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Functions of Law

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Any sociological analysis of law cannot refrain from questioning why legal systems exist or, with a different terminology, which functions they perform. This is a crucial question because it goes a long way toward tackling the most natural and profound kernel of scientific thought: *why* observable things are there. In sociology, the quest for this “why,” that is, for the causes or reasons why social institutions spring up, survive, and disappear, has been self-evident since the discipline's origins. As a matter of fact, it has inspired the most influential mainstream of sociological thinking, namely “functionalism,” especially in its functional-structural variation, whose most basic tenet is precisely the idea that social institutions exist because they perform certain functions and cooperate in keeping a social structure in its best state, or in equilibrium—a concept borrowed from Vilfredo Pareto (1848–1923).

Functions and Functionalism

Therefore, the quest for the social functions of law goes hand-in-hand with the evolution of sociology of law in all its stages, and scholars often place it at the core of sociolegal reflection. Think of Émile Durkheim (1858–1917), the pioneer of functional explanation in sociology. According to his theories, which portray law as the symbol of social solidarity, one may distinguish the diverse shapes that law assumes historically based on the functions performed by the diverse sanctions through which societies react to deviance. In simpler societies, held together by “mechanical” solidarity, one encounters deviance by *repressive* sanctions, functionally addressed to restore social links on a predominantly symbolic level. By contrast, in more complex and differentiated societies, whose solidarity is “organic,” *restitutive* sanctions increasingly restore social links, as they are functionally addressed to act on a predominantly material level.

Many sociologists worked throughout the twentieth century along these lines, focusing on disentangling the functions of law, which they conceived as the contribution offered by law to the equilibrium of a society, seen as a whole, whose constituent elements cooperate in keeping it in its best shape. Naturally enough, a perspective such as this displays evidence of a systemic character. One sees a whole society as a system. Single social institutions, in their turn, are subsystems, each of them performing one or more functions for the sake of the whole. Talcott Parsons (1902–1979), the most

celebrated exponent of sociological functionalism, gave a significant example of this approach when he included the legal system in his general vision, stressing that the “primary function” of law is *integrative* and thus addressed “to mitigate the potential elements of conflict and to oil the machinery of social intercourse” (1962: 58). This [p. 611 ↓] function, he added, can only be performed successfully if four problems—also termed as functions—are solved: the legitimation of the legal system, the interpretation of legal rules, the efficiency of sanctions, and the organization of an independent jurisdiction.

In his attempt to reshape functionalism, in ways that it could evade the sharpest critiques raised against it, especially from the trenches of philosophy of science, Niklas Luhmann (1927–1998) gave a seemingly general, though more abstract, description of the functions of law. He took a more neutral notion of function as “a regulative scheme of sense that organizes a range of reciprocally equivalent performances” (1970: 14) and stated that, in an exceedingly complex and contingent world, social systems exist in that they reduce social complexity and give some stability to social expectations. The legal system—he explained—fulfils this function because it enables one to select between diverse choices on the basis of a binary code, “lawful” or “unlawful” (*Recht-Unrecht*), that cuts in almost automatically or, as he said, “self-referentially.” When applied to a multitude of behavioral dilemmas, this selective mechanism contributes to rendering normative social expectations—those not abandoned despite deception—more secure, harmonious, and reliable. Therefore, as Luhmann said, law “relies on the congruent generalization of social expectations of the normative kind” (1983: 105).

Ideological Bias and Dysfunction

Although such portraits of law and its social functions come as no surprise, because they echo philosophical visions that have been deeply rooted for centuries, they nevertheless appear to be rather unilateral and ideologically biased. To make use of the best functionalist lexicon, one might say that they look exclusively at the so-called “eu-functions,” that is, the positive contributions offered by an element of a social system in its best condition, as seen through the analyst’s own eyes. However, this is precisely the weakest point of the whole construct of sociological functionalism. First, it is something of a commonplace—as the more creative functionalists, such as Robert Merton (1910–

2003), have also recognized—that some social institutions do not contribute to the welfare or equilibrium of a whole system of social relationships, because they perform “dys-functions” rather than eu-functions.

For example, the practice to which successive Italian governments have made fairly regular recourse—that of exchanging a “pardon” for such offenses as tax evasion at knock-down prices—may be considered a relatively stable legal institution. Nevertheless, one can hardly describe this as something useful to the social system as a whole; rather, it benefits certain political factions or groups of white-collar offenders. Beyond this, and more generally, the weakness of this perspective stems from the fact that a society’s “best state” or “state of equilibrium” defies definition in an analytically precise manner.

On one hand, any such definition looks ideologically biased. What is well balanced for Tom may not be so for Dick, leading to a radical dissension between them about whether one institution or another is eu-functional or dys-functional. On the other hand, the very concept of equilibrium, when applied to symbolic systems, as Ludwig von Bertalanffy showed all social systems are, is in itself symbolic, even metaphorical. This is due to the high number of variables that contribute to its definition, the subjective perspectives which affect it, and not least, because “all things flow” and an equilibrium, if there ever were to be one, is always precarious, subject to imbalances that may generate more balanced states at some time in the future.

The weight of such remarks becomes clear if one looks precisely at Parsons's conceptions. Perfectly efficient legislation, which achieves the effects aimed at by its framers, may not achieve social integration, but rather dissension, social laceration, and sharp conflict, in short, basic social disequilibrium, to adopt the functionalist lexicon. Laws passed during the French Revolution that repealed the more typical medieval legal institutions—such as collective property, common land, and the right of primogeniture—in the name of economic laissez-faire were evocatively termed as “eversive.” They did not bring any advantages to that society's constituent equilibrium, though they were indisputably helpful to the new bourgeois elites.

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One can make similar remarks, *mutatis mutandis*, about Luhmann's conceptions that substitute basic social needs, that is, reduction of complexity and contingency, for the "best state" or the "equilibrium" of a society. Leaving other questions aside, such as the truism that legal systems operate selectively according to the *Recht-Unrecht* binary code, one commonly held opinion suggests that each legal system may work so that social complexity and the level of contingency are increased rather than reduced. Think of the normative overload of contemporary legal systems, especially of private statutory law, for a significant example.

Revitalizing Functional Analysis

Theoretical and methodological remarks of this kind inspired the more perceptive critics of functionalism as well as those who attempted to revitalize the basic tenets of functional explanation throughout the closing decades of the twentieth century. They suggest that one should tackle the topic of functions of law in such a way as to avoid, as far as possible, the risk of reaching any excessively biased conclusions. Rather, analysts should give account of how legal systems operate concretely, regardless of whether they are acceptable from one viewpoint or another. In short, as Norberto Bobbio (1909–2004) suggested, the challenge is how to safeguard the *method* of functional analysis, which leads scholars to wonder "why" social, including legal, institutions exist, without paying too high a price to the functionalist *theory*. Nor, for the sake of theoretical functionalism, should one brusquely refute other general visions of society, such as conflict theories, which are at odds with theoretical functionalism but look particularly suitable with respect to the question of "why" law exists in human societies.

In a world of scarce resources and corresponding conflicts, it is scientifically important to test how law acts as the "structure of conflict," as Vincenzo Tomo (1930–1990) said. This kind of research is not impossible, on condition that one not mean the very notion of function *objectively*, that is, as the contribution given to the best state, or the needs, of a social system by its constituent elements. Rather, scholars might adopt the notion of function *subjectively* and *teleologically*, that is, as the contribution given by a social system's element to a project of social action framed by those who act through that element upon that system. Peter Achinstein defined these two alternative approaches

as the “good consequence doctrine” and the “goal doctrine” respectively, in a thoughtful methodological essay that listed some of the recurrent meanings of the notoriously polysemous word *function*.

This line of thinking may lead to a more realistic, and analytically less debatable, perception of the functions of law. There is actually no need to reject all the notions that scholars have expounded in the past. What matters is to reconsider them from a different perspective, which might enable the concepts used to be applied to any kind of legal system or legal ruling, irrespective of a person's ideological preferences.

Karl Llewellyn (1893–1962) offered one influential contribution that has proved to be useful from this viewpoint in an essay devoted to listing purportedly value-free “law-jobs.” These were (1) disposition of trouble cases, (2) preventive channeling and reorientation of conduct and expectations to avoid trouble, (3) allocation of authority and the procedural arrangement that legitimize action as being authoritative, and (4) “net” organization of the group or society as a whole to provide direction and incentive. Such jobs were represented as universal, that is, proper to any legal system, whatever its nature, development, or stage of evolution.

Several law and society scholars followed this line by supplying taxonomic lists of functions of law. For example, E. Adamson Hoebel (1925–1983) spoke of (1) definition of relationships among members of a society through the assertion of what is permitted and what is ruled out, (2) allocation of authority, including the determination of who may exercise physical force, (3) disposition of trouble cases when they arise, and (4) redefinition of relations between individuals and groups as the conditions of life change. Vilhelm Aubert (1922–1988) enumerated the functions of (1) reinforcing authoritatively promulgated rules to achieve conformity, (2) conflict resolution, and (3) allocating resources. Lawrence Friedman offers a richer catalog: (1) justice, considered as “the notion of meting out to persons and groups what they deserve, [p. 613 ↓] ethically speaking—no more and no less”; (2) settlement of disputes; (3) social control; (4) creation of norms, “the raw materials of social control”; (5) recording, that is, “a storehouse or memory for the thousands upon thousands of transactions necessary or desirable in the modern world”; and (6) announcement of “what rules and standards are,” especially in the field of penal law, which per se performs specific symbolic and cathartic functions (1975: 17–20). All such functions, however, seem to converge in

a sort of metafunction (though Friedman does not use the word “function” here). That would be *allocation*, which coincides with the assessment of goods, as well as authority and power-chances among diverse claimants.

Recent Thinking about Law's Functions

While not all these notions are completely value-free, they do offer a good opportunity for some fruitful thinking to move also from the viewpoint of a functional analysis that is not too ideologically biased or compromised with functionalist social philosophy. Nevertheless, they raise questions of both an analytical nature and appropriate linguistic choice. In particular, it could be reasonably argued that, for the sake of analytical clarity, the use of the term *function* should be reserved for only some of the jobs that legal systems actually perform. Harold Berman and William Greiner suggest those that are coessential, that is, the jobs that would be logically inconceivable that legal systems not perform, and which, for that reason, display a higher logical status than any other notion.

For example, starting from this viewpoint, and adopting a teleological notion of function, Vincenzo Ferrari observes that only three of the numerous notions pronounced by various writers under the label of *function of law* seem to occupy such higher logical status—namely social orientation, dispute treatment, and power legitimation. *Social orientation* means the aptitude of the legal system to offer a multitude of behavioral models, organized more or less systematically and more or less suited to channeling people clearly and unequivocally. *Dispute treatment* means that the legal system supplies institutional channels to which people address disputes, although this does not imply that they be solved peacefully because law can also generate, multiply, or perpetuate conflicts. *Power legitimation* means that law offers a set of normative arguments usable by social actors, in proportion to the amount of power they use, vis-à-vis both their counterparts and wider audiences, to justify their own decisions and achieve consent.

Such concepts, which André-Jean Arnaud and María Fariñas-Dulce as well as other scholars have adopted, might perhaps fit in with a description of how any legal system works, whatever its qualities, its efficiency, and the values it embodies, as Llewellyn

advocated. They also seem to include many other concepts, such as the organization function, which one may imply from both the social orientation and the dispute treatment functions. Seemingly education, which Jean Carbonnier (1908–2003) advocated as an important function of law, echoing Plato's tradition, might reduce to either social orientation or power legitimation. Again, the general concepts mentioned earlier might also comprehend such notions as the repressive function and the promotional function, which Bobbio ascribed to nineteenth-century liberal society and to the twentieth-century welfare state respectively. This vision was basically shared by other law and society scholars such as Aubert on one side, and Michel Van de Kerchove and François Ost on the other.

Social Control

One may wonder whether, in addition to suiting a value-free analysis and displaying a general logical status, the proposed notions should be ultimate, that is, beyond further reduction. Actually, functional analyses of law often look for the function of law, rather than its many functions, going in search of an all-embracing notion that comprehends all others. Two examples are especially significant here.

According to a recurrent formula, quite popular in the sociological tradition, the metafunction that includes all other subfunctions is *social control*. Although one can consider it in a weak sense, as the [p. 614 ↓] chance of individuals to use adequate means to affect each other's actions, sociologists usually adopt this notion in its stronger sense. For instance, Roscoe Pound (1870–1964) and Julius Stone (1907–1985) used social control as the top-down activity performed by governing elites to persuade or force people to conform their behavior to a law-and-order pattern and to refrain from threatening those in power.

In this perspective, advanced especially though not exclusively by Marxist writers such as Ralph Miliband, law is essentially a tool of minority domination wielded over majorities—the bourgeoisie over the proletariat, or the governors over the governed. Emphasizing the importance of repressive legal institutions, especially in penal law, they advance this theory vigorously in the radical currents of critical criminology. This vision

is unquestionably evocative because it is tellingly revealing about autocratic political systems where power is strongly concentrated.

Yet an objection could be brought—somewhat symmetrically with the eu-functional visions advanced by functionalist sociologists—that this represents but one side of the coin, the crudest one, while stressing the (undeniable) repressive and oppressive potentialities of legal machinery. While it is true that law is often the sheer imposition of the stronger upon the weaker, it is also true that it frequently springs from agreements between peers. It may even spring from struggles and victories of the weaker against the stronger (as with human rights), in the name of a justice ideal that is naturally connected with the idea of law.

Justice and Allocation

The theme of justice, in a broad philosophical sense, inspired another attempt at sorting out *the* function of law—the one Friedman asserted in *The Legal System* (1975). After listing the functions already mentioned, he focused his attention on justice, a notion that accompanies thinking about law throughout history. He then asked, “What is this justice that, in the broadest sense, the legal system must produce?” The answer he provided brings to the sociological field a philosophical notion that goes back to Aristotle. “For our purposes,” he said, “it refers to expectations and assessments” (1975: 20). Thus, according to Friedman, *allocation* seems to be the broadest and ultimate concept that one may use to explain how law works functionally.

The concept of allocation, as Friedman intends, is certainly general and particularly suited to a world in which resources (economic, political, and social) are scarce and, therefore, cannot satisfy all expectations. Yet there may still be scope here for wondering whether this notion, too, reveals more than one side of the situation. Making precise use of Aristotelian terminology, it could be observed that justice is not only “distributive,” that is, addressed to allocating scarce resources, but also “commutative,” that is, addressed to weighing and comparing different values, not only in the economic field. Nevertheless, one cannot deny that allocative effects connect with all of the general functions indicated above. Therefore, it would also be hard to say that it is devoid of heuristic value.

Quite certainly justice, in its most profound and ethical sense, is in itself a value that cannot be neglected when speaking about law. However, leaving all the difficulties arising from its definition aside, this topic must be separated from that of the functions of law to avoid confusing two conceptually different levels of discourse, that of reality and that of ideals. Renato Treves (1907–1992) expressed this correctly when he said that one should describe justice as the goal of law, rather than as its function, though acknowledging that one could by no means avoid the question of justice.

So far, the discussion of functions of a system of law have been conducted essentially on an analytical level, for the sake of clarity in recommending some verbal uses in the framework of scientific debate. A different approach would be required to discuss the functions of individual legal institutions, such as lawmaking, ownership, inheritance, contract, penal repression, or the judiciary, instead of the functions of law as a whole system.

Functions of Specific Legal Institutions

Here are some examples of specific parts, or units, of a legal system. The processes of lawmaking have [p. 615 ↓] recently manifested some problems that one can trace back to the functions of statutes. Classical legal positivism looked at statute law as a tool addressed to planning the future in a way that would drastically reduce uncertainty and risk. In recent decades, and especially during the age of the welfare state, many parliaments have made increasingly *symbolic* use of lawmaking, promulgating confused or even empty laws. They then relied on the simplified and often false impression that people would get more from the statutes through the media than from their capacity to channel social action effectively.

Ownership, a target of Marxist criticism, has apparently been so dissolved into a myriad of distinct power and control positions as to suggest to Karl Renner (1870–1950), himself a Marxist writer, that the institution in question had remained intact in its external shape, but had changed its substance and function. Ownership, in his opinion, showed less aptitude to protect the “virtual” domain over wealth, typical of industrial and financial economies, in comparison with the physical domain over things, typical of rural economies.

Contract, in principle, is a means whereby the contracting parties choose their respective rights and duties freely. Actually, its functional analysis reveals that the balance of power between the parties is so asymmetrical in many cases that one party can impose its will wholly on its counterpart, something that is becoming increasingly visible in today's transnational economy. Moreover, it has become clear that contractual clauses imposed by powerful businesses tend to be valid worldwide and to become a kind of surrogate of legislation on the transnational scale.

The characteristics of penal repression, the synthesis of state sovereignty, have changed as the function of statutes has changed. According to the enlightened vision inherited by Cesare Beccaria (1738–1794), penal repression should intend functionally to counter those behaviors that are more risky for social solidarity, as Durkheim would have put it. Actually, and to a certain extent against Durkheim's forecast, states have made increasing use of penal repression to attain contingent aims. On one hand, they have invented countless “artificial” crimes (*mala quia prohibita*) for the sake of their own elites' occasional interests. On the other hand, they have used penalties even more selectively, under the pressure of the media and law-and-order campaigns, as any research of social stratification in prisons will show.

The judiciary, in principle a body distinct and separate from political government, performs some functions that reveal how close it is to power, willingly or unwillingly. Justice has become an arena, highly visible through the media, where political elites fight to delegitimize their adversaries, and where each political faction tries to exert more or less hidden control over public prosecutors and judges.

These are but some examples. Actually, any other legal institution, such as human rights, constitutions, taxation, administrative discretion, labor law, or immigration, fits in with a functional analysis aimed, in many cases, at showing how functions change with time, that is, in a “law and social change” perspective. To conduct such analyses, it is especially important to distinguish between the official or declared functions of institutions and their unofficial, undeclared functions, thus adapting and updating the manifest-latent scheme put forward by Merton in one of his best methodological essays.

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See also

- [Aubert, Vilhelm](#)
- [Beccaria, Cesare](#)
- [Bobbio, Norberto](#)
- [Conflict](#)
- [Critical Criminology](#)
- [Dispute Resolution, Alternative](#)
- [Durkheim, Émile](#)
- [Functional Law and Economics](#)
- [Hoebel, E. Adamson](#)
- [Judicial Politicization](#)
- [Legislatures and Lawmaking](#)
- [Llewellyn, Karl](#)
- [Luhmann, Niklas](#)
- [Marxism](#)
- [Parsons, Talcott](#)
- [Pound, Roscoe](#)
- [Property, Sociology of](#)
- [Renner, Karl](#)
- [Social Change and Law](#)
- [Structural Functionalism](#)
- [Symbols in Law](#)
- [Tomeo, Vincenzo](#)
- [Treves, Renato](#)

Further Readings

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