

At the patient's bedside? Considerations on the methods of comparative law.

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SUMMARY: 1 An expected foreword. - 2. Comparative law as a critical understanding of the law: the fight against positivism. - 3. Structuralism and dissociation of legal formants. - 4. Functionalism and operational analysis. - 5. Continuation: economic analysis of law and comparative law. - 6. The hermeneutical perspective and post-modern comparative law. - 7. Moving beyond hermeneutics: institutional analysis and legal pluralism. - 8. Dissociation between methods and principles.

1. When discussing comparison methods, one of the most notable books of comparative law repeats a well-known saying, wherein sciences which examine their methods too closely are diseased sciences ¹.

Now it is well known that, at least in Italy, the opposite is the case. The lively debate on comparative law methods during the 1980s was very useful, not least because it brought the subject to the forefront at the academic level. This was not lost to scholars in Roman Law, worried as they were – like comparative lawyers – about the uncertain future of their subject, when trying to theorise about the construction of European law.

Comparative lawyers have not always been ready and willing to discuss their methods. But nowadays this debate has become slightly *démodé*, at least

¹ K. Zweigert and H. Kötz, *Introduzione al diritto comparato* (1984), Vol. 1, Milan, 1992, p. 35.

when compared to the discussion of Roman Law. There are even those who say that the desire to participate in setting up European law is the current agenda of the comparative lawyers².

Furthermore, not speaking about methods does not mean the subject is any less important. It cannot be otherwise: methods – just as much as any other areas of study – are chosen according to the various cultural aims of the research carried out.

Not stating this is not really a symptom of disease, although it is probably not a sign of good health either. This is the underlying belief, which I shall expound in this paper. I hope to be able to exorcise the so-called disease, and that my words do not show symptoms of the disease itself.

2. Comparative lawyers usually describe their field by providing detailed lists of the many purposes for which it may be used. These areas are usually brought together by a desire to unify international law, according to the forms and contents identified on the basis of current methodological and political standards³.

Many scholars have criticised this. They say that the purposes of comparison traditionally identified in the literature may only be considered after considerable results have been obtained. However, they go on to say, the purpose of comparative law is simply to reach a better understanding of law itself⁴.

The idea that comparative law may be defined by referring to merely cognitive purposes must be understood in the light of an additional affirmation, *i.e.* that the subject has a "destructive"⁵ or "subversive" function in terms of the effects produced upon theoretical orthodoxy⁶. This function can be translated into a struggle against mental habits brought about by the implicit or explicit

² M.R. Marella, *The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law*, in 12 *Eur. L. Journ.*, 2006, p. 78 *et seq.*

³ E.g. M. Ancel, *Utilità e metodi del diritto comparato* (1971), Naples, 1974, p. 15 *et seq.*

⁴ A. Gambaro, P.G. Monateri and R. Sacco, *Voce Comparazione giuridica*, in *Digesto civ.*, Vol. 3, Turin, 1988, p. 51.

⁵ B. Markesinis, *The Destructive and Constructive Role of the Comparative Lawyer*, in *RebelsZ*, 1993, p. 438 *et seq.*

⁶ H. Muir Watt, *La fonction subversive du droit comparé*, in *Rev. int. dr. comp.*, 2000, p. 503 *et seq.*

agreement of many supporters of internal law with the tenets of positivism, a creed which many comparative lawyers place on the same level as a belief in Father Christmas⁷.

If one takes several assumptions of positivism as one's starting point, it is difficult to understand the reasons for its differences from comparative law. Indeed, positivism challenges the approach used by the supporters of rational, natural law, and aims at proving that the only purpose of study is the study of law as it exists in reality, leaving aside the consideration of any ideals⁸, such as laws based upon human will (rather than laws whose source lies elsewhere).

Moreover, the reasons for convergence between positivists and comparative lawyers are only a *façade*. Ideas about the actual meaning of law based upon human actually are completely different, as are the terms by which it can be known.

Positivists, at least during the early stages, begin by stating that laws based upon human will are the same thing as laws produced by the political elite via various formal mechanisms, and that this can provide a complete, consistent set of principles.

Historically speaking this approach is typical of situations where the elite justifies itself using the traditional cornerstones of Enlightenment thought, including the separation of powers (whereby legislation is regarded as the perfect expression of popular sovereignty, and can be accepted with no need for interpretation). This belief is particularly widespread in France, where the publication of the Civil Code gave rise to a trend in thinking (the so-called *École de l'Exégèse*), aimed at confirming the postulates of the modern state.⁹

Positivists may also consider law to be the expression of the people – or rather the spirit of the people – at the same level as other cultural phenomena such as languages and the arts. It is the task of legal scholars to elaborate these expressions of popular spirit, and to classify it into a consistent and complete system of concepts and principles. This type of positivism, known as scientific positivism, arises as a reaction against Enlightenment tenets interpreted by

⁷ P. Legrand, *Questions à Rodolfo Sacco*, in *Rev. int. dr. comp.*, 1995, p. 968.

⁸ M. A. Cattaneo, *Voce Positivismo giuridico*, in *Novissimo Digesto it.*, Vol. 13, Turin, 1966, p. 316.

⁹ Ch.-L. de S. B. de Montesquieu, *De l'esprit des lois* (1748), Vol. 1, Paris, 1979, p. 203 (Book 6, ch. 3).

legislative positivism. Historically speaking, this happened in Germany, where legislation only later took the place of legal theory as the main source of law¹⁰.

Legislative positivism and scientific positivism thus support decidedly contradictory political models, which however aim to justify themselves through similar discourses. Very few people nowadays would consider that the grotesque image used to reduce law to merely the words pronounced by legislators¹¹ has any currency, especially because today's positivists prefer to develop ideas of pure legal thinking, rather than to continue to promote Enlightenment tenets.¹² However, a corollary to those tenets still endures, and it is the meeting place between the two types of positivism. It is also that which comparative lawyers are fighting against: the idea – closely bound up with the myth of consistency and completeness in legal systems, and fed by the cult of concepts – of the “unity” of the “legal rule”¹³

Alongside the controversy about what is law based upon human will, I mentioned another reason for conflict between the positivist approach and the methods used by comparative lawyers, *i.e.* the terms by which law can be known.

To explain this, I need to underline the connections between the positivism of law scholars and the positivism of scholars in other social sciences. This latter type of positivism (as indeed all others) cannot be reduced to a single paradigm, but is still the outcome of a set of basic convictions. Among these can be listed the idea that human knowledge is based upon inductive processes, similar to those used in natural science. This means that general assertions can be made by starting with observations of particular circumstances, and a clear distinction can be made between science and metaphysics. This depends upon the fact that the particular circumstances under observation are outside and different from the theoretical tableau used by the observer.¹⁴

¹⁰ G.F. Puchta, *Corso delle istituzioni presso il popolo romano* (1841), Vol. 1, Milan and Verona, 1858, p. XXVII *et seq.* (par. 15).

¹¹ A. Gambaro e R. Sacco, *Sistemi giuridici comparati*, in R. Sacco (ed.), *Trattato di diritto comparato*, Turin, 1996, p. 306 *et seq.*

¹² This reference is to H. Kelsen, *Lineamenti di dottrina pura del diritto* (1934), Turin, 1952.

¹³ R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in 39 *Am. J. Comp. L.*, 1991, p. 21.

¹⁴ On this point V. Ferrari, *Lineamenti di sociologia del diritto*, Vol. 1, Rome and Bari, 1999, p. 7 *et seq.*

We can sum up and clarify the above by using the law of the three stages, formulated by Saint-Simon (1760-1825). One of the best-known exponents of positivism and founder of sociology based on positivist philosophy, Auguste Comte,¹⁵ describes the succession of thoughts about knowledge by using a Darwinian approach.¹⁶ According to this theory, the positive stage is the ultimate sign of maturity of human thought, which is finally able to explain facts in their real terms and not in their supreme causes.¹⁷

The positivist approach now seems out of date in the social sciences. All its basic assumptions are questioned, especially the circumstance whereby knowledge can be purely empirical and that it can be translated into statements which are verifiable by their objective correctness. It is now said that knowledge is not a progressive accumulation of known facts which may be immediately perceived by the observer, and that the work of human observers cannot be described merely as passive chronicles of events¹⁸.

There is no doubt that human observers have to work in the context surrounded by insurmountable limits, such as the conditioning caused by the natural environment. And yet, they have to deal with facts – the outcome of social intercourse – which are free and full of symbolic value, and which are often so obscure that only hypotheses¹⁹ can be arrived at.

From such a point of view, knowledge can be arrived at via a completely different process than that described by the positivists, *i.e.* by deduction rather than induction. In other words, observation starts with general abstract assertions, worked out beforehand, and developed by elaborating these into concrete conclusions with a purely stochastic value²⁰.

Nor is this all. Knowledge is a set of discourses which are designed to produce that unanimity of opinion²¹ so necessary to justify the visions of the real world which the scholar assumes. Visions, according to which wide-ranging theoretical perspectives are selected – such as the postulates of positivism – and to give unity to these discourses: the scientific outcome as the focal point of the commitment which brings members of the profession together

¹⁵ E.g. V. Ferrari, *Diritto e società*, Rome and Bari, 2004, p. 6 *et seq.*

¹⁶ Cfr. A. Somma, *Tanto per cambiare*, in *Pol. dir.*, 2005, p. 105 *et seq.*

¹⁷ A. Comte, *Cours de philosophie positive*, T. 1 (1830), 5. ed., Paris, 1907, p. 2.

¹⁸ T.S. Kuhn, *La struttura delle rivoluzioni scientifiche* (1962), Turin, 1999, p. 20.

¹⁹ M. Weber, *Economia e società* (1922), Vol. 1, Turin, 1999, pp. 4 and 9.

²⁰ See Ferrari, *Diritto e società*, cit., p. 7 *et seq.*

²¹ P.K. Feyerabend, *Contro il metodo* (1975), Milan, 2002, p. 30 *et seq.*

predates all the various concepts, laws, theories, and points of view which may be abstracted from it²².

By applying this sort of analysis to the field of law, one ends up showing the prescriptive rather than descriptive approach developed under legislative positivism and scientific positivism. The scholar who uses this method does not merely describe a binding system of rules issued by central government or engendered by the spirit of the people: he sets up a new system, and formally relates it back to an external source purely for the purposes of justifying his power or the power system to which he belongs.

The idea stressed by comparative lawyers is that mere descriptions are unattainable, because all observers are irredeemably biased. Legal scholars are very fond of obscuring anything which cannot be celebrated as objective²³. Moreover, comparative law as a legal discourse cannot be neutral: it depends upon the scientific and cultural direction of the interpreter describing it²⁴, and is therefore extremely subjective²⁵.

In the same way, the use of comparative law as a way of critical understanding of the law is linked to the definite affirmation of the connection between the law as a phenomenon and the context in which it exists. This has meant calling upon the connection between comparative law on the one hand and sociology and history on the other²⁶, and underlining – with regard to the latter – the different function of legal theory and historical-comparative sciences²⁷.

Now we must return to the controversy concerning the purposes of comparative law, and in particular reconsider the assertion that, if comparative law wishes to be considered as the critical understanding of the law, it must coincide with the acquisition of knowledge.

Firstly, it must be pointed out that knowledge, as spoken of by the authors of this assertion, does not coincide with knowledge as spoken of by the

²² T.S. Kuhn, *La struttura delle rivoluzioni scientifiche*, cit., p. 30.

²³ Du. Kennedy, *Comportamenti strategici nell'interpretazione del diritto*, in J. Derrida and G. Vattimo (eds.), *Diritto giustizia e interpretazione*, Rome and Bari, 1998, p. 229 *et seq.*

²⁴ G. Alpa (ed.), *Corso di sistemi giuridici comparati*, Turin, 1996, p. 19 *et seq.*

²⁵ P. Legrand, *Le droit comparé*, Paris, 1999, p. 56 *et seq.*

²⁶ E.g. K. Zweigert, *Die soziologische Dimension der Rechtsvergleichung*, in *RabelsZ*, 1974, p. 299 *et seq.* and G. Gorla, entry on *Diritto comparato*, in *Enc. dir.*, Vol. 12, Milan, 1964, p. 940.

²⁷ P.G. Monateri, *La dottrina*, in G. Alpa et al., *Le fonti del diritto italiano*, Vol. 2, in R. Sacco (ed.), *Trattato di diritto civile*, Turin, 1999, p. 485.

positivists. It is not simply the assimilation of empirical data in addition to technical details: it involves the many relationships created by parts of the system being studied as a whole.

This can be understood as distancing oneself from the approach of those who think of research as merely empirical²⁸, such as the followers of sociological positivism, whose analysis lets us question the myth of consistency and completeness of the legal system, but not the myth of the immediate perceptibility of social data²⁹.

Moreover, simply doing away with empirical methods cannot shield comparative law from accusations of trying to hide its irrepressible subjectivity. If this were the case, we would also need to reconsider the critique of scientific positivism, belonging as it does to organic-type conceptualism, displays its dissatisfaction with the simple observation of empirical data³⁰.

There are also problems with invoking the connection between comparative law and the history of law. The latter, if we want it to contribute to overcoming positivist-based empiricism, should not merely be a widening of the horizons of legal scholars in their particular fields. The methods used by scholars of the history of law are, in fact, decisive, as we shall see shortly. They may either increase the subversive character of comparative law or may support the view of comparative law as a vehicle for positivist-based discourse.

3. In Italy, perhaps the most articulate and definitive critique of the completeness and consistency of the legal system has been that drawn up by comparative lawyers using structuralism in their methods. It is often these comparative lawyers who praise the cognitive purpose of their field and see structuralism as the ideal way of observing constants among the variety of concrete phenomena³¹.

Structuralism arose during the early twentieth century, especially in linguistics, thanks to the academic pursuits of Ferdinand de Saussure. Structuralism is based upon the observation that children do not learn a language by merely listening to it: rather, this is due to some innate system

²⁸ Upon which e.g. A. Heldrich, *Sozialwissenschaftliche Aspekte der Rechtsvergleichung*, in *RabelsZ*, 1970, p. 427 *et seq.*

²⁹ E.g. M.A. Cattaneo, *Voce Positivismo giuridico*, cit., pp. 316 and 319.

³⁰ For all, W. Wilhelm, *Metodologia giuridica nel secolo XIX* (1958), Milan, 1974, p. 66 *et seq.*

³¹ M. Losano, *Sistema e struttura nel diritto*, Vol. 3, Milan, 2002, p. 129.

which is capable of receiving, interpreting, storing, and using casual information provided by the senses³². This rationalist-based supposition – formulated as a polemic answer to the empirical concept of the individual as a *tabula rasa* – was developed during the second half of the twentieth century, especially by Noam Chomsky³³.

Structuralism has also given us the idea whereby parts of a system cannot be analysed separately: they must be examined in terms of their mutual relationships by studies which harness experience and skip any transcendental data³⁴. From such a point of view, structuralism cultivates a holistic approach, often accompanied by a holistic theory about meanings³⁵.

When one applies the tenets of structuralism to law, one ends up considering it as a structure that can be described by emphasising the mutual connections between its various elements, which are analysed by considering how they fit into the system and not individually and separately. At the same time, the context in which law takes shape is almost ignored³⁶. This is because structuralists believe that structure is an identity which can be perceived scientifically and in a non-biased way: they believe that structure is inside the object being studied, and not inside the head of the person studying³⁷.

Structuralist-based comparative law literature often stresses both these characteristics: on the one hand, the disassociation between discussions of law and its social context, and on the other the scientist approach to their analysis. These characteristics are exemplified by the emphasis upon the requirement for scholars to choose between science and politics, *i.e.* between impartial comparison and engaged comparison³⁸.

If this is the way things really are, structuralism is in danger of doing things which are not very different from those which Hans Kelsen ascribes to the field of pure legal theory, obtained by comparing all those phenomena

³² R.H. Robins, *Storia della linguistica* (1967), Bologna, 1997, p. 260.

³³ N. Chomsky, *Nuovi orizzonti nello studio del linguaggio e della mente* (2000), Milan, 2005, p. 57 *et seq.*

³⁴ A.-J. Arnaud, *Structuralisme et droit*, in *Arch. phil. dr.*, 1968, p. 298.

³⁵ P. Baert, *La teoria sociale contemporanea* (1998), Bologna, 2002, p. 19 *et seq.*

³⁶ K.A. Ziegert, *Juristische und soziologische Empirie des Rechts*, in *RabelsZ*, 1981, p. 69 *et seq.*

³⁷ M. Losano, *Sistema e struttura nel diritto*, Vol. 3, cit., pp. 117 and 129 *et seq.*

³⁸ Cfr. P. Legrand, *Questions à Rodolfo Sacco*, cit., pp. 949 and 959.

which are called law³⁹. It is no accident that this author is considered a structuralist *ante litteram* and *sui generis*⁴⁰.

Structuralism begins by paying tribute to linguistics – with explicit mention of De Saussure and Chomsky – and in particular comparative linguistics: the most powerful tool available for revealing structural regularities which might otherwise pass unobserved. They then go on to say that structural regularities are merely measured without having to use data from other sciences, whether political, ethical, or in some other way extraneous to the study of linguistics⁴¹.

This must also be true for comparative law, which is called upon to deal with legal rules without appealing to circumstances involving the social environment. Such circumstances are also extremely numerous, and would increase enormously the number of variables to be considered⁴².

As I pointed out before, the typical structuralist approach cannot be reduced to the empirical level, so commonly found in the positivist method. However, it is still a scientific-type approach and, as such, tends to obscure anything which I would call “subjective comparisons”, a formula which has been often repeated in critiques of studies carried out using structuralist methods, where also one finds it is impossible to expunge ideology⁴³.

This critique remains valid, in spite of the connections structuralism tries to create with the historical sciences. In reality, structuralism refers to the use of a particular methodology of historical sciences, which considers real that which actually happened⁴⁴.

This method was based upon an old idea.⁴⁵ The idea was originally posited in the early eighteenth century by Giambattista Vico, when trying to make a distinction between natural science and human science. The former is an attempt at understanding events, the *primum mobile* of which is divine in origin, and is therefore incapable of producing knowledge. The latter, however,

³⁹ H. Kelsen, *Lineamenti di dottrina pura del diritto*, cit., p. 173.

⁴⁰ M. Losano, *Sistema e struttura nel diritto*, Vol. 3, cit., p. 147.

⁴¹ R. Sacco, *Introduzione al diritto comparato*, cit., p. 12.

⁴² A. Gambaro, *Alcune novità in materia di comparazione giuridica*, in *Riv. dir. comm.*, 1980, I, p. 303 *et seq.*

⁴³ V. Denti, *Diritto comparato e scienza del processo*, in R. Sacco (ed.), *L'apporto della comparazione alla scienza giuridica*, Milan, 1980, p. 211.

⁴⁴ A. Gambaro, P.G. Monateri e R. Sacco, *Voce Comparazione giuridica*, cit., p. 52.

⁴⁵ A. Gambaro, *Riflessione*, www.jus.unitn.it/dsg/convegni/tesi_tn/riflessione.htm.

may produce knowledge because its purpose is the understanding of man-made phenomena⁴⁶.

A historical method based upon such a paradigm avoids the spread of positivist-based empirical approaches. Indeed it rejects any idea of history as a simple set of events disguised as pure erudition,⁴⁷ and is in basic agreement with the affirmation that research cannot be reduced to simply describing or identifying obvious causes and effects: the structures observed are latent structures, which are not immediately apparent to observation by the senses⁴⁸. Nevertheless, this historical method has a bias towards scientism: it ignores the unavoidable subjectivity of the writer of historical events⁴⁹.

Many comparative lawyers leave no doubts about their intentions in analysing the legal phenomenon by using structuralism very faithfully, and in particular by dissociating law from its social context. At least this is what can be understood from the affirmation – absolutely peremptory – that if basic structures survive in completely different economic, social, and political circumstances, this means they do not properly reflect the underlying power or economic system⁵⁰.

Other comparative lawyers, however, have adopted a more prudent approach. In fact, although they also study the history of ideas (*i.e.* the collective memory of those who have experienced law in a particular geographical area and at a certain time in history⁵¹), they believe methodologies based upon Vico's categories are no longer satisfactory⁵².

Therefore many do not accept the critique that structuralism is based on scientism and point out that such references to the historical method should not be taken seriously. The historical method was developed at a particular time – the 1980s – when legal studies were notable for their marked conceptualism. References to history (again, in the terms we examined above) aimed to support the idea that interpretation hides an unavoidable element of subjective

⁴⁶ To this end P. Rossi, *Introduzione*, in G. Vico, *La scienza nuova* (1725), Milan, 1996, p. 22 *et seq.*

⁴⁷ *Ib.*, p. 24.

⁴⁸ P. Baert, *La teoria sociale contemporanea*, cit., p. 20 *et seq.*

⁴⁹ E.g. C. Conrad e M. Kessel, *Geschichte ohne Zentrum*, in Id. (ed.), *Geschichte schreiben in der Postmoderne*, Stuttgart, 1994, p. 9 *et seq.*

⁵⁰ A. Watson, *Legal Transplants*, 2. ed., Athens etc., 1993, p. 107.

⁵¹ M. Graziadei, *Il diritto comparato*, in *Riv. crit. dir. priv.*, 1999, p. 346.

⁵² A. Gambaro, *Riflessioni*, cit.

judgement, and this idea is irreconcilable with any conviction that apolitical results⁵³ can be achieved.

References to history, while not assimilating the methods and practices of historians, are aimed at marking a border between comparative law and traditional legal studies, which purport to develop a binding system of principles⁵⁴. The insurmountable prescriptive essence of legal studies could be thus criticised, without having to find expedients for presenting purely descriptive discourses.

These attempts at developing a binding system of principles (so typical in traditional legal studies) ran alongside a tendency to think of scholarship as being based upon the tenets of conceptualism, tenets which had the purpose of implementing the principle of the unity of the legal rule. The radical opposition of comparative lawyers to this principle was expressed in a theory – widely accepted by most comparative lawyers nowadays – which was explicitly intended to bring about its destruction: the theory of dissociation of legal formants.

The term "formants" comes from acoustic phonetics: the study of the consistency of vocal sounds and their diffusion through a medium. It is used to indicate the frequency at which sounds resonate inside the mouth, and characterises the tone of a sound. In this way, the sounds can be analysed and the different elements can be isolated⁵⁵.

In structural analysis by comparative lawyers, the term "formant" is used to indicate the set of rules drawn up by various actors: in particular – but this list is not final – it refers to the rules contained in legislation, the rules formulated by scholars, the rules declared by courts and the rules actually enforced by courts. These sets are highlighted by the theory of dissociation of legal formants in all their diversity and inconsistency, characteristics that advocates of legislative positivism (with all its corollaries) repudiate as errors of interpretation⁵⁶.

Dissociation of legal formants is thus used to discredit the traditional theories about sources of law. These theories are influenced by the tenets of legislative positivism, and in this perspective they only mention institutions that are created by the mechanisms of political representation. No mention is made

⁵³ A. Gambaro, *Alcune novità in materia di comparazione giuridica*, cit., p. 311 *et seq.*

⁵⁴ P.G. Monateri, *Comparazione*, in *Riv. crit. dir. priv.*, 1998, p. 453 *et seq.*

⁵⁵ E.g. B. Malmberg, *La phonétique*, 19. éd., Paris, 2002, p. 12 *et seq.*

⁵⁶ R. Sacco, *Introduzione al diritto comparato*, cit., p. 44 *et seq.*

of case law which, at least in the civil law tradition, is not considered one of the formal sources of law⁵⁷. There is also no mention of the academic source of law, which is regarded as a formal source in Islamic countries⁵⁸.

However, dissociation of formants can also be a vehicle for scientism. Using this method, comparative lawyers either discredit scholars of domestic law when they speak about the consistency of legal systems or reveal that their affirmations are prescriptive. Nonetheless, comparative lawyers at the same time consider there to be consistency within formants⁵⁹, and that the consistency of a legal system can be measured if only it is analysed in a purely descriptive way⁶⁰.

In this way one understands how structuralism is affected by scientism. This can only be avoided by focusing on the subjectivity of comparative law and recognising the prescriptive nature of legal discourses.

4. If in Italy structuralism has helped comparative law to become the critical understanding of the law, this same role has been taken on in other countries – particularly Germany – by functionalism.

Functionalism is a composite set of social theories which were mainly developed during the early twentieth century. Sometimes these theories directly contradict one another. However, it has been more or less openly recognised that the core of functionalist thought owes its very existence to Émile Durkheim, one of the founders of modern sociology⁶¹.

It was Durkheim who enounced the principle according to which "society is not the mere sum of individuals, but [...] represents a specific reality which has its own characteristics. [...] By aggregating together, by interpenetrating, by fusing together, individuals give birth to a being, psychical if you will, but one which constitutes a psychical individuality of a new kind". Social phenomena can only be understood by taking into account this "individuality" of society, and by not limiting ourselves to analyses of the

⁵⁷ For all, G. Alpa, *L'arte di giudicare*, Rome and Bari, 1996, p. 9 *et seq.*

⁵⁸ R. Sacco, Entry on *Dottrina (fonte del diritto)*, in *Digesto civ.*, Vol. 7, Turin, 1991, p. 214 *et seq.*

⁵⁹ P. Legrand, *Questions à Rodolfo Sacco*, cit., p. 962.

⁶⁰ R. Sacco, *Introduzione al diritto comparato*, cit., p. 49.

⁶¹ E.g. P. Baert, *La teoria sociale contemporanea*, cit., p. 55 *et seq.*

vicissitudes of "its component elements": "The group thinks, feels and acts entirely differently from the way its members would if they were isolated"⁶².

These social phenomena are explained by examining the "function" they fulfil, and not their immediate utility or "efficient cause": things owe their existence to determining causes which cannot be reduced to the "usefulness of the results they produce." This means that the function of a social event must always be sought in the relationship it has with some social purpose⁶³.

Even structuralists believe that law should be considered as a system wherein the various elements must be examined in terms of the relationship with the whole.

However, structuralism aims at considering law as the outcome of relationships between its various parts, and not of relationships between these and external elements. Functionalism, on the other hand, sees law as part of a wider system and considers the relationship between law and the system to be the centre of its focus. In other words, structuralism appreciates those events covered by general legal theory, which it considers to be its subject as an independent system. Functionalism, on the other hand, concentrates upon events considered by the sociology of law, which considers law as a system dependent upon the rest of society⁶⁴.

Herein lies the essence of functionalist reaction against positivism and its corollaries which, as we have already seen, is one of the defining features of German comparative law. Here it is affirmed that the basic methodological principle of all comparative law is that of functionality, the principle according to which comparison focuses on that which fulfils the same task and the same function, and not on the conceptual framework, typical of one's own legal system⁶⁵.

Functionalism does not restrict itself to challenging the cultus of conceptualism, a traditional defect of the German system. The target of this critique is also legislative positivism and its corollaries, in particular traditional theories about the sources of law. In this regard, functionalists specified that comparative lawyers are required to consider as sources of law everything that governs and coordinates the juridical life of the system they are considering,

⁶² E. Durkheim, *Regole del metodo sociologico* (1895), Milan, 1979, p. 101 *et seq.*

⁶³ *Ib.*, pp. 95 and 106.

⁶⁴ R. Treves, *Sociologia del diritto*, 3. ed., Turin, 1996, p. 290.

⁶⁵ K. Zweigert and H. Kötz, *Introduzione al diritto comparato* (1984), Vol. 1, cit., p. 37. See also M. Ancel, *Utilità e metodi del diritto comparato* (1971), cit., p. 93 *et seq.* and M.A. Glendon et al., *Comparative legal traditions*, St. Paul, 1999, p. 8 *et seq.*

and that they must refer to the same sources as those used by domestic legal scholars of the system under consideration, and to give them the same weight and the same value these legal scholars give them ⁶⁶.

Upon closer examination, this reference to the domestic legal scholar's point of view is an indication that is not in line with the aim of promoting functionalism as a way of replacing the conceptualist approach. In reality, as even many structuralists affirm, to counteract these very defects which comparative lawyers complain about, this point of view should be replaced, as it gives too much weight to "explicit" sources of law, but not enough to the "implicit" data or "cryptotypes" ⁶⁷.

Another characteristic of functionalism is also the cult for systems, contained in arguments which are not used (or used less prominently) by structuralists. The cult for systems is exactly what reveals the positivist tendency to bring the methods used in natural sciences into social sciences, and this is something upon which critiques of conceptualism are based ⁶⁸.

However, the reasons for convergence between structuralist and functionalist comparisons are prevalent. Both contain methods which are marked by one of the most characteristic faults of the positivist approach, *i.e.* excluding any reference to particular legal contexts from final results.

This is a predictable fault of structuralist analysis, which is, after all, based upon the conviction that it is possible to identify core elements of the system that are unconditioned by historical contingencies. Less predictable, though, is the fact that this conviction is also shared by functionalists. Functionalists recognise the role of extra-legal phenomena, within which one must indeed search for the functional equivalent of a certain rule ⁶⁹. However, when they invoke the *praesumptio similitudinis* between practical solutions⁷⁰ or practical functionality⁷¹, they end up taking the same positions as structuralists with regard to historical data. The so-called *praesumptio similitudinis* then becomes a basic rule of comparison, which can be brought back to the idea that, except in certain cases, law is mostly apolitical ⁷².

⁶⁶ K. Zweigert and H. Kötz, *Introduzione al diritto comparato*, Vol. 1, cit., p. 39.

⁶⁷ A. Gambaro and R. Sacco, *Sistemi giuridici comparati*, cit., p. 7.

⁶⁸ V. Ferrari, *Diritto e società*, cit., p. 9 *et seq.*

⁶⁹ K. Zweigert and H. Kötz, *Introduzione al diritto comparato*, Vol. 1, cit., p. 42.

⁷⁰ *Ib.*, p. 41 *et seq.*

⁷¹ B. Markesinis, *Il metodo della comparazione* (2003), Milan, 2004, p. 49 *et seq.*

⁷² K. Zweigert, *Die «praesumptio similitudinis» als Grundsatzvermutung rechtsvergleichender Methode*, in AA.VV., *Scopi e metodi del diritto comparato*, Padua and

According to many, this essential convergence between structuralist-type and functionalist-type comparative law does not conflict with the cultural tableau to which the latter refers. As we have already seen, structuralism challenges the idea that the causal connections, necessary to describe a structure, are evident. For its part, functionalism assumes that these connections can be shown by analysing the deepest social rational which is to be found below the conscious levels of action ⁷³, or by turning one's attention to the "invisible hand," which is considered much more important than the "visible hand" ⁷⁴.

It is an invisible hand which, according to many critics of functionalism, seeks to bring about greater balance in the system being examined and conservatively hides any conflicts in the name of social cohesion and of the development of the system ⁷⁵. Functionalism, therefore, serves the established order ⁷⁶, and it is in this sense that, on the basis of the *praesumptio similitudinis*, law is seen as a tool used everywhere to satisfy the same human needs and the same aspirations ⁷⁷.

Accusations of conservatism may be relativised, provided a distinction is made between functionalism *strictu sensu* and functionalist method; the first is effectively an attempt at examining how a society works, and maintaining balance in a system, whereas the second is rather an attempt at examining why a society does not work, and appraising the terms for changing the system ⁷⁸. Functionalist method is therefore a critique, when required, of the liberal, bourgeois understanding of law as part of theories about a collective economy ⁷⁹.

This distinction will help us to identify levels of conservatism which are inevitably to be found in theories which purport to provide mere descriptions of social data. However, it does not help us to keep conservatism out of the

New York, 1973, p. 737 *et seq.* Previously E. Rabel, *International Tribunals for Private Matters*, in *Arb. Journal*, 1948, p. 212 and J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung*, Tübingen, 1956, p. 15.

⁷³ P. Baert, *La teoria sociale contemporanea*, cit., p. 55 *et seq.*

⁷⁴ D.L. Horowitz, *The Qur'an and the Common Law*, in *Am. Journ. Comp. Law*, 1994, p. 242.

⁷⁵ For all, V. Ferrari, *Funzioni del diritto*, 2. ed., Rome and Bari, 1993, p. 5 *et seq.*

⁷⁶ A. Izzo, *Storia del pensiero sociologico*, nuova ed., Bologna, 1994, p. 281 *et seq.* Another fundamental work is A.W. Gouldner, *La crisi della sociologia* (1970), Bologna, 1972.

⁷⁷ R.B. Schlesinger et al., *Comparative law*, 6. ed., New York, 1998, p. 37.

⁷⁸ N. Bobbio, *Intorno all'analisi funzionale del diritto*, in *Soc. dir.*, 1975, p. 9 *et seq.*

⁷⁹ M.G. Losano, *I grandi sistemi giuridici*, Rome and Bari, 2000, p. 458.

theories which clearly state prescriptive intentions: the various purposes of these theories need to be examined individually. Confirmation of this can be found by analysing an application of functionalism *strictu senso* and an application of functionalist method as used by comparative lawyers: these are, respectively, the factual approach used in operational analysis and the principle of efficiency used in economic analysis of law.

The factual approach is typical of studies which seek to appear as purely descriptive. This would be the confirmation of the statement that whereas functional analysts of law may examine its functions with no regard for its structure, supporters of a functional interpretation of society cannot examine its functions without also examining its structure⁸⁰.

The factual approach meets the tenets of functionalism as it aims at identifying the set of facts which bring about an individual effect in law, and therefore any operational rules, which are the concrete solutions variously used in different legal systems⁸¹. Typical of the functional method is also its intention of documenting how these solutions are not different, or at least not as much as what appears conceptually explicit. The factual approach is thus part of attempt at documenting the essential convergence – from an operational point of view – of most legal systems. In other words, it provides the methodological framework for identifying the common core of legal systems⁸², which in the final analysis is made possible by separating technical data from historical data⁸³. This separation is also made by structuralists, and this has given rise to accusations that the factual approach is affected with scientism and no sense of history⁸⁴.

Even the followers of the factual approach have discussed the connections between it and scientism. They admit that it entails a sophisticated use of dogmatic instruments⁸⁵. This has been recognised after parallels were found between operational analysis – analysis carried out to identify operational

⁸⁰ R. Treves, *Sociologia del diritto*, cit., p. 293. See also U. Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco*, in A. Riles (ed.), *Rethinking the Masters of Comparative Law*, Oxford e Portland, 2001, p. 252.

⁸¹ U. Mattei e P.G. Monateri, *Introduzione breve al diritto comparato*, Padova, 1997, pp. 11 and 15.

⁸² R. B. Schlesinger et al., *Comparative law*, cit., p. 42.

⁸³ For a well-known application of the factual approach, v. R. Schlesinger (ed.), *Formation of Contracts*, New York and London, 1968. To this end, R. Sacco, *Un metodo di lavoro nuovo*, in *Riv. dir. civ.*, 1972, II, p. 172 *et seq.*

⁸⁴ V. Giuffrè, *Studio comparato e studio storico del diritto*, in *Labeo*, 1963, p. 360.

⁸⁵ U. Mattei and P.G. Monateri, *Introduzione breve al diritto comparato*, cit., p. 17.

rules – and dogmatic analysis. The former affirms that individual solutions have been conditioned by groups or sets of important events, and in this respect has some points in common with the latter, which was designed to study sets of elements that were necessary and sufficient to have a significant effect on law⁸⁶.

However, according to the followers of the factual approach, these parallels should not lead to hasty conclusions. Operational analysis – for this is its logical pattern – starts by levelling the importance of all the factors in play in a particular solution, and tries to reconstruct their influence on the solution, no matter how they have been considered by legal scholars in the various systems being examined⁸⁷. Conversely, dogmatic analysis does not accept any such levelling: it reconstructs the system being examined with all due respect to the patterns used by the domestic operators in the system under consideration. It does not accept that to completely understand the legal system of a particular country we must not place our trust in what the legal scholars of that country say, because there may be very wide discrepancies between operational rules and those which are taught and spoken of⁸⁸.

Now, even if we leave aside the exhortation, made by several functionalists, to respect the point of view of the domestic legal scholars of the system under consideration, we must still note that by making a distinction between operational analysis and dogmatic analysis we can demonstrate that there is distance between the former and the conceptual approach. This distinction, however, does not provide us with any defence to use against accusations of scientism. Scientism is indeed evident in the conviction that operational rules can be identified by starting with abstract categories recognised as effective everywhere or, likewise, by using concepts presumed to insulate legal scholars from the conditioning effects of their own national legal systems⁸⁹. In reality, by pursuing this path, they reduce comparative law to the study of the logical structure of a system⁹⁰.

Finally, the factual approach is in dispute with the systematic method, because it tries to make generalisations on the basis of individual, concrete, empirical data. However, it is not an alternative to methods affected by

⁸⁶ For all, P.G. Monateri, *Pensare il diritto civile*, Turin, 1997, p. 217 *et seq.*

⁸⁷ U. Mattei and P.G. Monateri, *Introduzione breve al diritto comparato*, cit., p. 17.

⁸⁸ R. Sacco, *Introduzione al diritto comparato*, cit., p. 57.

⁸⁹ *Ibid.*, p. 55.

⁹⁰ G. Lombardi, *Premesse al corso di diritto pubblico comparato*, Milan, 1986, p. 32.

scientism, because it says that by means of the data being examined, we can appraise the consistency of a legal system: *i.e.*, judgements on the consistency of legal systems belong to comparative law, because it uses factual methods which can be affirmed or falsified⁹¹.

5. Let us now consider the principle of efficiency as used by economic analysts of law: we have already considered this principle as an aspect of the functionalist method, and therefore – according to the distinction we examined above between functionalism *strictu senso* and the functionalist method – the source for prescriptive comments about how to deal with social intercourse.

Economic analysts of law have emphasised their connections with functionalism and say that the economic analysis of law is based upon an idea of law as a system with a definite purpose, which is to achieve certain aims.⁹² The same things are said by comparative lawyers, who mostly see the effects of functional equivalence as being the spread of speculation in economic terms⁹³.

The prescriptive nature of the considerations made by economic analysts of law is sometimes disputed. However this mainly occurs with studies which, rather than applying functionalist methods, make considerations which are functionalist *strictu senso* and therefore try to provide explanations for the workings of a society by claims which are necessarily – but still falsely – purely descriptive. In other studies, the descriptive essence of the economic analysis of law, used to support its claimed neutrality, is simply untenable (as I shall shortly explain).

Economic analysis of law could be defined as an appeal to the tenets of economics in order to reflect on the phenomenon of law. This approach is fairly common in capitalist countries when applied to subjects where an interaction exists between law and economics, but it is also widespread in countries – or in studies – with a strong Marxist or Marxian creed⁹⁴. However, it has been increasingly used in examining other fields of study in the USA from the 1970s onwards⁹⁵. Nor is it difficult to understand why: this was the time when traditional theories about law reached crisis point and serious defects were

⁹¹ R. Sacco, *Introduzione al diritto comparato*, cit., p. 56.

⁹² G. Calabresi, *Costo degli incidenti e responsabilità civile* (1970), Milan, 1975, p. 2.

⁹³ H. Kötz, *Alte und neue Aufgaben der Rechtsvergleichung*, in *JZ*, 2004, p. 263.

⁹⁴ F. Cosentino, *Analisi economica del diritto*, in *Foro it.*, 1990, V, c. 154.

⁹⁵ For all, R. Pardolesi, *Voce Analisi economica del diritto*, in *Digesto civ.*, Vol. 1, Turin, 1987, p. 310.

pointed out, which in European systems were characterised by the positivist approach and the cult for its corollaries.

Indeed, the developing study of law from the second half of the nineteenth century onwards was positivist, in the wake of the theories drawn up by Christopher Columbus Langdell, who adapted German organic-type conceptualism to the American system of sources of law in order to elicit general principles from the common law⁹⁶. This method was considered capable of reaching formal, scientific truth, and thus of separating law from the context in which it had been developed⁹⁷.

Over the years the positivist orthodoxy has suffered many attacks, especially by pragmatists, and later by realists. The former were the first to say that the life of the law has not been logic, but experience⁹⁸, and the latter tried to bring out the political assumptions (and the implications) of court rulings according to various sets of values⁹⁹. Attacks such as these were then countered by new theories which, in the final analysis, are attempts at reaffirming the scientific – or at least neutral – essence of decisions made according to law. This is supposedly guaranteed by the independence of the legal process – that set of procedures by means of which social conflicts are appeased¹⁰⁰ – and by fundamental rights which are essentially neutral, *i.e.* which transcend any immediate result that is involved¹⁰¹.

This is the sort of cultural climate in which the economic analysis of law was developed, together with other movements which were brought together with the aim of recuperating the connection between law and society, and at the same time proving the fallacy of theories which tried to present law as objective and neutral: the fallacy of the traditional belief in the efficacy of the legal process and in the autonomy of fundamental rights¹⁰². However, there are serious doubts about the ability of the economic analysis of law – in particular when used by comparative lawyers – to provide results in line with these aims.

⁹⁶ A. Gambaro and R. Sacco, *Sistemi giuridici comparati*, cit., p. 181 *et seq.*

⁹⁷ G. Gilmore, *Le grandi epoche del diritto americano* (1977), Milan, 1988, p. 43 *et seq.*

⁹⁸ O.W. Holmes, *The Common Law*, Boston, 1881, p. 5.

⁹⁹ C. Sunstein, *Lockner's Legacy*, in *Col. L. Rev.*, 1987, p. 883. To this end, S. Castignone, *Introduzione*, in Id. (ed.), *Il realismo giuridico scandinavo e americano*, Bologna, 1981, p. 12 *et seq.*

¹⁰⁰ H.M. Hart Jr. and A.M. Sacks, *The legal process* (1958), Chicago, 1994.

¹⁰¹ H. Wechsler, *Toward neutral principles of constitutional law*, in *Harv. L. Rev.*, 1959, p. 15.

¹⁰² G. Minda, *Teorie postmoderne del diritto* (1995), Bologna, 2001, p. 126.

As I have said before, the economic analysis of law arose in the USA during the 1970s. In a sort of manifesto for the movement, or at least the writings of one of its leaders, Richard Posner lays out the terms for considering law according to some of the basic tenets of economics: understanding human choice, in a world where resources are limited in terms of what we desire, means investigating and testing the implications of the assumption according to which every man rationally maximises the purposes of his life and his satisfactions¹⁰³.

The tenets drawn up by economics, and which are supposed to be successfully applicable to law, arise out of the idea that people react to incentives. One of the first tenets is about the inverse relationship between the price of supply and the quantity of demand. This leads one to think of law, rather than a set of duties and punishments, as a tool for setting a price upon human behaviour: high, if it is to be discouraged, and low if it is to be incentivised. Another tenet is about the tendency of resources to gravitate towards their most profitable uses only when they are allowed to be freely exchanged. According to this way of thinking, resources are transferred to people who use them as a way of obtaining greater value: greater human satisfaction, commensurate with consumers' willingness to pay for goods and services¹⁰⁴.

Thus it can be deduced that the law must be used to set up a free market system, without any responsibilities should it fail. It must not help individual players to become stronger¹⁰⁵. This is the opposite of what had been the main trend in economic literature for many years, and which was summed up by Arthur Cecil Pigou: the state was expected to make remedial interventions if markets failed¹⁰⁶. Nowadays, state restraint is considered an indispensable prerequisite for a use of resources that maximise willingness to pay and is therefore efficient. If transactions are not voluntary, their efficiency implications may never be known¹⁰⁷.

The idea of efficiency is fundamental to the provisions of the economic analysis of law. Indeed its very centrality is a return to the Economics of

¹⁰³ R. Posner, *L'economia e il giurista* (1977), in G. Alpa et al. (ed.), *Interpretazione giuridica e analisi economica*, Milan, 1982, p. 66.

¹⁰⁴ *Ib.*, p. 66 *et seq.*

¹⁰⁵ This is the sense of the famous theorem formulated by R. Coase, *Il problema del costo sociale* (1960), in *Id.*, *La natura dell'impresa*, Trieste, 2001, p. 31 *et seq.*

¹⁰⁶ A.C. Pigou, *The Economics of Welfare*, 4th ed., London, 1952, p. 172 *et seq.*

¹⁰⁷ R. Posner, *L'economia e il giurista*, *cit.*, p. 70 *seq.*

Welfare, the branch set up by Pigou to study the ideal conditions for creating maximum efficiency in a system¹⁰⁸.

Providing a definition for efficiency is no easy task, especially since attempts to do so by lawyers and economists have often been contradictory. Among the definitions which may be considered in some way peaceful, I could mention those which bring out the neutrality of the concept, which show it as having stability and as providing satisfactory explanations – with references to willingness to pay – for different people's values¹⁰⁹. This means that a situation is efficient if it can be changed so that somebody can be better off, without making somebody else worse off¹¹⁰, or at least if the number of losers is at least compensated for by the number of winners¹¹¹.

These definitions are patently obscure¹¹², such as the one which explains efficiency as the greatest reduction in waste and – among other things – reducing the costs of transactions¹¹³. It is no accident that these definitions have a specific purpose, given that efficiency is a goal which is only sought in free market systems where rational beings operate.

But the idea of efficiency is important for another reason: it shows the gulf between economic analysis of law and traditional legal studies. Traditional legal studies are based upon the concept of justice, and thus refer to a vision of law as a set of duties and punishments, which has absolutely no place if law is seen as a set of incentives.

According to the economic analysts of law, the concept of justice allows for no considerations in scientific terms, as it is extremely subjective¹¹⁴. The idea of efficiency, on the other hand, is considered neutral or technical¹¹⁵, or at least non-arbitrary, because of its "universal" applicability, whereby it is

¹⁰⁸ P. Trimarchi, *L'analisi economica del diritto*, in *Quadr.*, 1987, p. 563.

¹⁰⁹ D.D. Friedman, *L'ordine del diritto* (2000), Bologna, 2004, p. 51 *et seq.*

¹¹⁰ R. Cooter et al., *Il mercato delle regole*, Bologna, 1999, p. 25, quoting Vilfredo Pareto.

¹¹¹ U. Mattei, *Comparative law and economics*, Ann Arbor, 1998, p. 4, referring to Kaldor Hicks.

¹¹² Cfr. P. Chiassoni, *Law and economics*, Turin, 1992, p. 233 *et seq.* and H. Eidenmüller, *Effizienz als Rechtsprinzip*, Tübingen, 1995, p. 169 *et seq.*

¹¹³ U. Mattei and P.G. Monateri, *Introduzione breve al diritto comparato*, cit., pp. 91 and 94 *et seq.*

¹¹⁴ *Ib.*, p. 86.

¹¹⁵ R. Posner, *L'economia e il giurista*, cit., p. 70.

perfectly capable of basing scientific discussions upon social structures¹¹⁶. The assessment of justice would be limited to a period before interpretation: the economist starts with the *status quo ante* and leaves anything which smacks of politics or philosophy to others. In other words, economic analysis of law is a way of providing individuals with the best (*i.e.* the most efficient) laws from among the many "right"¹¹⁷ ones, and makes the pie as large as possible after somebody else has decided how to carve it up¹¹⁸.

Before examining the connections between economic analysis of law and comparative law, I must point out some of the basic defects in the scenario we have been looking at so far. No particular problems are caused by seeing law as a series of incentives and deterrents, which is not so far away from understanding it in terms of duties and punishments. Envisaging consequences when certain activities arise means not only finding ways for dealing with negative effects, but also for effects which are usually considered desirable¹¹⁹.

Problems do arise, however, with the idea that providing legal incentives and deterrents is the only way of bringing about a desired result (an efficient one) in free market systems, and that individuals behave rationally within such systems.

Economics starts to consider everyone to be rational beings (a condition summarised in the formula *homo aeconomicus*) in the same period in which the foundations for natural and rational law were being laid. In both cases, the starting point is the selection of those innate, universal human characteristics which are unaffected by any economic or social differences in individual situations¹²⁰. Nevertheless, natural rational law uses a similar understanding as a way of elaborating the political and economic freedoms brought about by the French Revolution: the prerogatives of the citizen on one hand, and those of the landlord on the other¹²¹.

Economics only examines the economic freedoms, and from this perspective imagines the individual as somebody who maximises his own utilities, assuming that if everyone looks after his own interests, he works to the

¹¹⁶ U. Mattei and P.G. Monateri, *Introduzione breve al diritto comparato*, cit., pp. 83 and 86.

¹¹⁷ R.D. Cooter, *Le migliori leggi giuste*, in *Quadr.*, 1991, p. 526 *et seq.*

¹¹⁸ A.M. Polinsky, *Una introduzione all'analisi economica del diritto* (1983), Bologna, 1986, p. 7.

¹¹⁹ A. Catania, *Manuale di teoria generale del diritto*, Rome and Bari, 1998, p. 135.

¹²⁰ D. Besomi and G. Rampa, *Dal liberalismo al liberismo*, Turin, 1998, p. 21 *et seq.*

¹²¹ E.g. A. Laurent, *Storia dell'individualismo* (1993), Bologna, 1994, p. 48 *et seq.*

advantage of everyone else¹²². Such an outcome depends upon the condition whereby the coordination of each individual's behaviour according to utilitarian instincts is the exclusive prerogative of the metaphorical "invisible hand"¹²³.

Those who affirm the universality of *homo æconomicus* clearly apply the same concept to his natural habitat – the market – and thus rely on untenable cultural premises. This view would only be acceptable if it could be shown that the system being examined complies with a set of innate mental structures, or which are at least historically intrinsic. But all we have ever seen is the exact opposite: before our time there has never been an economy controlled by the market, even generally speaking¹²⁴.

As we know, challenging the universal character of the results of intellectual speculation is one of the identifying characteristics of positivist thought. And the reaction against positivism can be characterised as a reaction against the belief that social phenomena are observable through processes capable of excluding interpretative accretions, and that thus produce scientific knowledge.

Economists do not take these latter factors into consideration, and once again rely upon their field – which is considered as being without a scale of values – to provide descriptions of how the world works¹²⁵. The problem being that in this way they forget how in economics the problem is never mathematical proof but always the interpretation of a theorem, in terms that seem to refer to the real world¹²⁶.

The same scientist attitude is found among scholars of economic analysis of law, who justify their studies as speculation distinct from evaluation, as though the interpreter could identify in certain, definite terms the outcome of such evaluations, and then translate them into choices with absolutely no trace of the interpreter. To apply these terms to a critique within an economic analysis of law, this would be like separating efficiency and the distributive

¹²² G. Solari, *Socialismo e diritto privato* (1906), Milan, 1980, p. 37.

¹²³ A. Smith, *Recherches sur la nature et la cause de la richesse des nations* (1776), T. 1, Paris, 1800, p. 25 *et seq.* (Lib. II, Ch. 2) e T. 2, Paris, 1800, pp. 335 and 340 (Lib. IV, Ch. 2).

¹²⁴ K. Polanyi, *Economie primitive arcaïche e moderne* (1968), Turin, 1980, p. 5.

¹²⁵ Robert Dorfman quoted by G. Alpa, *L'analisi economica del diritto nella prospettiva del giurista*, in G. Alpa et al. (eds.), *Interpretazione giuridica e analisi economica*, cit., p. 1.

¹²⁶ P.G. Monateri, *Risultati e regole*, in *Riv. crit. dir. priv.*, 1995, p. 611.

effects of some measure, an underhand ideological attempt at promoting the distributive objectives of the writer by hiding it under the cloak of science¹²⁷.

Let us now look at the connections between economic analysis of law and comparative law, as invoked by several authors of studies in social sciences other than economics¹²⁸. These connections are expected to provide a beneficial osmosis. Comparative law would find a useful ally for the fight against legislative positivism, which would be useful for showing the economic dimension – in a broader, institutional sense – of the hermeneutical processes in law, or in the same way for taking on the role of discourses antithetical to law¹²⁹. An economic analysis of law is not, however, our most suitable ally: if it can set up alternative discourses to law the same cannot be said of the purposes to which they are put (justifying a binding system of ideas), which might actually make it an accomplice of legislative positivists.

Even economic analysis of law is supposed to benefit from a connection with comparative law. Comparative law provides critical knowledge, and economic analyses are in need of critical reviews, indispensable if the faults in economics methodology are to be eliminated¹³⁰.

Nor is this all: the critique of the principle of the unity of the legal rule developed by comparative lawyers may save many positive aspects arising out of natural models. By this I mean that we can return to a truly cosmopolitan idea of law, and at the same time keep in touch with centuries-old stratifications which vary from legal system to legal system¹³¹.

Reading the literature where attempts are made at encouraging osmosis between economic analysis of law and comparative law shows that these promised benefits have yet to come about. Nor can it be any other way: economic analysis of law perpetuates – as a tribute to its functionalist origins – many positivist-based considerations, and therefore heavily tinged with the spirit of scientism. All of this goes alongside considerations which do not even question the cultural basis of economic analysis of law, *i.e.* providing a better

¹²⁷ G. Calabresi, *Prefazione*, in G. Alpa et al. (eds.), *Interpretazione giuridica e analisi economica del diritto*, cit., p. IX.

¹²⁸ E.g. P. Baert, *La teoria sociale contemporanea*, cit., p. 208 *et seq.*

¹²⁹ R. Cooter et al., *Il mercato delle regole*, cit., p. 17 *et seq.*

¹³⁰ U. Mattei and P.G. Monateri, *Introduzione breve al diritto comparato*, cit., p. 102.

¹³¹ *Ivi*, p. 105.

defined and more complete liberal ideology¹³², or – in other words – a tool for maximising "bourgeois" values¹³³.

It may seem rash to state that the connection between economic analysis of law and comparative law will have a positivist outcome: the former claims prescriptive status, whereas positivism credits itself as merely descriptive. But this is precisely the point: the supporters of the connection in question consider that this status of economic analysis of law will entail the death of the old paradigm of objectivity and scientificity in law and greater harmony with the underlying political dynamics¹³⁴. However they then go on to push the same paradigm by solemnising the principle of efficiency as an objective value or as a way of maintaining objectivity and neutrality¹³⁵. Which means that, whether it is openly prescriptive or merely descriptive, comparative law and economic analysis of law ends up by celebrating the myth of scientism inherited from positivism.

In other words, connections between economic analysis of law and comparative law will never bring about a critique of the former that is capable of refuting accusations of being a refined version of Langdell's idea whereby law consists of a universal system of principles, open to scientific discovery¹³⁶. On the contrary, any such connections confine themselves to taking on the appearances of an ideological pluralism which has been heralded but not yet come about. Actually, they do allow for the continuation of types of conceptualism which it was hoped could never – or need never – be mentioned again¹³⁷.

A different conclusion may be reached by re-examining – as has already been done by its most fiery advocates (led by Posner) – the starting points upon which economic analysis of law has been based. Within the discipline, many have recognised the validity of other criteria than efficiency – such as the need for state intervention in the economy¹³⁸ – or have accepted that efficiency is a

¹³² M. Kelman, *A Guide to Critical Legal Studies*, Cambridge Mass., 1987, p. 114.

¹³³ D. Kennedy, *Cost-Benefit Analysis of Entitlement Problems*, in *Stanf. L. Rev.*, 1981, p. 387.

¹³⁴ U. Mattei and P.G. Monateri, *Introduzione breve al diritto comparato*, cit., p. 108.

¹³⁵ U. Mattei, *Comparative Law and Economics*, cit., p. 3 *et seq.*

¹³⁶ G. Minda, *Teorie postmoderne del diritto*, cit., p. 143.

¹³⁷ P. Cappellini, *Scienza civilistica*, in *Quad. fiorentini*, 1986, p. 528.

¹³⁸ G. Minda, *Teorie postmoderne del diritto*, cit., p. 159 *et seq.*

function of the state's system for allocating rights¹³⁹. Even maxims such as the one about the rationality of market operators are challenged: appreciation is given to conditioning which may affect the decision-making process, as understood by behaviouralism¹⁴⁰. In this sense, absolute rationality has been replaced by "limited rationality"¹⁴¹.

It is not my intention to examine this. Instead, let us merely observe that economic analysis of law has been transformed into a subject decidedly different from the one we have been looking at so far. The main differences lie in its dissociation from scientism, which has been so often celebrated by those in favour of mixing economic analysis of law with comparative law. They do not seem to have noticed the radical changes which have occurred. The same can be said for those who have developed theories in the field of EC private law, explicitly or implicitly based upon the basis of traditional economic analysis of law¹⁴².

6. There is a common thread which brings together the critiques of the theories we have seen so far: the idea that rebuilding reality is the result of an intellectual process which is not merely reproducing events. Indeed, knowledge is expressed in legal discourses that are unable to exclude accretions by interpreters, a phenomenon to which the term "subjectivity in comparative law" alludes. This is also true in cases where reality is made to coincide with the events being examined, as an argument against positivism, and which can be reproduced only partially, as is believed by followers of the structuralist method and followers of the functionalist method in terms of their analyses, dedicated, respectively, to the structure and the functions of law.

From the positivist point of view, knowledge of the law is the consequence of processes which take place after prescriptive provision are made, which are considered to be the competence of sources of law. And these

¹³⁹ See N. Mercuro and S.G. Medema, *Economics and the law*, Princeton, 1999, p. 118 *et seq.*

¹⁴⁰ E.g. J.D. Hanson and D.A. Kysar, *Taking behaviouralism seriously*, in *Harv. L. Rev.*, 1999, p. 1420 *et seq.* and H. Eidenmüller, *Der homo oeconomicus und das Schuldrecht*, in *JZ*, 2005, p. 218 *et seq.*

¹⁴¹ This formula is not new: cfr. H.A. Simon, *Un modello comportamentale di scelta razionale* (1955), Id., *Causalità*, Bologna, 1985, p. 119 *et seq.*

¹⁴² Cfr. A. Somma, *Temi e problemi di diritto comparato*, Vol. 4, Turin, 2003, pp. 66 *et seq.* and 130 *et seq.*

processes are supposed to have an exclusively technical significance, because their only purpose is to accommodate and reproduce legal materials which are already in existence or available, *i.e.* an already constituted object which contains all logical possibilities¹⁴³.

This is not shared by structuralism and functionalism, and yet it comes to life again via the many professions of scientism we have seen emerge from the considerations developed according to either of these two branches of thought.

As we know, structuralism appears not to diverge from positivism when it considers a structure to be an entity knowable – even in some mediated way – by an observer capable of faithfully describing all its characteristics. Clearly, the structure of the law – and especially of specific laws – is much more complex than the positivist principle of the unity of the legal rule would have us believe. And yet the danger is that this will not lead us to any real change of perspective if all that happens is that we apply an old method to new subjects, or if we think that formants are understandable in certain and objective terms, as was once the case with the principle of the unity of the legal rule.

Similar things can be said about functionalism. The implicit premise whereby the functions of law may be perceived – once again, in a mediated way – comes very close to scientism, when these functions have been identified by using the *praesumptio similitudinis* with respect to the various duties which law fulfils in the systems under examination. This is all reinforced, on one hand, by the stress which is given to the connections between operational and conceptual analysis and, on the other, by assertions of neutrality based on the idea of efficiency.

In all honesty, it must be stressed that some remedies for scientism provided by structuralism and functionalism have been worked out by structuralists and functionalists themselves. These remedies were designed to assert the centrality of interpretation as a way of understanding legal phenomena. They are the consequence of considerations which came about in the field of philosophical hermeneutics, and were initially applied to techniques for deciphering texts. Only later were they applied to the terms for rebuilding reality.

The first profile (deciphering texts) came to light during the nineteenth century in writings which intended to show that interpretation could not be

¹⁴³ F. Viola and G. Zaccaria, *Diritto e interpretazione*, Rome and Bari, 1999, pp. 14 *et seq.* and 409 *et seq.*

limited to obscure communications, as had already been summarised, before the Enlightenment, in the formula "in claris non fit interpretatio".¹⁴⁴ In this light, the typical explanations of the so-called exact sciences were transformed – for the social sciences – into understanding. This is to say that they belonged to that subjective, historical side of knowledge, to be understood as a means for arriving at the facts rather than to its objective, timeless features, which were so typical of attempts at identifying the necessary chain of cause and effect¹⁴⁵. Thus hermeneutics became a practice used for understanding the sense of texts, and of eliciting their supreme sense¹⁴⁶.

As I was saying, appeals to the constitutive character of the interpretation of texts also occur in studies by comparative lawyers using the methods we have seen so far.

The functionalists allude to this when deciding which data are to be considered to describe the characteristics of a legal system: the style of the system. Among these characteristics, mention is even made of using a particular juridical mentality, which is understood as the main, characteristic way of thinking of jurists¹⁴⁷.

We have already seen similar considerations applied to the field of structuralism, in suggestions for integrating analyses using Vico's historical method and examining how a particular mentality may have influenced the system. The structuralists have also urged us to consider the dissociation of formants as proof of the coexistence of explanatory results distinct from the authentic meaning of a text, and which are the result of using several hermeneutic methods¹⁴⁸.

Please note this reference to the authentic meaning of a text, which structuralists elicit by a literal interpretation¹⁴⁹. The latter has caused many lacunae which can only be filled by referring to elements from outside the text, such as efficiency and system, which have been developed, respectively, by economic analysis of law and dogmatic analysis. According to this view we

¹⁴⁴ M. Ferraris, *L'ermeneutica*, Rome and Bari, 1998, p. 9.

¹⁴⁵ F. Viola and G. Zaccaria, *Diritto e interpretazione*, cit., p. 112.

¹⁴⁶ F.D.E. Schleiermacher, *Ermeneutica* (1809-1810), Milan, 1966, p. 195 *et seq.*

¹⁴⁷ K. Zweigert and H. Kötz, *Introduzione al diritto comparato*, Vol. 1, cit., p. 84 *et seq.* V. also P. de Cruz, *Comparative law in a changing world*, 2. ed., London etc., 1999, p. 38 *et seq.*

¹⁴⁸ R. Sacco, *Interpretazione del diritto*, in J. Derrida e G. Vattimo (ed.), *Diritto giustizia e interpretazione*, cit., p. 114.

¹⁴⁹ *Ibidem.*

cannot fix the boundaries for the literal interpretation of a law and hope thereby to limit any lacunae: a law is only clear if it can relate to the social and cultural legislative context which gave rise to it without creating conflicts¹⁵⁰.

These considerations rely upon an approach to hermeneutics which is in some ways similar to and another way different from the one we have just seen in philosophical writings. It is different when it does not try to understand the supreme sense of texts which are the linguistic objectifications of the spirit¹⁵¹: those texts to which structuralism makes allusions are not sheets of white paper, or at least white paper marked with ordered dark scribbles, which we know to be graphemes arranged, according to some intelligent program, by an operator¹⁵². What is more, authentic laws – even when taken literally and not according to their spirit, and even when their boundaries are extremely ill-defined – do exist, and with them the abstract possibility of formulating discourses about law which help us to understand it immediately. This is where I think the point of contact exists between hermeneutics as used by structuralist comparative lawyers and nineteenth-century hermeneutics.

This very aspect was reconsidered during later developments in hermeneutics, when attempts were made at turning it into an independent, universal intellectual pursuit for examining the most fundamental characteristics of human life rather than eliciting meaning from texts¹⁵³. It is a pursuit which, even if it considers texts the starting point for substantiations and the parameter for measuring the acceptability of its interpretations, is based upon a considerations whereby the boundary constituted by the words of a text cannot be determined before interpretation begins¹⁵⁴.

This paradigm shift does not only affect hermeneutics by widening its field; its echoes are also heard in the knowledge which can be obtained by interpretation. This knowledge, to which nineteenth-century hermeneutics alludes, can actually be assimilated to knowledge as it is understood by positivists; it is based upon the intention of showing that human sciences are capable, just as the natural sciences, of methodically guaranteeing the

¹⁵⁰ R. Sacco, *L'interpretazione*, in G. Alpa et al., *Le fonti del diritto italiano*, Vol. 2, in R. Sacco (ed.), *Trattato di diritto civile*, Turin, 1999, p. 186.

¹⁵¹ M. Ferraris, *L'ermeneutica*, cit., p. 10.

¹⁵² R. Sacco, *L'interpretazione*, cit., p. 174.

¹⁵³ B. Pastore, *Recensione*, in *Ars Interpretandi*, 2000, p. 257.

¹⁵⁴ B. Pastore, *Identità del testo*, in V. Velluzzi (ed.), *Significato letterale e interpretazione del diritto*, Turin, 2000, p. 164.

objectivity of knowledge¹⁵⁵. Nineteenth-century hermeneutics was to become the science of the being of an entity, observed in its insuppressible historicity and its unrelenting incapacity to transmit the supreme or authentic sense of things¹⁵⁶. This is a conclusion which can be reached by the well-known claims that "there are no facts, only interpretations," and that these are not generated by deduction, but by artistically creative imagination¹⁵⁷.

When understood in this way, hermeneutics becomes a necessary alternative to the metaphysical understanding of truth: understanding it does not mean reproducing a fact which can be objectively received, but is part of the process of interpretation which creates the fact so that the two elements, the subjective and the objective, can no longer be separated¹⁵⁸.

In other words, hermeneutics is not only a theory about the historicity of the horizons of truth: it is itself a radically historical truth. It is here that we find the nihilist constitutive vocation of hermeneutics, which is so vital if it is not to deteriorate into a pure, relativist philosophy about the multiplicity of cultures¹⁵⁹. This vocation is also considered by comparative lawyers as the only way of avoiding the transformation of hermeneutics into a theory about the multiplicity of conceptual schemes¹⁶⁰.

The nihilist approach leads to an understanding of history which is well summarised in the proposition that, in its traditional version, it sets itself up as narration with the benefit of hindsight, *i.e.* the result of the intention to re-examine everything that came to light in the last ten seconds, like an aeroplane's black box¹⁶¹.

In other words, the nihilist approach leads one to see narration as constitutive of the past and thus to abandon forever Vico's theories which, as everyone knows, credit historical research with the ability to produce verifiable knowledge. Furthermore, this also discredits all the variations on these theories, which – as we have seen – have been fully accepted by the structuralists. Such theories are still narrations which have not been considered as constitutive of

¹⁵⁵ G. Bertolotti (ed.), *Ermeneutica*, Milan, 2003, p. 166.

¹⁵⁶ M. Heidegger, *Essere e tempo* (1927), Milan, 1986, p. 54 *et seq.*

¹⁵⁷ F.W. Nietzsche, *Frammenti postumi*, 1886-1887: 7 [60], cit. from M. Ferraris, *L'ermeneutica*, cit., p. 56.

¹⁵⁸ G. Vattimo, *Nichilismo ed emancipazione*, Milan, 2003, p. 139.

¹⁵⁹ G. Vattimo, *Oltre l'interpretazione*, Rome and Bari, 1994, p. 3 *et seq.*

¹⁶⁰ P.G. Monateri, *Correct our watches by the public clocks*, in J. Derrida and G. Vattimo (ed.), *Diritto giustizia e interpretazione*, cit., p. 200.

¹⁶¹ M. Ferraris, *L'ermeneutica*, cit., p. 14.

the events being described¹⁶², in particular events which are functional to those myths which western modernity feeds upon¹⁶³.

In this sense, retrospective comparisons are absolutely inadmissible, because they use the knowledge of historical data to identify differences and identities arising out of synchronic comparisons. This type of comparison is particularly popular among scholars of Roman Law who, in trying to fight back against accusations that they are not "real jurists" because their field is "dry and sterile" and "more history than law," devote themselves to developing a new concept of common law, based on Roman Law, which they believe can apply to the whole of Europe, indeed the whole world, including Africa, which they suppose has adopted its fundamental legal principles¹⁶⁴.

Retrospective comparative lawyers believe that their field is an exact science – which eventually might require a certain amount of combination with economic analysis of law – that produces results profoundly different from those based upon an history of institutions and social events¹⁶⁵. Faced with such an admission, it only remains for me to point out (and here I should like to repeat the nihilist critique of traditional historiography) that considering references to the past in order to understand the present would be like encouraging a strange idea of historicism, whereby the passage of time is seen as a mere question of chronology, and not also as an event which shows us different subjects¹⁶⁶. It also would be like not realising that these references are the consequence of a clearly biased selection of the history of foreign systems which are more familiar or which are easier to adjust to a pre-existing vision of the relationships between systems¹⁶⁷.

Such reflections form the basis of a theory of post-modern comparative law which aims to reject – or at least overlook – the historical dimension of the events being analysed. This is a reaction to comparative law which, as we saw from the structuralist and functionalist perspectives, starts out by referring to

¹⁶² C. Conrad and M. Kessel, *Geschichte ohne Zentrum*, cit., p. 19 *et seq.*

¹⁶³ J.-F. Lyotard, *La condizione postmoderna* (1979), Milan, 1985, part. p. 5 *et seq.*

¹⁶⁴ G. Impallomeni, *La validità di un metodo storico-comparativo nell'interpretazione del diritto codificato*, in Riv. dir. civ., 1971, I, p. 374 *et seq.*

¹⁶⁵ C.A. Cannata, *Il diritto romano e gli attuali problemi d'unificazione del diritto europeo*, in *Studi in memoria di G. Impallomeni*, Milan, 1999, p. 69 *et seq.*

¹⁶⁶ F. de Marini Avonzo and M. Campolunghi, *Riccardo Orestano oggi*, in *DRA*, 1, 1999, p. 50 *et seq.*

¹⁶⁷ D.J. Ibbetson, *A reply to Professor Zimmermann*, in T.G. Watkin (ed.), *The Europeanisation of Law*, London, 1998, p. 236.

the historical dimension, and then confirms theories from which any references to the passage of time have been more or less excluded¹⁶⁸.

Obviously the denial of any historical dimension is a rejection of a specific use of history: *i.e.* the use which is typical of narrations that, to point out an established fact, stress the aspect of continuity by inserting obligatory chains of cause and effect. This is also the paradigm for discussions drawn up in the exact sciences which, as we know, try to “explain”, unlike hermeneutics which tries to “understand.” In other words, in the post-modern understanding, history is “bonne à tout faire”¹⁶⁹, and to this end uses the past as a sort of set of political and moral examples. In its time, this use was bitterly criticised by the scientific positivists, who preferred that any references to the past be a tool by which they could conceal any discontinuities in the evolution of law¹⁷⁰.

It is worthwhile pointing out that the post-modern understanding of history is actually very close to what happened in ancient Greece; since there was no real understanding of the passage of time (which was only to be developed in late antiquity via Christian thought, according to which the universe began with Genesis), it was felt that history was a sort of uncreated cycle in which things are destined to repeat themselves forever¹⁷¹.

In the intentions of post-modern comparative lawyers, this sort of idea of history is a necessary prerequisite for a definite purpose: emphasizing differences¹⁷². All of this is only possible if we validate (indeed consider indispensable) the connection between the events we are analysing and the context in which they arose. It is undoubtedly a historical context, but we must avoid considering inordinately long periods of time. Just like inordinate distances, these would end up wiping out or restricting the importance of those elements upon which the diversity of the elements being examined is based¹⁷³.

As we know, such a holistically-based attitude is formally appreciated by structuralist comparative lawyers, and it is a tenet for linguists when trying to find connections between the structures of a language. Post-modern holism, however, is different. On one hand it amplifies the context in which events are

¹⁶⁸ E. Jayme, *Osservazioni per una teoria postmoderna della comparazione*, in *Riv. dir. civ.*, 1997, I, p. 814.

¹⁶⁹ G. Alpa, *La cultura delle regole*, Rome and Bari, 2001, p. 266.

¹⁷⁰ F.C. von Savigny, *Über den Zweck dieser Zeitschrift*, in *Zt. ges. Rw.*, 1815, p. 3.

¹⁷¹ M. Ferraris, *L'ermeneutica*, cit., p. 5.

¹⁷² E. Jayme, *Osservazioni per una teoria postmoderna della comparazione*, cit., pp. 814 e 816.

¹⁷³ M. Graziadei, *Il diritto comparato*, cit., p. 345.

being studied, until it includes circumstances which are not considered by structuralists. On the other hand, it shows the connections between context and event, in order to underscore their mutual constitutive features, without identifying absolute cognitive schemes (although these are inaccessible to empirical studies).

This aspect has been appreciated by the same author I mentioned at the start, when he examines the subjectivity of comparative law as a consequence of its arising out of interpretation. Let us now consider his words, all the better to understand his terms of reference in this process.

This analysis must start with a concept which is at the basis of all reflections on comparative methodology: the concept of “herméneutique amplifiante”¹⁷⁴. Several assertions appear to place it in the field of traditional philosophical considerations, which see interpretation as a process for understanding texts and which, in the final analysis, thinks it possible to identify an ascertainable sense in them. This at least is what appears from the statement that interpretation is a work of mediation which, by bringing to light the enigmatic nature of every legal culture, requires decoding by deciphering both the signifier and the meaning¹⁷⁵.

Other considerations, however, seem to place the “herméneutique amplifiante” in the nihilist field. They are basically in line with the idea that knowledge about the legal culture is the fruit of personal interpretation, and therefore an “invention” or at best a “likely” narration¹⁷⁶.

The nihilist side of the “herméneutique amplifiante” places comparative lawyers who use it in the area of post-modern research. This is supported by another aim of the “herméneutique amplifiante”: to conceive of analysis of comparative law as a differential analysis, which serves to emphasise the differences between the events compared¹⁷⁷. So much so that they believe that supporters of the unification of law are the exact opposite of comparative lawyers¹⁷⁸.

¹⁷⁴ P. Legrand, *Le droit comparé*, cit., p. 29.

¹⁷⁵ *Ib.*, p. 15.

¹⁷⁶ *Ib.*, pp. 59 and 61.

¹⁷⁷ P. Legrand, *L'analyse différentielle des jurisprudences*, in *Rev. int. dr. comp.*, 1999, p. 1053 *et seq.*

¹⁷⁸ P. Legrand, *Le droit comparé*, cit., p. 36 *et seq.*

7. Hermeneutical philosophy thus leads to widening the field of discussion of legal phenomena, and to nourishing the Wittgensteinian understanding of language as linguistic games¹⁷⁹.

Moreover, the use of texts by adherents of hermeneutics occurs within frameworks where it is seen as the problem of justifying solutions in a given institutional context. If this is the case, purely hermeneutical analyses end up becoming background “noise” which distracts from the truth. And truth is reached by appreciating the eminently extra-linguistic characteristics of law, *i.e.* in its manifestations beyond any hermeneutical shield as events based upon fabrications necessary to make decisions socially acceptable¹⁸⁰.

This same aspect is also seen in considerations made by Pierre Legrand, the proponent of the “*herméneutique amplifiante*”. He considers discourses about law as tools by means of which the dominant representations of a society are set up and justified, especially by the establishment in law of the social categories of oppressors and the oppressed¹⁸¹.

One theorist of hermeneutics' unavoidable tendency to nihilism has criticised this definition as being entangled with metaphysics. It is said to be the herald of the discovery that where we thought there was something, there is actually nothing¹⁸². What is more, as we have just seen, comparative lawyers who point out the inherently fabricatory nature of the interpretation of law are focusing on a level which is not the philosophical one. They do not mention this discovery of nothingness, and merely put the use of law as a demonstration of power at the centre of their works. This clearly leads us to understand the struggle for power as a dispute about philosophical instances (upon which the very success of western jurists is based¹⁸³) which nonetheless are merely a reference point for talking about completely different instances.

In other words, comparative lawyers must leave behind their western viewpoint, wherein recourse to law is an exercise governed by mechanisms for attributing power¹⁸⁴. These mechanisms have a role which is by no means secondary (and which is not found exclusively in western law), but which is

¹⁷⁹ See G. Minda, *Teorie postmoderne del diritto*, cit., p. 390 *et seq.*

¹⁸⁰ P.G. Monateri, *Correct our Watches by the Public Clocks*, cit., p. 199 *et seq.*

¹⁸¹ P. Legrand, *Le droit comparé*, cit., p. 49 *et seq.*

¹⁸² G. Vattimo, *Nichilismo ed emancipazione*, cit., p. 147 *et seq.*

¹⁸³ A. Gambaro, *Il successo del giurista*, in *Foro it.*, 1983, V, c. 82 *et seq.*

¹⁸⁴ A. Gambaro, *Alcuni problemi in tema di diritto e giustizia nella tradizione giuridica occidentale*, in J. Derrida e G. Vattimo (ed.), *Diritto giustizia e interpretazione*, cit., p. 72.

surely incapable of reliably governing the struggle for power in which scholars of all the various branches of law participate.

Comparative lawyers need to be aware of the analyses of the concept of power, *i.e.* the faculty or problematic possibility of subjecting others to their own designs, whatever their desires or ambitions¹⁸⁵.

To this end, we must surely consider the writings of Max Weber, the critic of positivist-based scientific inquiry, who has postulated that social communications are purely symbolic and therefore fundamentally ambiguous. His observation that the terms used by the ruling elite are determined by the various techniques used for justification is a development of such postulates. In particular, if a "rational power" is involved, discourses will be based upon belief in the legitimacy of established systems. "Traditional power", on the other hand, uses arguments based upon a "daily belief in the sacredness of enduring traditions"¹⁸⁶.

It is not difficult to find in positivism a way of legitimising both these types of power. In particular, legislative positivism becomes a vehicle for rational power, which tries to isolate discourses of law from their historical and cultural contexts, and justifies them upon a source of law which has been formally recognised as such. Scientific positivism, on the other hand, nourishes traditional forms of power because it produces constructs which are accredited by means of their historical roots. Only by pointing out this aspects of positivism can one claim that comparative law is the critical understanding of the law.

This role becomes decidedly stronger if other discussions about power are taken into account; at the end of the day, they develop visions of law which are typical of the time when the first reactions against positivism appeared: understanding law as an event brought about by the fight against arbitrariness¹⁸⁷, or against thinking of customs (which is not the same thing as customary law) as a system whereby one man commands another¹⁸⁸.

Reference can be made to Michel Foucault's analyses of the link between the attribution of meaning to concepts – and therefore the emergence and enforcement of values – and the struggle for power. This idea, it is worth repeating, is not an allusion to a centre which is capable of controlling a

¹⁸⁵ F. Ferrarotti, *Il potere*, Rome, 2004, p. 9.

¹⁸⁶ M. Weber, *Economia e società* (1922), Vol. 1, Turin, 1999, p. 210 *et seq.*

¹⁸⁷ R. von Jhering, *La lotta per il diritto* (1827), Bari, 1960.

¹⁸⁸ E. Ehrlich, *I fondamenti della sociologia del diritto* (1913), Milan, 1976.

periphery, nor to flesh and blood people capable of imposing their will upon the masses. The power spoken of here by Foucault is actually a widespread phenomenon, and it is not exercised without a series of intents and objectives. Nevertheless, it is not the outcome of a choice or decision by an individual¹⁸⁹.

Unlike critics of the syncretism of interpretation and fabrication, Foucault's analysis regards the discursive importance of the exercise of power, which is unrelated to a problem of hermeneutical philosophy. Indeed power is analysed as a phenomenon which controls and selects the production of discourse, for the purposes of controlling random events and avoiding dangers. For this purpose, it makes use of systems of exclusion. For it is power which, to return to a subject we dealt with at the start, determines recourse to the various concepts used by social theories to assert the definitiveness of their acquisitions¹⁹⁰.

It is also power which determines the conditions for the implementation of discourses and requires those individuals holding it to use a certain set of rules so that not everyone may have access to it¹⁹¹. All things considered, it is power which sets up the rituals and techniques used by scholars of law to protect their social role and at the same time to apply their function as accomplices of the despot, where they are required to create a “system” from what is “arbitrary and incoherent”¹⁹².

These statements ought to make comparative lawyers reject any constructs which imply the acceptance of technicality as a basis for their analyses. Alternatively, comparative lawyers ought to consider them as narrations to be used for eliciting the characteristics of power which operate in the system being examined. This and nothing else ought to indicate – among other things – classifications in which the distinction between Western and other systems is based upon the separation, in the former, between law and politics on the one hand, and between law and philosophical or religious traditions, on the other¹⁹³.

To illustrate proper methodologies, we can examine two practices that are already used by comparative lawyers: institutional analysis and the emphasis so-called legal pluralism.

¹⁸⁹ M. Foucault, *La volontà di sapere* (1976), Milan, 1978, p. 84.

¹⁹⁰ M. Foucault, *L'ordine del discorso* (1971), Turin, 1994, p. 5 *et seq.*

¹⁹¹ *Ivi*, p. 19.

¹⁹² A. de Tocqueville, *L'assetto sociale e politico della Francia prima e dopo il 1789* (1836), in *Id.*, *Scritti politici*, Vol. 1, Turin, 1969, p. 218.

¹⁹³ U. Mattei, *Three Patterns of Law*, in *Am. Journ. Comp. Law*, 1997, p. 5 *et seq.*

Institutional analysis takes its cue from considerations by institutionalist theoreticians. These considerations were developed in Europe in the early twentieth century as a way of elevating institutions above the regulations preferred by the opposing normativist theory as a animus of legal events¹⁹⁴. This animus is considered by American scholars to be the source of the distinction between forbidden actions and actions which are either allowed or required¹⁹⁵.

In the same way, institutional analysts uses sources of law in a different way from legal scholars when attributing sense to a text. The idea of institution as referred to in the debates by these analysts is also the one currently being used by scholars of social sciences other than law¹⁹⁶: it concerns that set of values, regulations, and habits which, with varying degrees of efficacy, define and regulate over time – whatever the identity of the individuals involved may be, and usually beyond their lifespan – the social intercourse and mutual behaviour of a certain group of individuals and the dealings which an indeterminable group of other individuals have or may have with the members of that group¹⁹⁷.

From such a point of view, institutional analysis calls upon the interpretation of sources of law as a political problem rather than a philosophical one, and by this means attributing sense to texts can be seen as an activity which is carried out without any limits upon the imagination¹⁹⁸. Actually, institutional analysis leads one to observe the activity of a range of institutional players – especially Parliament and the courts – and considers it to be a way of dealing with the central problems of implementing and running legal systems, thus bringing to the forefront the character of such activity as a struggle about the verifiability of hermeneutical results¹⁹⁹.

If one starts with the not exclusively philosophical importance of interpretation as understood by institutional analysis, one inevitably ends up by considering interpretation as constructs of law which aim at consolidating power. However, it must have pointed out that these construct of law are not

¹⁹⁴ M. Hauriou, *Teoria dell'istituzione e della fondazione* (1933), Milan, 1967, p. 6 *et seq.*

¹⁹⁵ Al proposito F. Treves, *Sociologia del diritto*, cit., p. 136 *et seq.*

¹⁹⁶ U. Mattei and P.G. Monateri, *Introduzione breve al diritto comparato*, cit., p. 19.

¹⁹⁷ L. Gallino, *Dizionario di sociologia*, 2. ed., Turin, 2004, p. 392.

¹⁹⁸ See G. Alpa, *Interpretare il diritto*, in J. Derida and G. Vattimo (ed.), *Diritto giustizia e interpretazione*, cit., p. 209 *et seq.*

¹⁹⁹ P.G. Monateri, *Pensare il diritto civile*, cit., p. 91 *et seq.*

such only if they have been formally labelled in this way. Indeed power uses forms of communication without the typical technicalities of law, but which are nevertheless aimed at bringing about certain behaviour: forms of communication such as cinema, artistic expression, architecture, or the mass media to name but a few²⁰⁰.

Primarily, as we all know, power cannot be identified by starting with classifications which have been developed for use by positivism and with all the associated rhetoric about formal sources of law.

In a certain way, similar elements are taken into consideration by analyses of so-called law in action, which show up in an anti-positivist light, the regulatory importance of social life, of trade, of habits, of the customs of all groups, and not just the legally recognised ones but also those which have been ignored by law and even those which have been prohibited by law²⁰¹.

Several considerations on the subject of legal pluralism are also very interesting. They appreciate the presence – in the system being examined – of non-formalised sources of law and alongside these the action of powers which are capable of expressing a set of regulations applicable to citizens.

Studies of legal pluralism, besides many differences, also have similarities with institutional analysis, so much so that some supporters of institutionalist theories of law allude to legal pluralism²⁰². What is more, at least in the definition accepted by comparative lawyers, these studies arise out of – and develop alongside – many studies of non-western law carried out by anthropologists, who must have immediately realised the inadequacy of the conceptual apparatus traditionally used to study the Western law. It is only in this way that, for example, they could understand the phenomenon of legal stratification, so typical of systems where remarkable changes have taken place in a relatively short period of time. This is so for many legal systems in Africa where colonisation once occurred and where, alongside the traditional stratum of customs in societies with widespread power and an islamic-based religious stratum, there is a colonial stratum comprising the law of the occupying

²⁰⁰ See A. Somma, *Rappresentare il diritto*, in M. Stolleis, *L'occhio della legge* (2004), Rome, 2005, p. 1 *et seq.*

²⁰¹ E. Ehrlich, *I fondamenti della sociologia del diritto*, cit., p. 592 *et seq.*

²⁰² R. Treves, *Sociologia del diritto*, cit., p. 127.

Western power and a post-colonial stratum, also based upon the legal systems of Western countries²⁰³.

Appreciated by analysts of Western law, legal pluralism has contributed to pointing out the fallacy of understandings which see the state and its articulations at the centre of the system for producing laws²⁰⁴. They highlight the heterogeneity of the system of sources of law and the undeniable role of unwritten law in all societies²⁰⁵.

In this way, legal pluralism expands the idea of law which comparative lawyers must use when making comparisons. In reality, as well as ideas which exalt the role of the state, we must reject those based upon natural law which are based upon the metaphysical concept of just law. In their place, we must appreciate attempts at defining law which take into consideration the concept of power as we have seen it here: law is the set of regulations covering the imperative distribution of a society's values. And imperative is that distribution which includes placing sanctions upon deviations: social sanctions (ostracism), religious sanctions (excommunication), and legal sanctions (loss of life, liberty, or property)²⁰⁶.

Closely connected with the theme of legal pluralism are those functional-type definitions of law, which see it as a set of precepts indispensable for the coherency and reproduction of society²⁰⁷. We all know that functionalism is a reaction against the positivist yardstick. But we also know that it is not a proper reaction, if it does not also provide an approach which – as well as widening the field of study for comparative lawyers – understands the essence of law as a discourse for organising society in a particular way.

This reference to the discursive character of law, which we have encountered several times, is a necessary premise when choosing approaches which highlight comparative law as a critique of traditional legal studies: *i.e.* conceptual-type studies, which are prescriptive, but also cognitive and empirical-type studies, by means of which law is identified in the actions being

²⁰³ e.g. U. Mattei and P.G. Monateri, *Introduzione breve al diritto comparato*, cit., p. 148 *et seq.*

²⁰⁴ For all J. Carbonnier, *Sociologie juridique*, Paris, 1994, p. 356 *et seq.* and M. Guadagni, *Il modello pluralista*, Turin, 1996, p. 3 *et seq.*

²⁰⁵ R. Sacco, *Modelli notevoli di società*, Padova, 1991, p. 42.

²⁰⁶ S. Castignone, *Introduzione alla filosofia del diritto*, Rome and Bari, 1998, p. 27 *et seq.*

²⁰⁷ N. Rouland, *Aux confins du droit*, Paris, 1991, p. 138.

described. Thus, the analysis of law as a discourse allows us also to identify the boundaries for studies carried out in the wake of the realist method: such studies build up the idea of law by starting with an analysis of the actions of both the ruling elite and of the people to whom such actions apply. Indeed, many of realist studies failed to realise that law consists mainly of the most intangible and uncontrollable convictions and ideologies²⁰⁸.

8. Now, to complete this overview of the methods used in comparative law, let me summarise various stages we have looked at and the methods by which comparative law has tried to present itself as the critical understanding of the law.

I started by saying that scholars of internal law are, all things considered, still affected by the virus of positivism. They continue to nourish the myths of consistency and completeness in legal systems, and of the unity of the legal rule. They also use a scientist approach when analysing systems, because they consider the knowledge of law to be an empirical, inductive process.

On the contrary, comparative lawyers embrace the critiques of positivism which have been built up over time, in particular those in the field of social sciences, whereby knowledge – often functional as a justification for systems of power in the scientific community – can be obtained deductively and is often purely probabilistic. This means that knowledge of law is always incomplete, as reached by continuously biased observer.

To show the fallacy of the positivist yardstick, structuralist and functionalist analyses of law was carried out. They were presented as anti-positivist and anti-scientific inquiries because, respectively, they disputed those conceptualist aberrations upon which the myth of consistency and completeness of legal systems was based, and stated that law must be understood by starting with elements which are not immediately perceptible (such as its structure and its function).

²⁰⁸ See A. Febbrajo, *Tre interpretazioni della giuridificazione*, in *Pol. dir.*, 1987, p. 25 *et seq.*

Furthermore, structuralism and functionalism minimize the context in which law exists. Thus they give rise to theories that are unsuitable for representing an effective alternative to the positivist way of studying law²⁰⁹.

Such an outcome appears inevitable for structuralism: it observes law as a system, the boundaries of which are supposed to be delineated by identifying those structural constants which can withstand the passage of time. The same cannot be said for functionalism: it studies law not as a system *in se*, but rather as part of a broader system. However, the latter (*i.e.* the context in which law exists) ends up being suffocated by the simplifications imposed by the *praesumptio similitudinis*, which are very indicative of Western egocentrism²¹⁰. This is true notwithstanding attempts have been made by functionalists at identifying more restricted degrees of equivalency²¹¹ or at suggesting concurrent methods for bringing out cultural data²¹².

Hermeneutics has tried to develop the context in which law exists. It considers interpretation as a process for understanding the sense of a text by placing it in between a range of historic time-based coordinates. However, these coordinates are not situated in some distant past, and cannot be understood in objective terms: historical accounts are always written with the benefit of hindsight. In this way, interpretation becomes a constitutive discourse for the whole of human life, as well as for individual texts which are incapable of explaining their own sense. The results of the process of hermeneutics are non-verifiable and its discourses are therefore not tainted with traces of scientism, which is so often found in structuralist and functionalist debates. This is the basic outcome which post-modern comparative law has arrived at, with its claims for absolute subjectivity in comparative law investigations.

If these considerations are brought together with analyses of power and its discourses, the final result will be to show the political – and therefore non-hermeneutical – nature of interpretation. This has been shown by institutional analysis, which considers the realm of law to be a struggle between rival powers carried out by using competing discourses. Moreover – and this is something which legal pluralism has achieved – the powers which are

²⁰⁹ J. Bell, *Comparative law and legal theory*, in *FS R.S. Summers*, Berlin, 1995, p. 19 *et seq.*

²¹⁰ L.-J. Constantinesco, *La scienza dei diritti comparati* (1983), Turin, 2003, p. 43.

²¹¹ As suggested by K. Scheiwe, *Was ist ein funktionales Äquivalent in der Rechtsvergleichung?*, in *KritV*, 2000, p. 30 *et seq.*

²¹² J. Husa, *Farewell to Functionalism or Methodological Tolerance?* in *RabelsZ*, 2003, p. 419 *et seq.*

emphasised are more numerous and more articulated than those contemplated in the traditional theory of sources of law. In this way, as I shall shortly point out, the study of legal discourses should not be subjected to any sort of conditioning that usually occurs when identifying traditional boundaries between branches of knowledge.

The study of power as a political problem combined with analyses of its discourses – which is also a convergence of political and philosophical approaches – leads comparative lawyers to analyse the unstable and non-reciprocal connections which exist between techniques and values, or between the legal discourses and the social order which they seek to promote²¹³.

A dissociation between techniques and values has often been considered by linguists. At least, this seems to be the outcome of the so-called ideational theory of language, according to which the meaning of linguistic expressions derives from their being mark of a certain idea²¹⁴.

Attempts at giving meaning to concepts contained in legal discourses – which is where the struggle for power takes place – is an ever-changing world. Transitions from one meaning to another occur during periods in which the second meaning, before it prevails and becomes accepted as self-evident, exists alongside the first meaning²¹⁵. I think that it is at such times that law is substantiated, as only rarely is there a clear break – by which I mean a situation in which power takes totalitarian control of social intercourse – rather than a gradual transition .

Nor is this yet all. These periods, during which a concept expresses different meanings, make evident the dissociation between techniques and values.

Indeed, it is at precisely these times that the ambiguity of law²¹⁶ – not to mention its chaotic, inconsistent nature – can be seen in all its innate glory.

Yet, it is not my intention to peddle theories on the connections between society and law to show the latter as a faithful mirror of the former²¹⁷. Appreciation must surely be given to these theories, since – as they bring out the values, expectations, and attitudes towards law and legal institutions held by

²¹³ A.M. Hespanha, *Introduzione alla storia del diritto europeo*, Bologna, 1999, p. 15 *et seq.*

²¹⁴ Including W. P. Alston, *Philosophy of language*, Engelwood Cliffs N.J., 1964, p. 22 *et seq.*

²¹⁵ P. Baert, *La teoria sociale contemporanea*, cit., p. 169 *et seq.*

²¹⁶ G. Frankenberg, *Critical comparisons*, in *Harv. Int. L. Journ.*, 1985, p. 453 *et seq.*

²¹⁷ For all, L.M. Friedman, *Law in a Changing Society*, London, 1959, p. 3 *et seq.*

citizens or by some members of the citizenry – they allow us to overcome comparisons between legal systems by providing a comparison between legal cultures²¹⁸. This formula is not far away from those often encountered in post-modern writings and, in general, in discussions about redefining the concept of law²¹⁹. Moreover, no mere widening of the goalposts is ever going to be enough. What will be important are the methods variously used, and their ability to reveal, on the basis of hermeneutical thought, the discursive nature of law.

In other words, we need to develop the observation whereby we must bring to the forefront the social substance of legal solutions and their particular technicality²²⁰ or, in the same way, make a distinction between social data and legal constructs²²¹. We also need to understand that connections between society and law can be identified at a discursive level as the essentially unstable relationship between the techniques used by the ruling elite – of which law is only one – and the values which they promote to come to power and to stay in power.

In this way, the task of comparative lawyers is to analyse legal discourses in order to highlight the values they wish to promote and the power system which can best connect the two.

Clearly we must start with legal discourses identified as such according to the indications within the systems we are studying. However, such indications are usually vitiated by a series of creeds inside those very systems – for example positivism with all its various corollaries – which, with the help of the pluralist approach, comparative law reveals to be essentially strategies for use by the ruling elite. Hence, the specification that law is only one of the techniques which can be used for this purpose. Indeed we must also consider the norms of behaviour as developed in various areas other than law, upon which human society is founded: for example norms arising from debates about the economy, or politics, or even religion.

I am now touching on the theme of division of intellectual labour²²². Indeed, creating branches of knowledge, identifying their boundaries and their

²¹⁸ L.M. Friedman, *The concept of legal culture*, in D. Nelken (ed.), *Comparing Legal cultures*, Aldershot etc., 1997, p. 34.

²¹⁹ E.g. E. Jayme, *Die kulturelle Dimension des Rechts*, in *RabelsZ*, 2003, p. 211 *et seq.*

²²⁰ T. Ascarelli, *Premesse allo studio del diritto comparato* (1945), in Id., *Saggi giuridici*, Milan, 1949, p. 11.

²²¹ L.-J. Constantinesco, *La scienza dei diritti comparati*, cit., p. 298.

²²² G. Vattimo, *Nichilismo ed emancipazione*, cit., p. 135.

internal divisions, which is exactly what happens with debates within those branches, is an activity which has been influenced by the struggle for power. The same can be said for the methods used to produce knowledge which, as we saw with respect to wide-ranging theoretical perspectives, are often one and the same thing as the branch of knowledge selected, and which often determines the use thereof²²³.

I am not going to promote visions for bringing together the branches of knowledge as happened with the founders of sociology, especially Auguste Comte, who introduced his new science as a universal way of analysing social behaviour based upon positivist methods²²⁴. Nor is it my intention to subscribe to any suggestions for identifying the study of law in the sociology of law, as indeed happens with the positive-type approach to knowledge²²⁵.

What I do want – and let me repeat it here – is to shed light upon the discursive dimension of law and show that it has non-reciprocal connections with the power system one wishes to bring about. This is the outcome of the hermeneutical approach which, on the one hand, can show how legal discourses are constitutive of legal reality and, on the other, can shed light upon the ruling elite's use of such discourses and therefore upon the characteristics of the system which they are trying to create or maintain.

²²³ N. Rouland, *Aux confins du droit*, cit., p. 143.

²²⁴ Cfr. V. Ferrari, *Diritto e società*, cit., p. 6.

²²⁵ See e.g. M.A. Cattaneo, *Voce Positivismo giuridico*, cit., p. 319.