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How Comparable are Legal Concepts?

The Case of Causation

It seems that nowadays more and more lawyers share Rudolf von Jhering's obsession: to "compare everything that comes [their] way, domestic with the foreign, or the present with the past".[*1] As the focus tends to shift from large legal families to particular institutions or individual legal concepts, it has already become a professional convention to add to almost every legal monograph, however limited its scope, a comparative section. It is also at the level of individual concepts that comparative law is generally taught. Emphasis on micro-comparison[*2] has been promoted also by the work of the Study Group on a European Civil Code, which has been accompanied by the publication of a wealth of comparative studies. In tort law, for example, such books have been published on fault, damages, causation, contributory negligence, and on many other concepts. Many of these comparative studies and the work of the study group, often conducted in the face of 'massive resistance'[*3], share the aim of working out a draft European Civil Code that could serve as a 'common frame of reference' for future work. This is to be done, as Christian von Bar has put it, "without losing time and without wearing oneself out on generalities".[*4] Now, it is to be hoped that this sense of urgency does not lead to a complete indifference of comparative law toward more theoretical issues. One such question, whose practical relevance might make us hesitate to categorise it among 'generalities', concerns the comparability of legal concepts. Eminent comparativists have in fact warned us not to compare 'apples with oranges'[*5], and every comparatively minded lawyer can probably enumerate many instances of seemingly similar concepts that function in a very different way in different legal systems. Limiting our attention to tort law, is the French concept of damages, for example, equivalent to the Belgian one? Or do the significant national differences in the use of the requirement of causation allow us to speak of 'the same' concept of causation or even of its 'common core' spanning different legal systems? As in translations from one language to another, we sometimes intuitively feel that the foreign counterpart of our domestic concept is not quite equivalent to it, carrying particular connotations that are not known to our domestic law.

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1 R. von Jhering. Bilder aus der römischen Rechtsgeschichte. Das Occupationsrecht an herrenlosen Sachen einst und jetzt. Eine romanistische Elegie. – Juristische Blätter 1880/11, cited in K. Zweigert, K. Siehr. Jhering's influence on the comparative legal method. – The American Journal of Comparative Law 1971 (19), p. 215.

2 For the relative roles that macro-comparison and micro-comparison have had in the history of comparative law, see the succinct remarks of Hein Kötz in Comparative Law in Germany Today. – Revue internationale de droit compare 1999/4, pp. 753–768.

3 See C. von Bar. Working Together toward a Common Frame of Reference. – Juridica International 2005, p. 21.

4 C. von Bar. Le groupe d´études sur un code civil européen. – Revue internationale de droit compare 2001/1, p. 129.

5 B. Markesinis et al. Compensation for Personal Injury in English, German and Italian Law. – Cambridge University Press 2005, p. 2.

The analogy from translation suggests an apparently easy way to account for the intuitive incomparability of legal concepts — affirming that the notions concerned do not have the same **meaning** in different legal systems. But it is evident that in making this claim we implicitly appeal to some view of legal meaning, and it is here that real difficulties begin. Many comparativists who conceive of law as a specific technique for achieving certain practical goals take as a rule what has been described by Herbert L. Hart[*6] as the 'operative' use of legal language. Such an instrumental view of legal concepts — that the latter have no reference independent of the social purposes that they serve — also seems to underlie the 'fundamental principle of comparative law'[*7], functional equivalence, according to which, despite all their dogmatic differences, most legal systems are expected to provide "identical or at least surprisingly similar"[*8] solutions to a great number of practical problems. Practical similarity in spite of divergent normative vocabulary is, however, only the positive side of functional equivalence. Negatively, the principle implies that because it is only at the level of **integral** institutions that convergence of legal systems is to be expected, the comparison of **single** concepts may well turn out to be meaningless.

The aim of this article is to study this question in some detail. An effort will be made to show that the problem of incomparability of concepts across legal systems is closely related to their indeterminacy, which, in turn, results from what we shall call their functional indifference. My belief is that our understanding of both of these problems can profit considerably from bringing together two threads of academic research that have hitherto tended to run a parallel course: comparative law and the study of legal reasoning. In the material that follows, I set forth to discuss the comparability of legal concepts from a semantic point of view. The first question asked is therefore of a more general nature: what is the meaning of legal terms? Without hoping, of course, to offer even an approximate answer to this notoriously difficult question, I concentrate on two theories that emphasise, respectively, the meaning in ordinary language and the specifically legal meaning of legal language. I then go on to analyse some features of legal argumentation and show how these are partly responsible for the indeterminacy of legal concepts. Taking causation as an example, I argue that it is generally not an individual concept but a whole institution, a legal technique, that is the most useful unit of comparison. Finally, I undertake to point out a few limits to the purely instrumental view of legal language that the first part of the paper might seem to suggest, by showing how the 'inertia' of legal concepts can impose real constraints on legal argumentation and often stands in the way of completely equivalent solutions in legal systems with different dogmatic structures.

1. From a legal alphabet to individual decisions: The tribulations of legal meaning

The question that serves as the focus of this article can be phrased in the following way: how similar is the meaning of 'causation', or any other concept, in different legal systems? Obviously, if 'A caused B' implies something entirely different in two systems, comparing the two concepts is not necessarily very illuminating. We "cannot compare the incomparable"[*9], as Konrad Zweigert has put it. In fact, this approach itself, focusing on individual notions, might not seem well-advised. Our starting point can, however, be justified by considering that many legal theorists have believed that concepts are the most fundamental building blocks of law. Before his pragmatist turn, Rudolf von Jhering, for example, thought that fundamental legal concepts (such as legal impossibility or the difference between nullity and contestability) can be compared to the letters of an alphabet: just as the latter are concatenated to form words and phrases, legal notions are combined to create legal norms. Jhering considered this alphabet to be both universal and timeless. "All lawyers of all countries and of all ages", he wrote, "speak the same language".[*10] To indicate this dependence of complex legal notions on more fundamental ones, Karl Bergbohm, an attentive reader of Jhering, envisaged the possibility of naming them in the manner applied for chemical substances.[*11] Such 'atomic jurisprudence', intent on grounding the whole dogmatic edifice of law in hard and fast legal notions, marked its zenith in the work of Bernard Windscheid, who argued that a decision in law is "the result of a calculus in which legal concepts are the terms".[*12] In other words, legal reasoning was to be a "matter of pure calcula-

6 See H. L. A. Hart. Problems of the Philosophy of Law. – Essays in Jurisprudence and Philosophy. Oxford: Clarendon Press 1983, p. 96.

7 K. Zweigert. Des solutions identiques par des voies différentes. – Revue internationale de droit comparé 1966/1, p. 5.

8 K. Zweigert. Methodological Problems in Comparative Law. – Israel Law Review 1972/4, pp. 466–467.

9 *Ibid*.

10 R. von Jhering. Geist des römischen Rechts auf den verschiedenen Stufen seiner entwicklung. Sechste Auflage. III Teil. 1. Abteilung. Leipzig: Verlag von Breitkopf & Härtel 1921, p. 9.

11 K. M. Bergbohm. Jurisprudenz und Rechtsphilosophie. Bd. 1. Einleitung. Abh. 1. Das Naturrecht der Gegenwart: kritische Abhandlungen. Leipzig: Verlag von Duncker & Humblot 1892, p. 82.

12 B. Windscheid. Lehrbuch des Pandektenrehts. Erster Band. 3. Aufl. Verlagshandlung von Julius Buddeus. Düsseldorf 1873, p. 60, paragraph 2.

tion in which the contents of the legal concepts are unfolded by logical deduction".*[13] If such were still our vision of the law, the natural way for a comparativist to go about his or her task would be to compare fundamental legal notions across many legal systems; it would be at this level that all similarities and differences could ultimately be explained. In fact, it is interesting to note that such an inductive-comparative method was considered by Bergbohm to be the first stage in the creation of a truly general legal science.*[14]

The theoretical underpinnings of this kind of conceptualism, or 'jurisprudence of concepts' (*Begriffsjurisprudenz*), were subjected to a ruthless, and profound, critique by Hans Kelsen. The author of *The Pure Theory of Law* intended to purify all legal notions of any non-positive, supposedly universal content. According to Kelsen, legal notions are nothing but convenient labels for bundles of norms, their meaning being entirely exhausted by the latter.*[15] Such a 'dissolution' of legal concepts into individual norms has two important implications. First, even the commonest concepts can be absent from some legal systems. Consider, for example, 'nationality'. Kelsen stresses that, as this concept is not a conceptually necessary element of the state, it is in no way universal. In fact, it is perfectly imaginable that the norms of which the concept of nationality is made up might not belong to a given legal system. "If it was decided to confer political rights on all who inhabit, in a durable manner, the territory of the state [...]; if no one was guaranteed the right of abode or if the political proceedure to expulse undesired persons from the territory of the state was abandoned; if there was no obligation to military service [...]; if, in addition, the state ceased to offer its subjects diplomatic protection abroad — there would be no reason to adopt the institution of nationality."*[16] Of course, Kelsen did not have the intention to argue that the institution of nationality is not useful or even inevitable. At issue, rather, is showing that this inevitability is not of a conceptual but of an entirely practical nature — the role of the concept of nationality is to discriminate among the inhabitants of the territory of the state. Kelsen writes: "To what extent [...] the institution of nationality is superfluous is a different question. Even if it was admitted that it is **indispensable**, it would not follow that it is **theoretically** necessary."*[17] Kelsen thus insists that, although there is no necessary link between the state, or a legal system, and the institution of nationality, the practical usefulness of the distinctions that this notion incorporates might still be such that the latter will in fact be a serviceable concept for describing most legal systems one might consider.

The second implication of Kelsen's view of legal concepts is that even if the same term appears in two legal orders, its meaning is very unlikely to be identical in the two systems. Let us consider the most paradigmatic of all legal concepts, that of the contract. If 'contract' is taken to refer to some non-legal phenomenon described as a 'meeting of minds', then we could indeed say that all legal systems make use of the same concept — minds are, after all, likely to meet more or less in the same way in, e.g., Estonia and South Africa. If, on the other hand, 'contract' is seen as a convenient heading under which norms that regulate certain ways of creating and changing rights and obligations are grouped, it becomes clear that this 'sameness' can refer only to some degree of similarity. It is, after all, hardly ever the case that the norms regulating the formation, modification and termination of contracts completely match those in other legal orders. The lesson that comparative law can draw from Kelsen's theory of legal concepts is therefore one of caution: even if it turns out that many legal systems make use of similar notions, their meaning can nevertheless be radically different. In other words, because there can be only a partial overlap of the norms that concepts stand for in different systems, "the comparison of systems by their concepts can lead to confusion and inaccuracies", as Basil Markesinis has written.*[18]

There is one other point concerning which Kelsen´s views are of great relevance for the purposes of this article. I will call it the theory of imposed meaning. It is well known that many 'ordinary' words undergo a change of meaning when incorporated into legal texts.*[19] Even though this phenomenon is familiar to all

[13] H. L. Hart. Jhering's Heaven of Concepts and Modern Analytical Jurisprudence. Essays in Jurisprudence and Philosophy. Oxford: Clarendon Press 1983, p. 266.

[14] K. M. Bergbohm (Note 11), p. 64. For more details, see H. Kalmo. Le positivisme de Karl Magnus Bergbohm: son arrière-plan et ses reflets dans la théorie pure du droit de Hans Kelsen. – Droits 2006/42, pp. 199–228.

[15] In a similar vein, Niklas Luhmann has argued that "it has been very detrimental to the discussion of legal concepts that concepts have been considered in a wholly punctual manner, as if determined by discernible characteristics". The meaning of 'delegation', for example, is made up of individual decisions about whether it is necessary for the validity of delegation that its extent be specified, whether delegated authority may be delegated in its turn, etc. In other words, it is through such individual decisions that the meaning of legal terms is gradually defined. See N. Luhmann. Das Recht der Gesellschaft. Frankfurt am Main: Suhrkamp 1993, p. 387.

[16] H. Kelsen. La naissance de l´État et la formation de sa nationalité: les principes; leur application au cas de la Tchécoslovaquie. – Revue de droit international 1929 (4) 3, pp. 613–641 reprinted in C. Leben. Hans Kelsen, Écrits français de droit international. – PUF 2001, pp. 27–57. See pp. 51–52.

[17] *Ibid*.

[18] S. B. Markesinis. Unité ou divergence: à la recherche des ressemblances dans le droit européen contemporain. – Revue internationale de droit comparé 2001/4, p. 812.

[19] See F. Ost, M. van de Kerchove. Le "jeu" de l´interprétation en droit. Contribution à l´étude de la clôture du langage juridique. – Archives de philosophie du droit 1982 (27), p. 398.

lawyers, there is no generally shared opinion on how pervasive it is and whether it allows us to speak of anything like a specific legal meaning in general terms. It seems that Herbert L. Hart was of the view that a specifically legal meaning of words that also appear in ordinary language is the exception rather than the rule. He concedes that there are divergences between the legal and non-legal usage of notions such as 'will', 'intention', and 'motive'. Hart also admits that law "because of difficulties of proof or as a matter of social policy, may often adopt what are called external or objective standards, which treat certain forms of outward behaviour as conclusive evidence of the existence of mental states or impute to an individual the mental state that the average man behaving in a given way would have had".*[20] Nevertheless, according to Hart, the fact that there are many legal rules that are inconsistent with the idea that a complex psychological fact — a 'meeting of minds' that jointly 'will' a certain set of mutual rights and duties — is required for a contract to come into existence, does not mean that the law cannot make the validity of a contract depend on certain 'mental elements' and thus approximate to the non-legal meaning of these terms. The Hart/Honoré book on causation also relies on the idea that it is the common-sense notion of cause — or, rather, a variety of causal concepts — that underlies the legal use. Of course, "the determination of the ground of responsibility falls within the province of legislators and, in default of clear guidance from them, of judges". But once the decision has been reached to make causal issues relevant, it is the common-sense notion of causality and not some legal construct that is in play. Although there are other grounds, such as policy considerations, for determining the allocation of responsibility, these 'second-stage considerations' are brought to bear only after causal issues have been resolved and should therefore be kept separate from the latter.*[21] Tony Honoré has thus explicitly contended that there is no special legal meaning of causation.*[22]

The position I call Kelsenian implies the opposite point of view: because of the institutional nature of law, it is the authoritatively imputed meaning that should be our starting point: "If a legal order attaches to a certain fact as condition a certain consequence, then it must determine in what manner, and especially by whom, the existence of the conditioning fact is to be established. [...] It is a fundmental, though often overlooked, principle of legal technique that in the province of law there are no absolute, directly evident facts, no facts 'in themselves', but only facts established by the competent authority in a procedure prescribed by the legal order. [...] In the province of law only the authentic opinion, that is, the opinion of the authority instituted by the legal order to establish the fact, is decisive. Any other opinion as to the existence of a fact as determined by the legal order is irrelevant from a juristic point of view.'"*[23] In deciding whether some legally relevant requirement is fulfilled, we cannot thus, according to Kelsen, have recourse to some common-sense criterion but, rather, need to adopt the perspective of the administrators of law. "It is not the actual will, the actual intention, that the judge has to identify in certain cases — for these he can not identify — and that belong to conditions of responsibility but [...] external conditions on which the judge relies to **presume** the presence of mental states," he writes.*[24] It also follows from this that the kind of metamorphosis that extralegal language undergoes by being incorporated into positive law hinges to a considerable extent on the area of law to which the relevant norms belong. In other words, the specificity of legal language does not result only from the autonomy of the legal system as a whole; it also stems from the peculiarities of its different component parts. Hart and Honoré treat causation in criminal law and tort law as essentially the same. We should, however, also take into account the fact that the rules governing the producing of evidence — and, by way of consequence, the establishment of conditioning facts — tend to be so different in criminal law and tort law that the same word or expression naturally has a very different meaning in these two areas of law. In many countries where parts of the social security law make use of the requirement of causation, the interpretation diverges from that applied under tort law. Although in Switzerland, for example, both tort law and social security law distinguish between a natural and an adequate relationship between cause and effect (defining these terms identically), the case law is not the same.*[25] The main reason for this is, of course, that considerations of fairness play a more conspicuous role in social security law. But an additional, less visible circumstance might be that the rules of procedure also diverge in these two branches of law.

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[20] H. L. A. Hart (Note 6), p. 96.

[21] H. L. A. Hart, T. Honoré. Causation in the Law. Second edition. Oxford: Clarendon Press 1985, p. xlvii.

[22] T. Honoré. Necessary and Sufficient Conditions in Tort Law. – D. G. Owen (ed.). Philosophical Foundations of Tort Law. Oxford 1995, p. 363.

[23] H. Kelsen. The Law as a Specific Social Technique. – University of Chicago Law Review 1941/9, p. 94. See also H. Kelsen. Reine Rechtslehre. Anhang: 'Das Problem der Gerechtigkeit'. 2., bearb., erw. Auflage. Wien: Deuticke 1983, p. 323.

[24] H. Kelsen. Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze. Zweite Auflage. Tübingen: J. C. B. Mohr 1923, p. 103. According to Hart's reading of Kelsen, the latter would have little to say in opposition to juristic definitions that contain psychological elements, "[f]or [he] expressly says that in the case where the law itself makes such elements relevant, e.g. where mens rea is a condition of criminal responsibility, then the sanction is directed to a psychologically qualified delict." See Hart's Kelsen Visited in H. L. A. Hart (Note 6), p. 297, referring to Kelsen's The General Theory of Law and State. Cambridge, MA: Harvard University Press 1949, pp. 55, 66. It seems, however, that Hart is here understating the imputational element in the Austrian lawyer's position, for Kelsen´s criterion of legal relevance is not 'being found in the relevant law' but, rather, 'being applicable by the administrator of law'.

[25] See A. Rumo-Jungo. The Impact of Social Security Law on Tort Law in Switzerland. – U. Mahnus (ed.). The Impact of Social Security Law on Tort Law. Vienna: Springer 2003, p. 204.

That legal science reaches not to the real mental will but only to the legal presumption of it is, assuredly, not a very novel claim. Kelsen does not, however, limit himself to pointing out such observational constraints. He goes further and argues that it is the application of sanctions that implicitly defines the meaning of legal terms. He states: "A decision that establishes [someone's] fault says nothing more nor nothing less than [a decision] that ascertains the presence of a punishable illegal act. We must also get used to the idea that it is not correct to conclude: a fault, therefore a sanction, but on the contrary [...]: just as it is the sanction that makes a certain act illegal, and as it is thus from a sanction that the [illegality of an] act is to be concluded, so we must deduce: because and in so far as the sanction, therefore and to that extent the fault."[*26] This is the other side of the preceding argument: because of the institutional character of the application of law, not only are there no facts 'in themselves' in law but also there is no meaning 'in itself'. Although it must be admitted that Kelsen's remarks are somewhat mysterious, his aim seems to be to propose a 'realist' definition of 'fault' that would rely not on any extralegal usage, nor even on the vocabulary that the administrators of law themselves use, but exclusively on the way this term is related to the substance of law — the sanction. If a legal norm makes the application of a sanction conditional on a certain type of behaviour and if, in addition, fault is held to be a condition of illegality, then this kind of behaviour implies *eo ipso* fault. In other words, if we adopt a purely descriptive viewpoint on law, then we should take the tangible element in it, the sanction, as a guide — our aim being to obtain a realist definition of legal terms, we should read it from the legal solution. Although concepts are used to justify decisions in law, the latter are the determinant, not the determined element, for an observer of law.

It must be admitted that Kelsen does not expand this idea of a norm as a backward definition of legally relevant terms into a full-fledged theory of juristic meaning. But nothing seems to stand in the way of such generalisation. We can say that what counts as the meaning of a word in a legal text is the way the word is implicitly defined in the actual administration of law. It is not our own or someone else's non-authoritative beliefs about the 'ordinary' or 'natural' usage, nor this usage itself. From a purely descriptive perspective, it would thus not be correct to interpret the requirement of causation in law as if referring to some extralegal phenomenon that is somehow given the power to bring about legal changes. We should instead adopt a rigorously *ex post* point of view: any time someone's liability for some loss is affirmed in law, the existence of a causal link between this person's behaviour and the damage is also to be assumed in a retrospective manner. It is only by grouping together all such instances of imputed causation and by comparing them with our common-sense notion of causality that we can ascertain whether any similarity between the two exists or if even any uniform semantic core emerges from these decisions. Of course, no-one would wish to deny that in many cases legal and ordinary meanings coincide. Communicative demands, as Robert S. Summers has pointed out[*27], are enough to ensure that the two do not drift too far apart. The extralegal meaning might also have great heuristic value in accounting for court decisions. These considerations notwithstanding, it seems clear that the institutional setting within which law is embedded is sure to stamp at least some mark on **all** words that appear in legal reasoning. Legal use is, as Hart himself has argued, an operative use of language where conformance to the ordinary meaning is by no means the only goal. In any case, such conformity can certainly not be taken for granted. As Kelsen suggests, juristic meaning is not a premise but the endpoint of our description of a legal system.

2. The same solution by different means

Even if we admit that the meaning of legal terms is 'endogenous' in the sense of being implicitly determined by the administration of law, we have not advanced a great deal until we have pointed to some method for extracting this meaning from the available body of case law. Now, someone might claim that a rigorously descriptive approach precludes us from trying this: we should halt at this stage and refrain from a largely speculative and inevitably non-authoritative interpretation of court decisions. In other words, we should content ourselves with a list of solved cases and should not look for a way to justify the decisions therein. Such an extremely restrained position would, however, hardly allow us to resolve any of the practical issues that face a lawyer. For this, we must try to make sense of individual decisions and find out what they imply as to the meaning of terms that happen to interest us. Of course, this is not an easy task. Take the following example.[*28] Suppose a statute provides that certain documents shall be filed not later than 5:00 pm on a certain date. Suppose further that A files these documents on the required day but at 5:31 pm. The responsible clerk, enforcing the statute, refuses to accept them. Learning this, A files an action for extraordinary relief, asking the court to order the clerk to accept the documents in question. Fortunately for him, the court

[26] H. Kelsen (Note 24), p. 142.

[27] R. S. Summers. The Argument from Ordinary Meaning in Statutory Interpretation. – Northern Ireland Legal Quarterly 1992 (43), p. 226.

[28] This is a simplified version of the case of Hunter v. Norman reported by Frederick Schauer. See F. Schauer. Formalism. – Yale Law Journal 1988 (97), p. 515.

issues the order but without giving any reasons for the ruling. Now, faced with the need to interpret the decision, should we take it to mean that, for legal purposes, 5:31 pm is held to be equivalent to 5:00 pm? There would certainly be nothing paradoxical about this 'liberal' interpretation of '5:00 pm'. The mere possibility of this interpretation does, however, not mean that it is necessarily the most convincing way to account for the ruling. It should be noted that what is at issue here is not a **causal** explanation, in terms of motives, secret ends, etc., of the way the decision came about. We are interested in a retrospective justification of the ruling, not to convince ourselves of its well-foundedness but to find out what it implies concerning the meaning of legal terms. Here, it seems clear that the decision does not imply anything with regard to other instances where '5:00 pm' or similar expressions appear in legal texts. Instead, the case can be explained much better by saying that, although A was late — and the rule barring him from filing the documents is applicable in principle — an exception from the rule was made in his favour. It therefore appears that while the interpretation of court decisions must always remain somewhat speculative, given the rules of justification in a legal system, not all explanations are equally convincing.

But let us take a more topical, and a more complicated, example.[*29] Suppose that the power supply of an entire neighbourhood has been cut off by an act of D, a building company. The cables belong to the supplier of electricity. A factory plant (P1) and its customers (P2) suffer damage. P1 and P2 sue D. Now, suppose the court decides that D is liable for the damage caused to P1 but does not have to compensate P2's loss. Here, we might have real difficulties in interpreting the decision. What we can infer is that because wrongfulness, a causal connection and damage all are conditions of liability, these must have been held to be present as far as the relationship between D and P1 is concerned. The lack of responsibility toward P2 can, however, be explained in a number of ways. It might be that there was held to be no relevant damage (e.g., the damage was held to be pure economic loss), that the causal link was not adequate or did not exist at all, that there was no fault because this type of loss does not fall within the category of risk against which the relevant statute was designed to protect, or something else entirely. Again, it is obvious that the manner in which the solution is to be justified depends very much on the kind of conceptual distinctions that are available in the legal system concerned. What this example serves to illustrate is how difficult it can be to extract the meaning of legal terms from their 'implicit definitions'. It is usually not one individual concept that is defined in such complex decisions but, rather, a number of interrelated concepts. In the case of belatedly filed documents, there was a more or less obvious way to reconstruct the reasoning behind the decision, but this is not always so. We are generally not able to give 'realist' definitions, in a Kelsenian sense, of legal terms because there is simply no way in which we could unequivocally link them to the application of sanction or whatever the final result of the court decision might be. It is also not entirely correct to say that courts interpret legal terms if this is taken to mean that in deciding individual cases courts impute a determinate meaning to them. Legal meaning is instead the result of our own *ex post* reconstruction, which is certainly not as easy as the Kelsenian idea of a backward definition might lead us to think.

It could perhaps be claimed that the type of indeterminacy I have been describing arises from an insufficiency of case law to interpret. That this is not the case can be seen by considering the following hypothetical situation. Suppose there are two legal systems with an identical dogmatic structure. Suppose further that a great number of factually equivalent tort cases have been solved in these systems in exactly the same manner (in the sense that responsibility has been assigned identically). Now, even with such an abundant body of cases, we could still not say whether the concept of causation functions similarly in the two systems. This is because there is theoretically an infinite number of ways to rearrange terms in the 'equation of responsibility' (to borrow an expression from Basil Markesinis) and still arrive at the same end result. To negate someone's responsibility, we can say that there was no fault, no damage, or no causal link between the defendant's behaviour and the loss of the victim[*30]; that the damage was extraordinary; or anything else from a rather long list of possibilities. Lord Denning, considering the problem of economic loss, has expressed this in very clear terms: "The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think that the time has come to discard these tests which proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable, or not."[*31]

But if the only information we had were the facts of the cases and the decisions rendered as to who is to bear the damage, we would have nothing to guide us in apportioning the aggregate meaning — the allocation of responsibility — among individual concepts. Court decisions are, of course, not generally so arcane as to make reconstruction of the reasoning behind them altogether impossible. The problem is, however, real enough, and it is hardly unusual to see many competent lawyers argue about which 'theory' explains the

[29] Many of the examples in this article, including the following one, come from J. Spier (ed.). The Unification of Tort Law: Causation. The Hague: Kluwer Law International 2000 (Unification of Tort Law), pp. 4–7.

[30] There seem to be significant differences in the way decisions are justified in tort law depending on whether responsibility is affirmed or negated, but this is an issue we cannot pursue here.

[31] Cited in S. Deakin, A. Johnston, B. Markesinis. Markesinis and Deakin's Tort Law. 5th ed. Oxford: Clarendon Press 2003, p. 84.

case law best — whether it can be described, for example, as an application of some 'theory' of causation, as proceeding from a certain typology of damages or still something else. Even within a given legal system, there are often many different ways to approach the same question. It has, for example, been written that "[t]he fluidity and equivocation of the basic concepts of negligence make it important to avoid too rigid an insistence on finding the 'correct' technical form in which to phrase an issue. Some questions may equally well be put in terms of either duty or causation [...]".*[32] The hypothetical situation of ignorance I described previously — two legal systems having reached precisely the same solutions — demonstrates that it is not only the paucity of, or contradictions in, the available cases that are at the source of the vagueness of legal concepts. The latter can be indeterminate even if the available case law is neither scarce nor erratic.

The problems we have been discussing — indeterminacy of legal terms and their limited comparability across legal systems — are, as already pointed out, partly rooted in the circumstance that it is possible to arrive at the same result in many different ways. In comparative law, this idea goes under the name 'functional equivalence', a notion that Zweigert has expressed as follows: "[D]ifferent legal systems find equal or at least astonishingly similar solutions — often down to the details — for similar problems, in spite of all differences in historical development, systematical and theoretical concepts and style of practice".*[33] Although the 'law of functional equivalence' is usually taken to refer to the practical convergence of institutions that belong to several legal orders, we can make use of a similar principle, the one referred to in this work as functional indifference, that is also relevant in describing individual legal systems: it is possible to rely on different arguments, or concepts, to arrive at the same desired solution. The word 'concept' is used in a broad sense here, embracing all available distinctions that can be used to justify a decision. Following Niklas Luhmann, we can view legal terms as depositories of distinctions that have been made in the past and can henceforth be relied on to justify conclusions in law. In fact, different legal systems sometimes articulate apparently similar notions in very different ways. For example, courts in Germany often distinguish between, on the one hand, a causal link between the tortious act and the infringement of the victim's right and, on the other hand, a causal link between the infringed right and the ensuing damage. This distinction makes it possible to argue against responsibility by saying that while one type of causation is present, the other is not. A very common distinction, that is to be found in some form in most legal systems, is the distinction between cause in fact and a legal cause or between an immediate and a remote cause. Alternatively, instead of 'breaking down' the concept of causation in this way, supple application of rules can be achieved by introducing a distinction between direct and indirect damages, by distinguishing among different degrees of fault, etc. Analogous to scholastic *distinctiones*, such conceptul means make possible an almost endless array of 'yes but' argumments that can all be relied on to find 'similar solutions to similar problems'.

The principle of functional indifference — 'the same solution by different means' — can be illustrated well by the Belgian case law on causation. Under Belgian law, there is in principle no difference between factual and legal causation: to be qualified as a cause, an event must fulfil the sole requirement of being a *conditio sine qua non* for the ensuing damage. Obviously, if this broad formulation of the theory of the equivalence of causes were taken at its face value, one would be tempted to conclude that the way the Belgian courts apply liability rules must be very different indeed from the approach seen in other countries. "From judging published case law, however, it appears that, although lip service is consistently paid to the theory of equivalence of conditions, its application does not really lead to unacceptable results," according to Herman Cousy and Anja Vanderspikken.*[34] In other words, different means are found to take the sting out of the equivalence theory. Or consider a somewhat more exotic example. Under the Ottoman Mejelle Code, as also under the Roman *lex Aquilia*, only damage by direct physical influence, *damnum corpore corpori datum*, was actionable. For example, when an animal, frightened at the view of someone, escaped and got lost, the person was not held to be responsible. Similarly, if someone let out a caged bird, no responsibility followed because there was no direct contact with the bird. We would, however, be mistaken if we were to think that, because of its restrictive concept of causation, the Mejelle Code allowed those malicious persons who took pleasure in frightening animals or freeing birds to go entirely unpunished. Here, as the commentator puts it, "[the] intention to harm makes up for the lacking causal connection *corpore corpori*".*[35] So, when the animal was frightened or the bird freed **on purpose**, responsibility still followed. These are only a few examples showing that legal systems are not, in fact, at the mercy of their concepts. In many cases, the solution can admittedly be 'built up' of concepts without regard to the end result, and this can very well be the way in which many 'easy' cases are actually solved. Windscheid's idea of a decision in law as a mere calculus is certainly grounded in the everyday practice of lawyers. When, however, a serious compensation gap or a similar undesired consequence is seen as a solution to this calculus, some concept is sure to be found elastic enough to make up for the perceived deficiency of others. Sometimes, concepts can even be called upon to render

[32] *Ibid.*, p. 83.

[33] K. Zweigert (Note 8), p. 469.

[34] H. Cousy, A. Vanderspikken. Causation under Belgian Law. – The Unification of Tort Law (Note 29), p. 26.

[35] C. Chenata. La théorie de la responsabilité civile dans les systèmes juridiques des pays du proche-orient. – Revue internationale de droit compare 1967/4, p. 891.

some *ad hoc* service, such as when a causal link is held to be present only because some of the defendants happen to be insolvent.[*36]

The implications of functional indifference are largely similar to these that have been drawn from the notion of functional equivalence. Just as it is only at the level of a whole institution that comparison is likely to be meaningful, it is within the context of a conclusion of law, resulting in a practical solution, that the meaning of legal terms can be understood. It has been written that "[t]he statement [...] that there is no *Grundbuch* system in the United States would be incorrect if one failed to add the fact that the functions of the Civilian official title registration — the *Grundbuch* — have been taken over to a considerable extent by privately owned title insurance companies".[*37] In a similar vein, it could be said that the statement that Belgium applies a one-step approach to causation, the but-for theory, is incorrect if one does not add that "somehow — and mostly via other ways than by openly declaring a departure from the official equivalence theory — the courts manage to reintroduce most of the limitations which are sought by other theories".[*38] In other words, similarly to language, which refers to extra-linguistic reality only at the level of a whole phrase — saying something to someone here and now[*39] — the content and tenor of individual legal terms is revealed only at the level of a decision of an administrator of law on some practical question here and now. This is the semantic aspect of functional indifference. The comparative aspect is that even in the case of very similar dogmatic frameworks, the comparison of individual concepts across different legal systems might still turn out to be of very limited value if the function assigned to the compared concept diverges considerably in the two systems. Thus, comparing causation in a country where it is used as a means of apportioning liability and a country where the same purpose is fulfilled by having regard for the respective gravity of the faults of the defendant and the victim might well amount to comparing apples with oranges. It, of course, always remains open to us to ask how the division of labour among different concepts is to be effected in view of the desirability of enhancing the flexibility and the ease of administration of a given scheme of liability — to ask, for example, whether a certain type of cases is better seen from the angle of causation or that of wrongfulness. Such an evaluation would be very much in line with Zweigert's call "to consider and to prove which of several solutions of a problem is more practical and more just".[*40] However, this can be undertaken only when all of the conceptual methods for achieving the same result have been considered.

3. Limits to a purely instrumental view of legal language — the 'inertia' of concepts

We have seen how legal terms can be applied in many, sometimes ingenious, ways to tip the end result in the desired direction. This has led some comparativists to adopt an openly instrumental view of legal vocabulary. Basil Markesinis has gone so far as to claim that tort law concepts "are nothing but words that help to phrase decisions and not reasons for these decisions".[*41] He reminds those who tend to take legal concepts too seriously that the latter can generally be manipulated to "espouse the positions of legal policy".[*42] Thus, the language of cause often serves "to decide questions of policy, such as which of the parties is best placed to shift the loss in question or which outcome will best promote loss prevention in that context in the future".[*43] Under the compulsory accident insurance schemes in social security law, establishing the causal link is also often influenced by social considerations (so-called *sozialrechtliche Theorie der wesentlichen Ursache*). In 'formalistic' European legal systems, where political considerations can generally not be directly relied on, many issues of social policy are indeed often addressed by agile use of concepts like wrongfulness, causation, and damage. As Deakin, Markesinis, and Johnston argue, flexible, sometimes even amorphous concepts allow us to use old tools — often of Roman origin — "to meet social needs of a new and different era".[*44]

But does all of this justify a view that legal reasoning is nothing but a surface appearance, offering little resistance to the undercurrents of legislative policy? Admittedly, the requirement of causation is sometimes used very liberally indeed. Concepts do not, however, seem so malleable as to permit **any** use to be made of

[36] For an argument along these lines, see S. Galand-Carval. Causation under French Law. The Unification of Tort Law (Note 29), pp. 53–61.

[37] K. Zweigert, K. Siehr (Note 1), p. 222.

[38] J. Spier, O. A. Haazen. Comparative Conclusions on Causation. – The Unification of Tort Law (Note 29), p. 130.

[39] See P. Ricoeur. La métaphore vive. Paris: éditions du Seuil 1975, p. 95.

[40] K. Zweigert (Note 8), p. 473.

[41] S. B. Markesinis. Réflexions d´un comparatiste anglais sur et à partir de l´arrêt Perruche. – Revue trimestrielle de droit civil 2001/1, p. 94.

[42] S. B. Markesinis. Unité ou divergence: à la recherche des ressemblances dans le droit européen contemporain. – Revue internationale de droit compare 2001/4, p. 821.

[43] S. Deakin, A. Johnston, B. Markesinis (Note 31), p. 185.

[44] *Ibid*., p. 61.

them in practice. An analogy may be discerned here with the role of the normative vocabulary that is employed for the description and evaluation of political life. It has often been assumed that the connection between ideology and political action is a purely instrumental one, as if the former relates to the latter in an entirely *ex post facto* way. But this, as Quentin Skinner tells us, must be a misunderstanding: "Consider, for example, the position of an agent who wishes to say of an action he has performed that it was honourable. [...] [As] Machiavelli shows, the range of actions which can plausibly be brought under this heading may turn out — with the exercise of little ingenuity — to be unexpectedly wide. But the term obviously cannot be applied with propriety to describe [just] **any** Machiavellian course of action, but only those which can be claimed with some plausibility to meet the preexisting criteria for the application of the term."*[45] From this, Skinner draws the conclusion that "the problem facing an agent who wishes to legitimate what he is doing at the same time as gaining what he wants cannot simply be the instrumental problem of tailoring his normative language in order to fit his projects. It must in part be the problem of tailoring his projects in order to fit the available normative language."[46]

Now, the available normative language is not the same in all legal systems, and whereas in both politics and law everything can be justified in principle, this is not necessarily so within the established conceptual distinctions. Because of the principle of *res judicata*, the formal validity of court decisions obviously does not hinge on their conformity to the prevailing doctrine or the precedent of case law. It would, however, amount to a confusion between formal validity and acceptability to conclude from this that the reasoning of the administrators of law is not constrained at all. It is significant that in making his case for legal justification as a 'surface', Markesinis refers to a very exceptional case solved by the highest civil court in France. The *Cour de cassation* can certainly side-step many constraints that limit the manoeuvring room of lower-level courts. If new distinctions and qualifications can always be introduced, then there is surely no limit at all to what can be justified in law. Most judges are, however, very unwilling to engage in revolutionary semantic innovation; they try to justify the solutions they adopt within the existing conceptual framework. This framework, as it stands, is generally rigid enough to exclude at least some arguments. It is remarkable that even economic analysts of law, who have worked out an entirely policy-oriented notion of causation, seem to feel constrained to respect at least to some extent the 'pre-existing criteria for the application of the term'. As Martin Stone writes: "If private liability actions are to be a means of spreading accident losses, there is no reason, at least so far as concerning the realization of **this** goal, for there to be **any** causal relationship between the parties. (Quite possibly, a party not — even remotely — connected to the accident, say [...] a manufacturer with a large sales base, would be an even more effective loss-spreader if **it** were liable)."*[47] Similarly, to continue this line of reasoning, it might well occur that someone who is not at all — or who is very remotely — connected to the accident happens to be either the cheapest cost avoider or the cheapest insurer. If we apply the purely economic criterion of causation, it inevitably follows that the behaviour of this 'outsider' should be held to be the cause of the accident. The reason this cannot be done convincingly is obviously that this interpretation would be very difficult indeed to reconcile with the way the requirement of causation is generally applied.

In addition to the semantic 'inertia' of concepts, legal argumentation is also subjected to constraints that result from the internal configuration of legal systems.*[48] To illustrate this point, we propose the following example. Suppose a statute requires a carrier by sea to keep animals in pens, the purpose of this requirement being to prevent the spread of disease. While P's animals are being carried on deck without pens they are swept overboard in a storm. If they had been penned, they would not have been lost. Now, let us assume that the judge who is called upon to solve this case feels that it would be an unsatisfactory result to make the carrier liable but the legal system concerned does not admit the 'protective purpose' theory. There are several means to achieve this result: it could be claimed that there was no fault; the relevant law may, as it does in Italy*[49], list several dangers that exonerate the carrier from liability, storms being among them; etc. Some arguments, although possible, would be difficult to adduce. It would, for example, be hard to argue that the defendant's omission was not a but-for cause or even an adequate cause of the loss of animals if the storm clearly wasn't such that the animals would have perished anyway. The point we wish to underscore is that, despite the argumentative equivalence of these justifications — they would all result in no responsibility for the carrier — making recourse to any one of them might not be easy and might in fact involve a substantial 'cost' for the judge. One component of this cost is the external effects of the conclusion: the declaration that there was no fault could have implications for other aspects of the case that the court might very well want to avoid. Such a normative 'spill-over' is sometimes avoided by limiting the effects of the interpretation to one branch of law. A case in point is the divergent qualification of the same legal acts for civil and adminis-

[45] Q. Skinner. The Foundations of Modern Political Thought. – Cambridge University Press 1978, p. XII.

[46] *Ibid*.

[47] M. Stone. Focusing the Law: What Legal Interpretation is not. – A. Marmor (ed.). Law and Interpretation. Oxford University Press 1995, p. 38.

[48] For a detailed analysis of many such constraints, see M. Troper et al. Théorie des contraintes juridiques. Paris: L. G. F. J. 2005.

[49] F. D. Busnelli, G. Comandé. Causation under Italian Law. – The Unification of Tort Law (Note 29), p. 85.

trative law purposes. If normative effects are disconnected in this way, it could very well be the case that a contract is null and void in one area of law and perfectly valid in the other. Should different interpretative practices develop, it is also possible to apply the requirement of causation liberally in social security law, in the service of fairness, without thereby impairing the foreseeability of the application of general tort law norms. There is, however, no reason to believe that the normative implications of a decision can always be localised in this way. In solving individual cases, it might be difficult to avoid the extension of a certain qualification — the presence of a causal link, the degree of fault, etc. — to other aspects of the same or closely related accidents.

An even more important component of the cost of manipulating concepts consists in the generalisability of conclusions in law not only to other aspects of the particular case in hand but also to other, similar instances. We already had occasion to refer to Luhmann's description of legal concepts as repositories of distinctions that have been made in the past. When a court makes use of a legal term, it adds to this historical weight, and this can evidently have unwanted consequences. Consider a case in which the owner of a car does not remove the key from the lock, despite the fact that many cars have been stolen in the area. T steals the car and causes an accident to P. Now suppose that, because of exceptional circumstances, the court does not want to deem the owner liable but finds it difficult to negate the causal link and the occurrence of loss in this case. The obvious way to handle the matter would be to claim that there was no fault. This, on the other hand, sends out a normative message that leaving keys in one's car will not entail liability when the car happens to be stolen and someone injured as a result. It is true that "the judge's vision of the law tends to be fragmented" and "likely to be strongly influenced by the facts of the particular case"[*50], but this does not mean that such cases are solved without any regard for the implications of the reasoning adopted for other cases. The court is thus likely to wish to avoid such a normative message. Another way to achieve the desired no-responsibility result would be to appeal directly to the exceptional circumstances. Although many legal systems allow exceptional circumstances to be taken into account, judges in formalistic European countries tend to make limited use of general principles to break the force of clear-cut rules. It is thus as if, in the case we are considering, the court would simply have no choice but to declare the owner liable. The reason is not that the facts are so well established and the meaning of the relevant legal terms — fault, causation, and damage — so clear that the owner's responsibility could not be plausibly negated, for it was implied that the concept of fault is of a sufficinently open texture to permit the decision to go either way. The inevitability of the undesired result is, rather, as we already pointed out, due to the need to avoid normative 'spill-over'.

4. Conclusions

It has been argued in this article that, for a number of reasons, comparing individual concepts across legal systems can be difficult and sometimes actually quite confusing. It is within a whole institution, serving a tangible social function, that the meaning of legal terms is revealed. The idiosyncrasies of many concepts are thus easily explained when their interaction with other concepts is taken into account. In addition, the functional character of legal concepts cannot be seen as something that comes into play only at a second stage, superimposed on their ordinary meaning if such exists[*51]. Paradoxically, the more formalistic a legal system is, barring direct recourse to substantive arguments, the more likely it is that legal notions will be put in the service of legislative policy. In other words, concepts have to bear the weight of strategic vagueness, making them flexible enough to meet changing social needs. But because of the functional indifference of many concepts — many can be made use of to achieve the same practical result — it is not necessarily the same concept that bears this weight in different legal systems. We should not, however, overplay the theoretical difficulties involved in comparing legal concepts. That their content is not likely to be equivalent implies in no way that we would always be comparing apples with oranges. Only a purist declares translation impossible because no foreign word can ever be quite the same as the one from his own language. Just as translation is carried out every day, so is legal comparison — both are theoretically difficult but practically feasible.[*52] Nor should we underestimate the importance of the conceptual minutiae of legal systems. The precise character of the argumentative constraints to which courts are subject depends to a considerable degree on the conceptual particularities of a legal system. Differences, even minor ones, in the architecture of legal orders can also significantly change the perspective from which certain issues are addressed. In spite of the overall convergence of practical results, predicted by the principle of functional equivalence, comparing legal concepts can therefore sometimes be very rewarding — provided, of course, that it is not done in a too blinkered a way.

[50] S. Deakin, A. Johnston, B. Markesinis (Note 31), p. 57 (citing Lord Goff).

[51] This is perhaps not evident in the case of causation, where causes in fact are generally distinguished from legal causes. Nevertheless, as Markesinis et al. remind us, this should not lead us to think that the but-for stage is a simply technical enquiry from which policy factors are absent. See Markesinis et al., *ibid*., p. 186.

[52] See P. Ricoeur. Le paradigme de la traduction. – Sur la traduction. Paris: Bayard 2004, p. 27.