be discredited because new evidence showed that Goodridge was a perjurer, a thief with a criminal record in New York, a fugitive from justice living under an assumed name, and a man violently prejudiced against Italians. Thayer ruled that Goodridge's prior criminal convictions could not have been used because they were too old, that Goodridge's use of an assumed name was "immaterial," and that in any case the defense had already "successfully impeached" Goodridge's "reputation for truth and veracity" at the trial. Thayer then addressed a matter "exceedingly unpleasant to me," and accused Moore of invading Goodridge's rights and attempting to smear the office of the district attorney. (Moore had tracked Goodridge to Maine, had him detained at police headquarters there for two nights without authorization, and threatened him with arrest under an old indictment in New York unless he admitted that he had made a deal with the district attorney to identify Sacco in Dedham in return for some benefit.)

"I have tried to look at this conduct of Mr. Moore with a view of finding some justification or excuse of it," Thayer continued, "I can find none."[23]

In the matter of another motion for a new trial, the so-called Andrews motion, Thayer found that Lola Andrews's retraction of her identification testimony of Sacco had "beyond doubt" been obtained through Fred Moore's "fraud, intimidation, coercion and duress" and "should not receive any consideration whatever in a court of justice." (Moore had located Andrews's teenage son in Maine, brought him to Boston, and staged a late-night confrontation where the son, Moore, and two associates took turns pressuring Andrews to retract her "terrible lie" and threatening to release "damaging evidence" about her past if she refused.) Moore's unprofessional conduct was an attempt to "defeat and take away the rights of the Commonwealth." While the judge regretted being compelled to criticize Moore, he said the attorney "has no one to blame but himself . . . ."[24]

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William Thompson had been dragging his feet about making a full-time commitment to the Sacco-Vanzetti case. Defense committee members now begged him to help. To get off the hook, he agreed to take the case for twenty-five

23. TRANSCRIPT, vol. 4, *supra* note 10, at 3891.
24. *Id.* at 3951-59.

thousand dollars up front, a demand he expected they would be unable to meet. To his surprise, they raised the money and presented him with a check.

And with that, Fred Moore drove off into the sunset.

To his admirers, he had been a "brilliant lawyer, quixotically devoted and self-sacrificing." His work had been heroic; his mistakes, exaggerated. He "subordinated . . . legalistic procedure to the larger needs of the case as a symbol of class struggle." If he had not done so, Sacco and Vanzetti would have died six years earlier [than they did], without the solace of martyrdom."[25]

In the parallel universe of his detractors however, Moore's approach had been a "grave error," and the defendants' martyrdom, a meaningless reward. Sacco for one "had no ambition to be a martyr. He wanted to go home . . . to his wife, his children and his job."[26]

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Sacco and Vanzetti had proclaimed their innocence repeatedly during their seven-year ordeal. But all of their attempts to win a new trial failed, and they were sentenced to death on April 9, 1927. Four months later, on August 23, 1927, they were executed in the Massachusetts electric chair, amid worldwide protest.

Would the outcome of the Sacco-Vanzetti case have been different if someone else—a mainstream lawyer at the top his game, a respected member of the Massachusetts bar—had been in charge of the defense from the beginning, instead of the outsider Moore, a radical defense lawyer who had been dismissed from his previous job for incompetence? A different lawyer might have effectively challenged the ballistics evidence. He might have better explained to the jury the prosecution's tactics for confusing alibi witnesses. He might have insisted on using an interpreter from the beginning to avoid misunderstandings, and he might have figured out how to keep evidence of Sacco's good character on the record (it was stricken, in order to keep mention of Vanzetti's prior conviction off the record). A different lawyer might have refrained from politicizing the case long before it went to trial, and almost surely would have provoked less antagonism on the part of the presiding judge.

A different lawyer might have done many things differently, but whether or not that would have resulted in a different outcome is unknowable.

## SHIFTING STORIES

As time passed, and the case grew older and colder, hearsay and rumor superseded evidence. It began most famously when Fred Moore told Upton Sinclair

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25. LYONS, *supra* note 2, at 13, 32.

26. CUOHROC: GJ, *supra* note 18, at 235; Mary Donovan, No Tears For My Youth (unpublished autobiography) (on file with Lilly Library, Indiana University: Hapgood Collections).

that he had come to believe that Sacco, and perhaps Vanzetti, had been guilty all along.

Moore never spoke publicly or wrote about this. He relayed his doubts in a conversation with Sinclair, whom he met when the writer was researching *Boston*, his documentary novel about the case. Moore had told William Thompson in 1923 that he believed "strongly" in his clients' innocence, but in 1927 he told Sinclair that "he had come reluctantly to the conclusion that Sacco was guilty of the crime for which he had died and that possibly Vanzetti also was guilty." Moore offered no reason for his change of opinion other than to say that some anarchists raised money by stealing, and that criminal lawyers succeeded by "inventing alibis and hiring witnesses." Moore conceded that neither the defendants nor their friends had ever admitted the slightest hint of guilt.[27]

Sinclair next interviewed Moore's ex-wife, who was "astounded" at Moore's assertion of his clients' guilt. "Fred is embittered because he was dropped from the case, and it has poisoned his mind," Lola Moore told Sinclair. William Thompson telegraphed Sinclair that Tom McAnarney "trustworthy and well informed emphatically contradicts Moore's confession to you."[28]

Why might Moore have changed his mind? He had lost a high-profile case, and been fired. He had been publicly reprimanded by the judge. His legal career had tanked. He did have ample reason to be embittered, as his ex-wife said.

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After William Thompson took over the Sacco-Vanzetti defense in 1924, Fred Moore left Boston. He had a few hundred dollars of borrowed money in his pocket and, on the back seat of his car, stacks of novelty signs for license plates that he planned to sell along the highway. Moore was reported to be in New York in 1925; in Colorado in 1927. How he supported himself is unclear. "He had no more law practice; for a while he eked out a miserable existence selling law books . . . . [He lived] in a 'little hotel room.'"[29]

By 1931 Moore was living in California, where he made a public appearance in San Francisco at a meeting of radicals. In 1933, at the age of 51, Fred Moore died of cancer at his mother's home in Los Angeles.

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27. Letter from Fred Moore, Attorney, to William Thompson (June 29, 1923) (on file with Boston Public Library, Felicani Collection, Ser. 4, Box 35, Folder 26); Upton Sinclair, *The Fishpeddler and the Shoemaker*, *in* 2 INST. SOC. STUD. BULL. 24 (Summer 1953).

28. Sinclair, *supra* note 27, at 24; Letter from William Thompson to Upton Sinclair (June 23, 1928) (on file with Harvard Law School Library, Ehrmann Papers, Box 14, Folder 16).

29. Letter from Michael Musmanno, Attorney to Aldino Felicani (Apr. 6, 1962) (on file with Boston Public Library, Felicani Collection, Series 6, Box 54, Folder 56).

Moore's early successes on behalf of the I.W.W. had long ago been eclipsed by his failure in Boston. He died in obscurity, his passing unnoticed except for a short memorial tribute in an anarchist monthly.

If Moore could have spoken on his own behalf, he might have echoed the courtroom remarks of George Vanderveer, his former I.W.W. colleague. "I speak with feeling of [downtrodden] men," Vanderveer had said of one of his clients, "for I know what life can do to them."[30]

30. LOWELL S. HAWLEY & RALPH BUSHNELL POTTS, COUNSEL FOR THE DAMNED: A BIOGRAPHY OF GEORGE FRANCIS VANDERVEER 320 (J.B. Lippincott Company 1953).

# *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*: Gaining the Court's Except-ance

Nathan Ellsworth

## Introduction

The First Amendment has been essential to the protection of religious freedom in the United States. In 2012, the Supreme Court for the first time recognized the ministerial exception, which has long been used by appellate courts to help ensure that this freedom is not encroached upon. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court unanimously held that the ministerial exception applies to a teacher at a religious school, allowing the school to fire ministers without being held liable for a violation of the Americans with Disabilities Act (ADA).[1] The Court said it was not competent to question why a religious organization would fire a minister, because this would violate the Religion Clauses of the First Amendment that say, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2] Much of the focus of the Court's opinion was centered on determining what qualifies as a "minister" within the ministerial exception. However, this inquiry has taken the Court on a foray into church doctrine that may affect how religious organizations are structured, effectually inhibiting the free exercise of religion.

In order to make sure they are staying within the ministerial exception, religious organizations may reasonably structure themselves in a more traditional or regimented fashion so that their ministers are more in line with what the Court deems to be "ministers." Some religious organizations may even change their focus so the duties of their ministers seem more religious to the popular sensibility. At the same time that the Court has used the ministerial exception to give religious organizations the independence required of the First Amendment, the Court has become tangled in deeply theological questions by inquiring into the classification of ministers.

## History of the Ministerial Exception

The ADA makes it illegal for an employer to discriminate against an employee based on a disability. "It also prohibits an employer from retaliating against any individual because such individual has opposed any act or practice

1. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 709-10 (2012).
2. *Id.* at 702.

made unlawful by the ADA or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA."[3] On the other hand, the First Amendment "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers."[4]

Prior to this case, the Supreme Court never had occasion to consider the ministerial exception. However, after the passage of Title VII of the Civil Rights Act of 1964, "the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception' . . . concerning the employment relationship between a religious institution and its ministers."[5] Since the government cannot force a religious organization to hire or retain ministers, the ministerial exception exempts religious organizations from employment discrimination laws regarding who they choose as their ministers. For example, whereas most employers cannot discriminate based on sex, the ministerial exception prohibits the government from "compel[ling] the ordination of women by the Catholic church or by an Orthodox Jewish seminary."[6]

## FACTS OF THE CASE

At the time of this litigation, Defendant Hosanna-Tabor Evangelical Lutheran Church and School, a member of the Lutheran Church-Missouri Synod, operated a school offering a "Christ-centered education."[7] At its kindergarten through eighth grade school, the teachers were divided into two classifications: *Called* teachers and *Lay* teachers.[8] "'Called' teachers are regarded as having been called to their vocation by God through a congregation."[9] Being called required that the teacher had taken theology classes and an oral examination and was commissioned by the congregation. A called teacher's official title was "Minister of Religion, Commissioned," and the teacher could have the call "rescinded only for cause and by a supermajority vote of the congregation."[10] All teachers who were not called teachers were lay teachers. Lay teachers did not have to be Lutheran or receive recognition by the congregation. They were hired for one-year renewable terms, and only when called teachers were unavailable.[11]

Plaintiff Cheryl Perich was a called teacher at Hosanna-Tabor. She taught general subjects such as math and reading, and also led the students in prayer,

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3. *Hosanna-Tabor Evangelical Lutheran Church & Sch.,*132 S.Ct. at 701.
4. *Id.* at 702.
5. *Id.* at 705.
6. *Id.* at 706.
7. *Id.* at 699.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 699-700.

took them to chapel, and led the chapel service twice a year.[12] After Perich became sick with narcolepsy and was on leave for half a school year, Hosanna-Tabor offered Perich a "peaceful release from her call."[13] Perich refused to resign, and later threatened to sue. Hosanna-Tabor sent Perich a letter of termination for "insubordination and disruptive behavior" and rescinded her call.[14]

## PROCEDURAL HISTORY

Perich filed a claim with the Equal Employment Opportunity Commission (EEOC) for termination in violation of the ADA.[15] The EEOC filed suit against Hosanna-Tabor for retaliatory discharge, and Perich filed a claim for unlawful retaliation under the ADA and the Michigan Persons with Disabilities Civil Rights Act.[16] Hosanna-Tabor moved for summary judgment, invoking the ministerial exception. Hosanna-Tabor claimed that Perich was fired for religious reasons, having violated the church's belief in "resolv[ing] their disputes internally" by threatening to sue in civil court. Summary judgment was granted for Hosanna-Tabor.[17]

On appeal, the Sixth Circuit Court of Appeals vacated the summary judgment and remanded for the district court to proceed on the merits of Perich's claims.[18] The Court of Appeals recognized the existence of the ministerial exception, but said that Perich did not qualify as a minister, "noting in particular that her duties as a called teacher were identical" to the duties of a lay teacher.[19] The Court of Appeals used the "primary duties" analysis, and concluded that Perich's duties as a teacher consisted primarily of teaching secular subject matter.[20] The Supreme Court granted certiorari.[21]

## THE SUPREME COURT'S OPINION

The first issue before the Supreme Court was whether the ministerial exception bars an action of wrongful termination "when the employer is a religious group and the employee is one of the group's ministers."[22] Secondly, if the ministerial exception was found applicable, the Supreme Court had to deter-

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12. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S.Ct. at 700.
13. *Id.*
14. *Id.*
15. *Id.* at 701.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778 (6th Cir. 2010).
21. *Hosanna-Tabor Evangelical Lutheran Church & Sch.,*132 S.Ct. at 702.
22. *Id.* at 699.

mine if Perich qualified as a minister.[23] All nine justices joined in Chief Justice Roberts' opinion and judgment. Justice Thomas also wrote a separate concurring opinion, and Justice Alito wrote another concurring opinion with which Justice Kagan joined.

The Court found that the Establishment and Free Exercise Clauses of the First Amendment do not allow discriminatory termination suits to be brought against a religious organization by its ministers.[24] Looking into the history of the First Amendment, the Court determined that one of its main purposes was to stop the government from interfering with the selection of religious organizations' ministers.[25]

The Court then looked at whether Perich was a minister within the meaning of the ministerial exception.[26] In its application, the Court said that every Court of Appeals has concluded that the ministerial exception is not limited to the head of a religious congregation.[27] The Court was reluctant to establish a "rigid formula" because it was enough to decide whether Perich qualified as a minister.[28] Finding that Perich did qualify as a minister, the Court pointed to several factors that were persuasive, including that Hosanna-Tabor "held Perich out as a minister, with a role distinct from that of most of its members."[29] The title of "called" "represented a significant degree of religious training followed by a formal process of commissioning."[30] Perich also "held herself out as a minister," and received a housing tax break for ministers.[31] Perich indicated herself as a minister by stating, "I feel that God is leading me to serve in the teaching ministry . . . . I am anxious to be in the teaching ministry again soon."[32] Finally, Perich's duties indicated "a role in conveying the Church's message and carrying out its mission."[33]

The Court said that Perich's title alone did not qualify her for the ministerial exception, but her ordination was "surely relevant." The Court of Appeals was wrong to say that the title does not matter, and it gave too much weight to the fact that lay teachers "performed the same religious duties as Perich."[34] The Court of Appeals placed "too much emphasis on Perich's performance of secular duties," pointing out that religious duties only consumed forty-five minutes of her seven hour workday. The Court said that almost all religious ministers

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23. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S.Ct. at 707.
24. *Id.* at 705-06.
25. *Id.* at 703.
26. *Id.* at 707.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 707-708.
32. *Id.* at 708.
33. *Id.*
34. *Id.*

do some secular duties, so this is not an accurate standard by which to measure.[35]

The Plaintiffs argued that Hosanna-Tabor's religious reason for firing Perich was merely a pretext.[36] The Court determined that whether Hosanna-Tabor's religious reason for firing Perich was "pretextual" is beside the point. The ministerial exception gives a religious organization the power to fire a minister without the government questioning its motivation. The Court was unwilling to consider the legitimacy of Hosanna-Tabor's claim that its doctrine valued internal dispute resolution, because the Court would have been forced to make a judgment about how important certain beliefs are to a religious organization. If the Court determines that someone is a minister, it will not look into the reason for firing as long as retaliatory discharge was claimed.[37] The Court expressed no opinion about how it would apply the ministerial exception to other types of claims.[38] Because the Court found that Perich was a minister falling within the ministerial exception, the Court's inquiry could go no further.

Justice Thomas' concurring opinion found that the Court should "defer to a religious organization's good-faith understanding of who qualifies as its minister."[39] He said that if courts could "second-guess" a religious organization's "sincere determination" that someone is a minister, that organization's right to choose a minister would be undermined.[40] Thomas emphasized that "the question whether an employee is a minister is itself religious in nature."[41] Religions that are not in the mainstream could be disadvantaged by the Court's determination of who is a minister, and "uncertainty . . . may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding."[42]

Justice Alito's concurring opinion expressed concern about the use of the word "minister" in the law. He said that "minister," though not used in many religions, must be interpreted in a way that applies to all religions.[43] Alito stressed that the Court must focus on the functions of the person, looking to anyone who leads a religious organization or conducts worship.[44] There are certain functions that all ministers have in common that are "essential" to relig-

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35. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S.Ct. at 708-09.
36. *Id.* at 709.
37. *Id.*
38. *Id.* at 710.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 711.
43. *Id.*
44. *Id.* at 712.

ious groups, and a religious organization's control over "employees is an essential component" of freedom of religion.[45]

## ANALYSIS OF THE CASE

Many religious organizations see this decision as a victory allowing religious liberty to proliferate without governmental interference.[46] It is true that Hosanna-Tabor Evangelical Lutheran Church and School won this case, and that the methods used in the Supreme Court's decision were less demanding upon Hosanna-Tabor than the analysis that was used by the Court of Appeals and subsequently overturned by the Supreme Court. However, the seeming victory still leaves a dark underbelly that allows for the government to affect the structure of religious organizations, and even their theology, in a more soft-handed way.

The nexus of this case lies not in whether a ministerial exception should apply to a religious organization, but in what constitutes a minister under the ministerial exception. The Court was not willing to create a "rigid formula" for determining what a minister is, but merely laid out what it found significant in this case.[47] It noted that Hosanna-Tabor "held Perich out as a minister," that she was formally commissioned, and that her job duties "reflected a role in conveying the Church's message and carrying out its mission."[48]

The Court also found it significant that Perich "held herself out as a minister."[49] Among a list of ways this was established, the Court said that Perich "indicated that she regarded herself as a *minister* at Hosanna-Tabor, stating: 'I feel that God is leading me to serve in the teaching *ministry* . . . . I am anxious to be in the teaching *ministry* again soon' " (emphasis added).[50] Because Perich said she wanted to be in "ministry," the Court found this to illustrate that she "held herself out" as the type of minister required by the ministerial exception. But even writings from a theological convocation of the Lutheran Church-Missouri Synod, Hosanna-Tabor's denomination, acknowledge that "the terms 'ministry' and 'minister' " are often used to mean "every form of Christian service in the church . . . (e.g., 'ministry of music,' 'youth ministry,' or even 'my

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45. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S.Ct. at 713.

46. *See Unanimous Supreme Court Decision Is Good News for Religious Freedom,* COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES (Nov. 19, 2012, 9:24 PM), https://www.cccu.org/news/articles/2012/Unanimous-Supreme-Court-Decision-Is-Good-News-for-Religious-Freedom; Tim Dalrymple, *Hosanna-Tabor Ruling Gives Strong Protection to Churches on Employment,* WORLD MAGAZINE (Nov. 19, 2012, 8:37 PM), http://www.worldmag.com/2012/01/community_property.

47. *Hosanna-Tabor Evangelical Lutheran Church & Sch.,*132 S.Ct. at 707.

48. *Id.* at 707-08.

49. *Id.* at 707.

50. *Id.* at 708.

own personal ministry'),"[51] and though it may not be a preferable use of the word, "the Missouri Synod's [Commission on Theology and Church Relations] report accepts this wide usage of the term" ministry.[52] When Perich used the term "ministry," she may have been holding "herself out as a minister," or she may have been referring to her "own personal ministry." Ultimately, this is a clearly theological question on which the Court should not express any opinion.

Rita Schwartz, the president of the National Association of Catholic School Teachers, has expressed concern for employees of religious organizations because many are unsure whether they are considered ministers within the definition of the Court.[53] The Court's attempt to illustrate what a minister is without any clear precision could reasonably cause religious organizations to try to make their structures more regimented or "mainstream" to make sure they are staying within the ministerial exception, as Justice Thomas suggests in his concurrence.[54] For instance, after this decision was announced, the National Association of Independent Schools advised parochial schools in the following way:

> [Schools] should consider whether they have policies and guidelines in place to help ensure a court will likely view them as a religious educational institution. They should look specifically at their hiring and admissions policies as well as their curricula. They should ensure that the school's religious purpose is clearly articulated in its governing documents and handbooks and that it adheres to them . . . . Schools should take time now to identify employees who perform a religious function central to the purpose of the school. Where there is uncertainty, schools should scrutinize their employment agreements, policies, and practices more generally to determine whether a legitimate religious purpose exists for positions which are not clearly religious in nature.[55]

Rather than giving religious organizations freedom from government interference, the Court is forcing religious organizations to divide staff into those who perform religious functions and those who perform secular functions. For many religious bodies, this structure may actually go against their doctrines. This could greatly affect the structures of religious organizations that traditionally have a loose structure. The Eastern District of Pennsylvania Court found that the position of "representative" at the Quaker United Nations Office was secu-

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51. Raymond Hartwig, *Contemporary Issues Regarding the Universal Priesthood, in* Church and Ministry, THE COLLECTED PAPERS OF THE 150TH ANNIVERSARY THEOLOGICAL CONVOCATION OF THE LUTHERAN CHURCH-MISSOURI SYNOD 185, 196 (1998), www.lcms.org/Document.fdoc?src=lcm&id=828.

52. John F. Brug, *Current Debate Concerning the Doctrine of the Ministry*, WISCONSIN LUTHERAN SEMINARY LIBRARY ESSAY FILE 1, 3 (1993), *http://www.wlsessays.net/files/BrugDebate.pdf.*

53. Jeff Karoub, *Supreme Court Ruling Confuses Religious Workers*, ASSOCIATED PRESS (Nov. 19, 2012, 10:33 PM), http://cnsnews.com/news/article/supreme-court-ruling-confuses-religious-workers.

54. *Hosanna-Tabor Evangelical Lutheran Church & Sch.,*132 S.Ct. at 711.

55. Michael Blacher & David Urban, *Say a Prayer for the First Amendment: The Ministerial Exception's Protections Against Employment Litigation*, National Association of Independent Schools 1, 12-13 (2012), http://www.nais.org/Articles/Documents/Ministerial_Exception_Article_Final2012.pdf.

lar, and not ministerial, "notwithstanding the assertion that the envoy's purpose was to give voice to Quaker values."[56] Because that case was decided prior to *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the court's analysis was somewhat different but still dealt with the same issue. In Quaker churches, just as in more hierarchical churches, the structural makeup is rooted in the religious organization's theology.[57] Under the Court's *Hosanna-Tabor* factors, if Quakers want their United Nations representatives to fall within the ministerial exception, the government has encouraged them to distinguish between ministers and non-ministers by forming more rigid structures than their theology may allow.

Amicus briefs in support of both sides of the argument expressed concern that the way the Court goes about determining who is a minister could actually compel religious organizations to assign more explicit religious duties to people who otherwise would not have them so that they fall within the ministerial exception.[58] If a doctor at a Methodist hospital was required to preach to his patients, would that doctor fall within the ministerial exception? If a yoga instructor incorporates Buddhist spirituality, would the exception apply to her? Amici curiae for Perich and the EEOC were concerned that a parochial school could "make everyone a minister by ensuring that each and every school employee, from the janitor to the bookkeeper to the P.E. teacher, leads a prayer at least once or twice during the school year."[59] It is not clear that the Court would consider once or twice a year sufficient, but the Court does concede that the issue cannot "be resolved by a stopwatch."[60] Amici curiae for Hosanna-Tabor were fearful that because courts are not competent to interpret religious doctrine they would give favoritism to those activities that are more tradition-

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56. Brief for Religious Organizations and Institutions as Amici Curiae Supporting Petitioner at 18, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553) (citing Leaphart v. Am. Friends Serv. Comm., No. 07-4919, 2008 U.S. Dist. WL 4682626, at *2 (E.D. Pa. Oct. 22, 2008)).

57. The Quaker Yearly Meeting of 1986 in London professed, "Our own experience leads us to affirm that the church can be so ordered that the guidance of the Holy Spirit can be known and followed without the need for a separated clergy." *Religions, Quakers*, BBC (Nov. 25, 2012, 4:44 PM), http://www.bbc.co.uk/religion/religions/christianity/subdivisions/quakers_1.shtml#h9. *See also* Fritz Tuttle, *Jesus Christ Established a Visible Church on Earth*, EWTN (Nov. 25, 2012, 5:03 PM), http://www.ewtn.com/faith/teachings/churb1.htm (explaining that the "Catholic Church . . . has a formal earthly structure established by Christ").

58. *See* Brief for Law and Religion Professors as Amici Curiae Supporting Respondents at 34, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553); *see also* Brief for American Bible Society et al. as Amici Curiae Supporting Petitioner at 29, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553).

59. Brief for Law and Religion Professors as Amici Curiae Supporting Respondents at 34, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553).

60. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.,*132 S.Ct. at 709.

ally "religious," not leaving room for religious organizations that emphasize "'teaching by example' over preaching."[61]

Thus, a "'ministerial exception' limited to sufficiently religious activities as perceived by a court . . . creates incentives for organizations to include more distinctly religious content in the duties of their leaders . . . even though the position would, ironically, be less faithful to the organization's religious tradition" of teaching by example.[62] This could pressure religious organizations into giving certain people religious duties that the people would otherwise not receive.[63] Rather than acting independently, religious organizations would be compelled to change their structures, reallocate responsibilities, and even create new religious duties so that their agents meet the Court's legal definition of a "minister."

A simple, very plausible example will suffice to illustrate this point. The Court did not express an opinion about whether lay teachers would be considered ministers at Hosanna-Tabor.[64] In the future, if enough called teachers are not available, a school like Hosanna-Tabor may decide that it would be better off making all lay teachers into called teachers so that they are all more likely to fall within the ministerial exception. The Court points out that Perich had to go through several classes of religious training and be formally commissioned by Hosanna-Tabor.[65] This appears to have been a fairly rigorous process. However, the Court is incentivizing religious organizations to make this type of process less rigorous to include more people as ministers. In the past, if a congregation was debating whether or not a person should be formally commissioned, the people may have discussed several things about the moral and spiritual quality of the person, and how well the person could convey the religious organization's message. Now the congregation will have a court-created incentive to commission a lay teacher to be a called teacher: if the teacher is not commissioned it is less likely that the religious organization will be protected by the ministerial exception. Without the Court's influence, perhaps the religious organization would have decided not to commission that person.

## CONCLUSION

While it is beyond the scope of this paper to defend an alternate method of determining to whom the ministerial exception should apply, Justice Thomas' proposition of "defer[ring] to a religious organization's good-faith understand-

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61. Brief for American Bible Society et al. as Amici Curiae Supporting Petitioner at 29, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553).

62. *Id*. at 29-30.

63. Brief for Religious Organizations and Institutions as Amici Curiae Supporting Petitioner at 19, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553).

64. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.,*132 S.Ct. at 709.

65. *Id.* at 699.

ing of who qualifies as its minister"[66] is a good place to start, and it puts an emphasis on religious organizations' independence in resolving religious matters. Thomas was correct that religious organizations that want the protection of the ministerial exception will likely be required to change their church structures and the duties of ministers in order to conform to what the courts are likely to consider those of a minister.[67]

The Supreme Court says that one of the First Amendment's goals is to allow religious organizations to independently deal with their internal affairs, so if the Court decides that someone is a minister, then that religious organization has the right to fire the person without the government interfering on grounds of discrimination. But who constitutes as a minister? The very nature of the question forces the soft-hand of government influence upon religious organizations and the doctrinal determinations that they make. This is an improper question for the courts to decide, especially while trying to uphold the free exercise of religion.

66. *Hosanna-Tabor Evangelical Lutheran Church & Sch.,*132 S.Ct. at 710.
67. *Id.* at 711.

# *Astrue v. Capato*: Implications for Posthumously Conceived Children

Andrew Chironna

## Introduction

The advancements in reproductive technologies have created the novel situation of a posthumously conceived child, conceived months and even years after the death of a parent. The rights and legitimacy regarding posthumously conceived children have been inconsistent across the varying state laws in the U.S. Much of the legislation that concerns the rights of all children were passed 60 to 70 years ago, when there was no possibility of a posthumously conceived child. However, the trend regarding these acts of legislation is to assume the original intent of the law passed. In the case of posthumously conceived children, the ability to inherit survivorship benefits from parents, a federal program, is determined by state law as a method of convenience.

The convenience of the court, however, comes at a cost of nationwide inconsistency. State law varies considerably. Some states specify that marriage ends at death, leaving the legitimacy of posthumously conceived children either explicitly denied or, at the very least, suspect. Beyond issues of legitimacy, the ability of a posthumously conceived child to inherit from and through their biological parent has recently become an issue of national significance, reaching the nation's highest court in March 2012.

The Supreme Court's unanimous ruling in *Astrue v. Capato* makes a posthumously conceived child's ability to inherit from their parent based solely on state law. This will result in disparate and inconsistent legal status imposed on these children throughout the country. Further claims similar to Capato are likely to arise regarding in vitro fertilization as techniques advance and become more common. As a result, individual states should specify the status of posthumously conceived children in their laws of intestacy to ease the burden of litigation on courts as well as encouraging responsible family planning.

## Background of the Social Security Act

Congress amended the Social Security Act in 1939 to create a safety net for family members of a deceased insured wage earner, including "child's insurance benefits."[1] To qualify for the benefits, the child must meet the Act's definition of child provided in section 416(e) of the Act: "The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild [with

1. 42 U.S.C. § 402(d).

certain conditions] and (3) . . . the grandchild or stepgrandchild [with certain conditions].[2] Section 416(h)(2)(A) further elaborates on the term 'child' within the Act: "In determining whether an applicant is the child or parent of [an] insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply the intestacy law of the insured individual's domiciliary State."[3] For applicants who do not meet these criteria, the Act also provides other ways to receive benefits, such as having the insured, before death, certify in writing that the applicant is their child.[4] In its notice-and-comment rulemaking, the SSA has interpreted these statutes with section §416(h) governing the meaning of child in §416(e)(1), meaning that the SSA has to look to state intestacy law as the primary means by which an applicant can establish 'child' status under §416(e) to gain child insurance benefits.

## FACTS OF THE CASE

In 1999, Robert Capato was diagnosed with esophageal cancer shortly after marrying his wife, Karen.[5] Fearing the treatment would leave him sterile, he chose to deposit sperm with a sperm bank where it was frozen and stored.[6] Despite the cancer treatment, Robert and Karen conceived naturally and gave birth to a son in August 2001.[7] Although the couple had expressed a desire for their son to have siblings, Robert's health deteriorated rapidly and he died in March 2002.[8]

The beneficiaries named in Robert's will included the son from his marriage with Karen as well as two children from a previous marriage.[9] Robert's will, which was executed in Florida, did not mention providing for any children conceived after his death, although Karen and Robert had told their lawyer they wanted any future offspring to be given equal importance with existing children.[10] Eighteen months after Robert Capato died, Karen gave birth to twins using Robert's frozen sperm.[11]

After the twins' birth, Karen claimed survivor's benefits for the twins, which was subsequently denied by the Social Security Administration.[12] The SSA stated that the twins would qualify for benefits only if the children could inherit through Florida intestacy law, as § 416(h)(2)(a) of the Social Security Act spec-

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2. 42 U.S.C. § 416(e).
3. 42 U.S.C. § 416(h)(2)(A).
4. 42 U.S.C. § 416(h)(3)(C)(i).
5. *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2026 (2012).
6. *Id.*
7. *Astrue*, 132 S. Ct. at 2026.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Astrue*, 132 S. Ct. at 2026.
12. *Id.*

ifies.[13] Since Robert was domiciled in Florida, the applicable Florida law states that a child born posthumously may inherit through intestate succession only if conceived before the parent's death, thus barring Karen and Robert's posthumously conceived twins from inheriting survivorship benefits through their father.[14]

## PROCEDURAL HISTORY

Karen brought an action for judicial review affirming that the twins, as the undisputed biological children of the decedent, satisfied the definition of "child" in §416(e), and were thus entitled to Social Security benefits.[15] The District Court for the District of New Jersey affirmed the agency's decision, stating that SSA's interpretation of 416(h)(2)(a) was the proper one and that Florida law, as applied, barred the Capato twins from inheriting survivor benefits because they were not conceived during Robert's lifetime.[16] The Court of Appeals for the Third Circuit reversed the District Court's decision, holding that "the undisputed biological children of a deceased wage earner and his widow" qualify for survivor's benefits without regard to state intestacy law.[17] The Court of Appeals determined that Section 416(e) of the Social Security Act decided the issue in defining a child as "the child or legally adopted child" of an individual.[18] In other words, the statute clearly means the biological child of a married couple.[19] The Supreme Court granted certiorari to resolve the issue of how to apply §416(h)(2)(a) of the Social Security Act as it relates the definition of "child."[20]

## THE SUPREME COURT'S OPINION

In a unanimous decision, the Supreme Court granted Chevron deference[21] to the Social Security Administration in their understanding of applying §416(h)(2)(a).[22] Justice Ginsburg delivered the opinion of the Court. The Court looked to the original legislative aim of the Social Security Administration in creating a program to provide dependent members of a wage earner's family with protection against the hardship caused by the loss of an insured's

13. *Id.*
14. Fla. Stat. Ann. § 732.106.
15. *Astrue*, 132 S. Ct. at 2026.
16. *Id.*
17. *Id.* at 2027.
18. *Id.*
19. *Astrue*, 132 S. Ct. at 2027.
20. *Id.*
21. "Chevron deference" references the holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). The term has since been used by the courts to mean the deference given to an administrative agency's interpretation of a statute that it administers.
22. *Id.* at 2033-34.

earnings. The SSA's longstanding interpretation of the issue of what types of dependents may inherit has long been available in the published regulations after notice-and-comment rulemaking.[23] Therefore, the Court concluded that the SSA's ruling was neither "arbitrary or capricious" in its longstanding policy of what kinds of children may inherit.

Capato claimed that 416(e)'s definition of "child" applied to her twins in ensuring that the legislation covered their survivor benefits and that 416(h)(2)(A) only applied when a claimant's status as the decedent's child was in question.[24] Since there was no question that the twins were Robert's, 416(h)(2)(A) did not apply. However, this interpretation would mean that 416(h) only applies when the status of the family status of the child needs to be determined, as the caption of 416(h) specifies.

The Court reasoned that there was no Congressional intent to include only the children of married parents under the act's coverage.[25] The Social Security Act also covers stepchildren, illegitimate children, and adopted children. Further, there is also no evidence to suggest that Congress meant 416(e) to mean "biological parents" to be a prerequisite to "child" status under the provision, since in 1939 there was no scientifically proven biological relationship between a child and father.[26] Therefore, the Court concluded that 416(h)(2)(A) is a supplement to the sparse definition of child offered in the 416(e) that is cross-referenced and should be analyzed in tandem in the Act's application of child insurance benefits.[27]

Because 416(e) did not apply to the Capato twins, the District Court correctly applied Chevron deference to the Social Security Administration in affirming that §416(h)(2)(a) correctly decided the issue with the applicable state law. Further, the Court also held against the second claim from Capato that §416(h)(2)(a) does not apply to 416(e) because there is no cross-reference. The Court held that a cross-reference in this case would be redundant and was not necessary. Earlier versions of the act with provisions to determine spouses and parents similarly had no cross-references.[28]

In upholding the decision to leave the issue to state law, the Court cited the benefit of state law as a workable substitute for a burdening case-by-case determination of whether a child was dependent on his or her parent's earnings. The SSA has applied the law in this manner for the past seventy years in holding

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23. *Astrue*, 132 S. Ct. at 2034.
24. *Id.* at 2029.
25. *Id.*
26. *Id.* at 2030.
27. *Astrue*, 132 S. Ct at 2030.
28. *Astrue*, 132 S. Ct. at 2031.

that all applicants for child survivor benefits satisfy §416(h), which leaves the determination to state intestacy law.[29]

The Court also noted the absence of qualifying time limits in the Third Circuit's ruling regarding the inheritance rights of posthumously conceived children. Establishing such a rule runs contrary to the legislative intent of the Social Security Act. The aim of the legislation was to provide for "dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings," not to have a program benefitting generally needy persons.[30]

## ANALYSIS AND IMPLICATIONS

Astrue v. Capato's unanimous holding affirms the Social Security Administration's determination that state intestacy laws are the primary determinant of whether a posthumously conceived child can receive survivor benefits from their parent's wages. The Court found the use of state law for a federal benefit acceptable based on not only the longstanding policy of the Social Security Administration but also because of state law used to define other terms in the Act, such as "wife" and "widow."[31] The inclusion of a single mandate to use state intestacy law guards against the congressional encroachment of family relations, which has been traditionally within the realm of state-law.

The Court's rationale further advocates use of state law in the legislation's original purpose of legislating for the generality of cases.[32] The Court reached this conclusion while acknowledging the differences of outcome depending on the state where the decedent was domiciled. Some states, such as California and Colorado, have specifically provided for posthumously conceived children to inherit. While there will be some situations where the intestacy criterion gives benefits to some children outside the Act's central concern, the criterion acts as a workable substitute for the burdensome analysis required to determine whether a child was, in fact, dependent on the parents' earnings.

Because the issue is now firmly within the control of state intestacy laws, the states that remain silent on the inheritance rights of posthumously conceived children should create legislation that addresses the situation. With reproductive technologies improving, the issue will continue with increased litigation. Thirteen states have laws that specifically allow posthumously conceived children to inherit in cases where there is no will. Four states specifically do not allow posthumously conceived children to inherit. The remaining states leave

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29. Kristine Knaplund, *Argument preview: Who is a decedent's "child"?*, SCOTUSBLOG (Mar. 14, 2012, 11:20 AM), http://www.scotusblog.com/2012/03/argument-preview-who-is-a-decedents-child/.

30. *Astrue*, 132 S. Ct. at 2032.

31. *Id.* at 2031.

32. *Astrue*, 132 S. Ct. at 2032.

the issue to their courts to determine who is a "child" entitled to inherit under state intestacy law.

It is in these states' interest to address posthumously conceived children in their intestacy laws. Similar to the Court's ruling, legislation would act as a workable substitute for determining inheritance rights and avoiding burdensome litigation in the state courts. Further, by having individual states address the novel issue of posthumously conceived children, different legislation and solutions will be offered as examples of what works and what fails in accomplishing the legislative purpose of the state.

In exploring the interests of the state, past examples of how a state court analyzed the issue are particularly helpful. In Woodward v. Commissioner of Social Security, Massachusetts considered the competing interests of the state, the decedent and the child.[33] By considering the interest of children, a legislature can evaluate the ways in which treating posthumously conceived children may become stigmatized by the manner in which they were conceived. In Massachusetts, the public policy of the state was to entitle all children the same rights and protections of the law regardless of the "accidents of their birth."[34]

Another interest considered in Woodward was the orderly administration of estates.[35] This potentially would include the legislation's requirement of a certification of filiation between the decedent and the child as well as establishing a limitations period on bringing claims against an intestate estate. The final interest considered by Massachusetts in Woodward was the right of the decedent to their reproductive wishes.[36] Uncertainty on the decedent's wishes regarding the use of stored gametes is likely to complicate the balancing of interests since modern techniques can keep sperm viable for up to ten years. The court in Woodward put the burden on the surviving spouse to prove the genetic connection to the decedent as well as the decedent's consent to the use of their gametes in assisted reproduction.

The court in Massachusetts engaged in this process because of the absence of a legislative directive determining the children's ability to inherit from their father's estate. While the analysis of the court is helpful, a legislature should engage in this process to address the growing issue of children conceived with assisted reproductive techniques. If there had been a legislative directive, the likelihood of going to court would decrease.

In another state's efforts, Louisiana amended its statute in 2003, adding the clause giving posthumously conceived children "all rights, including the capacity to inherit from the decedent, as the child would have if the child had been in

33. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 265-69 (2002).
34. *Id.* at 265.
35. *Id.* at 266.
36. *Id.* at 268.

existence at the time of the death of the deceased parent."[37] The legislation simultaneously balanced the rights of the child, the state and the decedent by granting the child's inheritance rights but also subjecting them to conditions that prevent encroachment on the rights of the decedent and state.[38] The time limitation within which a posthumous child has to be born to attain legal status was lengthened from one year to three years.[39] This factors in the state's interest in the timely administration of estates, since estates often take longer than three years to settle.[40]

However, Louisiana's legislation is not perfect and does have areas that are not adequately addressed. The act only applies to the children of married couples and the requirement of the decedent's written consent does not adequately consider whether the decedent preserved gametes as a last-minute decision.[41] Despite its flaws, the legislation from Louisiana should serve as a model to other states to address the issue of posthumously conceived children to ease the burden of litigation on state courts.

## CONCLUSION

With all nine justices voting in favor of the SSA's application of §416(h)(2)(a), the ability of posthumously conceived children to inherit is firmly within the control of state intestacy law. States that are silent on the inheritance rights of posthumously conceived children should draft legislation balancing the interests of the child, the state and the decedent. As a guide, state legislatures should look to the examples of state courts for their analysis of balancing the various interests of the state with the posthumous interests of the decedent and the inheritance interests of posthumously conceived children. By addressing the issue in a state's intestacy laws, the need for a burdensome case-by-case litigation will decrease and the surviving spouses may engage in responsible family planning.

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37. La. Rev. Stat. Ann. § 9:391.1.

38. Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 629 (2004).

39. *Id.*

40. *Id.*

41. *Id.*

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