

# Explanation and Interpretation in Functionalist Comparative Law – a Response to Julie de Coninck

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## I. Introduction

I am excited about Julie de Coninck's project as described in the article in this journal,<sup>1</sup> and expanded in another one, published elsewhere,<sup>2</sup> and grateful to the journal's editors to invite my brief response. I share the author's discontent with the state not only of method of comparative law but also of the debate itself, in which too much emphasis lies in criticism and too little in the formulation of new, better methodology. I am intrigued by her interest in building on one tradition in comparative law, namely the functional method – without necessarily denying that other methods are possible as well.<sup>3</sup> Her own proposal, merely summarized in the fourth section of her

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<sup>1</sup> *Julie de Coninck*, *The Functional Method of Comparative Law: Quo Vadis?*, in this issue p. 318–350 (cited as *Quo Vadis*).

<sup>2</sup> *Julie de Coninck*, *Overcoming the Mere Heuristic Aspirations of (Functional) Comparative Legal Research?, An Exploration into the Possibilities and Limits of Behavioral Economics: Global Jurist Vol. 9 Issue 4 (2009) Article 3*, available at <<http://www.bepress.com/gj/vol9/iss4/art3>> (cited as *Exploration*).

<sup>3</sup> *Geoffrey Samuel*, *Dépasser le fonctionnalisme*, in: *Comparer les droits, résolument*, ed. by *Pierre Legrand* (2009) 405–430.

article in this journal, is elaborated at greater length elsewhere, so my comment extends to that other article as well.<sup>4</sup>

De Coninck criticizes existing functionalist comparative law for what she perceives as lack of interest in empirical foundations. Traditional functionalists, so she says, simply presume similarity of problems without actually proving it. New functionalists (among whom she counts Prof. Jaakko Husa and myself) even abandon, she claims, any claim to empirical foundations. Her response is that empirical foundations can be found, in particular in behavioral studies, which reveal certain behavioral patterns. For example, the endowment effect “seems to provide an interesting empirical starting point from which to compare the ways in which different legal systems take account of the fact of physical possession.”<sup>5</sup> In this sense (I think) behavioral constants like the endowment effect are supposed to take the place that problems take traditionally in comparative law.

When de Coninck criticizes me for disclaiming any interest in empirical reality, this is a misunderstanding. In fact, de Coninck’s attention to empirical inquiry is very welcome in a discipline riddled with shallow stereotypes of different legal orders. The behavioral studies, currently in vogue in legal studies more general, may indeed prove especially fruitful. Particularly, her plea that behavioral economics is preferable to classical economics is welcome, especially for comparative law.<sup>6</sup> The rational agent model of traditional economics, in its universality, turns cross-country variation into an anomaly.<sup>7</sup> Behavioral economics, by contrast, should be more fruitful especially for the finding and explanation of differences.

What remains, I think, is a methodological problem. What she needs to show, I would argue, is not merely that behavioral studies are superior to classic economics, but also that empirical findings like the endowment effect provide a firmer basis for comparative law. The problem lies not so much in the acquisition of empirical data per se, but in the demonstration of the links between these data and the law.

## II. Explanation

Let me explain the methodological challenges on the basis of her own example: De Coninck suggests an “empirically substantiated behavioral pattern as a point of reference” for comparative law, namely the well-known

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<sup>4</sup> *De Coninck*, Exploration (supra n. 2).

<sup>5</sup> *De Coninck*, Exploration (supra n. 2) at 15.

<sup>6</sup> See already *Ralf Michaels*, Im Westen nichts Neues?: RabelsZ 66 (2002) 97–115 (110 n. 54).

<sup>7</sup> See *Ralf Michaels*, The Second Wave of Comparative Law and Economics?: U. Toronto L.J. 59 (2009) 197–213 (199–200).

endowment effect – the observation that individuals assign higher value to an object if they hold it in their possession than if they would need to acquire it, and, relatedly, that possession gives them a feeling of ownership.<sup>8</sup> These findings, she suggests, “lend further support to the proposition that (physical) possession is a prominent factor for assigning ownership to others that are in possession of the object in question.”<sup>9</sup>

A first problem I see with this concerns the endowment effect itself. The effect was long observed among students under quasi-laboratory conditions, no doubt in order to filter out noise from contextual and cultural “noise”.<sup>10</sup> However, this means that Frankenberg’s criticism of the functional method (which de Coninck cites approvingly) seems to apply equally to her own approach if we replace “solutions” with “observations”:<sup>11</sup> “How solutions can be ‘cut loose’ from their context and at the same time be related to their environment escapes me.” Her problem is similar: the endowment effect simultaneously represents, “quite a robust finding” and is “highly context-dependent”<sup>12</sup>. Indeed, de Coninck herself reports that a comparable economic experiment, the ultimatum game, has been shown to yield remarkably *different* results when tried in different cultures in the world.<sup>13</sup> The endowment effect is, in other words, *not* universal; it is no less culturally contingent than are social problems. This suggests that behavioral observations (like problems) cannot serve as universal referents.<sup>14</sup>

The problem is not only variation, however.<sup>15</sup> More broadly, the problem is that observations cannot be stripped from their relation to society if they

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<sup>8</sup> The endowment effect may thus be viewed as experimental evidence for an assessment that the law had previously assumed to be true. See, e.g., *Marianne Bauer*, Zur Publizitätsfunktion des Besitzes bei Übereignung von Fahrnis, in: FS Friedrich Wilhelm Bosch (1976) 1–25.

<sup>9</sup> *De Coninck*, Quo Vadis (supra n. 1) 348, internal reference omitted. A more detailed discussion is in *De Coninck*, Exploration (supra n. 2) at 7–11.

<sup>10</sup> The students in such experiments have been called WEIRD, an acronym for Western, Educated, Industrialized, Rich, and Democratic. See *Joseph Henrich/Steven J. Heine/Ara Norenzayan*, The Weirdest People in the World?: Behavioral and Brain Sciences (forthcoming).

<sup>11</sup> *Günter Frankenberg*, Critical Comparisons: Rethinking Comparative Law: Harv. Int. L.J. 26 (1985) 411–455 (440), cited in *de Coninck*, Quo Vadis (supra n. 1) 336.

<sup>12</sup> *De Coninck*, Exploration (supra n. 2) at 11, 18 respectively.

<sup>13</sup> *Joseph Henrich et al.*, Cross-cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies: Behavioral & Brain Sciences 28 (2005) 795–815; cf. *de Coninck*, Exploration (supra n. 2) at 16–18.

<sup>14</sup> *De Coninck*, Exploration (supra n. 2) at 16–18, suggests that a referent like the endowment effect need not be universal to enable meaningful comparison. I think her own example demonstrates the opposite: we can compare the different responses to the endowment effect experiment only because that experiment itself (and hence the problem posed) is the same across different cultures. In other words, although the endowment effect itself may not be universal, the experiment that generates it is.

<sup>15</sup> Quite to the contrary, an explanatory theory of comparative law would require variation (and preferably random variation at that) because causation cannot be inferred without it:

are supposed to have any implications for society. This is a problem especially for law. Law is necessarily interpersonal; it takes place in society. Whether Robinson Crusoe is the owner of the things on his island matters only once Friday appears. Given that ownership describes at least in part an interpersonal relationship between the owner and others (it is a “right against the world”),<sup>16</sup> a “feeling of ownership” cannot properly be measured without account of the others against whom it exists, and this suggests that we need to know about who these others are.<sup>17</sup>

A related *second* problem, more specific to comparative law, follows from the first. That problem is endogeneity, a problem that riddles comparative social sciences more generally.<sup>18</sup> Even if we accept the separation of observations and society, of facts and law, the direction of the causal arrow between them is unclear. De Coninck suggests that the law protects possession because people value possession highly. This sounds plausible, but the opposite may be the case, too: it may be that people value possession highly because they have internalized the legal rules that protect it. Or there may be no causation between observation and law at all, and instead an independent causal factor may be at work – maybe a hardwired structure in the brain that makes us prefer both possession and rules that protect it, maybe a general quality of societies that makes possession particularly valuable. To take another example: Does the law protect the purchase in good faith as a response to people’s general assumption that the seller in possession is the owner? Or does the purchaser in good faith assume the seller in possession to be the owner as a consequence of the legal rules that grant protection to good faith purchase?<sup>19</sup> It may be possible to show correlations this way (and this would be far from uninteresting) but not necessarily causation, explanation for existing legal rules.

A *third* problem, however, might be the most important one. Even if we think both that facts and law are separable and that the causal arrow goes from facts to law, it is not clear what kind of legal institutions the endowment effect would actually lead to. De Coninck’s suggestion, if I read her

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we cannot infer that A causes X unless we observe also situations without A and without X. In this regard, if the endowment effect were indeed universal it would be a particularly inadequate tool for explanation.

<sup>16</sup> In my view, ownership combines two relations: a relation of assignment between the owner and the object, and a relation of directedness with other persons. See Ralf Michaels, *Sachzuordnung durch Kaufvertrag* (2001) 249–257.

<sup>17</sup> See also Ino Augsberg, *Comment on Geir Stenseth’s Secrets of Property in Law: Ancilla Juris* 2008, 114–117 (a response to the article by Stenseth discussed approvingly in *de Coninck, Quo Vadis* [supra n. 1] 349).

<sup>18</sup> Adam Przeworski, *Is the Science of Comparative Politics Possible?*, in: *The Oxford Handbook of Comparative Politics*, ed. by Carles Boix/Susan C. Stoke (paperback ed. 2009) 147–171.

<sup>19</sup> Michaels (supra n. 16) 295–301.

correctly, is that the endowment effect is an explanation for stronger protection of possession by the law.<sup>20</sup> This rests on what is sometimes called the mirror thesis of law: law reflects preferences in society (and, one might add, psychological facts found in the individual). But the opposite seems *prima facie* equally plausible: if the affection that individuals have for things in their possession prevents desirable transactions from taking place, we might expect the law to counter this by awarding especially weak protection to possession. For example, if “one may feel some sense of ownership of items one does not own (e.g. a borrowed bicycle) and behave as an owner might (e.g., resenting the owners’ demand for its return),”<sup>21</sup> the law does not reward this feeling of ownership: the owner can still claim the bicycle back. Sometimes law mirrors individual preferences; sometimes law constrains individual desires.

### III. Functions

The last point can be restated: If we think that the endowment effect somehow leads to strong protection of possession rather than to legal institutions aiming at weakening possession, we do so because we make an assumption about the social relevance of the endowment effect: We think that the societal need created by the endowment effect is the protection of individual possession, not the restriction of possession. Only if we (or the law) draw this conclusion does it make sense for the law to respond with institutions that protect possession, rather than with rules that give incentives to do away with one’s possession. This translation helps situate de Coninck’s proposal within functionalist methods: legal rules are explained with their function in this case to protect individual feelings of ownership.

At the same time, the translation opens up ground for a criticism that de Coninck herself formulates: “whatever turns a factual situation into a problem already contains a – fundamentally contingent – value-judgment.”<sup>22</sup> The endowment effect may be an observable effect. Its implications for the law, however, depend on the interpretation of this fact, and interpretations can differ, and none can be demonstrated to be the correct one.

This is fatal only if we subscribe to a widely-held assumption in the social sciences, namely that only empirical generalizable knowledge is valid, and that the aim of comparative law must be to demonstrate generalities. A similar tendency to abstraction may be sufficient for other disciplines for which

<sup>20</sup> *De Coninck*, *Quo Vadis* (supra n. 1) 348 with references in n. 141.

<sup>21</sup> *Jochen Reb/Terry Connolly*, *Possession, Feelings of Ownership and the Endowment Effect: Judgment & Decision Making* 2 (2007) 107 (108), cited in *de Coninck*, *Exploration* (supra n. 2) at 19.

<sup>22</sup> *De Coninck*, *Quo Vadis* (supra n. 1) 327.

law is a mere object of analysis: Political scientists were satisfied with finding three different models of judicial review; economists were satisfied with two models of legal families – civil law and common law – as causes for economic progress. The promise of such abstraction is that it enables generality and large sample groups, a requirement for significant statistical findings.<sup>23</sup> Insofar, of course, “it is perfectly possible to make non-normative statements about normative issues.”<sup>24</sup>

The problem is, however, that specific knowledge, close attention to the peculiarities of a legal system and the context, both legal and extralegal, within which legal institutions exist – in short, the “thick description” that anthropologist Clifford Geertz has famously asked for – are made impossible.<sup>25</sup> This kind of description that is not possible through abstraction and generalization, is often what we most need in comparative law. This problem affects also findings in the behavioral sciences like the endowment effect, as exciting as they may be in other regards: The knowledge we gain from these findings – humans value possession, they are somewhat altruistic, etc. – tends to be very general; it is therefore of only limited assistance in the discussion of specific legal rules and institutions, at least without extensive speculation. Comparative lawyers should welcome this assistance, but they need to be aware of its limitations.

#### IV. Interpretation

If social scientific explanatory comparative law has these limits, how can we still compare? If problems and functional relations are not observable empirical realities, at least not in the neutral, observer-independent way that the social sciences typically require, do they lose all value? This is where the suggestion comes in to use problems and functions as heuristic tools in an interpretative approach to comparative law. The proposal to reconceive of functions as tools rather than realities does not disclaim empirical reality for comparative law, even less does it “expressly renounce any empirical claims” for the field, as de Coninck criticises. If anything, the approach does the opposite: it attempts to take empirical realities seriously and render them com-

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<sup>23</sup> See *Holger Spamann*, Large-Sample, Quantitative Research Designs for Comparative Law?: *Am. J. Comp. L.* 59 (2009) 797–810. See also, for a plea to use more empirical testing of hypotheses, *Christopher A. Whytock*, Taking Causality Seriously in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy: *Loyola L.A. L. Rev.* 41 (2008) 629–682.

<sup>24</sup> *De Coninck*, *Quo Vadis* (supra n. 1) 342.

<sup>25</sup> See *Michaels* (supra n. 7) at 210–211, and the response by *Gillian Hadfield*, The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law: *U. Toronto L.J.* 59 (2009) 223–235.

parable without the reductionism that comes with statistical analysis, with simple causal relations. To some extent this should not be a very revolutionary suggestion: Even the most empirics-focused social scientists agree that equivalence as a basis for comparability “is a matter of inference, not of direct observations”, in other words, a matter of interpretation.<sup>26</sup> “[T]o identify causal effects, we must rely on some assumptions that are untestable.”<sup>27</sup>

If we want to truly understand different laws we need a non-reductionist way to interpret our knowledge of legal rules and institutions, and functions can serve as an interpretive cross-systemic perspective. The only area where we should reduce our empirical aspirations is in the search for objectively existing problems and functions, simply because these are (as de Coninck agrees) constructs. However, this frees us to deal with the empirical facts that actually matter. Once we direct our attention to the way in which legal systems themselves create their own functional relations, once we compare the different (but functionally equivalent) responses in different legal systems to what we can see as similar problems, we understand better each of these legal systems in its specific characteristics. Such an interpretive approach may indeed not lead to the kind of cumulative knowledge that de Coninck asks for, but instead create the kind of development that Clifford Geertz claims for anthropology: “Studies do build on other studies, not in the sense that they take up where the others leave off, but in the sense that, better informed and better conceptualized, they plunge more deeply into the same thing.”<sup>28</sup>

This is not (yet) a fully developed theory, as de Coninck rightly points out,<sup>29</sup> and in this context I can do no more than sketch some elements. My own approach rests on the non-reductionist functionalism developed by Cassirer and Luhmann. Especially Luhmann’s system-theoretical approach to law has, I believe, potential for comparative law, too but an explicit elaboration does not exist. One of Luhmann’s insights is that problems and functional relations are constructions by the legal system itself; we may say they are the way in which the legal system makes sense of itself. This suggests why a specific juristic and normative approach – in other words, the internal method of law itself – may be more appropriate to this endeavor than an external observation of law. At the same time, it suggests why testable predictions are hard to attain: the choice of one amongst various functionally equivalent legal institutions is a choice made by the legal system that cannot

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<sup>26</sup> Adam Przeworski/Henry Theune, *The Logic of Comparative Social Inquiry* (1970) 117; see also, on the relation between interpretation and inference, Gary King/Robert O. Keohane/Sidney Verba, *Designing Social Inquiry* (1994) 36–42.

<sup>27</sup> Przeworski/Theune (previous note) at 169.

<sup>28</sup> Clifford Geertz, *The Interpretation of Cultures* (1973) 25.

<sup>29</sup> De Coninck, *Quo Vadis* (supra n. 1) 343.

be predicted merely from the nature of the problem itself.<sup>30</sup> Evolution can perhaps be proven to take place, but the specific direction of evolution cannot be predicted. We can understand the legal system from its past, but we cannot predict the specifics of its future.

## V. Conclusion

Inasmuch as we can gain relevant empirical observations, in particular in behavioral sciences, comparative lawyers should draw on them. In one respect de Coninck is even too cautious when she bemoans that behavioral economics has not found a theory as to why and when certain behavior occurs.<sup>31</sup> This is a problem for economics, but not necessarily for comparative law. At least insofar as comparative law tries to explain legal institutions as responses to empirically observable behavior, it needs no deep theory as to why this behavior occurs. For us, the endowment effect is the *explanans*, not the *explanandum*.

The question is just how far these observations of behavioral regularities will carry us, and here I remain somewhat skeptical. Certain hardwired structures in the brain, certain feats displayed by any given society, may be responsible for what H. L. A. Hart called “the minimum content of natural law” and which may be described as the necessary content any law must have because it is made for actual human beings.<sup>32</sup> Insofar, biological evolution may have explanatory value (though, given the great cross-ethnic similarity of our genetic code, it will rarely explain cross-cultural variation). Beyond this, the explanatory value of biological evolution currently in vogue seems to me exaggerated: Much can happen on the long way of causation from the last genetic mutation in humanity to contemporary corporate governance regimes. Most of the evolution that is relevant for the development of the law is social evolution, and although new developments in evolutionary theory can be very useful here, the messy terrain of social facts is familiar terrain for comparative law in general and functionalist comparative law in particular.

All of this implies that the empirical foundations de Coninck suggests have indubitable potential for comparative law. Regardless of whether the law replicates or counters the endowment effect, the effect itself is a relevant empirical factor in the explanation of the rule. The fact that *any* rule on pos-

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<sup>30</sup> Although evolution is downplayed in many articles on the functional method, the method, properly understood, is necessarily an evolutionary one, though not with a predetermined direction. See Niklas Luhmann, Funktionale Methode und Systemtheorie, in *id.*, *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme*<sup>8</sup> (2009) 39–67.

<sup>31</sup> De Coninck, *Exploration* (supra n. 2) at 24.

<sup>32</sup> H. L. A. Hart, *The Concept of Law* (1961) 189–195.

session is compatible with the endowment effect does not strip the effect of its relevance for every one of these rules. However, the (causal or functional) relation between facts and legal rules will only rarely be observable as an empirical fact itself, or even allow inference without the aid of untestable assumptions. More frequently, inference will not be sufficient, and we will be left with interpretation. I do not think this needs to be viewed as a failure.

