Addressing Methodological Challenges in Comparative Law Research

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Abstract

Comparative law is a field of study whose object is the comparison of legal systems with a view to obtaining knowledge that may be used for a variety of theoretical and practical purposes. It embraces: the comparing of legal systems with the purpose of ascertaining their differences and similarities; the systematic analysis and evaluation of the solutions which two or more systems offer for a particular legal problem; and the treatment of methodological problems that arise in connection with the comparative process and the study of foreign law. One type of interest pertaining to knowledge and explanation in comparative law is associated with the traditional comparison de lege lata and/or de lege ferenda. Pursuant to this comparison are searches for models for the formulation of new legislative policies at a domestic, regional or international level. Comparative law can also be a valuable tool when courts and other authorities interpret and apply legal rules or are faced with the task of filling gaps in legislation or case law. However, when carrying out their tasks, comparative law researchers are often faced with vexing methodological problems.

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Some of these problems pertain to difficulties in establishing the so-called tertium comparationis – the common denominator between the legal rules or institutions under consideration that makes comparison possible. This paper examines some key aspects of comparative law methodology, with particular attention being paid to the normative-dogmatic and functional approaches to the comparability issue. It is submitted that, depending on the demands and goals of the particular research project, combining elements of these two approaches may provide a useful way of addressing some of the methodological challenges that arise in the context of comparative law research.

Introduction

Modern comparative law has progressed through different stages of evolution. Influenced by developments in the social and biological sciences and a renewed interest in history and linguistics during the nineteenth century, comparatists tended to focus, at that time, upon the historical development of legal systems with a view to tracing broad patterns of legal progress common to all societies. The notion of organic evolution of law as a social phenomenon led scholars to search for basic structures, or a 'morphology', of law and other social institutions. They sought and constructed evolutionary patterns with a view to uncovering the essence of the idea of law. As Franz Bernhöft remarked, "comparative law seeks to teach how peoples of common heritage elaborate the inherited legal notions for themselves; how one people receives institutions from another and modifies them according to their own views; and finally how legal systems of different nations evolve even without any factual interconnection according to the common laws of evolution. It searches, in short, within the systems of law, for the idea of law".(1) In the late the nineteenth century, the French scholars Édouard Lambert and Raymond Saleilles, motivated by a universalist vision of law, advocated the search for what they referred to as the

'common stock of legal solutions' from amongst all the advanced legal systems of the world. This idea was introduced at the First International Congress of Comparative Law, held in Paris in 1900, which also adopted the view of comparative law as an independent and substantive science concerned with unravelling the patterns of legal development common to all advanced nations.(2)

However, in the first half of the twentieth century the view prevailed among scholars that comparative law is no more than a *method* to be employed for diverse purposes in the study of law.(3) According to this view, comparative law is simply a means to an end and therefore the purpose for which the comparative method is utilized should provide the basis for any definition of comparative law as a subject. This approach entailed a shift in emphasis from comparative law as an independent discipline to the uses of the comparative method in the study of law. By focusing on the uses of the comparative method, comparatists divided their activities into categories, such as 'descriptive comparative law' or '*comparative nomoscopy*',

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（1） F. Bernhöft, "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft", (1878) 1 *Zeitschrift für vergleichende Rechtswissenschaft*, 1 at 36-37. And see E. Rothacker, "Die vergleichende Methode in den Geisteswissenschaften", (1957) 60 *Zeitschrift für vergleichende Rechtswissenschaft*, 13 at 17. According to Giorgio del Vecchio, "many legal principles and institutions constitute a common property of mankind. One can identify uniform tendencies in the evolution of the legal systems of different peoples, so that it may be said that, in general, all systems go through similar phases of development." "L' unité de l' esprit humain comme base de la comparaison juridique", (1950) 2 (4) *Revue internationale de droit comparé*, 686 at 688.

（2） See G. Dannemann, "Comparative Law: Study of Similarities or Differences?", in M. Reimann & R. Zimmerman (eds), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford, Oxford University Press, 2019), 390, 392.

（3） The co-called 'method theory' has been advocated by a number of eminent comparatists, including Frederick Pollock, René David and Harold Cooke Gutteridge. See M. Siems, *Comparative Law*, 2nd ed. (Cambridge, Cambridge University Press, 2018), 6-7. Consider also J. Hall, *Comparative Law and Social Theory* (Baton Rouge, Louisiana State University Press, 1963), 7-10.

signifying the mere description of foreign laws; '*comparative nomothetics*', concerned with the comparative evaluation of legal systems; '*comparative nomogenetics*' or 'comparative history of law', focusing on the evolution of legal norms and institutions of diverse systems; 'legislative comparative law', referring to the process whereby foreign laws are invoked for the purpose of drafting new national laws; and 'applied comparative law' or 'comparative jurisprudence', with respect to which the aim of the comparative study may be, for instance, to assist a legal philosopher in constructing abstract theories of law, or a legal historian in tracing the origins and development of legal concepts and institutions.(4) Such divisions do not militate against the basic unity of the comparative method. As Harold Gutteridge pointed out, comparative law is not fragmentary in nature: it does not consist of a patchwork of independent inquiries related to each other only by virtue of the fact that they all involve the study of different legal systems. The basic feature of comparative law, understood as a method, is that it can be applied to all types and fields of legal inquiry. It is equally employed by the legal philosopher, the legal historian, the judge, the legal practitioner and the law teacher, and covers the domain of both public and private law.(5)

One might say that those who construe comparative law as a method and those who view it as a science look at it from different angles. When speaking of 'laws' and 'rules', the former appear to have in mind normative 'laws' and 'rules' – the things that legal professionals commonly work with. The latter, on the other hand, tend to perceive law primarily as a social and cultural phenomenon, and the relationship

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（4） See in general H. C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge, Cambridge University Press, 1946, repr. 2015), 4.

（5） H. C. Gutteridge, ibid at 10. And see G. Langrod, "Quelques réflexions méthodologiques sur la comparaison en science juridique", (1957) (9) *Revue internationale de droit comparé*, 363-69.

between law and society as being governed by ‘laws’ or ‘rules’, which transcend any one particular legal system.(6) At its simplest level, that of the description of differences and similarities between legal systems, the comparative method allows us to acquire a better understanding of the characteristic features of particular institutions or rules. But as the comparative method becomes more sophisticated, for example where the socioeconomic and political structures, historical background and cultural patterns that underpin legal institutions and rules are taken into account, the comparative method begins to produce explanations based on interrelated variables – explanations which become progressively more scientific in nature.(7) One might argue that a sharp dichotomy between science and method can be epistemologically dangerous, since there is no science without method. And what connects the two is the model whose aim is to relate the experience of the real world to an abstract scheme of elements and relations.(8) In this respect, one might say that comparative law is part of legal

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（6） According to J. H. Merryman, a distinction may be made between ‘professional’ and ‘academic’ comparative law scholarship. By professional comparative law scholarship, he means “the sort of work that is principally of interest and value to lawyers, judges and legislators professionally engaged in dealing with concrete legal questions. Academic [comparative law] can be divided into humanistic and scientific. Humanistic scholarship is in the tradition of philosophical, historical and literary description, narrative, interpretation, analysis and criticism. … scientific [refers to] scholarship that seeks to educe generalizations that can be used as the basis for explanations of and predictions about social-legal behavior. These are categories of convenience and are not mutually exclusive.” (1998) 21 *Hastings International and Comparative Law Review* 771, 772.

（7） Among the leading scholars who advocated the intrinsic value of comparative law as a science and as an academic discipline is Ernst Rabel. According to him, “comparative law can release the kernel of legal phenomena from the shell of their formulae and superstructures and maintain the coherence of a common legal structure.” Cited in H. Coing, “Das deutsche Schuldrecht und die Rechtsvergleichung” (1956) *Neue Juristische Wochenschrift*, 569, 670. On the view that comparative law constitutes both a science and a method consider G. Winterton, “Comparative Law Teaching”, (1975) 23 *American Journal of Comparative Law*, 69.

science, using the term ‘science’ to describe a discourse that functions at one and the same time within ‘facts’ and within the conceptual elements that make up ‘science’. And the goal of legal comparison as a science is to bring to light the differences existing between legal models, and to contribute to the knowledge of these models.(9) Scientific comparative law is distinctive among the branches of legal science in that it depends primarily on the comparative method, whereas other branches may place greater emphasis on other methods of cognition available, such as empirical induction or a priori speculation. Thus, although comparative law is sometimes identified with legal sociology, it is really more confined. Naturally it does, however, support the other branches of legal science and is itself supported by them.(10)

（8） As the German jurist Anselm von Feuerbach has observed, “The richest source of all discoveries in every empirical science is comparison and combination. Only by manifold contrasts the contrary becomes completely clear; only by the observation of similarities and differences and the reasons for both may the peculiarity and inner nature be recognized in an exhaustive manner. Just as the comparison of various tongues produces the philosophy of language, or linguistic science proper, so does a comparison of laws and legal customs of the most varied nations, both those most nearly related to us and those farthest removed, create universal legal science, i.e., legal science without qualification, which alone can infuse real and vigorous life into the soecific legal science of any particular country.” *Blick auf die deutsche Rechtswissenschaft, Vorrede zu Unterholzner, Juristische Abhandlungen* (München 1810), in *Anselms von Feuerbach kleine Schriften vermischten Inhalts* (Osnabrück 1833), 163. Cited in W. Hug, “The History of Comparative Law”, (1932) 45 (6) *Harvard Law Review* 1027 at 1054. Consider also H. Barreau, *L’ épistémologie*, 3rd ed., (Paris, Presses universitaires de France, 1995), 51.

（9） See on this R. Sacco, *La comparaison juridique au service de la connaissance du droit* (Paris, Economica, 1991), 8; “Legal Formants: A Dynamic Approach to Comparative Law”, (1991) 39 (1) *American Journal of Comparative Law*, 24-25, 389; G. Samuel, “Comparative Law and Jurisprudence”, (1998) 47 *International and Comparative Law Quarterly*, 817.

The Comparative Method

The comparison is a mental process wherein two or more different objects are examined to determine their possible relationships. As an element of the cognition process, comparison cannot be considered separately from other logical means of cognition, such as analysis, synthesis, induction and deduction. Scientific comparison involves three interconnected aspects: a logical method of cognition; a process or cognitive activity; and a cognitive result, i.e. knowledge of a certain kind. It also embraces judgment and evaluative selection, as it is usually concerned with one or some aspects of the objects compared, while abstracting provisionally and conditionally other aspects. Comparison is used in all fields of scientific inquiry, although in each field the comparative method employed has its own distinct features that fulfil the relevant cognitive functions. A distinction may be drawn between the function of comparison as an element of cognition in general, and the comparative method as a relatively autonomous, systematically organized means of research designed to achieve specific aims of cognition.[(11)]

Comparison is the essence of comparative law. In this context the comparative method is employed with a view to: (a) identifying the similarities and differences between two or more legal systems, or rules or institutions thereof; (b) elucidating the

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（10） Contemporary comparatists acknowledge the important relationship between law, history and culture, and proceed from the assumption that every legal system is the product of several intertwining and interacting historical and socio-cultural factors. Thus, Alan Watson defines comparative law as “the study of the relationship between legal systems or between rules of more than one system … in the context of a historical relationship. [The study of] the nature of law and the nature of legal development.” *Legal Transplants: An Approach to Comparative Law* (Edinburgh, Scottish Academic Press, 1974; 2nd ed. Athens, Georgia, University of Georgia Press, 1993), 6-7.

（11） On the nature of the comparative process see N. Jansen, “Comparative Law and Comparative Knowledge”, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 2nd ed., (Oxford, Oxford University Press, 2019), 291.

factors on the basis of which these similarities and differences may be explained; and (c) evaluating the legal models under comparison. The comparative method is used on both the descriptive-empirical and theoretical-evaluative levels. It may be applied in a variety of comparative inquiries concerning law, such as inquiries regarding the nature of the sources of law; the ideological foundations of legal institutions; the scope and operation of legal rules and principles; techniques of statutory interpretation; forms of legal procedure; and systems of legal education.(12) The selection of the particular legal systems or aspects thereof to compare naturally depends on the aims of the comparative study and the interests of the comparatist.(13)

A legal comparison may be bilateral (between two legal systems) or multilateral (between more than two systems). It may focus on aspects of substantive law, or on formal characteristics of the legal systems under consideration, e.g. the techniques used in the interpretation of statutory enactments or judicial decisions. The subject of comparison may be legal systems or elements thereof that existed in the

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(12) According to E. Örücü, in all fields of legal study the comparative method is "an empirical, descriptive research design using 'comparison' as a technique of cognisance". See "Methodological Aspects of Comparative Law", 2006 (8) 1 *European Journal of Law Reform* 29.

(13) As P. de Cruz remarks, "It has been argued by many eminent scholars that systems selected for comparison must be those which are at a similar stage of development, and these [scholars] include Gutteridge, Pollock, and Schmitthoff. Nevertheless, it is usually necessary to select systems or institutions which are at a similar stage of legal development, which will then ensure a baseline of similarity. However, it is not necessary that this is followed in every case, because the choice of legal systems must ultimately depend on the main aims and objectives of the particular comparative investigation." *A Modern Approach to Comparative Law* (Devender, Kluwer, 1993), 36-37. And see W. J. Kamba, "Comparative Law: A Theoretical Framework", (1974) 23 *International and Comparative Law Quarterly* 485, 506 ff. According to K. Zweigert and H. Kötz, it is difficult to speak in general terms about how a comparative law scholar should select legal systems for comparison, since much depends on the precise topic of his or her research. *An Introduction to Comparative Law*, 3rd ed., (Oxford, Clarendon Press, 1998), 42.

past, (diachronic or historical legal comparison) or contemporary systems (synchronic comparison). Moreover, one may choose to compare legal systems of a particular region or transnational or international legal regimes. Comparison within a single state is referred to as internal comparison, in contradistinction to external comparison, i.e. comparison of laws belonging to different national or international legal orders. Internal comparison may pertain not only to federal but also to unitary states, and may be diachronic or synchronic. Mixed legal systems provide interesting materials for internal comparison within a unitary state. Such a comparison is useful for explaining the significance and possible interrelation of the various legal sub-systems within a unitary national legal system.

One can further distinguish between a comparison focusing on entire legal systems, or families of legal systems, and a comparison focusing on individual legal institutions, rules or practices. In the first case, we allude to *macro-comparison*, or comparative law in a broad sense; in the second case, we refer to *micro-comparison*, or comparative law in a narrow sense.(14) Macro-comparison is concerned with those features that determine the general character or style of different legal systems. It examines, for example, the historical origins and evolution of legal systems; the sources of law and their hierarchy; the ways in which legal material is distributed into branches of law; the procedures through which legal problems are addressed and resolved; the roles of those involved in law-making and the administration of justice; legislative techniques; styles of codification; approaches to statutory interpretation; modes of judicial decision-making; the contribution of legal scholars to the development of law; the division of labour among legal professionals; and forms of legal instruction. Micro-comparison, on the other hand, is concerned with particular

(14)　See G. Dannemann, “Comparative Law: Study of Similarities or Differences?”, in M. Reimann & R. Zimmerman (eds), *The Oxford Handbook of Comparative Law*, 2nd ed., (Oxford, Oxford University Press, 2019), 390, 394.

legal rules or institutions and the way in which these operate in different systems. Examples of questions falling within the province of micro-comparison include: What factors are relevant to determining the custody of children in divorce cases? Under what conditions is a manufacturer liable for damage caused to others by defective products? How is the issue of compensation addressed in the case of road traffic accidents? What are the rules governing an heir's liability for the debts of the testator? What are the rights of an illegitimate child disinherited by his or her father or mother? What is the basis of liability of a person who allows his or her house to deteriorate to a state that a tile falls from the roof and injures a pedestrian? To what extent is it possible to have a contract foisted on a person because he or she failed to refuse an offer? As Zweigert and Kötz point out, micro-comparative and macro-comparative inquiries are interrelated or interdependent, "for it is only by discovering how the relevant rules have been created and developed by the legislature and the courts and ascertaining the practical context in which they are applied that one can understand why a foreign legal system resolves a given problem the way it does and not otherwise."(15)

Familiarity with the legal rules and institutions one seeks to compare is an essential prerequisite for any meaningful comparison between legal systems. This means that the comparatist must obtain current and accurate information on the relevant aspects of the systems under consideration. However, in order to adequately learn the details of foreign law, one must overcome a number of practical and theoretical problems. In particular, one needs to keep in mind that the study of legal rules and institutions alone is hardly sufficient; it is also necessary that one takes into consideration factors relating to the context within which law operates and develops.

（15） K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., (Oxford, Clarendon Press, 1987), 5. And see G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford, Hart Publishing, 2014), 50.

This context is not only the material context of sociology, history, economy and politics, but also the ideological context of the law as well as what may be called the 'juridical life', i.e. all elements not pertaining to ideology in a strict sense but, rather, to tradition, to legal style or mentality. Describing foreign law entails more than merely reporting legal rules, and certainly more than simply quoting the wording of statutory enactments. In the first place, one has to determine which legal rules are in force and binding at the time of consideration. This is a formal problem: has a particular rule been abolished or not? But it is also a problem of content: is the rule under examination compatible with a rule of a higher level in the hierarchy of legal sources? If not, the rule should be considered invalid, and thus non-existent in the legal order being studied. However, concluding that the relevant rule is invalid is not simply a descriptive statement; it is the conclusion of an interpretation. This shows the extent to which description and interpretation of legal rules are interrelated. Every description of the law implies a (conscious or unconscious) interpretation of the law. Facts do not simply exist; they are always perceived, described and classified through the eyes of the legal system concerned. Because a factual situation may be constructed in different ways, solutions to problems that appear to be possible in one legal system are not available in another. Legal concepts, categories and techniques on the one hand offer opportunities for resolving problems but on the other render certain solutions impossible. As the above discussion suggests, any legal description of facts is determined by the conceptual framework and rules of a particular legal system, as worked out and systematized in legal doctrine over the years. Such a systematization is carried out by means of the interpretation of the various legal rules on the basis of a number of basic concepts and principles.[16] This indicates that there

(16) The systematization of the legal materials is always partly determined by the concepts and wording used by the chief sources of law, such as the legislature and the courts.

is a close connection, not only between description and interpretation, but also between interpretation (of a specific rule) and systematization (of a set of rules). Legal doctrine, as concerned with the systematization and description of the law in a particular legal system, is, together with statute law, case law and customary law, an object of the comparative study. Moreover, legal doctrine is important for comparative law, because it is an area in which theories, such as, for instance, theories concerning legal sources, are made explicit, or proposed new theories are being discussed.

Probably the greatest danger facing a comparatist is the tendency to assume, consciously or instinctively, that the legal concepts, norms and institutions he or she is familiar with in his or her own legal system also exist in the foreign system being studied.(17) A comparatist, for instance, may be tempted to take for granted that the courts of the country whose system he or she is examining, similarly to the courts of his or her own country, look for guidance in preparatory legislative materials when seeking to interpret a particular statutory enactment. Such assumptions can often agree with reality, but it is just as often that they are wrong. A basic methodological principle of comparative law is that foreign legal rules, institutions and concepts must be approached or appraised from the viewpoint of the legal order to which they belong. In other words, the comparatist must be able to distance himself or herself

(17) In the 1970s some Western lawyers asserted that China has no legal system because she has no attorneys in the American or European sense, no independent judiciary and, following the Cultural Revolution, no formal system of legal education. Yet, this is surely to judge a non-Western system by Western standards. What is required when a non-Western system is being studied is not to search for Western institutions, rules or concepts, but to look for the functional equivalents of legal terms and concepts in the system under consideration. In other words, one should ask: by which institutions and which methods are the four basic tasks of the law, i.e., social control, conflict resolution, adaptation to social change and norm enforcement, are being performed?

from his or her own legal system and its way of thinking, placing himself or herself in the environment of the rules or institutions he or she is considering and using the legal concepts and methods of legal analysis and interpretation used by the lawyers and jurists of the foreign system or systems under consideration. As Zweigert and Kötz have remarked, "one must never allow one's vision to be clouded by the concepts of one's own national system."(18) Needless to say, removing oneself from one's own legal system when studying foreign law is not easy, for the legal education one has obtained in one's own country influences to a large extent one's way of thinking and approaching legal problems. False assumptions concerning foreign law naturally result in qualitatively poor and factually incorrect legal comparisons, but these potential difficulties should not discourage one from studying foreign law and making comparisons between different legal systems.(19)

As already noted, the study of foreign law, as a prerequisite of comparative law, depends on one's ability to obtain accurate and up-to-date knowledge about that law, and this in turn means that one must have access to reliable sources of information. It is important that a researcher relies on primary sources of law or authoritative texts, such as statutes, regulations, reports of judicial decisions and the like, although, depending on the goals and scope of the particular study, such materials may be combined with secondary sources, such as comparative law

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(18) K. Zweigert & H. Kötz, H., *An Introduction to Comparative Law*, 2nd ed., (Oxford, Clarendon Press, 1987), 31.

(19) As Zweigert and Kötz observe, "Writers often stress the number of traps, snares, and delusions which can hinder the student of comparative law or lead him quite astray. It is impossible to enumerate them all or wholly to avoid them, even by the device of enlisting multinational terms for comparative endeavours ... [Even] the cleverest comparatists sometimes fall into error; when this happens the good custom among workers in the field is not to hound the forgivable miscreant with contumely from the profession, but kindly to put him right." *An Introduction to Comparative Law*, 2nd ed., (Oxford, Clarendon Press, 1987), 33.

encyclopaedias, introductory textbooks, reference manuals, journal articles etc. A scholar researching a foreign legal system or aspect thereof may find it difficult to understand and make full use of the primary sources without having adequate background knowledge of the system being studied. Besides offering an overview of the legal issues under consideration in their broader legal context, introductory textbooks will normally include references to authoritative texts and other legal sources the researcher needs to consult.

It is important to note in this connection that a successful comparative study presupposes linguistic competence on the part of the comparatist and the ability to translate one world view into another. However, employing the skills of translation in this context is not easy. One needs to be extremely cautious and not assume that a word, concept or idea can be translated perfectly from one culture to another. The meaning of a word, concept or idea must be understood as it is used in its own cultural setting, before it is translated to another legal culture, whether the researcher's own or a different foreign culture. To successfully carry out the task of translation, the comparatist should be able to explain the cultural context the relevant word, concept or idea is situated in. A successful translation presupposes and relies on the prior knowledge and mastery of diverse semiotic systems and linguistic contexts, as well as the ability to determine how to adjust and transfer over a particular world view into another. If this task is accomplished well, translation can act as a bridge between cultures, illuminating the differences and similarities that exist between legal orders.[20]

Studying foreign law presupposes not only knowledge of foreign language, but

(20) See V. Grosswald Curran, "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives", (1998) 46 *American Journal of Comparative Law* 657, 661. And see S. Glanert, "Translation Matters", in S. Glanert (ed.) *Comparative Law: Engaging Translation* (Abingdon, Oxon, Routledge, 2014), 1.

also familiarity with the legal terminology of the legal system being studied. As Harold Gutteridge has pointed out, “the pitfalls of terminology are the greatest difficulty and danger which the student of comparative law encounters in his novitiate.”(21) Any form of translation involves the risk of overlooking the conceptual differences between national languages – differences which the comparatist must understand if he or she is to make sense of the objects being compared. A further problem here is that, even within the context of the same national language, words and linguistic structures used in legal terminology often have a different meaning from that which they have in everyday usage. For example, the word ‘provocation’ in ordinary English usage does not mean exactly the same as it does in English criminal law. Nor does the word ‘provocation’ in English law necessarily mean the same as the literal translation of ‘provocation’ in another legal system. Even if basic legal concepts in different countries are similar, different legal terms may be employed, and this may even occur within the same legal family. Conversely, even though the terms used may be identical, their substantive content or actual application may be different. Consider, for example, the term ‘equity’, used in both civil law and common law countries (*aequitas, equité, Billigkeit*). In civil law jurisdictions judges employ this concept whenever they do not wish to adopt a narrow or formal interpretation of a legal principle, especially when they wish to adapt such a principle to changing socio-economic circumstances. In the English common law tradition, on the other hand, the term ‘equity’ denotes the distinct body of law that evolved separately from the body of law developed by the common law courts. Other examples of identical terms which mean different things in different systems include ‘jurisprudence’, which in France refers to case law whilst in England is usually

(21)　H. C. Gutteridge, “The Comparative Aspects of Legal Terminology”, (1938) 12 *Tulane Law Review* 401, at 403.

understood to denote the general theory or philosophy of law; ‘good faith’, which is used as a general clause in German commercial law, but is simply a synonym for honesty and fair dealing in English sale of goods law; and ‘Auftrag’, roughly translated into English as commission or mandate, which in Swiss law refers to both remunerated and unremunerated commissions, whilst in German law it covers only commissions of the latter type.(22)

According to Walter Kamba, a comparative inquiry may be divided into a descriptive, identification and explanatory stage.(23) At the descriptive stage, one offers a description of the legal institutions, rules and principles the study is concerned with, as well as the relevant social problems and solutions provided by the legal systems under consideration. A proper description must be objective, i.e. free from critical evaluation, accurate and comprehensive. It is crucial to begin with a description of the legal institutions under comparison that uncovers their construction and intended or unintended consequences. The researcher must take into account all sources of law that the legal systems under consideration regard as authoritative, such as statutory enactments and judicial decisions, as well as the way in which these sources are understood and treated by legislative bodies, courts and academic scholars. Furthermore, he or she must clearly identify the factual situations that the relevant legal institution is designed to address. It is important that the researcher places the institution under consideration in the context of the entire legal system and examines its possible connections with institutions or rules in other areas of the law (such as constitutional provisions, procedural rules or requirements of international legal instruments).(24) Finally, attention must be given to socio-economic, political, ideological, cultural and other ‘extra-legal’ factors. Consideration of such factors is

（22） Remunerated commissions are referred to in German law as Dienstvertrag or Werkvertrag.

（23） W. J. Kamba, “Comparative Law: A Theoretical Framework”, (1974) 23 *International and Comparative Law Quarterly*, 485.

very important if one is to understand variations in the way in which the institutions under comparison operate in practice.

At the identification stage, the similarities and differences between the systems being compared are identified and set out. At this stage, the comparatist must draw attention to the properties of the legal institutions under consideration and explain how these institutions resemble or are different from one another.

Finally, at the explanatory stage the detected similarities and differences between the legal systems under comparison are explained or accounted for. Consideration of historical, socio-economic, cultural and other extra-legal factors can play a particularly important role at this stage. A historical analysis can reveal whether the legal institutions at issue are home-grown or borrowed from another legal system. On this basis one may conclude that the relevant institutions are similar because they have a common ancestry (e.g. they both derive from Roman law); or because they have developed in parallel or converged. In the case of parallel development, the institutions acquire similar features independently, whilst in the case of convergence they do so through some form of contact or through the mediation of another legal institution. The differences between the institutions under consideration may be explained by reference to the influence of extra-legal factors or as being due to an innovative doctrinal approach adopted by a national law-maker or

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(24) As J. C. Reitz points out, “a good comparative law study should normally devote substantial effort to exploring the degree to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison. This inquiry forces the comparatist to consider how each legal system works together as a whole. By asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law, including especially the relationships between substantive law and procedure.” “How to Do Comparative Law”, (1998) 46 *American Journal of Comparative Law* 617. 621-22.

court.

Although it is not necessary to always follow the above order, all three stages must at some point be considered if the inquiry is to be regarded as a comparative one. According to Kamba, the way in which a comparatist deals with the questions he or she encounters at each stage of the comparative process depends on three factors: (i) the comparatist's jurisprudential outlook, i.e. his general attitude to law;(25) (ii) the socio-cultural context of the legal systems under comparison; and (iii) the legal context of the legal issues under examination in the case of a micro-comparative study. In establishing what the law is in each jurisdiction under study one should: (a) be concerned to describe the normal conceptual world of the lawyers; (b) take into consideration all the sources on which a lawyer in that legal system might base his or her opinion as to what the law is; and, (c) take into consideration the possible gap between the law on the books and law in action, as well as possible gaps in available knowledge about either the law on the books or the law in action. Important issues that need to be considered when carrying out a comparative study include: (1) the type of legal system (national, subnational, transnational) and the legal family or tradition to which it belongs (civil law, common law, religious, hybrid); (2) the field of law in which the issue being studied is located (e.g. constitutional law, criminal law, administrative law, property law, etc); (3) the type of sources needed (e.g., statutes, law codes, transnational or international treaties, case books or law reports, legal encyclopaedias, textbooks, monographs, journal articles etc) and the techniques used in data collection (e.g., literature searches, interviews, empirical surveys); (4) language and translation issues; and, (5) critical analysis of the information collected and presentation of the conclusions set out in a clearly comparative framework.

(25) For example, a comparatist interested in legal history or the sociology of law will usually adopt a historical or sociological approach to the legal systems, institutions or rules under examination.

Stating the relative weight accorded to historical, socio-economic, cultural, ideological and political factors and the possible influence of these factors on the development and function of the legal rules or institutions under consideration is particularly important. Provided that the information obtained on the legal systems under comparison is accurate, the approach adopted is ultimately to be assessed in the light of the purposes or goals of the comparatist. In this respect one may ask, for example: does the approach adopted facilitate a better understanding of one's own law? Does it help in the formulation of a well-grounded theory? Does it assist in the development of a law reform or legal unification or harmonization program?

As previously noted, an important aspect of the comparative law methodology is concerned with the issue of comparability of legal phenomena: the question of whether the legal institutions, rules or practices under consideration are open to comparison. Comparatists recognize that a comparison is meaningful when the objects being compared share certain common features, which can serve as a common denominator (*tertium comparationis*). Determining the requisite common features in the relevant objects occurs at the preliminary stage of the comparative inquiry. At this stage one examines the structure, purposes and functions of the legal institutions or rules one intends to compare, without, however, embarking on a detailed analysis of the study's results. This analysis occurs in the main phase of the comparative inquiry, when one considers and attempts to explain the similarities and differences between the objects being compared. Certain legal institutions or rules may appear comparable at the preliminary stage of the inquiry, but as the comparative process progresses important differences may emerge. For example, legal institutions, which were initially assumed to be comparable due to certain common structural characteristics, may subsequently prove to operate in entirely different ways. In other words, whether two or more legal institutions that *prima facie* appear to be comparable in fact share certain common characteristics (e.g. are intended to address the same problem) often

cannot be declared with certainty before the actual comparison is executed.

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

The Normative-Dogmatic Approach to the Comparability Issue

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

The comparative law of the German *Begriffsjurisprudenz* (conceptual jurisprudence)[(26)] preferred this kind of comparison of conceptual forms as it hoped to use it to prove the existence of general, universally valid legal systematics. Comparative law could reveal the common core or essence (*Wesen*) of basic juridical concepts, even if it was recognized that every legal order has a system of its own. The unitary and universalistic mentality underpinning the definition of comparative law

adopted at the First International Congress of Comparative Law in 1900 reflects a similar approach.[27] However, the criticism directed against this school of thought has been annihilating. One of the most vigorous attacks upon the methods of the *Begriffsjurisprudenz* emanated from Rudolf Jhering, who insisted that legal theory must abandon the delusion that it is a system of legal mathematics, without any higher aim than a correct reckoning with conceptual schemes.[28] Furthermore, since the period of logical empiricism, a tendency prevailed to regard questions concerning the nature and essence of legal concepts as generally meaningless. The so-called Analytical School of law typically reduces legal problems to relationships between legal facts (*Rechtstatbestand*) and legal consequences (*Rechtsfolge*). Scholars who have adopted the analytical method and its conceptual nominalism (through logical empiricism) claimed that many traditional concepts were 'empty' and therefore

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(26) *Bergriffsjurisprudenz* placed strong emphasis on the formulation of abstract, logically interconnected, conceptual categories and principles as a means of developing a highly systematic body of positive law. See, e.g., Georg Friedrich Puchta, *Cursus der Institutionem* I (Leipzig 1841), esp. 95-108; Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 7th ed., (Frankfurt 1891) I, 59-60.

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

(28) See R. Jhering, *Scherz und Ernst in der Jurisprudenz* (Leipzig1884).

concepts with an extensional reference should be used. In other words, one must consider the function, not the imaginary essence of the concepts. From this point of view, one might assert that the regulation of contracts, for example, can be reduced to single relationships between *legal facts* and *legal consequences*. The event where certain consequences did not ensue can be termed 'invalidity', but otherwise the concept has no content at all.(29)

Even if it is accepted on an abstract level that one can detect certain common patterns, the substantive content of a particular legal institution and the way it operates in practice, often differs considerably from one legal system to another. The further apart two legal systems are the more difficult it is to rely on the assumption of institutional affinity as a basis of the comparison, for the differences in the content and function of the legal institutions in these systems would tend to negate that assumption. The unsatisfactory nature of a purely normative-dogmatic approach to the issue of comparability was noted when scholars embarked on the comparative study of civil law and common law legal systems. Certain legal institutions and categories of civil law systems were unknown to common law systems. On the other hand, basic categories of common law systems, such as the distinction between common law and equity are not found in the legal systems of Continental Europe. These differences that affected basic legal concepts and categories, legal terminology, structures of law, interpretation of legal norms and distinctive features of law enforcement were explained by reference to the specific historical circumstances under which the relevant legal systems developed. A further problem of the normative-dogmatic approach is that *prima facie* identical legal terms do not always have the same meaning in different legal systems.(30) On the other hand, certain legal

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

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

The reaction to the formalism and extreme conceptualism of the German *Bergriffsjurisprudenz* led to the emergence of new trends in European legal thought. Examples of such trends include *Zweckjurisprudenz*[(31)] (focusing on the purposes that legal rules and institutions serve) and *Interessenjurisprudenz*[(32)] (focusing on societal interests as the chief subject-matter of law), which were precursors of legal realism[(33)] and the sociology of law.[(34)] These new approaches are also connected with the rise of functionalism in comparative law.

The Functional Method of Comparative Law

The shortcomings of the normative-dogmatic approach prompted contemporary comparatists to adopt the view that to ascertain the real similarities and differences between the substantive contents of legal systems, one must start not with the names

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

(31) See R. Jhering, *Der Zweck im Recht* (Leipzig 1877).

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

(33) See Oliver Wendell Holmes, *The Common Law* (London 1881); "The Path of the Law", (1897) 10 *Harvard Law Review*, 457.

(34) R. Pound, "The Scope and Purpose of Sociological Jurisprudence", (1911) 24 *Harvard Law Review*, 591; (1912) 25 *Harvard Law Review*, 489.

of legal rules and institutions, but instead one should consider their functions, i.e. those real or potential conflict situations which the rules under examination are intended to regulate. The compared legal institutions must be comparable to each other functionally: they must be designed to deal with the same social problem. This common function furnishes the required *tertium comparationis* that renders comparison possible.(35)

Functional comparison does not proceed from a legal term or norm to a social fact but from a social fact to the legal regulation thereof. One does not compare abstract or general legal notions but, rather, how the legal systems under consideration deal with the same factual situations in real life. In other words, a prerequisite of functional legal comparison is the comparability of basic social conditions and problems. Such a similarity creates the possibility of concluding that the respective legal solutions found in different legal systems are comparable. According to Rheinstein, the principle of functionality requires comparative inquiries to "go beyond the taxonomic description or technical application of one or more systems of positive law…. every rule and institution has to justify its existence under two inquiries: First, what function does it serve in present society? Second, does it serve this function well or would another rule serve it better?"(36) And as Kamba points out, a key question for the comparatist is: "what legal norms, concepts or

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(35) As O. Brand points out, "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." "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies", (2007) 32 *Brooklyn Journal of International Law* 405, 409.

(36) M. Rheinstein, "Teaching Comparative Law", (1938) 5 *University of Chicago Law Review*, 615 at 617-618.

institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions of another system?”(37)

The resolution of a particular social problem may be achieved through a combination of different legal means in different systems. For instance, the institution of trust or trust ownership in English law has no equivalent in Romano-Germanic legal systems where the functions it fulfils are realized with the assistance of direct representation of a person lacking dispositive legal capacity by their legal representative. As this shows, different legal means are used to attain the same legal and social goal, i.e. defending the interests of a person lacking dispositive legal capacity. The fact that one of the two analysed systems does not possess a direct equivalent of a legal institution found in the other does not mean that there is a gap in the law nor that the two systems are incomparable with respect to the solutions they

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(37)　W. J. Kamba, “Comparative Law: A Theoretical Framework”, (1974) 23 *International and Comparative Law Quarterly*, 485 at 517. As Zweigert and Kötz explain, “The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function.” *An Introduction to Comparative Law*, 2nd ed. (Oxford, Clarendon Press, 1987), 31. The authors point out that “function is the start-point and basis of all comparative law. It is the *tertium comparationis*, so long the subject of futile discussion among earlier comparatists. For the comparative process this means that the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need. It means also that we must look to function in order to determine the proper ambit of the solution under comparison.” (Idem at p. 42). And see M. Siems, *Comparative Law*, 2nd ed., (Cambridge, Cambridge University Press, 2018), 31 ff; G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford, Hart Publishing, 2014), 65 ff; R. Michaels, “The Functional Method of Comparative Law”, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 2nd ed., (Oxford, Oxford University Press, 2019), 345.

have adopted for a particular social and legal problem. Thus, functional comparison may be defined as the study of legal means and methods for the resolution of similar or identical socio-legal problems adopted by different legal systems. Such a comparison serves both theoretical-scientific and applied-practical purposes, thus promoting a better understanding and assessment of legal institutions within one's own law.(38)

Functionalism rests on three interconnected premises. The first premise relates to the realist understanding of law as an instrument for guiding human behaviour and as a means of resolving conflicts and furthering social interests. This premise embodies the 'problem-solution' approach that functionalists advocate. Comparatists following this approach begin their comparisons by selecting a particular practical problem or social conflict. They then consider how different systems of law seek to resolve this problem. Finally, in a third stage, the similarities and differences between the solutions offered by the systems under consideration are identified, explained and assessed. The second premise of functionalism is that most of the problems that the law seeks to resolve are similar if not identical across diverse legal systems. The third basic premise of functionalism relates to the assumption that legal systems tend to resolve practical problems in the same way. The German comparatist Konrad Zweigert, cites many examples from various legal systems, to argue that in 'unpolitical' areas of private law, such as commercial and property transactions and business dealings, the similarities in the substantive contents of legal rules and the practical solutions to which they lead are so significant that one may speak of a

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

'presumption of similarity' (*praesumptio similitudinis*).[39] This presumption, he claims, can serve as a useful tool in the comparative study of different legal systems. At the end of a comparative study, if the comparatist concludes that the solutions offered by the examined systems are identical or compatible, this may be regarded as confirmation that he or she probably understood and compared them correctly. The discovery of substantial differences is a warning that an error may exist and thus the process should be repeated and the results carefully verified.[40] This 'presumption of similarity' is connected with the idea that it might be possible to develop, on the basis of comparative research, a system of general legal principles that could acquire international recognition. According to Zweigert:

> [The international unification of law] cannot be achieved by simply conjuring up an ideal law on any topic and hoping to have it adopted. One must first find what is common to the jurisdictions concerned and incorporate that in the uniform law. Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and

(39) See, e.g., K. Zweigert, "Des solutions identiques par des voies différentes", (1966) 18 *Revue internationale de droit comparé*, 5; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., (Oxford, Clarendon Press, 1987), 36. And see See G. Dannemann, "Comparative Law: Study of Similarities or Differences?", in M. Reimann & R. Zimmerman (eds), *The Oxford Handbook of Comparative Law*, 2nd ed., (Oxford, Oxford University Press, 2019), 390, 394-395.

(40) According to Zweigert and Kötz, "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." *An Introduction to Comparative Law*, 3nd ed., (Oxford, Clarendon Press, 1998), 40.

> more easily applied than any of the existing ones. Preparatory studies in comparative law are absolutely essential here; without them one cannot discover the points of agreement or disagreement in the different legal systems of the world, let alone decide which of the actual or proposed solutions is the best.(41)

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

Based on the above three premises, functionalists seek to explain the similarities and differences between legal norms found in diverse jurisdictions and how such norms are expressed in different or similar kinds of legal rules. They stress the importance of neutrality in the study of legal systems and legal institutions and the need to avoid approaching foreign laws through the mindset of one's own legal system. In other words, functionalists pay little attention to differences relating to the technical-juridical construction of rules, emphasizing that "the solutions [found] 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."(42) In this respect, the functional approach constitutes a major departure from the methods of

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(41) K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., (Oxford, Clarendon Press, 1987), 23.

(42) K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3nd ed., (Oxford, Clarendon Press, 1998), 44. And see J. C. Reitz, "How to Do Comparative Law", (1998) 46 *American Journal of Comparative Law* 617, 621-22.

nineteenth and early twentieth century scholars, who tended to place the emphasis on the wording, structure and systematic classification of legal rules and institutions rather than on the social purposes they were intended to serve. It has been adopted by comparatists in Europe, the United States and elsewhere, and continues to play a key part in comparative law research today.(43) There is a universalist trend inherent to functionalism, as this approach is taken to rest on the assumption that "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."(44)

However, for all its merits functionalism is not without problems. These pertain to the basic assumptions on which the functional method is based, i.e. the presence of a legal need that is common to the legal systems under consideration; and the existence of a similarity in the factual circumstances of the compared laws. According to the functional approach, a meaningful comparison is not possible unless the relevant problem is defined in similar practical terms by the compared legal systems. In other words, one cannot deal with a problem that has a different social significance in one of the systems under examination; in such a case there is no issue of legal rules or principles of similar function. However, because of the multiplicity of legal functions that may exist on different levels and may differ between cultures, 'common need' or 'function' and 'similarity' with respect to factual circumstances may be difficult to ascertain, even within one's familiar socio-economic

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

(44) K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., (Oxford, Clarendon Press, 1987), 31.

environment.[45] The diverse functions of the law on different levels – social, political, economic, religious, spiritual, symbolic – may be difficult to detect, describe and evaluate in terms of importance and thus functionality ultimately depends on the viewpoint embraced.[46] As McDougal remarks, "the demand for inquiring into function is…but the beginning of insight. Further questions are: 'functional' for whom, against whom, with respect to what values, determined by what decision-makers, under what conditions, how, with what effects".[47] As this suggests, it would be requisite for the functional method to have a broad scope so as to take proper account of the relativity in the socio-economic and cultural circumstances under which legal institutions operate. What is needed, in other words, is a method that focuses on the function of law as this function is conditioned by the socio-economic and cultural environment. Legal rules and institutions should be examined in light of their broader implications, with respect to not only the legal but also the social, economic and political system. As Ainsworth remarks, "[because a] legal order simultaneously encompasses systems of political arrangements, social relations,

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

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

(47) M. S. McDougal, "The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order", in W. E. Butler (ed.) *International Law in Comparative Perspective* (Maryland, Sijthoff & Noordhoff, 1980), 191 at 219. Consider also D. J. Gerber, "Sculpturing the Agenda of Comparative Law: Ernst Rabel and the Facade of Language", in Annelise Riles (ed.), *Rethinking the Masters of Comparative Law* (Oxford, Hart Publishing, 2001), 204; B. Markesinis, *Comparative Law in the Courtroom and in the Classroom: The Story of the Last Thirty-Five Years* (Oxford, Hart Publishing, 2003), 39.

interpersonal interactional practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives and ideological values", we must scrutinize not only rules but also legal cultures, traditions, ideals, ideologies, identities and entire legal discourses.[48] In other words, an interdisciplinary and comprehensive approach is a prerequisite for avoiding false assumptions on seemingly 'identical' societal problems and ill-founded, de-contextualized evaluations of legal solutions.[49]

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

(49) It should be noted here that traditional functionalists have also called for an interdisciplinary approach, albeit in somewhat different terms. According to Pierre Lepaulle, "[I]t must be clear that a comparison restricted to one legal phenomenon in two countries is unscientific and misleading. A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces and hence the similarity may be due to the purest coincidence – no more significant than the double meaning of a pun". "The Function of Comparative Law", (1921-1922) 35 *Harvard Law Review*, 838 at 853. Similarly, Rabel, one of the founders of functionalism, points out that "The material of reflection about legal problems must be the law of the entire globe, past and present, the relation of the law to the land, the climate, and race, with historical fates of peoples, - war, revolution, state-building, subjugation -, with religious and moral conceptions; ambitions and creative power of individuals; need of goods production and consumption; interests of ranks, parties, classes. Intellectual currents of all kinds are at work… Everything is conditioned on everything else in social, economic and legal design". E. Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung* (Munich 1925), 5. See also E. Rothacker, "Die vergleichende Methode in den Geisteswissenschaften", (1957) 60 *Zeitschrift für vergleichende Rechtswissenschaft*, 13 at 31; M. Siems, *Comparative Law*, 2nd ed., (Cambridge, Cambridge University Press, 2018), 44. For a critical assessment of functionalism see also O. Brand, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies", (2007) 32 *Brooklyn Journal of International Law* 405; M. Graziadei, "The Functionalist Heritage", in P. Legrand & R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003), 100.

This means that the use of the functional method demands from the comparatist an extremely broad knowledge not only of contemporary law, but also sociology, anthropology and history, among other things, i.e. a level of knowledge that is very difficult, if not impossible, for a comparatist to attain.(50) Because of this problem, functional legal comparison is usually conducted by international teams of experts. Specific socio-legal problems are assigned to national rapporteurs in accordance with a preliminary scheme designed with the aim of taking comparison into account. The representative of each national system then submits a report explaining how the law of each system resolves the specific problem being considered. This collective approach to functional comparison has considerable advantages, although it often involves significant costs and requires great organizational efforts and time.

Combining the Functional and Normative-Dogmatic Perspectives

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

(50) As J. C. Reitz remarks, "good comparatists should be sensitive to the ever-present limitations on information available about foreign legal systems and should qualify their conclusions if they are unable to have access to sufficient information or if they have reason to suspect that they are missing important information. If the gaps are too large, the study should not be undertaken at all because its conclusions about foreign law will be too uncertain to be useful." "How to Do Comparative Law", (1998) 46 *American Journal of Comparative Law* 617, 631.

essential; a relationship is required to render comparative law possible.[51] This relationship can be actual and historical or also 'inner' – an undeniable similarity between the peoples whose legal systems are compared. Historically, problems, juridical forms and their systematic organization are older than the norms of present law. General doctrines are extremely relevant as a framework for comparative legal studies. This is partly due to the presence of common problems but partly also due to historical tradition, e.g. the fact that Roman law has been an important common basis of many contemporary legal systems. Thus, the conceptual system of Roman law is an apt *tertium comparationis*, a common denominator of the legally organized relationships of life. These relationships are organized by forms that are derived from Roman law and are based on concepts such as *culpa, contractus, bona fides* and such like. These forms constitute a kind of *pre-knowledge* for most Western legal thinking.

A system of forms is meaningful when it corresponds to a related system of content. A legal system cannot but be both formal and substantial. But it is by no means obvious that the legal concepts and the juristic systematics of forms are a sufficient means to organize social states of affairs as far as comparative law is concerned. A *functional coherence* between social states of affairs must be established. Can this be expressed by an abstract scheme? In legal science, attempts have been made to reduce social relations to single right-duty relations, which are the objects of legal regulation. There are formal systems of legal relations. Consider, for example, the system proposed by Wesley Hohfeld, whereby all legal relations between humans can be expressed with the help of 'fundamental legal conceptions.'[52] The basic relations are: right – duty; privilege – no right; power – liability; immunity

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(51)　A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh, Scottish Academic Press, 1974; 2nd ed., Athens, Georgia, University of Georgia Press, 1993).

(52)　See W. N. Hohfeld "Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1917) 26 *Yale Law Journal*, 710.

– disability. With the help of such schemes, similarities and differences in legal regularities can be articulated in a particularly graphic manner. Such an approach could be used in comparative law to deal, for example, with the question concerning the legal positions of the buyer and the seller in the case of faulty goods. Has the buyer the right to have the goods repaired or is their legal position only a privilege? Has he or she the power to change their legal position by annulling the contract?

Although such legal relations may be abstract relations, they are also connected with social reality. A buyer is not only a buyer; he or she has other social roles to play, and these roles might determine that he or she must play the role of the buyer in a certain situation. The contractual roles express the relations of exchange of certain goods. But actual contractual relations are, to a considerable extent, not determined by the uniform will of the parties concerned but by their social roles. In short, legal roles and relations express other, often more basic, social positions. But this does not mean that analyses of legal relations have no value. Even if schemes such as the fundamental legal conceptions of Hohfeld are purely formal, they provide useful starting-points. Abstract legal relations are first described. Then one proceeds to ask whether they can be explained in terms of more basic social relations. Legal relations and the models of behaviour they express are based upon an experimental shaping of social relations. But this shaping is not purely empirical and cognitive. There are reactions, also partly evaluative, when certain states of affairs are chosen on axiological grounds as consciously followed goals. But this process involves a set of juristic forms, which are not incidental or particular to the relevant case: they stem from the history of legal doctrines and ideas. Thus, we may assert that whether we proceed from forms or from contents, the choices of subjects are not purely empirical; axiological and teleological choices must be considered and examined together with the doctrinal history of legal concepts and their systematic treatment.

To understand social function, one must comprehend social structures. It is

important that legal comparatists keep this in mind. For example, if one says, "in country A Lawmaker Z introduced the law L1 and in the country B Lawmaker X enacted the law L2', it is obvious that even if the lawmakers were the human causes of the relevant legal enactments we cannot build a reasonable comparison of L1 and L2 solely upon the personalities of Lawmakers Z and X. An understanding of the social situation is needed. We must grasp the conditions in the respective countries, i.e. their social structures that set the limits upon the legislative activities of lawmakers.

The structuralist view of society is related to the Marxist theory of the state and law: it refers to the socio-economic basis of law; law and state are phenomena of the so-called *suprastructure*. The basis consists of 'real' relations of production and exchange. Law is conditioned by the state, which in turn, is conditioned by class relations and cultural factors. But one cannot speak of *the* Marxist theory of law. Even though dialectical materialism is a common element among Marxists, their opinions differ considerably when the precise interrelationship of law and economics is contemplated. Law is *not determined* by the economic basis. Law is *relatively independent*: it not only expresses social relations but also influences them. Law also expresses certain historical traditions pertaining to the different ways of looking at legal issues. Law may be considered as a *form of social power*. But the role of law is not uniform in different societies: law can have a wider or narrower scope; it can cover a relatively larger or smaller part of intentional human behaviour. Legal regulation in society has both an explicit and a latent non-intentional function – this is the thesis of the German functionalist sociologists of law, such as Niklas Luhmann.(53) Law is not only a form but also a social structure whose functions may vary. Legal forms and their social context are interconnected. We can declare that comparative law proceeds from the following two assumptions: (a) law is not only a manifestation of will but is also socially constructed – one cannot compare legal regulations on a

purely formal basis; (b) law stems from social relations, but it cannot be entirely reduced to them, for otherwise one should not compare law at all but only the basic factors law expresses. There is an intentional element in law; its 'facts' are not 'brute facts' but *institutional* facts, which should be interpreted in their social context.(54)

Intentional human action can be interpreted with the assistance of an intentional scheme involving: (a) goals, i.e. states of affairs which have certain properties justifying their perception as valuable; and (b) epistemic conditions, i.e. knowledge concerning, among other things, social structures, possible means and means-goals relations. A decision to act (or not to act) may be construed as deriving from the combination of the above factors. It is important to realize that a value-element is present in all intentional decision-making, including lawmaking and the application of law. A value-element is also present in concepts used for imparting regulatory information. Evaluative concepts such as, for example, good faith and equity, are important, because the rapid development of society often renders it impossible for the legislator to foresee all potential situations. It is insufficient to compare the form and the factual content of a legal institution to some similar institution in another legal order. There is an evaluative component between facts and concepts, and this should not be ignored.

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(53) N. Luhmann's social theory is a systemic 'supertheory' of the social. This theory is universal in that it is a theory of everything, of the world, as seen and reconstructed from the standpoint of sociology, including a theory of itself. It is systemic because it uses the guiding difference (*Leitdifferenz*) between the system and the environment as its main conceptual tool to analyze the production and reproduction of the social. Analyzing society as a hypercomplex conglomerate of social subsystems, Luhmann insists that modern societies are so complex that his own theory of social complexity can offer only one possible formulation of the social among others. See N. Luhmann, *Rechtssystem und Rechtsdogmatik* (Stuttgart, W. Kohlhammer, 1974); *The Differentiation of Society* (New York, Columbia University Press, 1982); *Social Systems* (Stanford, Stanford University Press, 1995); *Law as a Social System* (Oxford, Oxford University Press, 2004).

It is submitted that most legal concepts are evaluative concepts, even if their value-laden nature is often only latent, concealed or not even contemplated. One may refer to a normative use of legal language. Such a use occurs every time when regulatory information is presented or applied in legal decision-making. One might perhaps assert that there is an element of decision-making in every step of an interpretatory operation. There are two basic components in such an operation: observation and evaluation. This suggests that relevant concepts also have two inherent aspects, a descriptive and a prescriptive one. Such an approach has far-

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(54) According to Searle, there are some entities in the world that seem to exist wholly independently of human institutions, and he designates these 'brute facts.' Their existence appears in no way dependent on our will, nor do they result from our practices and contrivances. Other entities, by contrast, do not seem to exist in this way. For example, consider a goal in a football match. If someone asks me what that is, I cannot point to anything in the material world that I can specify as a goal. I cannot point to a ball crossing the line and say, 'that is what I mean by a goal'. And yet, I can intelligibly articulate the existence of a thing such as a goal. According to Searle, these facts may be called institutional facts: "[They] are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions. It is only given the institution of marriage that certain forms of behaviour constitute Mr Smith's marrying Miss Jones. Similarly, it is only given the institution of baseball that certain movements by certain men constitute the Dodgers beating the Giants 3 to 2 innings. Even at a simpler level, it is only given the institution of money that I now have a 5-dollar bill in my hand. Take away the institution and all I have is a piece of paper with various green and grey markings." J. R. Searle, *Speech Acts* (Cambridge, Cambridge University Press, 1969), 51. See also E. Anscombe, "On Brute Facts", *Analysis* 18 (1957-58), 69. Legal entities appear to exist and behave in a similar way to our goal in a football match. For example, every time I board a bus a contract is formed between myself and the bus company, but I cannot point to it in the material world. I cannot point to myself getting on the bus and buying the ticket and say: 'that is the contract'. And yet I can, and legal practitioners do all the time, intelligibly allude to a contract. To declare that a contract exists presupposes the adoption of a particular view of a particular relation between two people, namely, that which is set within the frame of reference of certain organised groups of people, such as the legal profession, judges and law enforcement agents.

reaching implications for the methodology of comparative law. Consider, for example, a comparative analysis of attempts at reforming the law governing family relations. Such an analysis presupposes that the relationship between the institution of family and social ideologies is clarified. Between the present historical situation of society and current law there is an intermediate factor that enables us to understand this relationship. This may be termed 'the world-picture'. A world-picture corresponds, at a certain moment, to the basic structure of society. Legislation corresponds to the world-picture. The legislation is, one might say, a manifestation of the world-picture reflecting the way certain groups in society conceive the prevailing state of affairs and the manner in which matters should be arranged.

A world-picture is a set of beliefs held by certain social groups. It is an interpretation of nature, humankind and society. It is set forth by legal norms as the dominant ideology, whose function is also to explain and legitimate them. A world-picture contains opinions or beliefs on the status of matters at a certain moment and how these should exist now and in the future. The use of a particular world-picture for the purpose of legitimating legal norms presupposes a social group or class believing in such a world-picture and having sufficient social power to further its inherent goals. An analysis of social and state power is therefore needed when one seeks to understand and explain legal institutions. One should ask: which social group possesses the power to impose its own world-picture – its knowledge, beliefs and desires regarding society – as the basis for the creation and application of legal norms. After addressing this question, one can proceed to an analysis of those factors that led to the normative modelling of society through law in a certain way.

There are two types of elements in a world-picture: factual-theoretical and normative-ideological. These elements are intertwined in a very complicated manner, but they can be treated separately at an abstract level. The factual-theoretical element can be divided into two parts: actual and possible states of affairs. For instance, the

factual-theoretical element of the notion of family consists of a set of propositions on the definition of the family, its social position and functions. These beliefs are to a considerable extent based on everyday experience, which complements systematic theoretical knowledge and also supplies its interpretative basis. The normative-ideological aspect of the notion of family comprises a set of opinions concerning the question of how matters in society should exist. Every notion of the family contains viewpoints relating to social goals. Some states of affairs have not yet been realized, but they are deemed desirable, just, fair or equitable. The normative-ideological element furnishes a criterion that enables one to claim that the present state of affairs falls short of the desired one and, at the same time, articulates the means considered necessary for rectifying the situation. It is submitted that one should endeavour to devise a model of comparative analysis that would embrace both factual-theoretical and normative-ideological elements. Such a model would be an improvement over the traditional method of comparative law, in which the evaluative dimension of law-making is often neglected and, consequently, the (undeniable) role of traditional, historical systematics in the conceptual organization of regulatory information tends to be over-emphasized.

We may say, in conclusion, that in the quest for comparability, a mid-way approach – one that views the normative-dogmatic and functional methods not as contradictory but rather as complementary – appears more appropriate. Legal solutions relating to a particular social problem presuppose an analysis of specific legal norms and institutions. At the same time, considerable attention needs to be paid to the purposes that legal norms and institutions serve, i.e. their social role. The normative-dogmatic and functional comparison methods may thus be combined, although, depending on the goals of the particular study, either of these may be accorded priority. The common elements constituting the requisite *tertium comparationis* may appear at different levels pertaining to the language, structure,

functions, aims and outcomes of legal rules and institutions. Indeed, they may be present on several levels simultaneously. Depending on the nature, scope and goals of the comparative inquiry, several criteria of comparability may be used, either together or alternatively.(55) Knowledge of the goals the compared legal rules are intended to achieve is particularly important for understanding the detected differences and similarities. Such knowledge is also needed when one attempts to evaluate the legal solutions provided by the legal systems under consideration.

Concluding Remarks

Comparative law has to compare many more elements than merely law, but its object is ultimately law. The methodological problems of comparative law cannot be addressed solely at the level of *language* – these problems are not exclusively semiotic.(56) A successful translation of legal terms, important though it may be, is hardly sufficient.(57) Nor does the existence of certain similar social relationships constitute a sufficient condition for comparison. Although for a meaningful legal comparison to be carried out there must exist sufficient similarity with respect to

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（55） Suppose, for example, that one wishes to compare the text of a German statutory provision on marriage with that of a French statute on the registration of real property. If considered from the viewpoint of their substantive contents, these statutes have nothing in common and therefore are not open to comparison. If, on the other hand, one is interested in comparing how the text of the relevant statutes is structured, i.e., how it is divided into sections and subsections, a comparison appears possible.

（56） On the problem of legal translation see, e.g., M. H. Hoeflich, "Translation and the Reception of Foreign Law in the Antebellum United States", (2002) 50 *The American Journal of Comparative Law*, 753; L. Rayar, "Translating Legal Texts: A Methodology", Conference Paper, Euroforum, (April 1993).

（57） Thus, as it has been pointed out by scholars, the most evident translations of Roman legal terms accepted in different legal cultures may be misleading. See O. Kahn-Freund, "Comparative Law as an Academic Subject", (1966) 82 *Law Quarterly Review*, 40 at 52.

social function, a form of *conceptual commensurability* is also required.[58] The role of legal concepts is multifaceted. They are used as vehicles of regulatory information guiding human action and thus have an important normative function. Furthermore, they steer the use of legal argument when legal norms are being created and applied. When the selection of a certain concept is considered, this entails the evaluation of certain sets of arguments. Hence legal concepts stand for arguments – a function that is connected with a historical tradition in a particular legal culture. It is also correct to assert that concepts and their systematic arrangement express systems of values.[59] Elucidating these matters is one of the chief goals of comparative law. Attaining this goal presupposes that the methods applied have an adequate theoretical grounding; otherwise, comparative law will remain at the level of mere description or be ensnared in the trammels of speculation.

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(58) Consider on this D. Pearce, *Roads to Commensurability* (Dordrecht, D. Reidel, 1987), 188, 194.

(59) See W. Ewald, "The Jurisprudential Approach to Comparative Law: A Field Guide to 'Rats'", (1998) 46 *American Journal of Comparative Law* 701, 704-05; W. Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?", (1994-1995) 143 *University of Pennsylvania Law Review* 1889, 1973-74 (noting that it is important to compare law from an internal point of view so that we can understand how lawyers think in their own legal system). Consider also N. V. Demleitner, "Challenge, Opportunity and Risk: An Era of Change in Comparative Law", (1998) 46 *American Journal of Comparative Law* 647, 652.