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THE FUNCTIONALISM OF LEGAL ORIGINS

1. Introduction

Nothing could better characterize the state of legal studies in general, and comparative law in particular, than the fact that the topic for this jubilee issue of Ius Commune Europaeum is neither European nor actually legal. The legal origins literature has been generated by US-based self-declared 'lawyers wannabe'[1] and discussion among economists continues to pay fairly little attention to the views of legal scholars. The World Bank, which established its 'Doing Business' group to implement and expand on much of this research, employed, for a long time, only economists and no lawyers in the respective research groups.[2] Lawyers have been on the receiving end of this literature. Holmes' prediction, made in 1897, seems finally to have come true: 'For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.'[3] Similarly, Mattei's finding from two decades ago seems true as well: the wind has changed; it is now coming from the United States.[4]

If the use of economics US style still feels relatively new, the outcomes do not. Neither that law matters nor that the common law is superior to the civil law, are new ideas. Nor is the method used satisfactory. From a comparative law perspective, the focus on formal law (law in the books) is too narrow, the use of the civil law/common law distinction is inexcusably simplistic, the understanding of legal transplants is simplistic, and the assumed commensurability between legal systems at least problematic.[5] From a social science perspective, the new literature appears to run into many of the problems that brought the older law and development movement down.

In this paper, I want to focus on a trope that connects comparative law and social science, namely the use of functional methods,[6] and see what the trope has to

1 Florencio Lopez-de-Silanes, as quoted in Thompson 2005.
2 Disclosure: I am the only lawyer in a newly set up advisory group to the project.
3 Holmes 1897.
4 Mattei 1994.
5 Siems 2007; Siems 2008; Michaels 2009a, p. 775-791; Bakardjieva Engelbrekt 2009, p. 225-231.
6 Michaels 2006; Michaels 2009a, p. 777-779.

say about the legal origins literature. Of course, the legal origins literature is not explicitly functionalist, so both analysis and application of critique require a translation. Yet that translation helps link the legal origins literature to broader debates in the social sciences – and at the same helps explain why it is so successful.

Ultimately, I reach three results. In section 2, I demonstrate that the legal origins literature represents a functionalist method, and that perceived internal inconsistencies and tensions in the legal origins literature match similar inconsistencies between different concepts of functionalism. Although economics does not usually resort to the language of functionalism, ultimately it is a functionalist discipline. In section 3, I show that anti-functionalist critique in the social sciences is similarly powerful against the legal origins literature. In section 4, I suggest that the legal origins literature is more successful than predecessors in the field of law and development not because it has a better theoretical foundation but instead, ironically, because it has less. In short, the objectivity suggested by statistics and rankings blinds for underlying theoretical shortcomings. In a concluding section, finally, I speculate about the limits of such endeavours.

2. Legal Origins as Functionalism

How can we say that the legal origins literature represents a functionalist method? Although it has been remarked before that the legal origins literature has a close affinity with functionalist comparative law or sociological functionalism,[7] this affinity is not explicit. Where La Porta *et al* cite to Zweigert and Kötz, they cite not to the famous elaboration of the functional method, but mostly to the classification of legal families.[8]

Moreover, the legal origins literature is not uniform, and displays internal contradictions. One such contradiction is this: whereas some articles suggest that 'one size fits all', that best practices and legal rules can be identified and then recommended to all legal systems alike, others suggest, instead, that the best fit is a function of local circumstances and conditions.[9] Another contradiction is this: the legal origins literature claims that, on the one hand, legal origins (i.e. events centuries ago) are still determinative for success today, and, on the other hand, that legal reform can bring about change.[10]

These contradictions are not surprising from the perspective of functionalism. Similar contradictions are known there, arising from unclear and competing concepts of functionalism.[11] Between disciplines, the focus differs – more systemic and static in sociology, more teleological and dynamic in political sciences, more instrumentalist in policy studies. Even within one discipline, definitions differ. Thus, when Kingsley Davis famously declared, in 1959, that functional analysis was syn-

7 Michaels 2009, p. 768-769, 777; Cioffi 2009, p. 1520-1526; Whytock 2009, p. 1880; see also Ajani 2009.

8 La Porta, Lopez-de Silanes & Shleifer 2008, p. 286-288. I do not address their treatment of legal families here; for critique, see e.g. Michaels 2009a, p. 780-783; Cioffi 2009; Ramseyer 2009; Bakardjieva Engelbrekt 2009, p. 225-231.

9 As pointed out recently by Bakardjieva Engelbrekt 2009, p. 215-220.

10 E.g. Armour *et al*. 2009, p. 1436-1437.

11 For a longer discussion of different concepts, see Michaels 2006a, p. 343-363.

onymous with sociology, his point was not to posit a uniform method and theory, but the opposite: There was no one functional method; instead, all sociological methods properly speaking were functionalist, so, important methodological debates were concealed under the label of functionalism.[12] It should be noted that the functional method in comparative law also presents a mix of these concepts.[13]

Here, I want to confine myself to three different concepts.

2.1. System Functionalism

A first concept of functionalism is a descriptive one.[14] It is assumed that societies face certain problems, and institutions (in the broadest sense) emerge that respond to these problems. The response to the problem is the function that the institution plays for the society at large. Epistemologically, this means that the institution must be understood with regard to the function it plays. Moreover, the function explains both the existence and the persistence of an institution. At the same time, this implies that society must be understood as a system that is capable of generating problems. And solutions are system-specific – even if problems are universal (a controversial assumption), each society is likely to find the solution best equipped for its own situation. I call this idea system-functionalism.

We can see this concept at work in Glaeser and Shleifer's article on legal origins.[15] The authors ask why different legal systems emerged in England and France in the 12th century and offer a purely functional analysis. They identify a common problem (they say 'goal') all legal systems face, namely 'to protect law enforcers from being bullied with either physical force or bribes by powerful local interests'. The legal regimes are functional responses to this common problem, and they differ according to the respective society:[16] in France, feudal lords feared each other more than a despot, so they delegated lawmaking power to the king. In England, by contrast, feudal landlords were not afraid of each other, so they preferred paying the king so they could adjudicate independently. This is, then, a theory of functional equivalents: both centralized law in France and jury-based law in England fulfil the same function and are in this sense equivalent, not similar.

2.2. Finalism

A second concept of functionalism follows from the first but is at least partly different and can be called finalism. System-functionalism could be understood as a static theory, where societies are at equilibrium because their problems all find solutions. According to the finalism, however, solutions to problems create new problems that require new solutions. As a consequence, functionalism turns into a dynamic theory that explains and, ideally, predicts, the development of society. The best-known

12 Davis 1959.
13 Michaels 2006a, p. 360-363.
14 The most helpful balanced methodological introduction I know of is Abrahamson 1978; another valuable survey, this one rather a history of ideas, is Münch 2003.
15 Glaeser & Shleifer 2003.
16 For a similar argument, see Djankov *et al*. 2003.

example for such a predictive theory is European integration: once one legal area is harmonized, this creates new pressures toward the harmonization of other areas, with the result that integration becomes ever closer.[17] Often, however, finalism is used in retrospect, to explain developments in the past as somehow necessary.

This strand is clearly present in the legal origins literature, which explains the development of legal systems as determined by their past. Thus, Glaeser *et al*. argue that codification in 19th century French 'naturally follows from the original choice of royal judges over juries': to control these judges further, the sovereign must create clear rules (which they believe to be characteristic of the French Code) that make deviation easily observable. In other words, a problem – independence of courts from local pressure – created a solution – royal judges – which in turn created a new problem – central control of judges – and a new functional response – codification.

2.3. Instrumentalism

The third concept of functionalism is different still. Here, the emphasis shifts from an epistemological and descriptive to a normative position. Now, institutions are viewed as tools, introduced by decision makers in order to resolve certain problems or achieve certain goals. 'Law is social engineering', claim Zweigert and Kötz. following Roscoe Pound.[18] The lawyer constructs legal rules in response to societal requirements. I call this third idea instrumentalism.

Instrumentalism is not obvious in most of the economic literature on legal origins, which is, at least on its face, mostly positive not normative. Instrumentalism is, however, clearly present in the World Bank's Doing Business Reports, which are themselves influenced by the legal origins literature. These reports advise underdeveloped countries to adopt legal solutions that have been successful elsewhere. Law reform is viewed in the perspective of social engineering, with a particular comparative and functionalist-instrumentalist bent: what worked elsewhere in a donor country should also work and bring about progress in the receiving country. Remarkably, at least in its early reports, the World Bank suggested 'that when it comes to the manner of regulation, one size often fits all (in many cases there really is one best practice)'.[19] In other words, not only are problems universal; best solutions are also universal, regardless of their origin or their social and legal context.

2.4. Interrelations

It is obviously easy to confuse these ideas. For all of them, institutions relate to, are answers to, problems. In some ways, instrumentalism may look like the normative equivalent of system functionalism. And yet, the difference is relevant. System-functionalism starts from problems faced by the system of society as such; the ultimate function analyzed is, typically, the stabilization of society. Teleological functionalism shares the interest in society as such, but instead of stabilization, focus is on some kind of development. Instrumentalism, by contrast, focuses on

17 For recent summary, see Sandholtz & Stone Sweet 2012.
18 Zweigert & Kötz 1996 p. 45; Pound 1954.
19 World Bank 2004, p. xviii.

smaller, seemingly isolated problems – the reduction of crime, access to the justice system, getting creditors to pay their debts, etc. Such purposes may be related to the general function of society stabilization, but this relation is not a necessary one: we may intend to strengthen the due process rights of men accused for murder even if this is detrimental to societal stability.

System-functionalism and teleological functionalism account not only for manifest functions – those that are known and intended – but also, perhaps particularly, for latent functions – those that institutions perform, although they were not made for those functions and although those functions may not even be recognized within the society.[20] Instrumentalism, by contrast, accounts only for the actual purpose of an institution.[21]

System-functionalism is a theory aimed at understanding what stabilizes societies, without necessarily taking a position on whether such stabilization is desirable, or whether the institutions at stake are actually desirable. Teleological functionalism could likewise be viewed as purely descriptive in this sense, though the open acknowledgment of an intrinsic telos suggests a normative bent. Instrumentalism, by contrast, must necessarily take the desirability of the intended purpose into account.

3. Anti-Functionalist Criticisms

This reconceptualization of legal origins as functionalism is helpful for an assessment of the limits and promises of legal origins because it helps us tap into the rich array of methodological and theoretical debates devoted to functionalism in other disciplines –anthropology, sociology, to some extent also comparative law. Like the concepts of functionalism, critique is somewhat undifferentiated: some criticism is inspired against one kind of functionalism yet voiced against another.

3.1. Society as the Object of Functions

One challenge against functionalism concerns the idea of society. Legal rules can be responses to societal problems only if societies at large exist and have common problems. Yet different parts of societies may have different, often conflicting, needs, and legal rules may well satisfy some, while running against other needs. At the same time, the instrumentalist idea that problems can be isolated from their broader societal context seems problematic: for example, whether traffic accidents are compensated through tort law or through mandatory insurance has implications on the insurance market, the size of the regulatory apparatus of the state, etc.

To some extent, the legal origins literature takes this into account. Studies of corruption, for example, explain certain rules as performing functions for certain members of society, while being dysfunctional for society at large. However, in the

[20] Merton 1968, reprinted in Demerath & Peterson 1967 p. 9-75.

[21] For this reason, Whytock's suggestion that 'functionalist comparative legal scholars should explicitly distinguish between the rule's intended function and its actual consequences' (Whytock 2009, p. 1890) would arguably make sense only for an instrumentalist, not a functionalist comparative law.

end, the yardstick remains society. This reflects the interest in aggregate welfare over distributive questions that characterizes much of Chicago-style economics more generally. In the legal origins literature, however, the problem is enhanced, because the interest in 'doing business' (obviously a particular interest) is treated as though it were congruent with the interests of society at large. The Doing Business reports have been chided for insufficient attention to labour rights (which may be in tension with investors' interests), but by and large, the focus on entire economies remains.

3.2. Necessitarianism

A second frequent criticism of functionalism has been directed against the legal origins literature as well: the assumption that legal institutions necessarily perform certain functions and that certain functions make certain laws necessary.[22] The function of courts is to enforce contracts; the enforcement of contracts requires effective courts. This means, first that other functions of legal rules are ignored: warning functions of formal requirements, social protection in tenancy and employment laws, etc. Cioffi has recently voiced a similar criticism against the legal origins literature.[23] It means, secondly, that functional equivalents are insufficiently accounted for, a point Mathias Siems has made forcefully with regard to the legal origins literature.[24] It means, thirdly, that functionalism does not easily account for dysfunctional rules or for so-called survivals – rules that may at some point have had a function but no longer do.[25] As a consequence, functionalism tends to become apologetic for the status quo. In legal origins, this is strangely half-true: the literature is not at all apologetic of the status quo in underdeveloped countries, but it does accept, at face value it seems, the functionality of most law in the United States.

A related problem is the perceived conservative bias of functionalism. System functionalism prioritizes societal cohesion over conflict, so the criticism goes, just as legal origins prioritizes aggregate economic progress over other societal concerns. Teleological functionalism accounts insufficiently for human agency and creativity by suggesting that things could not have developed otherwise than they have, just as legal origins depicts ostensibly necessary trajectories from a system's legal origins.

This criticism of necessitarianism does not apply to instrumentalism, which explicitly favours human agency, but here the criticism is the opposite: the technocratic approach to law as a tool towards the fixing of problems underestimates not only the systemic resistances to such but also the underlying political and social tensions that characterize society.

22 See, most recently, Hyland 2009, p. 69-73.
23 Cioffi 2009, p. 1525.
24 Pistor 2009, p. 1646-1647.
25 Armour *et al*. 2009, p. 1435.

3.3. Reductionism

A third critique goes against the perceived reductionism of functionalism, which reduces legal rules to their functions.[26] Even if reductionism is not necessary for functionalist comparative law,[27] it seems unavoidable for legal origins. Coding as the method of the legal origins literature is necessarily reductionist; its isolation of single elements represents the polar opposite of thick description. Cioffi has rightly pointed out that LLSV 'seeks to reconcile the macro- and micro-level dimensions of law through microeconomic theory and functionalist analysis'.[28] Such combination of micro- and macro-comparison is necessary for proper functionalist comparative law, too.[29] Nonetheless, this means that other considerations, like justice or culture, have no place in the analysis. In one version, culture is absent altogether. In another, culture appears merely as an inadequate representation of what are really functional responses to problems (for example, ritualistic dance is 'really' about social cohesion). In yet another version, culture's irrationality stands in the way of functionalist rationality, as an obstacle to progress. Such criticism has been voiced against the legal origins literature in particular from French critics.[30]

Reductionism may be justifiable, to some extent, to ensure commensurability as a key prerequisite for comparability and therefore a key issue in comparative law. Comparison requires a *tertium comparationis*: we always compare legal systems with regard to a specific factor, be it the performance of a certain function or something else. It follows that findings of similarity and difference are always relative to the specific *tertium* that was chosen. Absolute comparison is impossible. This is even more true for determining the better law: a law can be better than another only with regard to the specific function they both perform. The legal origins literature accepts this restriction, as do the Doing Business reports. However, in the presentation, the relative character of the comparison drops out of sight. This may be the biggest problem with the ranking of countries in the Doing Business reports: they suggest a ranking with regard to the absolute quality of legal systems, and they thereby put pressure on countries to focus their domestic policies on the factors that the Doing Business report measures – and to neglect other functions of the law. It appears as though the common law is better than the civil law tout court, instead of only in promoting economic growth as measured in the project.

3.4. The Better Law Fallacy

A fourth critique of functionalism, especially in form of instrumentalism, goes against what is called the 'better law approach'. Zweigert and Kötz argued that a functional comparison can 'suggest[ing] how a specific problem can most appropri-

26 Geertz 1983.
27 Michaels 2006a, p. 364-365.
28 Cioffi 2009, p. 1518.
29 Michaels 2006, p. 375.
30 For summaries and evaluations in English, see Fauvarque-Cosson & Kerhuel 2009; Valcke 2010.

ately be solved under the given social and economic circumstances'.[31] Functionalism is thus expected to do two ostentatiously incompatible things – to show which legal rules are of equal value ('equivalent') in their responding to a given problem, and at the same time to show which of them is of the highest value, constitutes the best solution. The legal origins literature does the same: it explains legal rules as determined by their origin, while at the same time proclaiming which of them is the best one. On the micro-level, these tend to be the more deregulated solutions. On the macro-level, the general result is that the common law, by and large, performs better than do civil law systems (though among the latter, systems based on German law are said to perform slightly better than those based on French law).[32] This implies the suggestion that the better law can be identified regardless of context (one size fits all)[33] (though they have recently somewhat moderated this claim). This idea runs against a problem known from functionalist comparative law: the quality of a law depends on its context; transplanted laws may perform differently in different legal systems.[34] Strangely, the legal origins literature occasionally concedes this point: legal institutions may function well in developed countries but not in developing countries.

Whytock has recently suggested a way out of this problem: we should not evaluate legal institutions against some assumed objective standard, but rather assess their actual consequences vis-à-vis their purpose (Whytock speaks of 'intended function').[35] This is a valuable suggestion for instrumentalism but not, it seems, for system functionalism that focuses in particular on latent functions. This step also takes away one presumed advantage of functionalist comparative law, namely to identify a factor (function) that is similar in different legal systems. Purposes, by contrast, differ as among legal systems.

4. The Strange Lure of Economics

None of these critiques is particularly new. For sociology, Merton formulated, and answered, most of them as early as 1949.[36] In comparative law, all of these (and more) have long been voiced as well.[37] Nor is it surprising that they should be applicable to the legal origins literature. What is surprising is that the legal origins literature has, so far, survived these critiques that were damning elsewhere.

4.1. Legal Origins as Law and Development – a Déjà vu

The main focus of the legal origins literature is not on developed economies (though the ferocious defences of French law coming from French comparative lawyers

31 Zweigert & Kötz 1996, p. 11.
32 La Porta, Lopez-de Silanes & Shleifer 2008, p. 20.
33 But cf. La Porta, Lopez-de Silanes & Shleifer 2008, p. 324: 'the best solutions might differ across legal systems'.
34 Bakardjieva Engelbrekt 2009, p. 222-223.
35 Whytock 2008, p. 1890-1891.
36 Merton 1968.
37 See Michaels 2006a.

could suggest that).[38] For the descriptive and analytical project the law of developed countries – especially England and France – is used, predominantly, as an exogenous factor to understand the relationship between law and development in former colonies. For the normative project, the main hope is to improve the economies of underdeveloped countries. This is clear especially in the Doing Business project of the World Bank, which focuses predominantly on underdeveloped countries, in accordance with the Bank's mission 'to help developing countries and their people reach the goals by working with our partners to alleviate poverty'.[39]

Thus, although the authors do not explicitly acknowledge it, both their focus and findings place this literature in the law and development movement.[40] That movement, at least in its US version, pursued many of the same goals as the legal origins literature, albeit mostly with a somewhat different normative bent.[41] Here as well, the hope was to bring about economic success through legal reform. The project was, then, to identify those legal institutions that are conducive to economic success, implement them in developing countries, and then see the economy prosper. Law, understood mostly as formal rules and institutions, was viewed not as a cultural and culture-defined product, but instead as an instrument that could be applied towards development. Because western societies were the most advanced, their legal systems provided the toolbox from which these instruments were chosen.

That first law and development movement, however, withered away, for reasons that were empirical, financial, and theoretical.[42] Empirically, the hopes did not materialize: law reform, widely, did not spur success. The scholars promoting it found themselves in what Trubek and Galanter have called self-estrangement, the realization that they had contributed to something quite different from what they had intended.[43] Financially, support was withdrawn from development projects, partly for lack of success, party for ideological reasons.[44] Theoretically, the proclaimed direct link between law and societal well-being was found to be too simplistic.

Importantly, much of the theoretical criticism was directed against the simple functionalism underlying law and development. Indeed, we can understand the first law and development movement as a functionalist project. The Ford foundation justified its $ 3 Mio. grant for an International Legal Centre with the clearly functionalist goal 'to help developing countries establish legal institutions essential to the functioning of modern, free societies'.[45] This reflected a widespread understanding at the time of law, in particular Western-type law, as performing necessary functions towards the well-being of society. The hope was that the introduction of Western-style laws and institutions could bring about the same prosperity in underdeveloped countries as existed in the West. The underlying idea that societies must go through various stages of development[46] reflects the teleological worldview

38 Supra n 30.
39 Web.worldbank.org;.
40 Davis & Trebilcock 2008.
41 See, e.g., Tamanaha 1995.
42 See Davis & Trebilcock 2008, p. 915-938.
43 Trubek & Galanter 1974.
44 Merryman 1977, p. 459-460.
45 1966 Ford Foundation Annual Report 23. Cf. Trubek 1982, p. 6-10.
46 Mendelson 1970.

that characterizes some social science functionalism. At the same time, law was here understood instrumentally, as a tool to be utilized to bring such success about. Consequently, much of the criticism made against the first law and development movement mirrors, or is borrowed from, critique made against functionalism.

4.2. The Resilience of Legal Origins

Why then does the new literature not simply fail to the same type of criticism? One possible explanation would be that the new functionalism is different from the old one. Kerry Rittich has pointed out some differences:[47] the narrow focus on economic success instead of overall societal well-being,[48] the widespread reliance on neo-classical models and statistical research rather than close case studies, the preference for formal rules and institutions (law in the books) over entrenched law (law in action). None of these differences, however, can explain why the new literature can successfully escape the critique that brought the old law and development down. Scholars have pointed out that the new law and development literature suffers from many of the same shortcomings as the old one.

A second explanation is ideological. Where old law and development was predominantly a cause for the political left, the new literature is decidedly market liberal. Perhaps, the first law and development movement failed largely not for theoretical and methodological but for political reasons: it was unable to survive the political shift in the 1970s against the political left. However, such an explanation is insufficient, too. Although the new law and development project relies a lot on markets, it is not confined to the political right: there is broad political support for reform projects.

Both may be good reasons, but I think the most important one is a third one: the decline of sociology and the rise of economics, and with that a change in academic sensitivities. It seems safe to say that economics as a discipline is less occupied with matters of theory than is sociology. Or, put differently, theoretical critique of the assumptions, explicit or not, on which economic modelling rests, has done less against the self-confidence in the mainstream than it did, decades ago, in sociology and anthropology. The ability of economics to show results in objective-looking numbers and rankings has somehow rendered secondary the question whether these numbers and rankings rest on theoretically tenable assumptions. The reductionist quality of rankings is an advantage for their marketability. Rankings are simpler than complex comparisons and look more objective. Only very recently have scholars begun to question the use of indicators, central to both the legal origins literature and the Doing Business Reports, as an undertheorized mode of governance.[49] In particular, anti-functionalist critique has never been damning to economics because functionalism was never explicitly adopted as a method in the first place. Geoffrey Ingham has pointed out that economics as a discipline has so far largely ignored the criticism launched against functionalism within sociology

47 Rittich 1995.
48 See also Davis & Trebilcock 2008, p. 898-899.
49 See especially Davis, Kingsbury & Engle Merry 2010.

and anthropology, where the theory is practically dead today.[50] This is so although, at its core, the economic method used by the legal origins literature and the Doing Business reports is really a quantitative refinement of the functional method.[51]

This anti-theoretical stance exists not only in economics. If anything, it is even stronger in applied comparative law. Take, for example, the brief section on theory in the otherwise excellent 'Anatomy of Corporate Law' by Kraakman *et al*. They begin by acknowledging that a functionalist project is not unproblemtatic:

> 'We realize that the term "functional", which we have used here and in our title, means different things to different people, and that some of the uses to which that term has been put in the past – particularly in the field of sociology – have made the term justifiably suspect.' [52]

One would, then, expect two things to follow: first, a precision of what is meant by functional here, and second, at least a brief statement as to why the suspicion is unfounded for this book. The authors, however, treat all of this as a mere problem of labelling:

> 'It would perhaps be more accurate to call our approach "economic" rather than "functional", though the sometimes tendentious use of economic argumentation in legal literature has also caused many scholars, particularly outside of the United States, to be as wary of "economic analysis" as they are of "functional analysis".'

Justifiable suspicion for the term 'functional,' regionally confined wariness for the term 'economic' – what is the answer? Surprisingly, it is this: we can engage in functional analysis, as long as we close our eyes to its theoretical problems.

> 'For the purposes at hand, however, we need not commit ourselves on fine points of social science methodology. We need simply note that the exigencies of commercial activity and organization present practical problems that have a rough similarity in developed market economies throughout the world, that corporate law everywhere must necessarily address these problems, and that the forces of logic, competition, interest group pressure, imitation, and compatibility tend to lead different jurisdictions to choose roughly similar solutions to these problems.'

How can it be unnecessary to address 'fine' points of social science methodology, if what is 'noted' are all the problematic elements of that methodology – similarity of problems across countries, necessary types of solutions, a teleological confined trajectory of globalization? We are reminded of the anti-theoretical tradition in comparative law, most famously expressed in the statement that disciplines that must deal with their own methods are dead disciplines.[53] Viewed like this, the livelihood of the new law and development literature comes at the expense of theoretical foundations. Ironically, that seems to be to its advantage.

50 See Ingham 1996, p. 251-252. For a very early comparison and critique, see Gregg & Williams 1944.
51 Michaels 2009b.
52 Kraakman *et al*. 2009, p. 4.
53 Zweigert & Kötz 1996, p. 33.

5. Conclusion

What should we follow from this juxtaposition of functionalism and legal origins? My conclusion is ambivalent.

The success may suggest that the critique of functionalism in sociology was overblown. Maybe, a more sophisticated functionalism is actually a promising method and theory at the same time.[54] Such a functionalism would have to take into account at least three insights from the functionalism debate. The first is Merton's suggestion that many of the assumptions of functionalism ought to be treated as no more than testable hypotheses.[55] The second is the emphasis on the possibility of functional equivalents, long a topic in discussions of functionalism, but put at the centre of the theory only, as far as I can see, in Niklas Luhmann's early discussions of functionalism.[56] The third is the need for a systemic perspective, in which individual legal rules interact with the entire legal system.[57]

Progress is made on all three points. The need for more empirics may be the broadest theme: much of the criticism of legal origins questions the assumptions and ask for testing. The second, the focus on functional equivalents, requires special comparative law expertise that non-lawyers often lack, but it seems to me that for example the Oxford project around John Armour makes very promising advances in this regards, especially on the level of macro-comparison. Similarly, Gillian Hadfield's macro-comparison, which emphasizes context-specificity and functional equivalence more, seems promising.[58] The third point, finally, the sense for a systemic approach, underlies much of Katharina Pistor's recent work.[59]

Pistor's critique of the legal origins literature is also instructive, however, for what might remain a necessary limit of its method: Statistical analysis is necessarily reductionist. Such reductionism may sometimes be helpful;[60] but its use seems limited: by necessity, greater breadth reduces depth. This seems especially problematic in comparative law, where the number of legal systems in the world is too small, the differences between them to great, to yield truly meaningful statistical results, except in a fairly limited number of issues.

Some scholars have suggested, therefore, to move away from quantitative to qualitative analysis, and to focus in particular on case studies. This move resembles the suggested move in comparative law from functionalist to culturalist comparative law, and thereby from explicit comparison to a more hermeneutic approach. In comparative law, such a move comes with a cost, and the same is undoubtedly true in law and development. The challenge for comparative law will be to integrate functionalist and culturalist comparison.[61] In law and development, this might be

54 I make this point in Michaels 2006a. For a defence of functionalism in economics, see Jackson 2002.

55 Merton 1968.

56 For discussion, see Michaels 2006a, p. 356-359.

57 I make this point generally in Michaels 2006b, and more specifically with regard to legal origins, in Michaels 2009b.

58 Hadfield 2008.

59 Pistor 2009.

60 Thus e.g. Hadfield 2009; Spamann 2009.

61 My own first suggestion is to use the idea of legal paradigms: Michaels 2006b.

done through a combination of statistical analysis and case studies, as suggested by Milhaupt and Pistor.[62] Such an approach could save the best of functionalist and culturalist approaches, but it would look very different from the legal origins literature as it exists today.

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[62] Milhaupt & Pistor 2008.

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