



The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks

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I. Introduction

This article briefly explores the leading principle in the comparative method of law: functionality of comparisons. It will be shown *inter alia* that functionality serves as a common, unifying and mutually intelligible denominator amongst comparative lawyers around the world, even though not necessarily in a dogmatic fashion. Furthermore, both the rise of the principle and its main criticisms will be noted. The article concludes that functionality remains the epicentre of the comparative method of law and that its drawbacks remind us that the principle is susceptible to further refinement in the future.

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II. Definition: Maintaining the Orthodoxy

The vibrant heart of the comparative *method*¹ in the most dynamic² branch of law, comparative law, dances to the tune of functionality of comparisons. By all means, if there is one principle that the method adheres to, it is functionality.³ Normally, functionality is indeed referred to as a *principle*,⁴ not as a method or a technique. Calling such a principle a ‘method’ would present us with a clear paradox, a paradox which is to be avoided at all costs for the sake of epistemological clarity: If comparative law primarily encapsulates a method, the comparative method of law, then it cannot be superimposed on another method, the ‘functional method’, for – arguably – such a thing as a *sui generis* functional method does not exist.⁵ At the very least, we can be certain that a comparative method occurs but it is not at all certain whether, in turn, a functional method occurs. Therefore methodologically, and as a matter of mere legal pragmatism, a comparative method is used, which guides the subject of comparative law under the principle of functionality. Thus, the principle of functionality governs the comparative method of law and in turn the comparative method governs what we generically call ‘comparative law’.

With regard to defining functionality, especially as a *tertium comparationis*,⁶ all that can be said is that as long as in law things fulfil the same function, then they are normally comparable.⁷

With regard to the choice for the ‘orthodox’ definition of functionality, what can also be said is that when a way of business works, we should be sceptical of the introduction of a new way of business; even more so when nothing viable is on offer as a new way of business. Also, it is to be noted that such a definition is a particularly flexible one, by reason of the fact

¹ O Kahn-Freund, *Comparative Law as an Academic Subject* (Oxford Clarendon Press, Oxford 1965) 4. Also, L Constantinesco, *Traité de droit comparé*, Volume I (L.G.D.J., Paris 1972) 176-205; BS Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis* (Hart Publishing, Oxford 1997) 25; K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn Oxford University Press, Oxford 1998) 2, 34, 36 and JH Merryman, *The Loneliness of the Comparative Lawyer* (Kluwer International, the Hague/London/Boston 1999) 1. Cf. M Graziadei, ‘The Functionalist Heritage’ in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge 2003) 101.

² Lord Goff, ‘The Future of the Common Law’ (1997) 46 ICLQ 745, 747-748. See also, more recently, G Samuel, ‘Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences’ in M Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, Oxford and Portland Oregon 2004), 35f and M Andenas and D Fairgrieve, ‘Introduction: Finding a Common Language for Open Legal Systems’ in G Cavinet, M Andenas and D Fairgrieve (eds), *Comparative Law Before the Courts* (British Institute of International and Comparative Law, London 2004) xxvii. On the ‘march of comparative law from the law libraries into the courts themselves’, as M Freedland points out in the introduction to the last work see H Muir Watt, ‘Of Transcultural Borrowing, Hybrids, and the Complexity of Legal Knowledge: An Example of Comparative Law Before the French Courts’ and B Rabatel, ‘Liaison Magistrates: Their Role in Comparative Law Before International Judicial Cooperation’ in G Cavinet, M Andenas and D Fairgrieve (eds), *ibid.*

³ M Kiiikeri, *Comparative Legal Reasoning and European Law* (Kluwer Academic Publishers, Dordrecht 2001) 28 (quoting K Zweigert, ‘Methodological problems in Comparative Law’, (1972) 7 Israeli Law Review, 465 and A Pizzorusso, *Corso di diritto Comparato* (Giuffrè, Milano 1983) 79).

⁴ K Zweigert and H Kötz (n 1) 34.

⁵ *Ibid.* Cf. R Michaels and M Graziadei’s approach on the matter, who argue in favour of a ‘method’ as opposed to the orthodox approach speaking of a principle. See M Graziadei, ‘The Functionalist Heritage’ in P Legrand and R Munday (eds) (n 1) 100ff and R Michaels, ‘The Functional Method of Comparative Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford 2006). Note that Michaels admits that the term ‘functional method’ can be a misnomer.

⁶ M Bogdan, *Comparative Law* (Kluwer Law and Taxation, Deventer 1994) 60.

⁷ K Zweigert and H Kötz (n 1) 34.

that it is not formalistic or legalistic. In other words, the focus under functionality is not on what the formal requirements of the comparable in foreign law are but rather on how foreign law operates in the area of law in question.⁸ In close relation to this, Zweigert and Kötz argue that the comparatist may often have to go ‘beyond purely legal devices’ to seek functional equivalents.⁹ Accordingly, we should be scrupulous in our analysis as to why we should proceed with the resurrection of other, now largely deceased, approaches. Most certainly, with all its drawbacks, all its abstraction and peculiarities, functionality has served comparative law circles well, especially when there is no clear alternative in sight. Besides, why should we abandon the safest and quickest way to comparative law in the absence of such an alternative? Life itself points to functionality; why should we ever have a different approach in the comparative method law? Graziadei is illuminating on this:

We constantly resort to functional comparisons in daily life, to play, to work, to teach and learn, and, yes, to communicate with people who share beliefs about the world very different from our own.¹⁰

Of course, there are other approaches¹¹ as to how to compare, but these, unlike functionalism, do not constitute a concrete methodological pattern in their own right.

Contextual approaches¹² based on localisms here and there are not to be discarded altogether in research but they are by reason of their peripheral character in the comparative method not the main dish; in effect, they are mere side-orders. Accepting contextual approaches to the detriment of functionality in the comparative method would be like discarding the constitution of the method, when contextual approaches have only the analogical effect of subordinate legislation to the method. Hence, at its heart the comparative method hides a unified, overriding and powerful principle, the principle of functionality of comparisons. Ultimately, however, the question of accepting other considerations to the detriment of functionality in the comparative method is a question of ambition and agenda: whose agenda is more undesirably ambitious¹³? The agenda of functionalist comparatists who merely seek similars in the various jurisdictions as a matter of practicality for their *thinking* and *working* methods;¹⁴ or the agenda of ‘comparatists’ who want us to be something of a functionalist, a sociologist, a historian, a political scientist and a contextualist at the same

⁸ Ibid 34-35.

⁹ Ibid 35, 38.

¹⁰ M Graziadei, ‘The Functionalist Heritage’ in P Legrand and R Munday (eds) (n 1) 113, quoting J Gémar, ‘Seven Pillars for the Legal Translator: Knowledge, Know-How and Art’ in S Šarčević (ed), *Legal Translation: Preparation for Accession to the European Union* (Faculty of Law, University of Rijeka, Rijeka 2001) 111 and 121-125. Cf. M Van Hoecke, ‘Deep Level Comparative Law’ in M Van Hoecke (ed) (n 2) 173.

¹¹ Except for functional comparisons, there are also historical comparisons, evolutionary comparisons, structural comparisons, thematic comparisons, empirical and statistical comparisons. See VV Palmer, ‘From Lerrotholi to Lando: Some Examples of Comparative Law Methodology’ (2004) 4 *Global Jurist Frontiers* 2 <http://www.bepress.com/cgi/viewcontent.cgi?context=gj&article=1126&date=&mt=MTE1OTczNjUxNg%3D%3D&access_ok_form=Processing...> accessed 1 February 2008.

¹² Referring to one such approach, the historical approach, Graziadei calls it a ‘tradition’. See M Graziadei, ‘The Functionalist Heritage’ in P Legrand and R Munday (eds) (n 1) 100.

¹³ On the question of ambition and unrealistic perfectionism in comparative law, Van Hoecke noted recently: ‘Strong epistemological *pessimism* has a perfectionist view on understanding. If you do not fully understand something, you do not understand anything. In practice this means that almost nobody can understand almost anything. A rather frustrating conclusion, especially for those whose professional life is centred around teaching and publishing’. See M Van Hoecke, ‘Deep Level Comparative Law’ in M Van Hoecke (ed) (n 2) 173.

¹⁴ K Zweigert and H Kötz (n 1) 34.

time?¹⁵ Certainly, as the latter ‘comparatist’ is not a comparatist *stricto sensu*, the preference for the former is an obvious one. Again, to avoid misunderstandings, contextualism in ‘comparative law’ is very welcome¹⁶ indeed but the proposition is that this is to occur only upon the recognition of the primacy of the principle of functionality in the comparative method.¹⁷

Kahn-Freund once said we will teach our students of comparative law to be proud and we will teach them to be humble.¹⁸ However, if there is a division between functionalists and contextualists in the comparative method, even though we are not sure who is the prouder, we can without doubt be certain that contextualists are not as humble as functionalists. Their excessively ambitious agenda (stretching to almost anything in the theoretical disciplines) causes great problems to theoreticians¹⁹ *as well as* practitioners of comparative law, making their approach not only unpopular but also weak to the point of obsolescence.

Academics such as Palmer are, therefore, correct in maintaining that ‘to move into the courtroom and into the halls of the legislature will require methods which are not only enlightening, but feasible and non-threatening.’²⁰ Consider, for example, the complications that a pro-hermeneutics kind of a comparative method in law might result in. Not only is such an approach threatening to the unsuspected judge or practitioner by reason of the pedantic nature of such an approach but also to most comparatists or rather to mainstream comparatists. In other words, why are we to adopt a pro-hermeneutics approach, when practitioners would feel uncomfortable with it, in addition to the academic comparatists who already feel uncomfortable with it?

The main problem which the contextualists have yet to satisfactorily address is not so much whether we should seek the ‘contextual whys’ in our method, if at all, but rather why and how we should seek these ‘whys’, especially when our primary purpose is comparing equivalents *per se*. Then, it could be maintained that contextualists may argue in a *felix qui potuit rerum cognoscere causas* fashion.²¹ This may be acceptable but again function *can* be detected without resort to the contextual ‘why’, notwithstanding the fact that the *felix qui potuit rerum cognoscere causas* may be the way for comparatists to shut themselves in the proverbial ivory tower; thus, it is not necessarily the primary concern in comparing to detect the ‘why’. For example, if we compare cars on the basis of luxury and choose to purchase something between a Mercedes-Benz and a BMW of the same engine capacity, we may do so without pedantically referring to the history of the two companies; indeed, we may not even have to know how long it takes for each car to be produced in the assembly lines, nor why it takes so long, nor what it takes for the companies to actually produce a unit of each of the two

¹⁵ E.g. P Legrand, ‘How to Compare Now’ (1996) 16 LS 232, at 236 citing J Law, ‘Introduction: Monsters, Machines and Sociotechnical Relations in *ibid* (ed) *A Sociology of Monsters[:] Essays on Power, Technology and Domination* (London 1991) 18.

¹⁶ BS Markesinis (n 1) 26. Also, M Graziadei, ‘The Functionalist Heritage’ in P Legrand and R Munday (eds) (n 1) 101; G Samuel, ‘Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences’ in M Van Hoecke (ed) (n 2) 39 noting that ‘Concepts and rules need to be contextualised within a range of factual situations so that their function can become evident’ and M Van Hoecke, ‘Deep Level Comparative Law’ in M Van Hoecke (ed) (n 2) 167. Cf. M Graziadei in the work stated in this note at pp. 110-111.

¹⁷ The question of function precedes that of context. See Rabel’s approach as described in AM Glendon, MW Gordon and C Osakwe, *Comparative Legal Traditions* (West Publishing, St. Paul, Minn., 1994) 11.

¹⁸ O Kahn-Freund (n 1) 30.

¹⁹ E.g. Rabel’s approach justified in the past that the practical needs override the need of the comparatist to refer to philosophy or history. To this effect see B Markesinis, *Comparative Law in the Courtroom and Classroom* (Hart Publishing, Oxford/Portland, Oregon, 2004) 13.

²⁰ VV Palmer (n 11) 3.

²¹ Kiikeri states ‘culture’ based considerations are a matter of cognition. See Kiikeri (n 3) 33.

models under comparison.²² Why should we know in comparative law the context of law, when in life itself context (as opposed to function) hardly comes into play? Alternatively, a contextualist might wish us to focus our research on Aristotle's first lesson, as Markesinis calls it: rounded knowledge (in one's discipline).²³ This too seems to be worthy of critical scrutiny; this occurs by reason of the fact that even though in theory rounded knowledge and in our case a contextualist approach to comparative law is to be sought, in practical terms 'Beyond a certain point, narrowing one's focus is essential in order to sharpen it.'²⁴

Also, the comparatist who seeks the contextual causes of his comparables may deviate from his main task: comparing. Obvious as the point may be, comparing (and contrasting) per se *is* the primary task of the comparatist.²⁵ On the other hand, comparing and contextualising is acceptable, as long as the purpose of contextualising in the comparative method is defined. The question that such a comparatist has to address is: in addition to comparing functionally equivalents, why am I to additionally detect the contextual 'whys' behind my comparables? More interestingly and in relation to this last point, however, some comparatists argue that the contextual 'whys' lead us to good comparisons. The problem with this point of view is that these comparatists present us with no concrete method. It is not automatic that knowing the causes of comparables leads us to good comparisons. Contextualists ask from mainstream comparatists to seek 'contextual whys' but they fail to tell us, let alone convince us, why we should embrace their approach. The same people who ask us to seek the whys in our method, fail to concretely tell us why and how we should do so.²⁶

In short, if the comparatist is to compare, functionalism suffices; if he is to compare and in a rather peculiar, if not pedantic fashion, to compare and to discover other things, e.g., *mentalités* in his comparables, he may have to resort to other tools of an extra-legal nature (e.g., history, economics, politics).

A. 'Incomparables cannot usefully be compared'²⁷

The comparatist will always be haunted by this memorable and magical expression: 'incomparables cannot usefully be compared'. It will puzzle our minds forever, for we are seekers of the truth, our truth being good comparisons or, to use professional jargon, 'meaningful comparisons' in the realm of law. Somehow, it could be argued, this expression summarises our discipline. However, simple and self-evident as the proposition may seem, we cannot always readily detect the comparable. Yet the answer to our question is to concentrate on the word 'usefully'. Other comparatists have described 'usefully comparable' as sufficiently comparable, reasonably comparable, fruitfully comparable or meaningfully comparable.²⁸ In essence, the compromise reached in comparative law is that normally comparables have to be governed by a denominator of usefulness.

For Zweigert and Kötz things that are essentially *usefully* comparable are ones which fulfil the same function.²⁹ Even though this is largely true, at other times we may wish to base our analysis on use, a *telos*, a purpose in the employment of functionality.

²² Cf. Graziadei (n 16) 125.

²³ On this (though in a different context) see BS Markesinis (n 1) 25.

²⁴ *Ibid.*

²⁵ VV Palmer (n 11) 2.

²⁶ Most certainly, Van Hoecke is correct in arguing that the 'comparative lawyer is lost' in this respect. See M Van Hoecke in M Van Hoecke (n 16) 167.

²⁷ K Zweigert and H Kötz (n 1) 34.

²⁸ E Örüçü, *The Enigma of Comparative Law* (Martinus Nijhoff Publishers, Leiden/Boston 2004) 29.

²⁹ K Zweigert and H Kötz (n 1) 34.

III. Functionality Is Based on the Essence and the Telos of Comparables

In my own teaching of comparative law I have often felt that, like Bagehot's monarch, I had a duty to warn and a duty to encourage. To teach students not to be lured by homonyms and not to be afraid of synonyms.³⁰

In principle, comparing one thing to any other thing is possible,³¹ though in all probability not very useful unless, of course, the purpose of such an endeavour is defined from the outset.³² Academics are somehow divided on the matter. Graziadei, for instance, has criticised as naïve the approach that 'it is possible to compare the incomparable.'³³ Örüçü, on the other hand, successfully argues, however, that 'Even identicals must be compared in order to determine that they are in fact identical.'³⁴ Even so, the fact that something is readily permissible in science and more generally in life does not always make it a preferable option. In the comparative method this is the approach taken. The method's comparisons have to be dictated by some sort of unifying language of application; by some common denominator. Obviously, different objects may have different functions but as Örüçü argues 'all things are comparable even if *unique*.'³⁵ Indeed, there must be an infinite number of comparisons *in abstracto* in life. But as in the real world, what matters in the exciting microcosm of the comparative lawyer, is that he reaches comparisons that are not only valid but that they serve some purpose. In Academia the name of this purpose is called knowledge,³⁶ or at least the pursuit to reach it. In the national legislatures the name of the purpose can be law reform, whereas in legal practice such a purpose may be enhanced knowledge of legal solutions in other legal systems.

It is 'like for like' (*similia similibus*) that normally suffices in comparing.³⁷ However, as will be seen below, sometimes atypical comparisons may suffice for the purposes of the comparative method.

Names in comparisons do not matter a great deal. Homonyms may not always offer us 'meaningful' comparisons. However, the opposite is also true: apparently disconnected notions, concepts or areas of law may well be relevant to each other as a matter of a comparison.³⁸ But synonyms are not always to be discarded as a starting point for comparison. In this regard, the pairs of comparison Van Hoecke offers in a recent work are particularly illuminating.³⁹ So, for instance, the terms '*Interprétation* – Interpretation or Construction – *Auslegung*' respectively in French, English and German are a perfectly valid comparative trio (all words basically refer to the same intellectual activity).⁴⁰ Similarly, the terms '*Contrat* or *Convention* – Contract – *Vertrag*' refer to the same subject matter (all words basically refer to the same reality).⁴¹ These are therefore *prima facie* comparable concepts, even though one must state for the sake of balanced argument that the contract laws

³⁰ O Kahn-Freund (n 1) 19.

³¹ E Örüçü (n 28) 19.

³² E.g. HE Chodosh, 'Comparing Comparisons: In Search of Methodology' (1999) 84 Iowa Law Review 1025, 1066.

³³ M Graziadei (n 16) 105.

³⁴ E Örüçü (n 28) 19. Emphasis added.

³⁵ Ibid

³⁶ K Zweigert and H Kötz (n 1) 15.

³⁷ E Örüçü (n 28) 20.

³⁸ M Van Hoecke in M Van Hoecke (n 16) 175.

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

of France, Germany and England do not necessarily coincide in remit, approach and typology with one another.

A. *Comparer des pommes avec des oranges and apples to oranges?*

An idiom which has captivated the English-speaking world as well as significant parts of the French-speaking is the one which asks people not to compare apples and oranges, they being different in essence. ‘This response implies, first, that apples and oranges are incomparable, and, second, that the incomparability of apples and oranges is itself comparable to the incomparability of the two objects in the primary comparison.’⁴² This problem has been dealt with and its proposition of incomparability has been proved to be a false one in the past⁴³ but arguably, comparing a red apple with an a green apple, when one seeks to distinguish the colour quality of redness between the two does not make particular sense; yet if one compares an apple with an orange when one seeks to compare their nutritional qualities, this *should* arguably make good sense. This is very much true, as in the former case, we *know* a priori that by definition a green apple has no qualities of redness; such a comparison is therefore obsolete, as it would stress differences only, notwithstanding the fact that it would miss the point of our comparison: the redness between two normally *similar* artefacts (*similia similibus* doctrine). In the latter case, however, things are considerably more interesting; here, we have two ‘different’ fruits, both of which, however, are spheroid, tasty, and belong to the same scientific kingdom, division and class (*plantae, magnoliophyta, magnoliopsida* respectively). Yet, there are differences, and the differences outweigh the similarities between the two: apples are normally less bitter than oranges, though oranges can be sweet; apples are normally never orange and oranges normally never red; so too, apples and oranges do not share the same scientific order (*rosales* and *sapindales* respectively); hence they cannot be part of the same family (*rosaceae* and *rutaceae* respectively) and indeed cannot be part of the same genus (*malus* and *citrus* respectively). In other, scientific words, they are *different species* (*malus domestica* and *citrus sinensis* respectively). Ultimately these are two different artefacts with different nutrition qualities. Where does all this leave us in law?

In law things are broadly similar. And even though the author of this article wishes to maintain that it is normally directly similar objects which should be compared, at other times the focus need not be on the essence of the things compared so much as on the *purpose of comparison* of two or more ‘different’ artefacts.⁴⁴ That is not to say that broadly similar artefacts cannot and should not be compared; on the contrary, it would seem that in such cases comparisons are often not only less arduous but also more readily available. Theoretically, any law could be compared with any other law, if some common denominator of a valid comparison is found; yet the tendency – it would seem – in the comparative method of law is that we compare ‘corresponding’ areas of law or what is called ‘comparison of equivalents’.⁴⁵ On the other hand, it would be an omission not to state that confining purposes of comparisons effectively amounts to the confining of tools in the comparative method. That

⁴² HE Chodosh (n 32) 1061-1062.

⁴³ HE Chodosh (n 32) 1061-1063 citing JH Merryman, ‘How Others Do It: The French and German Judiciaries’ (1988) 61 Southern California Law Review 1865; also, CA Rogers, ‘Gulliver’s Troubled Travels, or the Conundrum of Comparative Law’ (1998) 67 George Washington Law Review 149, 150-151, 163.

⁴⁴ C Deligianni-Dimitrakou, *Eisagogi sto Syncritiko Dikaio* (Ekdoseis Sakkoula, Thessaloniki 1997) 24.

⁴⁵ K Zweigert and H Kötz (n 1) 36.

said, the comparative method *can* be a largely subjective exercise. In turn, subjective purposes of comparison may well result in subjective tools to pursue such purposes.⁴⁶

⁴⁶ D Kokkini-Iatridou, 'Some Methodological Aspects of Comparative Law, The Third Part of a (Pre-) Paradigm' (1986) *Netherlands International Law Review* 158ff. Markesinis considers this a question of predilection. See BS Markesinis (n 1) 25.

B. Comparing areas other than in substantive law (forms, techniques, styles)

Regardless, we may be tempted to consider the following. Let us argue that the legislator of Ruritania, for instance, is in pursuit of modernising its intellectual property law as a matter of form rather than as a matter of substance. In doing so, it wishes to refer to French law. However, in referring to comparative law material, the legislator of Ruritania, a common law country for the purposes of our example, wishes to refer to the Civil Code of France (as opposed to French intellectual property law). The legislator made this choice, because it is in pursuit of the ‘fresh and flexible’ spirit⁴⁷ of the French Civil Code as a matter of form,⁴⁸ so that this is incorporated in the Ruritanian Act to be drafted, even if such an act deals with intellectual property rather than civil law, as the French Civil Code does. Can the legislator do so? Should it do so? This is open to argument but Örüçü offers us the following provoking example:

Could we not compare, for example, an English statute on taxation, town and country planning or matrimonial causes with three pieces of German legislation on entirely different topics if we were trying to establish how such documents are prepared and how long or detailed they are in order to develop an understanding of such a source of law? The examples could be infinite.⁴⁹

Consequently, with regard to the identification of ‘functionality’ there are two variants here: The one variant suggests that Ruritanian intellectual property law and French civil law do not share the same function (i.e., they are not functionally equivalent), not only because Ruritanian legislation uses verbose and old-fashioned language, whereas French civil law uses flexible and fresh language, but also (and most importantly) because these statutes belong to different substantive areas. Our comparison – technically speaking – is an invalid one. Alternatively, however, we can argue that both the Ruritanian statute on intellectual property and the French civil code share the same function as a matter of a law reform exercise, even if the fact of the matter remains that the Ruritanian law to be reformed and the French civil code to be compared with belong to different substantive areas of law. Either way, the result is an unsatisfactory one, for in the former case we should not proceed (when we can as a matter of form) with our comparison for absence of substantive provisions, whereas in the latter case we would have to go to great lengths to imply functionality on the basis of form (as opposed to a functionality of substance which is the established approach to date). If, however, the latter approach is followed, then clearly it is all about the purpose of comparisons which makes functionality reveal itself.

The *telos* therefore is the ultimate judge of comparisons. This notion of *telos* connects well with the approach taken under mainstream comparative law, i.e., the comparative lawyer is a person who engages in comparison for a purpose.⁵⁰ It also connects well with the approach taken under mainstream functionality, i.e., ‘Functional inquiry also suits the

⁴⁷ K Zweigert and H Kötz (n 1) 90, 91, 100 & 145. Zweigert and Kötz praise the *Code Civil* with the following expressions: ‘The Code civil avoids the danger of being too detailed ... often been praised for its clear and memorable phrases, and for avoidance of cross-references and jargon ... its language [is] forceful and thrilling, free from heavy logic and detailed digression. In France ... ordinary citizens may have a feeling of warm affection, of closeness to their Code’.

⁴⁸ M Bogdan, *Comparative Law* (Kluwer Law and Taxation, Deventer 1994) 57ff.

⁴⁹ E Örüçü (n 28) 20.

⁵⁰ A Riles, ‘Introduction’ in A Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing, Oxford 2001) 11.

utilitarian approach to comparative law.⁵¹ However, even though *telos* and utility are not quite exactly synonyms, the comparatist is free to define purposes and utility for his method. In this respect, even though functionality is to this day the leading thesis, there is no restriction to the comparatist's research, as long as, of course, his purpose of research⁵² is defined and such purpose bears connection with certain needs, especially practical needs. The stress is on practicality because 'In law, ideas and notions that cannot be put to practical use, are likely to satisfy only those who spend their time devising them and then quoting each other with self-satisfaction.'⁵³

IV. Functionality in Its Manifestations

Except for the manifestation of functionality as a *tertium comparationis* in the comparative method of law, functionality, especially in the wider confines of comparative law as a whole, can be said to be a polysemantic concept, a concept with many functions.

Seven distinct functions of functionality are recognised in comparative law.⁵⁴ Thus, in addition to the *tertium comparationis* function, there are the epistemological function of functionality, the presumptive function (as in the *praesumptio similitudinis*), the formalising function in the building of a system, the evaluative function (as a determinant of the 'better law'), the universalising function and, finally, the critical function.

V. Functionality Serves the Identification of Both Differences and Similarities

One experiences a singular repugnance to think in terms of difference, to describe discrepancies and dispersions.⁵⁵

Because we cannot always be sure as to what amounts to a similar or a dissimilar in law, what the exact methods to define such terms are and whether the assessment of the similars and the dissimilars should be done in qualitative or quantitative terms or even in a subjective or an objective fashion, we must consider that in principle the identification of *both* differences and similarities should suffice for a comparative exercise as a whole. Also, it is to be noted that 'It goes without saying that comparative analysis will bring out the differences between actual solutions.'⁵⁶

Yet the comparatist is interested in proceeding with a workable solution for his discipline – not to enquire *in perpetuum* into questions of philosophy, at least not for practical purposes. In this respect, we must admit that the assumption of the 1900 Paris Congress⁵⁷ is still correct, i.e., it is similar things which are normally to be compared. In fact, in modern legal interpretative scholarship the emphasis is on the identification of similarities rather than

⁵¹ E Örüçü (n 28) 29.

⁵² Though on the context of comparing cases, Samuel asks that one's object of comparison (or what is called herein 'purpose of comparison') is defined. See G Samuel in M Van Hoecke (n 2) 37.

⁵³ B Markesinis (n 19) 53.

⁵⁴ R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford 2006).

⁵⁵ Foucault as quoted in P Legrand, 'What "Legal Transplants"?' in D Nelken, and J Feest (eds), *Adapting Legal Cultures*, (Hart Publishing, Oxford 2001) 67.

⁵⁶ K Zweigert and H Kötz (n 1) 43.

⁵⁷ E Örüçü (n 28) 20.

differences between legal systems.⁵⁸ More interestingly, even international social theory *stricto sensu* suggests that the ‘aim of cross-national research is to reduce unexplained variance and find patterns and relationships.’⁵⁹ Equally, it should be remembered that ‘to accept comparability is, however, not the same as accepting similarity: the comparison can of course demonstrate great fundamental differences.’⁶⁰ Without doubt, however, it is the identification of similarities that is more important to functionality (and hence comparability as a whole). This is true by reason of the fact that we should search for *equivalents* in the comparison embarked upon. To do so, we must normally be ‘freed from context’ and ‘the solutions [to the same problem] we find in different jurisdictions must be cut loose from their conceptual context and be stripped of their national doctrinal overtones.’⁶¹

The good comparatist will speak of the possible in his method, the better one will speak of the desirable in his method. Of course, as already maintained, comparisons can be infinite.⁶² It is possible as a matter of theory for one to compare any law to any other law. Is this desirable? Arguably, the example of the Ruritanian reformer is another blow to the strict application of the principle of functionality. Yet the fact that something is possible should not always make it a desirable phenomenon. Again, the dichotomy of academic comparatists is a matter of agenda: do we want in Academia comparatists who would be practice-oriented minds and concentrate on similars in their comparative projects or do we want comparatists whose work bears little relevance to practical needs but who are free to compare anything to anything even for the sake of identifying differences in the main? The author of this paper consciously opts for the former class of comparatists. Practical needs in comparative law by far override theoretical ones. Surely, this choice does not mean that a comparison of differences cannot be pursued, but even this *has* to bear relevance to practicality.

Effectively, whether functionality should stress similarities more than differences reminds us of Schlesinger’s question between ‘integrative’ and ‘contrastive’ comparative law.⁶³ Integrative comparative law stresses the similarities amongst legal systems; contrastive comparative law stresses the differences amongst legal systems. Schlesinger has maintained that whilst the contrastive approach has found its way well into the second half of the 20th century, he notes that ‘in the last two or three decades the pendulum has *again*⁶⁴ began to swing the other way’,⁶⁵ i.e., the discipline has now reverted back to what is seen as the 1900 thesis. Schlesinger was convinced that the future of comparative law belonged to the integrative approach.⁶⁶ It must therefore be stressed that the importance of similarities in comparative law might be the conscious or even unconscious expression of the idea that the world is shrinking; that the interdependence of national economics (and therefore the interdependence of legal systems) becomes day-by-day more prevalent; and that ultimately

⁵⁸ R Cotterrell, ‘Seeking Similarity, Appreciating Difference: Comparative Law and Communities’ in A Harding and E Özücü (eds), *Comparative Law in the 21st Century* (Kluwer Law International, the Hague 2001) 38.

⁵⁹ J Gould and WL Kolb (eds), *A Dictionary of the Social Sciences* (Tavistock Publications, London 1964) 116. More recently, E Øyen, ‘The Imperfection of Comparisons’ in E Øyen (ed), *Comparative Methodology: Theory and Practice in International Social Research* (Sage, London 1990) 1, 3.

⁶⁰ M Bogdan, *Comparative Law* (Kluwer Law and Taxation, Deventer 1994) 21.

⁶¹ K Zweigert and H Kötz (n 1) 44.

⁶² E Özücü (n 28) 19.

⁶³ RB Schlesinger, ‘The Past and Future of Comparative Law’ (1995) 43 *American Journal of Comparative Law* 479.

⁶⁴ Emphasis added.

⁶⁵ RB Schlesinger (n 63) 479. See also M Van Hoecke in M Van Hoecke (n 16) 172.

⁶⁶ RB Schlesinger (n 63) 481.

there exists unity of thought (and by extension unity of legal thought) in the human race, as Hegelian idealism⁶⁷ maintained.

VI. Functionality as a Common Intellectual Denominator of Legal Thought

We are in the habit of positing a single Form for each plurality of things to which we give the same name.⁶⁸

In relation to the point raised in the last paragraph, Plato teaches us in his theory of ‘one-over-many’, a sub-theory of his theory of the forms, that human thought is unitary in essence; yet the implementation of the *Denken* might differ in practice. According to this Platonic doctrine, when we speak of, for example, horses, we may speak of a black horse, a brown horse and a white horse. We may argue that a horse is strong and beautiful and that another horse is weak and unattractive. We may perceive different qualities and surrounding notions (in our case colours and exoteric qualities of horses) in a different and subjective fashion but *ultimately* we speak of essentially the same thing: the species of horses. For Plato the manifestations of the different did not matter so much, as he was convinced that a unitary, eternal, indivisible and unchangeable essence is found beneath variable qualities of the same thing.⁶⁹ All points to the idea of the one. With regard to law, the theory of ‘one over many’ is very much relevant to the law convergence thesis, a key area of what we generically call ‘comparative law’.

With regard to functionality the thesis here is as follows. Even though functionality in comparative law does not necessarily pertain to the Platonic belief that there is unity of human thought in abstract terms (except perhaps where the *praesumptio similitudinis* is apparently applicable), there is relevance of functionality in modern comparative law with the Platonic idea of one-over-many in that *both* seek similarities in the main. Thus, the scratching for useful comparisons should probably pertain to the scratching of similarities in the main, as functionality actively looks for unitary elements of thought rather than things that serve different purposes. In turn, functionality, so it could be argued, aims at the discovery of unity of comparable purposes, purposes which otherwise come in agreement with the Platonic belief in a favour of a unity of human thought (Platonic One).

Let us now argue why the above might be true. First of all, Kahn-Freund’s thesis of 40 years ago still holds true:

One of the lessons comparative law has to teach is that even within one orbit of civilization social needs may in one country be served by legal rules and decisions and in neighbouring country by techniques of what Pound calls ‘social engineering’ which are quite outside the law.⁷⁰

⁶⁷ E.g. RB Pippin, *Hegel’s Idealism: the Satisfactions of Self-consciousness* (Cambridge University Press, Cambridge 1989).

⁶⁸ Plato, *The Republic*, 596a.

⁶⁹ On this see Plato’s theory of the forms. The characteristics and functions of the forms according to Plato are: i) unchangeable (*Phaedo*, 78c10-d9), eternal (*Phaedo*, 79d2), intelligible, not perceptible (*Phaedo*, 79a1-5), divine (*Phaedo*, 80a3, b1), incorporeal (passim), causes of being (‘The one over the many’) (*Phaedo*, 100c), are unqualifiedly what their instances are only with qualification (*Phaedo* 75b).

⁷⁰ O Kahn-Freund (n 1) 22.

Second, but in close relation to what Kahn-Freund argued earlier, there is the Zweigert and Kötz's thesis: the *praesumptio similitudinis*, according to which there is a presumption of similarity of practical legal results amongst different legal systems.⁷¹ Accordingly, the comparatist normally discovers and realises that methods, techniques and approaches vary in domestic laws; practical results are broadly similar.⁷² Certainly, it must be observed that this presumption is not boundless, for such a presumption is not unqualified; as the fathers of the concept agree such extensive areas of law as law related to moral values, the law of succession or family law are automatically excluded from an endeavour in finding the *praesumptio*.⁷³ Third, in our world of globalisation, it is fair to argue that different legal systems bear more resemblances to one another than to their own history.⁷⁴

The idea of convergence, especially through the means of functionality, has been attacked. Legrand, for instance, has argued that comparative law should not be seduced by the idea of uniformity; it should rather support the 'contrarian challenge'.⁷⁵ Comparative law as an academic subject should be strongly attuned to diversity.⁷⁶ Yet, such a thesis is flawed. Reality dictates otherwise.⁷⁷ One is not sure first of all why functionality should not pursue equivalents and ultimately similars and second but most important, whether in finding such similars why not pursue convergence.

A poet once argued that 'a difference ...in everything keeps us apart'. This is very much true in life and also in law, as for instance American anti-trust laws might be different and perhaps more effective than anti-trust legislation in another country, only that it would be hazardous to claim that because implementation of the same legal purposes differs, therefore purposes are different and thus functionality is irrelevant in comparative legal analysis. Indeed, the comparative lawyer, though stricken from the range legal, social, cultural, economic, religious and political backgrounds in his endeavours to reach valid comparisons, has always been reminded that national legal methods might vary but end results or legal purposes not necessarily so. 'Foreign law is not very different from ours but only appears to be so.'⁷⁸ Also, from a practical point of view, Curran is right to point that a 'hypersensitivity to difference ...can become a liability when the comparatist also is a law-maker or is preparing to advise law-makers.'⁷⁹ It is a wholly different matter, a matter which does not touch the core of functionality, whether the effectiveness of different national tactics on the purpose of the same legal results reaches different levels of effectiveness. The fact that business laws in system X are more effective and result in a more thriving economy than the

⁷¹ K Zweigert and H Kötz (n 1) 40.

⁷² Ibid

⁷³ Ibid. Also, H Kötz, 'The Trento Project and its Contribution to the Europeanization of Private Law' in M Bussani and U Mattei (eds), *The Common Core of European Private Law* (Kluwer Law International, the Hague/London/New York 2003) 212. Kötz characteristically states that 'the [*praesumptio similitudinis*] is a rebuttable presumption, and rebutted it must be when there is evidence for doing so.' For indicative criticisms to the *praesumptio* see e.g. A Hunt, *The Sociological Movement in Law* (Macmillan, London 1978) 53 and H Collins, 'European Private Law and the Cultural Identity of States' (1995) 3 *European Review of Private Law* 353, 353-365.

⁷⁴ L Friedman, 'Borders: On the Emerging Sociology of Transnational Law', (1996) 32 *Stanford Journal of International Law* 65; 'Comments on Applebaum and Nottage' in J. Feest and V. Gessner (eds.), *The Proceedings of the 2nd Onati Workshop on Changing Legal Cultures* (Onati Institute, Spain, 1998), pp. 139-149.

⁷⁵ P Legrand (n 15) 242.

⁷⁶ P Legrand, *Le Droit compare* (Presses Universitaires de France, Paris 1999) 32-49.

⁷⁷ G Alpa, 'Foreign Law in International Legal Practice' in G Cavinet, M Andenas and D Fairgrieve (eds) (n 2) 209.

⁷⁸ BS Markesinis (n 1) 41.

⁷⁹ VG Curran, 'On the Shoulders of Schlesinger: The Trento Common Core of European Private Law Project' (2002) 2 *Global Jurist Frontiers* 8 as quoted in E Öricü (n 28) 27.

functionally equivalent laws and the economy of system Z should not negate comparative efforts, even though it might be argued (especially from the law reformer's point of view) that the laws of X are an example to be followed and the laws of Y an example to be avoided.

As stated above, we do not have to be comparatists to realise that our world is shrinking. In fact, close to Plato's unity of thought appeal, humanity realises day by day that the things which unite us are more than the ones which divide us. 'There is no such thing as "German" physics or "British" microbiology or "Canadian" geology.'⁸⁰ The obvious question which has to be answered then is if knowledge and science as a whole are unconfused, indivisible and inseparable, why should there be separate national laws in non-culturally specific areas of law (as opposed to single convergent laws)? It therefore makes little sense in law to stress differences, when differences are the direct offspring of a nationalist and parochial approach to law. Finally, let it also be borne in mind that it is a more demanding task to identify similarities (and hence pursue legal unity) in comparative law research than it is to identify differences, which largely occur by reason of the very division of legal systems.

VII. The Dysfunctional in Functionality

Nonetheless, the principle of functionality in the comparative method of law is not exactly free from defect. Rather like the high level of abstraction and generalisation in Continental legal systems,⁸¹ we cannot be absolutely certain how functionality *in abstracto* can always serve practical needs and how this guiding principle can be applied in practice. In fact, there is no such thing as a concrete guide as to what can actually be compared with what, e.g., in judicial matters.⁸²

Thus, the first major problem with functionality is the fact that it is more of an abstract notion than a practical guide on how to compare. Equally, it may be argued that this is the case as such a powerful principle has been literally bred and born in law Academia (as opposed to legal practice). Yet the inescapable fact is that what may seem theoretically obvious may not seem as obvious to practitioners. And even though functionality seems to act as a liberating device for the legal scholar, the same notion may initially distance the practitioner from comparative law.

Another critique against functionality seems to suggest that its presumptive and universalising function may take away from comparative law all that is interesting⁸³ about it. Frankenberg has once argued that 'The claim to universality forbids question of the purity of [the comparatist's] motives, the objectivity of her methods, or the correctness of her

⁸⁰ K Zweigert and H Kötz (n 1) 15. The thesis of the unity of science comes in agreement with the modern Vienna Circle of philosophy. For writings on the unity of science see e.g. L von Bertalanffy, 'An Outline of General System Theory' (1950) 1:2 *British Journal of the Philosophy of Science* 134, 134-165; P Oppenheim and H Putnam, 'Unity of Science as a Working Hypothesis' (1958) 2 *Minnesota Studies in the Philosophy of Science*, 3-36 as reprinted in R Boyd, P Gasper and JD Trout, *The Philosophy of science*, Cambridge (MIT Press, Mass./London 1991) 405-427. Cf. J Fodor, 'Disunity of Science as Working Hypothesis' (1974) 28 *Synthese* 77, reprinted as 'Special Sciences' in Boyd and others in the work stated in this note at pp. 429-441 and more recently, J Fodor, 'Special Sciences: Still Autonomous After All These Years?' (1997) 11 *Philosophical Perspectives* 149-163.

⁸¹ K Zweigert and H Kötz (n 1) 37.

⁸² On this see e.g. CH McCrudden, 'A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *OJLS* 499.

⁸³ AM Glendon, MW Gordon and C Osakwe (n 17) 12.

results.⁸⁴ However, this is highly arguable. For one thing, functionality is not necessarily abortive of contextual approaches; for another, most mainstream comparatists wish to make some allowance for contextual inroads to functionality. In this respect, such critique can be questioned. In relation to Frankenberg's point, it could perhaps also be argued that his approach clearly goes against the more traditional Saleilles 1900 thesis (emphasis on the *unité des résultats dans la diversité des formes juridiques d'application*).⁸⁵

Recently, it has been argued that functionality may bring about a presumption of a common epistemological understanding of what is meant by 'law' between legal systems.⁸⁶ This approach clearly approximates the problem of functionality as a universal apparatus of cognition of problems and solutions. The problem is in a sense exacerbated by reason of the fact that there is a multiplicity of legal systems and that for all the ubiquitous character of the comparative method, there is no agreement amongst comparatists as to what amounts to 'law'.

Also, a last critique towards functionality can be launched against its presumptive character (and together with it against its universalising character). Here, the problem is not so much whether the *praesumptio similitudinis* always occurs or not, but rather whether this actually represents 'ideological neutrality' on the part of the forefathers of such a presumption. As for whether the presumption is a rebuttable presumption, Kötz has recently made it clear this is 'a rebuttable presumption, and rebutted it must be when there is evidence for doing so.'⁸⁷ So, for instance, the more culture-specific the area of law, the more onerous it is for the comparatist to detect functional equivalence. It is questionable, however, whether the strict language used in the definition ('[the comparatist] should be warned and go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough'⁸⁸) is free from ideology. To this there can be no definitive answer. For one thing, similarities between legal results in the various jurisdictions can indeed be detected; for another, the fact that Kötz has come to slightly water down his earlier, strict approach may lead us to think that the presumption is not so much a matter of ideology but rather a common-sense, empirical rule, a rule that appeals to the legal senses. If this is true, we can in turn rebut the presumption that the universalising character of functionality is of an ideological nature (as opposed to an epistemological nature).

A. An expansive principle

Reaching the last area of critique concerning functionality, all that could be said is that functionality's very strength emanating from its expansive nature in comparative law as a whole is its very weakness. Comparative law – it would seem – has a more expansive approach when it comes to functionality than any other discipline. Even though its *tertium comparationis* function is understood to be the most central to comparative law, as we know it, the other functions with which it comes simply cannot be ignored. In this respect, we must acknowledge that functionalism in comparative law is convoluted and that Markesinis' call is still a contemporary one (even though some things in relation to this have improved) – our

⁸⁴ G Frankenberg, 'Critical Comparisons Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 424. More recently, see generally P Zumbansen, 'Comparative Law's Coming of Age: Twenty Years after *Critical Comparisons*' (2005) 6 *German Law Journal* 1073-1084.

⁸⁵ R Saleilles, 'Conception et objet de la science du droit comparé', in *Congrès international de droit comparé. Procès verbaux I* (1905), 167, 173 and 178.

⁸⁶ G Samuel in M Van Hoecke (n 2) 61.

⁸⁷ H Kötz in M Bussani and U Mattei (n 73) 212.

⁸⁸ K Zweigert and H Kötz (n 1) 40.

discipline is still in search of an audience,⁸⁹ and functionality is worthy of further simplification or rather refinement. It is expected that this will breathe new life into the theoretical part of the discipline and will further familiarise interested parties (e.g., judges, practitioners, reformers) with the practical nature of the subject.

VIII. Conclusion

To conclude, even though the leading thesis in the comparative method should be taken to be that of 'functional equivalents', at other times the comparatist may well benefit from specifying the purpose of his comparisons. Functionality, however, is a flexible notion, not an arteriosclerotic one. It liberates the comparatist; it does not restrict him. Expansive and embracing as the principle is, we cannot disregard the fact that it can pertain to the identification of both differences and similarities, yet it would be negligent not to stress that functionality reminds us that there ultimately is unity of thought in the human race, that despite different approaches of peoples and legal systems, problems, solutions and end results are largely similar. For that reason, the universalising character of functionality cannot be ignored. To be sure, there are disadvantages, but the advantages by far exceed them.

Most importantly, in the almost complete absence of a *concrete* and hence a *viable* alternative to the much-abused notion of functionality in the comparative method of law, the comparatist has to learn to live with it. The message is clear: Comparative law's principal gift to 20th century legal science,⁹⁰ functionality, has a future, but it must be used with care and respect and in a non-dogmatic and contextually inclusive fashion.⁹¹ In using functionality, as Zweigert and Kötz have argued most successfully, we are to proceed both with discipline and imagination.⁹²

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⁸⁹ BS Markesinis, 'Comparative Law in Search of an Audience' (1990) 53 *MLR* 1.

⁹⁰ AM Glendon, MW Gordon and C Osakwe (n 17) 11.

⁹¹ R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (I)' (1991) 39 *The American Journal of Comparative Law* 1, 29; M Van Hoecke in M Van Hoecke (n 16) 191-192; VV Palmer (n 11) 29.

⁹² K Zweigert and H Kötz (n 1) 36-37.