11-1-2005

The Functional Method of Comparative Law

Ralf Michaels

Duke University Law School

Follow this and additional works at: http://lsr.nellco.org/duke_fs

Part of the Comparative and Foreign Law Commons

Recommended Citation

http://lsr.nellco.org/duke_fs/26

This Article is brought to you for free and open access by the Duke Law School at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in Duke Law School Faculty Scholarship Series by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.
The Functional Method of Comparative Law

Ralf Michaels*

This is a draft version only. The final paper will be published in The Oxford Handbook of Comparative Law (Mathias Reimann & Reinhard Zimmermann, eds., forthcoming with Oxford University Press)

I. “THE FUNCTIONAL METHOD” ........................................................................................................2

II. CONCEPTS OF FUNCTIONALISM .....................................................................................5

1. NEO-ARISTOTELIAN FUNCTIONALISM..................................................................................7
2. EVOLUTIONARY FUNCTIONALISM .........................................................................................9
3. STRUCTURAL FUNCTIONALISM .............................................................................................11
4. NEO-KANTIAN FUNCTIONALISM .........................................................................................17
5. EQUIVALENCE FUNCTIONALISM .........................................................................................19
6. FUNCTIONALIST COMPARATIVE LAW: SYNTHESIS OR ECLECTICISM? .........................23

III. FUNCTIONS OF FUNCTION ..............................................................................................25

1. THE EPISTEMOLOGICAL FUNCTION: UNDERSTANDING LAW ...........................................26
2. THE COMPARATIVE FUNCTION: FUNCTION AS TERTIUM COMPARATIONIS ...................29
3. THE PRESumptIVE FUNCTION: PRÆSUMPTIO SIMILITUDINIS ..........................................31
4. THE FORMALIZING FUNCTION: BUILDING A SYSTEM .........................................................34
5. THE EVALUATIVE FUNCTION: DETERMINING THE BETTER LAW ....................................36
6. THE UNIVERSALIZING FUNCTION: UNIFYING LAW ..........................................................39
7. THE CRITICAL FUNCTION: CRITIQUE OF LEGAL ORDERS .............................................42

IV. TOWARDS INTERPRETATIVE FUNCTIONALISM IN COMPARATIVE LAW? 44

* Associate Professor of Law, Duke University. This essay was finalized while I was a Lloyd Cutler Fellow at the American Academy in Berlin.
I. “The Functional Method”

The functional method has become both the mantra and the bête noire of contemporary comparative law. For its proponents it is the most fruitful, perhaps the only method of comparative law. For its opponents it stands for everything that is bad about mainstream comparative law. The debate over the functional method is therefore much more than just a disinterested scientific methodological dispute. It is the focal point of almost all discussions about the field of comparative law as a whole, about centers and peripheries of scholarly projects and interests, about mainstream and avant-garde, about ethnocentrism and orientalism, about convergence and pluralism, about technocratic instrumentalism and cultural awareness, etc.

Not surprisingly, this functional method is a chimera, both as theory and as practice of comparative law. Regarding theory, the typical reference point for both supporters and opponents alike is a chapter of less than twenty pages in an introductory textbook, a text which is in its original conception almost fifty years old, and whose author expressed both disdain for methodological debate and passion for inspiration instead of methodological rigor as the


3 For Zweigert’s famous disdain for methodological debates see Zweigert, Kötz (n. 2) 33, calling “generally true” a quote from Gustav Radbruch, Einführung in die Rechtswissenschaft (9th ed. 1958) 242: “sciences which have to busy themselves with their own methodology are sick sciences”. A more moderate version of
comparatist’s ultimate guide.⁴ Even a seminal text like this one cannot possibly provide all possible elements of a functional comparative law, nor suffice to deal with all criticism directed against the approach. Moreover, even a spurious overview of comparative law theory reveals that functionalism is, and has always been, only one of several approaches. Even leaving aside both the classification of legal systems in legal families (which is, arguably, rather a prerequisite for comparative legal studies than actual comparison), and the many comparative studies that do not apply any recognizable method, we still find at least three main current approaches to comparative law other than functionalism: comparative legal history, the study of legal transplants, and the comparative study of legal cultures.

And regarding practice, there are of course some famous examples in comparative law of successful and methodical explicitly functional comparison, but they are famous in no small part because they are so rare.⁵ “Functional method” often serves merely as a reference to traditional comparative law, again for supporters and opponents alike. Two recent works on similar topics illustrate this. On the one hand Stefan Vogenauer explicitly places his comprehensive comparative study on statutory interpretation within the functional tradition, although his argument is methodological, not functional.⁶ On the other hand Mitchel Lasser describes the method behind his comparison of judicial styles of argument as a (cultural) analysis of mentalité⁷, but his explanation for differences between legal systems – the goals of transparency, judicial


Infra n. 94.


accountability and control are guaranteed in all legal systems, albeit by different means\(^8\) – is a typically functionalist argument from functional equivalents.

In short, “the functional method” is a trifold misnomer: There is not one (“the”) functional method but many, not all methods so called are functional at all, and some projects claiming adherence to it do not even follow any recognizable method. So does functionalist comparative law actually mean anything? There are some common elements on which functionalist Comparatists agree. First, functional comparative focuses not on rules but on their effects, not doctrinal structures and arguments, but events. As a consequence, its objects are often judicial decisions as reactions to real life situations, and legal systems are compared with regard to their answers to similar situations. Insofar, functionalist comparative law resembles the so-called case method or factual method,\(^9\) and this method is indeed often referred to as functionalist. But while the factual method looks merely at events and has little to say about their meanings, functionalist comparative law combines its factual approach with the theory that these facts must be understood in the light of their functional relation to society. This theoretical background is the second important element of functionalist comparative law. Law and society are thus thought to be separable but connected. Consequently, and this is the third element, function serves as yardstick for comparison, as tertium comparationis. Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfill similar functions in different legal systems. A fourth element, not shared by everyone, is that functionality can serve as an evaluative criterion. Functionalist comparative law then becomes “better law comparison” – the better of several laws is that which fulfills its function better than the others.

In order to evaluate this method we first need to reconstruct it. I will therefore first place the functional method in a historical and interdisciplinary context, in order to see its connections with, and peculiarities opposed to, the debates about functionalism in other disciplines. Second, I will try to use the functionalist method on the method itself, in order to determine how functional it is. This makes it necessary to place functionalism within a larger framework – not within the development of comparative law, but instead within the rise and fall of functionalism in other


disciplines, especially the social sciences. It is of course a risk for a comparative lawyer to use disciplines foreign to his own – sociology, anthropology, philosophy – as lens on his own discipline. The risk may be justified with respect to the insight from comparative law that looking through the eyes of the foreign law enables us better to understand ourselves. Such a connection yields three promises. First, the interdisciplinary look should enable us to (re-) construct a more theoretically grounded functional theory of comparative law than is usually presented. Second, it should help us formulate and evaluate critique of this concept. As comparative law can borrow from the development of functional methods in the social sciences, so it can borrow from the development of critique. However, comparative law is not a social science, and here lies the third promise of an interdisciplinary approach: The comparison with functionalism in other disciplines may enable us to see what is special about functionalism in comparative law, and why what would in other disciplines rightly be regarded as methodological shortcomings may in fact be fruitful for comparative law.

II. Concepts of Functionalism

In 1971, Konrad Zweigert postulated a methodological monopoly: “The basic methodological principle of all comparative law is that of functionality.”\(^\text{10}\) Twelve years before him, Kingsley David had done something for sociology and anthropology when he had called structural-functional analysis “synonymous with sociological analysis.”\(^\text{11}\) Similarly again, for legal doctrine and theory Laura Kalman quips that the notion of the statement that “we are all realists now” as a truism has itself become a truism.\(^\text{12}\) Such claims of monopoly suggest lack of conceptual clarity or lack of theoretical sophistication or both. If functionalism is the only method in a discipline, chances are that either the discipline does not recognize all of its potential, or the notion of functional method is blown up to cover so much that it becomes a meaningless concept. Indeed, neither Davis nor Kalman thought that a specified version of functionalism had won the day in their respective disciplines. Davis proposed

\(^{10}\) Zweigert, Kötz (n. 2) 34.
\(^{12}\) Laura Kalman, Legal Realism at Yale, 1927-1960 (1986), 229. See also Lawrence Rosen, ‘Beyond Compare’, in Legrand, Munday (n. 5) 493, 504, ending his critique of functionalism by proclaiming: “In some sense, of course, we are all functionalists and that is all to the good inasmuch as it leads us to see connections we might not otherwise have thought obtained.”
to drop the notion of functionalism because it blurred the underlying methodological differences. Similarly, the “we are all realists” quote has been used as a strategy to conceal the special contributions of legal realism rather than to adopt their general ones, a way of beating realism by embracing it to death. If we are all functionalists as Zweigert proclaims, then functionalism cannot mean very much – but neither, as one tends to overlook, can its rejection by its critics. This is true for the debate in comparative law even more than for that in other disciplines.

Once we try to reconstruct a more specific concept of functionalism in each discipline, we reach another, less obvious but more important problem. Superficially, one may think that functionalism is, broadly the same in different disciplines. After all, the turn in the 19th and 20th century away from essentialist to functionalist methods, from observation of objects themselves to observation of their relations amongst each other and to the whole, was so widespread that one could well speak, in parallel to the famous linguist turn, of a general “functionalist turn” away from essentialism in all academic disciplines (and beyond, for example in architecture). There may indeed be no more fashionable concept in the 20th century than that of function. The story of the simultaneous rise and fall of functionalism in different disciplines suggests a similar, perhaps even a common, development, or evolution, of ideas. Similarity becomes more plausible once we realize that the development of functionalism was not only parallel, but was based on cross-fertilizations between disciplines: Ernst Cassirer transposed the notion from

13 At one point one great functionalist Radcliffe-Brown called himself an antifunctionalist just in order to distinguish himself from the other great functionalist, Malinowski, and his definition of the term: A.R. Radcliffe-Brown, ‘Functionalism: A Protest’, (1949) 51 American Anthropologist 320, 321.
17 Connections are drawn e.g. by Rudolf B. Schlesinger et al., Comparative Law (6th ed. 1998), 49; Rosen (n. 12), 504.
mathematics and science to philosophy, sociologists from Comte and Spencer via Durkheim to Parsons and Luhmann through borrowed biological concepts, lawyers like Jhering and Pound were inspired by sociological ideas of function. But such cross-fertilization, as we well know from the legal transplants debate, is not immune to misunderstandings and alterations, both knowing and unknowing. The story of a common development, suggestive as it may be, tends to overlook the differences between concepts and disciplines and, as a consequence, the differences between different kinds of functionalism. This is especially problematic for a discipline like comparative law that sees its place somewhere between the social sciences on the one hand and legal studies on the other, and draws methodological inspiration from both. If the concepts and methods in these disciplines are different, the result can only be methodological mishmash.

In fact, one can distinguish five different concepts of functionalism: neo-Aristotelian functionalism based on inherent teleology (1), evolutionary functionalism in a Darwinian tradition (2), structural functionalism related to Durkheimian sociology (3), neo-Kantian functionalism emphasizing a relational epistemology (4), and equivalence functionalism, building on these concepts but emphasizing the nonteleological, noncausal aspect of functional relations (5). Functionalist comparative law uses all of them, oblivious of incompatibilities (6).

1. Neo-Aristotelian Functionalism

Obviously, the idea that law performs some function for society in an unspecific sense is old. In one way it can be found in Aristotle, for whom the purpose of things, their telos or causa finalis, was part of their nature. Underlying this was a teleological image of the world, in which everything strived towards perfection. Is and ought were connected, the correct laws could be deduced from the nature of things. Such thoughts were later rejected both in philosophy and in legal theory, but the crisis of legal positivism spurred a simultaneous return to natural law and comparative law, and Aristotelian ideals, in the twentieth century. Once it could be shown that not only problems but also their solutions were similar, a return to a minimal version of natural law or at least ius gentium, based on the Aristotelian notion of function, seemed possible. To this end, the revived rhetorical tradition of topics could be made fruitful. Topics, taking the role of

---

19 Ernst Cassirer, Substanzbegriff und Funktionsbegriff (1910); English translation as Substance and Function (1923).
20 Besides Max Salomon see especially Fritz v. Hippel, Zur Gesetzmäßigkeit juristischer Systembildung (1931); Theodor Viehweg, Topik und Jurisprudenz (1954, 5th ed. 1974) = Topics and Law (1993); Ernst A.
problems, did not spur universal solutions by themselves but inspired similar analyses with a tendency of similarity.

The most important work in this tradition and at the same time one of the most important works of functionalist comparative law is Josef Esser’s seminal work on principles and rules in judicial lawmaking.\(^{21}\) Esser’s functionalism is richer and more sophisticated than the one developed later by Zweigert, but its central element are strikingly similar: institutions are contingent while problems are universal, the function can serve as *tertium comparationis*, different legal systems find similar solutions by different means, so universal principles of law can be found and formulated as a system with its own terminology.\(^{22}\) The reason for the similarity is that problems carry their own solutions within them and arguments can be made from the *Natur der Sache* (the thing’s nature); a commonality of values is the consequence. Another comparatist, more openly in the tradition of Aristotle and Thomas Aquinas, is James Gordley.\(^{23}\) While his approach is more philosophical than Esser’s, his general approach is quite similar: Gordley also sees different laws as different responses to the same, universal problems.\(^{24}\) Neo-Aristotelians postulate that comparative law can lead us to universal common legal principles. Different laws provide answers to similar problems that are doctrinally (formally) different but substantively similar, and their relative similarity suggests inherently correct solutions to these problems – a natural law, a *ius commune* (Gordley), or a *ius gentium* (Esser).

Both Esser and Gordley call their approach functional and have been influential for functionalist comparative law. However, they use function in a very specific sense: For them it is synonymous with purpose and *causa finalis*. This is quite different from the modern notion of function as developed by Durkheim, who had explicitly rejected the Aristotelian fourfold concept of causa by confining ‘cause’ to *causa efficiens*, and had replaced end or goal (*causa finalis*) with function.\(^{25}\)


\(^{22}\) Esser (n. 21), ch. 10.


Since then, the function of a thing (or a law) has been separated not only from the reasons for its origin and evolution, but also from its essence; functional relations were separate from the things themselves. Esser’s and Gordley’s functionalism must be understood against the background of Aristotelian ontology and metaphysics, and the weaknesses of the Aristotelian tradition cause problems for their functionalism as well.

2. Evolutionary Functionalism

The Aristotelian worldview was rocked by Darwinism, but Darwinism did not discard teleology altogether. While individuals now fought for their own interests rather than for their own nature, they nevertheless still contributed to the progress of the whole. Darwinian ideas influenced all disciplines in the 19th century, including the new discipline of sociology, and the concept of function in it. Auguste Comte, who gave sociology its name, introduced a vision of society as a complex organism which evolved as a whole, while its elements all performed certain functions towards this evolution. Herbert Spencer, closer to Darwinism, conceptualized society more as a struggle of all against all, but emphasized the important interplay between structures and their functions for society. Not surprisingly, evolutionist thought was also influential on lawyers of the time, none more perhaps than Jhering. His analysis was openly teleological, only the source of the telos had moved from nature to society.

This evolutionary functionalism seemed especially apt for comparative studies, that consisted largely of comparative legal history as the history and diffusion of ideas and doctrines. The new sociological interest in interrelations between law and society changed the focus. Now law was neither to be drawn from texts nor from the spirit of a particular people, but from general ideas about societies and their development. Consequently, generalizations across borders were possible, and comparative law could become a science dealing with the way that societies dealt

26 Durkheim (n. 25), 183. “Faire voir à quoi un fait est utile n’est pas expliquer comment il est né ni comment il est ce qu’il est”.
27 This is in dispuite. For Darwin’s high esteem for Aristotle (whom he discovered late in his life) see Allan Gotthelf, ‘Darwin on Aristotle’, (1999) 32 J. of the History of Biology 3-30.
with similar problems on their paths toward progress. Law, so it seemed, had to become sociology (or, in Holmes’ famous words, economics), in order to remain both adequate and scientific. Central to these developments was the focus on functions, both of law at large and of its individual institutions. This enabled a second, more prescriptive, application of evolutionary functionalism to comparative law: law as social engineering and its comparative law application in the law and development movement. If law contributed to a society’s progress, then it should be possible to export well-functioning laws to developing countries and thereby help them evolve and progress.

Today, evolutionary functionalism survives only in a very reduced form. In political science it is used as an explanation of convergence, especially of the European Union\footnote{David Mitranyi, \textit{A Working Peace System: An Argument for the Functional Development of International Organization} (1943); Ernst B. Haas, \textit{Beyond the Nation-State: Functionalism and International Organization} (1964); cf. Jürg Martin Gabriel, \textit{Funktionalismus – Ein Überblick} (1996); David Long, Lucian M. Ashworth, ‘Working for Peace: the Functional Approach, Functionalism and Beyond’, in id. (eds.), \textit{New Perspectives on International Functionalism} (1999), 1-26.}. In comparative law, the idea that law can help countries develop is tried again on countries of former Eastern Europe, with different degrees of success. Otherwise, faith in teleological evolutionary functionalism has suffered. The catastrophe of two World Wars rattled the faith both in teleological evolutionism and in progress through law. Once the direction of the world had lost its inner teleology, the complexity of the world made simple functionalism of means and ends harder to justify both as explanatory theory and as guiding principle. Methodologically, evolutionary functionalism seemed to suggest a false determinism, a criticism also brought forward against evolutionary functionalism as explanation of legal developments as well.\footnote{William Gordon, ‘Critical Legal Histories’, (1984) 36 \textit{Stan. LR} 57-125; Günter Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’, (1985) 26 \textit{Harv. Int’l L. J.} 412, 438.} As a normative theory of legislation it failed largely because social engineering proved much more complex than one had thought, for various reasons: a naïve faith in monofunctionality of legal institutions, insufficiency of legal regulation to prevent society to bring about the disliked results by other, legal means.\footnote{Kerry Rittich, ‘Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates’, (2005) 55 \textit{U. Toronto L. J.} 853-868.}

For law and development an additional problem was a lack of awareness for cultural differences – what functions well in one system may not work at all in another. Evolutionary functionalism has therefore been called ideological and ethnocentric, again a criticism replicated in comparative law.
3. Structural Functionalism

Evolutionary functionalism relied on ideas of inner teleology and was based on a somewhat naïve faith in progress. Sociologists interested in a value-free sociological science tried to develop a nonteleological, nonevolutionary functionalism, the third concept of functionalism. It can be traced back to Émile Durkheim, who introduced two important ideas. First, as we have seen, he separated functions from origins and established functions as relations between, not qualities of, elements. Second, he emphasized that the goals of individuals were contingent and therefore no valid object of scientific endeavors; sociology as a science could only focus on objective functions. Both steps were crucial. If the ends or goals of an institution were its inherent elements, any explanation had to be teleological, and an analysis would have to focus either on the will of a transcendent creator, or on the inherent nature of things. If institutions were defined by the purpose defined by their creators, a systematic analysis would likely be impossible, because individual goals could be hard to observe and would be arbitrary and contingent. The emphasis on objective functions, distinct both from origin and purpose, allowed the search for general laws, the goal of all sciences, and indeed, according to Durkheim, revealed a remarkable degree of regularity and similarity between societies.

Several elements of Durkheim’s functionalism reappear in functionalist comparative law: the scientific character and objectivity of research, the regard to society as a whole that transcends the sum of its parts because its elements are interrelated, the idea that societies have needs, the idea that law can be understood with regard to the needs it fulfills, a focus on observable facts rather than individual ideas (law in action versus law in the books), and, in particular, the finding of similarity between the institutions of different societies. But although Durkheim himself was a trained lawyer, his theory had relatively little direct impact on functionalism in comparative law. In 1900 Saleilles defined that comparative law “cherche à définir le type d’idéal tout relatif qui se dégage de la comparaison des législations, de leur fonctionnement et de leurs résultats” and emphasized “l’unité des résultats dans la diversité des formes juridiques d’application”. But most comparatists in the Durkheimian tradition focused rather on a nonteleological comparative legal history than on functional analysis and opposed functionalist comparative law.

---

34 Durkheim (n. 25) 194 ff.
Indeed this criticism reveals the differences to what may look like his closest analogue in law to sociological functionalism, namely legal realism in the form of instrumentalism. Instrumentalism is explicitly normative, while functionalism is not (and for this reason the difference between realism and law and development is much less clear than that between Durkheimian and Comtean sociology). Yet the idea that legal institutions fulfill functions for society is one shared by both disciplines. If law fulfills functions and meets societal needs, then the lawyer’s task is to develop laws that are apt to this task, and comparative law can help compare different solutions in their ability to solve problems. Jhering had already emphasized that law developed in response to ends not of individual but of society. An early example of such functionalism comes from Franz v. Liszt, a supporter of a functional criminal law in the tradition of Beccaria. He suggested that, because punishment was necessary for maintenance of the legal order and the legal order in turn was necessary for maintenance and development of the state, criminal law norms had to be judged against their ability to maintain the legal order (legal functionalism), and this function was the tertium comparationis for the comparison of criminal law in different legal orders (functionalist comparative law). Similarly, antiformalist legal thought in the beginning of the 20th century showed the influence of functionalism. Philipp Heck, the most important proponent of a jurisprudence of interests, also argued for functionalist comparative law: Because different societies had similar values their laws were different only in doctrine but similar in results. In the United States the sociological school of law, one predecessor to legal realism, took its inspirations from these European developments. Roscoe Pound’s interest, in sociological-functional law and in comparative law alike, was in “law in action, not law in the books” and in “how the same things may be brought about, the same problem may be met by one legal

39 v. Liszt (n. 3) 60.
institution or doctrine or precept in one body of law and by another and quite different institution or doctrine or precept in another” — both central elements of functionalist comparative law. With the advent of legal realism, functionalism became fashionable in law review articles and in proposals for law curriculum reform, although, somewhat surprisingly, the interest of legal realism in comparative law was scant. All these approaches start from the notion of function in a sociological sense. But then they translate objective functions into purposes to be set by legislators, they substitute teleological analysis for Durkheim’s objective science, and they assume that the effect of laws on society can be measured and controlled, both very doubtful assumptions from a sociological perspective.

Indeed, the more complex sociological functionalism became, the less useful it became for functionalist comparative law. The work of the likes of Radcliffe-Browne, Malinowski, and Parsons finds little response in comparative law, mostly because they were interested in building a theory of societal system, while functionalism in comparative law was never meant to be more than a method. More surprising is the fact that authors who focused on functionalism as a method seem largely unknown in comparative law, too. Especially Robert Merton’s seminal text on latent functions should have shown the problems of translating Durkheim into comparative law. For example, Merton introduced into the sociological debate the important distinction between manifest functions (functions intended and recognized by participants) – and latent (unknown and unintended) functions. The separation of objective functions from subjective intentions not only has the pedagogical effect of pointing researchers to the importance of latent functions which, precisely because they were unrecognized, promised more significant increments in sociological knowledge. Comparative lawyers sometimes recognize this when they focus on what the courts do in fact, as opposed to what they say they are doing. But then, when they want to use comparative law for social engineering is, they forget that legislators by definition cannot know latent functions, that social engineering presumes a simplicity of relations between society and laws that is unrealistic.

44 Merton (n. 18). An early version of the argument was published as ‘Sociological Theory’, (1945) 50 American Journal of Sociology 462-473.
45 Merton (n. 18) 105, 114-136; see already id., ‘The Unintended Consequences of Purposive Social Action’, (1936) 1 American Sociological Review, 894-904.
46 Merton (n. 18) 122.
Another of Merton’s contributions is his challenged to the postulate of functional unity of society, the axiom that societies are integrated and interdependent in the sense that changing one element is likely to have impacts on all other elements. Rabel and Zweigert both assume that law and society functioned as a completely interdependent whole point in its importance for comparative law. In response Merton suggests that different societies are integrated to different degrees and empirical tests are necessary to determine this degree. This is a challenge that functionalist comparative law still has to acknowledge and that complicates its project considerably.

A third of Merton’s criticisms goes against the assumption that every element in society fulfills some vital function. The existence of survivals – nonfunctional or even dysfunctional institutions – had been known before, both in sociology and in functionalist comparative law. But traditional sociologists and anthropologists, and likewise comparatists, consider their existence to be unstable and only temporary. This suggests that function and cause are somehow again connected: Functions are reasons if not for the creation, then for the persistence of institutions, a thought that Durkheim had already developed Merton in turn emphasized that whether institutions were functional or not was a matter of empirical research, a point made forcefully in comparative law from an antifunctionalist perspective by Alan Watson. Again, if legal institutions can be dys- or nonfunctional, this makes the comparative lawyer’s job more complicated.

In pondering the usefulness of Merton’s insights for comparative law one must not forget that Merton’s new and influential “paradigm for functional analysis in sociology”, like Parsons’ evolutionary systems theory, have been subject to intense critique that led to the demise of

---


48 See e.g. Durkheim (n. 25) 184; also Zweigert, Kötz (n. 2) 35 on the nonfunctional German provision on “joke transactions”, BGB § 118; ibid. 634 on the dysfunctional role of BGB § 831 (delictual liability for others) and for functional equivalents within German law.

49 See e.g. Wsevolod W. Isajiw, Causation and Functionalism in Sociology (1968), 127 f.

50 Merton (n. 18) 79-84.

51 Merton (n. 18) 84-86.

52 See e.g. Alan Watson, Legal Transplants (1974), 12-15; for a brief debate of survivals within the functional method of comparative law and in the work of Alan Watson see Graziadei (n. 5), 123. See also Frankenberg (n. 32) 437 f.; for dysfunctionality see also M. Schmidt, in Festschrift für Konrad Zweigert (1981), 525-535.
functionalism in sociology, criticism that mirrors that in comparative law. In general the fear that Parsons’ “grand theory” was too abstract and therefore often unable to predict all empirical findings is shared by comparative lawyers. More specifically, functionalism is criticized as intrinsically teleological and therefore unable to fulfill Durkheim’s own postulate of a value-free social science. Connected to this is a criticism of implicit tautology and circularity, mirrored in comparative law. The survival of societies is explained by the existence of institutions, while the existence of these institutions in turn is explained by the needs of society. Durkheim had already pointed out that cause and function, though analytically distinct, stood in a complex relationship. On the one hand, causes often determine functions: an institution is established in order to maintain a certain status quo and then fulfills that function. On the other hand functions often determine if not the origin then at least the persistence of institutions: dysfunctional institutions cannot compete with more efficient institutions, societies with wasteful dysfunctional institutions cannot survive. (The parallel with economic theories on the efficiency of the common law, and of regulatory competition, should be obvious.) For critics this means that either functional relations are not different from causal relations (and therefore dispensable as a separate category), or that teleology is reintroduced into sociology. Furthermore it leads to an argument of circularity: institutions are explained as responses to societal needs while the existence of societal needs was derived from the existence of these institutions. Other critics went against the program of functionalism. They argued that emphasis on the stability of systems made its proponents both

---


56 See the references in n. 5; see also, from a different perspective, William Alford, ‘On the Limits of ‘Grand Theory’ in Comparative Law’, (1985) 61 Wash. LR 945-956.


59 Durkheim (n. 25) 189 f.
politically conservative and methodologically incapable of explaining social change, again a criticism raised also against functionalist comparative law. And finally and perhaps most importantly, sociological functionalism is considered unable to account for culture, in particular to understand practices that serve no function – again a critique we find in comparative law as well. After these critiques, functionalism lost ground, a school of “neofunctionalism” were not successful. Within sociology and especially anthropology, functionalism made way for cultural and hermeneutic methods, a move that can be seen in comparative law as well. At the same time sociology as a discipline, not least due to perceived lack of methodological sophistication, had to yield its once leading position within the social sciences to economics, again a development replicated not only in law but also in comparative law. Legal functionalism has faced similar challenges. Criticism of the German Civil Code structure as nonfunctional remained unheard; later abuses of functionalism by the Nazis made it unattractive after the world war. As a theory of statutory interpretation and legal argumentation, the jurisprudence of interests made way for a jurisprudence of values, under which the interpreter must implement the preferences of the legislator, reintroducing subjective purpose for objective function – and this contingent telos can

no longer serve as basis for a universal comparative legal science. Most of this was a reaction to the difficulties of functionalism and antiformalism to develop a theory of values, a difficulty apparent already in Felix Cohen’s seminal article on “Transcendental Nonsense and the Functional Method” with its brilliant first part debunking legal conceptualism and its disappointing second part focusing on a theory of values.

4. Neo-Kantian Functionalism

Having lost an Aristotelian foundation, functionalism required another philosophical basis. Such a basis was found in neo-Kantian philosophy, which supplied two very different contributions to functionalist comparative law. The first occurred in legal thought. Kant himself, while positing a strict separation between is and ought, had conceived the possibility of a rational law based on reason. Neo-Kants hoped to use comparative law as a response to Kirchmann’s famous verdict on law as non-scientific, and as a way towards such a rational law. In 1905 Gustav Radbruch proposed a Kantian version of ideal law as tertium comparationis for solutions to similar problems. This ideal law could not be deduced from the insights of comparative law (that would have been an is/ought crossover), but could help psychologically in the quest for better law.

Twenty years later Max Salomon expanded on these thoughts and formulated the credo of modern functionalist comparative law: Legal science as science deals with universals, but these universals are not legal norms but rather legal problems. As a consequence, comparison between legal norms is only possible between norms responding to the same legal problems. Legal science is possible, only, as comparative law. Comparative law became phenomenological.

---

67  Cohen (n. 18).
68  Gustav Radbruch, Über die Methode der Rechtsvergleichung, (1905/06) 2 Monatsschrift für Kriminalpsychologie und Strafrechtsreform 422-425 = Zweigert, Puttfarken (n. 3) 52-56 = Heinrich Scholler (ed.), Gustav Radbruch – Rechtsvergleichende Schriften (Gustav Radbruch Gesamtausgabe Vol. 15, 1999), 152-156. See also id., Rechtsphilosophie (1932), 120 (Wertbeziehung as scientific criterion for legal science). For a stricter application of the is/ought argument and critical response to both Radbruch and Salomon see Julius Binder, Philosophie des Rechts (1925), 951 ff.; for the possibility of a natural law derived from the comparison of positive laws v. Liszt (n. 3) 61 f.; Konrad Zweigert, ‘Rechtsvergleichung als universale Interpretationsmethode’, (1949/50) RabelsZ 5, 19-20.
70  Alois Troller, Ueberall gültige Prinzipien der Rechtswissenschaft (1965); id., ‘Rechtsvergleichung und Phänomenologie’, in Mario Rotondi (ed.), Scopi e metodi del diritto comparato / Buts et méthodes du droit
Comparatists view the solutions in different legal systems not as emanations of some underlying metaphysical universal law, neither as unconnected instances, but the different solutions acquire their sense as solutions to common problems.

Another, seemingly unrelated development from Kant was Ernst Cassirer’s work on functional epistemology. Cassirer posited that, since Kant had suggested that laws of nature were not inherent in nature but rather human constructs to understand it, there had been a seismic shift from a focus on substance to a focus on function, from attempts to understand how things “really” are (their substance, ontology) to understanding them only in their (functional) relation to particular viewpoints (their function, epistemology). It was no longer possible to define classes of elements simply by common traits, because such an abstraction would deny the necessary relation between the element and the whole. Individual numbers did not have an essence, only the totality of all numbers could be said to have an essence. Rather, individual elements had to be understood in relation to particular aspects, as different results to the same function. A series $a_{\alpha_1} \beta_1, a_{\alpha_2} \beta_2, a_{\alpha_3} \beta_3 \ldots$ need not be understood simply by the common criterion $a$, but by the regularity in which its elements are brought about through the function $a \times y$, in which the variable $x$ defines all $\alpha$, the variable $y$ defines all $\beta$, and all these elements stand in a functional regularity so it is possible to create new elements of the series. This move has two decisive advantages. First, it is not necessary to recognize some essence of a particular element; it is sufficient to understand the element as variable result of a functional connection with a variable other element. Second, it is possible to conceive of groups of elements and to describe them easily, without the loss of specificity that comes with traditional classifications. The function $a \times y$ describes all elements of the series completely, whereas a focus on the common element $a$ as classificatory criterion would ignore the specific functional relation between $a$ and $y$ that creates the respective elements.

$\text{comparé (Inchieste di diritto comparato), } 2 \text{ vol. (1973), 685-705, esp. 694 for references to functionalist comparatists.}$


Cassirer (n.19), 420 f.

Cf. Cassirer (n.19) 18 ff., 313 ff.
Although Cassirer had no direct influence on functionalist comparative law, we see several parallels. First, like Cassirer functionalist comparative law is interested not in some essence of legal institutions, but rather in their function, in their relation to particular problems they set out to meet. Second, functionalist comparative law also tries to avoid the abstraction inherent both in conceptual comparisons and in the macro-comparison of legal families, and instead focuses on a legal institution’s relation to the whole. Third, Cassirer’s emphasis on totality of elements as opposed to individual elements replicates Salomon’s attempt to define universal jurisprudence beyond individual national institutions. Cassirer’s concept of function, which he borrowed from mathematics, can work as a formalization of functional equivalents: If we define $a$ as a particular problem, ‘$x$’ as the variable for legal systems $\alpha_1, 2, 3 \ldots$, and ‘$y$’ as the variable for legal institutions $\beta_1, 2, 3 \ldots$, we can formalize the functional comparison of different legal institutions as a series, where for example $a \alpha_1 \beta_1$ is the French law ($\alpha_1$) response ($\beta_1$) to problem $a$, $a \alpha_2 \beta_2$ is the German law ($\alpha_2$) response ($\beta_2$) to the same problem $a$, and so on. At the same time, this approach enables the comparatist to focus not only on the similarity between the elements (the common problem $a$), but also on the differences (between $\alpha_1$ and $\alpha_2$, and between $\beta_1$ and $\beta_2$ respectively), and furthermore allows her to explain these differences between institutions as a function (!) of the differences between legal systems. While such a formalization raises many problems (not the smallest being the question of regularity in the social sciences, as opposed to mathematics and the natural sciences), it seems to be a promising step towards more rational comparative law.

5. Equivalence Functionalism

Aristotelianism, evolutionary functionalism and structural functionalism all contain traces of determinism and teleology. If similar problems cause similar solutions, then the solutions must somehow be inherent to the problems. Indeed, while sociological functionalists long emphasized functional similarities between societies, they thought that the same functions were fulfilled by the same kinds of institutions. Durkheim expressly rejected functional equivalence as finalist and proclaimed a remarkable similarity between institutions of different societies as responses to functional requirements. As late as 1966, Goldschmidt’s otherwise original study of

75 Durkheim (n. 25) 187: “En fait, quand on est entré quelque peu en contact avec les phénomènes sociaux, on est … surpris de l’étonnante régularité avec laquelle ils se reproduisent dans les mêmes circonstances.
comparative functionalism in anthropology claimed that “certain social needs repeatedly call forth similar social institutions, that correlations between institutional forms can be found because, broadly speaking, they are the ‘natural’ or ‘preferred’ means by which certain necessary social tasks may best be performed in given circumstances.” 76 Given how different institutions are in detail, such a view was hard to maintain except in very abstract analysis. As a consequence, similar institutions became abstract ideal types, devoided of their specificity, unable to provide valuable insights, a problem still frequent in comparative political science. A way out can be found already in Cassirer’s epistemology, which paved the way towards functional equivalence. Similar problems may lead to different, though comparable, solutions; the solutions are similar only in their relation to the specific function under which they are regarded. In sociology, it was again Merton who provided a way out of this problem. He questioned the postulate of indispensability, according to which every element in a society is indispensable for the working of the system. Merton pointed out that even indispensable necessities could be met by different institutions that acted as functional substitutes or functional equivalents. 77

Comparative lawyers, due perhaps to their focus on details and specificities, had long known that this was not the case. They knew on the one hand that similar institutions can fulfill different functions in different societies or at different times, 78 and they found, on the other hand, that similar functional needs can be fulfilled by different institutions, the idea of the functional equivalent. This idea, central to functionalist comparative law, appears in all kinds of functionalism: Max Salomon’s focus on problems as the unifying element of general jurisprudence enabled scholars to see different solutions as functionally equivalent; Josef Esser developed the concept for comparative law, 79 and Konrad Zweigert made it the central point of his approach to comparative law, and an important tool towards seeing universalities in what may look like differences. 80

---

76 Walter Goldschmidt, *Comparative Functionalism: An Essay in Anthropological Theory* (1966), 30, see also 122: “similar problems evoke similar solutions.”

77 Merton (n. 18) 86-90.


79 Esser (n. 21), esp. 354 ff.

Indeed, the recognition of functional equivalents gave a boost to the possibilities of comparative law. In particular, the comparison between common law and civil law has traditionally tempted functionalists, for two reasons: First, functionalist comparison should be able to overcome the epistemic/doctrinal difference between civil and common law by ignoring it as irrelevant. Second, the common law with its organic development should be particularly apt for functional understanding. Not surprisingly then, some of the most influential works applying the functional method have focused on institutions from the common law and their functional equivalents in the civil law, for example trusts and consideration. But even intersystemic comparison between socialist and capitalist legal systems seemed possible once it was possible to say that different legal solutions, while not similar, were nonetheless functionally equivalent.

However, equivalence functionalism in comparative law has always been explicated by examples rather than developed theoretically. Thus, it is not clear whether functional equivalence suggests some uniformity of values beyond the universality of problems. Likewise, the concept of a function suggests a comparatively naïve relation between the problem and the institution, either between cause and effect (so the problem causes an institution to exist), or between purpose and implementation (so a legal solution serves the purpose of solving a recognized problem). Here, comparative law could profit from sociological equivalence functionalism as developed especially by Niklas Luhmann, who, like his own teacher Parsons, was influenced by Cassirer. Equivalence functionalism is a response to the challenge that functions are either nothing more than causal relations, or contain an element of teleology. Equivalence functionalism


explains an institution as one contingent solution amongst several possibilities. As a consequence, the specificity of a system even in the presence of (certain) universal problems lies in its decision for one against all other (functionally equivalent) solutions, a concept reminiscent of Cassirer’s epistemological functionalism. Legal developments are thus no longer necessary but only possible, not predetermined but contingent. This method in turn requires an understanding of society (and its subsystems, including law) as a system constituted by the relation of its elements, rather than set up by elements that are independent of each other. It does not avoid the criticism of tautology – institutions are understood with regard to problems, and problems are understood as such with relation to institutions. But such a tautology is not problematic for Luhmann’s constructivist approach, in which societies constitute themselves precisely through such tautologies, as a way of making sense.

Although Luhmann emphasized that “the functional method is ultimately a comparative one” and occasionally suggested the comparison of systems as a valuable project of verification, he did not, apart from a passing reference to Josef Esser, use this for comparative law. Functionalist comparative law on the other hand, despite the similar focus on functional equivalence, has unfortunately rarely reacted to Luhmann’s method, although it could profit tremendously. Of course, Luhmann’s systems theory has been criticized severely – for its indifference to the individual, for its inherent conservatism (again), for its problems in verifying the identity of systems over time. All of these are important criticisms, but they can be launched against functionalist comparative law as it stands, too. It makes sense first to reestablish the

---

89 E.g. Luhmann, Soziale Systeme, 85 = Social Systems, 54 (both n. 88); cf. id., ‘Funktionale Methode’ (n. 88) 43 ff.; id., Die Gesellschaft der Gesellschaft II (1997) 1125 f.
90 E.g. Luhmann (n. 86) 31 f.
functional method on the basis of Luhmann’s equivalence functionalism and then to test its strengths and weaknesses.

6. **Functionalist Comparative Law: Synthesis or Eclecticism?**

Which of these concepts is the concept behind the functional method in comparative law? The answer is: all of the above. The method picks and chooses different concepts, and cares little about their incompatibility.92 There is still, amongst comparatists, a strong faith that the similarities that the functionalist method reveals between different legal orders is neither merely a result of circular reasoning nor mere evidence of similar needs between societies but proof for deeper universal values. While this suggests natural law origins and reminds of Aristotelian approaches, then again the functional method places itself squarely outside of legal philosophy and within legal sociology. In the concept of function itself, the method borrows, if inadvertently, the antimetaphysical focus of epistemological functionalism as opposed to an essential concept of legal institutions; it understands institutions in their relation to problems, not abstractly. But it is not clear whether this concept of function is teleological or not. Sometimes comparatists use functions in an openly teleological fashion, as a way towards progress reminiscent of evolutionary functionalism – when only legal systems at similar stages of evolution are called comparable,93 or when the development of the law is called important for the discovery of its function,94 a combination of cause and function anathema to Durkheim’s postulates. Sometimes Comparatists focus on legal institutions as tools for the preservation of stability, something more akin to structural functionalism. But then it is often unclear whether functions include latent functions, in the focus on what laws do in effect, or whether they are confined to manifest functions, as in instrumentalism and social engineering. And finally, the claim that “there will always remain … an area where only sound judgment, common sense, or even intuition can be of any help”95 has a dangerously irrational ring to it that would, it seems, distance functional comparative law from the scientific aspirations of functionalism in all other disciplines.96

93 Zweigert, Kötz (n. 2) 3 (referencing Lambert).
94 Zweigert, Kötz (n. 2) 8: “… if the comparatist is to make sense of the rules and the problems they are intended to solve he must often investigate their history.”
95 Zweigert, Kötz (n. 2) 33, see also 34 (“feeling”), 35 (“imagination”).
96 But see, for the possible need of irrationality for comparison, Luhmann, Soziale Systeme, 90 f. = Social Systems, 57 f. (both n. 88), and the cite to Alfred Baeumler, Das Irrationalitätsproblem in der Ästhetik und Logik des 18. Jahrhunderts bis zur Kritik der Urteilskraft (1923/1967), 141 ff.
The reason for this mishmash is that the founders of the functional method were more pragmatically than methodologically interested. When Ernst Rabel suggested, almost in passing, that the function of institutions had to stand at the center of the comparative endeavor, he did not base an elaborate method on this insight. Rabel’s approach was deliberately pragmatic rather than theoretical; he was not interested in expansive methodological debate, but rather in solving practical problems. Ascribing a “functional method” to him was rather the work of his student Rheinstein who introduced his thoughts to the United States. Josef Esser came closer to developing an elaborate functional method, but this method was only partly received, and his Aristotelian foundations are problematic. Konrad Zweigert finally, who followed both Rabel and Esser published much more extensively on methodological questions than critics of his method usually acknowledge. Yet it appears that he was driven primarily by interest not in methodology per se but in universalist humanism and in legal unification; the functional method was simply the best tool to reach these goals, rather than the superior method per se. Finally, Roscoe Pound may have been the most philosophically educated of the proponents of functionalism. But his functional method oscillates between sociological jurisprudence and philosophical conceptions.

All in all, the pragmatic interest of Comparatists may explain (if not excuse) the lack of methodological rigor. At the same time, it invited the criticism we have seen, and has led to a current crisis of functionalist comparative law. Functionalist comparatists react surprisingly defensively. One strategy is to acknowledge the relevance of culture within functionalist comparative law. With no clear view on the relationship between culture and function, this must lead to an eclectic, internally inconsistent method. Another strategy is to postulate a “methodological pluralism” in which functionalism is only one of several methods, and the comparatist picks (ad hoc?) whichever method seems most appropriate for a given purpose.

Both strategies do not seem promising unless the strengths and weaknesses of a more clearly

---

97 Ernst Rabel (n. 47) 282 = Zweigert, Puttfarken (n. 3) 88.
100 Rabel’s importance for Zweigert becomes clear in von Caemmerer, Zweigert (n. 2). Zweigert wrote a short foreword for Esser’s book; see Esser (n. 21) VII.
101 See e.g. Jaako Husa, ‘Farewell to Functionalism or Methodological Tolerance?’, (2003) 67 RabelsZ 419, 446 f.
functional method are recognized. If the functional method is deficient, it is not clear why a
moderated version should be maintained; if it is not deficient it is unclear why it should be
moderated. Yet we cannot evaluate this as long as we lack a coherently formulated functional
method.

III. Functions of Function

One could be excused for thinking that functionalist comparative law cannot be defended. After
all, we have seen that the functional method is an undertheorized approach with an undefined
disciplinary position, assembling bits and pieces from various different traditions, which, though
mutually incompatible, have nearly all failed in their own disciplines. But this would be hasty.
Given how unclear the substance of a functional method in comparative law is, we should move
from a substantive to a functional analysis and look at what it does, instead of what it is. In the
spirit of Durkheim and Merton we should measure the method neither by its origins nor by the
intentions of participants in the academic community but by its functionality. We should look at
the functions of the concept of function, including its latent functions, in the production of
comparative law knowledge. We should look at whether it is functional or dysfunctional, and we
should look whether alternative proposals could serve as functional equivalents. This should
enable us at the same time to start reconstructing the functional method as an interpretive
enterprise instead of a science, as a way of making sense of legal systems by constructing them
as meaningful, instead of merely measuring them, and thereby – perhaps – integrate cultural
considerations. Of course, such a method must use the same concept of functionalism throughout.
I propose to use equivalence functionalism, both because it is the most robust concept in
sociology, and because it represents the central element of functionalist comparative law as
developed by Rabel and Zweigert.

Of several functions we could distinguish, this section focuses on seven: the epistemological
function understanding legal rules and institution (1), the comparative function of achieving
comparability (2), the presumptive function of emphasizing similarity (3), the formalizing
function of system building (4), the evaluative function of determining the better law (5), the
universalizing function of preparing legal unification (6), and finally the critical function of
providing tools for the critique of law (7).

ICLQ 800, 833 f.
1. The Epistemological Function: Understanding law

The first function of function is epistemological. Functionalism provides a tool to make sense of
the data we find. We understand this function of function if we distinguish functionalist
comparative law from an approach that shares some of its methodology and is often referred to as
functionalist: the factual method as applied in common core research.\textsuperscript{103} There are two important
differences which strip the factual method of much of the explanatory power that functionalism
claims for itself, and which suggest that the factual method and common core research should not
be called functionalist.\textsuperscript{104} First, the factual method shows us similarities across legal systems, but
it does not tell us whether these are accidental or necessary, or how they relate to society. Second,
the case method, in its focus on cases, is limited in its view in two ways: its problems are only
disputes; its solutions are only court decisions. Functionalism in turn promises more. It aims at
explaining the effects of legal institutions as functions (a specific kind of relation), and it
promises to look at non-legal responses to societal requisites, too. The functional method asks us
to understand legal institutions not as doctrinal constructs but as societal responses to problems,
not as isolated instances but in their relation to the whole legal system and beyond to the whole of
society.

Obviously functionalism is not and cannot be the only available epistemological scheme for
understanding a legal system.\textsuperscript{105} It deliberately chooses an observer’s perspective as an
alternative to, not a substitute for, the participant’s perspective chosen by cultural approaches,
and emphasizes the view of law in a specific relation (namely functional relation),
acknowledging other relations. Of course this means that functionalism cannot claim to capture
some essence of legal institutions.\textsuperscript{106} But such a claim would run counter to its own program
anyway. We have seen that functionalism is the fruit of a move, in sociology like in philosophy,
away from metaphysical concepts like “substance” and “essence”. Function is not an ontological
category.

\textsuperscript{103} Rudolf Schlesinger (ed.), 	extit{Formation of Contracts – A Study of the Common Core of Legal Systems, Vol. 1}
(1968), 30-41.


\textsuperscript{105} Geoffrey Samuel, 	extit{Epistemology and Method in Law} (2003), 301 ff., esp. 318 for comparative law; id.,
‘Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences’, in Mark van

\textsuperscript{106} Cf. Graziadei (n. 5) 112: "The attempt to reduce the legal meaning of any fact to the legal effects of that fact
as stated in operative terms is probably flawed inasmuch as it pretends to capture some ultimate truth".
At the same time, the frequent criticism that functionalism is reductive or has no view for culture is somewhat misplaced. It was the great advantage of functionalism over substantivism, emphasized first by Cassirer, that it enabled generalizations without loss of specificity. The functional analysis emphasizes relations in addition to institutions, and it focuses on latent in addition to manifest functions. In this sense, a functionalist view of legal institutions, focusing on the complex interrelatedness of societies, leads to a picture that is not less but more complex than that of the participant in a legal system. Second functionalist comparative law rightly understood is aware of the cultural embeddedness of legal rules, especially once latent functions are accounted for. In fact, when functionalists emphasize culture and mentalité they sound almost like their critics: “Le fait que tout droit est un phénomène culturel et que les règles de droit ne peuvent jamais être considérées indépendamment du contexte historique, social, économe, psychologique et politique est confirmé avec une force particulière par les enquêtes de droit comparé;” “cette méthode fonctionnelle … permet d’atteindre…le système dans son homogénéité, dans son esprit, dans ce qu’on a justement appelé sa ‘mentalité’…” What separates functionalists and culturalists is not their attention to culture, but their approach to it. What critics call reductionist is the functionalists’ resistance to adopt an insider’s view, their unwillingness to approve of culture simply because it is culture, and of course its reconstruction of culture as functional (or dysfunctional) relations. This can only account for one aspect of culture. But once we give up the hope to grasp any “essence” of culture, a functionalist outsider’s account need not be inferior to a culturalist insider’s account, it just highlights a different aspect. Of course, such a functionalist comparative law, driven by a particular interest of the comparatist, cannot be fully objective and neutral, and functionalism’s claim to neutrality is problematic. If functions are relations between institutions and problems, then the first task is to find the universal problems to be solved by legal institutions, but determining problems is a problem, however. First, it is not clear whether problem is a philosophical, sociological, or juristic

107 Supra II.4.
108 Luhmann, Soziale Systeme, 88 = Social Systems 56 (both n. 88).
109 Zweigert, Solutions identiques (n. 80) 13 f.
110 Ancel, Le problème (n. 1) 4.
For evolutionists a problem is a situation in society that spurs legal and ultimately social change; the solution is only a temporary step forward that will lead to new problems. For neo-Kantians a problem is a legal problem ("Rechtsproblem") and thus a problem defined by the law not by social reality, an aprioristic philosophical concept. As a consequence, the solution cannot be found in an analogy to the sciences because it requires a value judgment. For structural functionalists finally a problem is one side of a bipolar functional relation, the other side taken by the institution that meets the need, so society can stay in equilibrium.

Moreover, when sociologists and anthropologists defined substantive problems, they often fall into one of two traps. Either their lists of societal needs are too abstract for meaningful comparative law – survival of society becomes relevant on a different level than the enforcement of consumer rights. Or problems are contingent on specific societal structures and thus no longer universal. Yet within differentiated societies, needs and functions are hard to determine abstractly. For example, we may think that societies require deterrence of wrongdoing and that tort law is there to fulfill this need. But how do we know that this is the problem that tort law solves? Why is its function not rather compensation, or the effectuation of certain societal values? Or is tort law perhaps even dysfunctional?

These are real problems with functionalism as a social science, but somewhat less for comparative law. The sociological attempt to determine the functions of legal institutions as real facts is difficult (although, as we will see in a moment, comparison helps in this regard). But functionalism can be understood as a constructive approach. By explaining legal institutions functionally, we produce hypotheses not only about the existence of problems and the structure of a society as realities (either empirical or philosophical), but also make proposals about how societies can and should be understood, not just how they work. We need not “prove” that a problem “exists” and an institution is a “response” to it, we need to make this connection plausible as a way of understanding. We may well say that problems are “constructed” and still

---

113 See Arwed Blomeyer, ‘Zur Frage der Abgrenzung von vergleichender Rechtswissenschaft und Rechtsphilosophie’, (1934) 8 RabelsZ 1, esp. 12 f.
114 Salomon (n. 69) 51 ff.
116 Goldschmidt (n. 76) 106 ff.
118 Cf. Luhmann, Soziale Systeme 86 = Social Systems 54 (both n. 88): “[T]he real theoretical achievement provided by the introduction of functional analysis resides in the construction of problems.”
maintain explanatory power; we may analyze from a particular non-universal viewpoint and offer
this analysis as one of several possible interpretations. Functionalism thereby turns from a
scientific to an interpretative approach to law, a way of “making sense” that is distinct from the
participants’ way of making sense of their legal systems. This would be problematic for a
science, but for an argumentative discipline like law it seems to be an important function of
functionalism. And it seems plausible to interpret law which is after all a more normative,
purpose-oriented activity than some activities, in such a way.

2. The Comparative Function: function as tertium comparationis
Of course this interpretative reconstruction of functionalism immediately raises the question why
one functional explanation should be more plausible than the other. Again this is a problem both
in the social sciences (how can functions be tested empirically?) and in philosophy and law (how
can we prove values?). Comparison can help here, and this brings us to the second function of
function, its function as tertium comparationis.

Comparison traditionally requires an invariant element. While in theory, a functional method
could set either problems or institutions as invariant,¹¹⁹ in practice, as long as institutions are non-
universal, only problems can play the role of constant. Yet this still begs the question whether
needs and problems are universal.¹²⁰ Connected is a second problem: It is not even clear what
universality of problems means. Philosophers like Salomon understand these problems as
philosophically universal problems of general jurisprudence, while the sociological strand
understands them as empirically universal problems of societies. As a consequence, it is not clear
whether function as tertium comparationis refers to (manifest) value judgments by legislators or
to (latent) sociological needs or, as Rabel said somewhat opaquely, to both.¹²¹

¹¹⁹ Luhmann (n. 86) 21; Scheiwe (n. 84) 30 n. 2.
¹²⁰ Alan Watson, Legal Transplants (1974) 4 ff.; Jerome Hall, Comparative Law and Social Theory (1963) 108-
110; Wolfgang Mincke, ‘Eine vergleichende Rechtswissenschaft’, (1984) 83 ZVglRWiss 315, 324; Richard
Hyland, ‘Comparative Law’, in Dennis Patterson (ed.), A Companion to Philosophy of Law and Legal
Theory (1996), 184, 189; de Cruz (n. 1) 228-230; James Q. Whitman, ‘The neo-Romantic turn’, in Munday,
Legrand (n. 5) 312, 313.
¹²¹ Ernst Rabel, ‘El fomento internacional del derecho privado’, (1931) 18 Revista de derecho privado 321, 331
= Gesammelte Aufsätze III (n. 47) 35, 50: “el tertium comparationis, constituido de un lado por las
intenciones sociales económicas y éticas de las leyes, y de otro por las exigencias practicas de la vida que se
presentan como parecidas entre sí.” See also id., “In der Schule von Ludwig Mitteis”, (1954) 7-8 Journal of
Juristic Papyrology 157, 159 = Gesammelte Aufsätze III (n. 47) 376, 378: „die funktionelle Betrachtung –
die man auch die soziale, aber am wichtigsten die juristische nennen konnte...“.
Both concerns must be taken seriously, but they are not fatal. Take first the problem of
universality of problems or needs. Comparatists try to avoid it by restricting the analysis to
societies at similar stages of development and in certain relatively value-neutral areas of the
law. Yet not only have such comparisons have frequently been made. Moreover, the
restriction to societies at the same stage of development stems from the now discarded functional
evolutionism, the restriction to value-neutral areas of the law not only assumes, perhaps
prematurely, that such areas exist, but also gives no reason why values should be the only
relevant difference between legal orders. It seems more fruitful to differentiate between different
levels of analysis. We can assume relatively safely that certain abstract problems like the need to
survive are universal, at least in the sense that all societies face them qua being societies. Such
general problems cannot simply be broken down to the specific problems that comparative
lawyers are interested in, just as discussions about the function of law in general do not yield
answers to functions of specific legal institutions. Many problems are contingent on the solutions
to other problems. But they enable the comparatist who does not find universality of a certain
problem at a high degree of specificity to step up one level because derived needs are somehow,
if in a contingent way, derived from original needs. The more specific a problem is, the less
likely its universality, but the focus on the more general level enables us to see not only the
contingency of certain problems but also what the analogous problems in other legal systems are.
This leads to a much more complex functional analysis but does not disable functional
comparison altogether.

This leads to the second concern, namely that it is not clear in what sense problems are universal
at all. Functionalists often claim that comparative law can serve as the closest substitute for an
experiment to test a hypothesis on functional relation, a problematic claim that would require
universality of problems. Yet once we understand the formulation of a problem as an
interpretative move, not an empirical one, we find that universality of problems is likewise an
interpretative move, not a mere representation of reality. We attain comparability through the

---

122 E.g. Zweigert (n. 80) 756.
123 See the examples given by Graziadei (supra n. 5), 109 f.; cf. also the criticism by Frankenberg (n. 32) 437 f.
fiorentini per la storia del pensiero giuridico 77, 98.
125 Goldschmidt (n. 76) 106 ff.
126 Lepaulle (n. 180) 853 f. = Zweigert, Puttfarken (n. 3) 77 f. ( “recouplement”); Roscoe Pound, Some
Thoughts about Comparative Law, in Hans Dölle et al. (eds.), Festschrift für Ernst Rabel (1954) 7, 12 f.
similarly Merton (n. 18) 108; see also Goldschmidt (n. 76).
construction of universal problems as *tertia comparationis*. This is where the notion of functional equivalent gets its capture. Even if we understand legal institutions as responses to societal needs we need not ignore that they are not caused by these needs in the sense of logical necessity; rather, they are contingent responses to these needs that can be identified with reference to the other possible responses, the functional equivalents, that were not chosen.\(^{127}\) We may not know these functional equivalents until we see them in other legal systems, but seeing them enables us to isolate the underlying problem and thereby recognize the functions of a legal institution. The similarity of results to certain fact situations, regardless of differences in doctrine, strongly suggests that the respective legal institutions can be seen as different (but functionally equivalent) responses to a similar problem which, in turn, can then be assumed as universal. This reasoning is of course circular – we go from problems to functions and from functions to problems. This would be problematic in comparative law as science; in comparative law as interpretation it enacts a hermeneutical circle.\(^{128}\)

3. The presumptive Function: *praesumptio similitudinis*

This leads us to the problem of difference and similarity. Famously, Zweigert suggested a *praesumptio similitudinis*, a presumption of similarity.\(^{129}\) The comparatist should assume that different societies face different needs and must therefore, to prevail, have institutions that meet these needs. As a consequence, if he finds no functional equivalent in a foreign legal order, he should “check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.”\(^{130}\) There may well be no statement in the history of comparative law that has been criticized more than this short passage. Three types of critique deserve attention here. First, the postulate violates requirements of scientific method: Following Popper’s critical rationalism, the comparatist should not try to prove but rather to falsify her hypotheses.\(^{131}\) Second, the postulate violates requirements of ideological neutrality, or requirements of the correct ideology. The comparatist should not favor similarity over difference, but should either be objective and neutral as between

\(^{127}\) See supra II.5.

\(^{128}\) Cf. Zacher (n. 112) 39 f.

\(^{129}\) Zweigert, Kötz, (n. 2) 40, for an earlier version see already Zweigert, ‘Des solutions’ (n. 80). Zweigert first mentioned the præsumptio in ‘Méthodologie’ (n. 2) 297 = ‘Zur Methode’ (n. 2) 198.

\(^{130}\) Zweigert, Kötz (n. 2) 40.

similarity and difference or should even openly advocate difference over similarity.\textsuperscript{132} Third, the postulate is reductionist: similarity will only appear once legal orders, or institutions, are stripped of culturally relevant and contingent details\textsuperscript{133}. Some defendants of functionalism give in to the critique and give up the presumption of similarity; they admit that the presumption is problematic and proclaim a functionalism in comparative law that is indifferent between similarity and difference.\textsuperscript{134} But things are not this easy.

First one should put the presumption in its historical context. When it was formulated it served to counter the presumption of difference prevailing among ordinary lawyers, and of course between countries that had just gone to war on the basis of essentialized differences.\textsuperscript{135} In this sense, the presumption of similarity was as critical of the current state of affairs as the more recent emphasis on difference, which may likewise be just a rhetorical strategy against the presumption of similarity.\textsuperscript{136} Calls for “falsification” of the presumption are then as misplaced as calls for a switch to a \textit{praesumptio dissimilitudinis} because they only shift the rhetoric.\textsuperscript{137}

More to the point however, the presumption is indeed closely linked to the methodological assumptions. Recall that functionalist comparative law assumes universality of problems. If problems are universal, then every society must respond to these problems in some way. A society that has no response to a problem would be evidence that the problem is not universal. In this sense the presumption is not just Zweigert’s naïve idea, but rather a necessary element of functionalist comparative law. Here the caveat that only societies at similar stages and institutions in value-neutral areas of the law can be compared becomes important. Of course it turns the assumption into a tautology: problems are universal insofar as we exclude all problems that are not universal. This tautology would be fatal for a functionalist theory, but it becomes helpful for an interpretative functional method again, because it describes a thought process between the general and the specific that creates knowledge. The claim of universality of a problem is a first

\begin{footnotesize}\footnotesize
\begin{itemize}
\item[132] E.g. Curran (n. 58); Legrand (n. 62); cf. Hyland (n. 120) 194; “\textit{coniectura dissimilitudinis}.”
\item[134] E.g. Ancel, Utilité (n. 1) 55 ff.; de Cruz (n. 1) 230; Husa (n. 101) 440 f., 442 f.; see also Ruskola (n. 112) 191.
\item[135] Curran (supra n. 58) 67 ff.
\item[136] Thus Legrand (n. 62) 302; see also Husa (n. 101) 442 f.
\end{itemize}
\end{footnotesize}
interpretative step that can be challenged, but that, again, is a way of making sense of one legal system in relation to another.

Given that the presumption is central to the functional method, it becomes vital to understand clearly what the presumption does and does not say. Unfortunately, Zweigert’s own formulation of “similarity” is misleading. What is presumed to be similar are not the legal institutions but the problems to be solved by them and the need for societies to respond to them. Even if we assume the universality of at least some problems, and if we can do away with rhetorical and strategic arguments discussed before, we cannot possibly claim that different solutions to similar problems, the core element of the functional method, are really “similar”. Nobody could seriously say that for example tort law and insurance law are similar just because they fulfill the same function of providing accident victims with compensation for their accidents. Tort law and insurance law are obviously different not only in their doctrinal structures but also, a point often neglected by comparatists, in their effects and functions (and dysfunctions) regarding other functional requirements than that of compensation like, for example, deterrence, creation of certain kinds of jobs (judges or insurers), litigiousness or welfare mentality in society, etc. In other words, they are similar only with regard to exactly one element, namely the solution of one specific problem. This is not normally called similarity, this is called functional equivalence.138

If critics consider the *praesumptio similitudinis* internally inconsistent, because comparatists claim that different legal systems find similar results although at the same time they advocate differences between the legal institutions they compare,139 they are right. Comparatists do indeed look at difference and similarity at the same time, but that is not inconsistency. Rather, functional equivalence is similarity in difference, it is the finding that institutions are similar in one regard (namely in one of the functions they fulfill) while they are (or at least may be) different in all other regards – their doctrinal formulations, but also the other functions or dysfunctions they may have besides the one on which the comparatist focuses. The decision to look at a certain problem, and therefore at a certain function, becomes crucial therefore for the findings of similarity or difference, but this is always similarity only with regard to the one function. The finding of similarity is contingent on the comparatist’s focus.

138 Cf. Scheiwe (n. 119) 35.
139 Jonathan Hill (n. 61) 103, 109. Cf. Frankenberg (n. 32) 440: “How solutions can be “cut loose” from their context and at the same time be related to their environment, how law can be “seen purely” as function satisfying a “particular” need, escapes me. It seems to require two contradictory operations: first, suppressing the context and considering it; and then moving from the general (function) to the specific without knowing what makes the specific specific.”
To assume that this degree of similarity explains the whole institution would be a gross misunderstanding for two reasons. First, the choice of one institution comes with the exclusion of other functionally equivalent institutions. The choice of tort law for compensation purposes is, at least in part, a choice against insurance law for the same purposes. It would therefore obviously be wrong to say that “really” both are the same, because this would strip a legal system of its uniqueness. Second, when the comparatist uses one function as his *tertium comparationis*, he deliberately leaves other functions out of his view, with regard to which institutions may well be different.\(^\text{140}\) Insofar as functional equivalence means similarity with regard to one function, the presumption is tautological:\(^\text{141}\) because only institutions fulfilling the same function are comparable, by definition they must be similar with regard to their quality of fulfilling this function. Nothing is said about any further similarity or difference. The point is so poorly understood in the current debate that it may deserve to be repeated: Functionality leads to comparability of institutions that can thereby maintain their difference even in the comparison. It neither presumes nor leads to similarity.

### 4. The Formalizing Function: building a system

Functional comparatists themselves blur this insight. Zweigert announces, as last step in the comparative method, the “building of a system” with its own “special syntax and vocabulary”.\(^\text{142}\) In a way this is at the same time the most interesting and the most problematic function of function. It finds parallels both in sociology and anthropology, where for example Radcliffe-Brown hoped that function could lead to a general heuristic of societies and societal systems, and in legal philosophy, where comparative law is linked to the system-building project of general jurisprudence.\(^\text{143}\) In both these disciplines the projects have rightly been criticized. General theories of societies and general systems of jurisprudence alike have been found insensitive to details and therefore not very helpful. The move is even more surprising however in comparative

\(^{140}\) See Luhmann (n. 86) 25: “Einzelne funktionale Leistungen sind nur in einer bestimmten analytischen Perspektive äquivalent.”; Scheiwe (n. 84) 36 f.

\(^{141}\) For this criticism see Scheiwe (n. 84) 34, 35


\(^{143}\) Supra II.4.
law. After dismissing doctrine and replacing it with function, this step requires the comparatist now to retranslate these functions into doctrinal terms and even a system. After destroying all doctrinal systems, the comparatist is asked to build a new one. Must not such a system be as formalist and as doctrinal as the national systems that the functional methods try to overcome? “Comparative law is by its nature a functional and antidogmatic method.”, says Zweigert. Can it be formalist at the same time?

The problem is, as so often, that formalist/antiformalist is a very unclear dichotomy. We can distinguish three versions of the formalism critique against functional comparative law, and consequently develop three kinds of response. The first version of the criticism – functionalism is too rule-centered – is appropriate for many studies that call themselves functional, but less for the theoretical approach of comparative law. Functionalists explicitly ask that Comparatists look not only at legal rules (“law in books”), not even only at legal rules as applied (“law in action”), but beyond this at non-legal answers to societal needs. Few Comparatists may practice this, but this is not inherent to the method. The broader problem, whether “law” can be separated from “society”, cannot be discussed here in full. Suffice it to point out that the idea of “law as a semiautonomous field” of study is not a peculiarity of (comparative) lawyers, and that using “law” as starting point for comparative studies does not necessarily entail a claim of independence from society.

The second version of the criticism is related to the first but has more force. Any system that functional comparatists try to build must, whether it is a system of law or of “meta-law”, necessarily be formalist to some degree, because systems always are. Functionalism may not require us to build a legal system, but is functionalism possible without building any system? A

---

144 It may well be that the prominent position of the system in Zweigert & Kötz’s treatise is due to the fact that Zweigert was interested in a system of comparative law before he put the functional method to the fore. See e.g. Konrad Zweigert, Book Review, (1949/50) 15 RabelsZ 354-358; Bernhard C.H. Aubin & Konrad Zweigert, Rechtsvergleichung im deutschen Hochschulunterricht (Recht und Staat in Geschichte und Gegenwart 168/169, 1952), e.g. 39 (“Einheit eines überpositiven Systems”).

145 For criticism see Ernst Kramer (n. 20) 10-12, against Esser and Rothoef.


148 According to Riles (n. 5) 244 f., the postmodern critique of modernist comparative law parallels the modernist critique of earlier comparative law.

149 Cf. Frankenberg (n. 32) 438; Grazziadei (n. 5) 110; Rosen (n. 12) 504.

150 E.g. Ascarelli (n. 2) 30, 40; Zweigert, Kötz (n. 2) 38 f.

151 Cf. Frankenberg (n. 32) 424; Gordon (n. 32) 102 ff.; Samuel, ‘Epistemology and Comparative Law’ (n. 105) 39 ff.
look at functionalism in the social sciences suggests otherwise. The highly abstract and formalist taxonomies of anthropologists, Talcott Parsons’ AGIL scheme, Luhmann’s systems theory, all of these heuristic devices geared at making sense of legal rules and institutions are formalist systems. The abstraction of a function from a legal institution, and the claim that the function (unlike the institution) is universal, are almost by definition formalist moves. This may explain why the functional method is antiformalist and formalist at the same time: it discards one kind of formalism (namely doctrinal formalism) and replaces it with another kind of formalism (namely functional formalism).

Functionalism cannot counter this criticism. On the one hand, if the system to be built is itself a legal system it falls prey to the critique, just as the legal realists’ attempts to build more functional rules could not counter the attack of reintroducing formalism. On the other hand, Zweigert is certainly right that we cannot easily dispense of a syntax and a system outside our objects of analysis in order to analyze them critically. But is this a problem? It is submitted that this formalizing project is problematic only as long as we ascribe some essentialist character to the system we build. The problem would be the attempt to define this syntax as somehow more “real” than the doctrinal constructions of national legal systems, to see this system as the “true” system of law underlying the formulations in individual systems. Indeed functionalist comparatists come close to such a position when they seek universal truths behind the contingent solutions of different legal systems and thereby fall back on a natural law functionalism. We have learned from the failure of legal realism to create a theory of values that there is no “true” functional system behind the “merely formal” doctrinal constructions of national legal rules. But we can safely construct, and propose, functional systems, even formulated in legal terminology, as interpretative lenses on existing legal systems, and ultimately as critique of these legal systems. Any such system will be open to criticism like any other system, but each of them may provide new angles on the legal systems we compare, and help us both understand and critique them.

5. The Evaluative Function: determining the better law

While the construction of a system is thus an implicitly normative-critical project, functionalist comparative law sometimes asserts an explicitly normative function: Function should serve as yardstick to determine the “better law”. This step from facts to norms is problematic. Saleilles proposed to look to the majority solution of legal orders to find a (functionally defined) “droit
idéal relatif", but why should majority suggest superiority? The common core projects, the historical one by Schlesinger and the current one by the Trento group, only look to commonalities between all legal orders, but even the fact of commonality (to the extent it exists) does not have normative force. Indeed functional comparatists often hesitate to move to such normative conclusions. Rabel already argued that evaluation was not strictly an element of comparative law. Neo-Kantians on the other hand evaluate their solutions against a philosophical concepts of ideal law, but here the relevance of comparing legal systems to each other remains unclear. Both approaches thus face the same problem from different sides. The sociologist cannot deduce an ‘ought’ from an ‘is’; comparative material gives no guidelines, even commonality has no independent normative force. The idealist philosopher on the other hand can, in theory, develop his ideal law in the abstract; but it is not clear how the knowledge of the different legal orders can help him or why it is relevant.

Zweigert himself was aware that the empirical material collected by the comparatist did not have legal authority, that normative analysis is exclusively the (comparative) lawyer’s task. The sociologist is not only unable to help but will even frown at the comparative lawyer’s methods. But to the extent that comparative law studies finds similarity in result between different legal orders (and this is, for Zweigert, almost always the case), all that needs to be evaluated is the better doctrinal formulation, and this is a task that the jurist is both able and entitled to do. Others are even more ambitious – they ask which rule actually serves its function better. But there is a problem here: After a certain function has been used to determine relative similarity, now the same function must use to assess superiority, which assumes difference – again with regard to this function. This is impossible. We cannot first isolate a legal institution’s function

---

153 Zweigert (n. 68) 14 f.
154 Hill (n. 61) 103; Michaels (n. 104).
155 Rabel (n. 47), 280 (but see 286 ff.).
156 Radbruch, ‘Über die Methode’ (n. 68); Salomon (n. 69) 30 ff.; Blomeyer (n. 113) 2.
158 Zweigert, Kötz (n. 2) 11 f.
159 Zweigert (n. 157) 408 f.; for a more explicit is/ought cross-over id. (n. 68) 20.
160 Max Rheinstein, ‘Teaching Comparative Law’, (1937-38) 5 U. Chi. LR 615, 617 f.: “[E]very rule and institution has to justify its existence under two inquiries: First: What function does it serve in present society? Second: Does it serve this function well or would another rule serve it better? It is obvious that the second question cannot be answered except upon the basis of a comparison with other legal systems.” (internal footnote omitted).
from its doctrinal formulation and throw away the doctrine, and then measure the remaining functional element against some ideal function, simply because we have found the function not in some heaven of functional concepts (to paraphrase Jhering) but in the mundane reality of the legal order. We cannot first find two institutions to be functionally equivalent – of equal value with regard to the function in question, to translate literally – and then decide which of them is of greater value with regard to this same function. Better law theory is not compatible with functionalist comparative law.161

This point may be surprising, given the aspirations of functionalist comparative law. It becomes more plausible given the number of functionalist comparative studies that list similarities and differences and then run out of criteria to determine which of the laws is better. We may say that ceteris paribus, the better among two institutions is the one that fulfills its function more efficiently, with the use of fewer resources and more exactly. But the ceteris paribus is the big problem here. It requires two crucial assumptions. First, measuring an institution against its function requires us to reify our assumptions. Methodologically, isolating one function from an institution is only a heuristic device, it does not confer ontological status to the function. Now suddenly this isolated function becomes an object of analysis as though it really existed as an institution by itself. More problematic is the second assumption, that we can evaluate legal institutions with regard to one function, without taking other effects into account. This requires a simplistic view of legal institutions as monofunctional. Equivalence functionalism warns against such assumptions. The focus on functional equivalence instead of similarity or difference is born from the complexity of the interrelation both amongst legal institutions and between them and society, it is a deliberate way to reduce complexity. In order to evaluate institutions we would have to reintroduce complexity and analyze again all effects that legal institutions have. Indeed some Comparatists seem to suggest this much, but of course this is an impossible task. For example, we may say that insurance law is functionally superior to tort law with regard to the function of compensation, because its transaction costs are lower. We may also say that criminal law is functionally superior to tort law with regard to the function of deterrence, because it is more accurate. But what follows? Are insurance law and criminal law altogether better than tort law, either combined or in isolation? In order to answer this, we would have to know all

functions and dysfunctions of tort law, criminal law, and insurance law. Any functional micro-comparison would ultimately have to end up as macro-comparison of whole legal systems. Functional comparison can determine what is comparable, but the criteria needed for evaluation are different. We can see this exemplified in the House of Lords decision in *White v. Jones*.\(^{162}\) The question was whether a solicitor, who had negligently failed to finalize a will, was responsible to the intended beneficiaries. The court started by assessing several functions of liability: Tort-feasors should not go “scot-free”, solicitors should maintain a high standard, legacies played an important role in society etc. Then the court compared various functionally equivalent foreign doctrinal constructions for this result as to their adequacy within English law. However, while these foreign solutions were comparable because they were responses to the same problem (functionalism), the second step, assessing whether these solutions could be adopted in English law, was a matter of doctrinal fit. Functionalism could play no role in this. This does not mean that evaluation of the results of functionalist comparison is impossible, but it suggests that the criteria of evaluation must be different from the criteria of comparability. Functional comparison may have given us a new view of the legal systems, but cannot help us evaluate them. Moreover, any evaluation is contingent on the function which formed the focus of the comparative inquiry. One law is not better than the other *tout court*, but at best with regard to a certain function. Ultimately, evaluation remains a policy decision under conditions of partial uncertainty. The functional method can show alternatives and provide some information, but it cannot substitute this policy decision.

6. **The Universalizing Function: Unifying law**

Evaluation is closely linked to another function of function that may have been primordial in the beginning: to be a tool for the unification of law. Functionalist Comparatists advocate their method as an ideal tool for the unification of law, whether regionally (for example in Europe), or worldwide. The argument for the functional method rests on two alleged qualities: first, its ability to reveal which of different laws is the best, regardless of doctrinal constructions, and second, its ability to guide the process of writing an optimal uniform law that overcomes and transcends the doctrinal peculiarities of local legal systems. Once we realize that different laws are really

\(^{162}\) [1995] 2 AC 207.
functionally similar, so the argument goes, it becomes easier to unify them on the basis of these findings.

We have already seen two problems with this argument. First, the functional method, properly understood, cannot reveal which of several legal systems is better than the others (III.5). Second, the antiformalist functional method is not a good tool for the formulation of legal rules that must necessarily, as rules, be formalist (III.4.). It deliberate ignores the experiences that legal systems have made with legal doctrine and the creation of systems, experiences that will be necessary for the building of a new doctrine and a new system. Functionalist comparative law works well for the critique of doctrine, far less well for its establishment.

Yet there is an additional, slightly less obvious reason why functionalist comparative law is a particularly bad tool for the unification of law. As we have seen, functionalism with its emphasis on functional equivalence preserves difference within similarity; different institutions are formally different but functionally equivalent. This means that benefits from unification are likely to be meager, because they concern only form, not substance (or, more specifically, functionality). They may well be outweighed by the costs. Not only is it costly for lawyers to learn about new forms. Moreover, the functional method assumes that each legal institution performs a variety of functions within its legal system, and that there is a sensitive interaction between the various institutions in each system that accounts for intersystemic differences. Partial unification of law is then likely to unsettle this balance, a problem we see in the difficult coordination between the UN Sales Convention and national legal systems. This may explain why practitioners and business in Europe reacted with some reserve to proposals for a unified contract law – from a functional perspective (which, presumably, is that of the practice) its costs may well outweigh its benefits. The functional method shows why unification may be easier than one may think, but also why it is less important.

Of course interrelatedness can also provide an argument in favor of unification. The fact that different legal systems respond to similar problems with different needs may mean that actors, willing or unwillingly, pick and choose solutions from different legal orders that do not combine to a whole. For example, one legal system may protect surviving spouses through the


law of succession, the other through family law; one legal system protects poor parties through the law of damages, the other through the law of procedure. This can lead to consistencies if, under a choice of law analysis, different laws are applicable for different areas. Most of these problems however can be countered through a functionalist approach in choice of law.\textsuperscript{165} Remaining problems that provide an argument for legal unification are not so frequent. So we see with some surprise that the functional method is not only a bad tool for legal unification but even provides powerful arguments for maintaining differences. Indeed, alternatives to unification are often based on a preference for functional equivalence over unification, if not always explicitly. For example, in European Union Law directives must be implemented not in their doctrinal structure but only with regard to their results – EU member states are free to pass statutes that function as functional equivalents. Similarly, the EU law principle of mutual recognition requires not similarity but equivalence, which must presumably be understood as functional equivalence.\textsuperscript{166} But functionalist comparative law is not confined to Europe, as the law of international trade shows. For example, in a dispute between the US and Japan over semi-conductors, the EEC complained that the Japanese government was, through monitoring Japanese corporations, effectively preventing Japanese companies from exporting below certain company-specific costs. Japan countered that monitoring measures were not mandatory restrictions. However, a GATT panel made clear that the formal character of a governmental measure was irrelevant as long as it operated in a manner equivalent to mandatory restrictions.\textsuperscript{167} This was the case in the Japanese culture in which even formally nonbonding measures by the government were treated like binding regulations, they were, in other words, functionally equivalent.

Why do supporters and opponents believe that the functional method is a tool for, not against unification? Perhaps their concept of functionalism is different from the one used here. A teleological version of functionalism may well contain a tendency towards convergence. Indeed, the work of both Rabel and Zweigert already contains some elements of this teleological notion, especially where they discuss convergence. Equivalence functionalism on the other hand provides arguments against unification. Proponents of unification must either show that the costs

\textsuperscript{165} Infra III.7.
\textsuperscript{166} Cf. the examples of education degrees and data protection in Scheiwe (n. 84) 31 f.
from the formal differences between legal orders are unusually high and the costs of unification are unusually low, or they must emphasize other, nonfunctional arguments for legal unification.

7. The Critical Function: Critique of Legal Orders

This leaves us with the last claimed function of functional analysis, its critical function. This can mean different things: tolerance of foreign law, critique of foreign law, critique of our own law, and critique of law in general. Functionalism does not fare equally well for all of these. Proponents hope that it can overcome a home bias against foreign law. We see this clearly in the use of functionalist comparative law within the conflict of laws, where the question whether foreign law should be accepted is actually relevant. The most famous example for functionalism in the conflict of laws is Rabel’s proposal to use functional comparison for the purpose of characterization. Similarly, substitution and adaptation, the (somewhat idiosyncratic) methods of aligning different legal orders, require functional comparison. Finally the most important use of functionalist comparisons and functional equivalence concerns the question whether application of foreign law violates the forum’s public policy. The German Bundesgerichtshof held that a foreign judgment on punitive damages did not automatically violate German public policy, based on an extensive analysis of the various functions of punitive damages and its German functional equivalents. A Californian Court of Appeal could, in a case concerning an accident in the Dominican Republic, dispense a French company from the requirement of workers compensation insurance with a Californian insurer, assuming that the manifest function of the requirement – employers should be adequately insured by a solvent company French insurers – could also be attained by different means, in this case insurance with a French company. Similarly, western courts are now more willing than before to recognize Islamic divorce based on unilateral repudiation, because they find repudiation functionally equivalent to divorce in Western democracies which can also, effectively, be brought about

---

against or without the will of one of the spouses. In all of these cases, the tolerance for foreign law is brought about only by the recognition of functional equivalence.

At the same time, functionalist comparison can help us critique foreign law, especially where a legal system insists on its cultural autonomy. Invoking culture is a popular tool of critical strands in comparative law, for the sake of plurality and autonomy. But given that culture is sometimes invented and sometimes undesirable, one may well ask how we can differentiate between “true” (“good”?) culture worth preserving, and “false” (“bad”?) culture invoked for undesirable purposes. This is difficult for an insider who may lack a critical perspective, and for an outsider who may lack sufficient insight. Functionalist comparative law can here be helpful in building the ground for critique. The reason is that functionalist comparison combines two important perspectives: awareness of culture on the one hand, an outside perspective on the other. By reconstructing legal culture in functional terms it helps preserve the culture’s otherness while at the same time making it commensurable with our own law – we see what the foreign law’s functions and dysfunctions are, both manifest and latent, and we know from comparison how else these effects can be brought about. This is all the method does, it does not provide us with the tools to critique the foreign law. But without the groundwork laid, such critique is hard to formulate.

On the other hand, functionalist comparative law helps less in the critique our own law. The reason is again functional equivalence: Because we cannot say whether a foreign law is better than our own, recognizing different solutions abroad does not show us deficiencies at home. Functionalist comparison can open our eyes for alternative solutions, but it cannot tell us whether those alternative solutions are better or not. Functionalism can provide us with a view from outside on our own law, but whether what we see thus can be critiqued remains for other methods to be determined. Functionalism can be critical of doctrinalism by showing us the contingency of our doctrines, but it cannot shows us a way towards law without doctrine, and it cannot provide such law.

Finally, functionalism is indeed uncritical in various respects, in which we may wish for critique. First, functionalism does not help us in critiquing functionality and purposes. Quite to the contrary, in showing that other societies pursue the same goals by different means, it may reinforce our conviction that certain purposes are somehow necessary. Second, functionalism

---

172 Hill (n. 61) 106 f.
does not help us much in a fundamental critique of law. Functionalism may show that other societies fulfill certain needs with other institutions than law, but it cannot provide alternatives to the functionalist thinking which is inherent to our thinking about law. Third, functionalist comparative law avoids governance and may therefore be considered inherently conservative.\footnote{David Kennedy, ‘New Approaches to Comparative Law: Comparativism and International Governance’, \textit{1997 Utah LR} 545, 588 ff.}; its deliberate political neutrality is of little help for projects of understanding and critiquing globalization. Fourth, because functionalist comparative law presumes separate societies and separate legal systems as objects of comparison, it is unable to conceptualize the way in which these systems, and these societies, are interdependent, a growing problem under conditions of globalization. Fifth, functionalist comparison is unable to account for tension within legal systems, tensions, at least as long as it focuses on legal systems as interrelated, not on subsystems.

All of these are real shortcomings, not only of the functional method in comparative law but of traditional comparative law at large. In this way, those who critique the functional method while what they aim at is mainstream comparative law as a whole, are partly right: insofar functionalism stands for mainstream comparative law. It remains to be seen, however, whether the critics can come up with methods that are as powerful as the functional method, even with regard to critical potential. The comparative law that would be necessary for these tasks might have to be more radical than the projects of critics as well.

**IV. Towards Interpretative Functionalism in Comparative Law?**

Part III has left us with some surprising results. Generally, one assumes that the strength of the functional method lies in its emphasis on similarities, its aspirations towards evaluation and unification of law. This is the main reason why supporters since Rabel have seen in it such a powerful tool, and why opponents have felt the need to combat it so fiercely. We have seen that supporters and opponents are both wrong: The functional method emphasizes difference, it does not give us criteria for evaluation, and it provides powerful arguments against unification. Further, one generally assumes that the functional method does not account sufficiently for culture and is reductionist. However, we have seen that the functional method not only requires

\footnote{David Kennedy, ‘New Approaches to Comparative Law: Comparativism and International Governance’, \textit{1997 Utah LR} 545, 588 ff.}
us to look at culture, but also enables us, better than other methods, to formulate general laws without having to abstract from the specificities.

Part II shows us why these misunderstandings exist. The problem is that the functional method, as generally described, combines a number of different concepts of function: an evolutionary concept, a structural concept, a concept focusing on equivalence. The relation between these different concepts within the method is unclear, its aspirations therefore unrealistic. If we reconstruct the method plainly on the basis of functional equivalence as the most robust of the three concepts of function and emphasize an interpretative as opposed to a scientific approach, we realize that the functional method can make less claims, but at the same time is less open to some of the critique voiced against it. In short, the functional method is strong as a tool for understanding, comparing, and critiquing different laws, but a weak tool for evaluating and unifying laws. It helps us in tolerating and critiquing foreign law, it helps us less in critiquing our own.

All of this suggests that the intensive methodological debates in sociology cannot simply be transposed because there are important differences between sociological and legal functionalism. We can see this in the different reactions. Indeed, reactions in both disciplines are different. Whereas sociological functionalism had been criticized as inherently conservative, legal functionalism and social engineering were rejected as overly progressive; functionalist judges are rejected as activists. Whereas sociological functionalism is tautological, legal functionalism is criticized for its open introduction of new values into legal arguments. Whereas functionalism in the social sciences failed because it proved too much and became non-falsifiable, functionalism in law failed because it achieved too little. The reason is that the goals in sociology and law, and consequently the respective concepts of function, are different. While sociological functionalism is interested in latent functions (and largely ignores the intention of lawmakers), lawyers focus precisely on manifest or even imagined as opposed to latent functions. The judge must interpret a statute according to the function intended by the legislator even if the statute does not fulfill the function; the legislator is logically able only to consider manifest functions,

because by definition he does not know about latent functions. One may say with H.L.A. Hart that sociologists take an external, lawyers take an internal point of view.

Yet this difference is linked to another difference, that between the goals of functionalism in both disciplines. Only partly is this the difference between normative and descriptive-analytical goals (after all, a large part of the judge’s task is descriptive, too). Rather, sociologists use functionalism in order to raise complexity, so their picture of observed societal systems becomes more accurate than a mere listing of its elements. Lawyers on the other hand need functionalism in order to reduce complexity – they hope for functionality to tell them which of several alternative decisions they should take. The effects of their decisions are only partly the responsibility of judges, and even legislators must make decisions in necessary partial ignorance of effects.

Finally, a third difference is important. Sociologists and legal philosophers often focus on the differentiated functions of relatively broadly defined institutions, while comparative lawyers on the other hand take the existence and functionality of law for granted and focus on very specific legal issues. The clash can sometimes come to the open – when Roscoe Pound’s sociological comparative law is criticized from the Durkheimian tradition as unsociological, when a lawyer rejects a questionnaire proposal by a sociologist as too unspecific and too oblivious of legal categories, when Zweigert’s concept of functional comparative law is criticized by lawyers as not sufficiently legal, by sociologist as not sufficiently sociological.

A big interdisciplinary project at the Hamburg Max-Planck Institute, bringing together sociologists and lawyers, largely

175 Of course, legislators may learn about latent functions over time. Sunset clauses for legislation are a response to the problem: lawmakers make laws, then observe their latent functions and dysfunctions, and then react to this learning experience.


178 Luhmann (n. 86) 10, 6.


180 Lepaulle (n. ).

181 Evan et al. (n. 176).

failed, and the interaction between sociology and comparative law has focused more on empirical sociology than on theory.\textsuperscript{183} This may suggest why functionalism in comparative law is stronger than in other disciplines. First, it may be true that other disciplines discarded functionalism, but only after they had utilized the insights from functionalism. Functionalist comparative law has by far not yet achieved its potential. This study could only hint at the possibilities. But it should already have suggested that a more methodologically aware functionalism will provide us with better insights into the functioning of law, and can be more useful insights than other current approaches. Second, functionalism in comparative law, understood as a legal discipline, may well be immune against some of the critique voiced against functionalism in the social sciences. It is important to recall that law is a normative discipline, for which teleology need not be a bad thing, but instead necessary for its own functioning. Of course, what is necessary is the reconstruction of a more robust functional method on these terms. This contribution proposes to base such a method on equivalence functionalism and on an understanding of comparative law as interpretative, not scientific. Whether such a method, more fully developed, can hold its own – against the uncritical version of functionalism on the one hand, and against the critical alternatives to functionalism on the other – remains to be seen. But it seems well worth the attempt.