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THE FUNCTIONAL METHOD TO STUDY GENERAL PART OF CONTRACT LAW IN HISTORICAL PERSPECTIVE: PRO ET CONTRA

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THE FUNCTIONAL METHOD TO STUDY GENERAL PART OF CONTRACT LAW IN HISTORICAL PERSPECTIVE: PRO ET CONTRA[2]

Comparative legal history is a fashionable new discipline which aims at a better understanding of the law's past by comparing similarities and differences of legal phenomena in two or more jurisdictions beyond the limits of national legal histories. Despite its popularity in Europe, it still lacks comparative projects that cover both Western and Eastern areas of the Continent, not least because the methodology of such comparison requires proper consideration and cannot be simply copied from comparative law or national legal histories.

The present article evaluates the applicability of the dominant method of today's comparative law (the functional one) in the domain of the general contract law of the first codifications in the major jurisdictions of Continental Europe (Austria, France, Germany, Russia) during the 'long 19th century'. This subject matter is chosen by way of example as a 'legal cross-road' of legal concepts and models, more susceptible to changes, innovations, borrowings, and closely linked to social needs.

In the main part of the article, it is argued that the adaptation of the functional method to the needs of comparison in legal history becomes plausible due to at least two factors. First, comparatists mitigated the rigid assumptions of the 'classical' functionalism of the 20th century (rejecting its privileged status and purely functional perception of law, irrebuttable presumptions of similarity and unification of compared legal systems etc.). Second, many legal historians, like the drafters of the first civil codes in Western and Eastern Europe, also believe that law is more than minimally connected to social problems and manifests itself primarily through its actual application.

On the basis of such premises, the author of this article discusses potential benefits and limitations of researching general contract law in the selected jurisdictions with the functional method. At the preparatory (descriptive) stage, it can be useful to assure comparability of contract law in the selected civil codes, to identify omissions in the codified general rules on contracts, and to arrange legal provisions around practically relevant issues. At the stage of analysis, functionalism can be coupled with teleological interpretation of legal norms to enable us to understand better the link between the application of the legal rules, their legal purposes, and the practical social problems serving as *tertium comparationis* for all the compared jurisdictions.

A sketch of such an analysis in the final part of the article allows to conclude that a research with the help of the functional method narrows our perception of law as a cultural phenomenon and breaks the inner doctrinal logic, but in return, it offers a starting point for a much needed dialogue of legal historians with a wider legal community.

JEL Classification: K10.

Keywords: comparative legal history, contract law in Europe, functional method, *tertium comparationis*, codification of civil law

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Introduction

Contract law became the hotbed of modern comparative approach, as it was forged by Ernst Rabel, Rudolf Shlesinger, Gino Gorla and others. Many scholars regard it as a springboard for a larger comparison of the 'common core' of Western (European) private law, or even a sphere of a truly transnational law and a subject matter for transnational legal scholarship.[3] Against a plethora of research in contemporary contract law the historiography on its comparative development looks rather pale in number, variety of methods, and scale of research. Most investigation has been done in the framework of national legal history where foreign law is taken into account as a formant of national law and not as an equally important subject area. The studies of European private law conducted and edited by Helmut Coing, Reinhard Zimmeramnn, or some publications in book series at Brill Publishing remain rare exceptions and tend to limit pan-European scale to Western Europe with a shared legal culture.[4]

This situation is mostly due to the fact that comparative legal history is still a new discipline, younger that comparative law.[5] It becomes fashionable because of its promises to clear the way to new insights and to present them in a manner interesting to more members of legal community. As with other young disciplines, the success of this enterprise largely depends on a viable methodology. Which one? Should comparative legal historians invent methods of their own or can they build on the experience of comparative law? To answer this daunting general question it is better to start with concrete studies of a specific subject area.

In this article I choose the contract law of the early codifications in Europe for several reasons. To begin with, this subject matter is well researched in the national secondary literature which provides abundant information about legal developments in separate jurisdictions. Next, contract law begs for comparison because of its remarkably cosmopolitan character and susceptibility to change and to adopt. Also its comparative study on the basis of the functional method looks more plausible than in many other areas because its inner logic is believed to be closely connected with social needs fairly similar in European countries on the same level of development. Finally, comparative studies of the history of this subject area have already been initiated and yielded first results to be discussed and evaluated.

To test my main hypothesis of applicability of the functional method in research of the history of contract law in West and East of Europe I proceed in three steps. First, the concrete subject matter of research (i.e. the 'general part' of contract law) is described. Second, the meaning of functionalism in comparative law and comparative legal history is discussed and its benefits for investigating the general rules on contracts are being weighed. Third, a sketch of the functional study of the subject matter is presented. In the concluding remarks I sum up challenges, opportunities, and benefits of this method in comparative legal history of contract law.

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3 By way of example see: Hein Kötz, *European contract law* (Oxford: Oxford University Press, 2017, 2nd ed.) (with further references). For an overview of this subject area in comparative law see a chapter 28 by Allan Farnsworth in: Mathias Reimann, Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2008), p. 899-935.

4 For references see section 1 below.

5 Since 2009 a growing number of its protagonists join their efforts in the European Society of Comparative Legal History (ESCLH). Its blog is available at <http://esclh.blogspot.ru/p/about-esclh.html>

1. General part of contract law as the object of research

In legal scholarship a negative result is still a result. Yet, some positive outcome is welcomed. For comparative studies such a reward was and still is the discovery of commonalities between comparable objects. A significant number of commonalities was found in private law, specifically in the law of obligations and contract law of European countries. Legal history could take a chance on this domain as well.

1.1. Comparative history of private law in Western and Eastern Europe

The search for commonalities was *raison d'être* and the original sin of legal comparison which shifted its focus to the domain of private law of the Western jurisdictions and until the end of the 20th century entrusted the whole discipline of comparative law in the hands of specialists in private law.[6] It has been duly criticized.[7] Untill quite recently, comparative studies have not sunk deeper roots in public law which is believed to have closer connection with national identity, ideology, culture, and hence, singular and almost incomparable.[8]

Apparently, legal historians who venture to transcend national borders face similar difficulties. It is enough to mention the outcomes of major research projects at the Institute of European legal history in Frankfurt am Main. Efforts of the international team of scholars under the funding director of the Institute have culminated in voluminous dogmatic history of private law based on Roman-Canon *jus commune*.[9] A logical continuation of this enterprise (a history of European public law) was limited to a history of public law in Germany, obviously due to less obvious shared tradition and predominantly national spirit. Although more research of the rule of law, constitutionalism, or human rights might indicate the existence of *jus publicum Europaeum* in the past.[10]

Still, legal history in many Western European countries is still primarily a history of private law as a field of research and a university discipline (*Privatrechtsgeschichte*). Private law was the preferred subject matter of Roman jurisprudence and the main content of Justinian's *Corpus Juris Civilis* which determined the course of legal studies at universities in Europe till the 18th century. The teaching of private law formed the professional mentality and language of many jurists in the jurisdictions which were justly ascribed by comparatists to the *civil law* family. The civil codes which arose on this legacy became true economic constitutions of civil societies, even where political constitutions emerged much later.[11]

For centuries Eastern Europe (and Russia as its major jurisdiction) knew the legal tradition of

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6 Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1998, 3rd ed.), vol. 1, p. 65 ('partially because it is only private lawyers… who have been interested in the [comparative] theory').

7 Gerhard Danneman, Comparative Law: Study of Similarities or Differences?, in: Mathias Reimann, Reinhard Zimmermann, *op.cit*., note 3, p. 383-419 (with further references).

8 For constitutional law see: Michel Rosenfeld, András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2013) p. 6-8.

9 Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 3 vols. (München: C.H. Beck, 1973-1988); also Helmut Coing, *Europäisches Privatrecht*, 2 vols. (München: C.H. Beck, 1985-1989).

10 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 4 vols. (München: C.H. Beck, 1988-2012). Yet, see the author's concluding remarks on *jus commune publicum* (*ibidem*, vol. 4, p. 681-688).

11 This is not to ignore the fact that 'private law' changed over time and it took its modern form in the 19th century as a result of idealistic philosophy and ideology of liberalism. See: Nils Jansen, Ralf Michaels, Private Law and the State: Comparative Perceptions and Historical Observations, in: *The Rabel Journal of Comparative and International Private Law*, 71(2) (2007), pp. 345-397.

its own which ignored a strict 'public/private divide' and the scholarly interpretation of the *Corpus Juris Civilis*.[12] Yet, in the course of modernization of the Russian Empire in the 19th century, substantial elements of Western legal culture spread eastwards and narrowed many legal discrepancies. For the purpose of this article it would be enough to state that no part of Russian legal landscape remained unaffected. Its multiple casuistic laws were complied in the *Svod Zakonov Rossijskoi Imperii* (hereinafter the *Svod Zakonov*) in 1832 which tacitly integrated many features of the *Code Civil*, the Austrian Civil Code, and the relevant doctrines.[13] Legal education was gradually reformed along the lines of German historical jurisprudence and *Pandektism*. It helped to establish civilian legal scholarship and to 'scientify' positive civil laws.[14] These trends culminated in the Draft Civil Code of the Russian Empire (hereinafter the Draft Civil Code of 1905). The Draft was under preparation from 1882 with the active participation of professional community of lawyers and academics and involved a massive comparative studies of the major foreign civil laws, with particular attention to the French, Austrian, and German Civil Codes.

All the above gives good reasons to compare legal developments in major continental jurisdictions during the 'long 19th century' (from 1789 till 1914, as defined by Eric Hobsbawm), or the second 'legal century', the 'age of codification' which formed the style of the civil law legal family and saw its expansion to the easternmost regions of Europe.

1.2. General contract law in the 'long 19th century'.

During the long 19th century civil law became codified and contract law within civil codes acquired its generalizing style. The 'general part' of contract law (or of the law of obligations based on contract law as its most important section) became the hallmark of the legislation in Romano-Germanic jurisdictions, present in the General State Laws for the Prussian States of 1794 (ALR), the French *Code Civil* of 1804, the Austrian Civil Code of 1811 (ABGB), the German Civil Code of 1896 (BGB), but also in other codes which are not considered in this article. About 25 articles with general rules on contracts were incorporated into the *Svod Zakonov*. But the general part reached the Western level of sophistication only in the Draft Civil Code of 1905.

The general style of contract law was the result of a long doctrinal development reaching back to the late Scholasticism and early modern natural law[15] as part of the overall transition to the mentality of thinking in principles (general rules).[16] It fueled the 'spirit of (modern) codifications' and underpin the methods to interpret, understand, and apply the codified legal rules to specific

12 See: Tomasz Giaro, Some Prejudices about the Legal Tradition of Eastern Europe, in: Bronisław Sitek, Jakub Szczerbowski, Aleksander Bauknecht (eds.), *Comparative Law in Eastern and Central Europe* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013), p. 26-50.

13 See: Maxime Vinaver, Ob istochnikakh X toma [Svoda Zakonov], in: Idem, *Iz oblasti tsivilistiki* (St. Petersburg: Tipografia Rozena, 1905), p. 1-78.

14 See: Anton Rudokvas and Alexej Kartsov, "The Development of Civil Law Doctrine in Imperial Russia under the Aspect of Legal Transplants (1800–1917)", Zoran Pokrovac (ed.), *Rechtswissenschaft in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert, Sonderdruck* (Klostermann, Frankfurt am Main, 2010), vol. 5, 291–333. On the German concept of 'scientification' developed by Franz Wieacker see: Martin Avenarius, Verwissenschaftlichung als 'sinnhafter' Kern der Rezeption: eine Konsequenz aus Wieackers rechtshistorischer Hermeneutik, in: Okko Behrends, Eva Schumann (eds.), *Franz Wieacker: Historiker des modernen Privatrechts* (Göttingen: Wallstein Verlag, 2010), p. 119-179, at 137-139.

15 See Wim Decock, *Theologians and Contract Law: the Moral Transformation of the Ius Commune (ca. 1500–1650)* (Martinus Nijhoff Publishers, Leiden, Boston, 2012), 105 (with further references).

16 Helmut Coing, *Grundzüge der Rechtsphilosophie* (Walter de Gruyter, Berlin, New York, 1993, 5 ed.), 251; Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500-1933)* (C.H. Beck, München, 2012, 2 ed.), 276 (with reference to Peter Landau).

cases till our days.[17]

However, even an overview of general provisions reveal multiple differences (see the table on page 16 below) showing that there was no fixed 'canon' to define 'contract' in general, to classify kinds of contracts, to indicate conditions of their validity, or to set rules regarding their subject matter, the procedure of making, modifying, discharging, and terminating contracts, to interpret them, and to provide guarantee or security to the creditor. Terminological variety makes comparison even more complicated. Most key-terms of general contract law (such as French *cause licite*, German *Rechtsgeschäft*, or Russian *zaprodazha*) are steeped in particular doctrinal traditions and cannot be easily translated into other languages.

Hence, comparing so similar and so different general rules on contracts even in the codes with some elements of shared tradition requires some methodological reflections.

2. Functionalism amidst competing approaches to compare laws

Methodological issues are known to stir up lively debates among the protagonists and opponents of a young discipline of comparative legal history. Perhaps, legal historians can learn to some extent from the similar disputes in comparative law. To test this hypothesis, one must look into the meaning of the preferred method in comparative law before deciding on its applicability and eventual adaptation for the needs of comparing general contract law of the 19th century.

2.1. Functionalism in comparative law.

Contemporary comparative law is marked by methodological pluralism. Some argue, it has no 'royal road' in this discipline.[18] Many others call functionalism the dominant method (approach) to compare both private and public law. Despite a vivid debate, a theory of this method 'hardly exists', even the meaning of a 'function' is not a matter of consensus.[19] The basic idea of the method is to analyze law from the point of view of social problems it addresses which tend to cut across various jurisdictions. To these days the method is used to set the focus not on legal concepts, doctrines, and institutes but on the social problems and their practical legal solutions, e.g. to test earnestness of the parties to enter into a legally binding agreement or to limit a number of enforceable promises.[20] These problems become the criterion of comparing (*tertium comparationis*) laws of various nations in an attempt to discover similarities (a 'common core' or *acquis commun*) and explain, even minimize differences among them.

The advocates of 'pure' legal and cultural approaches criticize this 'classical' functionalism mainly for dismissing the inner logic of national legal orders and its intricate ties with national cultures by choosing an extra-legal criterion (social function) with the aim of re-arranging legal systems and recasting them into an artificially harmonized legal order where specific legal systems

17 See Rémy Cabrillac, *Kodifikatsii* (Statut, Moscow, 2007, translated by Leonid Golovko from *Les codifications*, PUF, Paris, 2002), 361; Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Springer, Berlin, 1991).

18 Maurice Adams, Dirk Heirbaut (eds.), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford: Hart Publishing, 2014), p. 6.

19 See Ralf Michaels, The Functional Method of Comparative Law, in: Mathias Reimann, Reinhard Zimmermann, op.cit., note 3, p. 339-381. For functionalism in comparative private law see: James Gordley, The Functional Method, in: Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (Cheltenham: Elgar, 2012), p. 107-119. For public law see: Vicki Jackson, Methodologies of Comparative Constitutional Law, in: Michel Rosenfeld, András Sajó, *op.cit*., note 8, p. 62-66.

20 See Hein Kötz, op.cit., note 3, p. 49-71; James Gordley (ed.), The Enforceability of Promises in European Contract Law (Cambridge: Cambridge University Press, 2009).

are treated as no more than national variations of a 'common core' of the 'civilized' (western) countries with presumably similar social needs.[21]

Despite the criticism, Catherine Valcke and other protagonists of the functional method believe it is still valid because most jurists still hold that law is at least minimally connected to social problems and exercises some impact on the societies. Moreover social institutions gain their meaning in the particular contexts of application, 'meaningful acts' (Max Weber) rather than words.[22] These basic assumptions make it appropriate alternative to 'legal labels' for sorting out the material on the preparatory stage of comparison and even for analyzing how law actually operates to resolve the problems it targets. Such an analysis can start with 'a hypothetical state of legal difference' (*praesumptio dissimilitudinis*) to prove from the contextual data the existence of similar problems across the jurisdictions involved in the study.[23]

Alternatively, James Gordley argues that functionalism is compatible with the competing cultural approach when they both are regarded as variants of a more general teleological approach. It purports to understand functions as purposes or intended results of legal rules, and in that way to give a more accurate legal description of law in a society.[24] Gordley's expertise in comparative law and legal history makes his suggestion even more relevant for a debate about common methods of comparison of private law now and in the past.

2.2. Functionalism in comparative legal history?

As Maitland once wrote, 'history involves comparison'.[25] It is enough to mention the names of Henry Maine, Rodolphe Dareste, Maxime Kovalevsky, Paul Vinogradoff and other great historians of the 19th century to show that comparison in history and respective methodological reflections are coeval with the modern discipline of national legal history. But the path to actual comparison turned out to be thorny. Comparative legal history differs from a national one in a way that it entails traveling through time and space to pull together materials from two or more jurisdictions in order to gain a better understanding of all or most of those jurisdictions involved.[26]

Perhaps, one should start with the Institute of European legal history (founded in Frankfurt in 1964) under the directorship of Helmut Coing. Yet, several circumstances prevented its team from benefiting from the functional method. First, under Coing, the agenda of the Institute was focused on the doctrinal history of the Roman-Canon *jus commune* which was based on Latin and ensured many commonalities of legal concepts, models, and values. Second, Coing and his team saw legal history as a hermeneutical enterprise to 'understand legal rules of the past by taking into account all

21 Günter Frankenberg, Critical Comparisons: Re-thinking Comparative Law, in: Harvard International Law Journal, 26 (1985), 411-455 (cited after Russian translation in: *Sravnitelnoye Konstitutsionnoe Obozrenije*, 2004, p. 99); Dmitry Dozhdev, Sravnitel'noe pravo: sostojanie i perspektivy, in: *Rossijskij ezhegodnik sravnitel'nogo prava* (St. Petersburg, 2008), p. 7-28, at 24-25; Catherine Valcke, Mathew Grellette, Three Functions of Function in Comparative Legal Studies, in: Maurice Adams, Dirk Heirbaut, *op.cit*., p. 99-112, at 104-106, 109-111.

22 Catherine Valcke, Mathew Grellette, *op.cit*., p. 104-105.

23 After Legrand's idea. See: Pierre Legrand, The Return of the Repressed, Moving Comparative Legal Studies Beyond Pleasure, in: *Tulane Law Review*, 75 (2001), p. 1033-1051.

24 James Gordley, Comparison, Law, and Culture: A Response to Pierre Legrand, in: The American Journal of Comparative Law, 65(1) (2017), p. 133-180.

25 See: *The Collected Papers of Frederic William Maitland*, edited by H.A.L Fisher (Cambridge: Cambridge University Press, 1911), vol. 1, p. 488.

26 Agustín Parise, The Value of Comparative Legal History for American Civil Law Jurisdiction, in: Idem (ed.), *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 (defining comparative legal history).

(political, economic, religious, spiritual) conditions of a given period'.[27] Third, coeval comparative law could offer only the 'classical' functional method as a tool of legal unification.

After Coing, Reinhard Zimmermann accomplished a comparative doctrinal history of the law of obligations without mentioning functionalism.[28] Other legal historians openly contested its applicability in research. Albrecht Cordes claimed that legal history expected very little or none at all from comparative law because there was no space for *praesumptio similitudinis* in history.[29] Such a denial, obviously, refers to the 'classical' functionalism used for legal unification. However, gradual expansion of the research area of the history of law in Europe beyond its western continental 'core' in combination with recent modifications of the functional method by comparatists may motivate legal historians to reconsider.

Comparative legal history as doctrinal enterprise can hardly embrace all regions of Europe, given the divides between civil law and common law, West and East etc.[30] A possible workaround to this limitation is to focus on the transmission of Western legal culture across the continent and beyond, but it leaves out of scope all regions before or without such an influence and it builds heavily on the doctrinal history.[31] Another solution is to develop a concept of 'multi-normativity', to facilitate understanding and comparison of more and less legalized normative traditions across Europe and beyond.[32]

A better idea might be a closer look on a moderate version of functionalism in comparative law because its assumptions are not that alien to legal historians. Many of them believe in this practical dimension of law (in addition to its symbolic and ideological meaning). Some of them directly call themselves legal realists[33] who would subscribe to the ultimate task of non-dogmatical comparative law – to discover all apparent and hidden factors which determine how cases are resolved.[34]

In fact, some historians already rely on functionalism. An example of 'functional identification' gives the textbook on European legal history by Udo Wesel. He arranged legal institutes into coherent groups related to family, property, succession, contracts, private wrongs, and trade. This core of 'horizontal' relationships was valid for the period from the high Middle Ages till the changes brought about within societies by the industrial revolution.[35]

Functional grouping and analysis can be found in the monograph of Emmanuel Van Dongen

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27 Helmut Coing, *Aufgaben des Rechtshistorikers* (Wiesbaden: Steiner, 1976), p. 21.

28 Reinhard Zimmermann, *The Law of Obligations: Roman foundations of the Civilian Tradition* (Kennwyn: Juta, München: Beck, 1990; later re-published by Oxford University Press in 1996 and 2013).

29 Cited after the report about his presentation at the 32nd Congress of German legal historians in Regensburg in 1998 after: *Juristenzeitung*, 7 (1999), p. 349-350.

30 The international project of comparative studies in Continental and Anglo-American legal history made it obvious. See: Helmut Coing, Common law and civil law in the development of European civilization: possibilities of comparison, in: Helmut Coing, Knut Wolfgang Nörr (eds.), *Englishe und Kontinentale Rechtsgeschichte: ein Forschungsproject* (Berlin, Duncker&Humblot, 1985), p. 31-41.

31 Serge Dauchy et al. (eds.), *The Formation and Transmission of Western Legal Culture: 150 Books That Made the Law in the Age of Printing* (Springer Verlag, 2017) (despite the pretentious inaugural phrase in the introduction 'Law is culture', ibidem, p. 1).

32 See Thomas Duve, *Global Legal History – A Methodological Approach* (April-May 2016). Max Planck Institute for European Legal History Research Paper Series No. 2016-04. Available at SSRN: https://ssrn.com/abstract=2781104

33 Heikki Pihlajamäki, Comparative Contexts in Legal History: Are We All Comparatists Now?, in: Maurice Adams, Dirk Heirbaut, *op.cit*., p. 132 ('we're all realists now', citing Gary Peller).

34 Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)', in: *American Journal of Comparative Law*, 39 (1991), p. 23.

35 Udo Wesel, *Geschichte des Rechts in Europa: von den Griechen bis zum Vertrag von Lissabon* (München: C.H. Beck, 2010), §§ 91-95, 116-124, 138-142.

on contributory negligence. The author decided to investigate century-long tradition of legal solutions for cases where 'the person who suffered damage in one way or another contributed to his own harm' (as in traffic accidents where the injured party did not observe the traffic rules as well). He chose to call it 'contributory negligence' 'as a classification concept... that may not appear in the sources but that is used for better understanding of the sources'.[36] As a result, it indicates comparable problems in various jurisdictions across time and space, from Ancient Rome till our days. The author rightly calls his approach 'comparative legal history' 'from a perspective of a functional problem'.[37] And its field of application can well be extended.

2.3. Studying general part of contract law: benefits of functionalism.

Functional approach to the history of the general part of contract law is particularly disturbing for a traditional historiography. General provisions on contracts were the result of dogmatical re-thinking of the casuistry of the *jus commune* on the basis of early modern philosophy, later introduced to the civil codes. For this reason they have been studied dogmatically, with particular attention to concepts, principles, and legal models by Helmut Coing, Reinhard Zimmermann, Wim Decock and others (cited above).

The functional method aims at looking beyond dogmatic labels or constructions and motivates researchers to draw new distinctions based on the social needs that legal rules address. For example, in his recent textbook, Hein Kötz introduced the chapter 'Tests of Earnestness' which indicates directly the practical need behind various doctrinal models and does not correspond to the doctrinal model of any national jurisdiction.[38]

In my view, contemporary functionalism can facilitate a better understanding of the general part if the researcher (comparatist or legal historian) links its doctrinal models and the social functions via the legal purposes behind each legal rule. In other words, I suggest to study what legal goals the legislator intended to attain with introducing such and such provision of the general part of contract law and what social needs did it address. This approach builds on the functional and teleological perspectives on contract law. I believe they are intertwined since legal goals are meant to address *de jure* social needs. This combination allows to apply functionalism at preparatory and analytical stages of research.

At preparatory (descriptive) stage.

The general part of contract law is already a selection of rules made by the legislator to meet a range of issues common to various contracts, usually on the basis of a careful study of the previous legislation, case law, and doctrine, both domestic and foreign. These efforts relate legal rules to practical issues. It follows from the intent of the legislator to give instructions relevant to enter, modify, discharge, and terminate all relationships matching the label of 'contract' or 'contractual obligation' under civil law.

Under such circumstances the study of practical issues addressed by the general part of contract law could facilitate the analysis in the following ways:

First, to assure comparability of contract law in the selected jurisdictions. General rules on

36 Emmanuel van Dongen, *Contributory Negligence: a Historical and Comparative Study* (Leiden: Brill Nijhoff, 2014), p. 7-8.
37 Ibidem, p. 7.
38 Hein Kötz, *op.cit*., p. 49-71. At the same time, Kötz is not consequent enough to re-arrange the whole course of European contract law along the functions of legal rules. It would confuse most contemporary jurists and disturb the doctrinal tradition.

contracts became legalized through codifications of civil law in the course of the 'long 19th century' when the societies were transformed by the industrial revolution, abolition of serfdom, expansion of civil equality, urbanization, rise of entrepreneurial activity. General rules on contracts aimed at sorting out a growing variety of specific contractual arrangements which can no longer be effectively managed on a case-by-case basis. The social changes facilitated transfer of this new legal technique across the Continent.

Second, to identify omissions in the codified general rules on contracts. Although general rules on contract could address similar needs and pursue similar goals, the concrete content of general part varied from legislation to legislation. Some of them could be present in one code and omitted or put in a different section in another code. It would be appropriate to explore the range of general issues in contract law before analyzing them in particular.

Third, to arrange legal provisions around practically relevant issues. Due to the circumstances of drafting the civil codes, 'general parts' also vary in their wording more than in practical issues or legal goals. Therefore, the latter provide an alternative to sort out the legislative general provisions on contracts more coherently than the sequence of titles and subtitles of the codes.

At the stage of analysis.

The applicability of the functional method to analyze the rules of the general part of contract law rests on the link of these rules with social problems related to establishing, modifying, interpreting, discharging, and terminating contractual bonds. Even the doctrinal origin of the general part does not break this link because the very sense of generalization as a task of legal scholarship aimed at a better dispute resolution of practical issues.[39] The practical character of general provisions on contracts follows from the efforts of the drafters of the civil codes, as testify the preparatory materials.[40] It is also confirmed by references to the provisions of the general part of contract law in the court practice that emerged after the enactment of the codes.[41]

Thus, the functional analysis does not answer all questions but enables us to understand better the link between the application of the legal rules, their legal purposes, and the practical social problems serving as *tertium comparationis* for all the compared jurisdictions.

3. A sketch of the functional analysis of general provisions on contracts

The purpose of this article is to discuss applicability of the functional method in comparative legal history, not to conduct actual research of this vast domain. Yet, legal historians are rightly cautious about purely methodological reflection because any method is meant to be applied to concrete material. In this section I sketch out the functional research on the general part of the codified contract law, as it was described in part 1 of this paper.

39 Such was the intention of the early modern inventors of the general part: *inter alia*, to enable confessors to determine the penitence at *forum internum* more justly and coherently, as well as to instruct Christians how to enter into contracts and to discharge them in a virtuous manner. See Wim Decock, *op.cit*., p. 26 f.

40 For example, see: Jean-Étienne-Marie Portalis, *Discours préliminaire du premier projet de Code civil, prononcé le 21 janvier 1801 et le Code civil promulgué le 21 mars 1804* (Éditions Confluences, Bordeaux, 2004, first published in Paris in 1801), p. 56 ('*En traitant des contrats, nous avons d'abord développé les principes de droit naturel qui sont applicables à tous*.').

41 As attested by law reporting. For Russia see: *Dogovornoe pravo po reshenijam Kassacionnogo Senata* (Vladimir, 1880, 2nd ed.) (dedicated to the general part of contract law). The practical applicability as one of the reasons to develop general provisions was specifically mentioned in the motives to the first section of book 5 of the Draft Civil Code (*op.cit*. p. 1-2).

3.1. The sources to study

Legal history stems from the sources and depend of them in many ways. So does the study via the functional method. As it presupposes a substantial connection between law and social problems, this method requires a considerable number of sources dealing with the actual application of legal rules to specific cases. Furthermore, the actual impact of contract law on the society may be juxtaposed with the intention of the respective legislator who assigns each rule with a specific goal. It allows to correlate the intended results of the rules with actual ones and requires familiarity with the motives of the drafters and interpreters of the laws. In terms of sources, the 'long 19th century' is, perhaps, the earliest period to conduct this kind of research with regard to Western and Eastern Europe. It provides legal historians with all kinds of necessary sources concerning all major Continental jurisdictions.

First, one can find the motives of the legislator on the intended application of the *Code civil*, ABGB, BGB.[42] Such materials are scarce for the *Svod Zakonov* but abundant for the Draft Civil Code of the Russian Empire[43].

Second, the subsequent life of general contract law is attested by voluminous collections of case law. Law reporting became an established practice in France[44] and German jurisdictions[45] by mid-19th century. It sank roots in Russia since the 1870s.[46] As a result, law reports became if not the 'true repositories of the law' (Joseph Story), then at least a valuable source of information on the interpretation of the codified law by the high courts in the 19th century.[47]

Third, both legislation and case law came to be the object of interpretation and criticism for a growing legal community. Many commentaries combined practical and doctrinal materials to clarify legal purposes of the codified provisions, their interpretation, and application in higher courts.[48]

Last but not least, rich national historiographies deliver enables the researcher to reconstruct

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42 For the *Code Civil* see: Pierre-Antoine Fenet (ed.), *Recueil complet des travaux préparatoires du Code Civil: suivi d'une édition de ce code, à laquelle sont ajoutés les lois, décrets et ordonnances formant le complément de la législation civile de la France*, 15 vols. (Paris: Au Dépôt, 1827, reprinted in 1968). For ABGB see the commentary of the main drafter of this code: Franz Edlen von Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Österreichischen Monarchie* (Wien, Triest, 1812). For BGB see: Benno Mugdan (ed.), *Die gesammten Materialien zum Bürgerlichen Gesetzbuch*, 2 vol. (Berlin: Decker, 1899; reprinted in 1979, 2005), also Werner Schubert (ed.), *Materialien zur Entstehungsgeschichte des BGB: Einführung. Biographien, Materialien* (Berlin: De Gruyter, 1978).

43 For the former see the collected papers of Speransky, the main drafter of the laws under Alexander I and Nicolas I: Mikhail Speransky, *Rukovodstvo k poznaniju zakonov*, edited by Igor Osipov (St. Petersburg: Nauka, 2002) (with bibliography). For the latter see: *Grazhdanskoye Ulozhenije, kniga 5, s objasnenijami*, vol. 1 (obligations, general part) (St. Petersburg: Tipobrafia Senata, 1899).

44 The most significant law reports are '*Recueil général des lois et arrêts'* edited by Jean-Baptiste Sirey in 30 vols. (1806-1830), '*Journal des audiences des lois de la Cour de cassation et des cours d'appel',* founded in 1809 by G.T. Denevers and continued by Victor Dalloz (since 1816), also *Jurisprudence générale or Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence* in 44 vols. (3rd. ed., 1859).

45 For example, see: *Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten* (München: J.G. Cotta, 1847 etc.), founded by Johann Adam Seuffert (since vol. 12 edited by E.A. Seuffert, A.F.W. Preusser, H.F. Schütt); *Entscheidungen des Königlichen geheimen Obertribunals*, 83 vols. (Berlin: Ferdinand Dümmler, 1837-1879); *Reichsgericht: Entscheidungen in Zivilsachen*, 172 vols. (Veit & Co, till 1919; Walter de Gruyter till 1945).

46 See: *Reshenija Grazhdanskogo kassacionnogo departamenta Pravitel'stvujushhego Senata* (St. Petersburg: Tipografia Senata, 1866-1916). Occasionally, private collections of the case law were published as well: *Dogovornoe pravo po reshenijam Kassacionnogo Senata*. 2nd ed. (Vladimir, 1880).

47 Jean-Louis Halpérin, *Five legal revolutions since the 17th Century: an analysis of a global legal history* (Cham: Springer, 2014), p. 49 f,

48 By way of example, for France see: Lahaye, Waldeck-Rousseau, Giraudias, De Morineau, Faye (eds.), *Le Code Civil annoté…* (Paris: Rennes, 1840). For Austria: Franz Edlen von Zeiller, *op.cit*. For Russia: Igor Tjutrjumov (ed.), *Zakony grazhdanskie s razjasnenijami Pravitel'stvujushhego Senata i kommentarijami russkih juristov, kniga 5* (M.: Statut, 2004; first published in 1900).

the context of application general rules of contract law. For Western Europe it is enough to indicate the history of European private law by Helmut Coing. For Eastern Europe and Russia in particular one should consult several publication.[49] One can find multiple evidence in support of similar needs of the industrializing societies, as well as their perception in the eyes of the lawgiver and professional legal community.

3.2. The functional identification

Given a wealth of primary and secondary sources in the national historiographies, a comparative legal historian can venture to explore the links between social needs and the codified general part of contract law. To begin with, one should reveal the function of the 'generalized' contract law amidst such trends as:

– *The growing number of voluntary arrangements* in the face of advances in agriculture, progressive industrialization, increased commercialization of national economies, gradual abolition of serfdom between 1789 and 1861 on the pan-European scale, and a new rhetoric (ideology) of individual liberty and personal responsibility, the rise of civil society.

– *Inadequacy and shortcomings* of the old contract law, its casuistry, formalism, lacunas which resulted in unclear regulation for typical and especially for atypical contractual arrangements, to uncertainty and injustice, ignorance in the matters of the law, unfair advantage of a stronger party, distrust of the positive law.

– '*Legal revolution' of the age of codification*[50] that asserted the monopoly of the nation-state to legislate by promulgating the complete new law which contained clearly stated major premises for the syllogistic model of the application of law in courts. This legal revolution had a profound influence on legal profession and the role of legal scholarship in interpreting, criticizing, and applying legal rules. It paved the way to applicability of such generalized rules on contracts in legal practice which should be proved on the basis of law reports of each jurisdiction in comparison.

Thus, the context of the codification of civil law in major European jurisdictions could justify comparability of the general part of contract law, identify its 'common core' in various codes, and suggest to arrange various legal provisions around the practical goals they addressed. A tentative list of issues may include: the practical meaning of general part and the concept of contract in case law; the conditions to acknowledge agreements as a contract and to enforce it; the procedures to make, modify, discharge, and terminate contracts, to interpret them, and to provide guarantee or security to the creditor.

3.3. The analysis of the functions and purposes

The most daunting part of application of the functional method in comparative legal history is to demonstrate the link between legal rules and social needs via corresponding goals. The legal rationality of the 19th century Europe implied that the legislator was there to address the social needs with particularly designed norms, institutes, and definitions. This task, however, was not an easy one due to the complexity of societies and limited abilities of human minds to comprehend it. The discrepancy led to imperfect performance at each step of legal regulation. Social needs could be

49 For a detailed bibliography see: Gábor Hamza, *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die romischrechtliche Tradition* (Budapest: Eötvös Univ., 2009).

50 Jean-Louis Halpérin, *op.cit.*, p. 49 f.

inaccurately understood, the goals might be set inadequately and without clarity, legal rules could be formulated in a way that the goals do not follow from them clearly and are not understood properly by the addressed individuals or even professional community.

However schematic this description may be, it raises a variety of questions. Did this link actually exist in all jurisdictions? How was it understood by legislators, judges, legal scholars, and practitioners? What similarities and differences could be discovered in the course of this analysis? How can they be best explained? To answer these and similar questions in relation to the general part of contract law means to analyze its provisions functionally and teleologically with recourse to all groups of primary sources (above n. 3.1). Naturally, such an analysis is likely to reveal both similarities and differences between general provisions on contracts in French, Austrian, German, and Russian jurisdictions which can be only partially explained within the functional approach.

Conclusion

Comparative legal history is still new and lacks research even where legal traditions crossed quite often. Its eventual success depends on a well-thought methodology which, as I reasoned in this article, cannot be simply copied either from national legal history, or from comparative law. Yet, we can consider adopting the preferred method of many comparatists to understand law's historical development, at least in Europe. General part of codified contract law offers a good starting point due to its susceptibility to changes, innovations, borrowings, and a close link with social needs.

This project becomes plausible at least because of two factors. First, comparatists mitigated the rigid assumptions of the 'classical' functionalism. It is regarded as *a* method that does not exclude multiple dimensions of law other than its actual application. It has been linked with preliminary contextual studies to design a comparative research and proved to be compatible with 'a hypothetical state of legal difference' (*praesumptio dissimilitudinis*) without the necessary pursuit of unification of compared legal systems. Second, many legal historians would agree that law is there primarily to resolve social problems (however different they might be in various societies). It resonates with the attitude of a wider legal community today, as well as at the times of the first civil codes in Western and Eastern Europe. These factors facilitate comparative research of the past with the functional method both at the preparatory stage and at the stage of analysis of the gathered materials.

In the domain of general contract law in Austria, France, Germany, Russia during the 'long 19th century', the functional method can be useful at the preparatory (descriptive) stage to assure comparability of contract law in the selected jurisdictions, to identify omissions in the codified general rules on contracts, and to arrange legal provisions around practically relevant issues. At the stage of analysis, functionalism can be coupled with teleological interpretation of legal norms to enable us to understand better the link between the impact of the legal rules, their legal purposes, and the practical social problems serving as *tertium comparationis* for all the compared jurisdictions.

Building on various groups of sources (including the legislation, its drafts and motives, law reports, academic and practical commentaries and treatises) the legal historian can investigate new needs in the modernizing societies which were not met by the old contract law, identify the

purposes of the new codified contract law, evaluate correctness of their understanding, application, critique *de lege lata* and *de lege ferenda*, as well as eventual reform of contract law.

The promises of the functional method in comparative legal history do not discard many reservations and limitations highlighted by the advocates of cultural or purely legal approaches in comparative law. Yet, even if this method narrows our perception of law as a cultural phenomenon and breaks the inner logic of its lasting principles, in return, it offers a starting point for a much needed dialogue of legal historians with a wider legal community. Legal history as a distinct discipline does not mean national legal history alone.

ALR 1794	*ABGB 1811*	*BGB 1896*	*Code Civil 1804*	*Svod Zakonov 1832*	*Draft Civil Code 1905*
452 art, in title 1, part 1 (§§ 1-453): 'On contracts'.	78 art. in chapter 17 'On contracts in general'. (§§ 859-937)	68 art. in chapter 3, section 3 ('transactions') book 1 ('General part', §§ 145-157) and in section 2, book 2 ('obligations from contracts', §§ 305-361)	268 art. in Tit. 3, book 3 '*On contracts or contractual obligations in general*'. (art. 1101–1369)	ca. 25 art. in vol. X, part. 1: - book 2, part. 2 ('On rights *in rem*'), chapter 5, book 2 ('*On rights from obligations*'); - book 2, part. 3, chapter 2 ('*On acquiring rights in rem*'); - book 4 ('On contractual obligations'), part. 1, chapters 1-2, ('*On making and terminating contracts*')	180 art. in book 5 ('On obligations'), section 1 ('*Obligations from contracts in general*')
- definitions, - division, I. Capacity; II. Subject matter (legal and illegal), III. Acceptance of an offer. IV. Form of contracts (§109-)	- Ground for personal claims; - Division of contracts; Conditions of validity of contracts (capacity, consent; possibility of performance) Form of contract; - Drafting of contract;	Provisions on contract in the 'general part': - making contract via offer and acceptance; - good will by interpretation of contracts.	**Chapter 1**: *Preliminary regulations*: definition, types of contracts. **Chapter 2**: *Conditions of validity of agreements*: consent, capacity, subject matter, cause.	- binding effect of obligations and their enforceability (art. 568-573); - invalidity of acquiring rights in rem under duress or fraud (art. 700-703);	**Chapter 1**: *Contracts*: definition, conclusion, subject matter, vices of agreement, third parties, collateral. **Chapter 2**: *Performance*: general rules, order of discharge, non-performance.
V. Securing contract. (§185-) VI. Additional contract clauses. (§ 226-) VII. Rules of interpretation. (§252-) VIII. Performance of contracts. (§270-)	- Joint and several obligations Additional clauses in contracts: - conditions; - motive; - time, place, mode of performance; - earnest money; - compensation for termination; - additional charges;	Titles in the section 'Obligations from contracts' 1) making contracts, their subject matter; 2) commutative contract;	**Chapter 3**: *Effect of obligations*: general rules, obligations of giving or (not) doing, damages, interpretation, third persons. **Chapter 4**: *Species of obligations*: conditional, for a term, alternative, joint and several, (in)divisible, penal clauses.	**Section 1**: 'On drafting, making, discharging and terminating contracts in general' Chapter 1: 'On drafting and making contracts in general (art. 1528-1544) Chapter 2: On discharging contracts. (art. 1545-1553)	**Chapter 3**: *Cession and delegation*: **Chapter 4**: *Termination of contractual obligation*: general rules, set-off, confusion of debts, agreement to renounce, repudiation. waiver.
IX. Termination (§349-). X. On joint and several obligations. (§424-)	Interpretation of contracts. Performance and termination. General rules on commutative contracts. Guarantee and warranty (cases of liability, conditions, consequences). Abnormal loss of more than half. Precedent agreement.	3) promise to third party; 4) earnest money, penalty; 5) repudiation.	**Chapter 5**: *Extinction of obligations*: payment, novation, remission, compensation, confusion, loss, nullity or rescission. **Chapter 6**: *Proof of obligations and of payment*: literal, testimonial, presumptions, acknowledgment, oath.	**Section I1**: 'On collateral in contracts and obligations'. 1) suretyship, 2) penalty, 3) pledge, 4) pawn. (art. 1554-1678)	**Chapter 5**: J*oint and several obligations*.

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