# Comparability, Functionalism and the Scope of Comparative Law

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## *Introductory*

Law may be perceived as consisting, ontologically, of a reflective relationship between two elements: *norm and behaviour*. Legal norms are set forth by human behaviour; their content is composed of models of behaviour. Norms are interpreted together with a real or imagined behaviour. But behaviour is also interpreted or assessed by reference to norms. This 'ontological dualism' of law cannot be disconnected, even though the different elements of law can, to a certain extent, be considered separately. Norms must refer to some form of behaviour, otherwise norms cannot be understood at all. On the other hand, behaviour that cannot be interpreted on the basis of legal norms is, strictly speaking, legally irrelevant. It is evident that law can be studied from different angles. One can stress the norm-element to such an extent that a discourse on valid law becomes equivalent to that on valid legal norms. In this case the formal validity of law is emphasized – the fact that a norm has been legally prescribed and has not been abolished or fallen in abeyance. On the other hand, one may allude to law as behaviour. In this case

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validity hinges upon a kind of 'prognosis' of behaviour. However, neither of these perspectives can overlook the dualistic nature of law. For example, the Kelsenian conception of validity requires a minimum of effectiveness as a criterion for legal validity; on the other hand, realist theories of law must employ some criterion for distinguishing between rules and regularities, for prognoses of behaviour presuppose that behaviour is in some way intentional: it is guided by norms. In view of the above, one might say that the principal object of legal comparison is the relationship between norm and behaviour. But law may be understood in different contexts, or by reference to its various connections with the different conditions under which it emerges. Contexts of law are often defined in diverse ways by various schools of legal theory. One may articulate three types of contextual understanding of law pertaining to (a) the semantical and systematic context of norms; (b) the relationship between law and social reality; and (c) the evaluative context of law. Realist and sociological theories of law often stress that legal norms cannot be properly understood unless they are examined in the light of social facts – including the intentions, interests and evaluations of social agents. Most normativists also recognize that analyses of legal norms presuppose that the intentional and extensional aspects of legal concepts are taken into consideration.

In the light of the above analysis, a distinction may be drawn between three types of comparative-legal inquiry: *idealistic, realistic* and *particularistic*. According to the idealistic approach, legal order is a normative matter that is present in the factual legal order although it cannot be identified with it. The realistic approach, on the other hand, is based upon an empirical view of legal order. Both the idealistic and realistic perspectives are concerned with the problem of *generalization*. The study of legal orders brings to light innumerable differences and similarities. Should a comparatist strive to arrive at generalizations capable of application to different legal orders? Idealistic universalism seeks to discover the *ideal of law*, which is present in all legal orders; realistic universalism seeks to reveal the *sociological laws* governing legal phenomena. In spite of their theoretical juxtaposition, both perspectives have universalism in

common: they are not content with a mere description as they want to *systematize*, to find out general means of explanation to account for legal phenomena irrespective of time and place. Those who follow a *particularistic* approach to comparative law, by contrast, claim that general principles are too abstract to serve as goals of study. This approach, quite common in the practice of comparative law, tends to reduce comparative law to a detailed description of different legal orders. From this point of view, in other words, comparison is only a translation of valid legal orders into one language. In most cases, however, some kind of intermediate position between universalism and particularism is sought, as far as it is recognized that there are both general and particular features in every legal order.[1] One might thus say that the universal and individual features of legal phenomena are *different* aspects of a uniform whole, although both aspects are *necessary* in order to grasp reality. The more general a description is, the more phenomena of concrete life it covers, and the better it is as a scientific description, but the less does it represent a particular form of life. The exact course of historical events is always individual and can be explained only by reference to its particular elements; but the broad outline of the events is subject to general socio-historical laws. Comparative law has to deal with very complex phenomena. Wide social, cultural and religious diversities (not to mention the impact of particular individuals) produce distinctive legal systems, that each must be studied and understood on their own, even if some or all systems manifest similar traits. In other words, knowledge of the particular as opposed to knowledge of the general is crucial to the understanding of law and legal institutions. Even though legal sociology might strive towards a universalist knowledge of law, as does legal philosophy in a different sense, comparative law is by its own nature forever bound to vacillate between the general and the particular. The comparative process may be described as dialectical,

1 This reflects the Aristotelian view of legal order as a result partly of natural regularities and laws, and partly of human will.

since it focuses upon the inter-connection between general principles and concrete observations made when these principles were applied in practice. Thus, the general explanatory background is concretized in particular cases; at the same time, a general historical outlook enables one to make certain generalizations from particular events within the framework of a general model of explanation.

Modern comparative law has progressed through different stages of evolution. Influenced by developments in the biological sciences, linguistics and new theories of social evolution during the nineteenth century, comparatists tended to focus, at that time, upon the historical development of legal systems in the belief that there exist certain laws of social development common to all societies. In the late nineteenth century, a period of relative tranquillity in Europe, the French scholars Lambert and Saleilles, aspiring for the world unification of law, advocated the search for what they referred to as the 'common stock of legal solutions' from amongst all the legal systems of the civilized world. It was quite natural for many comparatists of that time to perceive comparative law as a substantive subject; a substantive science with a distinct and self-contained subject matter. As such, comparative law was mainly concerned with unravelling the patterns of legal development and concepts that were common to all nations. During the early years of the twentieth century, however, many comparative law scholars, most notably Gutteridge and David, put forward the view that comparative law was no more than a *method* to be employed for diverse purposes in the study of law. According to this view, comparative law is no more than a means to an end and therefore the purposes for which the comparative method would be utilized should provide the basis for any definition of comparative law as a subject. This approach entailed a shift in emphasis from comparative law as a science to the uses of the comparative method in the study of law.[2]

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2 By focusing on the uses, aims or purposes of the comparative study, comparatists divided their activities into categories such as 'descriptive

It seems to me that those who view comparative law as a method and those who regard it as a science look at comparative law from different angles. When speaking of 'laws' and 'rules', the former have in mind normative 'laws' and 'rules' – the things that lawyers commonly employ. The latter, on the other hand, tend to perceive law primarily as a social phenomenon, and the relationship between law and society as governed by 'laws' or 'rules' that transcend any one particular legal system. At its simplest level, the description of differences and similarities between legal systems, the comparative method allows us to acquire a better understanding of the characteristic features of particular institutions or rules. But as the comparative method becomes more sophisticated, for example, when the socioeconomic and political structures, historical background and cultural patterns that underpin the institutions or rules are taken into account, the comparative method begins to produce explanations based on interrelated variables – explanations

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comparative law' or 'comparative nomoscopy', signifying the mere description of foreign law; 'applied comparative law' or 'comparative legislation', referring to the use of foreign law for the purpose of reforming one's own legal system; 'comparative nomothetics', concerned with the evaluation of foreign law; 'comparative nomogenetics' or 'comparative history of law', focusing on the evolution of legal norms and institutions; and 'abstract or speculative comparative law' or 'comparative jurisprudence', with respect to which the comparative method was designed to assist sociologists and legal philosophers. See in general, H. C. Gutteridge, *Le droit comparé–Introduction à la méthode comparative* (Pichon & Durand-Auzias, Paris 1953) 20. However, the above divisions do not militate against the basic unity of comparative law as a scientific method. As Gutteridge points out, comparative law is not made up of a variety of independent inquiries related to each other only by virtue of the fact that they all involve the study of different legal systems. The basic feature of comparative law, as a method, is that it can be applied to all types and fields of legal inquiry. *Le droit comparé*, ibid at 28. And see G. Langrod, "Quelques réflexions méthodologiques sur la comparaison en science juridique", (1957) *Revue internationale de droit comparé*, 353.

which become progressively more scientific in nature. Scientific comparative law is distinctive among the branches of legal science in that it depends primarily upon the comparative method, whereas other branches may place greater emphasis on other methods of cognition available, such as empirical induction or *a priori* speculation.

## *The Comparative Process*

The comparison is a mental process where two or more different objects (i.e. different in quality, quantity or kind) are examined to determine their possible relationships. It involves the composition of different objects in one's conscience so that human intelligence, when moving from one object to the other, finds them to be identical, similar or opposite. As a basic element of the cognition process, comparison cannot be considered separately from other logical means of cognition, such as analysis, synthesis, induction and deduction. Scientific comparison involves three interconnected aspects: a logical method of cognition, a process or cognitive activity and a cognitive result, i.e. knowledge of a certain kind. It also embraces judgment and evaluative selection, as it is usually concerned with one or some aspects of the objects compared, while abstracting provisionally and conditionally other aspects. Comparison is used in all fields of scientific inquiry, although in each field the comparative method employed has its own distinct features that fulfil certain cognitive functions. A distinction may be drawn between the function of comparison as an element of cognition in general, and the comparative method as a relatively autonomous, systematically organized means of research designed to achieve specific aims of cognition.

Comparison is the essence of comparative law. In this context, the comparative method as a method of legal science, is designed to perform certain cognitive tasks: to identify the similarities and differences between two or more legal systems, or rules or institutions thereof, and to elucidate the factors on the basis of which these similarities and differences can be explained. The

comparative method is multi-functional, as it is used on both the descriptive-empirical and theoretical-evaluative levels. It may be applied in a variety of comparative inquiries concerning law, such as inquiries regarding the nature of the sources of law; the ideological foundations of legal institutions; the scope and operation of legal rules and principles; techniques of statutory interpretation; forms of procedure; and systems of legal education. The selection of the particular legal systems or aspects thereof to compare naturally depends on the aims of the comparison and the interests of the comparatist.

A legal comparison may be bilateral (between two legal systems) or multilateral (between more than two systems). It may address the substantive law or formal characteristics of the legal systems under consideration, e.g. the techniques used in the interpretation of statutory enactments or judicial decisions. The subject of comparison may be legal systems that existed in the past, or elements thereof (historical legal comparison) or contemporary systems (synchronic comparison). Moreover, one may choose to compare legal systems of a particular region or various international organizations. Comparison within a single state is referred to as internal comparison, in contradistinction to external comparison, i.e. comparison of laws belonging to different national or international legal orders. Internal comparison can pertain not only to federal but also to unitary states, and may be diachronic or synchronic. Mixed legal systems provide interesting materials for internal comparison within a unitary state. Such a comparison is useful for explaining the significance and possible interrelation of the various legal sub-systems, local or personal, within a unitary national legal system.

One can further distinguish between a comparison among entire legal systems, or families of legal systems and a comparison between individual legal institutions or rules. In the first case, we allude to *macro-comparison*, or comparative law in a broad sense; in the second, we refer to *micro-comparison*, or comparative law in a narrow sense. Macro-comparison focuses upon those features that determine the general character or style of different legal systems. It is concerned, for example, with the historical origins and evolution of

legal systems; the sources of law and their hierarchy; the ways in which legal material is distributed into branches or categories of law; the procedures adopted for dealing with legal problems; the roles of those involved in law-making and the administration of justice; legislative techniques; styles of legal codification; methods of statutory interpretation; modes of judicial decision-making and the ways legal scholars contribute to the development of law; approaches to legal instruction; and the division of labour among legal professionals. Micro-comparison, on the other hand, is concerned with particular legal rules or institutions and the way these operate in different systems. The following are some examples of questions falling within the province of micro-comparison. What factors are relevant to determining the custody of children in divorce cases? Under what conditions is a manufacturer liable for damage caused to others by defective products? How is the issue of compensation addressed in the case of road traffic accidents? What are the rules governing an heir's liability for the debts of the testator? What are the rights of an illegitimate child disinherited by his or her father or mother? What is the basis of liability of a person who allows his or her house to deteriorate to a state that a tile falls from the roof and injures a pedestrian? To what extent is it possible to have a contract foisted on a person because he or she failed to refuse an offer? As Zweigert and Kötz pointed out, micro-comparative and macro-comparative inquiries are interrelated or interdependent, "for it is only by discovering how the relevant rules have been created and developed by the legislature and the courts and ascertaining the practical context in which they are applied that one can understand why a foreign legal system resolves a given problem the way it does and not otherwise".[3]

An important aspect of the modern comparative law methodology is concerned with the comparability of positive legal phenomena: the question whether the legal institutions, rules or

3 K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, (2nd edn, Clarendon Press, Oxford, 1987) 5.

practices under consideration are open to comparison. A comparison is deemed meaningful when the objects of the comparison share certain common features, which can serve as the common denominator (*tertium comparationis*). Determining the requisite common features in the relevant objects occurs at the preliminary stage of the comparative inquiry. At this preliminary stage one examines the structure, purposes and functions of the legal institutions or rules one intends to compare, without, however, embarking on a detailed analysis of the study's results. This analysis occurs in the main phase of the comparative inquiry, when one considers and attempts to explain the similarities and differences between the objects compared. According to Kamba,[4] this phase may be divided into three parts or stages: the descriptive, identification and explanatory stages. At the descriptive stage, one offers a description of the legal institutions, rules and principles that the study addresses, as well as the socio-economic problems and the solutions provided by the legal systems under consideration. At the identification stage, one detects and sets out the similarities and differences between the systems compared. Finally, at the explanatory stage, one attempts to explain the detected similarities and differences. Although it is not necessary to always follow the above order, all three stages must at some point be considered if the inquiry is to be regarded as a comparative one. Certain legal institutions or rules may appear comparable at the preliminary stage of the inquiry, but as the comparative process progresses important differences may emerge. For example, legal institutions, which were initially assumed to be comparable due to certain common structural characteristics, may subsequently prove to operate in entirely different ways. In other words, whether two or more legal institutions that *prima facie* appear to be comparable in fact share certain common characteristics (e.g. are intended to address the same problem) often cannot be declared with certainty before the actual comparison is executed.

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4 W. J. Kamba, "Comparative Law: a Theoretical Framework", (1974) 23 *International and Comparative Law Quarterly*, 485.

Although resolving the problem of comparability does not presuppose the full application of the comparative method, ascertaining comparability is not always easy. The following two questions must be addressed: what are the criteria for ascertaining the existence of common elements or characteristics in the objects one seeks to compare? To what extent are considerations pertaining to the broader socio-economic, political and cultural environment relevant to defining these criteria? The following paragraphs elaborate the different theoretical approaches to the problem of comparability, which is one of the major theoretical problems of modern comparative law methodology.

## *The Normative-Dogmatic Approach to the Comparability Issue*

In the nineteenth and early twentieth centuries comparatists tended to proceed from the assumption that the common ground rendering the comparison of two or more legal institutions possible emanates from their institutional affinity. They believed, in other words, that similar legal institutions, norms, concepts and principles reflect general legal ideas or patterns that reside in most, if not all, legal orders. In the case of normative-dogmatic comparison one proceeds from a consideration of legal terms, concepts and categories peculiar to one's own legal system. It is supposed that another comparable legal system uses the same terms, concepts and categories, and that behind a similar name there exists a common legal idea or general pattern. The comparative law of the German *Begriffsjurisprudenz* (conceptual jurisprudence)[5] preferred this kind of comparison of

5 *Bergriffsjurisprudenz* placed strong emphasis on the formulation of abstract, logically interconnected, conceptual categories and principles as a means of developing a highly systematic body of positive law. See, e.g., Georg Friedrich Puchta, *Cursus der Institutionem*, I, (Breitkopf und Haİrtel, Leipzig, 1841) esp. 95-108; Bernhard Windscheid, *Lehrbuch des Pendektenrechts* (7th edn, Literarische Anstalt Rutten & Loening Frankfurt a. M. 1891) esp. I, 59-60.

conceptual forms as it hoped to use it to prove the existence of general, universally valid legal systematics. Comparative law could reveal the common core or essence (*Wesen*) of basic juridical concepts, even if it was recognized that every legal order has a system of its own. The unitary and universalistic mentality underpinning the approach to comparative law adopted at the First International Congress of Comparative Law, held in Paris in 1900, reflects the influence of the *Begriffsjurisprudenz*.[6] However, the criticism directed against this school of thought has been annihilating. One of the most vigorous attacks upon the methods of the *Begriffsjurisprudenz* emanated from Rudolf Jhering, who insisted that legal theory must abandon the delusion that it is a system of legal mathematics, without any higher aim than a correct reckoning with conceptual schemes.[7] Furthermore, since the period of logical empiricism, a tendency prevailed to regard questions concerning the nature and essence of legal concepts as generally meaningless. The so-called Analytical School of law typically reduces legal problems to relationships between legal facts (*Rechtstatbestand*) and legal consequences (*Rechtsfolge*). Scholars who have adopted the analytical

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6 As E. Lambert declared at that Congress: "[C] omparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral or social qualities of the different nations but to historical accident or to temporary or contingent circumstances". "Conception générale et definition de la science du droit compare", in *Procès verbaux des séances et documents du Congrès international de droit comparé 1900*, 1905-1907, I, 26. Lambert drew a distinction between comparative law based on historical and ethnological research, concerned with the discovery and understanding of universal laws of social evolution and serving mainly scientific and theoretical purposes; and comparative law as a special branch of legal science seeking to identify common elements of legislation in different states with a view to laying the basis for the development of a 'common legislative law' (*droit commun legislatif*).

7 R. Jhering, *Scherz und Ernst in der Jurisprudenz* (Breitkopf & Härtel, Leipzig, 1884).

method and its conceptual nominalism (through logical empiricism) claimed that many traditional concepts were 'empty' and therefore the concepts with an extensional reference should be used. In other words, one must consider the function, not the imaginary essence of the concepts. From this point of view one might assert that the regulation of contracts, for example, can be reduced to single relationships between *legal facts* and *legal consequences*. The event where certain consequences did not ensue can be termed 'invalidity', but otherwise the concept has no content at all.[8]

Even if it is accepted on an abstract level that one can detect certain common patterns, the substantive content of a particular legal institution and the way it operates in practice often differ considerably from one legal system to another. The further apart two legal systems are the more difficult it is to rely on the assumption of institutional affinity as a basis of the comparison, for the differences in the content and function of the legal institutions in these systems would tend to negate that assumption. The unsatisfactory nature of a purely normative-dogmatic approach to the issue of comparability was noted when scholars embarked on the comparative study of Civil Law and Common Law legal systems. Certain legal institutions and categories of Civil Law systems were unknown to Common Law systems. On the other hand, basic categories of Common Law systems, such as the distinction between common law and equity are not found in the legal systems of Continental Europe. These differences that affected basic legal concepts and categories, legal terminology, structures of law, interpretation of legal norms and distinctive features of law enforcement were explained by reference to the specific historical circumstances under which the relevant legal systems developed. A further problem of the normative-dogmatic approach is that externally identical legal terms do not always have the same meaning in different legal systems.[9] On the other hand, certain legal

8 See, e.g., A. Aarnio, *Denkweisen der Rechtswissenschaft* (Springer Verlag, Vienna & New York 1979) 65 ff.

9 For instance, 'equity', is a term that is used in both common law and

institutions may be comparable even when the differences between them with respect to legal terminology are so great that, in terms of language, it is difficult to recognize any common elements.

The reaction to the formalism and extreme conceptualism of the German *Bergriffsjurisprudenz* led to the emergence of new trends in European legal thought. Examples of such trends include *Zweckjurisprudenz*[10] (focusing on the purposes that legal rules and institutions serve) and *Interessenjurisprudenz*[11] (focusing on societal interests as the chief subject-matter of law), which were precursors of legal realism[12] and the sociology of law.[13] These new approaches are also connected with the development of functionalism in comparative law.

## *The Functionalist Perspective*

The shortcomings of the normative-dogmatic approach prompted comparatists to adopt the view that to ascertain the real similarities and differences between the substantive contents of legal systems,

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civil law systems. In English law the technical meaning of this term refers to a body of law that developed separately from the judge-made common law. The boundary between equity and law was so clearly drawn that English lawyers tend to think of the relevant distinction as juristically inevitable. By contrast, in civil law countries such as France and Germany, equity is a clearly recognized element in the administration of justice. Judges in these countries use the concept whenever they do not wish to adopt a formal or narrow interpretation of a legal principle, or when they wish to adapt such a principle to changing social conditions.

10 See R. Jhering, *Der Zweck im Recht* (Breitkopf und Härtel, Leipzig, 1877).

11 Consider on this P. Heck, "Gesetzesauslegung und Interessenjurisprudenz", (1914) 112 *Archiv für die civilistische Praxis*, 1-318.

12 See O. W. Holmes, *The Common Law*, (Little, Brown and Co, Boston 1881); "The Path of the Law", (1897) 10 *Harv. Intl L. R*. 457-478.

13 R. Pound, "The Scope and Purpose of Sociological Jurisprudence", (1911) 24 *Harv. Intl. L. R*., 591.

one must start not with the names of legal rules and institutions, but instead one should consider their functions, i.e. those real or potential conflict situations which the rules under examination are intended to regulate. The compared legal institutions must be comparable to each other functionally: they must be designed to deal with the same social problem. This common function furnishes the required *tertium comparationis* that renders comparison possible.

Functional comparison does not proceed from a legal term or norm to a social fact but from a social fact to the legal regulation thereof. One does not compare abstract or general legal notions but, rather, how the legal systems under consideration deal with the same factual situations in real life. In other words, a prerequisite of functional legal comparison is the comparability of basic social conditions and social problems. Such a similarity creates the possibility of concluding that the respective legal solutions found in different legal systems are comparable. According to Rheinstein, the principle of functionality requires comparative inquiries to "go beyond the taxonomic description or technical application of one or more systems of positive law.... [A] 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?"[14] And as Kamba points out, a key question for the comparatist is: "[W]hat legal norms, concepts or institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions of another system?"[15] The resolution of a particular social problem may be

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14 M. Rheinstein, "Teaching Comparative Law", (1938) 5 *U. Chi. L. Rev.*, 615 at 617-618.

15 W. J. Kamba, "Comparative Law: A Theoretical Framework", supra note 4 at 517. As Zweigert and Kötz explain, "The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill

achieved through a combination of different legal means in different systems. For instance, the institution of trust or trust ownership in English law has no equivalent in Romano-Germanic legal systems where the functions it fulfils are realized with the assistance of direct representation of a person lacking dispositive legal capacity by their legal representative. As this shows, different legal means are used to attain the same legal and social goal, i.e. defending the interests of a person lacking dispositive legal capacity. If one of the two analysed systems does not possess a direct equivalent of a legal institution found in the other, it does not mean that there is a gap in the law nor that the two systems are incomparable with respect to the solutions they adopted for a particular social and legal problem. Thus, functional comparison may be defined as the study of legal means and methods for the resolution of similar or identical socio-legal problems adopted by different legal systems. Such a comparison serves both theoretical-scientific and applied-practical purposes, thus promoting a better understanding and assessment of legal institutions within one's own law.[16]

The functional approach constituted a departure from the methods of nineteenth century scholars, who tended to place the

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the same function." *An Introduction to Comparative Law*, supra note 3, 31. The authors point out that "function is the start-point and basis of all comparative law. It is the *tertium comparationis*, so long the subject of futile discussion among earlier comparatists. For the comparative process this means that the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need. It means also that we must look to function in order to determine the proper ambit of the solution under comparison." (Idem at p. 42).

16 In this connection, it should be noted that, according to some scholars, the functional approach may be construed to eliminate the problem of comparability as the social needs that legal institutions and rules address are largely the same in most systems. See M. Ancel, 'Le probléme de la comparabilitéet la méthode fonctionelle en droit comparé', (1982) *Festschrift für Imre Zajtay*, 5.

emphasis on the wording, structure and systematic classification of legal rules and institutions rather than on the social purposes they were intended to serve. It has been adopted by comparatists in Europe, the United States and elsewhere, and continues to influence comparative legal scholarship today.[17] There is a universalist trend inherent to the functionalist approach as far as the latter is taken to rest on the assumption that "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."[18]

The German comparatist Konrad Zweigert, cites many examples from various legal systems, to argue that in 'unpolitical' areas of private law, such as commercial and property transactions and business dealings, the similarities in the substantive contents of legal rules and the practical solutions to which they lead are so significant that one may speak of a 'presumption of similarity' (*praesumptio similitudinis*).[19] This presumption, he claims, can serve as a useful tool in the comparative study of different legal systems. At the end of a comparative study, if the comparatist concludes that the solutions offered by the examined systems are identical or compatible, this can be regarded as confirmation that he probably understood and compared them correctly. The discovery of substantial differences is a warning that an error may exist and thus the process should be repeated and the results carefully

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17 The more recent trend to combine comparative law and economics may be taken to constitute a narrower version of functionalism focusing not on social functions in general but on a particular function, namely the efficiency of a legal rule or institution in economic terms. See U. Mattei, *Comparative Law and Economics* (University of Michigan Press, Ann Arbor, 1997); "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics", (1994) 14 *International Review of Law and Economics*, 3.

18 Zweigert and Kötz, *An Introduction to Comparative Law*, supra note 3, 31.

19 See, e.g., K. Zweigert, *Des solutions identiques par des voies différentes*, (1966) *Revue internationale de droit comparé*, 5 ff; Zweigert and Kötz, *An Introduction to Comparative Law*, supra note 3, 36.

verified. This 'presumption of similarity' is connected with the idea that it might be possible to develop, on the basis of comparative research, a system of general legal principles that could acquire international recognition. According to Zweigert:

> [The international unification of law] cannot be achieved by simply conjuring up an ideal law on any topic and hoping to have it adopted. One must first find what is common to the jurisdictions concerned and incorporate that in the uniform law. Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and more easily applied than any of the existing ones. Preparatory studies in comparative law are absolutely essential here; without them one cannot discover the points of agreement or disagreement in the different legal systems of the world, let alone decide which of the actual or proposed solutions is the best.[20]

It is important to note here that Zweigert, in both publications where he elaborates the idea of a 'presumption of similarity' refers only to the field of private law and within this field to the law of contract and the law of tort, but not to family law. Moreover, he recognizes that there are important differences between legal systems in the way they attain their solutions. It is the solutions to societal problems that are very often the same.

However, for all its merits the functional approach is not without problems. These pertain to the two basic assumptions upon which the functional method operates, i.e. the presence of a legal need that is common to the legal systems under consideration, and the existence of a similarity in the factual circumstances of the compared laws. According to the functional approach, a meaningful comparison is not possible unless the relevant problem is defined in similar practical terms by the compared legal systems. In other

20 *An Introduction to Comparative Law*, supra note 3, 23.

words, one cannot deal with a problem that has a different social significance in one of the systems under examination; in such a case there is no issue of legal rules or principles of similar function. However, because of the multiplicity of legal functions that may exist on different levels and may differ between cultures, 'common need' or 'function' and 'similarity' with respect to factual circumstances may be difficult to ascertain, even within one's familiar socio-economic environment.[21] The diverse functions of the law on different levels – social, political, economic, religious, spiritual, symbolic – may be difficult to detect, describe and evaluate in terms of importance and thus functionality ultimately depends on the viewpoint embraced.[22] As McDougal remarks, "[t]he demand for inquiring into function is...but the beginning of insight. Further questions are: 'functional' for whom, against whom, with respect to what values, determined by what decision-makers, under what conditions, how, with what effects".[23] As this suggests, it would be requisite for the functional method to have a broad scope so as to take proper account of the relativity in the socio-economic and cultural circumstances under which legal institutions operate. What is needed, in other words, is a method that focuses on the function of law as this function is conditioned by the socio-economic and cultural environment. Legal rules and institutions should be examined in light of their broader implications, with respect to not only the legal but also the social, economic and political system. As Ainsworth remarks,

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21 According to commentators, "the functional approach runs the risk of simplifying complex reality by assuming that similarity of problems produces similarity of results". G. Frankenberg, "Critical Comparisons: Re-thinking Comparative Law", (1985) 26 *Harv. Intl L. J*., 411 at 436.

22 Focusing on economic efficiency as the sole basis for comparing laws, as the strict law and economics approach suggests, represents a reductionist understanding of law and its role in society.

23 M. S. Mc Dougal, "The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order", in W. E. Butler (ed.) *International Law in Comparative Perspective* (Sijthoff & Noordhoff, Alpen aan den Rijn 1980) 191 at 219.

"[because a] legal order simultaneously encompasses systems of political arrangements, social relations, interpersonal interactional practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives and ideological values", we must scrutinize not only rules but also legal cultures, traditions, ideals, ideologies, identities and entire legal discourses.[24] In other words, an interdisciplinary and comprehensive approach is a prerequisite for avoiding false assumptions on seemingly 'identical' societal problems and ill-founded, de-contextualized evaluations of legal solutions.[25] This means that the use of the functional method demands from the comparatist an extremely broad knowledge not only of contemporary law, but also sociology, anthropology and

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24 J. E. Ainsworth, "Categories and Culture: On the 'Rectification of Names' in Comparative Law", (1996) 82 *Cornell L.R.*, 19, at 28.

25 It should be noted here that traditional functionalists have also called for an interdisciplinary approach, albeit, in somewhat different terms. According to Pierre Lepaulle, "[I] t must be clear that a comparison restricted to one legal phenomenon in two countries is unscientific and misleading. A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces and hence the similarity may be due to the purest coincidence – no more significant than the double meaning of a pun". "The Function of Comparative Law", (1921-1922) 35 Harv. L. Rev., 838 at 853. Similarly, E. Rabel, one of the founders of functionalism, points out that "The material of reflection about legal problems must be the law of the entire globe, past and present, the relation of the law to the land, the climate, and race, with historical fates of peoples, - war, revolution, state-building, subjugation -, with religious and moral conceptions; ambitions and creative power of individuals; need of goods production and consumption; interests of ranks, parties, classes. Intellectual currents of all kinds are at work... Everything is conditioned on everything else in social, economic and legal design". *Aufgabe und Notwendigkeit der Rechtsvergleichung* (Rothschild, Berlin 1925) 5. See also E. Rothacker, "Die vergleichende Methode in den Geisteswissenschaften", (1957) 60 *Zeitschrift für vergleichende Rechtswissenschaft* 13 at 31.

history, among other things, i.e. a level of knowledge that is very difficult, if not impossible, for a comparatist to attain. Because of this problem, functional legal comparison is usually conducted by international teams of experts. Specific socio-legal problems are assigned to national rapporteurs in accordance with a preliminary scheme designed with the aim of taking comparison into account. The representative of each national system then submits a report explaining how the law of each system resolves the specific problem being considered. This collective approach to functional comparison has considerable advantages, although it often involves significant costs and requires great organizational efforts and time.

In the quest for comparability, many contemporary commentators maintain that the normative-dogmatic and functional methods should not be juxtaposed, but regarded as complementary to one another. Legal decisions relating to a particular social problem undoubtedly presuppose an analysis of specific legal norms and institutions. At the same time, considerable attention is paid to the socio-economic purposes that legal norms and institutions serve, i.e. their social role, and not merely legal form. The normative-dogmatic and functional comparison methods may thus be combined, although, depending on the goals of the particular research, either of these may be accorded priority. The current development of comparative law appears to demand such a broader approach to the comparability issue.

## *Extending the Functionalist Paradigm*

As already noted, the starting-point of comparative law is often the appearance of common social problems in different legal orders. The question is whether there are common features or, conversely, differences in their legal regulation within these diverse legal orders. How should these similarities or differences be explained? It is submitted that the existence of a common social problem is not a sufficient starting-point for comparative law. For a meaningful legal comparison to exist, there must also be some form that is sufficiently similar. As Watson notes, some common features of legal

culture are essential ; a relationship is required to render comparative law possible.[26] Historically, juridical forms and their systematical organization are older than the norms of present law. General doctrines are extremely relevant as a framework for comparative legal studies. This is partly due to the presence of common problems but partly also due to historical tradition, e.g. the fact that Roman law has been an important common basis of many Western legal systems. Thus the conceptual system of Roman law is an apt *tertium comparationis*, a common denominator of the legally organized relationships of life. These relationships are organized by forms that are derived from Roman law, such as the distinction between *ius publicum* and *ius privatum*, *culpa*, *contractus*, *bona fides* and such like. These forms constitute a kind of *pre-knowledge* for most Western legal thinking.

A system of forms is meaningful when it corresponds to a consequent system of content. A legal system should be both formal and substantial – it should take a stand on relevant problems of legal regulation. But it is by no means obvious that the legal concepts and the juristic systematics of forms are a sufficient means to organize social states of affairs, as far as comparative law is concerned. One should bear in mind that a *functional coherence* between social states of affairs must be established. Can this be expressed by an abstract formal system? In legal science attempts have been made to reduce social relations to single right-duty relations, which are the objects of legal regulation. There are formal systems of legal relations. Consider, for example, the system proposed by Hohfeld, whereby all legal relations between humans can be expressed with the help of 'fundamental legal conceptions'. The basic relations are : right – duty ; privilege – no right ; power – liability ; immunity – disability.[27] With the help of this and similar schemes, similarities and differences in legal regularities can be

26 A. Watson, *Legal Transplants : An Approach to Comparative Law* (2nd edn, University of Georgia Press, Athens 1993).

27 W. H. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (W. Cook ed., Yale U. Press, New Haven, 1923).

articulated in a particularly graphic manner. Even if schemes such as the 'fundamental legal conceptions' of Hohfeld are purely formal, they provide useful starting-points. Abstract legal relations are first described. Then one proceeds to ask whether they can be explained in terms of more basic social relations. Legal relations and the models of behaviour they express are based upon an experimental shaping of social relations. But this shaping is not purely empirical and cognitive. There are reactions, also partly evaluative, when certain states of affairs are chosen on axiological grounds as consciously followed goals (*axiology changes into teleology*). This process involves a set of juristic forms, which are not incidental or particular to the relevant case: they stem from the history of legal doctrines and ideas. Thus, we may assert that whether we proceed from forms or from contents, the choices of subjects are not purely empirical; axiological and teleological choices must be considered and examined together with the doctrinal history of legal concepts and their systematical treatment.

In society different states of affairs are functionally coherent, but certain conditions are relatively permanent and thus exercise permanent influence on other elements of the function. In this respect, one can allude to structures; the relationship between the structures is the structure of the whole function. To understand the social function one must comprehend the structures. This is also necessary in comparative law. For example, if one says, "in the country A King Z introduced the law L1 and in the country B King X presented the law L2', it is obvious that even if the kings were the human causes of the legislation we cannot build a reasonable comparison of L1 and L2 upon the personalities of Kings Z and X. An understanding of the social situation is needed. We must grasp the conditions in the respective countries, i.e. their social structures that set the limits upon the legislative activities of kings and other persons. The structuralist view of society is related to the Marxist theory of the state and law: it refers to the socio-economic basis of law; law and state are phenomena of the so-called *suprastructure*. The basis consists of 'real' relations of production and exchange. Law is conditioned by the state, which in turn, is conditioned by class

relations and cultural factors. But even if dialectical materialism is a kind of common element among Marxists, their opinions differ considerably when the precise interrelationship of law and economics is contemplated. Law is *not determined* by the economic basis. Law is *relatively independent*: it not only expresses social relations but also influences them. Law also expresses certain historical traditions pertaining to the different ways of looking at legal issues. Law may be considered as a *form of social power*. But the role of law is not uniform in different societies: law can have a wider or narrower scope, it can cover a relatively larger or smaller part of intentional human behaviour. Legal regulation in society has both an explicit and a latent non-intentional function – this is the thesis of the German functionalist sociologists of law, such as N. Luhmann.[28] Law is not only a form but also a social structure whose functions may vary. Moreover, legal forms and their social context are interconnected.

Furthermore, the nature of legal relations and the current social situation set *certain ideological limits* upon legal regulation. In this respect, natural law doctrines emphasize the role of *values and goals* in all law-making. But even if early natural law theories considered values as cognizable, it is entirely possible to start from a materialistic ontology of values: because the state of affairs X has

28 Luhmann's social theory is a systemic supertheory of the social. This theory is universal in that it is a theory of everything, of the world, as seen and reconstructed from the standpoint of sociology, including a theory of itself. It is systemic because it uses the guiding difference (*Leitdifferenz*) between the system and the environment as its main conceptual tool to analyse the production and reproduction of the social. Analysing society as a hypercomplex conglomerate of social subsystems, Luhmann insists that modern societies are so complex that his own theory of social complexity can offer only one possible formulation of the social among others. See N. Luhmann, *Rechtssystem und Rechtsdogmatik* (Kohlhammer, Stuttgart, 1974); *The Differentiation of Society* (Columbia University Press, New York, 1982); *Observations on Modernity* (Stanford University Press 1998); *Law as a Social System* (Oxford University Press, New York & Oxford, 2004).

the properties a, b and c, X is v-valued (a goal) in the value-system AS. It can be said, without contradicting the basic ideas of natural law, that these properties are cognizable *through the evaluations of human beings*. Values are reduced to evaluations, but in certain natural and social conditions there are *objective rational limits* to evaluations. It is important to realize the value-element present in all intentional decision-making, including legislation and the application of law. Therefore it is understandable that such a value-element is also present in the concepts used for imparting regulatory information. It is clear that it is insufficient to compare the form and the factual content of a legal institution to some similar institution in another legal order. There is an evaluative component between facts and concepts, and this should not be ignored. It is submitted that most legal concepts are evaluative concepts, even if their value-laden nature is often only latent, concealed or not even contemplated. The use of legal concepts in law-making is an integral part of decision-making. One may refer to a normative use of legal language. Such a use occurs every time when regulatory information is presented or applied to legal decision-making. One might perhaps even assert that there is an element of decision-making in every step of interpretatory operations. There are two basic components in these operations: observation and evaluation; or a *cognitive* and a *non-cognitive* element. This seems to imply that relevant concepts also have two inherent aspects, a descriptive and a prescriptive one. Such an observation has far-reaching implications for the methodology of comparative law. For example, consider a comparative analysis of attempts at reforming family law. Such an analysis presupposes that the relationship between the family institution and social ideologies is clarified. Between the present historical situation of society and present law there is an intermediate factor that enables us to understand the relationship. This may be termed 'the world-picture'. A world-picture corresponds, at a certain moment, to the basic structure of society. Legislation, on the other hand, corresponds to the world-picture. The legislation is, one might say, a manifestation of the world-picture reflecting the way powerful groups in society conceive the prevailing state of

affairs and the manner for arranging matters.

A world-picture is a set of beliefs, typical of a certain social group. It is an interpretation of nature, humankind and society. It is set forth by legal norms as an 'official' ideology, whose function is also to explain and legitimate them. A world-picture contains opinions or beliefs on the status of matters at a certain moment and how these should exist now and in the future. Returning to an earlier example, the world-picture embodies the conception of the institution of the family, an element covering a certain sphere of life. There are two types of elements in a world-picture: factual-theoretical and normative-ideological. These elements are intertwined in a very complicated manner, but they can be treated separately at an abstract level. The factual-theoretical element can be divided into two parts: actual and possible states of affairs. Thus, the factual-theoretical element of the family notion consists of a set of propositions on the concept of the family, its social functions and positions. These beliefs are cognitive in nature. The normative-ideological aspect of the conception of family comprises a set of opinions concerning the question of how matters in society should exist. Every notion of the family contains such viewpoints relating to social goals. Some states of affairs have not been realized, but they are regarded as desirable, just, fair, equitable and such. The normative-ideological element: (a) furnishes a criterion which enables one to claim that the present state of affairs falls short of the desired one; and (b) it articulates the means considered necessary for rectifying the situation.

In light of the above analysis, one may construct a scheme of legal comparison that considers both factual-theoretical and normative ideological elements. Such a scheme would, in my view, be a clear improvement on the traditional method of comparative law, where the evaluative dimension of law-making is often disregarded and, consequently, the *per se* undeniable role of traditional, historical systematics in the conceptual organization of regulatory information tends to be over-emphasized. But there are two basic difficulties. First, there is an intertwinement between goals and knowledge. One cannot compare goals without contemplating the cognitive element.

A circumstance or factor is envisaged as a goal in light of certain knowledge. On the other hand, a certain knowledge is acquired (or its acquisition is sought) because something is considered desirable. Secondly, there are difficulties in explaining collective social behaviour with a basically individual model. This is a key-issue and it is also immediately relevant to the methods of comparative law. It is not sufficient to construct (or re-construct) an intentional model of law-making. One must explain why someone has managed to use their own world-picture. This presupposes the consideration of the *social power* aspect. The use of a certain world-picture for the purpose of legitimating certain legal norms presupposes a social group or class believing in such a world-picture and having sufficient social power to further its inherent goals. An analysis of social and state power is also needed when an intentional model is used to understand and explain legal institutions. Such an analysis may complement both normativist and realist approaches to comparative law. An important starting-point of comparative law is, accordingly, an analysis of social power. One should ask, which social group possesses the power to impose its own world-picture – its knowledge, beliefs and desires regarding society – as the ground for legal norms and their application. After addressing this question, one can proceed to an analysis of those factors that led to the normative modelling of society through law in a certain way.

In light of the above discussion, one might perhaps conclude that, in the ultimate analysis, everything depends on anything. But such a conclusion is mitigated by the possibility of using a *ceteris paribus* assumption. If such an assumption is sustained, i.e., if there is a sufficient similarity between world-pictures, even a mere comparison of forms and concepts can produce interesting results. Thus when one asks whether a foreign legal institution should be adopted in one's own country, a starting-point is the assumption that society is similar in some respects within the countries under consideration. If there is a social similarity and a certain juristic creation is available, its adoption may be warranted.

## *Concluding Note*

Comparative law is concerned with more matters than merely law, but its object is ultimately law. I think that the legal point of view must be emphasized in these days of an omnipotent sociology, whose importance, of course, cannot be overstated. In summary, we can declare that comparative law should proceed from the following two assumptions: (a) law is not only a manifestation of free will but is also socially established; one cannot compare wholly incidental legal regulations on a purely formal basis; (b) law stems from social relations, but it cannot be entirely reduced to them. Otherwise, one should not compare law at all but only the basic factors which the law expresses. There is an *intentional* element in law; its 'facts' are not 'brute facts' but *institutional* facts, which should be interpreted in their social context.[29] Although for a meaningful legal comparison

29 According to J. Searle there are some entities in the world that seem to exist wholly independently of human institutions, and he designates these 'brute facts'. Their existence appears in no way dependent on our will, nor do they result from our practices and contrivances. Other entities, by contrast, do not seem to exist in this way. For example, consider a goal in a football match. If someone asks me what that is, I cannot point to anything in the material world that I can specify as a goal. I cannot point to a ball crossing the line and say, 'that is what I mean by a goal'. And yet, I can intelligibly articulate the existence of a thing such as a goal. According to Searle, these facts may be called institutional facts: "[They] are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions." *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, Cambridge, 1969) 51. Legal entities appear to exist and behave in a similar way to our goal in a football match. For example, every time I board a bus a contract is formed between myself and the bus company, but I cannot point to it in the material world. I cannot point to myself getting on the bus and buying the ticket, and say 'that is the contract'. And yet I can, and legal practitioners do all the time, intelligibly allude to a contract. To declare that a contract exists presupposes the adoption of a particular view of a particular relation

there must exist sufficient similarity with respect to social relationships, a form of *conceptual commensurability* is also needed. The role of juridical concepts in law-making is multifaceted. They are used as vehicles of regulatory information guiding human action and thus have an important normative function. But they also *steer the use of legal argument* when law is created and applied. When the selection of a certain concept is considered, it is realized that this entails the evaluation of certain sets of arguments. Hence legal concepts stand for arguments – a 'representative' function that is, of course, connected with a historical tradition in a certain legal culture. It is also correct to assert that concepts and their systematical connections express systems of values. Elucidating these matters is a chief goal of comparative law. Attaining this goal presupposes that the methods applied have an adequate theoretical grounding; otherwise, comparative law will remain at the level of mere description or be enmeshed in the trammels of learned speculation.

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between two people, namely, that which is set within the frame of reference of certain organised groups of people, such as the legal profession, judges and enforcement agents. From this point of view, it is possible to say what the 'institution' itself is. And see G. E. M. Anscombe, "On Brute Facts", (1957-58) 18 *Analysis* 69.

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