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Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies

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CONCEPTUAL COMPARISONS: TOWARDS A COHERENT METHODOLOGY OF COMPARATIVE LEGAL STUDIES

*Oliver Brand**

ABSTRACT

Functionalism is still the dominant method of comparative legal studies. This, however, is not the case because functional analysis is particularly well suited for the needs of comparatists, but because of a lack of alternatives. Comparative Law and Economics and various “postmodern” approaches have failed to provide more viable solutions. The first part of this Article examines the virtues and flaws of the respective methods. Under the heading of Conceptual Comparisons, the second part introduces a new approach to comparative law. It follows the lead of other comparative sciences, which have abandoned functionalism some time ago and have replaced it with typological considerations. Conceptual Comparisons adapts these considerations to the particular needs of legal research, thus opening new avenues for the perception of law and its role in different legal systems.

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I. INTRODUCTION

“Oh eerie tis to roam the fen,”¹ shivers the Münsterian poet Annette von Droste-Hülshoff—and boggy indeed are the contemporaneous fields of comparative law. Peril seems to lurk under every footstep because comparatists supposedly try to reach dry ground without the guidance of serious thoughts on methodology. Methodological “avoidance,”² “agnosticism,”³ or even “anarchism”⁴ are said to be prevalent. On closer reflec-

1. ANNETTE VON DROSTE-HÜLSHOFF, *Der Knabe im Moor*, in SÄMTLICHE WERKE 83 (1966) (F.R.G).

2. Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1044 (1999); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1891 (1995) [hereinafter Ewald, *Comparative Jurisprudence (I)*].

3. John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 618 (1998); see Geoffrey Samuel, *Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 35, 35–36 (Marc Van Hoecke ed., 2004).

4. TP van Reenen, *Major Theoretical Problems of Modern Comparative Legal Methodology (I): The Nature and Role of the Tertium Comparationis*, 28 COMP. & INT’L

tion, however, the methodological malaise of comparative law seems to be incoherence rather than a lack of efforts. From the mid-1990s onward, scholars sailing under the somewhat enigmatic banner of “postmodernism”⁵ have sparked a lively debate on comparative methodology. Comparatists nonetheless still “start from different points and proceed in different directions with different goals,” as Merryman complained as early as 1974.⁶ Meaningful results are obscured because the different schools of methodological thought do not engage in constructive discourse. Thus, the central question of whether we can afford a pluralism of methods⁷ in comparative law or whether we have to encourage consensus⁸ has become a Gordian knot.

This Article will try to sever the knot by devising a methodological approach to comparative studies that allows scholars to work in their different traditions, but come to coherent results. My argument consists of three parts. First, I will present the dominant approach to comparative studies, functionalism, and analyze it critically (Part II). Subsequently, newer trends that challenge functionalism are introduced and assessed (Part III). In these parts it will be maintained that none of the existing methods suitably fulfils the needs of the comparatist, either to serve as a platform for dialogue or to demand supremacy over the other approaches. Accordingly, Part IV is dedicated to the proposal, explanation, and illustration of a new method of comparative legal studies: Conceptual Comparisons.

L.J. S. AFR. 175, 175 (1995); see Georges Langrod, *Quelques réflexions méthodologiques sur la comparaison en science juridique* [Some Methodological Reflections on the Comparison in Juridical Science], 9 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 353, 354–56 (1957) (Fr.).

5. Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT'L & COMP. L.Q. 800, 801 (2000).

6. John Henry Merryman, Address to the Ninth International Congress of Comparative Law in Teheran (1974); see also John Henry Merryman, *Fines, Objeto y Metodo del Derecho Comparado*, 9 BOLETÍN MEXICANO DE DERECHO COMPARADO 65 (1976), available at <http://www.juridicas.unam.mx/publica/librev/rev/boletin/cont/25/art/art5.pdf>.

7. Jaakko Husa, *Farewell to Functionalism or Methodological Tolerance?*, 67 RABELSZ 419, 444 (2003); Ralf Michaels, *Im Westen Nichts Neues: 100 Jahre Pariser Kongreß für Rechtsvergleichung—Gedanken anlässlich einer Jubiläumskonferenz in New Orleans*, 66 RABELSZ 97, 114 (2002) (F.R.G); Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 AM. J. COMP. L. 261 (2005).

8. Xavier Blanc-Jouvan, *Centennial World Congress on Comparative Law: Opening Remarks*, 75 TUL. L. REV. 859, 863 (2001).

II. DOMINANT APPROACH—FUNCTIONALISM

In the history of comparative law, periods of integrative comparison have continuously exchanged with those of contrastive comparison.⁹ Today, the hallmark of the former, the so-called “functional method,” has risen to a position of dominance:¹⁰ functionalists author the major treatises on comparative law, fill the editorial boards of comparative journals, and preside over societies dedicated to the study of the subject.

A. Operation

Functionalism is so centrally relevant to contemporary comparative law because of its orientation towards the practical. It is particularly concerned with how to compare the law’s consequences across legal systems and therefore allows rules and concepts to be appreciated for what they do, rather than for what they say. Functionalists believe that the “function” of a rule, its social purpose, is the common denominator (*tertium comparationis*) that permits comparison.

Functional comparisons rest on three central premises. The first premise relates to the realist conception of the law as an instrument for channeling human behavior and claims that the law answers to social needs or interests.¹¹ This premise establishes the “problem–solution approach” that functionalists champion.¹² They begin their comparisons by choosing a particular practical problem. Then, they present legal systems with regard to how they resolve this problem. In a third step, similarities and differences between the solutions are listed, explained, and evaluated.

The second premise of functionalism addresses the problem that the actual function of legal institutions is a matter of sociological concern. To avoid large-scale empirical investigations, functionalists presuppose that the problems that the law is asked to resolve are similar or even identical across different legal systems. “If law is seen functionally as a regulator of social facts, the legal problems of all countries are similar. Every legal system . . . is open to the same questions and subject to the

9. Rudolph B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477, 477 (1995).

10. Peter Leyland, *Oppositions and Fragmentations: In Search of a Formula for Comparative Analysis?*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 211, 215 (Andrew Harding & Esin Örüçü eds., 2002); Peters & Schwenke, *supra* note 5, at 809. *But cf.* Michele Graziadei, *The Functionalist Heritage*, in *TRADITIONS AND TRANSITIONS* 100, 100 (Pierre Legrand & Roderick Munday eds., 2003).

11. Richard Hyland, *Comparative Law*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 184, 185–87 (Dennis Patterson ed., 1999).

12. KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 43–44 (Tony Weir trans., 3d ed. 1998); Husa, *supra* note 7, at 425.

same standards, even in countries of different social structures or different stages of development.”¹³

The third methodological premise of functionalism, the *praesumptio similitudinis*, maintains that legal systems tend to resolve practical questions in the same way. “[D]ifferent legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation.”¹⁴ Two reasons explain the existence of this rather counter-intuitive presumption. First, it enables the comparatist to scrutinize social problems and their solutions within the familiar legal framework, rather than having to venture into sociological research. Second, the presumption of similarity can be used as a means of testing the results of a comparison:

the comparatist can rest content if his researches . . . lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to 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.¹⁵

The *praesumptio* suggests that comparative research is not complete until it has been demonstrated that the legal systems under consideration reach similar results in similar circumstances. This highlights that functional studies are out for the grand similarities of legal systems, not for differences in detail.

Grounded on these three premises, functionalists have been most interested in explaining how norms are similar or different from one jurisdiction to another, how such norms are borrowed or transplanted, and how they are expressed in differing or similar kinds of rules. Normatively, they have fostered the production of uniform law, most suggestively with

13. ZWEIFERT & KÖTZ, *supra* note 12, at 44. For a more cautious analysis, see Hein Kötz, *Abschied von der Rechtskreislehre?*, 6 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 493, 504–05 (1998) (F.R.G); for an even more fundamental functionalist view, see Uwe Kischel, *Vorsicht, Rechtsvergleichung!*, 104 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFTEN 10, 16 (2005) (F.R.G).

14. ZWEIFERT & KÖTZ, *supra* note 12, at 39.

15. *Id.* at 40; see also A.E. Özücü, *Method and Object of Comparative Law*, in *METHODE EN OBJECT IN DE RECHTSWETENSCHAPPEN* 57, 60–61 (H.W. Blom & R.J. de Folter eds., 1986) (F.R.G).

their attempt to delineate a common core of legal institutions.¹⁶ They believe that they can study legal systems neutrally. The choice of functionality as a *tertium comparationis* is partially an expression of the desire to avoid seeing foreign legal systems through the mind-set of one's own legal system.¹⁷ The functional method disregards differences in technical-juridical construction and legal concept so as to deconstruct the local dimension of rules: "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."¹⁸

B. Development

From the late nineteenth century onwards, functionalism permeated all social sciences. In comparative law, it supplanted previous formalism in the 1920s. Conventionally, Ernst Rabel is its proclaimed father.¹⁹ In the 1950s and '60s, functionalism in comparative law was cross-fertilized with anthropological and sociological functionalism, particularly due to the influence of Luhmann.²⁰ This "embeddedness" of comparative legal functionalism in the network of the social sciences raises first doubts over its future: from the 1970s onward, objections to functionalism convinced the other social sciences to abandon it.²¹ That begs the question of whether law is the "happy match" for functionalism or whether similar objections that uprooted functionalism in other social sciences also necessitate its abandonment for comparative law.

16. See generally PIERRE BONASSIES ET AL., *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* (Rudolf Schlesinger ed., 1968).

17. David J. Gerber, *Sculpturing the Agenda of Comparative Law: Ernst Rabel and the Facade of Language*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 190, 199 (Annelise Riles ed., 2001).

18. ZWEIGERT & KÖTZ, *supra* note 12, at 44; Reitz, *supra* note 3, at 621–22.

19. ZWEIGERT & KÖTZ, *supra* note 12, at 61; Ulrich Drobnig, *Die Geburt der modernen Rechtsvergleichung*, 14 *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 821 (2005) (F.R.G.); Peters & Schwenke, *supra* note 5, at 808. In fact, Rabel's method merely rephrases earlier studies of Max Solomon. See generally MAX SALOMON, *GRUNDLEGUNG ZUR RECHTSPHILOSOPHIE* 26–39 (1925) (F.R.G). To focus on Rabel, however, is defensible on the ground that he and his disciples became leading comparatists in the United States and Germany, and thus guarantors for the success of the method.

20. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 *HARV. INT'L L.J.* 411, 434 (1985) [hereinafter Frankenberg, *Critical Comparisons*]; Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 *HARV. INT'L L.J.* 221, 233 (1999).

21. William R. Schonfeld, *Political Parties: The Functional Approach and the Structural Alternative*, 15 *COMP. POL.* 477, 478–80 (1983).

Another issue is that in the beginning, functionalism—as devised by Rabel—served only two very specific ends. First, it was meant to solve the characterization problem in the field of conflict of laws, which was of “great scholarly concern during the first decades of the twentieth century.”²² Secondly, efforts were undertaken at the same time to unify commercial law in a new and unstable socio-economic environment.²³ In particular, the International Institute for the Unification of Private Law (UNIDROIT) in Rome asked a number of leading comparative scholars—among them Rabel—to draft a uniform law for the international sale of goods. Rabel hypothesized that, if the legal constructions and characterizations particular to each legal system were ignored and if attention were instead directed exclusively to the law’s actual consequences, then a common or best solution would emerge naturally and directly from the comparison.²⁴

Rheinstein, one of Rabel’s disciples, first suggested that the functional method could be generalized and applied beyond the contexts of conflict of laws and unification of law to the entire comparative process.²⁵ This generalization is related to theories of sociological jurisprudence, especially those of Pound and von Jhering (*Interessenjurisprudenz*).²⁶ However, that functionalism originated as a specialized instrument to deal with specific problems casts doubt over the validity of this generalization.

C. Putative Problems with the Functional Method

Accordingly, the functional method has not escaped criticism. Some of the objections, however, miss the point: while aiming at the method as such, they in fact hit instances of incorrect exercise of functionalism.

1. Particularism

Gerber has accused the functional method of producing results that are “particularist,” i.e., unrelated to the socio-economic and historical cir-

22. Graziadei, *supra* note 10, at 103–04.

23. BASIL MARKESINIS, *COMPARATIVE LAW IN THE COURTROOM AND IN THE CLASSROOM: THE STORY OF THE LAST THIRTY-FIVE YEARS* 45 (2003).

24. Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, 3 *GESAMMELTE AUFSÄTZE* 17 (1924) (F.R.G).

25. MAX RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 25–27 (2d ed. 1987) (F.R.G).

26. See F. C. Auld, *Methods of Comparative Jurisprudence*, 8 *U. TORONTO L.J.* 83, 86 (1950).

cumstances that dictated them.²⁷ In another version of this critique, the functional method is criticized for being formalistic or “legocentric.”²⁸ As an essentially empirical-inductive method, it is said to rely too heavily on positive legal phenomena embodied in rule-texts and to pay too little attention to “law in action,” i.e., the law in its practical application. Indeed, when turning to the leading textbooks, the numerous facts deliberately left out of the picture because they are considered disruptive to the operation of the method is surprising. Schlesinger, for example, fails to mention history, mores, and ethics.²⁹ While it may be true that many functionalists did not always attend to all the factors that play a part in the production of the problem being examined, more recent studies have shown that the functional method as such is capable of doing so. Modern functional comparisons generally accept that comparatists should study not “law in books,” but “law in action”³⁰—though they might not always adhere to this advice in practice. Additionally, they routinely study rules and institutions as part of a larger socio-legal and political context and assess customs and other social practices as devices for solving problems, as, for example, Cappelletti proved in his piece on questions of civil procedure.³¹ However, even the most contextual study can only partially address the extra-legal interdependencies of law. Legal comparisons remain “essayistic.”³² This is not a particular flaw of functionalism, but a truth that comparatists will have to accept independently from the method with which they are working.

27. Gerber, *supra* note 17, at 204; *see also* MARKESINIS, *supra* note 23, at 39; Graziadei, *supra* note 10, at 109.

28. Frankenberg, *Critical Comparisons*, *supra* note 20, at 438; Lawrence M. Friedman, *Some Thoughts on Comparative Legal Culture*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY* 49, 52 (David S. Clark ed., 1990); *see also* Pierre Legrand, *How to Compare Now*, 16 *LEGAL STUD.* 232, 235 (1996) [hereinafter Legrand, *How to Compare Now*].

29. RUDOLF B. SCHLESINGER ET. AL., *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 32 (5th ed. 1992).

30. RENE DAVID, *TRAITE ELEMENTAIRE DE DROIT CIVIL COMPARE* [ELEMENTARY TREATISE ON COMPARATIVE CIVIL LAW] 17–25 (1950) (Fr.); *see* 1 ADOLF F. SCHNITZER, *VERGLEICHENDE RECHTSLEHRE* 31–32 (1961) (F.R.G.); Ulrich Drobnig, *Methods of Sociological Research in Comparative Law*, 35 *RABELSZ* 496, 498 (1971); William Ewald, *Posner's Economic Approach to Comparative Law*, 33 *TEX. INT'L L.J.* 381, 383 (1998) [hereinafter Ewald, *Posner's Economic Approach*].

31. MAURO CAPPELLETTI & BRYANT GARTH, *A World Survey*, in 1 *ACCESS TO JUSTICE* 7–8 (1978); *see also* Husa, *supra* note 7, at 423.

32. Wolfgang Mincke, *Eine vergleichende Rechtswissenschaft*, 83 *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT* 315, 323–24 (1984) (F.R.G.).

2. Externalism

More serious is the accusation that functional studies suffer from taking a purely external view upon the legal systems under comparison. Adopting such a perspective is said to lead to a lack of “immersion,” i.e., a failure in understanding the ideas that lie behind foreign legal systems from the inside.³³ Externalism, however, is not necessarily disadvantageous at all, as elucidated by the search for hidden assumptions of different legal systems begun in the 1990s.³⁴ Such assumptions are difficult to detect by lawyers within a particular system, but are more easily understood by foreign lawyers looking from the outside. It is usually the latter who unveil the explicatory potential of unconscious legal assumptions that are so obvious that “culturally immersed” lawyers are barely aware of them. Furthermore, it is an illusion to believe that the comparatist will ever be able to “immerse” in a foreign legal culture—however closely related this culture might be. Kohler and Großfeld are right: the comparatist will always remain bound by his or her preconceptions and cultural disposition; the comparatist will stay “one of his [or her] own people.”³⁵

3. Ethnocentricity

Another supposed flaw of the functional method is ethnocentricity.³⁶ For the last several decades, U.S.-based émigrés from Europe and their students have led the functional community. These scholars have maintained close ties with their European counterparts. Not surprisingly, therefore, functional studies focus almost exclusively on the comparison of American and European legal systems. That certainly neglects problems and solutions of more remote societies. However, it is probably more telling about the attitudes and agendas of contemporary compara-

33. William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats,”* 46 AM. J. COMP. L. 701, 703–04 (1998) [hereinafter Ewald, *A Field Guide to “Rats”*].

34. See, e.g., Ichiro Kitamura, *Brèves réflexions sur la méthode de comparaison franco-japonaise* [Brief Reflections on the French-Japanese Comparative Method], 47 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 861 (1995) (Fr.); Rodolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455 (1995).

35. See Bernhard Großfeld, *Sinn und Methode der Rechtsvergleichung*, in Festschrift für Otto Sandrock 329, 339 (Klaus Peter Berger ed., 2000) (F.R.G.); J. Kohler, *Ueber die Methode der Rechtsvergleichung*, in 28 ZEITSCHRIFT FÜR DAS PRIVAT- UND ÖFFENTLICHE RECHT DER GEGENWART 273–84 (1901) (F.R.G.). See also Kischel, *supra* note 13, at 14.

36. LEONTIN-JEAN CONSTANTINESCO, *TRAITÉ DE DROIT COMPARÉ, TOME III: LA SCIENCE DES DROITS COMPARÉS* 63 (1983) (Fr.) [hereinafter CONSTANTINESCO, TOME III]; Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 741–44 (1999); Michaels, *supra* note 7, at 107–09.

tists than about the theoretical limits of their method. Functionalism, as such, has—as we will see—reductionist tendencies, but it does not command or foster ethnocentricity.

D. Real Problems with the Functional Method

However, some problems are inherent to the functional method and are not only issues of implementation. They can be divided into two categories: (1) axiomatic ones that originate from the three presuppositions that underpin the functional method; and (2) shortcomings in its operation.

1. Axiomatic Problems

a. First Premise: Law as a Solution of Problems

The first basic assumption of functionalism, that law is a rationally developed entity fulfilling a specific purpose,³⁷ is a weak starting point. Too many factors that in practice obscure the effectiveness of legal rules are left out of the picture. Saying that law solves problems, for example, presupposes also that it is capable of doing so. That is not always the case. There are bodies of law that are dysfunctional in one of four ways. Firstly, there might be situations where law is enacted for purely symbolical reasons. For instance, a legislator may want to be seen as doing something rather than actually being committed to tackling a problem, as occurred with the German legislation on combat dogs in 2000.³⁸ Secondly, norms that would usefully address social problems may be absent in a particular system. Especially strong ideologies might hinder the law in answering social problems effectively, as socialism did with the right of workers to strike.³⁹ Thirdly, a legal institution may serve ends or obtain results that were neither foreseen nor desired by its framers (“unintended functions”). The main instance of dysfunctionality, however, is that a legal institution might have lost its particular function altogether so that its existence can only be explained historically. Alan Watson has examined the evolution of the rules of private law in various “civil law” countries.⁴⁰ He found that while underlying social, economic, and politi-

37. See *supra* Part II.A.

38. See Rudolf Wassermann, *Gesetzgebungsethik?—Der plötzliche Eifer des Normgebers beim Kampf gegen die “Kampfhunde,”* 35 NEUE JURISTISCHE WOCHENSCHRIFT 2650 (2000) (F.R.G.).

39. See CONSTANTINESCO, TOME III, *supra* note 36, at 65.

40. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 107–18 (2d ed. 1993); Alan Watson, *Legal Culture v. Legal Tradition*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW, *supra* note 3, at 1, 3; see also JOHN BELL, FRENCH LEGAL CULTURES 17 (2001); LEONTIN-JEAN CONSTANTINESCO, TRAITÉ DE DROIT

cal circumstances have changed, entire bodies of law, mostly from the *Corpus Iuris Civilis*, have been transplanted, essentially unaltered, from society to society. Any interesting connection between the social context of those countries and the rules of their private law remained elusive; legal borrowings often proved inappropriate. One has to conclude that the notion of law as mirror of society is, in fact, just a "mirage." Not all legal norms and doctrines are functionally related to social life because they run counter to any conceivable need or interest.

A reversed image of the dysfunctionality problem is the multifunctionality dilemma. Functional studies tend to regard the function of law as a monolithic, independent entity. They focus on "the" function of legal institutions.⁴¹ However, a specific legal institution can have simultaneously diverse functions.⁴² There might be universal social requirements that need answering. These wants, however, are often accompanied and even eclipsed by needs that are specific to a particular society. Correspondingly, law has not only generic functions, but also at the same time national or regional functions.⁴³ A contract, for example, universally secures the parties' expectations of performance. In a market-based economy, it also allows the parties to administer autonomously their economic relations; whereas in a command economy, a contract is a tool to fulfill the goals set out by the plan.⁴⁴ Is that really functionally equivalent? A study by Folke Schmidt has revealed that collective labor contracts have as many as five distinct functions.⁴⁵ These functions are furthermore dependent on the specific institutional setting in which they are performed. Institutions and structures of a society reflect its unique historical experience and its established ways of working. Bell rightly ex-

COMPARÉ, TOME II: LA MÉTHODE COMPARATIVE 86, 322 (1974) (Fr.) [hereinafter CONSTANTINESCO, TOME II]; Ewald, *A Field Guide to "Rats,"* *supra* note 33, at 702; D. Kokkini-Iatridou, *Some Methodological Aspects of Comparative Law: The Third Part of a (Pre-)Paradigm*, 33 NETH. INT'L L. REV. 143, 160 (1986).

41. See *supra* Part II.A; ZWIGERT & KÖTZ, *supra* note 12, at 44.

42. See Oliver Brand, *Grundfragen der Rechtsvergleichung—Ein Leitfaden für die Wahlfachprüfung*, JUS 1082, 1087 (2003) (F.R.G.); Jonathan Hill, *Comparative Law, Legal Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101, 108 (1989); Peters & Schwenke, *supra* note 5, at 828; Rudolf Schlesinger, *The Common Core of Legal Systems*, in LEGAL ESSAYS IN HONOR OF HESSEL N. YNTEMA 65, 68–69 (Kurt H. Nadelmann & Arthur T. von Mehren eds., 1961).

43. CONSTANTINESCO, TOME III, *supra* note 36, at 63–64; John Bell, *Comparative Public Law*, in COMPARATIVE LAW IN THE 21ST CENTURY 235, 243 (Andrew Harding & Esin Öricü eds., 2002).

44. See Brand, *supra* note 42, at 1087.

45. Folke Schmidt, *The Need for a Multi-Axial Method in Comparative Law*, in FESTSCHRIFT FÜR KONRAD ZWIGERT 525, 533–534 (Herbert Bernstein ed., 1981).

plained the distinctiveness of constitutional provisions in Europe by the unique problems of the past that the respective jurisdictions wanted to deal with, e.g. Germany with regard to the failure of the Weimar Republic.⁴⁶

Concentrating on one generic function as the delimiting trait of the “social problem” under scrutiny consequently ignores alternative conceptualizations that could be established when choosing another function as the *tertium comparationis*. Functionalism therefore runs the risk of miscomprehending or even overlooking the institution’s cumulative contribution to the respective legal system.

b. Second Premise: Similarity of Problems

As our look at the roots of functionalism in the early twentieth century has shown, the method was not designed as a basis for all comparative studies. Especially its second presupposition, that problems are similar across legal systems, imposes severe operational limitations upon it.⁴⁷ The implied universalism of this premise confines comparatists to dealing with problems defined in similar practical terms. As soon as one system attributes a different social significance to a particular problem, the similarity of function (and the comparability of “solutions”) ends.

Acknowledging this, functionalists frankly admit that there are “blind spots,” areas of the law, e.g., the law of wills or same-sex marriages, which are “system conditioned” to an extent so that they are beyond the reach of their method.⁴⁸ Even if you accept this proviso, the functional method is deficit because it neither offers a precise definition of the term “system conditioned,” nor shows a way in which the comparatist may distinguish between “system conditioned” problems and those that are not.⁴⁹ This shortcoming has a wider implication. If functionalism is not capable of dealing with individual “system conditioned” institutions, how can it investigate the socio-economic relativity of the legal system as a whole?

Another “blind spot” of functionalism is its lack of causal explanation. By definition, the method reverses the usual order of cause and (social) effect by explaining things in terms of what happens afterward, not what came before. This prevents functionalists, for example, from examining filial relationships between legal systems and institutions properly, be-

46. Bell, *supra* note 43, at 241–42.

47. See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 230–33 (2d ed. 1999); Husa, *supra* note 7, at 424; van Reenen, *supra* note 4, at 188–89.

48. ZWEIFERT & KÖTZ, *supra* note 12, at 39.

49. Efsthathios K. Banakas, *Some Thoughts on the Method of Comparative Law: The Concept of Law Revisited*, 1981 ARCHIVES FOR PHIL. L. & SOC. PHIL. 289, 292 (1981).

cause, as Alan Watson has demonstrated, cause/effect relationships between a transplant and its foreign antecedent are fundamental for studies in the migration of legal ideas.⁵⁰ The general lack of structural-causal explanations forces functionalists either to reduce the explanatory claims of their theory or to deny all non-technical attributes of the law, neither of which they want.

Even in those areas in which functionalism can work, its second premise severely limits its operation by fostering reductionism.⁵¹ The functionalists' reluctance to properly establish the comparability of the problem sociologically restricts their comparisons to grand, superficial similarities. Indeed, it is hard to believe that many legal problems are the same in two societies except on a technical level. To assume the opposite seemed "utter dilettantism" to Kohler.⁵² The underlying political, moral, and social values in different systems simply vary too much. Functionalists do not seem to realize this because they generally fail to discuss how one establishes "likeness" and "sameness" as a starting point for comparison. Further, they do not propose a method for finding and evaluating differences, however small, among "like" phenomena. Partly as a result of this, the functional approach is unable to solve the problem of apparently similar social and economic conditions producing radically different legal solutions, or even no solutions at all.

c. Third Premise: Problems Are Solved in a Similar Way

The heuristic principle of the *praesumptio similitudinis*, finally, is a further incentive to concentrate uncritically on similarities and thereby deepen the reductionist tendency of functionalism. It seduces them into neglecting the cultural-historical specificity of legal systems as long as, generally, their solutions to "problems" coincide. The assumption of similarity works reasonably well within the same cultural sphere. If comparisons, however, take place between culturally more remote systems, it becomes increasingly pointless, which the existence of institutes such as *ordre public* in the field of conflict of laws suggest.⁵³ Further exemptions are necessitated by the problem, that there are institutions for

50. Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469, 469-70 (1995).

51. From a historical perspective, see WATSON, *supra* note 40, at 4-5; from a culturalist perspective, see Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 61 (1998); from a critical legal studies perspective, see Frankenberg, *Critical Comparisons*, *supra* note 20, at 436; van Reenen, *supra* note 4, at 191.

52. Kohler, *supra* note 35, at 275.

53. Graziadei, *supra* note 10, at 102.

which equivalents are not found in all systems, e.g., polygamous marriages. Some problems, such as marrying a second cousin, pose a problem for some legal systems, but not for others. That is why functionalists tend to apply the *praesumptio* only to legal subjects that are relatively “apolitical” and unimpressed “by moral views or values,”⁵⁴ such as contract law. But can we really assume that there is such a thing as “apolitical law” in an age where policy issues such as consumer protection permeate all fields of the law, including the law of contracts? Is it not that we have to accept that law is nothing else but successful politics?

Finally, the presumption of similarity questionably encourages the view that legal and extra-legal regulation are essentially the same, as long as they fulfill the same function.⁵⁵ Yet, in legal theory, it makes a difference whether individuals are free to discover their obligations for themselves or whether their obligations are imposed by law. Ignoring this hides a vital issue of comparison: the way legal systems allocate regulation between law and custom.

2. Operational Problems

a. Pseudo-Factuality

On a non-axiomatic level, functionalism is in deficit, too, by maintaining a “factual approach”⁵⁶ to comparative law, while in fact not doing so. Functional studies begin by defining a social problem.⁵⁷ A social problem, however, is a factual situation plus the value judgment that this situation causes consequences that need to be remedied. This value judgment is contingent. The answer to what makes a factual situation a problem can be different from one legal system to another. It may depend, for example, upon who finds a particular factual situation “problematic.” It makes a difference whether a particular situation in one legal system is considered problematic by a lobby group, in another by academics, and in a third by a large majority of the public. Functionalism does not care for this contingency. Therefore, its claim of neutrality, which hinges on the claim of being a factual approach, cannot be upheld.

b. Contemporality

Another operational shortcoming of the functionalist method is that it is nearly exclusively occupied with studying contemporal legal problems

54. ZWEIGERT & KÖTZ, *supra* note 12, at 40.

55. *Id.* at 38.

56. Peters & Schwenke, *supra* note 5, at 808.

57. *See supra* Part II.A.

(horizontal or synchronous comparisons).⁵⁸ It neither creates incentives to look at how a problem was solved in the past,⁵⁹ nor does it care to compare legal systems or institutions that are remote from each other in time (vertical or diachronous comparisons). Though difficult and not universally exercisable, diachronous comparisons are possible as long as the institutions or legal systems under scrutiny have enough characteristics in common to validate a comparison.⁶⁰ Other comparative disciplines, such as comparative politics, make frequent use of such comparisons.⁶¹ Studies like Buckland and McNair's *Roman Law and Common Law* elucidate that diachronous comparisons also yield valuable knowledge for lawyers.⁶²

Not to examine how a particular legal system addressed a certain problem in the past is cumbersome, where this jurisdiction adopted a specific solution first and opted for another solution later. In such a case, functionalists will often neglect the former solution because it is discontinuous. Even where an institution stands the test of time, the functionalist will regularly overlook that it may have had additional or alternative functions in the past. Nearly every institution serves functions at some time in a given society that have been ignored in other times. It has, however, the potential to perform each of these functions even if in the given concrete contemporaneous case, it does not do so. This potential is important for understanding the significance of a legal institution, which functionalists will regularly fail to notice.

E. Conclusion

The pragmatically motivated functional method has been a useful guide for establishing comparative law as a discipline. It still has its virtues and valuable applications today. As a model for all comparative studies, however, functionalism is no longer a good fit because it is too limited in its application by its premises and operational problems. Merely abandoning the *praesumptio similitudinis*, as arguably its most

58. CONSTANTINESCO, TOME III, *supra* note 36, at 42.

59. Gerber, *supra* note 17, at 206.

60. CONSTANTINESCO, TOME II, *supra* note 40, at 46; Sir Frederick Pollock, *The History of Comparative Jurisprudence*, 5 J. SOC'Y COMP. LEGIS. 74, 76 (1903).

61. See, e.g., Joshua B. Forrest, *Asynchronic Comparisons: Weak States in Post-Colonial Africa and Mediaeval Europe*, in MATTEI DOGAN & ALI KAZANCIGIL, *COMPARING NATIONS: CONCEPTS, STRATEGIES, SUBSTANCE* 260 (1994).

62. W.W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE* (3d ed. 1965).

controversial presumption,⁶³ cannot save the method. The objections to the remaining presuppositions are too serious.

III. ALTERNATIVE APPROACHES

Towards the end of the twentieth century, the growing dissatisfaction with functionalism enabled new approaches to comparative law to challenge its claim for methodological dominance. Three of these trends are worth mentioning: Comparative Law and Economics, Comparative Law and Culture, and Critical Comparative Law. They shall be examined in turn to see whether they can present a viable alternative to functionalism. I will not present historical comparative law as a separate method because the historical dimension of law is, in fact, an integral part of every meaningful comparative study.⁶⁴

A. Mattei—*Comparative Law and Economics*

While comparative lawyers increasingly employ disciplines such as history, anthropology, and sociology, until recently economic theory has been largely ignored. Only in the mid-1990s did Law and Economics claim a share in comparative studies. It promises to benefit comparative research by providing a degree of measurement to its statements: economic efficiency. Comparative Law and Economics scholars strive to distinguish themselves from mainstream law and economics insofar as they claim a more neutral role for the discipline as an analytical, rather than a normative tool.⁶⁵ This, however, is merely an ill-concealed lip service. As their studies reveal, in fact, they aim to operate both at the levels of descriptive and normative analysis.⁶⁶

1. Operation

Analytically, Comparative Law and Economics seeks to begin the comparison from a “neutral scale” that can be validated by observable data: economic efficiency. The term “efficiency,” in its comparative sense, is defined as “whatever legal arrangement ‘they’ have that ‘we’ wish to have because by having it they are better off”⁶⁷—in terms of lesser waste, lower transaction costs, better resource allocation, or greater

63. Husa, *supra* note 7, at 424.

64. ZWIGERT & KÖTZ, *supra* note 12, at 8. See Örüçü, *supra* note 15, at 63–65.

65. UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 7 (1997).

66. *Id.* at 123; Ugo Mattei & Fabrizio Cafaggi, *Comparative Law and Economics*, in I THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 346, 347 (Peter Newman ed., 1998).

67. MATTEI, *supra* note 65, at 145.

freedom for individuals to interact.⁶⁸ Mattei's archetypal methodology begins by building a model of what he hypothesizes is an efficient legal institution.⁶⁹ This blueprint, according to him, needs to be abstracted from the pool of solutions offered by existing legal systems under the presumption that all of the relevant empirical data for the assessment of efficiency are available.

In a second analytical step, law and economics comparatists then compare their model to the real-world alternatives (i.e., substantive rules) of different legal systems.⁷⁰ When faced with departures from the efficient model, which will frequently be found, they seek to explain why this inefficiency occurs. A proper analysis is very complex because law and economics comparatists accept that efficiency is context-dependent.⁷¹ Even where market structure and consumer preferences are similar, the same legal rule may be efficient or inefficient depending on the institutional and cultural background to which it refers. Less efficient solutions can be justified by offering some non-distributional benefit that outweighs the gains that the efficient solution would have generated. In judging the overall efficiency of a legal system, the comparatist furthermore has to watch out for institutions that can work as efficiency restoring substitutes, where inefficiency is diagnosed. In this way, comparative scholars can isolate and evaluate variables that contribute to or detract from the relative efficiency of the systems under comparison.

The third step of Comparative Law and Economics transcends from the analytical to the normative level. After having identified and explained the deviations from the efficient model, the comparatist is supposed to define the conditions for policy changes in order to get closer to the model in those instances where the reasons for distance do not appear justified.⁷² Such conditions are determined by the transaction costs of changing a given historically prefixed routine. For example, while certain aspects of trust law, as developed in the common law tradition, have efficiency advantages in the case of bankruptcy over their counterparts available in civil law, the costs of changing the general structure of prop-

68. Dieter Krimphove, *Der Einsatz der ökonomischen Analyse des Rechts als notwendiges Instrument der Europäischen Rechtsvergleichung*, 39 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 185, 189 (1998) (F.R.G).

69. MATTEI, *supra* note 65, at 182; *see also* JAN SMITS, THE MAKING OF EUROPEAN PRIVATE LAW: TOWARD A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM 61 (Nicole Kornet trans., Intersentia 2002).

70. MATTEI, *supra* note 65, at 182.

71. *See* Krimphove, *supra* note 68, at 191; Mattei & Cafaggi, *supra* note 66, at 347.

72. Mattei & Cafaggi, *supra* note 66, at 347.

erty rights to accommodate trusts might outweigh the benefits of such an introduction.⁷³

As we can see by this example, Comparative Law and Economics focuses on developments in the relationship between legal systems, i.e., convergence, divergence, and the occurrence of legal transplants.⁷⁴ It seeks to explain convergence and divergence as a result of competition between legal systems. Legal systems are believed to function as markets for the supply of different solutions for a specific problem.⁷⁵ If transaction costs were zero, then law would be freely transplantable (free movement of legal rules) and would evolve naturally toward the most efficient rule.⁷⁶ Legal diversity (transplantation resistance)—according to Comparative Law and Economics—results from the transaction costs of tradition, culture, and ideology.⁷⁷

2. Development

Law and Economics originated in the late 1950s in the United States, and dominated the legal discourse there during the 1960s and '70s under Coase and, later, Posner.⁷⁸ Progressively it found its way into other countries. Its appeal “at home,” however, began to wither when Ugo Mattei and Dieter Krimphove paved the path for its application to comparative studies in the 1990s.⁷⁹ For a proper evaluation of Comparative Law and Economics, it is important to note that the intellectual history of this variant of law and economics is curiously longer than that of its parent. Technically, Comparative Law and Economics, in its search for the “efficient solution of a given problem,” is a narrowed and specified version

73. See Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 445–66 (1998).

74. MATTEI, *supra* note 65, at 123; Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT'L & COMP. L.Q. 405, 405–09 (1999); Esin Örüçü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, 4.1 ELECTRONIC J. COMP. L. 9 (2000), available at <http://www.ejcl.org/41/art41-1.html>.

75. See William W. Bratton & Joseph McCahery, *Regulatory Competition as Regulatory Capture: The Case of Corporate Law in the USA*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 207, (Joseph McCahery et al. eds., 1996); Meinrad Dreher, *Wettbewerb oder Vereinheitlichung der Rechtsordnungen in Europa?*, 3 JURISTENZEITUNG 105 (1999) (F.R.G.).

76. SMITS, *supra* note 69, at 69.

77. MATTEI, *supra* note 65, at 121.

78. See Ejan Mackaay, *History of Law and Economics* 65–80, available at <http://encyclo.findlaw.com/0200book.pdf> (last visited Feb. 7, 2007).

79. See, e.g., MATTEI, *supra* note 65; Krimphove, *supra* note 68.

of functionalism.⁸⁰ It “radicalizes” this method by focusing on one particular function only: the rule’s or institution’s efficiency.⁸¹

The second source of inspiration for Comparative Law and Economics is the work of Gustav Radbruch. It was Radbruch who first maintained that when comparing two *comparanda*, this could only be by reference to a third, constant element.⁸² According to Radbruch, this common point of reference has to be a supra-national legal system, an objective, “higher” or “natural” law (“*richtiges Recht*”). For adherents of Comparative Law and Economics, the “efficient” rule is this higher or natural law.

3. False Trails of Criticism

Naturally, not everybody agrees on the existence of such a kind of “higher law.” A frequent reservation against Comparative Law and Economics is that it relies on simplistic presuppositions drawn from neoclassical economics.⁸³ This criticism is worthwhile, but it only disqualifies Comparative Law and Economics based on neoclassical models and not the method as such. The neo-institutional movement in economics allows for observing the institutional settings of human interaction and their impact on transaction costs.⁸⁴ Behavioral Economics employs social sciences to rectify the inaccurate assumptions in traditional “Law and Economics” models by adopting a more realistic idea of man.⁸⁵ Consequently, there are viable alternative theoretical foundations for Comparative Law and Economics.

80. Ewald, *Posner’s Economic Approach*, *supra* note 30, at 383; Peters & Schwenke, *supra* note 5, at 808.

81. Günter Frankenberg, *Stranger than Paradise: Identity and Politics in Comparative Law*, 1997 UTAH L. REV. 259, 262 (1997) [hereinafter Frankenberg, *Stranger than Paradise*].

82. Gustav Radbruch, *Über die Methode der Rechtsvergleichung*, 2 MONATSSCHRIFT FÜR KRIMINALPSYCHOLOGIE UND STRAFRECHTSREFORM 422, 423 (1906) (F.R.G).

83. Catherine A. Rogers, *Gulliver’s Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 186 (1998); *see also* Mackaay, *supra* note 78, at 86.

84. Mattei & Cafaggi, *supra* note 66, at 347.

85. *See* Claire A. Hill, *Beyond Mistakes: The Next Wave of Behavioural Law and Economics*, 29 QUEEN’S L.J. 563 (2004) (Can.); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055–58 (2000). *But cf.* Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC’Y REV. 973, 973 (2000).

4. Real Problems

There are, however, limits to Comparative Law and Economics, which disqualify it as a central method for comparative studies. The most fundamental objection is that—as its development has shown—it is a mere variant of functionalism.⁸⁶ That makes Comparative Law and Economics vulnerable to the same objections put forth against functionalism in its broader sense. Furthermore, its focus on efficiency as the sole function of law invites additional criticism.

Mattei's idea of a neutral model as a *tertium comparationis* is appealing, not because a defined, objective point of reference is regarded as a logical necessity of comparative methodology as Radbruch (erroneously) believed,⁸⁷ but because it “purges” the comparative process from preconceptual bias. In order to be neutral and have such a purifying effect, the *comparatum* must not be loaded with preconceptions itself. However, it is doubtful whether that is true for “efficiency.”

a. Ambiguity

A first problem with this term is its ambiguity. Efficiency can refer to “partial equilibrium solutions,” i.e., pursuing an efficient outcome for a particular problem in a particular market; but it can also mean “general equilibria,” i.e., efficient solutions for an entire economic system.⁸⁸ The comparatist is not told which of these scenarios to rely upon when building “efficient models.” The reason for this might be that both equilibria are indeterminate within themselves. Efficient solutions in partial equilibrium situations cannot be defined unambiguously for logical reasons because they are path-dependent⁸⁹ and may become inefficient once one takes into account third parties or collateral effects to other sectors.⁹⁰ To seek general equilibrium efficiencies is technically impracticable for the

86. Brand, *supra* note 42, at 1087; Michaels, *supra* note 7, at 108; Peters & Schwenke, *supra* note 5, at 809.

87. Cf. Otto Sandrock, *Über Sinn und Methode zivilistischer Rechtsvergleichung*, 31 ARBEITEN FÜR RECHTSVERGLEICHUNG 3, at 45 (Ernst von Caemmerer ed., 1966) (F.R.G). Meanwhile, it is firmly established that two instances can be compared directly without reference to a third object.

88. Rogers, *supra* note 83, at 185.

89. Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW, *supra* note 66, at 465, 471.

90. Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 641 (1979–80).

comparatist because of the enormous information requirements that it would place on him or her.⁹¹

b. Non-Neutrality

Even worse, efficiency as a criterion is not only ambiguous, but also partisan. Efficiency analysis is essentially a dynamic cost-benefit analysis. It does not look statically at a certain provision and asks whether this rule is "efficient." Instead, it examines collective decisions (e.g., a change in legal rules) and asks, under the predominant Kaldor-Hicks test,⁹² whether they generate sufficient gains to their beneficiaries so as to hypothetically compensate the losers and render the latter fully indifferent to the change but still have some gains left over for themselves. This test contains the seed of non-neutrality in the form of the so-called offer-asking problem. Kelman was the first to observe that people generally have a greater concern for and attachment to things as they are compared to things as they could be.⁹³ As a result, people will ask for a higher price when they have to give up something (asking price) than what they would be willing to pay when bound to acquire the same good (offer price). This difference in price matters to efficiency because it renders the determination of the respective gains and losses of winners and losers dependent on hidden value judgments. The offer-asking problem even creates room to argue about who is a winner and who is a loser of a proposed change. At first blush, the application of the offer-asking problem to efficiency's test—that winners must be able to bribe losers—would measure the bribe at its offer price and the loss at its asking price.⁹⁴ Other law and economics scholars, however, have interpreted win and loss just the other way around.⁹⁵ Neither position can be said to be wrong. The choice to measure win and loss at the offer price or the asking price is a question of perspective and correspondingly a question of policy: the winners from change are the losers from no-change. If effi-

91. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 395 (1981); Rizzo, *supra* note 90, at 641–42.

92. For the test and the rival Pareto test, see MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 7, 19–21 (1993).

93. Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 678–95 (1979).

94. Thomas C. Heller, *The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385, 395–96 (1976).

95. Richard S. Markovits, *The Causes and Policy Significance of Pareto Resource Misallocation: A Checklist for Micro-Economic Policy Analysis*, 28 STAN. L. REV. 1, 2–3, n.4 (1976) (measuring the winners' gains at their asking price and the losers' losses at their offer price).

ciency therefore inevitably involves value judgments, it cannot serve as the neutral *tertium comparationis* that Comparative Law and Economics requires it to be.

Another expression of the inherent dependency of efficiency on value judgments is the problem of multiple optima. Comparative Law and Economics suggest an efficient model as *comparatum* against which to assess real-world legal institutions. Such a model cannot be built with reference to efficiency alone. If transaction costs are low, i.e., almost any agreement that is to the mutual benefit of the parties concerned is made, any assignment of rights will lead to an efficient outcome. Winners and losers of a proposed change in the law would always bargain for the efficient solution.⁹⁶ This means that there is a set of efficient solutions, rather than a single efficient outcome. The choice of any of them is a matter of value judgment unrelated to efficiency. The situation is no different when transaction costs are numerous and/or high. Here, it is the lawyer-economist's task to manipulate entitlements and redistribute units of factors until the allocation of resources resembles the efficient solution found in a world with no/low transaction costs.⁹⁷ This is impossible to achieve with reference to efficiency alone, because, as we have just seen, even in a world with no transaction costs there is no single efficient solution. Therefore, under no circumstances, can law reformers use efficiency alone to support any particular program of rules.

Even proponents of a law and economics approach to comparative law are reluctantly realizing how political and value-laden efficiency in fact is. Mattei, for example, complains about a severe "American-centric" provincialism in the discipline.⁹⁸ Indeed, law and economics scholars mostly work under the rather uncritical assumption of the American institutional background; they seem to assume that "there is, whether by conscious choice or by social necessity, a strong tendency for the [American] common law to adopt efficient rules."⁹⁹ Mattei tries to tackle the problem by establishing the context-dependency of efficiency. If efficiency, however, is context-dependent, there is no way to work with it as a neutral *tertium comparationis*.

96. DAVID D. FRIEDMAN, LAW'S ORDER 39 (2000); Kennedy, *supra* note 91, at 395, 441–42.

97. Kennedy, *supra* note 91, at 444.

98. MATTEI, *supra* note 65, at xii, 69–70.

99. *Id.* at 125.

c. Distortedness

Efficiency is also unsuitable as a scale for comparative studies because it distorts the perspective of the comparatist in two ways. First, efficiency is a transient phenomenon. Even slight changes in the economic circumstances invalidate findings because what is considered to be efficient in today's economic environment might be inefficient in that of tomorrow. Therefore, efficiency is oriented toward short-term results. While this might be acceptable in a (reactive) common law jurisdiction, it does not agree with legal systems based on codification with their higher need for legal certainty. Secondly, efficiency analysis is purely concerned with resource allocation.¹⁰⁰ Distributive issues, i.e., all non-efficiency considerations, are ignored or marginalized. Such a focus on an exclusive criterion under which to evaluate laws is a decidedly reductionist view of the law and its role in society. It breathes new life into Gerber's fear that functional comparisons of any kind produce particularist knowledge. Opting for Comparative Law and Economics instead of functionalism, would therefore change things from bad to worse.

B. Legrand—Comparative Law as Hermeneutic Exercise

With Comparative Law and Economics apparently unable to overcome the objections against functionalism, we have to turn our eyes to other contenders. Since the mid-1990s, conventional comparative law has been challenged by members of the culturalist movement.¹⁰¹ Their thinking orbits around the term "legal culture," which means "those historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society."¹⁰² From this starting point, culturalists essentially contend that legal rules are embedded in local dimensions of the law. Each legal culture is a unique, culturally contingent product, which is incommensurable and untranslatable except through a deep understanding of the surrounding social context. Pierre Legrand is the prime proponent of this movement in comparative law.

100. Paul H. Brietzke, *New Wrinkles in Law . . . and Economics*, 32 VAL. U. L. REV. 105, 127–29 (1998); Peters & Schwenke, *supra* note 5, at 829.

101. See, e.g., PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 27–34 (1999). See generally ERHARD BLANKENBERG ET AL., COMPARING LEGAL CULTURES 1 (David Nelken ed., 1997) (composing a collection of works by various authors "to consider the possibilities and advantages of using comparative work . . . to clarify the meaning and character of legal culture"); J.C. SMITH ET AL., COMPARATIVE LEGAL CULTURES (Csaba Varga ed., 1992).

102. JOHN H. MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 28 (1978).

1. Operation

While functionalism is concentrated on finding similarities and convergences, Legrand's basic experience is that of plurality and difference. He argues that comparative law is not a search for function, but a hermeneutic exercise (*démarche herméneutique*).¹⁰³ Functionalism, according to his view, was only partially successful in penetrating the façade of language. What a rule does "functionally," he believes, is yet another layer of the surface appearance of law. The task of the comparatist is to delve beyond that technical surface and to uncover what the rule signifies in terms of its political, social, economic, and ideological context.

For Legrand, the specificity of legal traditions and cultures is central. He sees their structures and values as contained in language, which is not always translatable, and builds therefore an insurmountable framework of contingent ways of legal reasoning.¹⁰⁴ Comparative law is about "finding what is significantly different" abroad. Accordingly, it can only be descriptive, not normative. Foreign law may only be used as a tool to encourage criticism of the presuppositions of one's own tradition, but not to provide a model for its reform because each legal tradition is requisite and irreplaceable. Methodologically, the explanation of the deep cultural and mental structures expressed by legal texts becomes the main aim of comparative law. This "hermeneutic exercise" is, in fact, a search for the cultural, moral, and linguistic relativism of law. How that search is to be conducted, however, is merely hinted at.¹⁰⁵ After having established a linguistic framework that at least allows a proper perception of foreign law, the comparatist has to carefully lift in his or her description the latter's cultural veils one by one, paying special attention to decision making structures, i.e., legal actors and the way they interact and reason.

Legrand can only find limited applications for comparative law because of his focus on perspective. He is "anti-foundationalist," i.e., rejects the belief that there is a universal truth.¹⁰⁶ Instead, he claims human knowledge can, at best, be partial in nature and only validated within a specific context; the comparatist, in other words, cannot escape from his

103. PIERRE LEGRAND, *LE DROIT COMPARÉ* [COMPARATIVE LAW] 31 (1999) (Fr.); Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. COMP. L. 111, 123 (1997) [hereinafter Legrand, *The Impossibility of "Legal Transplants"*]; see also Husa, *supra* note 7, at 439–42.

104. Legrand, *How to Compare Now,* *supra* note 28, at 234–35, 240; Legrand, *The Impossibility of "Legal Transplants,"* *supra* note 103, at 123.

105. Pierre Legrand, *Comparer,* 48 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 279, at 285, 293 (1996) (Fr.).

106. Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law,* 82 CORNELL L. REV. 19, 25 (1997).

or her cultural framework.¹⁰⁷ This belief, that not only law, but also all knowledge is culturally and historically contingent, poses an immense methodological hurdle for comparative studies.

2. Development

A look at the roots of Legrand's approach provides an explanation. Historically, it is based on forethinkers, who were biased against comparative law, and philosophically, it is rooted on movements that are weak in methodology-building.

When Legrand regards legal cultures as unique "spiritual creations" of the community, he reaches back to Montesquieu, who proclaimed the dependency of law on local conditions as early as 1748 with his seminal *De l'Esprit des Loix*.¹⁰⁸ Legrand can also be seen as an unintentional successor of the German historical school of law that considered law to be the manifestation of the people's national spirit ("*Volksgeist*") and thereby particular to every nation—an organic product of society which has to be watched for and discovered, rather than made or tampered with.¹⁰⁹ Even though the contribution of its founder, Savigny, to comparative law is underestimated,¹¹⁰ this school was more than ambivalent towards comparative legal studies.¹¹¹

Theoretically, Legrand's works are based on two different schools, culturalism and deconstruction. The banner of culturalism was raised in the early 1980s by Stuart Hall as a countermovement to structuralism and universalism.¹¹² The main objective of culturalism was to allow societies to be evaluated in their uniqueness and their complex social and political context.¹¹³ The dark side of this perspective is that societies, like individuals, all of a sudden seemed incommensurable if not incompatible.

107. Legrand, *How to Compare Now*, *supra* note 28, at 308–09.

108. MONTESQUIEU, *THE SPIRIT OF LAWS* 103–05 (David Wallace Carrithers trans., U. Cal. Press) (1977).

109. See James Knudson, *The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes*, 11 J. TRANSNAT'L L. & POL'Y 407, 409 (2002); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 28 (Stan. U. Press) (2d ed. 1985).

110. Brand, *supra* note 42, at 1085.

111. Ewald, *Comparative Jurisprudence (I)*, *supra* note 2, at 2012–42; Peters & Schwenke, *supra* note 5, at 806 n.30.

112. See Stuart Hall, *Cultural Studies: Two Paradigms*, 2 MEDIA, CULTURE AND SOC'Y 57 (1980).

113. See JOCHEN HÖRISCH, *THEORIE-APOTHEKE: EINE HANDREICHUNG ZU DEN HUMANWISSENSCHAFTLICHEN THEORIEN DER LETZTEN FÜNFZIG JAHRE, EINSCHLIEßLICH IHRER RISIKEN UND NEBENWIRKUNGEN* 70–71 (2004) (F.R.G.).

Accordingly, the diversity of cultures became sacrosanct. Research therefore had to diversify as well, often to such an extent that a fruitful dialogue was hardly viable anymore.

Culturalism found a natural ally in deconstruction,¹¹⁴ which in turn stands on the shoulders of hermeneutics. The latter is concerned with human understanding and the interpretation of texts. Gadamer, one of Heidegger's disciples, first applied hermeneutics to legal texts in order to understand them as signifiers of something deeper.¹¹⁵ The French post-structuralist philosopher Derrida, whom Legrand refers to frequently, also borrowed from Heidegger and transformed his form of textual analysis ("*Dekonstruktion*") into a tool of "destructive criticism."¹¹⁶ Central to deconstruction is the French neologism "*différance*." In simple terms, this means that rather than seeking commonality, simplicity, and unifying principles, deconstruction emphasizes difference, complexity, and non-self-identity.¹¹⁷ A deconstructive interpretation of law aims to unveil hidden inconsistencies and biases by demonstrating how a seemingly unitary concept contains different or opposing meanings. According to Derrida, however, deconstruction never condensed to either a school or a method, but is merely an occurrence within the text itself.¹¹⁸

3. Problems

The upshot of Legrand's "method" is total incomparability across history and culture. He simply negates the mere existence of things such as legal transplants¹¹⁹ or convergence of legal systems.¹²⁰ Any cross-cultural comparisons are labeled "superficial." One wonders whether that is just over-conscious thinking or, in fact, the expression of an agenda to pose as many obstacles to the normative use of comparative law as possible. Cultures are, as Legrand admits, not hermetic, closed, or immutable entities.¹²¹ They influence and infiltrate each other (Americanization!), because unlike individuals, they do not have readily determinable boundaries. If boundaries between cultures are blurry, then those of their

114. *See id.* at 68.

115. HANS-GEORG GADAMER, WAHRHEIT UND METHODE 252 (4th ed. 1975) (F.R.G.).

116. *See* HERMAN RAPAPORT, HEIDEGGER AND DERRIDA: REFLECTIONS ON TIME AND LANGUAGE 22–23 (1989).

117. J.M. Balkin, *Deconstruction*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 367, 368–69 (Dennis Patterson ed., 1996).

118. *Id.* at 367.

119. Legrand, *The Impossibility of "Legal Transplants," supra* note 103, at 111–12.

120. Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52, 52 (1996); Legrand, *How to Compare Now, supra* note 28, at 295.

121. Legrand, *How to Compare Now, supra* note 28, at 238, n.26.

epistemic and socio-economic background are too. That makes a fruitful dialogue between members of a different cultural background possible.

Certainly, Legrand and other culturalists have commendably elucidated shortcomings of functionalist studies in paying due respect to the socio-cultural context of law, drawing “destructive” strength from their philosophical roots. However, this potential might be exhausted. As pointed out above, functionalists today accept that the comparative study of law needs to be contextual. Because they also can accommodate this consideration within their theoretical framework, it seems as if all that can be done with Legrand’s approach meaningfully, is to “deconstruct the ambiguities and indeterminacies” within individual comparisons.¹²² Otherwise, Legrand’s comparative thoughts have little to offer for actual research-practice in comparative law. “Methodologically,” he wants to contextualize the objects of comparison and thereby capture their essence as a unique manifestation of the community. This, however, is more a goal than a method. One cannot avail oneself of the idea that Legrand, like most of the law-as-culture scholars, is still working on a “proto-methodological” level. He is preoccupied with contemplating the legitimacy and the aims of comparative law. In his “*Droit comparé*,” for example, Legrand concentrates on philosophic, epistemological problems besetting the discipline. He devotes no space to the history, accomplishments, or methods of the subject. The question of “how to compare now” dawns, but it is still superimposed by the question of “why to compare.” It is not unlikely that Legrand will never emerge from this state. His theoretical sources, culturalism, and deconstruction hardly provide him with workable tools for method-building.

C. Frankenberg—Critical Comparative Law

A similar fate seems to await Guenter Frankenberg, one of the few scholars associated with Critical Legal Studies who pays closer attention to questions of comparative methodology.

1. Operation

For Frankenberg, the question of method encompasses not only the “how,” but also the “why” of comparative studies.¹²³ He negates functionalism’s presumptions of the necessity, functionality, and universality of law and aims to transform conventional comparative law into a tool for the critique of law by using an analysis of abortion decisions to illus-

122. Husa, *supra* note 7, at 441–42; Peters & Schwenke, *supra* note 5, at 812; Riles, *supra* note 20, at 248.

123. Frankenberg, *Critical Comparisons*, *supra* note 20, at 416, 445.

trate his approach. This approach divides the comparative process into three steps.¹²⁴ In the first step, the comparatist is required to scrutinize carefully what happens when the multiple facets of a factual situation are taken out of their social context and fitted into a legal framework. A second step is to elucidate this legal framework by critically analyzing its structure (especially the public/private distinctions) and to delve into the processes of legal decision-making. The latter opens the door to the political dimension of law, which Frankenberg sees primarily as a theoretical instrument for the purpose of gaining, cementing, and justifying the exercise of power.¹²⁵ He thinks that comparatists need to move from traditional conceptions of legal discourse, such as rights and duties, to the politics of the subject studied. For him that is the only way to insure that comparative law does not obey hidden political agendas of hegemony and domination. In a third step, finally, the comparatist has to reintroduce the socio-cultural context that has been lost by “legalizing” a problem.

To avoid the bias of functionalism, Frankenberg wants comparatists to understand their studies as “learning experience[s]” that require “a greater sensitivity to the relationship between the self and the other,” and “tolerance for ambiguity.”¹²⁶ They are encouraged to avoid concentrating on similarities and to allow differences, especially in the political context, to emerge. To cope with pre-conceptual bias, Frankenberg wants to unravel the ties that bind the comparatist to his domestic legal regime. Comparative research undertaken so far, he believes, has to be reassessed by taking into account the scholars’ motives, interests, and perspectives, i.e., the scholars’ legal education, exposure to different legal cultures, networks, etc.¹²⁷ Self-criticism as the prime virtue of the researcher is meant to insure that future comparative law produces valuable knowledge. Only then can the comparatist unearth the sub-structural, often unarticulated, categorizations and silent assumptions of law.¹²⁸

2. Development

Frankenberg’s insights have two sources of inspiration. First, like Legrand, he is driven by the idea of difference that in Frankenberg’s case is loosely inspired by feminist studies and the philosophical theory of literature. The theme of difference harmonizes well with Frankenberg’s second source, the Critical Legal Studies movement. This rather hetero-

124. *Id.* at 451–52.

125. Frankenberg, *Stranger than Paradise*, *supra* note 81, at 261–63; *see also* Frances Olsen, *The Drama of Comparative Law*, 1997 UTAH L. REV. 275, 278 (1997).

126. Frankenberg, *Critical Comparisons*, *supra* note 20, at 441.

127. *Id.* at 443.

128. *Id.*

geneous school, whose crystallization point was a conference at the University of Wisconsin-Madison in 1977, applies ideas of Marx, Marcuse, and Adorno to the study of law.¹²⁹ Of central importance is the idea that legal rules and institutions are tilted towards the preservation of entrenched interests with wealth and power and therefore are biased against the poor and oppressed, especially the working class, women, and people of color. Critical Legal Studies flourished in the United States in the 1980s, but its influence began to fade in the early 1990s.

3. Problems

Some scholars sense a “thirst for a more aggressive and dynamic comparative law”¹³⁰ such as Frankenberg’s approach. However, his insights have so far not helped to establish a more convincing methodological approach to comparative studies than the heavily criticized functionalism. Like Legrand, Frankenberg is good at analyzing weaknesses of conventional comparative studies and at further reducing their reach and explanatory power. In addition, his elaboration on the political dimension of law and the need for self-reflection provides helpful guidance for the comparatist—even though it may divert the focus of research from the comparison of laws to the history, epistemology, and politics of comparative research itself.¹³¹ Again, like Legrand however, Frankenberg does not muster the strength to come up with a fully developed counter-theory to functionalism. His “three step approach” remains “patchwork”—mainly because the theoretical framework he is working in, Critical Legal Studies, does not provide the necessary tools for theorizing. It confines its adherents to the critical analysis of pre-existing institutions, rules, and theories.¹³² Correspondingly, Frankenberg leaves us in a kind of Socratic aporia: our belief in functionalism is shattered, but no replacement is offered.

129. See John Finnis, *On the Critical Legal Studies Movement*, 30 AM. J. JURISPRUDENCE 21, 22 (1985); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 663–65 (1983).

130. Husa, *supra* note 7, at 420.

131. See, e.g., Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425 (1997) (providing an example of such with research on Latin American law).

132. Cf. Guyora Binder, *Critical Legal Studies*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 280–82 (Dennis Patterson ed., 1996) (explaining Critical Legal Studies in terms of its critiques of various existing theories).

4. Conclusion

Parts II and III have drawn a rather gloomy picture of comparative legal methodology as a garden filled with withering or infertile flowers. It seems that functionalism is still dominant because of a lack of alternatives, not because it is particularly well-suited. Apparently, there is need for a fresh sapling. But what qualities would it have to bring? The analysis of functionalism has demonstrated negatively that whatever methodology we want to adopt for comparative studies must not work under the three presumptions that: law answers to social needs; problems are at least similar across legal systems; and these problems tend to be resolved in the same way. Positively, Comparative Law and Economics suggested that model building might be a promising alternative—“efficiency” is just not the neutral scale required. Cultural Deconstruction and Critical Legal Studies, finally, did not offer much methodologically, but provided at least hints for avoiding pitfalls by emphasizing the need for a contextual approach.

IV. OWN APPROACH—CONCEPTUAL COMPARISONS

This Part tries to develop a method for comparative studies that serves the needs of the comparatist without being subject to the criticism outlined above. Section A is devoted to preliminary observations, section B outlines the operation of the method, and section C suggests some applications. In sections D and E, I will discuss advantages of the proposed method and anticipate likely objections to it. As the method uses models or concepts as *comparata*, I shall call it “Conceptual Comparisons.” Wherever possible, the terminology used in describing my approach is adapted to the usage in other social sciences that work comparatively with concepts to enable and foster an interdisciplinary dialogue. To illustrate how Conceptual Comparisons works, I will discuss the second-tier protection of inventions in Europe as an example.

A. Preliminary Remarks

1. Presuppositions

Conceptual Comparisons rejects the presumptions upon which functionalism works. However, it cannot operate without three presumptions of its own. Firstly, law, as the object of comparison, is understood as a normative system that consists of principles, rules, institutions, and other institutionally defined instruments.¹³³ The conceptual structure employed

133. A similar presumption is used by Banakas, *supra* note 49, at 306.

by legal systems is important in ordering legal understanding and ensuring that like cases are decided alike. Its effects must not be marginalized, as functionalism does and as culturalists and critical scholars do to an even greater extent.

Secondly, Conceptual Comparisons acknowledges that impurities in the comparative act are inevitable, mainly because comparatists cannot escape the preconceptions of their own legal culture and education.¹³⁴ However, while it is true that the perspective on law and accordingly the work of individual scholars are inevitably subjective, the process by which legal institutions are compared is not necessarily subjective, too.¹³⁵ Conceptual Comparisons shares the conviction of Comparative Law and Economics that a neutral *tertium comparationis* as an “expurgatory tool” is not only desirable, but also constructible. Objectivity is envisaged to derive from combined efforts of comparatists using a common system of reference for mutual scrutiny and criticism of each other’s work. Unlike Comparative Law and Economics, however, Conceptual Comparisons endeavors to use this reference system purely analytically.

Thirdly, Conceptual Comparisons presumes that it is possible to formulate a neutral reference system in the form of concepts. By concepts, I mean abstract models derived in an inductive process from specific instances of real-existing law. Culturalists and critical legal scholars, however, believe that all types of categories and classifications are suspicious because they are culturally contingent.¹³⁶ Outsiders are said to be unable to understand foreign classifications and translate them into their own. Indeed, domestic categories and classifications vary in different legal systems, at different times. They are neither universal nor neutral. That, however, only out-rules real law as a neutral *tertium comparationis*, but not purely theoretical, abstract models that dwell “in between” the existing legal systems.

2. Conceptualisation

Abstract models successfully serve as neutral analytical tools in the natural sciences. Fortunately, conceptualization is firmly established in the social sciences, too,¹³⁷ and accepted by analytical jurisprudence as

134. See *supra* Part II.C.3. Cf. Peters & Schwenke, *supra* note 5, at 821.

135. *But cf.* Hill, *supra* note 42, at 104.

136. Curran, *supra* note 51, at 48; Frankenberg, *Stranger than Paradise*, *supra* note 81, at 267.

137. See KARL ENGISCH, DIE IDEE DER KONKRETISIERUNG IN RECHT UND RECHTSWISSENSCHAFT UNSERER ZEIT 238–39 (1953) (F.R.G); see, e.g., Arthur L. Kalleberg, *The Logic of Comparison: A Methodological Note on the Comparative Study of*

crucial to our perception and understanding of law.¹³⁸ It is the basic tool for lawyers to communicate with each other and to transfer knowledge from one area of the law to another. However, an analogy to the concepts and categories of the natural sciences is only possible to a limited extent.¹³⁹ The latter rely on properties that can be verified empirically. Accordingly, the categories of natural sciences can be construed so that they are mutually exclusive: an animal is either a vertebrate or an invertebrate. In social sciences, the properties used for concept construction have their source in theoretical discourse, rather than in observable matter; concepts can be cumulative. A particular legal institution can belong to more than one category at the same time. A compulsory license, for example, can be classified (by substantive matter) as a limitation of an intellectual property right or (procedurally) as a defense in an infringement action.¹⁴⁰ That is why concepts in social sciences have to be more fluid, flexible types, rather than schematic terms.¹⁴¹ To diminish the “lack of observability” in law, the comparatist is well advised to scrutinize legal institutions not in the abstract, but based on factual situations.

Comparative law is not unaware of conceptualization. Classifications dominate macro-comparisons.¹⁴² In micro-comparisons, models have been used occasionally in order to give the comparatist some point of reference, according to which he can position legal phenomena in relation to one another.¹⁴³ Moreover, nineteenth century comparative law

Political Systems, 19 WORLD POL. 69 (1966) (discussing the use of conceptual approaches in the study of comparative politics).

138. GEOFFREY SAMUEL, *EPISTEMOLOGY AND METHOD IN LAW* 217 (2003); Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U. W. AUSTL. L. REV. 1, 3–5 (1996) (asserting that taxonomy “promotes understanding” and is “essential” to ensure stability and consistency in the law). Explicitly for comparative studies, see HENRY W. EHRMANN, *COMPARATIVE LEGAL CULTURES* 11–12 (1976); WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 190 (2000); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AM. J. COMP. L. 5, 6 (1997).

139. SAMUEL, *supra* note 138, at 250–52.

140. Brad Sherman & Lionel Bently, *The UK’s Forgotten Utility Model: The Utility Designs Act 1843*, 3 INTELL. PROP. Q. 267 (1997).

141. See generally Großfeld, *supra* note 35, at 331; Hans Wolff, *Typen im Recht und in der Rechtswissenschaft*, 5 STUDIUM GENERALE 195, 197 (1952) (F.R.G.).

142. For different macro-taxonomies, see ZWEIGERT & KÖTZ, *supra* note 12, at 40, 64; Brand, *supra* note 42, at 1090; Mattei, *supra* note 138, at 5.

143. MATTEI, *supra* note 65, at 147, 179; see, e.g., Leyland, *supra* note 10, at 221–33 (describing and illustrating the model method in comparing changes between the economic systems of Russia and England); Ilse Bechthold, *Ziele und Methoden der Rechtsvergleichung zwischen beiden Teilen Deutschlands*, 12 RECHT IN OST UND WEST 1, 7 (1968) (F.R.G.); Georg Schwarzenberger, *Historical Models of International Law: To-*

dreamed of an ideal system, a network of universal archetypes (“universalities”) that all existing legal system should approximate.¹⁴⁴ Closer scrutiny of the operation of legal systems and their extra-legal connotations, however, has shattered this dream. Today we accept that there is no single set of archetypes that can accommodate the plenty of legal ideas across the globe.¹⁴⁵ Assuming the opposite necessarily leads to bias and misconception.

3. Overview

Conceptual Comparisons seeks to establish an approach to conceptualization that allows expression of the variety of conceptualizations in different legal systems. The method draws inspiration from typology—especially typological comparisons¹⁴⁶—comparative methods of other social sciences, and plant taxonomy. It operates in two phases. In the first phase (conceptual orientation), the researcher construes certain elements of legal reality in logically precise, abstract, and unambiguous models (comparative concepts). In the second phase (systematic comparison), real-world institutions and rules can be matched and assessed against these concepts. The ultimate, admittedly Herculean, goal of Conceptual Comparisons is to establish a comprehensive network of concepts covering all legal institutions from all jurisdictions and to assess how these different concepts complement each other or conflict.

The two phases of Conceptual Comparisons are two separate comparative processes. Conceptual orientation requires—as we will see—considerable preliminary comparative investigation. The following systematic comparison between the concept and the rules or legal institutions from the chosen legal systems is not only supposed to provide a

ward a *Comparative History of International Law*, in *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE* 227, 227–50 (William E. Butler ed., 1980).

144. See Raymond Saleilles' *droit commun idéal* in R. Saleilles, *La Fonction juridique du Droit comparé* [*The Juridical Function of Comparative Law*], in *JURISTISCHE FESTGABE DES AUSLANDES ZU JOSEF KOHLERS 60. GEBURTSTAG 164* (Fritz Berolzheimer ed., 1909) (Fr.) and Édouard Lambert's "*droit commun législative*" in ÉDOUARD LAMBERT, *LA FONCTION DU DROIT CIVIL COMPARÉ* [THE FUNCTION OF CIVIL COMPARATIVE LAW] 922 (1903) (Fr.), which are the most prominent versions of this approach; see also Kohler, *supra* note 35, at 275; Radbruch, *supra* note 82, at 423.

145. See CONSTANTINESCO, *TOME II*, *supra* note 40, at 66; GEORGES SAUSER-HALL, *FONCTION ET MÉTHODE DU DROIT COMPARÉ* [FUNCTION AND METHOD OF COMPARATIVE LAW] 54–64 (1913) (Fr.); WATSON, *supra* note 40, at 12–13; Großfeld, *supra* note 35, at 337; Michaels, *supra* note 7, at 100–01.

146. See Bechthold, *supra* note 143, at 7. Critically, see HANS-JOACHIM BARTELS, *METHODE UND GEGENSTAND INTERSYSTEMARER RECHTSVERGLEICHUNG 75–77* (1982) (F.R.G.).

detailed analysis of communalities and differences, but shall also lay bare the underlying determinants of the legal phenomena under scrutiny, including their historical and cultural dimensions. The two processes, however, cannot be conducted strictly one after another. They have to be mutually adjusted, necessitating the comparatist to shift back and forth in a “hermeneutical circle”—writing up the conceptual orientation to verify and refine it later when he or she has produced the systematic comparison and vice versa. For the sake of simplicity, I will refer, in the following sections, only to the comparison of legal institutions. The comparative process as such applies *mutatis mutandis* to rules and principles as well.

B. Operation

The conceptual comparatist begins his or her study by examining a factual situation in a particular legal system. Unlike the functionalist, the conceptual comparatist disregards, at this stage, to what extent these facts amount to a social problem. The situation can be hypothetical, but it should be for reasons of verifiability, preferably one that has arisen in practice. The research question put to the fact is, which institutions address the facts under scrutiny? Beginning with one legal system, the respective institutions are “carved up” into their properties, i.e., their structure and consequences according to the methods of the particular legal system. The merit of this approach is that it honors the dogmatic individuality of the legal systems under scrutiny.

1. First Phase: Conceptual Orientation

After having broken down the initial institution into its components, the comparative process begins. The main objective of the first phase of Conceptual Comparisons, the conceptual orientation, is to establish a standard for comparability in the form of a concept. Conceptualization renders phenomena comparable by putting them in a common context. The key question is how to establish a comparative concept in a meaningful way—regardless of whether the comparatist is working with pre-existing concepts¹⁴⁷ or is developing new ones. Pre-existing concepts must never be passively accepted. They have to be reassessed critically—and potentially reformulated—in the same way the researcher would have constructed a new concept: the resulting comparative concepts must fulfill six criteria in order to serve as a neutral *tertium comparationis*:

147. See also Chodosh, *supra* note 2, at 1091–93.

1. They have to be appropriate to the theoretical questions posed by the comparatist.
2. They must be effective, i.e., address the factual situations chosen for comparison. Accordingly, concepts must not be characterized by disorganized or trivial properties.
3. The properties used for concept construction must not be context-dependent.
4. They have to be named unambiguously.
5. They should be construed so that they vary as little as possible over time.
6. Finally, their construction has to be falsifiable. A concept is useless when no statistical or other evidence can be obtained in order to review it.

In order to fulfill these requirements, it is not advisable to design concepts a priori and apply them afterwards in a deductive process to real-world legal institutions. In that case, a concept might be construed too ideally and lack any real-world application. Political scientists, such as Theodore Becker for example, once defined the concept of "court" for a comparative study abstractly by seven characteristics.¹⁴⁸ Shapiro rightly criticized this approach because he could hardly find anything real to subsume under the entirety of these criteria.¹⁴⁹ Accordingly, concepts have to be construed by abstracting common elements from observed phenomena in a number of given legal systems. This inductive process could look like this: the comparatist should apply the initial facts, tested against the rules of one legal system, to another legal system and determine again the institution(s)/rule(s) that address the situation. After having done this with a number of legal systems, the search for communalities in the properties of the institutions/rules invoked begins. These communalities form the bones of the comparative concept.

To gain meaningful properties for the construction of the concept, the abstraction process has to be exercised on two different levels, a qualitative and a quantitative one. This two-fold analysis is necessary to unveil appropriately the legal strategies of different legal systems to deal with a particular factual situation. The qualitative analysis of a concept tells

148. THEODORE L. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS* 13 (1970); see also C. Neal Tate, *Judicial Institutions in Cross-National Perspective: Toward Integrating Courts into the Comparative Study of Politics*, in *COMPARATIVE JUDICIAL SYSTEMS: CHALLENGING FRONTIERS IN CONCEPTUAL AND EMPIRICAL ANALYSIS* 7, 12–13 (John R. Schmidhauser ed., 1987).

149. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1981); see also Chodosh, *supra* note 2, at 1107–08.

which requirements a particular strategy has whereas the quantitative analysis reveals which factual situations a strategy can address. In this way, Conceptual Comparisons becomes an analysis of capability. Like owners of a Swiss Army knife who seldom if ever use the tools of their knives in their entirety, not all jurisdictions employing a certain strategy might be aware of which potential is inherent in the tools they use. Only a comparison with other legal systems that employ similar tools can disclose this potential.

Both the qualitative and the quantitative analysis look at the structure and the consequences of a given institution or rule. The latter's "function" and history, at this stage, are irrelevant. They are the factors that render legal institutions context-dependent and therefore cannot be used in formulating a *tertium comparationis*. Due respect to them will be paid in the systematic comparison.

a. Qualitative Analysis

The qualitative analysis establishes the intension of a concept: the key attributes that define it, delimit the concept from other concepts, and determine membership. It is an empirical search for common, cross-sectional qualities in several legal orders. Each concept is characterized qualitatively by the fact that its members share at least one property that is not found in another concept. Properties of legal institutions or rules can be differentiated into typical, defining ones (a, b, . . .) and accompanying properties that are peculiar to individual institutions (α , β , . . .). For the construction of concepts, only defining properties are used; accompanying ones are disregarded. A comparative concept established in this way is analogue to a species in plant taxonomy¹⁵⁰ and to a type in social sciences—what Engisch called an average type ("*Durchschnittstyp*"),¹⁵¹ based on the characteristic properties of an average member of a group, rather than an ideal type ("*Idealtyp*") of the kind Weber regarded as the basic comparative unit.¹⁵² Ideal types such as the models of "presidentialism" and "parliamentarism," formerly used in comparative public law, are in decline.¹⁵³ Increasingly, too few instances could be found that

150. V.H. HEYWOOD, *PLANT TAXONOMY* 14 (2d ed. 1976).

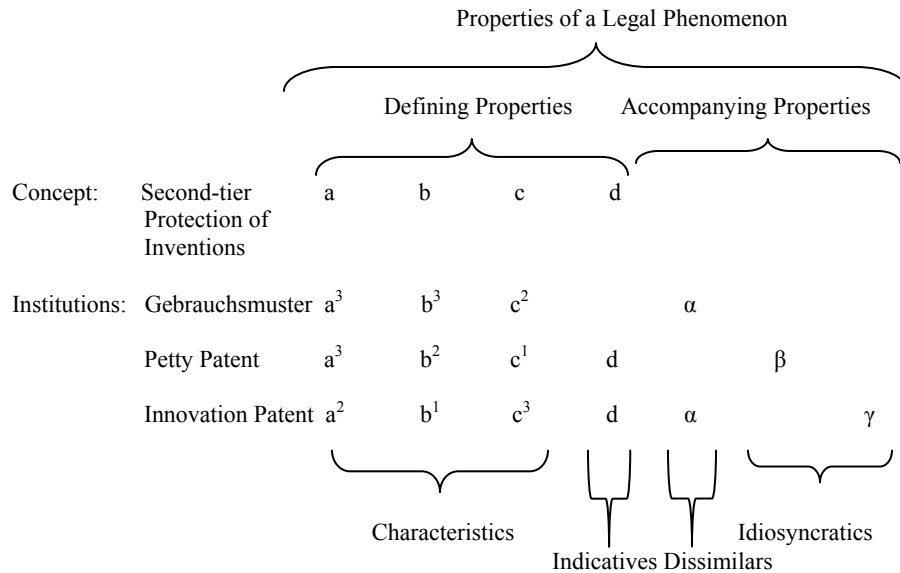
151. See ENGISCH, *supra* note 137, at 240–41.

152. This type describes the perfect condition of an institution or rule that is only partially approximated in reality. See NEIL J. SMELSER, *COMPARATIVE METHODS IN THE SOCIAL SCIENCES* 116 (1976). Critically on Weber's approach, see generally Ahmed A. White, *Max Weber and the Uncertainties of Categorical Comparative Law*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW*, *supra* note 17, at 40, 53.

153. Rett R. Ludwikowski, *Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot*, 21 B.U. INT'L L.J. 29, 37–38 (2003).

were subsumable under these headings to allow a meaningful comparison. The following diagram illustrates the composition of comparative concepts:

Diagram 1: Properties Used for Concept Formation¹⁵⁴



As shown in Diagram 1, defining properties and accompanying properties should be further differentiated into two sub-categories each. Defining properties can be distinguished into characteristics and indicatives. Characteristics are “compulsory” defining properties, i.e., such ones that in their sum are necessary and sufficient to identify an institution as a member of the concept. A comparative concept, being a type, should always consist of a multitude of characteristics.¹⁵⁵ This decreases the risk of choosing a distinguishing property judgmentally, adds depth to the concept, and enhances its explanatory utility. To find out which properties are characteristics, ideally all legal systems have to be searched for legal institutions that share characteristics with the one of interest. Mini-

154. The terms “defining properties” and “accompanying properties” are taken from Giovanni Sartori, *Guidelines for Concept Analysis*, in *SOCIAL SCIENCE CONCEPTS: A SYSTEMATIC ANALYSIS* 15, 33 (Giovanni Sartori ed., 1984). These subdivisions are original.

155. John Gerring, *What Makes a Concept Good?: A Criterial Framework for Understanding Concept Formation in the Social Sciences*, 31 *POLITY* 357, 380 (1999); Heyde, *Typus*, 5 *STUDIUM GENERALE* 235, 239 (1952) (F.R.G.).

mally, all legal systems that are part of the comparative research project have to be surveyed.

Indicatives, or “sometimes differentiating properties,” are optional defining properties. They are individually and in their sum not capable of defining an institution as a member of a specific concept, but they indicate membership because many members of a concept share these properties. To include indicatives in the definition of a concept makes sense because they illustrate its dynamics. In the case of emerging concepts, indicatives refer to properties that might become characteristics once the concept has materialized fully. In the case of aging concepts, they indicate properties that once were characteristics. The latter is important to tackle the problem of conceptual stretching.¹⁵⁶ This problem refers to the distortion that occurs when an aging concept does not fit new cases. The usual result in such a case is that an otherwise useful concept is malformed or abandoned.¹⁵⁷ This rather unwelcome outcome can be avoided when means are found not to depend on the assumption that members of a concept share a full set of defining properties.¹⁵⁸ Indicatives are such a means.

Accompanying characteristics are those that do not serve to distinguish concepts from one another. They fall into the categories of dissimilars and idiosyncraties. Idiosyncraties are properties that are unique to a particular institution, but not characteristic enough to distinguish from other members of the same concept. The consideration doctrine of the common law, for example, would be such an idiosyncratic property within the concept of “voluntary agreements.”¹⁵⁹ Dissimilar properties of a legal institution have a complement in other members of the same concept. This complement, however, is of a different kind, but again, not characteristically different. Compulsory licenses, for example, are administered in some countries by public authorities, in others by courts. This dissimilar difference is not substantial enough to subsume the two systems under different concepts.

i. Defining Properties

To determine defining properties properly and to distinguish them from accompanying ones is probably the most important operation of the

156. See generally David Collier & James E. Mahon, Jr., *Conceptual “Stretching” Revisited: Adapting Categories in Comparative Analysis*, 87 AM. POL. SCI. REV. 845 (1993) (discussing conceptual stretching within the context of democracy and authoritarianism).

157. Heyde, *supra* note 155, at 239.

158. Collier & Mahon, *supra* note 156, at 852.

159. Reitz, *supra* note 3, at 621.

method. For practical reasons, only a part of the properties of an institution can be used for the purpose of its classification. A relevant choice has to be made because the classification will vary depending upon which element is used as the focal point.

Gerring has recommended two key criteria for good concept formation: internal coherence and external differentiation.¹⁶⁰ Internal coherence means that the defining properties should not merely coincide in space and time, but have an inner relationship to one another. External differentiation means that the defining properties are chosen so that they clearly define the borders of the concept by delimiting it against other concepts. The defining properties should not only say what the concept is, but also what it is not. Consequentially, concepts should not overlap each other. Though there might be hybrid real-world legal institutions insofar as they might fall in between two legal concepts, there are no hybrid concepts. That would reduce the utility of each of the concepts and might increase the danger of the appearance of memberless concepts.

Otherwise, the six criteria set out for the formation of comparative concepts guide the selection of defining properties. To preserve the validity of a concept, its defining properties must not be of wide variation, must not be easily modified by extra legal factors, and must not change readily.¹⁶¹ Furthermore, to avoid bias, characteristics should be devised as neutral as possible. Although, this goal will not always be achievable. "Genocide" is hard to define without recourse to pejorative attributes and "human rights" without valorizing ones.¹⁶² However, characteristics can at least be named neutrally: the comparatist must not rely on the idiosyncrasies in taxonomy and terminology of any particular jurisdiction because these were created as explicatory mechanisms for particular legal phenomena. Especially, homonyms in different legal systems present traps.¹⁶³ The conceptual comparatist needs to distinguish carefully between the legal terms he or she finds (which are irrelevant for the comparative process) and the legal institutions they represent (which are the "bricks" that he or she wants for the construction of his or her concept).

Characteristics have to represent both the structure and the consequences of the legal institutions that are members of a concept. If either structure or consequences differ substantially, then the institutions in question belong to different concepts. "Morals crimes" (prostitution, dis-

160. Gerring, *supra* note 155, at 373–76.

161. HEYWOOD, *supra* note 150, at 33.

162. Gerring, *supra* note 155, at 385.

163. Sartori, *supra* note 154, at 35–39; WATSON, *supra* note 40, at 11; BARTELS, *supra* note 146, at 92; Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 L.Q. REV. 50, 52–53 (1966); *see, e.g.*, Ainsworth, *supra* note 94, at 20–21.

tribution of child pornographic material, etc.) may, for example, fulfill the structural criteria of statutory sanctions in three different legal systems.¹⁶⁴ In system A, though, the behavior is treated as a misdemeanor, in system B as a felony, and in system C as a mere infringement of administrative regulations. In this case, the legal institutions of systems A and B can be attributed to the same comparative concept because the consequences—though not identical—are sufficiently similar (both systems grade the factual circumstances as criminal offenses).¹⁶⁵ The legal institution of system C forms part of a separate concept (administrative offense).

ii. Gradation

The difference in consequences between legal systems A and B lead to another feature of Conceptual Comparisons: gradation. Concepts have to be defined and named in such a broad way that they cover even heterogeneous legal institutions, as long as they share overriding defining properties. Accordingly, the characteristics employed in concept formation have to be considerably wide. As in the example of “morals crimes,” some members of the concept will have more of a characteristic than others. This varying grade is highlighted in Diagram 1 as superscript numerals. The higher this number, the more typical is the particular institution. We measure gradation for two reasons. First, it helps concepts to weather the storm of scholarly debate. As empirical research of psychologists suggests, concepts that are construed as rigid, logically bound domains defined exclusively by all-or-none criteria are unlikely to maintain their hold on the discourse. This is because scholars naturally disagree upon how well an institution represents a concept or one of its characteristics.¹⁶⁶ Secondly, gradation has an inherent analytical value. It allows for singling out institutions that are more central to the concept than others (prototypes) because they express its characteristics to an exceptionally pure degree.

b. Quantitative Analysis

In its quantitative analysis, the conceptual orientation looks at the extension of a particular concept, the entities in the world to which it refers.

164. See Richard S. Frase, *Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses*, 100 W. VA. L. REV. 773, 788 (1998).

165. JOHN CYRIL SMITH & BRIAN HOGAN, CRIMINAL LAW 26 (10th ed. 2002).

166. See Eleanor H. Rosch, *Natural Categories*, 4 COGNITIVE PSYCHOL. 328, 328–50 (1973).

These entities are the various factual situations that are covered by the legal institutions that form part of the concept (case lines). The underlying question is, which other factual situation than the one we started with do the institutions that are members of the concept cover? These factual situations can be considered the quantitative characteristics of the comparative concept. Again, similar to the qualitative analysis, ideally all legal systems are browsed for case lines, which members of a certain concept address. All factual situations discovered in this way form the quantitative dimension of the concept, though only seldom will a real-world institution cover the full set of situations. In its quantitative dimension, therefore, the comparative concept is a Weberian ideal type, or "moulded type" ("*Ausprägungstypus*") in Engisch's words,¹⁶⁷ an ideal model for a group of existing legal institutions in which the determining qualities of these institutions are represented exceptionally purely. The reason why the quantitative analysis is looking for an ideal type, as opposed to the real type that the qualitative analysis established, is the former's significance for the capability analysis at which the conceptual orientation aims. Only an ideal type allows for assessing the relative potential of a particular institution later in the systematic comparison.

In construing the quantitative dimension of the concept, one should remember the analogy drawn between comparative law and a dictionary.¹⁶⁸ Just as a dictionary is full of obsolete and archaic, unused and common words, the quantitative dimension of the taxonomic concept is timeless. It includes all case lines that have been addressed by the concept, past and present. Should more than one institution address one factual situation in a particular legal system, like, for example, an accident that can give rise to delictual as well as contractual liability, it is quantitatively relevant for all of these institutions.

c. Example: Conceptualization of Second-tier Protection for Inventions

In the following section, I will give an example of how a conceptualization under Conceptual Comparisons might look, and how it might make comparative studies more meaningful. The example is taken from the field of intellectual property law. Second-tier protection for inventions (second-tier protection) has become a hotbed for comparatists since 1995 when the European Commission announced its intention to harmonize national laws of the EC Member States in this regard.¹⁶⁹ Second-tier

167. See ENGISCH, *supra* note 137, at 246.

168. Friedman, *supra* note 28, at 49–50.

169. Commission of the Eur. Communities, *Green Paper: The Protection of Utility Models in the Single Market*, COM (1995) 370 final (July 19, 1995). This report has

protection is conventionally defined as all forms of intellectual property that provide protection for minor technical inventions, which do not comply with the requirements of patentability.¹⁷⁰ Such a kind of intellectual property right is believed to be particularly suited for small and medium-sized enterprises that make modest workshop improvements to existing products and lack the resources and the necessary market information to engage in full-scale patenting.¹⁷¹

i. Pre-existing Conceptualization

Applying Conceptual Comparisons to second-tier protection is an exercise in re-conceptualization. Comparatists have divided European jurisdictions already into three¹⁷² or four¹⁷³ different groups of regimes that they see as instances of second-tier protection. The criteria used for differentiation, so far, are the extent of subject matter protected and the test of necessary advance over the prior art. According to this conceptualization, a first group, including Italy, Portugal, and Spain, has retained the classic “utility model” regime of the late nineteenth century. Second-tier protection, here, mainly fills a particular gap in the law of technical design by protecting functional shapes (“spatial forms”) of hand tools and similar implements, which are neither covered effectively by patent law nor by trade secret law.¹⁷⁴ Jurisdictions of this group distinguish second-tier protection from patent protection by lowering the threshold of admis-

been followed by a working paper in 1996; a proposal for a directive in 1997, *Commission Proposal for a European Parliament and Council Directive Approximating the Legal Arrangements for the Protection of Inventions by Utility Model*, COM (1997) 691 final (Dec. 12, 1997), amended by *Commission Amended Proposal for a European Parliament and Council Directive Approximating the Legal Arrangements for the Protection of Inventions by Utility Model*, COM (1999) 309 final /2 (Dec. 7, 1999); and another working paper in 2001, *Commission Summary Report of Replies to the Questionnaire on the Impact of the Community Utility Model with a View to Updating the Green Paper on Protection by the Utility Model in the Internal Market*, SEC (2001) 1307.

170. MARGARET LLEWELYN, SECOND-TIER PROTECTION: EUROPEAN COMMISSION GREEN PAPER ON THE PROTECTION OF UTILITY MODELS IN THE SINGLE MARKET 1 (1996); Jeremy Newton, *Towards a European Utility Model*, 18 EUR. INTELL. PROP. L. REV. 446, 446 (1996).

171. Opinion of the Economic and Social Committee on the Commission’s 1995 Green Paper, O.J. C-174/6, 1.7–1.10 (1996).

172. Newton, *supra* note 170, at 446.

173. WILLIAM CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS ¶¶ 3-31–3-32, at 127–28 (5th ed. 2003); LLEWELYN, *supra* note 170, at 14.

174. J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2458–59 (1994).

sibility compared with the inventive step requirement of patent law on the one hand, and by confining the protectable subject matter to “products in a spatial form” on the other hand. A second group, including Germany, Denmark, and Austria, has moved away from the classic utility model regimes by dropping the spatial form requirement while retaining the “soft” inventive step standard. A third group of countries, including France, Belgium, and the Netherlands, likewise refrains from the spatial form requirement, but unlike the second group, uses the full inventiveness test of patent law.

In addition to these three groups, some scholars recognize a fourth group of European jurisdictions, notably the United Kingdom and Luxembourg, where protection for minor inventions allegedly is provided by “functional equivalents” to second-tier protection, such as trade secret law,¹⁷⁵ unregistered design rights,¹⁷⁶ or the lowering of the general inventiveness test in patent law.¹⁷⁷

ii. Mis-conceptualization

This conceptualization of second-tier protection—especially the inclusion of the fourth group—is devised by scholars working in the functional tradition.¹⁷⁸ True to his or her method, the conceptual comparatist has to reassess the pre-existing classification critically. Upon his or her presumption, that the structure of a particular legal institution is important in ordering legal understanding, it will strike him or her as questionable, whether both the third and the fourth group of countries can be subsumed under the heading “second-tier protection.” The French “*certificat d'utilité*” of the third group, for example, runs parallel with the patent law system with the only difference being that inventions merely get a short-term protection of six years under a *certificat d'utilité*, which is granted without a prior search report.¹⁷⁹ Inventions of a lower level of inventiveness do not receive any particular attention. Accordingly, “second-tier protection” in France is, in practice, used to a much lesser extent

175. Mark D. Janis, *Second-tier Patent Protection*, 40 HARV. INT'L L.J. 151, 215 (1999).

176. CORNISH & LLEWELYN, *supra* note 173, ¶ 3-23, at 127; Trevor Cook, *So-called Bio-piracy and the Beneficiaries of Protection*, 47 MANAGING INTELL. PROP. 3 (1995).

177. Margaret Llewelyn, *Proposals for the Introduction of a Community Utility Model System: A UK Perspective*, 2 WEB J. CURRENT LEGAL ISSUES (1995), available at <http://webjcli.ncl.ac.uk/articles2/llewe12.html> (last visited Feb. 6, 2007).

178. For a general critique of functionalism's conceptualisation capacities, see C.J.P. van Laer, *The Applicability of Comparative Concepts*, 2.2 ELECTRONIC J. COMP. L. (1998), available at <http://www.ecjl.org/22/art22-1.html> (last visited Feb. 6, 2007).

179. UMA SUTHERSANEN, DESIGN LAW IN EUROPE 19-006 (2000).

than in countries of the first two groups.¹⁸⁰ For the conceptualist, therefore, the *certificat d'utilité* is an alternative form of patent protection,¹⁸¹ rather than a second-tier protection regime.

The conceptual comparatist will also reject subsuming “functional equivalents” that supposedly exist in legal systems under the concept of second-tier protection. Some of these “equivalents,” such as trade secret law, are not even equivalent because second-tier protection was explicitly devised in the nineteenth century to compensate their deficits (in the case of trade secret law deficits in protecting minor inventions).¹⁸² Others, like the unregistered design right, afford short-term protection to original shapes and configurations. They are nonetheless dissimilar to second-tier protection in the form of a utility model right because the kind of protection they grant is different.¹⁸³ Most importantly, the unregistered design right does provide its holder with a lower level of exclusive protection¹⁸⁴ than second-tier protection of inventions. A violation of the registered design will only be recognized by courts when its holder can prove “reproduction” by copying, whereas a second-tier protection regime will always grant exclusive protection regardless of a proof of copying. Furthermore, the law of unregistered designs works with a different standard for protection (“creativity” instead of “inventiveness”) and does not warrant priority for the inventor because no registration takes place. Like the protection of minor inventions, within the framework of patent law, by lowering the latter’s requirements for inventiveness, protection by unregistered design seems to be an alternative form of protection, rather than an equivalent to second-tier protection.¹⁸⁵

180. For the statistical data accumulated by Jeremy Tunnell, see Jeremy Tunnell, *The International Approach of a Tired Patent System and its Role in Patent Reform in the United States* 17 (2004), available at <http://www.wise-intern.org/journal04/WISE2004-JeremyTunnellFinalPaper.pdf>.

181. See Friedrich-Karl Beier, *The Future of Intellectual Property in Europe*, 22 INT’L REV. INDUS. PROP. & COPYRIGHT L. 157, 166 (1991).

182. Reichman, *supra* note 174, at 2458–59.

183. SUTHERSANEN, *supra* note 179, at 19–046; LLEWELYN, *supra* note 170, at 80–82; Andrew Parkes, *Short-Term Patents in Ireland*, 25 INT’L REV. INDUS. PROP. & COPYRIGHT L. 204, 208 (1994).

184. On the various levels of exclusivity in intellectual property law, see Oliver Brand, *Die Ketten des Prometheus—Grenzen der Ausschließlichkeit im Immaterialgüterrecht*, in JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 2005 77, 78–83 (Axel Halfmeier et al. eds., 2006) (F.R.G.).

185. LLEWELYN, *supra* note 170, at 33.

iii. Re-conceptualization

Accordingly, the conceptual comparatist has to try to re-conceptualize second-tier protection. The conceptual comparatist will begin by breaking down legal institutions from jurisdictions, which fall into one of the uncontroversial first two groups, into their components to abstract the defining properties that he or she needs to establish the qualitative dimension of the concept "second-tier protection." Most likely, the conceptual comparatist will come up with three characteristics.¹⁸⁶ Second-tier protection covers any institution:

1. whose requirements for acquiring exclusive protection are less stringent than those for patents, because the tests of "inventive step" and/or "non-obviousness" are lower or absent altogether;
2. whose term of protection is shorter than that for patents (usually between seven and ten years without the possibility of extension or renewal); and
3. that is not subject to substantive examination prior to the grant.

In addition, the conceptual comparatist will find one indicative, showing the rise of a new characteristic of second-tier protection. An increasing number of legal systems that award some form of second-tier protection follow the German lead in affording for the applicant a grace period. The conceptual comparatist's (or his or her predecessor in title's) written publications or public use within six months before the priority date of the invention do not constitute prior art. On the other hand, unique features, such as a limitation of the number of claims available under second-tier protection in Australian innovation patent law,¹⁸⁷ will be disregarded as accompanying properties.

Gradation allows us to identify German, Spanish, Danish, and Irish institutions as members of the concept "second-tier protection," though the threshold of novelty is surmounted at a different level. While Danish and Irish laws apply novelty for second-tier protection at a universal level, like in patent cases, German examiners take into account a more restricted state of the art (written publications worldwide, but only if they are in public use within Germany before the priority date of the invention). In Spain, the standard is even more restricted. Here, novelty for

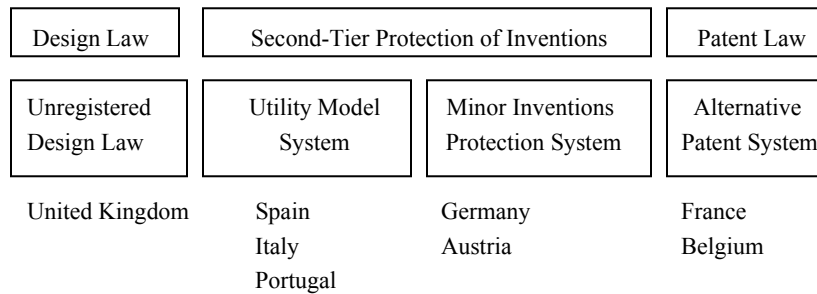
186. A full list of the properties that need to be assessed can be found in Tunnell, *supra* note 180, at 15.

187. Janis, *supra* note 175, at 172.

second-tier protection is determined according to the national state of the art only.¹⁸⁸

The defining properties, as abstracted above, would enable the conceptual comparatist to approach second-tier protection with a refined definition of the concept: it refers to all registration-based forms of intellectual property that provide protection for technical inventions with a lower level of inventiveness without prior examination and under less onerous conditions than patent law. Its qualitative dimension would accordingly only encompass the first two groups of the initial conceptualization and might, in the context of neighboring concepts, look like this:

Diagram 2: Second-Tier Protection Re-conceptualized



The quantitative dimension of second-tier protection—as abstracted from the legal institutions that contain at least all of its characteristics—is provided in Diagram 3. The “case lines” addressed by this concept are the different instances of protectable subject matter that the second-tier regimes cover. Diagram 4 shows the quantitative “share” of the concept “second-tier protection” that a real-world institution—the German “*Gebrauchsmuster*”—has. The darker color indicates case lines that German law does not cover.

188. See F.P. Goebel, *Schutzwürdigkeit kleiner Erfindungen in Europa—die materiellen Schutzvoraussetzungen für Gebrauchsmuster in den nationalen Gesetzen und dem EU-Richtlinienvorschlag*, in *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT* 916, 919–20 (2001) (F.R.G).

Diagram 3: *Quantitative Dimension of the Concept*¹⁸⁹

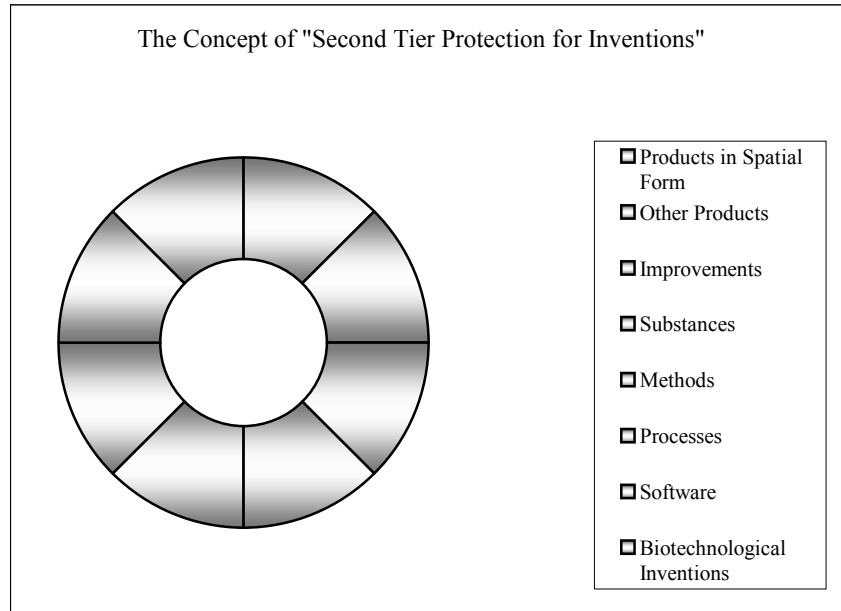
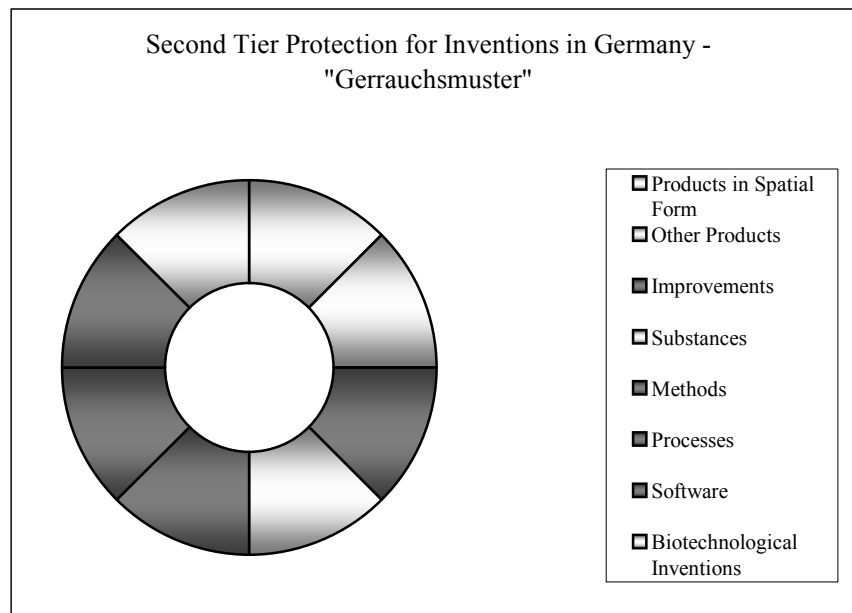


Diagram 4: *Quantitative Dimension of a Legal Institution*



189. For an overview of the subject matter covered by second-tier protection, see J.W. BAXTER, *WORLD PATENT LAW AND PRACTICE*, § 1.10 (2d ed. 1973).

2. Second Phase: Systematic Comparison

We have now seen how a conceptualization in phase one of Conceptual Comparisons might look. In the second phase, the systematic comparison, the concept is utilized by comparing it to real-world institutions. The aim is to determine and explain the extent to which these institutions conform to the concept or deviate from it and how they deviate from one another. The systematic comparison has three stages. As with the two phases of the comparative study themselves, these three stages of the second phase are not always distinctly separated from each other, nor are they always dealt with in the same order: they may be intermingled in the same discussion. The three stages are all analytical in nature. Comparatists will disagree, as discussed in Part III, upon whether it is permissible to exploit the knowledge derived from these stages normatively. Therefore, this optional fourth stage of the systematic comparison is left out of the picture here.

a. Descriptive Stage

The first stage describes the legal phenomena under scrutiny. A proper description has to be objective, i.e., free from critical evaluation, as well as comprehensive. The latter requires the comparatist to examine the *comparanda* from at least four different perspectives. It is crucial to begin with an “internal description” of the legal institution that uncovers its precise construction and consequences because this shows whether the material used for construing the defining properties of the concept has been assessed properly. The internal description has to take into account all sources of law that the legal system under comparison regards as such, including the written and unwritten authoritative material as well as affirming and derogative usage.¹⁹⁰ These sources have to be presented as reflected in the intentions and procedure of the legislature, the jurisprudence of the courts, and the position of the doctrine. Additionally, it might be helpful to analyze whether the latter is divided and whether it is concordant or discordant with judicial positions.

The second perspective is the conceptual one. In describing the legal institutions, the comparatist must make clear how they relate to the concept established in phase one of the comparative process. Qualitatively, the comparatist has to demonstrate that the institution shows the defining properties of the concept. Quantitatively, it has to become clear which factual situations of the ideal set contained in the concept that the real-world institutions address.

190. See ZWEIGERT & KÖTZ, *supra* note 12, at 35–36.

The third perspective—the systematic one—will place the topic under study in the context of the entire legal system, for the same institution may be central for one legal system and of only marginal relevance for another.¹⁹¹ The systematic description will ask, furthermore, how an institution conforms to general principles, and whether it depends on rules or institutions in other areas of the law such as procedural rules, constitutional provisions, or the requirements of supra-national law (e.g., EC directives).

The fourth perspective, finally, is meta-legal. It requires a description of the socio-economic factors of the systems in question; their policy considerations; their philosophical premises, such as the roll of law; and their social values. This perspective is extremely important for comparisons, which, like Conceptual Comparisons, are based on typology. If the socio-economic context of the *comparanda* is left unexamined, then variations in the level of power that they confer (effective law versus symbolic law) remain hidden, which might impair the comparative process.¹⁹² The meta-legal perspective also seeks to identify the actors that have played a role in shaping the objects of comparison because law must be understood as a consequence of political decisions and power structures.¹⁹³

b. Identification Stage

The second stage identifies the differences and similarities between the systems under comparison (identification stage). At this stage, the comparatist has to establish the extent to which the respective institutions deviate from the concept and from one another. In determining the deviation from the concept, the question of gradation has to be addressed. Furthermore, the accompanying properties of particular institutions have to be brought out and distinguished from the defining ones that place them within the concept.

191. M. Schmitthoff, *The Science of Comparative Law*, 7 CAMBRIDGE L.J. 94, 97–98 (1941). For the necessity to pay due attention to the dogmatic context, see Kischel, *supra* note 13, at 18–20.

192. See BARTELS, *supra* note 146, at 77; von Senger, *Von der Vergleichung des Rechts zur Vergleichung der Gesellschaftsführung*, 47 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 43, 62 (2006) (F.R.G.); Kischel, *supra* note 13, at 21.

193. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 546, 606–14, 622–29 (1997); Olsen, *supra* note 125, at 275; see, e.g., Jennifer Widner, *Comparative Politics and Comparative Law*, 46 AM. J. COMP. L. 739 (1998) (utilizing such a perspective in reflecting on the problems of developing comparative law research).

c. Explanatory Stage

The third stage accounts for divergences and resemblances—especially with regard to the concept—and can therefore be called the “explanatory stage.” Historical analysis, functional analysis, and actor analysis exercise especially strong explanatory power. Historical analysis puts institutions to a “diachronic test” by revealing whether they are genuine or borrowed from another legal system: legal institutions may be similar for three different reasons. They may have common ancestry, i.e., derive from the same (now discontinued) legal institution in the past (e.g., Roman law), they may have developed in parallel, or they may have converged. Parallel development and convergence can be distinguished by the fact that in the former case, legal institutions developed similar features independently, while in the latter case, they did so through direct contact or through mediation of a third legal institution. The variation of legal institutions, on the other hand, can be explained with regard to three other factors. The extra-legal environment might have modified them in a different way or they might have diverged either through the influence of a third legal system or due to innovative doctrinal reconstruction in the domestic law.

Alongside historical inquiry, functional analysis can be used at the explanatory stage. Here, this sort of analysis is valid because it is only used as a means of differentiating legal institutions from one another with regard to an abstract concept that has no particular function because of the way its characteristics are defined. Neither similarity nor difference in the function of the institutions under comparison is presupposed. Their function shall be determined exclusively in their respective domestic contexts. Deviations from the concept can be caused by the fact that the institutions might address different cases or that the cases addressed are problematic to a different extent in diverse legal systems. As part of a functional explanation, “hidden rules,” such as the political norms of the *qian guize* in China,¹⁹⁴ can be detected and economic considerations can be put forward as well. Economic issues, however, again have to be analyzed strictly contextually. Otherwise, the problem of multiple optima might rear its troublesome head again, as we can see beautifully in our example of second-tier protection. Here, economic analysis in Germany,¹⁹⁵ Australia,¹⁹⁶ and the United States¹⁹⁷ have recommended rather

194. See von Senger, *supra* note 192, at 56–58.

195. See LLEWELYN, *supra* note 170, at 50–72; Michael Kern, *Towards a European Utility Model Law*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 627, 628–29 (1994).

196. See AUSTRALIAN ADVISORY COUNCIL ON INTELLECTUAL PROPERTY, A REVIEW OF THE PETTY PATENT SYSTEM, ch. 5 (1995).

different arrangements for second-tier protection, arguably because the respective local needs, perceptions, and institutional settings are different, too.

Actor analysis, finally, takes into account that legal processes are complex configurations of institutional and non-institutional legal actors.¹⁹⁸ They give legal institutions their characteristic shape by applying and interpreting the standards of legal norms and doctrine. In this respect, the occurrence of "pre-eminent lawgivers" (*überragende Nomostheten*) demands particular attention. A pre-eminent lawgiver is a person who coins institutional actions (i.e., court decisions or enactments) to such an extent that these actions appear his or her own, rather than actions of the institution in which he or she is embedded.¹⁹⁹ At the same time, the influence of actors cannot be measured in terms of their impact on positive law only.²⁰⁰ Otherwise, the influence of legal scholars like Rheinstein, Ehrenzweig, or Kelsen, who "never directly influenced enactments or court decisions," would be overlooked.²⁰¹ As the influence of a particular actor is determined by his role within a given legal culture, the central questions to be addressed by the comparatist regarding actor analysis are: Who is responsible for the development of the law? Which interest groups support change or adherence to the law? Are there changes in the institutional structure of an actor (affirmative action, regime change, etc.)? What are the motives and perspectives of these groups? Which are their formal and informal roles in a given society and how do they interact with other actors? In our example of second-tier protection, answering questions such as these can highlight, for example, why some legal systems have not adopted such a form of intellectual property: in the Netherlands, local industry lobby groups prevented an enactment of second-tier protection because they feared its enactment might favor foreign competitors.²⁰²

197. Janis, *supra*, note 175, at 189–90.

198. BELL, *supra* note 40, at 12–13, 19; Chodosh, *supra* note 2, at 1112.

199. On pre-eminent lawgivers, see Oliver Brand, *Language as a Barrier to Comparative Law* (unpublished article) (on file with author).

200. Cf. Edward Rubin as criticized by Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 COLO. L. REV. 569 (1992). Hermann Kantorowicz gives a good methodological example. He argued that law is shaped not only by judicial actions, but also by scholarship. See, e.g., Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240 (1933).

201. Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 208 (1994).

202. Dick van Engelen, *The Misappropriation Doctrine in the Netherlands*, 22 INT'L REV. INDUS. PROP. & COPYRIGHT L. 11, 21 (1991). For similar influences in nineteenth

d. Contextuality

In all three stages, the legal institutions under scrutiny must be viewed in the socio-economic and cultural context in which they thrive. This context is vital for a proper understanding and accurate delineation of the law at the descriptive stage, for the precise identification of differences and similarities at the identification stage, and for a valid evaluation at the explanatory stage as well. As established above in the critique of functionalism, a mere study of texts and formal rules will give an incomplete and distorted picture. Some socio-economic and cultural background is needed in every comparative study. The amount of contextual discussion necessary depends on the socio-cultural proximity of the legal systems chosen for comparison.²⁰³ The greater the proximity between the *comparanda*, the less detail of the general social context needs to be examined. In intra-cultural comparisons—e.g., comparing German and Austrian law—the “socio-cultural context” may be restricted to the immediately relevant aspects of the social and economic environment. In comparisons of legal systems that belong to distinct societies (cross-cultural comparisons)—e.g., English law and Maori law—a detailed discussion of the social structure and organization is essential to properly assess factors such as social differentiation. To highlight the socio-economic background, methods of sociological research might have to be employed, such as statistical evidence,²⁰⁴ questionnaires, and interviews.²⁰⁵ Documents from legal practice such as standard business terms, register forms, etc., furthermore help to fill the abstract rules of foreign law with life.

C. Applications

Conceptual Comparisons aims to permit comparisons among the entire range of legal systems, even between systems from dissimilar socio-economic environments and between “radically different cultures.” Naturally, however, the same set of legal systems is not equally relevant for

century Britain, see Brad Sherman & Lionel Bently, *The United Kingdom's Forgotten Utility Model: The Utility Designs Act 1843*, 3 INTELL. PROP. Q. 265, 273–75 (1997).

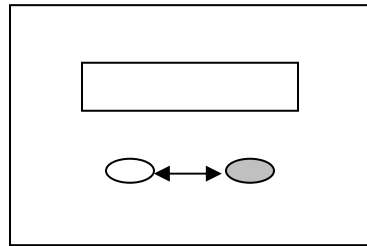
203. W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L & COMP. L.Q. 485, 515 (1974).

204. Recently, comparative expertise in this respect is made available under the heading of “numerical comparative law.” See Mathias M. Siems, *Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity?*, 13 CARDOZO J. INT'L & COMP. L. 521 (2005). Critically, see Detlev F. Vagts, *Comparative Company Law—The New Wave*, in Festschrift für Jean Nicolas Druey 595, 598–99 (Rainer J. Schweitzer et al. eds., 2002) (F.R.G.).

205. See Drobnič, *supra* note 30, at 499–03.

every comparative study. The question of which legal systems the comparatist should choose to compare must be answered on a case-by-case basis. The concentration on “parent systems”²⁰⁶ is not even good as a working rule. Rather, the choice of the *comparanda* depends on the kind of study that the comparatist wants to undertake. In the following sections, the range of studies that Conceptual Comparisons allows is explored. In the diagrams, included for reasons of clearness, squares symbolize concepts, ellipses stand for individual legal institutions, and arrows indicate the comparative studies that may be undertaken.

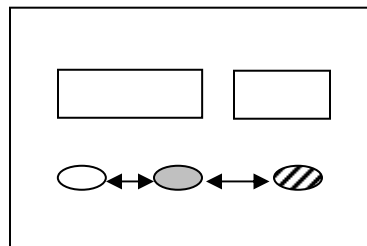
1. Deviant Case Studies



The first interesting application of Conceptual Comparisons is the “deviant case study.” After having established a concept, this kind of study takes one of the ordinary members of the concept and compares it to another member of the same concept that possesses either a remarkable quantitative dimension—be

it exceptionally large or small—or a notable number of accompanying properties (deviant case). Deviant case studies make use of the critical potential of comparative law. They reveal the tolerance of a concept towards the moral and political values imposed by legal systems upon the form and substance of legal institutions. In the example of second-tier protection, Austrian law would qualify as a deviant case within the concept because, quantitatively, it is the only jurisdiction that uses this kind of intellectual property right to provide protection for software.²⁰⁷

2. Contrastive Comparisons



Like deviant case studies, contrastive comparisons aim to highlight the diversity of law. There are two versions of this application. Intra-conceptual contrastive comparisons concentrate on “polar types,” members of the same concept that differ maximally either in illustrative and accompanying properties

or in the underlying socio-economic implications. These comparisons

206. ZWEIGERT & KÖTZ, *supra* note 12, at 41.

207. [Utility Model Act] Bundesgesetzblatt [BGBl] No. 211/1994, Part I, §§ 1–12; *see* Goebel, *supra* note 188, at 917. *But cf.* Janis, *supra* note 175, at 190.

use concepts as “benchmarks” against which to establish the unique features of the real-world systems under scrutiny. Their heuristic value is to map the width of the concepts. In our example of second-tier protection, the comparison of a (narrow) classical utility model system, such as the Spanish one, and a much wider second-tier system, such as the Irish “petty patent” or the Austrian “*Gebrauchsmuster*” that protect any patentable subject-matter, would be an instance worthy of a contrastive study. Intra-conceptual contrastive comparisons also allow for comparisons in highly value-laden areas of law. One might compare, for example, the approach of the “antipodes of the Muslim world,” Indonesia,²⁰⁸ and Morocco,²⁰⁹ towards the discrimination of women under the common roof of the *shari’a* principles.

Inter-conceptual comparisons juxtapose a member of one concept with a member of another concept, while both institutions address a similar set of factual situations. To compare members of different concepts is valid because the applicability of concepts as a *tertium comparationis* does not depend on the actual presence or absence of the relevant characteristics in the legal institutions compared, but rather on the capability of these institutions to exhibit that characteristic.²¹⁰ That is the reason why it is possible to apply foreign concepts to one’s own legal system, as it has been done, for example, in a study applying American theories of evidence to Dutch criminal justice.²¹¹ A contrastive comparison with an institution outside the concept of second-tier protection would probably ask how the United States or the United Kingdom addresses the case lines covered by second-tier protection, highlighting problems with substituting second-tier protection with trade secret law and a reduced inventiveness standard in patent law.

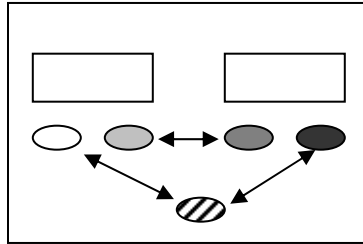
208. See, e.g., SHARI’A AND POLITICS IN MODERN INDONESIA 123 (Arskal Salim & Azyumardi Azra eds., 2003).

209. See, e.g., Bharathi Anandhi Venkatraman, Note, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1977–81 (1995).

210. E. Gene DeFelice, *Comparison Misconceived*, 13 COMP. POL. 119, 123 (1980).

211. See, e.g., WILLEM A. WAGENAAR, PETER J. VAN KOPPEN, & HANS F.M. CROMBAG, *ANCHORED NARRATIVES: THE PSYCHOLOGY OF CRIMINAL EVIDENCE* (1993).

3. Developmental and Hybrid Studies



Conceptual Comparisons can also analyze developments in the relationships between legal systems. Such an analysis has to be exercised in two steps. In a first step, the comparatist has to explore tendencies of convergence or divergence between legal systems (in terms of “real” differences). In a second

step, a comparative developmental study would explain and evaluate such tendencies: Why do systems converge or diverge? Is convergence desirable or undesirable? In an increasingly integrated world, convergence may, for example, be required under international (e.g., World Trade Organization [WTO]) or supra-national (e.g., European Union [EU]) law. Consequently, “hybrid” legal institutions at the “intersections” of comparative concepts may emerge. The existence of hybrids can also be explained by the fact that characteristics cannot always be formulated in a “binary code:” real-world legal institutions do not fit into characteristics in a “yes-or-no” way, or a “more-or-less” way, if you take gradation into account. They might fit in only “partially,”²¹² as the French “*certificat d'utilité*” does, for example, in the system of second-tier protection as well as in the system of patent protection.

4. Taxonomic Comparisons

A fourth possible application for Conceptual Comparisons is taxonomic comparison. Concepts can be differentiated into equivalent, horizontal categories and hierarchical, vertical ones. The latter can be organized in the form of taxonomies similar to the botanical ordering of genus, species, and sub-species. A taxonomy of concepts—while certainly not an end in itself—might enhance the heuristic value of comparative law as an organizational discipline.²¹³ It simplifies and systematizes data collection and makes intra- and inter-group comparisons easier by highlighting the interrelation of concepts.

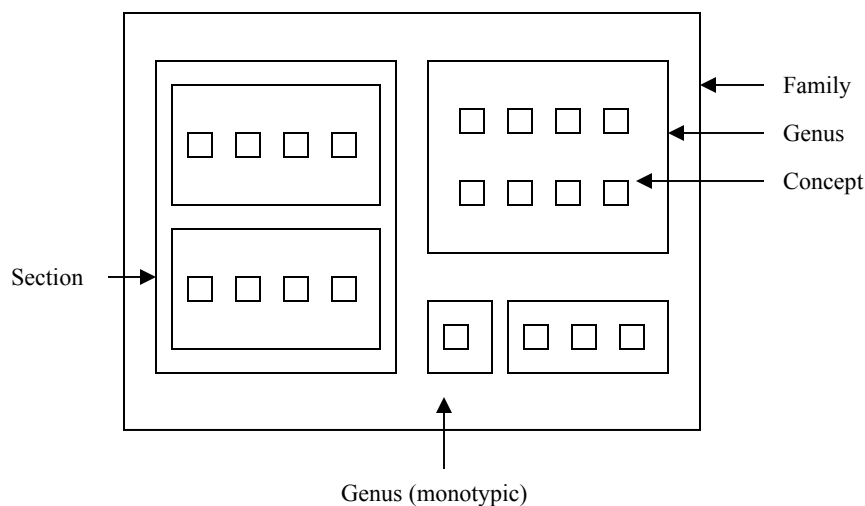
Concepts, which share the most characters in common, can be placed into larger, more inclusive classes (genera); these in turn are assembled into even more inclusive groups called families as outlined in Diagram 5. The concept, “agreement of sale,” for example, belongs to the genus “voluntary agreements” that forms part of the family “obligations.” Each

212. See generally Tate, *supra* note 148, at 19–20 (listing examples).

213. Kokkini-Iatridou, *supra* note 40, at 151. But see Sandrock, *supra* note 87, at 65.

vertical class can be understood as a different level of abstraction. We climb the “ladder of abstraction by reducing (in number) the characteristics of a concept [and] descend a ladder . . . by augmenting (in number) [those] characteristics.”²¹⁴ It is advisable, however, to climb the ladder of abstraction with care. A concept described by only very few characteristics can become analytically insignificant.²¹⁵ When the conceptual comparatist climbs the ladder of abstraction, he or she has to be careful. The quantity of objects that a concept refers to says nothing about its analytical utility. Therefore, even concepts that have only one member can be built (monotypic concepts).²¹⁶ That might be useful and necessary for including very remote legal systems in a comparative study.

Diagram 5: Taxonomic Organization of Concepts²¹⁷



At this point, it should be reiterated that the concepts, which Conceptual Comparisons forms, are not necessarily alternative, i.e., mutually exclusive. They can also be cumulative, i.e., concepts in which institutions can be classed that also belong to another category.²¹⁸ This is unproblematic as long as comparatists are aware that the taxonomies they create with Conceptual Comparisons constitute a number of interrelated taxonomic “trees” that comparatively describe the law, and not a single, unitary one.

214. Sartori, *supra* note 154, at 44.

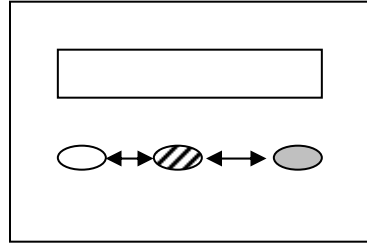
215. BARTELS, *supra* note 146, at 76.

216. Cf. SMELSER, *supra* note 152, at 176.

217. The diagram is an adaptation of HEYWOOD, *supra* note 150, at 14.

218. See *supra* Part IV.B.1.b.

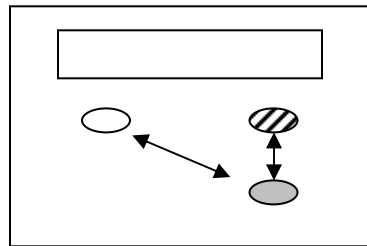
5. Prototype Studies



Concepts will be frequently derived from a specific system of geopolitical and economic significance to the comparatist's audience. That might lead to an implicit equivalence of a parochial "prototype" with the concept.²¹⁹ It might be interesting to compare the prototype with other members of the concept. This

could elucidate the way in which the concept and its members develop. Prototype studies could reveal, for example, that concepts are becoming more condensed because of internal tendencies for further convergence. As it might happen in the case of second-tier protection, the intended harmonization of the law of EC Member States is closely based on the "prototypical" German approach.²²⁰ On the other hand, it might be shown that concepts are becoming weaker because benchmark jurisdictions that have provided models for shaping a particular area of the law lose their appeal, as it now happens with German company law.²²¹

6. Diachronous Comparisons



A sixth application for Conceptual Comparisons is the diachronous study. These studies involve either the comparison of subsequent legal institutions in one legal system that is a member of a specific concept, or the comparison of different members of a concept that existed at different periods of time. Such

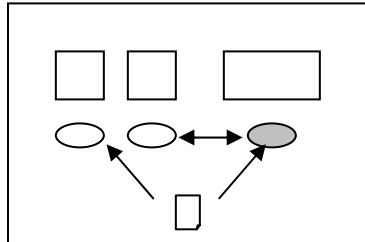
comparisons establish the historical connections within a concept and allow the study of legal development. In the case of second-tier protection, it might be interesting, for example, to compare the German approach prior to 1990, when it still had a spatial form requirement, with the present Spanish or Italian law, which currently maintains this requirement.

219. Chodosh, *supra* note 2, at 1107.

220. SUTHERSANEN, *supra* note 179, at 19–048.

221. See REINIER R. KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 75–94 (2003).

7. Case Studies



Case studies, the final application of Conceptual Comparisons, are concentrated on one particular factual situation. In a particular case, we might ask for example: How do different legal systems deal with minor improvements in the manufacture of hand-tools? From that starting point, the comparatist has to

find out which legal institutions are invoked by the legal systems that he or she wants to study to deal with the situation. These institutions, in turn, have to be grouped under the various concepts to which they belong. Only then is a direct comparison between the different legal institutions possible.

D. Virtues of the Method

The applications of Conceptual Comparisons indicate some advantages of the method. First, it allows for studies not viable under functionalism or any of the other methods discussed in Part III. Prototype studies, taxonomic comparisons, and diachronous comparisons, are unique to Conceptual Comparisons. This method also responds to a rising call for expanding the scope of comparative law to purely domestic contexts (one-country studies).²²² In areas where legal transplants are frequent, as in company law, transplanted and domestic institutions often co-exist and compete with each other in the same legal system. Conceptual Comparisons might provide a proper yardstick to analyze such situations because it does not require *comparanda* from different legal systems to be operational.

Secondly, over time, Conceptual Comparisons will establish a common reference system in the form of the concepts that it develops. Thereby, it might serve as a “research cycle” that allows a more fruitful dialogue of scholars working in different traditions. Critical legal scholars and culturalists can continue their work within the framework of “deviant case studies” and “contrastive comparisons.” They can, furthermore, monitor whether the explanatory stage of phase II pays due respect to the extra-legal context of the rules examined. Functionalists—in the broader and the narrower sense—can also carry on contributing to comparative studies. Conceptual Comparisons probably makes their insights even more

222. Chodosh, *supra* note 2, at 1084.

valuable. It frees them from objections against the premises upon which they work by acknowledging that the function of law is context-dependent and by consequently limiting the role of functionalism to that of an explanatory tool in phase II of the comparative process.

Thirdly, Conceptual Comparisons might make the application of knowledge derived from comparative studies more likely. The works of comparative lawyers, especially those from civil law jurisdictions, are often disregarded by their more dogmatically oriented colleagues because of their functional or otherwise un-dogmatic approach. Conceptual Comparisons has the capacity to alter this by providing a framework that pays more attention to the constructional details of the law and might therefore dissolve or mitigate the antagonism between comparatists and dogmatic scholars.

Fourthly, Conceptual Comparisons makes the choice of legal systems for comparison more transparent and rational. The process advocated so far by functionalism is dependent on implicit choices necessitated by the functionalists' general avoidance to discuss questions of "likeness" and on the operational limitations that the three presuppositions of functionalism force upon the comparatist. In contrast, the conceptualization undertaken in phase I of Conceptual Comparisons provides a criterion that requires the comparatist to make an explicit and rational choice. As the sample applications sketched above have shown, the comparatist will have to limit research to those legal systems that fit the kind of study he or she wants to undertake. That can still be "radically different cultures" in the case of a contrastive comparison or members of the same concept in a prototype or deviant case study.

Finally, Conceptual Comparisons can assist the study of legal transplants in numerous ways. Conceptualization has predictive value.²²³ It can predict legal transplants and legal change by answering questions such as: Why and how do legal systems change? Which factors are more likely to resist legal change by imitation? How does the structure of a recipient legal system affect and modify a received legal institution? The conceptualization undertaken in phase I of the method also helps to understand the transplanting process itself better. It provides a degree of measurement against which it can be established, whether legal change takes place in the form of a gradual process of "cross-fertilisation"²²⁴ or whether entire tracts of law move from one system to another. Thus,

223. HEYWOOD, *supra* note 150, at 2-3; Mattei, *supra* note 138, at 6-7.

224. This term is used by John Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe*, in *NEW DIRECTIONS IN EUROPEAN PUBLIC LAW* 147 (Jack Beatson & Takis Tridimas eds., 1998).

regulative competition between legal systems becomes more transparent. Conceptual Comparisons furthermore allows us to distinguish between two kinds of transplants: intra- and inter-conceptual transplants. The former are more likely to happen and more likely to be successful because the receiving and the donating legal system can rely on a sufficiently similar structure in addressing a certain factual situation.

E. Possible Objections to the Method

In conclusion of this study, there are four likely objections to Conceptual Comparisons that I would like to pre-empt.

First, it might be said that Conceptual Comparisons has little value for practical comparative law.²²⁵ Practitioners, especially judges, will not base their decisions on artificial average types or ideal types like the concepts established by the proposed method. That is certainly true. It is maintained, however, that “practically applicable comparative law” is an illusion anyway. The restraints on time and resources—especially of courts—are too pressing to allow meaningful comparative work on a broad scale.²²⁶ To make comparative law practicably relevant, it has to be “filtered” through the “lenses” of comparative scholarship that in turn can be consulted by practitioners.²²⁷ Conceptual Comparisons, in this regard, makes sure that the distorting effect of the lenses is mineralized.

Secondly, comparatists might fear that Conceptual Comparisons leads them back into the formalism of nineteenth century comparative law and Saleilles’ dream of a *droit commun idéal*. That fear is unfounded. Conceptual Comparisons acknowledges that social facts are so diverse that they do not lend themselves to a single scheme of concepts. Respectively, it does not claim that there is a single set of mutually exclusive concepts under which all legal institutions of all legal systems can be subsumed. As shown in the description of taxonomic comparisons, the proposed method rather sees concepts on a horizontal level as competing

225. See Sandrock, *supra* note 87, at 48.

226. See generally Hein Kötz, *Der Bundesgerichtshof und die Rechtsvergleichung*, in 50 JAHRE BUNDESGERICHTSHOF: FESTGABE AUS DER WISSENSCHAFT 825 (Claus-Wilhelm Canaris et al. eds., 2000) (F.R.G); see also T. Koopmans, *Comparative Law and the Courts*, 45 INT’L & COMP. L.Q. 545, 548–50 (1996).

227. See generally K.P. Berger, *Auf dem Weg zu einem Europäischen Gemeinrecht der Methode*, 9 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 4, 12 (2001) (F.R.G) (evaluating methodologies and legitimization of the use of comparative law in Europe to “Europize” general law for its adoption and use by practicing jurists); see also Guy Canivet, *The Practice of Comparative Law by the Supreme Courts: Brief Reflections on the Dialogue Between the Judges in French and European Experience*, 80 TUL. L. REV. 1377, 1387, 1395 (2006).

ways of addressing a factual situation, allowing for a variety of alternative and cumulative concepts that can be vertically integrated in different ways. As long as the comparatist explains the construction of his concepts in a way that allows other comparatists to verify them, there is also no need to fear²²⁸ that value judgments of the individual comparatists may become intermingled inseparably with seemingly neutral concepts.

Thirdly, one might suggest that the proposed method makes case studies, which form the bulk of the comparative work, exceedingly difficult. It is conceded that Conceptual Comparisons makes them more complex. That, however, is only appropriate. Case studies are inherently dangerous because they only ask how the law addresses one particular factual situation, without regard to other situations with which the institution may have to deal. Conceptual Comparisons forces the comparatist to take into account that not only the law, but also the factual situation it addresses, must be seen as part of a wider context.

Finally, scholars might object that functionalism may not be displaced as the core method of comparative law because of its analytical value for private international law. In fact, there are various approaches to conflict of laws that use "functional" or "teleological" methods in characterizing foreign legal institutions or rules.²²⁹ However, these approaches have to be distinguished methodologically from functionalism as the basis of comparative law. That becomes evident already by the fact that functional analysis in the field of private international law routinely works in areas that comparative functionalism admits to be beyond its reach, e.g., family law.²³⁰ The demise of functionalism as the basis of comparative studies and its replacement with Conceptual Comparisons would therefore not interfere with the mechanisms of private international law.

228. BARTELS, *supra* note 146, at 76.

229. For Continental European approaches, see JAN KROPHOLLER, *INTERNATIONALES PRIVATRECHT* 122 (4th ed. 2001). For American approaches, see EUGENE F. SCHOLES ET AL., *CONFLICT OF LAWS* 43–58 (3d ed. 2000) (discussing the functional approach developed to analyze conflict of laws).

230. BERND VON HOFFMANN & KARSTEN THORN, *INTERNATIONALES PRIVATRECHT: EINSCHLIEBLICH DER GRUNDZÜGE DES INTERNATIONALEN ZIVILVERFAHRENSRECHTES* § 6, Nos. 5–8 (7th ed. 2002) (F.R.G.).