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THE FUNCTIONAL METHOD AS THE STAPLE OF COMPARATIVE STUDIES OF EUROPEAN LEGAL HISTORY IN THE EARLY 21ST CENTURY?

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THE FUNCTIONAL METHOD AS THE STAPLE OF COMPARATIVE STUDIES OF EUROPEAN LEGAL HISTORY IN THE EARLY 21ST CENTURY?²

The Europeanization of legal scholarship and legal education facilitates the emergence of comparative legal science as a promising new tool to discover similarities and differences between two or more jurisdictions and their past development. Yet, the specific methodology of such studies is still not clear. Some legal historians hold that comparative legal history does not or should not have its own methodology other than that of comparative law. Others warn against imposing a contemporary agenda and toolbox on legal history. The author of this article aims to clarify this debate by examining the prospect of applying one of the most popular methods of comparative law – the functional method – to the domain of legal history. On the basis of several examples from the European legal past he claims that examining the functions (the social purpose) of legal norms can help legal historians in three ways: first, to determine the objects of comparison and the sources of analysis, despite the variety of verbal shortcuts (the initial stage of research); second, to analyse legal norms from the perspective of solving social problems in the past – to study the 'law in action'; and third, to arrange the results of the research according to meaningful criteria at the final stage.

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Introduction

The Europeanization of legal scholarship and legal education has been on-going for some time. At the turn of the 21st century one of its fruits is the trend of *comparative legal history*. It aims to discover similarities and differences between two or more jurisdictions and to identify the various factors of their development made more visible through their comparison. A comparative approach distinguishes this new discipline (or methodology?) from well-established national legal histories. The focus on the legal past helps to differentiate it from comparative law.³

A comparative approach in legal history is anything but new. Several prominent legal historians of the 19th century contemplated its benefits for the subject. In England, this was Frederic Maitland, who clearly stated that 'history involves comparison'.⁴ In Russia, Maxime Kovalevsky was the leading protagonist of the 'historical-comparative' method in jurisprudence.⁵ In the 20th century nationalist sentiments and the Cold War prevented comparative studies covering all legal circles of Europe. Yet, even behind the Iron Curtain some scholars, like Oleg Zhidkov, practiced comparison in the domain of foreign legal history and proposed developing a truly universal legal history.⁶ Advances in European integration since 1989 have had their impact on legal history. Continental scholars, most notably Germans, call upon a comparative approach to reveal the shared legal tradition and provide a blueprint for the common normative and intellectual background across all legal systems (rooted to some degree in received Roman law, Christianity and ancient Greek philosophy)⁷.

The potential of a comparative approach is still far from being fully exploited even within the large community of European legal historians. On the one hand, the last decade witnessed a massive rise of professional interest in the subject. The number of forums for the relevant debates grows (e.g. the biennial conferences of the European society of comparative legal history). Thematic journals have been established (*inter alia*, 'Comparative Legal History', 'Journal on European History of Law', 'Glossae. European Journal of Legal History'). A series of secondary literature⁸ and

³ For a discussion on the concept of comparative legal history see: Parise A., *The Value of Comparative Legal History for American Civil Law Jurisdiction*. In: Parise A., *Ownership Paradigms in American Civil Law Jurisdictions: Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th-20th centuries)*. Leiden, Boston: Brill, 2017, p. 29-34.

⁴ Fisher H. (ed.), *The Collected Papers of F.W. Maitland*. Cambridge: The University Press, 1911, vol. 1, p. 488.

⁵ Kovalevsky M.M. *Istoriko-sravnitel'nyj metod v jurisprudencii i priemy izuchenija istorii prava* [Historical-comparative method in jurisprudence and methods of studying legal history.] Moscow, 1880. (in Russian)

⁶ Zhidkov O.A., *O sostojanii i zadachah nauchnyh issledovanij v oblasti vseobshhej istorii gosudarstva i prava* [On the state and goals of academic research in the area of universal history of state and law] (1976). In: Zhidkov, O.A., *Izbrannye trudy* [The Selected Works.] Moscow: Norma, 2006, p. 33. (in Russian)

⁷ Coing H., *Europäisierung der Rechtswissenschaft*. In: *Neue Juristische Wochenschrift*, vol. 43, Nr. 15, 1990, p. 937-941; Zimmermann R., *Roman Law, Contemporary Law, European Law*. Oxford: Oxford University Press, 2001; Stolleis M., *Rechtsgeschichte schreiben. Rekonstruktion, Erzählung, Fiktion?* Basel: Schwabe, 2008, p. 29; Waelkens L., *Amne Adverso: Roman Legal Heritage in European Culture*. Leuven: University Press, 2015, p. 17 (also referring to Robert Feenstra).

⁸ Most notable are 'Comparative studies in continental and Anglo-American legal history' (originally edited by Helmut Coing and Knut Wolfgang Nörr) published by Duncker & Humblot, and Brill's 'Legal History Library' and 'Studies in the History of Private Law', at brill.com/shpl.

some textbooks⁹ in comparative legal history have also been published.

On the other hand, comparative legal history has not fully overcome the biases and prejudices of national legal historiographies. The European legal past is still presented through the prism of the advanced 'core' lands and the underdeveloped 'periphery'. It echoes 'Western Eurocentrism' and means that 'a truly European legal history remains to be written'.¹⁰ Even the very concept of comparative legal history is far from clear. Some call it a genuine new academic discipline¹¹, others treat it as an advanced version of conventional legal history¹², yet others define it as 'only a methodology'.¹³

One of the sources of uncertainty about the new discipline is the lack of an established methodology. What methods can a researcher use to meaningfully compare the legal past? Can he or she rely on the experience of the well-established comparative law? This looks possible given the genetic link between the two and we shall consider the relevance of the functional method for legal history, since it is still widely used by comparatists.

1. A toolbox of comparatists for legal historians?

The issue of the specific methods of comparative legal history is rarely discussed. One of few examples is a recent publication by David Ibbetson. Yet, despite the promising title, the author ponders over the choice of homogenous objects (legislation, doctrines, court practice) and the goal of comparative legal history (the discovery of an external factor providing 'a tipping point' for legal changes).¹⁴ Many seem to share the conviction, voiced by Martin Löhnig, that 'legal history itself has no genuine comparative method' and 'a legal historian [...] can help himself to the instruments of comparative law'.¹⁵ Yet, there are sceptics who believe that legal history which 'expects almost nothing from comparative law' and who ask not to 'torment history with the contemporary agenda'.¹⁶

The choice of the tools of comparative law looks intuitive. Since the late 19th century both legal historians (first, Frederic Maitland and Maxime Kovalevski, then Reinhard Zimmermann) and

⁹ *Inter alia*, see Wesel U., *Geschichte des Rechts in Europa: von den Griechen bis zum Vertrag von Lissabon*. München: C.H. Beck, 2010; Lesaffer R., *European Legal History: A Cultural and Political Perspective*. Cambridge: Cambridge University Press, 2014; Waelkens L., *Op.cit.*

¹⁰ Pihlajamäki H., Comparative Contexts in Legal History: Are We All Comparatists Now? In: Adams M., Heirbaut D.(eds.), *The Method and Culture of Comparative Law. Essays in Honour of M. Van Hoecke*. Oxford: Hart, 2014, p. 127.

¹¹ Parise A., *The Value of Comparative Legal History*, *Op. cit.*, p. 28.

¹² Pihlajamäki H., *Op. cit.*, p. 132.

¹³ Ibbetson D., Comparative legal history: A Methodology. In: Musson A., Stebbings Ch. (eds.), *Making legal history: approaches and methodologies*. Cambridge: Cambridge University Press, 2012, p. 134.

¹⁴ Ibbetson D., *Op. cit.*

¹⁵ Löhnig M., Comparative Law and Legal History: A Few Words about Comparative Legal History. In: *The Method and Culture of Comparative Law. Op.cit.*, p. 113.

¹⁶ The first opinion is voiced by Albrecht Cordes in his presentation for the 32nd Congress of German legal historians in Regensburg in 1998 (see: *Juristische Zeitung*, 7, 1999, p. 349-350). The second quotation is from Mario Asheri's preface to Monateri P., Giaro T.; Somma A. (eds.), *Le radici comuni del diritto europeo: Cambiamento di prospettiva*. Roma: Carocci, 2005, p. 16.

comparatists (Eduard Lambert, Ernst Rabel and Gino Gorla) acknowledge the link between the two disciplines. Towards the end of the 20th century Rodolfo Sacco repeated the thesis of Gino Gorla that 'the comparative perspective is historical *par excellence*'.¹⁷

Comparative law today is much more than a dogmatic study of black letter law and can be defined as 'a collection of methods that may be helpful in seeking answers to an almost endless variety of questions about law'.¹⁸ Its toolbox comprises the functional, the hermeneutical, the structural, the sociological and the dialectical methods, often applied in various combinations to reach specific research goals.¹⁹

The functional method enjoyed the leading role in comparative law throughout much of the 20th century. As conceived and applied by Ernst Rabel, Rudolph Schlesinger, Konrad Zweigert and Hein Kötz, it rests upon the ideas that 1) law is primarily aimed at solving societal problems, 2) these problems are roughly the same in societies at a similar level of development, 3) this similarity of problems leads to a similarity of their legal solutions (*praesumptio similitudinis*). Thus, social problems are a suitable criterion of comparison (*tertium comparationis*) which cuts across a multitude of statutory and doctrinal 'verbal tags' wrapping up actual legal solutions.²⁰

A more complex vision of law and the methodology of its study has in the recent decades exposed the functional method to serious critique and prompted many adherents of the functional method to acknowledge some simplifications of 'classical' functionalism.²¹ Yet, they continue insisting on a 'thin(ner) means–end connection between law and social problems' which allows the use of 'functionality for the preliminary purpose of identifying the legal data to be compared' and even the analysis of the 'said data from a functional perspective'.²² The function is therefore still relevant for most comparative legal research aiming at the 'law in action'. Although, when it comes to the analysis, most comparatists would agree to complement any single method with others to investigate all the 'factors present today which determine how cases will be resolved in the near future'.²³

Is this corrected functional method of any value for legal historians? Some of them shared basic assumptions of comparatists and historians make us think positively about such a perspective. Indeed, many academics in both fields would agree with the vision of the law as a complex and

¹⁷ Sacco R., Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II). In: *American Journal of Comparative Law*, vol. 39, Nr. 1, 1991, p. 24.

¹⁸ Adams M., Heirbaut D. Prolegomena. In: *The Method and Culture of Comparative Law*. Op. cit., p. 7.

¹⁹ For a comprehensive overview see: Samuel G., *An Introduction to Comparative Law Theory and Method*. Oxford: Hart Publishing, 2014.

²⁰ Zweigert K., Kötz H., *An Introduction to Comparative Law*, 3rd ed. Oxford: Oxford University Press, 1998, p. 31 ff.

²¹ For the overview see: Michaels R., The Functional Method of Comparative Law. In: Reimann M., Zimmermann R. (eds.), *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2008, p. 340-382.

²² Valcke C., Grellette M., Three Functions of Function in Comparative Legal Studies. In: *The Method and Culture of Comparative Law*. Op. cit., p. 101.

²³ Sacco R., Op. cit., p. 386. For a successful application of the functional method see the numerous publications of the 'Trento Project' on the 'Common Core' of the European private law at <http://common-core.org/node/8>

dynamic phenomenon which still is primarily destined to solve social problems in a similar way for societies at a similar level of development.²⁴ Social anthropologists have discovered striking similarities even in the forms of social and legal organization of the ancient civilizations which had no contact with one another.²⁵ At the same time the specificity of the subject and the goals of legal history warn against the application of the functional method without any caveats.

2. Three ways of applying the functional method in comparative legal history

Comparative legal study goes through several phases: description, analysis and conclusions. Most comparatists and historians would agree on that. Catherine Valcke singles out the identification stage of the relevant material for comparison and the stage of its subsequent analysis²⁶. Martin Löhning divides comparative study into three: the preliminary description; finding possible explanations (causes); and revealing explanatory models, ideal types, patterns of development.²⁷ Further subdivision is possible²⁸, but three stages are specific enough to show the uneven relevance of the functional method at each of them.

2.1. The first (descriptive) stage

When traveling through time and space, historians face a large variety of verbal labels, terminology and languages. Functions tend to cut across jurisdictions, as Ernst Rabel put it, and help researchers to identify the objects of comparison within the European legal tradition. The link between social problems and their legal solutions is attested by the search for *ratio legis*, that Italian commentators (*mos italicus*) started in the course of their adaptive interpretation of Roman laws in the *Corpus Juris* as early as mid-13th century.²⁹ Most of the learned jurists in other regions of Europe followed the same pattern, so that the whole of jurisprudence swung between *auctoritas* and *ratio*, not only before the age of codification³⁰ but also after national codes replaced the old *auctoritates*.³¹

The purpose of legal rules allows comparatists to transcend the 'law in books' and find *tertium*

²⁴ See *The Method and Culture of Comparative Law*. Op. cit.; also Monateri P.J. (ed.), *Methods of Comparative Law*. Cheltenham: Edward Elgar, 2012.

²⁵ Trigger B., *Understanding Early Civilisations: A Comparative Study*. Cambridge: Cambridge University Press, 2003, p. 684 (his conclusion is based on the study of ancient Egypt and Mesopotamia, Shang China, the Aztecs, the Classic Maya, the Inka and the Yoruba).

²⁶ Valcke C., Grellette M., Op. cit., p. 101-111.

²⁷ Löhning M., Op. cit., p. 117-118.

²⁸ In Russian methodological literature one differentiates between 1) selecting the objects of comparison, 2) choosing the criteria, 3) gathering the pool of sources, 4) revealing similarities and differences, 5) explaining the results. See: Mazur L.N. *Sravnitel'no-istoricheskij metod* [Comparative historical method]. In: Chubar'jan A.O. (ed.), *Teorija i metodologija istoricheskoi nauki. Terminologicheskij slovar*. [The theory and methodology of legal history. Terminological dictionary]. Moscow, Akvilon, 2014, p. 468-470. (In Russian)

²⁹ On the origins of the interpretation focused on *ratio legis* see: Padoa Schioppa A., *History of Law in Europe: from the early Middle Ages to the twentieth century*. Cambridge: Cambridge university press, 2017, p. 151 f. (cited after Italian original publication, Bologna: il Mulino, 2007).

³⁰ Renoux-Zagamé M.F. La méthode du droit commun: Réflexions sur la logique des droits non codifiés. In: *Revue d'histoire des facultés de droit et de la science juridique*, Nr. 10-11, 1990, p. 133-152.

³¹ Wieacker F., *A history of private law in Europe with particular reference to Germany*. Translated by T. Weir, Oxford: Clarendon Press, 1995, p. 409 ff.

comparationis in the social needs crossing jurisdictional borders.³² The same is true for legal historians who would like to compare the various legal circles unevenly impacted by Roman law and the learned law (such as the profoundly Romanized regions of continental Western Europe and those indirectly affected by the reception of Roman law areas in Scandinavia and Russia), and the *sui generis* jurisdiction of English common law. Without recourse to the function, a doctrinal study would be the most probable alternative, and it would limit the comparison to the jurisdictions of the same legal circle or to the circles linked through some one-way or mutual influence (e.g. Western legal culture influencing Eastern Europe in the course of the 'long 19th century').³³

2.2. The second (analytical) stage

The functional method in comparative law implies a specific vantage point: the research of the actual impact of legal rules on a society and their application in practice. Historians would agree that this is but one aspect of law, in addition to its symbolic, axiological and cultural dimensions. Yet, this very aspect of law is of primary concern for most legal historians, while the symbolism of law could be studied by social anthropologists or art historians.³⁴

The application of law has also been the main concern for jurists since the revival of jurisprudence in Europe. Italian commentators, to begin with, have definitely been practice-oriented at least since the late 13th century. So were the late medieval interpreters of the decisions (*arrêts*) of the courts of appeal during the *ancien régime* in France and the commentators of modern usages (*usus modernus*) of Roman law in early modern Germany and the Netherlands. The academic schools of French humanists, Spanish late scholastics or early modern jusnaturalists in Western Europe had a profound impact on the shape of the European legal tradition, but only in the long run.

The presumed link between law and social problems is further confirmed by the growing number of judiciary (first clerical, then royal and princely) and litigations, the expansion of secular jurisdiction and the acceptability of the judicial way of solving disputes.

Another staple of the functional method – *praesumptio similitudinis* – looks more problematic in the domain of legal history. Years ago Albrecht Cordes contested it on the grounds of the diversity of medieval legal orders.³⁵ Recent studies have produced more evidence of 'legal hybridity' and 'jurisdictional complexity' not only in the Middle Ages, but well until the 'long 19th century'.³⁶ Thus, legal diversity reveals itself as a feature of all pre-industrial societies and it weathers away gradually in the aftermath of industrialisation with its 'iron cage' of rationalized

³² Valcke C. Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems. In: *American Journal of Comparative Law*, vol. 52, 2004, p. 730–731.

³³ On the course of this influence see: Dauchy S., Martyn G., Musson A., Pihlajamäki H., Wijffels A., *The formation and transmission of Western legal culture: 150 books that made the law in the age of printing*. NY: Springer, 2017, p. 400-442.

³⁴ For the same thesis with regard to comparative law see: Valcke C., Grellette M., Op. cit., p. 107 f.

³⁵ In his presentation at the 32nd Congress of German legal historians in 1998 (*Juristische Zeitung*, 7 1999, p. 349-350).

³⁶ Donlan S., Heirbaut D., *A Patchwork of Accommodations: Reflections on European Legal Hybridity and Jurisdictional Complexity* (August 7, 2014) at <https://ssrn.com/abstract=2477325> See also: Donlan S., Heirbaut D., *The laws' many bodies: studies in legal hybridity and jurisdictional complexity, c. 1600-1900*. Berlin: Duncker&Humblot, 2015.

social life. As a consequence, in historical research it should be replaced with a hypothetical state of legal difference (*presumptio dissimilitudinis*) advocated by Pierre Legrand with respect to comparative law.³⁷ This does not prevent the usage of the functional method, as the search for similarities (and proof thereof) is no longer believed to be the main goal and the only tenable result of comparative studies.³⁸

Presuming legal diversity for medieval societies and legal similarity for the industrialised ones does not preclude scholars from revising their hypothetical starting point. In doing so, they follow the general logic of scientific discovery, according to Karl Popper.³⁹

Recourse to the functional method helps legal historians from different legal circles bridge the discrepancies in their perception of law. This effect is more evident with regard to continental and English scholars. The former are used to looking at law from a doctrinal vantage point. Quite often they write about the learned law as the law proper, the 'law in action', without further recourse to court practice or local customary usages. In doing so, they participate in the grand narrative of medieval and early modern professors who preferred to present the *ius commune* as the actual law of the Christian world.⁴⁰ The latter operate in the jurisdiction of judge-made law which was not well taught at the universities until William Blackstone (1723–1780). Thus, it is more obvious to an English historian that 'law cannot be treated purely as an intellectual system, a game to be played by scholars whose aim is to produce a perfectly harmonious structure of rules.'⁴¹ Attention to the function of legal rules calls for the perception and research of law as something which exercises some influence in society and has to be understood as such.

Shifting the focus of the research from the doctrines and black letter law to the operational level of legal rules helps legal historians to reveal and dismantle stereotypes and clichés built within national legal histories and passed down through the system of legal education. Most notably, it shakes the image of the uniqueness and superiority of one's national law by showing that other legal orders offer solutions leading to similar results. To boost the iconoclastic effect, though, a researcher might need to combine of functional and other comparative methods.

2.3. The third stage (arrangement)

Paying attention to the functions of legal rules could give legal historians reliable criteria to arrange the results of their research on the macro- and micro-level. Anthropologists proved its applicability and effectiveness in their studies of primitive societies when they arranged aboriginal law into rules aiming at biological reproduction, maintenance of social integrity and the exploitation

³⁷ Legrand P., The Return of the Repressed: Moving Comparative Legal Studies beyond Pleasure. In: *Tulane Law Review*, vol. 75, Nr. 4, 2001, p. 1048.

³⁸ Valcke C., Grellette M., Op. cit., p. 109-111.

³⁹ Popper K., *The Logic of Scientific Discovery*. London, Hutchison, 1972, p. 31–32.

⁴⁰ For remarks of the exaggerated influence of *ius commune* in Europe see: Wesel U., Op. cit., p. 337.

⁴¹ Ibbetson D., Op. cit., p. 135.

of natural resources and the ecosystem.⁴²

In later preindustrial civilisations more complicated social relations were conceptualized by professionals who began to consider the functions of legal rules. In Rome, with the birth of secular jurisprudence, this tendency led to the emergence of an institutional scheme of civil law comprising persons, things (and obligations), and actions. This famous three-fold scheme was coined by Gaius in his *Institutes* (2nd century A.D.) and accepted by the Byzantine compilers of the *Institutes of Justinian* (the 6th century). But it goes back to the undertaking of Quintus Mucius Scaevola (early 1st century B.C.) who was the first to arrange late republican civil law into groups (*generatim*, D. 1.2.2.41) concerning inheritance, persons and family, things and real rights, and obligations, according to 'the *needs* of pre-classical Rome to regulate its rural economy and maintain its patriarchal family structure (emphasis added — *D.P.*)'.⁴³

In the course of the reception of Roman law this institutional arrangement became the most influential scheme on the European continent⁴⁴. It became especially popular from the 16th century when legal humanists (François Connan, Hugo Donneau and others) began to perceive it as the manifestation of 'skillfully arranged law' after Cicero's ideal ('*ius in artem redigere*' mentioned in *Gell. Noct. Att. I,22,7*). In the 17th and 18th centuries it also resonated with jusnaturalists who regarded it as the manifestation of natural reason.⁴⁵ Finally, it came to underpin all European civil law codes and so 'imbued' in the legislation and mentality that comparatists tend to ascribe it to the structural analysis of law without mentioning its functional origins.⁴⁶

It is also remarkable that the function-based institutional scheme competed with and eclipsed other practical arrangements of law stemming from procedural actions in courts. Such were the order of the praetor's edict in Rome, Germanic 'laws of the barbarians', and medieval customary law books (the Saxon Mirror and similar). The procedural scheme of writs or forms of actions prevailed in common law, although in his famous 'Commentaries on the Laws of England' (1765–1769) William Blackstone proved it to be reducible to a similar functional division on the rights of persons, things and (private and public) wrongs. The institutional scheme of private (civil) law travelled from German-speaking universities eastwards to the reformed law faculties in the Russian empire from the 1830s.⁴⁷ By the end of the 19th century it permeated all areas of the European legal tradition.

Contemporary scholars see it as appropriate to view the development of private law in various

⁴² Suholinskiĭ P.R. *Pravo v dogosudarstvennykh social'nykh sistemakh* [Law in pre-state social systems]. PhD in law thesis. Moscow, 2013 (2nd thesis) (in Russian); Rouland N., *Anthropologie juridique*. Paris: PUF, 1988.

⁴³ García Garrido M.J., *Derecho privado romano: casos, acciones, instituciones*, 7th ed. Madrid: Dykinson, 1998, p. 85, nt. 25. (cited after Russian translation edied by L.L. Kofanov, Moscow: Statut, 2005).

⁴⁴ Stein P. *Legal Institutions: The Development of Dispute Settlement*. London: Butterworths, 1984, p. 125-129.

⁴⁵ It is enough to quote the arrangement of civil law in 'natural order' in the famous treatise by Jean Domat "*Les lois civiles dans leur ordre naturel*" (first published in 1689).

⁴⁶ Samuel G., *Op. cit.*, p. 96.

⁴⁷ For details see: *The formation and transmission of Western legal culture*. *Op.cit.*

legal circles (including the relevant part English common law) on the functionalist basis into the provisions concerning the status of persons and family, things and real rights, the transfer of things on the constant and temporary basis, and compensation for wrongs causing harm to persons and things.⁴⁸

The same pattern is applicable on a smaller scale. The development of contract law in continental jurisdictions can be traced through the provision common for all or most contracts, even before such generalizations were forged in the learned law and confirmed by the legislators in the codes of the 18th and 19th centuries. Helmut Coing offered a list of general provisions on contracts concerning their formation, content and interpretation, (in)validity, the benefit of a third person, agency, contractual performance, default and consequences, and the substitution of parties and plurality of persons in an obligation.⁴⁹

Functionalism offers an unmatched opportunity to arrange academic courses dealing with legal history within the European legal tradition and beyond. It underpins the cross-cultural comparison of various civilisations in anthropological studies. However, it could also be of assistance for universal legal history(ies) which went out of fashion in the 19th century because the main assumptions and methodology did not keep up with the evolution of hard sciences and the postmodern critique of science.⁵⁰ At Russian law faculties a course on universal legal history ('the history of the state and the law of foreign countries') which covers an immense timespan from ancient civilisations until the late 20th century is taught. The grand narrative of the evolution of private law is centred around its 'core' institutions, such as: family and persons, property and real rights, inheritance, contract law, and delicts (private and public).⁵¹

Conclusion

The functional method may be applied in comparative legal history, although with some reservations. It seems more productive for the purpose of identifying the objects of comparison and the pool of sources for a project to transcend national borders or one legal circle, since it cuts across the boundaries of black letter law, legal doctrines and other verbal tags. For the same reason it is also convenient for arranging the results of such comparative studies. Its application for the analysis of the selected sources is limited by the purpose of exploring the 'law in action', as it operated on the daily basis and as it was practiced in courts of law. This is only one aspect of the complex

⁴⁸ Coing H. *Europäisches Privatrecht*. 2 vols. München: C.H. Beck, 1985-1989.

⁴⁹ Coing H. Op. cit. Vol. 1, p. 398-449 (chapter 19); Vol.2, p. 442-473 (chapter 22).

⁵⁰ Monateri P. (ed.), *Methods in comparative law: an intellectual overview*. In: Monateri P. (ed.), *Methods of comparative law*. Cheltenham: Edward Elgar, 2012, p. 7-25.

⁵¹ Zhidkov, O.A., Krashenninnikova N. A. (eds.), *Istoriya gosudarstva i prava zarubezhnyh stran. Uchebnik [History of the state and law of foreign countries]*. Textbook. Moscow: Norma, 2015. (in Russian) The same logic rules the narrative of the legal history in Europe. See Wesel U. Op. cit.

phenomenon called 'law' but an important one for many jurists now and in the past.

The application of the functional method builds upon the connection between social problems and legal provisions, proved by the practical character of the legal profession and its search for *ratio legis* since the revival of jurisprudence in medieval Europe. The diversity of the objects of comparison in time and space and the academic goal of understanding the past rather than changing the present and the future require legal historians to presume a state of difference rather than a state of similarity and to combine various methods of comparison in their quest. Yet, in this endless quest to understand legal diversity, legal historians and comparatists advance side by side, often starting with functional interpretations to discover similarities and differences, and the manifest and hidden factors of the constantly evolving 'law in action'.

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