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Map and Territory in Comparative Law and Economics

Ernesto Vargas Weil
Professor of Private Law, University of Chile, Santiago, Chile;
Associate Lecturer (Teaching), University College London (UCL),
London, UK
ernesto.vargas@ucl.ac.uk

Abstract

This paper argues that developing more reliable methodological foundations for Comparative Law requires us to acknowledge the virtues and limitations of well-designed simplification in successfully accounting for the complexity of legal reality. If the researcher is aware of its limitations, Law & Economics is well suited to providing analytical frameworks that increase our ability to compare real-life legal institutions by reducing the complexity of the law in action. Relying on some underexplored elements of New Institutional Economics and recent developments in Comparative Law and in Law & Economics, it presents a pathway to overcome the main methodological pitfall of a joint approach. For this purpose, it analyses the problems of the functional method, traces how Law & Economics was brought into Comparative Law, discusses the main methodological advantages and pitfalls of combining both disciplines and proposes concrete forms to make use of such advantages, while avoiding the pitfalls.

Keywords

comparative law – methodology – functional method – comparative law and economics – comparative legal thinking – economic analysis of law

1 Introduction[1]

Every year the London Underground transports over 1.4 billion passengers across a complex network that connects 270 stations through more than 400 km of railway.[2] To reach their destination, passengers rely on a single map that has no other geographical feature than an abstract representation of the river Thames and highly distorts all distances, the path followed by the lines and the location of the stations. However, it is precisely this 'misrepresentation of reality' that allows Londoners to arrive at every point of the city by just taking a look at the 'Tube Map'.[3]

This was not always the case. Until the 1930s, there was no unified map of the Underground. Each individual company had maps that emphasized its own routes and represented the location of places in the city and the distances between them in a cartographic manner. Due to their accuracy, these 'mimetic maps' did not have enough room to include the names of the stations in central London, but were also full of empty space where stations were more distant, while the sinuous form of the different lines created a visual jumble.[4] Faced with this variety of overlapping, complex and messy guides, a young engineering draughtsman named Harry Beck came up with the idea of radically simplifying the existing maps by *'straightening the lines, experimenting with diagonals and evening out the distance between stations*'.[5] By these means, Mr. Beck managed to bring all lines and stations previously depicted in separate accurate maps into one single 'diagram' that *increased* the representation efficiency of all previous maps by *reducing* its similarity with the territory.[6]

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1 This paper is an outcome of the research done for the methodology of my PhD at UCL. Preliminary versions of it were presented at an informal seminar on comparative methodology held at UCL in 2018, the 8th Annual Conference of the Younger Comparativists Committee of the American Society of Comparative Law (2019) and UCL's PhD Work in Progress Forum (2020). I am especially grateful to Professors Ben McFarlane, Charles Mitchell and Florian Wagner-von Papp and to Trevor Clark, Andrew McLean and Ioannis Bazinas for their insightful comments. I also thank two anonymous reviewers for their observations. The story of Beck's map was first introduced to me by Bruno Carriquiry, many years ago. All errors remain mine.

2 O. Green, *London 's Underground. The Story of the Tube* (London: White Lion Publishing, 2019) at 6–7.

3 See Kenn Garland, *Mr. Beck's Underground Map* (London: Capital Transport Publishing, 1994) at 5.

4 J. Schwetman, 'Harry Beck's London Underground Map. A Convex Lens for the Global City', *Transfer* 2(4) (2014) 86 at 90–92.

5 Harry Beck, quoted in Garland (n 3) at 7.

6 B. Bitarello, P. Ata and J. Queiroz, 'Notes about the London Underground Map as an Iconic Artifact', in: P. Cox, B. Plimmer and P. Rodgers (eds), *Diagrammatic Representation and Inference. Diagrams 2012. Lecture Notes in Computer* (Berlin: Springer, 2012) at 351.

Beck's map was an immediate,[7] enduring and universal success. Today, it is still the basis of the London Tube Map and has inspired the design of almost every other transit map in the world.[8]

Around the same time Beck created his first map, Comparative Law was experiencing a similar conceptual revolution. Inspired by a loose conception of functionalism, comparative researchers argued that very different and complex legal realities could be successfully compared by focusing on the social problems that legal institutions aim to solve. This approach was a breakthrough in Comparative Law and has dominated the discipline ever since.[9] However, in contrast to the enduring success of Beck's map, the functional approach has for decades been under constant attack due to its failure to accurately account for the richness of legal reality.[10] The intensity of this criticism is so strong that discussions about the method are at the heart of almost every Comparative Law debate.[11] Nonetheless, this growing methodological discussion has not delivered any form of consensus[12] and, as a result, Comparative Law is still in deep need of stronger methodological foundations.[13]

Inspired by the expression 'the map is not the territory',[14] this paper argues that developing more reliable methodological foundations for Comparative Law requires us to acknowledge the virtues and limitations of *good* simplification in successfully accounting for the complexity of legal reality. In particular, it claims that, if the researcher is aware of its limitations, Law & Economics is

7 Green (n 2) at 162.

8 See Schwetman (n 4) at 87, 89.

9 See 2.1. below.

10 See 2.3 below.

11 See R. Michaels, 'The Functional Method of Comparative Law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford and New York: OUP, 2019) at 346.

12 R. Michaels, 'Comparative Law' in J. Basedow, K. J. Hopt and R. Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (Oxford and New York: OUP, 2012) at 297.

13 See M. Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', *The American Journal of Comparative Law* 50 (2002) 671 at 671, 685, 686, 688, 689; R. Michaels, 'Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung – Gedanken anläßlich einer Jubiläumskonferenz in New Orleans', *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 66 (2002) 97 at 111, 114; R. Michaels, 'The Second Wave of Comparative Law and Economics?', *University of Toronto Law Journal* 59 (2009) 197 at 203, 211.

14 This expression is normally associated with a presentation given by Alfred Korzybski in 1931. See A. Korzybski, 'A Non-Aristotelian System and Its Necessity for Rigour in Mathematics and Physics', in: *A. Korzybski: Collected Writings, 1920–1950* (Eglewood: Institute of General Semantics, 1990).

especially well suited to providing analytical frameworks that *increase* our ability to compare real-life legal institutions by *reducing* the complexity of the law in action. In other words, it argues that a sound combination of the functional comparative method and Law & Economics can decisively help in making the complexity of different legal systems conceptually more manageable.

This is by no means a new idea. The use of Law & Economics in comparative legal research has been explored since, at least, the mid 1990s. However, such efforts have not been successful and methodological problems have been identified as the main obstacle.[15] Relying on some underexplored elements of New Institutional Economics and recent developments in both Comparative Law and Law & Economics, this paper proposes a pathway to overcome the main methodological pitfalls of a joint approach. For this purpose, it isolates and analyses the problems of the functional method (Section 2); traces the separate origin of Law & Economics and how it was brought into Comparative Law (Section 3); discusses the main methodological advantages and pitfalls of combining both disciplines (Section 4); and proposes concrete forms to make use of such advantages, while avoiding the pitfalls (Section 5).

2 The Functional Method and Its Weaknesses

2.1 *Inbuilt Methodological Weakness*

The early modern comparativists of the turn of the 20th century assumed that only similar things could be compared, leading them to narrow their research scope to the similarities in the statutory law of the legal systems of Continental Europe.[16] After the First World War, a 'second generation' of comparative lawyers developed a more scientific approach based on the ideas of 'functionalism'.[17] The grounding of the method is mostly credited to Ernst Rabel,[18] who gave emphasis to the use of case studies and the practical outcomes achieved

15 See 3.3 below.

16 K. Zweigert and H. Kötz, *Introduction to Comparative Law* (Oxford and New York: OUP, 1998) at 59; Michaels, 'Im Westen nichts Neues?' (n 13) at 101; G. Dannemann, 'Comparative Law: Study of Similarities or Differences?' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford and New York, OUP 2019) at 392; A. E. Örücu, 'Methodology of Comparative Law' in J. M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham and Northampton: Edward Elgar Publishing Ltd, 2012) at 560.

17 Zweigert and Kötz (n 16) at 33; Dannemann (n 16) at 393.

18 Zweigert and Kötz (n 16) at 61; Dannemann (n 16) at 393; M. Graziadei, 'The Functionalist Heritage' in P. Legrand (ed), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: CUP, 2003) at 104–106.

in different legal systems, aiming to bring to light the substantive legal solutions that hide behind technical national constructions.[19] In this effort, Rabel '*changed the structure of the analysis, moving the focus from the formal language of the system's rules and principles to the concrete reality* (*function*) *to which those rules and principles related*.'[20] This method was a breakthrough, as its focus on social problems and functional equivalents made it possible to compare institutions developed in very different legal systems[21] and it dominated the discipline for most of the 20th century.[22]

However, despite frequent invocations of their scientific commitment, the main defendants of the functional approach have never been too interested in methodological aspects. Its founders had an openly pragmatic approach, more interested in practical problems than in methodological debates.[23] On the one hand, they borrowed a variety of concepts from other disciplines which had experienced a 'functional turn' since the 19th century, without attending to their incompatibilities.[24] On the other, traditional comparative lawyers barely separated the functional method from their political commitment to the legal unification agenda.[25] As a consequence, still today, there hardly exists a pure and elaborated version of the functional method, and its standard reference continues to be a brief chapter in Zweigert and Kötz's textbook,[26] where its authors, who are seen as the most conspicuous functional comparatists,[27] show a clear scepticism as to the possibility of drawing up a logical and self-contained methodology for Comparative Law.[28]

2.2 *The Standard Account*

The central credo of the functional method is that only legal institutions which fulfil the same function are usefully comparable.[29] In Zweigert and Kötz's classic

19 Dannemann (n 16) at 393.

20 D. J. Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language' at 190, available at: http://scholarship.kentlaw.iit.edu/fac_schol/247.

21 Zweigert and Kötz (n 16) at 62.

22 Dannemann (n 16) at 393; G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014) at 66.

23 Michaels, 'The Functional Method of Comparative Law' (n 11) at 367; U. Kischel, *Comparative Law* (Oxford and New York: OUP, 2019) at 91.

24 Michaels, 'The Functional Method of Comparative Law' (n 11) at 349, 350, 365.

25 For example, see Zweigert and Kötz (n 16) at 15, 24–28.

26 Michaels, 'The Functional Method of Comparative Law' (n 11) at 346.

27 See Kischel (n 23) at 88.

28 See Zweigert and Kötz (n 16) at 33.

29 See ibid at 34; M. Siems, *Comparative Law* (Cambridge: CUP, 2014) at 27; Kischel (n 23) at 88, 89; Michaels, 'The Functional Method of Comparative Law' (n 11) at 347, 348.

account, the method rests on the basic assumptions 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'*.[30] Thus, according to this classic approach, the starting point of any comparative inquiry must be a research question posed without reference to a specific legal system in order to allow the researcher to find the 'functional equivalents' used by different legal systems to address the same socio-economic problems.[31]

The most controversial feature functional method[32] is the *'praesumptio similitudinis'*.[33] According to Zweigert and Kötz, at least in those areas of private law that are relatively 'unpolitical',[34] one can almost speak of a basic rule of Comparative Law: '*different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation*'.[35] However, it is worth noting that Zweigert and Kötz saw this presumption only as a working rule that, at the beginning, tells the researcher where to look to find similarities and substitutes; and, at the end, serves to check the results. If the findings are too different, the researcher should be warned and go back to the question and corroborate if it is accurately framed.[36]

The rest of the method is presented by different authors in diverse manners, but its substance is more or less the same, tending to reflect Zweigert and Kötz's classic blueprint:[37] after laying down the research question and choosing the legal systems to be compared,[38] the researcher must report the answer of each legal system, accounting for them in their own terms and explaining why each jurisdiction has reached a certain solution, looking anywhere in the realm of social sciences.[39] The following step is building a system with its own syntax and vocabulary, capable of embracing the quite heterogenous legal

30 Zweigert and Kötz (n 16) at 34.

31 *Ibid* at 36; Siems (n 29) at 26.

32 According to Michaels, perhaps, the most criticized statement of the history of Comparative Law. Michaels, 'The Functional Method of Comparative Law' (n 11) at 375.

33 Zweigert and Kötz (n 16) at 40.

34 ibid at 40.

35 *Ibid* at 39. For a classical example, see L. Fuller, 'Consideration and Form' *Columbia Law Review* 41 (1941) 799; A. T. von Mehren, 'Civil-Law Analogues to Consideration: An Exercise in Comparative Law Analysis' *Harvard Law Review* 72 (1959) 1009; B. S. Markensis, 'Cause and Consideration: A Study in Parallel' (1978) 37 Cambridge Law Journal 53.

36 Zweigert and Kötz (n 16) at 40.

37 Graziadei (n 18) at 101, 102; Siems (n 29) at 13, 24.

38 Zweigert and Kötz (n 16) at 41, 64–73; Siems (n 29) at 13–16.

39 Zweigert and Kötz (n 16) at 43, 44; Siems (n 29) at 16–20.

institutions which are functionally comparable.[40] The final stage is the critical evaluation of the findings, meaning the assessment of which is 'the better solution'.[41] Why the comparatist should assume this task is not completely clear.[42] In fact, Rabel was rather sceptical as to the suitability of the functional method for making normative judgements,[43] but the insistence of Zweigert and Kötz that comparative lawyers are in the best position for this evaluation[44] firmly placed this aim within the structure of the method.[45]

2.3 *Unbridgeable Complexity of the Law?*

For decades, the functional method has been openly challenged[46] by a variety of currents that Mathias Siems has loosely labelled as 'postmodern' approaches. According to him, what unifies these views is a critical appraisal of the scientific neutrality of the functional method and the support of approaches that put more emphasis on the complexity, diversity and cultural dependence of the law.[47] The most radical of these attacks are inspired by the cultural comparison movement, also called cultural legal studies.[48] This criticism holds that the law is a complex phenomenon, that only can be accounted properly for in terms of 'culture', which involves much more than rule-following.[49] Thus, this view rejects the reduction of law to its function, arguing in favour of understanding national law as an expression and development of the general culture or mentality of a society. As the latter are not observable from the outside, cultural differences are unbridgeable.[50] For example, for Pierre Legrand, probably

40 Zweigert and Kötz (n 16) at 44, 45; Siems (n 29) at 20–22.

41 Zweigert and Kötz (n 16) at 47.

42 Siems (n 29) at 22.

43 Zweigert and Kötz (n 16) at 47, referring to Ernst Rabel, 'Die Fachgebiete des Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht'. A similar account of Rabel's work can be seen in Michaels, 'The Functional Method of Comparative Law' (n 11) at 380.

44 See Zweigert and Kötz (n 16) at 47.

45 See Siems (n 29) at 22, 23; Samuel (n 22) at 67, 68; Michaels, 'The Functional Method of Comparative Law' (n 11) at 348.

46 Siems (n 29) at 33; Samuel (n 22) at 79; Örücu (n 16) at 563; Kischel (n 23) at 90. For a recent summary of the criticisms to the functional method, see *ibid* at 90–101.

47 Siems (n 29) at 97, 98.

48 Michaels, 'Comparative Law' (n 12) at 298; Graziadei (n 18) at 114. For an example, see P. Legrand, 'The Same and the Different' in P, Legrand (ed), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: CUP, 2003).

49 Graziadei (n 18) at 114; R. Cotterrell, 'Comparative Law and Legal Culture' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford and New York: OUP, 2019) at 711, 721.

50 Michaels, 'Comparative Law' (n 12) at 298; Örücu (n 16) at 571; R. Cotterrell, 'Is It so Bad to Be Different? Comparative Law and the Appreciation of Difference' in E. Örücü and D. Nelken (eds), *Comparative Law A Handbook* (Oxford: Hart Publishing, 2007) at 136–138.

the most radical champion of this view,[51] *'law does not have a determinate content apart from a given culture and therefore, it cannot have the same content outside the community that first establishes it.* (…) *if comparative law ignores the significance of cultural diversity and difference, it can only approach the matter in a bookish or technical fashion'*.[52]

Many persuasive arguments have been made against the extreme position of Legrand,[53] but nowadays few doubt the existence of some relation between law and culture.[54] However, there is little agreement on how to determine this relation,[55] while the vagueness of the notion of culture entails additional problems regarding the identification of its components and its boundaries.[56] Thus, invocations of legal culture often entail the risk of reading in it what one wishes to see.[57] Nonetheless, it seems clear that legal culture is normally seen as related to the creation and sharing of symbolic meaning, and not to mere instrumental aspects of social life.[58]

From this starting point, the cultural movement has developed some specific arguments against traditional Comparative Law which need to be addressed before bringing Law & Economics into the functional method. The first criticism is that functionalism is excessively focused on black letter rules and does not account for the importance of the broader cultural context in explaining the law.[59] This might be correct as a criticism of what functional comparative researchers actually do, but is hardly a criticism of the method itself.[60] Since Rabel's time, the functional method has stated the importance of looking to the law in action and the facts behind rules, giving a key value to the broad context of the 'social fabric' to understand the legal phenomena.[61] Following this trend, nowadays, the need of looking into the wider social, economic and

51 Dannemann (n 16) at 396.

52 M. Graziadei, 'Comparative Law, Transplants, and Receptions' in M. Reimann and R. (eds), *The Oxford Handbook of Comparative Law* (Oxford and New York: OUP, 2019) at 468, summarizing many works by Legrand. For another summary of Legrand's position, see Cotterrell (n 50) at 138–145.

53 See Graziadei (n 52) at 468–470.

54 D. Nelken, 'Comparative Law and Legal Studies' in E. Örücü and D. Nelken (eds), *Comparative Law A Handbook* (Oxford: Hart Publishing, 2007) at 28.

55 *ibid*.

56 Cotterrell (n 49) at 717; see also Graziadei (n 18) at 114.

57 Cotterrell (n 49) at 717.

58 Nelken (n 54) at 29. For an example, P. Legrand, *Fragments on law-as-culture* (Deventer: WEJ Tjeenk Willink, 1999) at 19, 27.

59 Cotterrell (n 49) at 711, 713, 721; Graziadei (n 18) at 110, 111; Samuel (n 22) at 80, 81.

60 Reimann (n 13) at 680; Michaels, 'The Functional Method of Comparative Law' (n 11) at 369.

61 Michaels, 'The Functional Method of Comparative Law' (n 11) at 369; e.g., see Zweigert and Kötz (n 16) at 11, 38.

cultural context to identify the actual function of rules is widely acknowledged.[62] Hence, the lack of attention to cultural context is only a problem of practice, not of method.[63]

A second criticism engages with the central assumption of the functional method that social problems are universal.[64] Due to this assumption, functional comparative lawyers implicitly took the view that the solutions to such problems are somehow inherent to such problems (*i.e.*, that the problem already calls for a certain solution).[65] Critics contradict this, arguing that human needs are not universal, but conditioned by their environment, reflecting the different priorities than can be found across different jurisdictions.[66] Thus, for this view, the universal nature of social problems is an illusion, fuelled by the incapacity of the observer to see other societies without the lens of his own culture, typically western.[67]

This criticism has been seen as striking close to the core of the functional method.[68] However, its sting depends on the level of abstraction at which social problems are defined. For example, the need of survival seems very universal.[69] In Legal Theory, the universality of this problem has been used by the positivist tradition to account for a minimal moral content of the law, explaining why the most characteristic rule of law (and morality) is 'you shall not kill'.[70] Thus, the real challenge is that generic needs cannot be simply deductively turned into the real-world problem that constitute the starting point of the functional method.[71] This criticism is not fatal. Newer versions of the functional method have given up the point, separating functionalism from universalism. These views propose to construe functional research problems as plausible ways of understanding the reality, in what can be called 'interpretative reconstructionism'.[72] Hence, the universalism criticism does not challenge the core assumption of functionalism that law is there to solve social problems, but only forces

62 Reimann (n 13) at 679, 680.
63 *ibid* at 680; Michaels, 'The Functional Method of Comparative Law' (n 11) at 369.
64 Örücu (n 16) at 562; Michaels, 'The Functional Method of Comparative Law' (n 11) at 353, 354, 355.
65 Michaels, 'The Functional Method of Comparative Law' (n 11) at 350, 351; see also J. Gordley, 'The Universalist Heritage' in P. Legrand (ed), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: CUP, 2003) at 31.
66 Siems (n 29) at 38.
67 See Dannemann (n 16) at 395, 396, describing this view.
68 Siems (n 29) at 38.
69 Michaels, 'The Functional Method of Comparative Law' (n 11) at 374.
70 See H.L.A. Hart, *The Concept of Law* (Oxford and New York: OUP, 2012) at 194, 195.
71 Michaels, 'The Functional Method of Comparative Law' (n 11) at 374.
72 *ibid* at 371, 372, 374.

it to acknowledge that social problems are culturally construed rather than given.[73] The problem is that the principle of functionality does not seem especially well equipped for construing these problems, making apparent its need to resort to concepts coming from other approaches. That is one of the gaps that can be filled by Law & Economics.

Another strong methodological argument against functional comparative law engages with the elusive *praesumptio similitudinis.* In essence, it holds that the presumption violates the requirement of the scientific method that hypothesis should be falsified rather than proved, it infringes the requirement of ideological neutrality and has a reductionist effect, because it inherently strips away all the cultural aspects that make the compared legal institutions different,[74] making it tautological and inherently biased towards finding shallow similarities and avoiding differences.[75] To a large extent, this criticism engages with the bold language used by Zweigert and Kötz when stating the presumption.[76] However, the presumption should be read as no more than what it was initially intended to be: a working rule to tell the researcher where to look to find a problem and to check its results, not a substantive rule as to the expected outcomes.[77] Correctly understood and applied, the functional method does not only see similarities. As Zweigert and Kötz explicitly acknowledge, similar functional rules can have great differences in their legal history, conceptual structure and style of operation.[78] Following Michaels, what the method presumes to be similar are neither the legal institutions, nor the problems to be solved. The formulation of 'similarity' is misleading: solutions are similar regarding only one element, namely, the solution of one specific problem. In turn, the vast differences found in the style of different national solutions can largely be described in terms of culture, showing that both approaches are not essentially opposed.[79] Moreover, in Section 5, this paper will argue that presumptions as this, including an economic presumption, can be a key methodological tool to uncover the hidden aspects of the law in action.

A fourth argument against the functional method is that it has an 'agenda of sameness' which is a menace to cultural diversity.[80] However, this is more

73 Nelken (n 54) at 22, 23.
74 Michaels, 'The Functional Method of Comparative Law' (n 11) at 374, 375.
75 *Ibid* at 375; Siems (n 29) at 37; Graziadei (n 23) at 108.
76 See Zweigert and Kötz (n 16) at 40.
77 *Ibid.*
78 *Ibid* at 39; Dannemann (n 21) at 395.
79 Michaels, 'The Functional Method of Comparative Law' (n 11) at 376, 377.
80 Örücu (n 16) at 564; Nelken (n 54) at 25; Reimann (n 13) at 680. For an example, see Legrand, 'The Same and the Different' (n 67) at 245–250, 258–260.

a political statement than a methodological criticism. The emphasis of the cultural approach on differences seems essentially underpinned by the promotion of tolerance regarding the cultural diversity of different legal systems and the consequential opposition to the comparative evaluation of foreign law and of any attempt of legal unification.[81] However, the argument confuses the method (functionalism) with the purpose to which it has been applied (harmonization, unification and legal transplants). Hence, this claim does not reveal a problem of method -at least not one different from those based in the universal nature of social problems or the implicit bias of the *praesumptio similitudinis*- but a political opposition to the unification agenda shared by many functional comparative lawyers.[82] However, the fact that the 'diversity argument' does not engage with the functional method makes a different problem apparent: functionality does not really offer any normative theory to assess which is the 'better law'. Thus, any attempt to make a comparative evaluation of the law must rely on a theory outside functionalism.[83] Law & Economics can offer an alternative for this.

2.4 *What the Functional Method Does, and Does Not, Need to Surrender*

The previous section showed that the functional and the cultural approach are not completely opposed, as both reject the reduction of law to black letter rules and look to its place in society for a deeper understanding. Properly understood, functionalism does not presume similarity of the legal systems, as the use of functional equivalents aims to simultaneously grasp similarities in the solutions and differences in the way such solutions are developed, which, in turn, can be described as legal culture.[84] However, the consistency of different eclectic or pluralistic approaches to comparative methodology has been disputed.[85] With no clear idea of the relation between culture and law, simply adding the relevance of culture into the method might look more inconsistent than eclectic.[86] In this line Michaels has asked: if the method is deficient,

81 See Cotterrell (n 49) at 712, 724.

82 E.g., see Legrand (n 48) at 245–247, attacking many comparative lawyers of the 20th century. On the links of the functional comparative law and legal unification, see Michaels, 'The Functional Method of Comparative Law' (n 11) at 381, 382; Dannemann (n 16) at 407. The best manifestation of this is that legal unification is almost always included among the aims of comparative law. For example, Zweigert and Kötz (n 16) at 24–28; Michaels, 'Comparative Law' (n 12) at 297.

83 Michaels, 'The Functional Method of Comparative Law' (n 11) at 380.

84 Michaels, 'Comparative Law' (n 12) at 298; Dannemann (n 16) at 398–403; Graziadei (n 18) at 114.

85 Michaels, 'The Functional Method of Comparative Law' (n 11) at 367.

86 *ibid*.

why insist on it with moderate changes; if it works, why compromise? Hence, a claim in favour of an eclectic view will not be promising until a clearer vision of such method itself is achieved.[87] To advance in this line it is necessary to, first, deconstruct the basis of the cultural criticism of the functional method in order to identify where the opposition between them lies; and second, acknowledge that the principle of functionality, standing alone, does not offer useful normative standards. This will make apparent that the principle of functionality is necessary, but not sufficient to ground a comparative method, as it critically depends on other disciplines to fulfil many of its tasks.

As to the first, cultural criticism presents as one what in reality are two close, but conceptually different, arguments: (i) law is imbedded in culture and cannot be understood in a meaningful form detached from it and (ii) cultures are so radically different that it is practically impossible to compare them in a useful manner. The functional method does not dispute the first argument. In this sense, recognizing the relevance of culture for the functional method is in no sense settling for an eclectic theory. However, to be consistent, functionalism needs to give up its claim to the universal nature of problems and move towards approaches that provide analytical tools to construe research questions that are specifically tailored for each inquiry and also accept that its findings will be limited by the manner in which the problems are stated. To do this, the functional method needs to add an approach that is able to link law and society in a meaningful manner. Economics offers a set of possible analytical tools for this. As to the second, classic comparative methodology needs to accept that functionalism is not a normative theory. As said by Michaels, functional equivalents are equal in regard to the function, and hence, function, by itself, is a poor yardstick for evaluation.[88] However, acknowledging the value of cultural diversity does not require the functional approach to give-up its core idea, this is, that functional equivalents are comparable. To the contrary, what this criticism implies is that, if the method is to retain an evaluative aim, it must add an external approach for this purpose. Economics also offers an answer in this field.

What comparative functionalism truly challenges is the idea that cultural differences are so radical that useful comparison of legal institutions across jurisdictions becomes impossible. In this, no compromise is possible. This does not deny that functionalism implies simplifying and omitting many dimensions of the law, cultural or not.[89] However, this should not be seen as a

87 *ibid*.

88 *ibid* at 380.

89 See Graziadei (n 18) at 110–113.

problem. Simplification is common to all attempts to explain reality. Any useful explanation is, by definition, a simplification of reality and, in such process, something is always lost. For example, to explain the shape of continents and countries and their location in the world, a *mappa mundi* simplifies the globe by making it smaller, colourful, and, many times, even flat! Of course, the size and shape of the globe are lost in the process but that is precisely why a *mappa mundi* can show an observer the shape and location of continents.

This poses to relevant challenges for Comparative Law. The first is simplifying reality in a manner that accounts for all the elements that are relevant for the purpose of a given research question. This cannot be done without a common language that bridges the technical differences among the compared jurisdictions. The second is making researchers aware that functionalism is a map and not the territory and that, as such, it only provides a stylized representation of reality. When this is not clear, users start to complain about the map: in 1976, after the introduction of a new map of the New York Subway that depicted streets and parks on the surface, tourists using it to visit Central Park found that it took them much longer than expected to cross it and started to complain that the map did not accurately represent the size of park.[90] However, this was not failure of the map, but of its users, who were applying a guide designed to navigate the subway to visit the city.

3 A Transatlantic Wedding

3.1 *The Methodological Connection*

The shortcomings of the functional method inevitably raise the question of possible alternatives. However, despite their strong criticism, the most virulent opponents to the functional method have not been able to offer developed and identifiable alternatives,[91] while other options tend to be only partial modification or new formulations of the old functional approach.[92] In this line, considering the relative success of the functional approach as the methodological backbone of modern Comparative Law, it seems wiser to follow an incremental approach, building on its core and amending its failures, rather than to simply discard it.

As argued in Chapter 2, the incompleteness of the functional method calls for a discipline that can fill its methodological gaps in a consistent manner.

90 Schwetman (n 4) at 96, 97.
91 Samuel (n 22) at 81.
92 Kischel (n 23) at 102.

The functional nature and success of Law & Economics makes it an obvious candidate.[93] Since the mid 1990's some scholars have tried to merge both approaches to create the new discipline of 'Comparative Law & Economics',[94] arguing that both disciplines have much in common, as both aim to use a functional approach to transcend positive law[95] with the aim of providing a scientific[96] outside look to the dynamics of the law.[97]

However, after a promising start and, despite some relevant contributions,[98] this approach then failed to attract much interest.[99] Indeed, until recently, Comparative Law remained almost completely detached from economic analysis and comparative legal research substantially absent from mainstream Law & Economics.[100] For example, in a conference hold for the 100th jubilee of the 1900 Paris Comparative Law Conference, Law & Economics was virtually absent.[101] After more than twenty years, there still is no clear definition of what Comparative Law & Economics is[102] and the feasibility of bringing both approaches together has been seriously questioned.[103] Recently, some developments in the field of Economics, especially the literature on legal origins,[104]

93 See F. Faust, 'Comparative Law and Economic Analysis of Law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2019) at 827, 832–836.

94 Especially, U. Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' *International Review of Law & Economics* 14 (1994) 3. For a brief history, see R. Caterina, 'Comparative Law and Economics' in J. M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham and Northampton: Edward Elgar Publishing Ltd, 2012) at 191–197; M. Reimann, 'Comparative Law and Neighbouring Disciplines' in M. Bussani (ed), *The Cambridge Companion to Comparative Law* (Cambridge: CUP, 2012) 30.

95 F. Wagner-von Papp, 'Comparative Law & Economics and the Egg-Laying Wool-Milk Sow A Special Issue Dedicated to the Memory of Professor Simon Roberts, 1941–2014' *Journal of Comparative Law* 9 (2014) 137 at 139.

96 See G. B. Ramello, 'The Past, Present and Future of Comparative Law and Economics' in T. Eisenberg and G. B. Ramello (eds), *Comparative law and economics* (Cheltenham and Northampton: Edward Elgar Publishing Ltd, 2016) at 6; Faust (n 93) at 833 and Zweigert and Kötz (n 16) at 33.

97 Faust (n 93) at 827.

98 Caterina (n 94) at 191.

99 R. Caterina, 'Comparative Law and Economics' in J. M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham and Northampton: Edward Elgar Publishing Ltd, 2006) at 161; Faust (n 93) at 849.

100 Caterina (n 94) at 191.

101 Michaels, 'Im Westen nichts Neues?' (n 13) at 110.

102 Ramello (n 96) at 3.

103 E.g., see Wagner-von Papp (n 95), at 137, 139.

104 R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The Economic Consequences of Legal Origins' *Journal of Economic Literature* 46 (2008) 285.

have triggered a strong reaction on the side of comparative lawyers,[105] renewing the attempts to use economic analysis to cure the chronic methodological weakness of Comparative Law.[106] Nonetheless, Comparative Law & Economics remain unfruitful. Most difficulties point to differences derived from their distinct origins,[107] making it important to understand where Law & Economics comes from before attempting to bring it into Comparative Law.

3.2 *An Ocean Apart*

Law & Economics has been often saluted as the most important novelty of modern legal scholarship,[108] at least in the US.[109] The movement was born around the University of Chicago in the 1960s when some scholars started applying economic analysis to the American legal systems across the board.[110] During the 1970s this approach crystalized into a new discipline under the leadership of Richard Posner,[111] becoming pervasive in US teaching and scholarship.[112] From there, it also expanded to the judiciary and the legal profession, having an impact on court decisions and the development of the American common law.[113]

From a comparative perspective, the success of Law & Economics in the US has been attributed to a combination of circumstances unique to the American legal reality which uncoupled academic discourse from positive law,[114] including (i) the heritage of American Legal Realism[115] and its focus on the actual consequences of judicial decision,[116] (ii) the role of the Economic Theory of Federalism in achieving more legal uniformity across the different

105 Caterina (n 94) at 199; Reimann (n 94) at 33. For example, Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13); M. Bussani and U. Mattei, 'Diapositives versus Movies – the Inner Dynamics of the Law and Its Comparative Account' in M. Bussani and U. Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge: CUP, 2012) at 4.

106 *E.g.*, Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) at 203, 213.

107 Caterina (n 94) at 191; Ramello (n 96) at 4.

108 Mattei (n 94) at 3, 18; Ramello (n 96) at 6.

109 R. Harris, 'The History and Historical Stance of Law and Economics' in M. D. Dubber and C. Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford: OUP, 2018) at 24.

110 R. A. Posner, *Economic Analysis of Law* (New York: Aspen Publishers, 2007) at 23, 24; Harris (n 109) at 25–28.

111 Harris (n 109) at 29–31; Ramello (n 96) at 6.

112 Wagner-von Papp (n 95) at 141. For the details, Harris (n 109) at 30–34.

113 Harris (n 109) at 31–33.

114 Wagner-von Papp (n 95) at 140.

115 *ibid*; Faust (n 93) at 843.

116 Zweigert and Kötz (n 16) at 246–249.

US States,[117] (iii) the existence of a powerful judiciary that exercises an essentially legislative function which frequently relies on policy reasoning,[118] (iv) the fluidity of the American legal profession which enabled a number of law professors identified with the movement to become consultants, government official, judges and even Justices in the Supreme Court,[119] (v) the prestige of applied economics in the United States,[120] and (vi) the presence in Law School of students with a background in Economics.[121]

By the same token, Law & Economics has not had the same success outside the US.[122] In the early 1990s Mattei and Pardolesi argued that Europe was more or less fifteen years behind the US in this field, but were optimistic regarding the chances to close the gap.[123] However, time proved them wrong: at least until recently, Law & Economics remained in the periphery of European scholarship.[124] There are many reasons for this. On the one hand, other common law jurisdictions, such as England, have judiciaries that are less willing to make policy decisions,[125] and their common law has not experienced the systematization effort that took place in the US during the 20th century (*e.g.*, Restatements of the Law and the Uniform Commercial Code).[126] As a result, these jurisdictions tend to follow a 'historic rationality'[127] that requires them to spend most of their resources reconciling hundreds of years of case law by means of an 'historic exegesis'.[128] On the other hand, civilian countries, as Germany, tend to exhibit a 'systematic rationality'[129] that relies on the 'doctrinal exegesis' of codified law,[130] and are normally reluctant to depart from value

117 Richard A Posner, 'The Future of the Law and Economics Movement in Europe' *International Review of Law & Economics* 17 (1997) 3, at 6; Wagner-von Papp (n 95) at 140.

118 Posner (n 117) 3; K. Grechenig and M. Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' *Hastings International and Comparative Law Review* 1 (2008) 295, at 302–303.

119 Posner (n 162) at 3, 4.

120 *Ibid* at 4.

121 Wagner-von Papp (n 95) at 144; Grechenig and Gelter (n 118) at 304, 305.

122 Posner (n 117) at 5; Wagner-von Papp (n 95) at 141–144.

123 U. Mattei and R. Pardolesi, 'Law and Economics in Civil Law Countries: A Comparative Approach' *International Review of Law & Economics* 11 (1991) 265, at 271–272.

124 Grechenig and Gelter (n 118) at 298.

125 See P. S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press, 1987) at 116, 117, 134, 141, 142.

126 Wagner-von Papp (n 95) at 141.

127 See O. Kahn-Freund, 'Introduction' in K. Renner, *The institutions of private law and their social functions* (London: Routledge & Kegan Paul Limited, 1949) at 112–114.

128 Wagner-von Papp (n 95) at 141.

129 See Kahn-Freund (n 127) at 12–14.

inspired moral philosophy[131] in favour of adopting the utilitarian approach that underlies Law & Economics.[132] For example, standard German doctrine acknowledges that economic analyses may offer valuable insights in the legislative process and in legal interpretation, but also takes care to highlight that efficiency is only one criteria among others, that Law & Economics is based on assumptions that only exist in models and that, in the application of the law, justice (*Gerechtigkeit*) has always the highest value, outweighing efficiency.[133]

This resistance to the inclusion of economic elements in legal discourse has often been attributed to an excessively narrow understanding of Law & Economics by scholars who reject the whole method due to their criticism of the Chicago School.[134] However, comparative research has uncovered deeper causes for the European reluctance to embrace Law & Economics, especially in the case of Germany, a country that is especially influential in comparative legal scholarship. Grechenig and Gelter argue that there are two key factors that prevented the development of this approach in German speaking countries. On one hand, the German Free Law movement (*Freirechtsbewegung*) -an approach similar to American Realism– did not live long enough to discredit the classical approach of the German Conceptual Jurisprudence (*Begriffsjurisprudenz*). As a result, Germany did not experience the vacuum of normative standards that allowed the rise of Law & Economics in the US and continued relying on legal approaches underpinned by different forms of 'reproductive argumentation'. On the other hand, the pervasive influence of Idealism in German philosophical thinking, particularly the Kantian idea that the value of something cannot be judged by its consequences, prevented utilitarian ideas from achieving popularity in Germany.[135] Thus, it comes as no surprise that, prior to introducing Comparative Law & Economics in his recent textbook, the German comparatist Uwe Kishel makes an extensive criticism of economic analysis in general, mentioning, among other points, the absence of crucial considerations of justice, its tendency to instrumentalizing individuals for supposedly higher goods and reducing everything meaningful to monetary terms.[136]

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130 Wagner-von Papp (n 95) at 142.

131 E.g., se K. Larenz and M. Wolf, *Allgemeiner Teil Des Bürgerlichen Rechts* (Munich: Beck, 2004) at 21, 22.

132 Wagner-von Papp (n 95) at 143.

133 E.g., H. Honsell, 'Einleitung Zum BGB', in: D. Kaiser and M. Stoffels (eds), *Staudinger BGB. Eckpfeiler Des Zivilrechts* (Berlin: Sellier & de Gruyter, 2018) 1 at 89; J. Wilhelm, *Sachenrecht* (Berlin and Boston: De Gruyter, 2016) at 140–141.

134 Grechenig and Gelter (n 118) at 300.

135 Grechenig and Gelter (n 118).

136 Kischel (n 23) at 119–129.

In consequence, despite having an evident functional connection, Law & Economics and Comparative Law developed apart.[137] At least two reasons have been offered to explain these separate paths. First, Michaels proposes that Law & Economics has an *a priori* approach to the law which has little interest in the concrete forms and differences of real life legal institutions, while Comparative Law, which could have used efficiency analysis as its *tertium comparationis*, was insufficiently concerned with developing its methodology.[138] Wagner-von Papp adds that the continental hostility toward the utilitarian dimension of economic analysis might also have prevented its wider adoption in Europe.[139]

3.3 *The Wedding of Comparative Law and Economics*

The separate paths of Comparative Law and Law & Economics only started to intersect after the fall of the Berlin Wall[140] and with the movement towards the unity of Western Europe.[141] In that context, it did not take long until scholars tried to formally bring both approaches together. The lead was taken by Ugo Mattei, who in 1994 declared the 'methodological wedding' between what he held to be the two most interesting recent attempts to understand the law, coining the new approach as 'Comparative Law & Economics'.[142] However, this 'wedding' was not a developed account of the method of the new discipline, but a specific attempt to throw some light on the role of economic efficiency in explaining the patterns of legal change in a comparative perspective.[143]

An attempt to provide a more encompassing view of Comparative Law & Economics came three years later announcing a bright future for the discipline,[144] but despite some developments,[145] this approach has not been very fruitful.[146] A clear sign of this is that the 'anthology' on the subject edited by

137 See Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) at 198.

138 *ibid* at 199.

139 Wagner-von Papp (n 95) at 143.

140 See G. de Geest and R. van den Bergh, 'Introduction' in G. de Geest and R. van den Bergh (eds), *Comparative law and economics* (Cheltenham and Northampton: Edward Elgar Publishing Ltd, 2004) at xix; Posner (n 117) at 8; Y. u Chang and H. Smith, 'An Economic Analysis of Civil versus Common Law Property' (2012) 88 The Notre Dame Law Review 1, 8; Zweigert and Kötz (n 16) at 17.

141 See Posner (n 117) at 5, 6; Geest and Bergh (n 140) at xix.

142 Mattei (n 94) at 18.

143 *ibid* at 3.

144 U. Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997) at x.

145 E.g., A. Ogus, 'The Economic Basis of Legal Culture: Networks and Monopolization' *Oxford Journal of Legal Studies* 22 (2002) 419.

146 Ramello (n 96) at 4.

Dee Geest and Van den Berg in 2004 is mostly a collection of articles from the previous 40 years,[147] that somehow converge to this subject.[148] However, Dee Gesst and Van den Bergh also noted that part of the problem was that second generation Comparative Law does not really contain functional explanations or that such are purely based on common sense and intuition, and attempted to solve this by placing Law & Economics within the typical structure of the functional method.[149] Despite its seminal value, this framework is incomplete and underdeveloped. It neglects the stating of the research question stage, and it does not account for the many methodological problems involved in merging both approaches. However, more recently, new impetus for using Law & Economics to address the methodological problems of Comparative Law came as part of the reaction against the 'legal origins literature'.[150] Inspired by the so called 'second wave of Law and Economics',[151] some comparative legal scholars have suggested to build upon it to cure the chronic methodological problems of the functional method. The two remaining sections of this paper are an attempt to advance in this direction.

4 Working Out the Marriage

4.1 *Bringing Law & Economics into Comparative Law*

Most defendants of Comparative Law & Economics build on two basic arguments. First, assuming that the legal framework has a relevant impact on economic performance, they aim to reverse the process to explain the development of the law as a result of the pursuit of economic growth.[152] In this way, they hold, Comparative Law could be enriched by the explanatory powers of modern Economics.[153] Second, they argue that Comparative Law and Law & Economics have an essential methodology compatibility, as economic analysis

147 Geest and Bergh (n 140) at xv–xix.

148 Chang and Smith (n 140) at 3.

149 Geest and Bergh (n 140) at x–xi.

150 Caterina (n 94) at 197–201. For an example of this reaction, Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) at 200.

151 See G. Hadfield, 'The Second Wave of Law and Economics: Learning to Surf' in M. Richardson and Gillian Hadfield (eds), *The Second Wave of Law and Economics* (Sidney: The Federation Press 1999).

152 E.g., A. Ogus, 'The Economic Approach: Competition between Legal Systems" in E. Örücü and D. Nelken (eds), *Comparative Law A Handbook* (Oxford: Hart Publishing, 2007) at 155, 156.

153 Geest and Bergh (n 140) at ix.

is a refined functional method that measures a legal rule not by its doctrinal context but by its ability to fulfil social needs.[154]

An additional complementarity of both approaches that has not been stressed enough is that Law & Economics has a strand that gives a central role to institutional comparison. The reasons for this omission is, most likely, that Law & Economics tends to be essentially identified with Posner's abstract neoclassical economic analysis of stylized legal rules.[155] However, the starting point of Law & Economics -the Coase theorem- points to the fact that neoclassical models based in a zero-transaction costs world are highly unrealistic.[156] By showing the impact of transaction costs in practice, Coase's argument points to the importance of comparative institutional analysis in finding the configuration of institutions that maximizes the wealth in the real world.[157] Coase explicitly stated the desirability of approaching economic problems and questions of economic policy by comparing different institutional arrangement,[158] even though it seem clear that he was thinking of Pigouvian taxes and contracts as different forms to internalize externalities,[159] not in comparing institutions from different legal systems.

The fact that the mainstream of Law & Economics had shown little interest for the operation of real-life institutions does not imply that this path cannot be explored. On the one hand, Coase's work inspired New Institutional Economics, a branch of Economics which makes actual institutions the centre of its approach.[160] On the other, within the Law & Economics movements, the last years have witnessed a new flourishing of approaches that take real-life legal forms more seriously. This view is well explained by Calabresi's later work, which distinguishes between 'Law & Economics' and 'Economic Analysis of Law'. According to him, the later follows an approach that can be traced to Bentham: it analyses the legal world from utilitarian perspective and, as a

154 Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) at 198.

155 See G. Calabresi, *The Future of Law and Economics. Essays in Reform and Recollection* (New Haven: Yale University Press, 2016) at 15; Harris (n 109) at 27, 29–31.

156 R. H. Coase, *The Firm, the Market and the Law* (Chicago and London: University of Chicago Press, 1988) at 174; B. Lee and H. Smith, 'The Nature of Coasean Property' *International Review of Economic*s 59 (2012) 145, at 146; H. E. Smith, 'Economics of Property Law' in F. Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private Law and Commercial Law* (Oxford and New York: OUP, 2017) at 152.

157 Lee and Smith (n 156) at 146.

158 R. Coase, 'The Problem of Social Cost' T*he Journal of Law & Economics* 3 (1960) 1, at 43.

159 Lee and Smith (n 156) at 149; Coase (n 158) at 29–43.

160 On the shared origin of Law & Economics and New Institutional Economics, see J. N. Drobak, 'Introduction: Law & The New Institutional Economics', in: J. N. Drobak (ed), *Norms and the Law*, vol 26 at 2.

result, confirms, casts doubt on, or seeks reform of the law. Instead, the former, which Calabresi links to Mill's criticism of Bentham, begins with a more agnostic acceptance of the world as it is: if Economic Theory cannot explain it, it asks whether the legal reality has been correctly identified and looks for a better explanation of the world. If, however, a more comprehensive description of the law discloses rules and practices that Economic Theory cannot explain, it looks to the expansion of Economic Theory to account for such dimensions. Finally, it accepts that some aspects of our legal practices will not be explicable by an extended Economic Theory. Relying on Mill, Calabresi describes this as the 'un-analysed experience of the human race', which might result, either from undesirable practices that need to be reformed (as suggested by Bentham) or from legal relationships that Economics can simply not explain.[161] The path I propose to bring Law & Economics into the functional method is set in the tradition of Mill and Calabresi.

There are different concrete forms to take advantage from the broad complementary of Law & Economics and Comparative Law. According to Faust, first, one discipline can be used as ancillary to the other; and, second, one discipline can become a subject matter of the other.[162] Only the first option is directly concerned with the 'methodological possibility' Comparative Law & Economics, but the second will prove useful in avoiding some pitfalls of this approach. Scholars have highlighted that this could benefit Comparative Law in, at least, three ways. First, Law & Economics can provide Comparative Law with an idiom (i.e., the '*tertium comparationis*') for comparing legal doctrines and institutions developed in different 'local' legal languages.[163] Second, thanks to its ability to explain human behaviour, Law & Economics can also help comparative inquiries in finding and explaining the reasons behind the differences and similarities across jurisdictions.[164] Third, Law & Economics can play a role in the normative evaluations intended by many comparative inquiries by offering a clear normative standard in the form of the promotion of efficiency.[165]

4.2 *Overcoming the Pitfalls*

Despite their evident connection, the viability of Comparative Law & Economics has been viewed with scepticism due to the risk of combining the

161 Calabresi (n 155) at 1–6.
162 Faust (n 93) at 827.
163 Posner (n 117) at 6.
164 Faust (n 93) at 828, 833, 834.
165 *ibid* at 835.

methodological problems of the two disciplines in one. For example, Wagner-von Papp has argued that good comparative economic analysis of law looks as an imaginary cross-breed creature that combines an impossible set of desirable attributes, but might end up giving poor outcomes.[166] This subsection shows these pitfalls are not fatal and can be overcome.

The first pitfall derives from a problem of lack of technical knowledge. On one side, Comparative Law inquiries are full of traps which can easily mislead economists with no adequate comparative legal training, including the risk of making excessively crude comparisons, typically the result of overgeneralizations, and failing to find the comparable legal institutions, due to the difficulty in identifying the real-life functional equivalents.[167] On the other side, comparative legal scholars tend to lack state of the art economic training and tend to rely on statements made in Law & Economics text books which might not be transferable to the topic under research.[168] Even if these risks should not be underestimated, it is important to note that, at least conceptually, both can be solved either by training lawyers or economists in the other discipline or by collaborative efforts.[169] More importantly, it should not be forgotten that lawyers with economic training played a key role in developing the Law & Economics movement. Posner himself stated that '*economic analysis of law need not be conducted at a high level of formality or mathematization. The heart of economics is insight, rather than technique*'.[170]

A second pitfall is the inherent tension between the approaches of Comparative Law and Law & Economics: while good legal comparison tries to develop rich descriptions of the law in action, economic analysis aims to reduce the complexity of the real world by bringing it into models.[171] Hence, it has been said that integrating both in one single approach carries the risk of adopting a superficial approach to the legal system or a model too rich to make any prediction.[172] However, this tension can be solved, by noting, first, that each approach should focus on different stages of the comparative inquiry and, second, that contemporary Economics has branches with a key interest in real-life institutions, like New Institutional Economics, and also offers analytical tools,

166 Wagner-von Papp (n 95) at 137, 139.
167 ibid 148–150. For a detailed criticism of this problem, see Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) at 200, 201.
168 *Ibid* at 152.
169 *Ibid* at 153.
170 Posner (n 117) at 14.
171 Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) 211; Wagner-von Papp (n 95) at 155.
172 Wagner-von Papp (n 95) at 155.

such as Behavioural Economics, that allow for much more realistic modelling. Thus, on the one hand, the rich approach of Comparative Law should lead in finding the functional equivalents, describing them in intelligible terms and the uncovering their relationship with the wider legal, social and historical context. On the other, economic concepts should concentrate in framing (i.e., 'modelling') a research problem in functional, but realistic terms, and providing a common language for the analytical comparison stage. Thus, instead of being seen as a problem, the opposite approaches of economic and legal analysis could represent a methodological advantage: the use of economic models can help lawyers to identify legal practices that are overlooked because they do not reach courts; while a detail-oriented approach to the law can provide evidence that challenges existing economic models, forcing them to improve.[173]

A third methodological pitfall is the biased selectivity danger present in both disciplines. In Comparative Law, this bias typically comes from the limitations imposed by the linguistic capacity of the researcher and the difficulty of getting immersed in too many legal systems. In Law & Economics the bias results from the fact that the outcome of the model depends on the method used, the underlying assumptions and the variables included in it.[174] Comparative lawyers have identified these problems in the legal origins literature, pointing to its structural bias in favour of the common law.[175] Continental comparative lawyers seem especially aware of these risks. For example, despite promoting Comparative Law & Economics, Michaels warns against the temptations of using simplistic economic analysis to overcome the weakness of comparative functionalism, explaining that this entails the risk of replacing the legal bias coming from (one's own) national law for those coming from another discipline (Economics) or from American law.[176]

Despite the risks of bias, it should be noted that this has precluded neither economists nor comparatists from continuing researching in their fields. In consequence, this cannot be a final argument against Comparative Law & Economics, or at least, it is as final as it is for each discipline considered separately. Nonetheless, it will require Comparative Law & Economics to be on guard against them. In this line, the interdisciplinary nature of this approach could serve for the reciprocal control of these biases. For example, De Geest and Van den Berg suggested that Comparative Law could help to correct the

173 See Calabresi (n 155) at 17–21. On this, see Section 5.
174 ibid at 159–160.
175 Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) at 200, 201.
176 *Ibid* at 205.

tendency of Law & Economics to see the 'normality' of the US as optimal[177] and Calabresi has stressed the unique position of lawyers to tell what part of the 'unanalysed experience of the human race' is worth keeping and what is 'none-sense on stiles' -to use Betham's words- and should be reformed.[178]

The close relation that Comparative Law has with other legal sciences makes it especially suitable for this purpose.[179] For example, Mattei's reliance in the theory of the 'efficient common law' to explain legal transplants and legal convergences as resulting from a quest for efficient rules,[180] could be checked against other approaches with strong grasps on Comparative Law. For example, Ron Harris has recently accounted for the fierce methodological criticism that the theory of the efficient common law has raised among legal historians,[181] while Comparative Law offers a variety of other plausible explanations for legal transplants, including the role of prestige, power and migration in the flux of legal ideas across jurisdictions.[182] Finally, in the field of Legal Theory, Ronald Dworkin has argued that, if anything, the evidence shows that, in hard cases American judges tend to follow a right-based approach, not policy reasoning.[183]

A final pitfall suggested for Comparative Law & Economics is the risk of bringing into Comparative Law the sort of moral arguments made against Law & Economics, including the claims that it has a 'monstrous egotistical utilitarian nature' and that it 'fails to understand that wealth is not value'.[184] This criticism is only partial as, using Calabresi's distinction, it derives from reducing all 'Law & Economics' to 'Economic Analysis of Law'. Further, the criticism is not fair. Posner himself acknowledges the ethical limitations of efficiency as social decision-making criteria.[185] More important, this criticism is not properly methodological. Its basic core is little more than saying that Law & Economics is 'too economic' and, as result, it overlooks other descriptive and moral aspects.[186] To avoid entering into a discussion about the moral virtues of utilitarianism, it is possible to follow Michaels, who held in this

177 Geest and Bergh (n 140) at viii, xiv.
178 Calabresi (n 155) at 17–20.
179 On the relations of Comparative Law with other disciplines, Reimann (n 94); Zweigert and Kötz (n 16) at 6–12.
180 Mattei (n 94) at 3–16.
181 Harris (n 109) at 38.
182 See Graziadei (n 52) at 445–554.
183 R. Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2013) at 122.
184 Wagner-von Papp (n 95) at 162.
185 Posner (n 110) at 11.
186 See Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) at 203.

regard that the fact that a theory cannot account for all is not a reason to discard it.[187] Nonetheless, as the hostility and mistrust evidenced towards Law & Economics among continental comparative lawyers has probably been a key factor in hindering a wider success of Comparative Law & Economics, tackling these concerns seems essential for a wider use of economic arguments in Comparative Law.

4.3 *Insisting on the Method*

The methodological difficulties faced by Comparative Law & Economics are not insurmountable. As said by Michaels, Comparative Law & Economics is still young, why decide *ex ante* what is possible and what not?[188] In fact, until now, the main problem of this approach seems not to be the low quality of its outcomes, but that its scarce output has not allowed a discussion that could sharp its method in an incremental manner. In fact, its few developments have deeply increased our stock of knowledge about the law (*e.g.*, the role of efficiency in legal transplants) or given rise to enlightening discussions, as happened with the criticism that the legal origins literature has raised among comparative lawyers.

Probably the best reason to persist in developing Comparative Law & Economics is the advantage provided by the transparency of its argument. If done well, it discloses its assumptions and reasoning, providing more transparent and rational arguments than simply arguing that a given legal institution is 'fairer' or 'just'.[189] Thus, Mattei's promise of using Law & Economics to build models, which work as homogeneous grounds for comparing the concrete solutions of the legal institutions analysed[190] still seems valid. However, working out a more robust method for Comparative Law & Economics requires, at least, addressing: (i) the tension between rich (comparative) description and abstract (economic) modelling; (ii) the risk of importing economic biases into Comparative Law, and (iii) the criticism related to relying on efficiency arguments to ground normative statements. The next section will suggest how to overcomes these three problems.

187 *ibid.*
188 *Ibid* at 212.
189 *Ibid.*
190 Mattei (n 144) at 94.

5 Bringing Law & Economics into the Functional Method

As shown in Section 2, the core assumptions of the functional method are that: (i) legal institutions have functions; (ii) that these functions consist in addressing certain problems found in societies; and (iii) that institutions fulfilling equivalent functions are comparable in a useful manner. As argued there, only the third assumption has been defied as such. Hence, the methodological challenge for Comparative Law is developing a method to find and understand functional equivalents in a manner that allows a useful comparison. Relying on sections 3 and 4, this final section will show that this is possible by: (i) a committed use of the classic comparative notions of 'function and context'; (ii) benefiting from the ability of Law & Economics for abstract modelling; and (iii) acknowledging without anti-economics prejudices the broad value that efficiency can have in finding the better law and its limits.

5.1 *Function and Context*

As discusses in Chapter 2, since Rabel's time, the key concepts of classic Comparative Law have been 'function and context' and here is where this discipline should concentrate its input. The functional approach that underpins mainstream Comparative Law and its awareness of the importance of looking for the law in action makes this discipline especially well-equipped to go beyond black letter rules to find the real-life legal solutions that solve a certain problem in various societies. Therefore, Comparative Law has great advantages over Law & Economics in finding the functional equivalents that should form the basis of comparison. Second, the vocation of sound Comparative Law for rich description, also makes it especially suitable for accurately describing each institution and its relations with its environment. As this description moves from the relevant institution to its broader legal and extra-legal context, the need to resort to comparative legal approaches external to the functional method becomes apparent. In this process, Legal History, the study of Legal Transplants and Cultural Studies should prove essential in accounting for the context in which a given institution came into existence and operates. In one sentence, to use economic concepts to design a reliable map, it is essential to previously have done an accurate 'legal cartography'. Otherwise, the map and the territory will not have enough identity (*isomorphism*). Comparative Law must do the bulk of such 'cartographic' research.

However, economic models can also play a key role in finding functional equivalents. Calabresi has shown that the same reasons that makes lawyers good at describing reality, also makes them overlook elements of the real world that do not find their way into the cases to which they devote their attention.

He exemplifies this with his famous work on liability rules:[191] although a simple economic model suggested its existence, at that point in time, prevailing legal scholarship held that, the right to abate nuisance by payment did not exist. Puzzled by this, he and Melamed looked more carefully into the legal reality and found that such right actually existed, but was applied administratively, not by courts.[192] This anecdote shows how a '*presumptio oeconomica*' or '*presumptio efficientiam*' can play a role similar to the *presumptio similitudinis*: if a legal institutions under comparison does not make economic sense, it might be worth checking whether the research has screened the whole relevant reality.

For example, according to a superficial look, the German rules on formation prevent the offeror from withdrawing the offer until reasonable times has elapsed (§ 145 BGB), while, in English law, despite promising not do this, the offeror is always entitled to withdraw the offer, as such promises not to withdraw, generally lack consideration.[193] From an economic perspective none of these rules make complete sense, as it seems more efficient to have a flexible rule that allows the parties to create binding or non-binding offers, depending on the circumstances. Unsurprisingly, that is what happens in practice: German merchants frequently introduce text in their offers to make them non-binding, while common law jurisdictions have introduced doctrines that weaken the practical effect of freely revocable offers.[194]

However, to avoid economics biases resulting from explaining the reality in efficiency terms, the researcher must also be ready to abandon the existing models and look elsewhere when necessary. To achieve this, the description of the context should always account for the role that *tertium comparationes* might have in the compared legal systems. In the case of Comparative Law & Economics, this requires accounting for the place that economic rationality and policy arguments have in each legal system; this is, it demands making Law & Economics the subject matter of Comparative Law. As mentioned in Chapter 3, in the US, this kind of reasoning is much more internal to the law, as policy concerns are openly used as normative standards to fill gaps and systemize case law; while in other jurisdictions, typically in the civil law tradition, such arguments have less space, as legal arguments are seen as much more intrinsic to the law. In doing this, researchers must take great care in avoiding

191 See G. Calabresi and A. D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' *Harvard Law Review* 85 (1972) 1089.

192 Calabresi (n 155) at 20.

193 *Dickinson v Dodds* (1876) 2Ch D 463.

194 Zweigert and Kötz (n 16) at 38–39.

crude generalizations, because the role of policy arguments also varies within a single tradition. For example, following Eisenberg, policy concerns seem to always have some role in the American common law, either in the way that rules are first established by courts or in the way in which those rules are then extended, restricted and applied.[195] Thus, American courts tend to assume a much more extensive role in shaping the law than English judges, who are more circumspect when it comes to developing the law,[196] tending to defer major reforms to the legislator.[197] Hence, by making explicit the role of economic and policy arguments within each jurisdiction, the researcher will have a better chance to avoid economic biases. This implies that micro-comparative studies using Law & Economics should include a macro-comparative research that accounts for the place of economic and policy arguments within each of the compared legal systems.[198]

A good example of the need to be aware of the role that economic thinking has within each legal culture is the literature on the justification of the *numerus clausus* of property rights. According to this principle, the content of property rights are strictly limited by the law, creating a salient limitation to the principle of freedom of contract, which is seen in economic thinking as one of the keys for the efficient allocation of property.[199] However, instead of disregarding the principle as inefficient, an American strand of literature asked why most modern legal systems did have this principle, finding alternative economic explanations as to why that the standardization of property rights is actually efficient.[200] By contrast, once the focus is put outside the US, the explanation for the same principle changes. In England, attempts to find a justification for the same principle have tackled the issue from a conceptual perspective, relying on the broader principle according to which agreements can generally not impose a duty or a liability on someone who is not a party to such agreement;[201] while in Germany, where the principle has been known for

195 M, Eisenberg, *The Nature of the Common Law* (Cambridge, MA: Harvard University Press, 1988) at 2, 3.

196 Atiyah and Summers (n 125) at 134.

197 ibid at 141, 142; R. Ward, A. Wragg and R. J. Walker, *Walker & Walker's English Legal System* (Oxford and New York: OUP, 2008) at 5.

198 Michaels, 'The Second Wave of Comparative Law and Economics?' (n 13) at 204.

199 T. W. Merrill and H. E. Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle', *The Yale Law Journal* 110 (2000) 1.

200 E.g., *Ibid*; H. Hansmann and R. Kraakman, 'Property, Contract, and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights', *Journal of Legal Studies* 31 (2002) 373.

201 E.g., B. McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land', in: S. Bright (ed), *Modern studies in property law*, vol 6 (Oxford: Hart Publishing, 2011) at 311.

a long time, a variety of long standing doctrinal, historical, philosophical and policy justifications have been discussed.[202]

5.2 *Modelling*

Bringing complex realities into a stylized models is the key to economic analysis. Thus, this approach should be used in stages of comparative research that need to simplify the reality to be able to explain it. The first of these stages is laying down the research problem. As explained in Section 2, the functional method is not a theory about society and, thus, is ill-equipped to frame social problems. To the contrary, the aptitude of Law & Economics for modelling complex real problems and explaining human behaviour in a stylized form can make it a useful approach for defining research problems. This is obvious for areas of law that incorporate explicit economic concepts or regulate economic activities, but not for others. Naturally, the capability of Law & Economics to model reality is limited, as many significant phenomena of human life are not intelligible in this way,[203] something that contemporary Law & Economics has taken into account.[204] However, it is also worth noting that the richness and flexibility of modern Economics (including rational choice and nonmarket economics)[205] applies its rationality to fields that are more remote from economic transactions and regulations.[206]

The analytical power of economic concepts to frame functional problems can be exemplified by Calabresi and Melamed's model of takings (i.e., expropriations), based on the distinction between entitlements protected by property rules and liability rules. Under a property rule, the transfer of an entitlement requires the consent of both parties based on a freely agreed valuation; while under a liability rule, a party can obtain an entitlement of another, against its will, as long she is willing to pay an objectively determined value.[207] Legal systems favour liability rules when the holder of the entitlement has a monopoly position that allows her to conduct strategic or speculative behaviour that might prevent reaching an agreement, hindering the efficient transfer of the

202 See H. Fleischer, 'Der Numerus Clausus Der Sachenrechte Im Spiegel Der RechtsÖkonomie', in: T. Eger and others (eds), *Internationalisierung des Rechts und seine ökonomische Analyse. Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag* (Wiesbaden: Gabler Verlag, 2008).

203 E. J. Weinrib, *The Idea of Private Law* (Oxford and New York: OUP, 2012) at 5–6.

204 E.g., Calabresi (n 155) at 5–7.

205 Posner (n 117) at 4.

206 *ibid* at 14.

207 *ibid* at 1092.

entitlement, for example, in takings.[208] By using the same toolkit of concepts, other real-life problems can be modelled in terms that are easy to understand and identify in practice. For example, some economic activities regarding the exploitation of natural resources can only be made *in situ*, *e.g.*, mining or hydraulic and wind generation. Due to their right to exclude others, the relevant landowners have monopoly positions to give access to such resources, which can lead to an inefficient allocation of such. How do different legal systems address this problem? How do they assign the right to exploit natural resources which are different from land but depend on it?

In this vein, New Institutional Economics offers especially useful analytical frameworks to account for complex social realities in stylized, but realistic manners. Explaining economic performance over time, Douglass North argued for a 'Theory of Institutions' made up of three basic building blocks: (i) a theory of property rights, (ii) a theory of the State and (iii) a theory of ideology. Property rights are understood by North as human-created devices that reduce transactions costs and organize exchange, thereby setting the basic personal and group incentives of the economic system. In turn, the State is in charge of creating and enforcing such rights, while the costs of maintaining and enforcing them derive from the worldview or 'ideology' existing in the relevant community, this is, whether the property system is perceived as justified or if it is under attack as setting unjust terms of exchange.[209] North's attention to elements neglected by the neoclassical model provides a framework capable of embracing central elements of functional and cultural comparative legal research. For example, accounting for 'property rights' seems the classic domain of micro-comparative analysis, explaining the role of the 'State' (Government, Legislators and Courts) corresponds to a typical interest of macro-comparative law for the wider legal systems and 'ideology' seems to be part of the elusive notion of 'mentality' advanced by Legrand.

A second moment in which economic concepts can prove their value for the functional method is at the analytical comparison stage. Law & Economics offers to translate the diversity of legal cultures into the universal language of Economics,[210] providing a powerful conceptual structure that can serve as a substantial *tertium comparationis*. For example, the Cultural Legal Studies movement holds that different legal cultures are a matter of mentality, which

208 R. Epstein, 'A Clear View of The Cathedral: The Dominance of Property Rules', *Yale Law Journal* 106 (1997) 2091 at 2093–2094.

209 D. C. North, *Structure and Change in Economic History* (New York and London: WWNorton, 1981) at 7, 8, 11, 12, 17, 49, 53.

210 Posner (n 110) at 6.

are essentially incomparable.[211] However, Anthony Ogus has shown how different legal cultures can be compared, for example, by using networks economics as common language. In his view, legal cultures can be described as networks made up of a combination of language, conceptual structures and procedures that, because of the commonality of their use, reduces the cost of interactive behaviour. However, because the value of a network increases as more users adopt it, networks tend to become monopolies (*e.g.*, telecommunication systems). In the case of legal culture, lawyers are the primary interested party in keeping such a monopoly. Thus, in areas of the law with particularly strong legal cultures, one tends to find monopoly problems that make them very parochial (*e.g.*, real property law); while areas with frequent interjurisdictional transactions have far less distinctive legal cultures (*e.g.*, sales law).[212] Of course approaches as this will distort many features of legal reality. However, many times, this is a price worth paying, as when countries in a map are painted in colours to show their political boundaries. The real world does not have those colours, political borders are disputed, and a single national state can hide deep ethnic fault lines, but who can deny the visual clarity provided by a political map?

Finally, on the one hand, the ability of the neoclassical economics to account for human behaviour can be useful to explain many aspects as to why legal institutions of different systems are similar (*e.g.,* convergence and legal transplants based on efficiency) or different (*e.g.,* path dependence, network effects and parochialism). On the other, the insufficiency of the neoclassical model identified by other economic approaches, notably New Institutional Economics, can help to identify when elements different to efficiency play a key role in explaining the dynamics of legal change (*e.g.*, 'ideology'). Moreover, the fact that Economic theory is not able to explain every aspect of human behaviour does not mean that is should be discarded as to what it actually can explain.

In some cases, economic analysis can show that similarity results from lawgivers striving to provide the most efficient rule for their society.[213] For example, According to Mattei, despite having very different constitutional backgrounds the law on expropriations in France, Germany, Italy, the UK and the US is largely convergent, so far as the underlying principles are concerned. He explains this convergence as a process of legal transplantation driven by the aim to adopt what the economic theory of public goods shows to be the

211 Cotterrell (n 49) at 720, 721.

212 Ogus (n 145) at 420, 422, 428–429; Ogus (n 152) at 164–165.

213 Faust (n 93) at 833–834.

most efficient rule. On one side, this theory justifies the acquisitions of inputs needed by the Government to provide public goods that are not easily available in the market; while, on the other, it forces the Government to pay its market value to avoid externalities.[214] In other cases convergence might result from using legal transplants as a cost-efficient form to tackle new problems (*i.e.*, to avoid 're-discovering the wheel'). For example, cost-efficient lawgiving can explain the vast adoption of translated versions of the French *Code Civil* in the emerging Latin-American republics of the beginning of the 19th century.[215]

Alternatively, Law & Economics can also help to account for differences between legal systems, as specific efficient solutions can vary as a consequence of having developed in different cultural and institutional settings.[216] For example, Chang and Smith propose that, due to the transactions costs involved in the delineation of property entitlements, civilian and common law property systems have largely similar functional structures. They argue that civilian ownership in land and the common law freehold coincide remarkably in their basic features: a basic right to prevent invasions subject to qualification and some supplementary duties, while lesser interests, as leases and easements also bear a close resemblance. However, on the other hand, the particular manner of delineating entitlement (*i.e.*, its style) is characteristic of a given legal culture. As a consequence of path dependence and network effects, once a particular style of delineating property rights is established, typically by organized actors capable of paying high initial fixed costs, as revolutionaries or authoritarian rulers, and the use of such system grows over time, it becomes increasingly harder to change. The style of property law comes from the context in which certain groups were able to overcome the collective action problems involved in creating a new property system: in the common law this was the result of the introduction of the feudal system after the Norman conquest, while in civilian systems the style of property rights comes from Roman law received and systemized by the 19th century civil codes, a process closely linked to the French Revolution or the German Unification.[217]

Finally, contemporary Economics also offers approaches that point to the limitations of economic rationality in explaining human behaviour and hint where to look for better explanations. For example, North has shown that

214 *ibid* at 5–7.

215 Zweigert and Kötz (n 17) at 113, 114; J. Kleinheisterkamp, 'Development of Comparative Law in Latin America', in: M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford and New York: OUP, 2019) 252 at 260–262.

216 *Ibid* 834.

217 Chang and Smith (n 140).

casual observation evidences that the neoclassical model to explain group behaviour[218] is not capable of accounting for how large groups overcome free-rider problems nor why individuals obey rules they could infringe with profit. Following North, this happens because the neoclassical approach only serves to model cases in which people behave in self-interest. According to him, neoclassical economics requires a theory of ideology capable of accounting for the value that people put in the legitimacy of the legal system, either to change it or comply with it.[219] This shows how North's 'simple' economic model can be broad enough to fit the moral kind of arguments prevailing in civilian systems, and might even be capable of providing a conceptual box to account for complex theoretical legal discussion.[220] In a similar line, in his understanding of Law & Economics, Calabresi has recently acknowledged that there will always be a dimension of human behaviour that Economics is not able to explain. This does imply that an economic approach is useless, but rather than a different approach is also needed.[221]

5.3 *The Search for the Better Law*

The value of Law & Economics for the evaluative stage of the classic functional method is less straightforward. As said in Section 2, the functional method is not especially well suited for evaluative purposes. By definition, functional equivalents are equal in regard to the function, and hence, function, by itself, is a poor normative standard.[222] Hence, the most interesting normative criteria that Comparative Law could offer for the final stage are alien to the functional approach, such as the safeguard of cultural diversity or the need for uniform laws.

By contrast, normative economic analysis has been held to offer a clear criterion for normative evaluation in the promotion of efficiency. For example, Mattei has shown that the case of someone who inadvertently builds a few inches onto the land of his neighbour has opposite treatments in Germany and France. In Germany the trespasser is entitled to the building but has to pay compensation, while in France ownership of the building passes to the

218 This is, M. Olson, *The Logic of Collective Action. Public Goods and the Theory of Groups* (Cambridge MA: Harvard University Press, 1965).

219 North (n 209) 10–11, 45–48.

220 On the importance that law is normally obeyed in spontaneous manner and the role of perceived legitimacy in it, see Hart (n 70) at 51–61; L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' Harvard Law Review 71 (1958) 630, at 642; A. S. Gold and H. E. Smith, 'Sizing Up Private Law' Advanced On line University of Toronto Law Journal (2019).

221 Calabresi (n 155) at 5.

222 Michaels, 'The Functional Method of Comparative Law' (n 11) at 380.

neighbour who has to compensate the trespasser for the lesser amount of the increased value of the land or the expenses of building. In principle, according to the Coase Theorem, no matter who has the property, parties would bargain an efficient solution as long as transactions costs are low. However, if the negotiations break down, the French rule will end with the wasteful destruction of the building after a costly proceeding, while the shift in property under the German law would be virtually costless. Hence, according to Mattei, from an efficiency perspective, the German rule is better.[223]

As mentioned in Section 3 and 4, the utilitarian nature of this moral theory has been fiercely criticized and it is not possible to address such discussion in this paper. Here it should be sufficient to acknowledge that efficiency is not the only normative reason that can control a given decision, but that it still might be highly relevant as an ancillary criterion to almost any other normative reason. As argued by Ogus, in legislation and case law, economic goals (mainly allocative efficiency) compete with other goals that are sometimes broadly referred to as 'distributional justice'. The intensity with which a legal system wishes to sacrifice efficiency for these other goals depends on political and ideological considerations.[224] Thus, even if efficiency is discarded as a reason for such choices, its input is always valuable to make the costs of our distributive preferences apparent. In the previous case, it shows the cost that French Law is willing to pay to keep the sanctity of property.

6 Conclusion

The success of Beck's Underground Map relied on three main features. The first is its isomorphism with the environment (*e.g.*, same stations and same possibilities of interconnection) which make it capable of providing the key information for the user's decisions. The second is that it has visual features that facilitate the process of uncovering this information[225] (*e.g.*, different lines have different colours, all change stations have the same sign). The third is that users are aware of the limitations of the map: no one pretends to use it to find stations on the surface nor that the Thames really is a uniformly wide blue strip, with only 90- and 45-degree bends.

This paper has shown that a functional method, correctly enriched with Law & Economics, has the same elements. First, the classic functional approach

223 Mattei (n 94) at 11–14.

224 Ogus (n 152) at 155–156.

225 Bitarello, Ata and Queiroz (n 6) at 350, 351.

provides isomorphism with the legal reality, as it ensures that the compared legal institutions relate to the same social problem (that both of the compared stations serve to change lines). Second, economic thinking provides frameworks that are able to explain these functions in a stylized form and compare them (different interchange stations can be depicted by an empty circle and evaluated by their efficiency in allowing passengers to change lines). Finally, a researcher conscious of the limits of functionalism and economic thinking will not fall into the trap of extending this approach for purposes for which it is not designed: mindful users know that real stations do not look like empty circles in the street nor use New York's subway map to stroll through Central Park. In summary, as long as comparative researchers acknowledge that function and economic rationality are the map and not the territory, Law & Economics can play a central role in providing a more rational methodological foundation for much of the research undertaken in Comparative Law.