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Functional Comparative Law Germany vs. USA

PL ACADEMIC RESEARCH

Chapter 1 Methodical Introduction

A. The Term 'Comparative Law'

Comparing one's own legal system with foreign legal systems provides possibilities of learning from other legal cultures and thereby enhances the legal framework of the former[50]. There are 42 legal systems in the world[51]; hence, there is plenty of material that may be used to conduct research in Comparative Law[52].

In order to understand the term Comparative Law one must understand its component words. "To compare" means "to mark or point out the similarities and differences of (two or more things); to bring or place together (actually or mentally) for the purpose of noting the similarities and differences"[53]. Law is defined as "a rule of conduct imposed by authority"[54] or, rather, as "the body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects"[55]. This imposition of rules is an ubiquitous establishment of all societies throughout the world[56]. Since it is promulgated individually, it exists in a variety of forms, shaped by its social surrounding due to assimilating the features which the particular community asks for[57]. According to that, Comparative Law may be defined as the collation of similarities and differences between legal systems. In this respect, the term Comparative Law is misleading[58] because conducting comparative law research requires compliance with certain rules. If a study is labeled as a comparative law research, a recognized method must be followed in order to achieve the general aim of "cognition"[59].

If the essence of Comparative Law is "the research of truth"[60] through the "creation of a stock of legal solutions"[61] acquired by means of comparison, it

50 Großfeld, Kernfragen der Rechtsvergleichung, 1996, pp.1, 3.
51 De Cruz, Comparative Law in a Changing World, 1999, p. 3.
52 The selection of which legal systems are to be compared is limited by the skills of the comparatist. Examining a foreign legal system requires a base of knowledge "in all the important aspects of comparison that make up being a comparative lawyer" (Edge, Comparative Law in a Global Perspective, 2000, p. 10). This typically includes the respective foreign language, [the necessity of] time spent immersed in the foreign legal culture and more, in order to be able to get the substantial meaning of a legal idea behind a written word and to properly translate law from one language to another. Ultimately, the selection of a foreign legal system depends on the personal interest and the aim of the comparatist, who for logical reasons will choose a foreign legal system in which he assumes to find answers for his specific legal research. Aimless comparing of non-selective legal systems is a time-consuming task, with a chance of creating useless knowledge for the matter of cause. (Cf. Markesinis, Rechtsvergleichung in Theorie und Praxis, Munich, 2004, p. 50 et seq.; Rusch, Methoden und Ziele der Rechtsvergleichung, Jusletter 13. February 2006, p. 5.
53 The Oxford English Dictionary, Second Edition, Vol. III, 1989, p. 592.
54 The Oxford English Dictionary, Second Edition, Vol. VIII, 1989, p. 712.
55 The Oxford English Dictionary, Second Edition, Vol. VIII, 1989, p. 712.
56 Edge, Comparative Law in a Global Perspective, 2000, p. Xiii.
57 Roxin, Strafrecht AT, Band I, p. 16, marginal no. 7 et seq.
58 De Cruz, A Modern Approach to Comparative Law, 1993, p. 5.
59 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 14.
60 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 3 - According to Zweigert/Kötz who describe Compara-tive Law as "the research of truth" and "truth" is to be found through achieving "cognition". This results from the fact that Comparative Law as such is purposeless. Therefore, "truth" and "cognition" primarily depend on a

can be said that Comparative Law "describes the systematic study of particular legal traditions and legal rules on a comparative basis"[62].

Since comparing institutions within one's own legal framework is the everyday business of jurisprudence[63], a study in the context of Comparative Law must include rules of at least two different law systems in order to find and analyze similarities and disparities in the two by means of contrast[64]. Contrary to opinions saying that Comparative Law does not need a comparative element in the sense of comparing[65], it is assumed that a side by side holding of different legal systems reveals similarities and disparities[66] between such, which then must be explored at least to some degree, in order to establish a connection between them (e.g., one's own legal system and the one of interest). Only by analyzing similarities and differences, and perhaps even exploring the reason for such, one is able to draw a conclusion in order to gain a profit in cognition concerning the respective law as such or concerning a specific initial question. This intellectual challenge makes Comparative Law a scientific task[67]. As it is shown below, the scientific component varies in dependence on which form of Comparative Law is chosen. But regardless of a certain variety, the matter of Comparative Law as such must be correctly understood and existing rules must be strictly followed in order to achieve useful results in consequence of its application.

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concrete aim. The general aim of Comparative Law is to somehow enhance law in whatever sector. This enhancement appears from the possibility of seeing another, until then unknown, possible way of dealing with legal situations and so being able to scrutinize accustomed manners, and so fortunately refine and thus eventually find the best way of legally handling a certain matter. What is ´best´ depends on the concrete aim, the initial question. For example, if the initial aim refers to the question of how to handle a given legal problem, "the best" in this contextual meaning would stand for the ideal way of handling this legal problem in reference to the particular society.

61 Expression ascribed to Zitelmann by Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 26; Zweigert/Kötz, Rechtsvergleichung, 1996, p. 14.

62 De Cruz, Comparative Law in a Changing World, p. 3.

63 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 1, 2

64 De Cruz, Comparative Law in a Changing World, 1999, p. 3; Cf. Eser, FS Kaiser, Vol. II, 1998, p. 1499 (1501).

65 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 11.

66 For the dispute whether to emphasize similarities or differences or to strike a balance between both see Dannemann, Comparative Law: Study of Similarities or Differences? in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, p. 383 (384 et seqq.).

67 De Cruz, A Modern Approach to Comparative Law, 1993, p. 5 with reference to Watson, Legal Transplants (1974) who argues for the necessity of an intellectual content to meet the requirements of Comparative Law.

B. Classification and Derivation of Comparative Law from other Disciplines

The following deals with the question of what is the nature of comparative law[68].

1. Classification of Comparative Law as a "pure science"

Comparative Law, described as a mental process, which deals with law and contains comparison[69], does not clarify the nature of the scientific approach. The study of Comparative Law follows its own specific rules. It has its own functions, which differ from the function of law as such and exceeds the purpose of an ordinary drawn comparison. Since sociology has an impact on many approaches of law comparisons, Comparative Law has been referred to as a social science[70]. However, Comparative Law is not a social science[71]. The material collected through comparison "forms part of a separate body of knowledge"[72]: Knowledge regarding law. Therefore, Comparative Law is too interlocked with the science of law to be called a social science and necessarily too interlocked with the science of law to be called a "science pure"[73]. Since law is the object of critical scrutiny, it better matches the opinion that Comparative Law is a separate scientific discipline within the study of Law[74]. Referring to the meaning of the term 'Comparative Law' there is no need to point out that the most important ingredient of this scientific approach is law. The term as such reveals the relationship: the 'Comparative' in its adjectival function serves the noun 'Law'. Nothing else applies to the semantic level of the meaning of this term: Comparative Law serves law by aiming at enlightening the entire legal sector by drawing comparisons.

2. Comparative Law, a Part of Jurisprudence?

Jurisprudence as the science of law is the general term for many areas of law, such as public law, criminal or civil law and so on.

It is common to group the rules of a society into areas depending on their specific subject. For example, rules for combating criminal behavior belong to the branch of criminal law while rules which address the state are classified as public law. Essentially, Jurisprudence is an academic science which teaches judicial thinking[75]. It is the effort to understand law by understanding the rules

68 De Cruz, A Modern Approach to Comparative Law, 1993, p. 2.
69 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 1.
70 De Cruz, A Modern Approach to Comparative Law, 1993, p. 3 with further reference to Saleilles, Rabel, Hall; Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 11.
71 Michaels, The functional method of comparative law, in: Matthias Reimann/ Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, p. 339 (342).
72 De Cruz, A Modern Approach to Comparative Law, 1993, p. 3.
73 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 6 says that is how Comparative Law illustrates itself for the first instance.
74 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 2, 4 – with reference to Lambert, Conception générale et définition et défintionde la science du droit compáre, Procès-verbaux des seánces et documents, Congrès international de droit comparé I (1905) 26, printed in: Zweigert/Puttfarken (eds.), Rechtsver-gleichung, 1978, p. 30.
75 Cf. Zweigert/Kötz, Rechtsvergleichung, 1996, p. 22.

of a legal system. Understanding rules includes knowledge of their meaning, their implementation and their function for the addressed society. Law must be understood in order to create it and consequently, to apply it. In order to understand law different branches of a legal system[76], usually of one's own, must be studied intensively. Besides private or civil law, one must usually delve into branches such as criminal law, public law, historical law, economic- and social law and so forth[77]. Studying and practicing in the field of law means looking at a specific problem in order to find the right solution by examining various legal regulations offered by a legal code. This solution never emanates from the implementation of a single rule but from the interaction of the right combination of rules. If trying to order Comparative Law beside the categories of public law, civil law, criminal law and so on, it can be seen that it does not fit throughout these exemplary named areas[78]. Even if interpreted as a body of law in the sense of including all areas of a legal system[79] it does not suit to be considered a category of law because it misses an own substantive type of law, a "body of rules"[80]; instead it rather affects all branches of law. If one proposes to compare the criminal law system of two countries the knowledge of criminal law of both countries is a necessary precondition[81]. Therefore, a law comparison builds up on an existing area of law. Which area depends on the chosen theme of the comparison and therefore is exchangeable. What is definite is the way of dealing and handling the chosen area of law, so Comparative Law is more a form of activity, a way of exploring law, like a working technique.

An interaction of legal regulations throughout the different areas of law enables a wider insight into law and creates general legal knowledge, which is necessary to establish a judicial understanding. Since judicial understanding is the result of intensive study of legal regulation, the focus lies first – and often only – on regulations of one's own legal system. But there is no need to point out that the more branches of law one looks into and the more various handlings of legal problems are understood, the more inner relations and universal orderliness can be sensed and therefore a generally deeper and better understanding of the subject of law can be achieved. This could happen for instance by examining actual legal solutions to a concrete problem which different legal systems provide[82], in order to then critically weigh which solution seems best to address the concrete situation of one's own society at this specific moment[83] Thereby the nationally effectuate solution is clearly outlined and the sense for the own legal system can be understood in its whole

76 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 22.
77 Cf. § 18 par. 2 Bavarian Training- and Examination Rules (Bayr. Ausbildungs- und Prüfungsordnung für Juristen).
78 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 11.
79 De Cruz, Comparative Law in a Changing World, 1999, p. 1.
80 De Cruz, Comparative Law in a Changing World, 1999, p. 2; cf. The Oxford English Dictionary, Second Edition, Vol. VIII, 1989, p. 712.
81 Edge, Comparative Law in Global Perspective, 2000, p.10.
82 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 22.
83 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 22.

purpose[84]. This would qualify Comparative Law as an academic pursuit or a method of study and research[85], yet neglecting all the other purposes a law comparison could aim at. Besides being an academic discipline, thereby serving as a means of understanding legal rules, Comparative Law serves as an aid to law reform by being a tool for creating new law or unifying and harmonizing various legal systems by delivering a preparatory examination and therefore serving as a preparative operation[86]; or it is a great utility to legal science by researching historical developments of various legal systems due to discovering or examining legal evolutions (evolution of laws)[87]. The examination by Comparative Law is deeper than what usual studying affords. It requires a different way of delving into law. Due to its combination of studying areas of one's own legal system and those of foreign ones and putting them into a purpose-build of whatsoever specified relation a new composition arises which, according to its individual content, deserves a separate classification. Since Comparative Law moreover can be identified by an intellectual content, it involves more than just putting two different provisions next to each other and comparing them in the usual sense of comparing. Comparative Law is not just a "systematic procedure by which a complex or scientific task is accomplished"[88], hence, not just a technique, but since it describes a certain dealing and handling with law including international elements it could be named an "international legal practice"[89] or in general "a method of Jurisprudence". A method is generally referred to as "a special form of procedure adopted in any branch of mental activity, whether for the purpose of teaching and exposition, or for that of investigation and inquiry"[90]. It is hard not to identify Comparative Law as a method[91] since it is an approach which follows its own (and therefore) special rules in the branch of law and, depending on the aim of the comparatist, even fulfills all possible elements of the definition: according to its task in academic science the purpose of teaching is made clear above. The purpose of the exposition comes easy when systematically illustrating legal systems, whereas the purpose of investigation and research are essential precepts in order to find similarities and differences.

3. Resume

Comparative Law is not to be classified as a "science pure"[92]. Since it is not based on a specific and therefore distinct body of rules, but related to a special theme of law: systematic comparison, it perfectly fits in the discipline of jurisprudence. Thereby it has the potential to create new law in existing areas

84 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 22.
85 Gutteridge, Comparative Law, 1949, p. 1.
86 De Cruz, A Modern Approach to Comparative Law, 1993, p. 15.
87 De Cruz, A Modern Approach to Comparative Law, 1993, p. 5.
88 http://www.thefreedictionary.com/technique - accessed 2011/09/09.
89 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 11.
90 Simpson and Weiner, The Oxford English dictionary , Vol. IX, 1989, p. 690.
91 Rheinstein, Einführung in die Rechtsvergleichung, 1987, S. 11.
92 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 6.

and thus can be defined as “rules and practice proper to a particular art”[93] and therefore constitutes a method of Jurisprudence, a method of dealing with law.

C. Tasks and Aims of Comparative Law

The general aim of every comparative study of law, regardless of which method is chosen, is 'cognition'[94] or 'the research of truth'[95]. Driven by interest in another legal culture[96], there is always some sort of enhancement expected for the legal system of the researcher.

In order to be classified as Comparative Law, a study not just has to follow a recognizable method, it must also be in pursuit of a purpose which can be achieved with respect to one of the various functions of Comparative Law. Comparative Law is used for scholarly purposes, legislative functions[97] or for reasons of scientific research.

For the purpose of scientific research various types of studies are on hand, for instance, studies ascertaining similarities and differences between legal systems, studies investigating the causal relationship between different systems of law, and those analyzing solutions to a given legal problem which various systems offer, further studies referring to the historical development of law or evolutionary history[98].

D. Methods of Comparative Law

Comparative Law is the generic term for different ways of comparing law. There are only a few approaches that are actually acknowledged for comparing law. However, it does not depend on what method a study pretends to apply, the decisive factor is its compliance with given principles so that one of the following approved variants of Comparative Law is ascertainable.

1. Case Method and Scientific-Theoretical Comparative Law

The initial point for applying the case method is a statement of affairs, a real life situation, or a legal problem that exists in a similar way in different societies as an initial point. Proceeding from the problem that is to be solved, one compares the solutions that are offered in the respective countries. This approach is based on facts, starting with law cases one examines the available solutions that are judicial decisions[99]. In contrast to the functional method described below, the relation between law and society is irrelevant.

93 Simpson and Weiner, The Oxford English Dictionary, Vol. IX, 1989, p. 690.
94 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 14.
95 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 3.
96 Edge, Comparative Law in a Global Perspective, 2000, p. 11.
97 De Cruz, A Modern Approach to Comparative Law, 1993, pp. 14, 15.
98 Cf. De Cruz, A Modern Approach to Comparative Law, 1993, p. 5.
99 Markesinis, Rechtsvergleichung in Theorie und Praxis – Ein Beitrag zur rechtswissenschaftlichen Methodenlehre, 2004, pp. 6, 7.

One does not aim at further cognition regarding the reason for the found similarities and disparities[100].

The method of scientific-theoretical Comparative Law illustrates several law systems by summing up similarities and differences[101] in order to find the better law[102]. Such a work could serve as a basis for decision-making for the legislator[103] or act as stimulus for "borrowing"[104] institutions from another legal system, thus implementing "legal transplants"[105]. The better the law system of a country, the more advantage it brings for other societies. Not least because of this, there is always a competition with other nations of having the better law[106] in order to achieve a locational advantage[107]. Studies which focus on comparing the developments of various legal systems or of discovering nationwide legal evolution generally[108] may proceed in a descriptive theoretical way. If an explicit illustration of similarities and differences remains undone, such a research still qualifies as Comparative Law because mentally drawn comparisons are essential in order to come up with results according to the initially mentioned aim.

2. The Functional Method of Comparative Law

Comparative Law has many manifestations; the main one is the one of functionality[109]. The principle of functionality pervades the comparison at every step, all the way to the finish. At every step of this method of comparison, functionality reveals itself in a distinct manifestation[110].

Usually functionality is referred to as a principle[111]. However, since Comparative Law is understood as a method, speaking of functionality as a

100 Örücü, Comparative Law: A Handbook, 2004, p. 52.
101 Zweigert/Kötz, Rechtsvergleichung, 1996, pp. 11, 12.
102 If legal solutions or handlings differ from each other, or even are mutually incompatible, this can not only be seen as a proof of law being differential, but as a chance for the cognitive comparatist to evaluate one legal solution as good and the other one as unsuitable. As a result, the unsuitable solution is to be avoided or abolished, not just in one's own legal system but also in the country in which it actually is effective. This cognition comes by discovering which of the incompatible laws solves the respective problem best in regard to the specific problem or topic chosen. (For general difficulties related to the attempt of evaluating in a comparative study refer to Chapter 1, D., 2. The Functional Method of Comparative Law, especially marginal no. 23).
103 Heller/Dubber, The Handbook of Comparative Criminal Law, 2011, p.1; De Cruz, A Modern Approach to Comparative Law, 1993 p. 16.
104 Entered the discourse of A. Watson, Legal Transplants and European Private Law, Vol. 4.4 Electronic Journal of Comparative Law, (December 2000).
105 Entered the discourse of A. Watson, Legal Transplants and European Private Law, Vol. 4.4 Electronic Journal of Comparative Law, (December 2000).
106 If legal solutions or handlings differ from each other or even are mutually incompatible this can not only be seen as a proof of laws being various but this could be a change for the cognitive comparatist to value one way of legal solution as good and the other one on the contrary as bad. As a result he found the better law.
107 Voigt, Globalisierung des Rechts. Entsteht eine dritte Rechtsordnung?, in: Voigt (ed.), Globalisierung des Rechts, 2000, p. 17.
108 De Cruz, A Modern Approach o Comparative Law, 1993, p. 16.
109 Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Re-marks, Electronic Journal of Comparative Law 12.3 (December 2008), pp. 1 et seqq. (2).
110 Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Re-marks, Electronic Journal of Comparative Law 12.3 (December 2008), pp. 1 et seqq. (10).
111 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 33.

method[112] would engender a method within a method[113], thus bereft the later of its meaning. So for the sake of conceptual clarity, "functional method" here refers to a comparative method whose subject is analyzed using the principle of functionality[114].

The premise of the functional method of Comparative Law is the notion that each society addresses similar problems, which must be solved by the law of the respective society[115]. Law and society are related in so far that law fulfills a function by offering a solution to existing problems and giving an answer to social or economic needs[116]. The functional method of Comparative Law is essentially a factual method. The starting point is a real life situation which forces a legal system to react. It is based on facts.

While problems may be similar in every society, the particular way of how they are solved is to be discovered in the process of comparison. Hence, the initial point for comparison is a certain problem[117], which exists in a similar way in the societies, whose legal systems are to be compared. With this as point of departure, the solutions offered in the respective countries are compared. Since the problem is the basis of the functional approach, the legal systems are not investigated in terms of form[118]. Non-statutory regulations are in focus, but its effects in relation to the initial problem of specific society. Therefore, rules are comparable if they fulfill the same function, i.e., solving a specific problem which is common to both societies. Function so far stands for the relation between solutions and problems[119]. Functionality itself aims at explaining the effects of solutions on problems and society.

The first step of comparison is to find a problem which is to be solved by legal institutions. It is necessary to define the specific social problem which is to be investigated; therefore the term by which the original question is phrased has to be purely functional[120]. The problem has to be named without using the legal expression of any law system. It must be especially freed of expressions from one's own system in order to detect its underlying content independent of an understanding in conjunction to a legal solution. Therefore it must be extracted from any legal context and determined in the form in which it actually

112 Graziadei, The Functionalist Heritage in Legrand and Munday (eds.), Comparative Legal Studies: Traditions and Transitions, Cambridge University Press, 2003, p.101.

113 For the discussion see Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks, Electronic Journal of Comparative Law 12.3 (December 2008), pp. 1 et seqq. (2).

114 Ibid.

115 Richard L. Abel, Law as lag: Inertia as a social theory of law, Michigan Law Review 80, 1982, p. 785 (789); David Nelken, Towards a Sociology of Legal Adaption, in: Nelken/Feest (eds.), Adapting Legal Cultures, 2001, p. 7 (12); Uwe Kischel, Vorsicht, Rechtsvergleichung!, ZvglRWiss 104, 2005, 10 (p. 16).

116 Uwe Kischel, Vorsicht, Rechtsvergleichung!, ZvglRWiss 104, 2005, p. 10 (16); Otto Kahn-Freund, Comparative Law as an academic subject, The Law Quarterly Review 82, 1966, 40 (p. 51).

117 Reitz, How to do Comparative Law, American Journal of Comparative Law 46, 1998, pp. 617 et seqq. (622).

118 Michaels, The functional method of comparative law, in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, 339 (pp. 370 et seqq.).

119 Michaels, The functional method of comparative law, in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, 339 (p.366).

120 Zweigert/Kötz, Rechtsvergleichung 1996, p. 33.

exists in the individual society[121]. This enables one to seek for the counterpart in the foreign society and to make sure it is truly the same or, at least, basically similar[122] to the problem existing in one's own society. The underlying assumption that the needs and problems of societies are universal qualifies the problem as the denominator of comparison, while the comparables are the institutions which are marked as solutions. It follows that function itself serves as a tertium comparationis. Tertium comparationis as "the third part of the comparison" is the quality that the two things which are being compared have in common[123]. The next step of the comparison requires choosing the legal systems for comparison. Choosing a legal system as a comparable, presupposes that one has an idea which counterpart seems most fruitful according to the specific aim of the comparatist. In principle, comparing one thing to any other thing is possible[124], yet this says nothing about the usefulness of a comparison. Partly, a distinction is made between intra- and intercultural law comparison. A different method should be chosen when comparing societies of different socio-cultural types, one which focuses more on the social context[125]. Some want to exclude certain sections of law which are influenced by moral- and religious thoughts and thus differ between societies[126]. Others prefer to compare only legal systems of societies, which are on similar levels of development[127].

With respect to the matter of functionality, the choice of the comparable legal system depends on the purpose of the comparison[128]. Do the legal systems which are to be compared share the same function, in the meaning of being functionally equivalents? Do they, in its principal coincide in remit, approach and typology with one another[129]? If not, is it able to overcome these differences in terms of transferability of possible solutions? If both countries share the same function, at least according the relevant aspects of comparison, there is a common denominator for a valid comparison.

After one has chosen the relevant societies, the next step is to search for solutions to the chosen problem provided by the compared societies. Since the starting point of all functional comparison is a problem, a real life situation, a solution can be provided not only through a legal rule (law in the books) and

121 Zweigert/Kötz, Rechtsvergleichung 1996, p. 33.
122 Edge, Comparative Law in Global Perspective, 2000, p. 12.
123 Zoller, Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?, Indiana Law Journal 78, 2003, 567 (p.582).
124 Örücü, The Enigma of Comparative Law, 2004, p. 19; Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks, Electronic Journal of Comparative Law 12.3 (December 2008), p. 6.
125 Kamba, Comparative Law: A Theoretical Framework, International and Comparative Law Quarterly 23, 1974, 485 (pp. 511 et seqq.).
126 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 38.
127 Schmitthoff, The Science of Comparative Law, The Cambridge Journal 7, 1939-1941, p. 94 (96).
128 Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks, Electronic Journal of Comparative Law 12.3 (December 2008), p. 4.
129 Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks, Electronic Journal of Comparative Law 12.3 (December 2008), pp. 6 et seq.

not only in their application (law in action) but through a non-legal answer[130]. This results from the fact that functional comparative law does not focus on formal requirements of the comparable in foreign law but on how foreign law operates in the area of law in question[131]. Considering this, one might have to look beyond legal rules to find possible functional equivalents[132]. Rabel had the opinion that universal problems cause common results[133]. Zweigert/Kötz[134] suggested even stronger that the comparatist shall assume that different societies have equal problems which leads to similar solutions. This praesumptio simultudinis reviews the advanced step in which the initial problem was determined: if an equivalent solution cannot be detected in another legal system, one must go back to the first step and check if the problem was not named functionally enough and the extent of the search might not have been wide enough[135]. Within this step it is suggested to build a systematic system and invent own terms by building wide general terms to cover different but functional similar terms[136].

After drawing the comparison and knowing how the respective legal systems deal with their similar problem it seems that an evaluation and the decision according which solution serves best is the logical consequence[137]. After all the comparatist experienced the subject-matter at first hand and thus seems predestined to gain the laurels of the comparative work by providing the best solution. However, evaluating which solution is best in the manner of determining the better law[138] is generally not accepted in the functional approach. Usually it is the main aim to reveal how well or not a legal rule fulfills its function in solving the specific addressed problem.[139] Therefore, it is necessary to examine whether the effect which it is aimed by a norm is achieved in society[140]. However, at this point, this effect has not been the object of study within a comparative work. Even the recourse to existing

130 Michaels, The Functional Method of Comparative Law, in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, p. 339 (364).
131 Zweigert/Kötz, An Introduction to Comparative Law, 1998, pp.34, 35.
132 Zweigert/Kötz, An Introduction to Comparative Law, 1998, pp.35, 38.
133 Piek, Die Kritik an der funktionalen Rechtsvergleichung, GreifRecht 2009, p. 84 (89); Rabel, Aufgabe und Notwendigkeit der Rechtsvergleichung, Rheinische Zeitschrift für Zivil- und Prozessrecht, 13, 1924, pp. 279 et seqq.
134 Zweigert/Kötz, Rechtsvergleichung 1996, p. 39.
135 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 39.
136 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 43.
137 Bogdan, On the Value and method of rule-comparison in comparative law, in: Mansel (ed.), Festschrift für Erik Jayme, Vol. 2, 2004, p. 1233 (1240); Piek, Die Kritik an der funktionalen Rechtsvergleichung, GreifRecht 2009, pp. 84 et seqq.
138 With the meaning of "the better law" it is referred to such cases in which legal solutions or handlings differ from each other or even are mutually incompatible and the comparatist not solely views this difference as, the proof that laws are various but also judge that one legal solution is more valuable that the other in order to serve a specific problem. However the decision of one law being favored over another can be acknowledged solely in regard to a single problem and has no validity if it is not connected to the object of investigation.
139 Capeletti, A General Introduction, in: Capeletti et. al., Integration through Law, Europe and the American Federal Experience Band 1, Vol. 1, 1985, p. 5; Piek, Die Kritik an der funktionalen Rechtsvergleichung, GreifRecht 2009, p. 84 (94).
140 Bogdan, On the Value and Method of Rule-comparison in Comparative law, in: Mansel (ed.), Festschrift für Erik Jayme, Band 2, 2004, p. 1233 (1240); Piek, Die Kritik an der funktionalen Rechtsvergleichung, GreifRecht 2009, pp. 84 et seqq.

material of empirical social research might not lead to the sufficient answer of the comparatist´s general question of which law is best. It might be that a better solution could not be chosen, because whether something is good or not often depends on value judgments or political decisions[141]. The effects of the same rule as such could differ from one society to another because such effects depend on the mentality of a society, on the culture of the people, lifestyle habits, economic and social conditions which are all influenced by the specific history of a nation and many more complex factors. Whoever wants a law comparatist "to be something of a functionalist, a sociologist, a historian, a political scientist and a contextualist[142] all at the same time"[143] certainly seems to misinterpret the sense of a legal comparative study. By accepting the possibility that a comparative work does not end with the word of advice which law to choose, a legal comparison remains in its best cause being a preparatory base[144], serving a wide range of possible solutions out of which the legal authority is able to choose. The recognition of this service of a comparative study renders a valuation at the end as superfluous[145]. Therefore, the decision as to which way of dealing with the issue at stake is best has to be made by legal authority[146].

To avoid misunderstandings, valuing at the end is welcome[147]. Moreover failure to show results from the achieved cognition would be unreasonable, but only with regard to the examined aspect of a rule, which lies in solving this one specific problem, leaving all other possible functions unconsidered. With this understanding the proposition that the valuation must "occur only upon the

141 Bogdan, On the Value and Method of Rule-comparison in Comparative law, in: Mansel (ed.), Festschrift für Erik Jayme, Band 2, 2004, p. 1233 (1240 et seqq.); Piek, Die Kritik an der funktionalen Rechtsvergleichung, GreifRecht 2009, pp. 84 et seqq.

142 Contextualism "describes a collection of views [-originally derived in philosophy-] emphasizing the importance of the context in solving problems, holding the opinion that an action, […] expression [and so on can] only be understood relative to that context. Contextualist views [–in whatever doctrine-] hold that controversial concepts, such as "the reason for hate crime" and possibly even findings such as "being true" or "being right" only have meaning relative to a specific context". (Cf. http://encyclopedia.thefreedictionary.com/contextualist - accessed June 2011; for further information refer to Price, Contextuality in Practical Reason, 2008 and Feldman, Contextualism and Skepticism, in: Tomberlin (ed.), Philosophical Perspectives 13, Epistemology, 1999).

143 E.g. Legrand, 'How to Compare Now' (1996) 16 LS 232, at 236 citing Law, 'Introduction: Monsters, Machines and Sociotechnical Relations in Law (ed.) A Sociology of Monsters[:] Essays on Power, Technology and Domination (London 1991) 18. ; Cf. example in: Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks, Electronic Journal of Comparative Law 12.3 (December 2008), p. 1 (4).

144 Jeschek, Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung, 1955, p. 43.

145 Cf. Eser, FS Kaiser Vol. 2, 1998, p. 1499 (1522) - who states that working out possible solutions and finally making a choice are two different things.

146 Eser, FS Kaiser Vol. 2, 1998, p. 1499 (1511).

147 Markesinis, Rechtsvergleichung in Theorie und Praxis, 2004, p. 26; Graziadei, 'The Functionalist Heritage' in Legrand and Munday (eds.) (n 1) 101; Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in: Van Hoecke (ed.) (n 2) 39 noting that 'Concepts and rules need to be contextualized within a range of factual situations so that their function can become evident' and M Van Hoecke, 'Deep Level Comparative Law', in: Van Hoecke (ed.) (n 2) 167. Cf. Graziadei in the work stated in this note at pp. 110-111; Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks, Electronic Journal of Comparative Law 12.3 (December 2008), p. 1 (5).

recognition of the primacy of the principle of functionality in the comparative method"[148] stays respected.

The following opinion leads to the same result concerning the precept that a valuation which law is to be chosen within a legal comparison is not the general idea of a law comparison: It is opined that every legal rule has to justify its existence. Hence, not only the question what is the function of a rule in society is to be answered, but also if this function is being served properly, or if another rule would serve this function better[149]. This is done by illustrating the consequences which occur in case of keeping, abolishing or changing a rule[150]. However, this evaluation does not involve any opinion whether a rule should be changed, abolished or kept. That would be a matter for legal politics, but not for a law comparison[151].

Since legal institutions are only being compared in regard to their functional relation to a specific problem, a decision whether a norm shall be abolished, kept or changed cannot be made at this point. In order to make this decision, a legal rule has to be examined as a whole. This would require investigating all other possible functions of a legal institution in order to evaluate its right to exist in the present form[152]. This extent of complexity reveals that an evaluation at the end, in terms of determining which norm is to be chosen for the own legal system, is not part of a law comparison but comprises a different task, involving many other, in the comparison not yet considered, aspects. Therefore, an evaluation stating what legislative changes are to be made at the end of a legal comparison based on the alternatives worked out for a given legal problem would not be thought out well and has to be omitted. In any case such an evaluation would be useful only in regard to the narrowed area concerning the one examined problem.

Law comparison according to the functional principle can be accomplished on different levels. On an abstract level, a comparison is drawn in a wider range via a comparison done on a deeper specified level. While in the first level legal systems are compared in all points, or at least certain points are compared en bloc, the second level of comparison scrutinizes detailed legal subjects.

Comparative Law done on the macro level takes place between more general or basic legal circumstances. General dealing and handling with law is being compared for example by comparing the frame of legal systems, the overall surrounding or basic principles on which a legal systems are built on. Also different methods of law could be compared not in relation to specific problems or subjects but showing up differences within the matter of law on the whole[153].

148 The question of function precedes that of context. See Rabel's approach as described in: Glendon/Gordon/Osakwe, Comparative Legal Traditions (West Publishing, St. Paul, Minn., 1994) 11; Platsas, The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks, Electronic Journal of Comparative Law 12.3 (December 2008), p. 5.

149 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 26.

150 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 26.

151 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 26.

152 Piek, Die Kritik an der funktionalen Rechtsvergleichung, GreifRecht, 2009, p. 84 (96).

153 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 4.

Therefore, abstract generic topics are chosen to be compared such as working techniques, tasks and functions of persons being involved in legal systems and so on.

On the micro level, specified legal dealings and handlings are compared. On this layer Comparative Law focuses on concrete problems and their legal localization. Comparison takes place on a deeper layer by specifying a concrete matter of comparison. While comparison on the macro level concentrates on different legal systems as such, comparison on the micro level concentrates on individual problems which are embedded in different legal systems. For example, when analyzing the legal handling of so-called hate crimes in a legal system, one would compare specific institutions and legal solutions to a specific problem in different legal systems and thus law comparison takes place at the micro level.

A strict separation of these two levels of comparison is not always possible because specific problems in foreign legal systems often can be understood only if the foreign legal system is examined as a whole[154]. In the example given of comparing law referring to hate crimes, the legal practice of the relevant legal systems need to be understood in order to fully compare the legal handling corresponding to the specific problem.

3. The Delineation of Comparative Law to other Disciplines

After the description of Comparative Law, one may be tempted to think of other disciplines of jurisprudence dealing with international legal systems. Comparative Law is necessarily separated from other branches which, at least, partly focus on foreign rules such as International Civil Law, International Public Law, Historical Law, Ethnological and Social Law, but especially International Law.

International Civil Law is not based on comparison. It solely answers the question which legal system is to be followed if a concrete case, which involves private individuals, includes foreign elements[155]. Therefore, it is about the implementation of national law in the case that foreign elements play a role. Comparative Law on the contrary is the examination of own and foreign law by interrelating different legal systems.

Public International Law is a cross-border stock of binding regulations among nation-states and other international parties[156]. Therefore, it is a distinct greater law of affiliated parties, addressing states not civilians.

The science of Historical Law is often utilized by Comparative Law. An examination of a historical legal system necesssarily leads to drawing a comparison between the one being explored and the one actual being in force[157]. By taking into consideration that a comparison could be drawn not

154 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 4.
155 De Cruz, A Modern Approach to Comparative Law, 1993, p. 7.
156 Rogers, International Law and United States Law, 1999, p. 1.
157 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 8.

only between different national legal systems, but also within the same legal system within different times[158], it becomes difficult to distinguish Comparative Law from Historical Law. Even if one requires a foreign element for law comparison[159], there is an interrelation between these two sciences[160]. It is essential to have a comprehensive understanding of a regulation in order to conduct a law comparison[161]. This understanding can be achieved by a comprehensive interpretation of a rule. There are certain specific methods accepted to achieve the full sense of a rule. One of these methods is to interpret a rule from a historical viewpoint[162]. To be able to compare law, a law comparatist may employ this method of historic examination. Actually, the comparatist uses the historical examination of a rule only in order to achieve his original goal, which is comparing law; thus he does not conduct historical research for historical exploration purposes only. This is where Historical Law and Law Comparison differ. The distinction of Historical Law and Comparative Law lies in the different setting of priorities with respect to the history of law. Historical Law focuses on researching the development of law in contemporary history, whereas the study of Comparative Law just takes the historical development of law into consideration as a necessary intermediate step on the way to the final aim. After all, historical research regarding the development of a rule in the context of performing a Law Comparison is just a means to an end.

The study of International Law describes the law of one or more foreign countries[163]. In the context of this study, one provides a monographic overview of a foreign legal system, not necessarily with regard to a special topic. If one chooses to examine law systems of more than one foreign country, the results are usually displayed by providing a synoptical illustration[164]. The difference of this procedure to Comparative Law is that the pure description of a foreign law system does not include an evaluation or any kind of comparison. The study of International Law misses the key element of interrelating different legal systems[165]. The lacking element of comparing provides the criterion for demarcation. This study of International Law is a way of gaining and imparting foreign legal knowledge to one's own system without drawing a conclusion. International Law is a separate subject, but a necessary first step before

158 Different opinion stated by De Cruz, A Modern Approach to Comparative Law, 1993, p. 7 - where Comparative legal history is described as vertical comparative law whereas the comparison of actual legal systems is referred to as horizontal comparative law.
159 De Cruz, A Modern Approach to Comparative Law, 1993, p. 3; Zweigert/Kötz, Rechtsvergleichung, 1996, p. 2.
160 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 8.
161 De Cruz, A Modern Approach to Comparative Law, 1993, p. 7.
162 Legal interpretation methods.
163 Rheinstein, Einführung in die Rechtsvergleichung, 1987, pp. 22, 28.
164 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 22.
165 De Cruz, A Modern Approach to Comparative Law, p. 4 referring to Watson, Legal Transplants, 1974, pp. 6,7; Zweigert/Kötz, Rechtsvergleichung, 1996, p. 6.

dealing with Comparative Law[166]. Only when one knows about the foreign law to which a comparison is aimed at, one is able to compare[167].

Legal Sociology is concerned with how legal rules affect society[168]. Especially in certain principles of Comparative Law, in particular the functional principle, the study of Comparative Law does not only focus on exploring similarities and differences between legal handling, but if such are found, also tries to seek the reasons for such[169]. Such an analysis must be accomplished by considering the social surrounding in which a legal rule came into effect once upon a time and how social conditions affected it then and now[170]. Considering this, both sciences are aiming at the extent to which law influences behavior and therefore its effects on society. However, when Comparative Law aims at more than just understanding one's own legal system, it tries to clarify the function of law as such, therefore the boundary of legal sociology is crossed[171]. Some opinions even claim that the method of Comparative Law and Legal Sociology are similar in some ways[172]. How much the Sociology of Law and Comparative Law have in common depends on which of the above named variant of Comparative Law one follows, this again depends on the individual aim of comparison and must be decided in connection with the topic that is explored.

166 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 22.
167 Edge, Comparative Law n Global Perspective, 2000, pp. 10, 11.
168 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 10.
169 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 28.
170 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 28.
171 Rheinstein, Einführung in die Rechtsvergleichung, 1987, p. 28.
172 Zweigert/Kötz, Rechtsvergleichung, 1996, p. 10.