

Week 2: The Traditional/Functional Comparative Law Method

Lecturer: Victoria Reznik, June 14, 2021



What is Methodology?

It's about **how** a researcher **systematically designs a study** to ensure valid and reliable results that address the research aims and objectives.

For example, how did the researcher go about deciding:

- **What** data to collect
- **Who** to collect it from
- How to **collect** it
- How to **analyse** it

Four Critical Parts to Comparative Methodology

1. Acquire the skills of a comparativist in order to evaluate law clearly, objectively, and neutrally
2. Evaluate the law as it is expressed concretely, in words, action, or orally
3. Evaluate how the law actually operates within a culture
4. Assemble data and conclude comparative observations

What is the Functional Method?

- Doesn't have a widely accepted definition
- Generally it looks for the way a certain social, political and/or economic problem is solved by law
- It is factual, focuses not on rules, but on their effects
- It focuses on events and not on doctrinal structures and arguments
- Judicial decisions as responses to real life situations are examined
- Compare legal systems with their various judicial responses to similar situations
- Focuses on functions or even DYSfunctions

What is the Functional Method?

- Objects being studied are understood in the light of their **functional relation to society**
- Law and society are separated, but related
- Functionality can sometimes determine ‘better-law comparison’ based on which law fulfils its function better than the others

Tertium comparationis: Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems.

Problems with the Functional Comparative Method

- Known as the 'mainstream' method
- Is widely accepted but also contested; associated with the 'West'
- There is no 'one' functional method
- Stuck between the social sciences and legal studies
- There are 7 different concepts of functionalism across other disciplines
- Under-theorized and borrows from other disciplines

#1 - The 7 Functions of Function: Epistemological Function of understanding Legal Rules & Institutions

- The first function of functions is epistemological
- Functionalist view focuses on the complex interrelatedness of societal elements, not just on facts or rules
- The core is factual research, but still aims to explain the effects of legal institutions as functions and also looks at non-legal responses to societal requisites
- Assumes culture is embedded in the law, the separation of society and law enables more analytical reasoning

#2 - The 7 functions: Comparative Function of Achieving Comparability

- The second function of function is *terrarium comparationis*
- Max Salomon, philosopher, understands institutional problems as universal problems of general jurisprudence (theoretical study of law) and people understand them as universal problems of societies
 - Unclear whether *terrarium comparationis* fits both of these perspectives
- 2 problems can arise: Very different entities are compared to each other or specific societal structures are so unique, they are no longer universal

#2 - The 7 functions: Comparative Function of Achieving Comparability... Continued

- A focus on the more general level can yield more complex, richer, and functional analysis than to focus on a problem with a high degree of specificity
- Results of a law or a judicial decision to a particular problem can be the same from two different legal systems, so the functionalism is the same, but the legal institutions are different
- It's constructivist, meaning the comparatist is always learning in action and is interpreting the material in their own way

#3 - The 7 functions: Presumptive Function of Emphasizing Similarity

- Zweigert's *praesumptio similitudinis*: assume similarities, different societies face similar problems, so a society must have a functionally equivalent institution that can address the problem
→ If a functionally equivalent institution to a problem is not found, should look again with a wider search

#3 - The 7 functions: Presumptive Function of Emphasizing Similarity... Continued

Three problems with *praesumptio similitudinis*:

1. Scientific methodology dictates that a hypothesis should be falsified rather than proved
2. Should not favour similarity over difference, undermines neutrality and objectivity
3. Similarities will only appear after stripping legal orders and institutions of their details and culture elements through a reductionist approach

#3 - The 7 functions: Presumptive Function of Emphasizing Similarity... Continued

- Similarities are not actually similar, they are functionally equivalent, wrong interpretation

Eg. Tort law and insurance law fulfil the same function, to provide accident victims with compensation, they are different in their doctrinal structures and in their effects regarding problems, such as deterrence. Only similar as a solution to a problem = they're functionally equivalent but NOT similar

#3 - The 7 functions: Presumptive Function of Emphasizing Similarity... Continued

“Functionalism leads to comparability of institutions that can thereby maintain their difference even in the comparison. It neither presumes, nor does it lead to, similarity.”

#4 - The 7 functions: Formalizing Function of System Building

- Zeigert's last step in comparative method is 'building a system'

Eg. "Comparison reveals that ownership is transferred by mere consent in some legal systems, while others require the passing of possession, but the answers to specific fact situations are remarkably similar. These results can be formalized in three easy rules: Between transferor and transferee ownership passes through mere consent; with regard to third parties ownership passes through transfer of possession; third parties with notice must accept the transfer of ownership between transferor and transferee under the first rule."

#4 - The 7 functions: Formalizing Function of System Building... Continued

- The example built a system out of rules
- This system is open to criticism and is formal
- But legal doctrines and institutions are also open to criticism and are formal as well
- Michaels says that this is alright and that it provides another level of analysis

#5 - The 7 functions: Evaluative Function of Determining the Better Law

- Equivalence functionalism provides limited tools for evaluation
 - Equivalence does not allow for superiority or inferiority
 - Would need an ideal function to compare it to = Doesn't exist
- A certain a law can be better at a certain function, but NOT better overall

#6 - The 7 functions: Universalizing Function of Preparing Legal Unification

- Functional method since the early days had the goal of UNIFYING law either regionally or in the world on the basis of similarities
- 3 reasons why this method is bad for unifying law:
 1. This method cannot reveal the best legal system alone
 2. It works well to critique doctrine and not create new doctrines
 3. Lawyers don't want to learn new rules if established ones fulfil the same function
 4. Unification may disrupt the unique relationships between institutions in a legal system

#7 - The 7 functions: Critical Function of Providing Tools for the Critique of Law

- There exists a tolerance of foreign law in practice

Eg. “Western courts are now more willing than before to recognize Islamic divorce based on unilateral repudiation because it is functionally equivalent to divorce in Western democracies, which, though nominally consensual, can effectively be brought about against or without the will of one of the spouses.”

#7 - The 7 functions: Critical Function of Providing Tools for the Critique of Law... Continued

- The method doesn't provide us with tools to evaluate foreign law
- However, it does encourage awareness of culture and offers a perspective from the outside, which can help in critiquing foreign law
- More difficult to critique our own law, recognizing legal system abroad does not shine light whether your own system is 'bad or 'good'
- The method's separation of legal systems undermines the conceptualization of interdependence between them or overlap

Instructions for the functional method:

1. Pose a functional question to a problem you want to explore
2. Present the systems and their way of solving that problem
3. List similarities and differences in ways of solving the problem
4. Adopt a new point of view from which to consider explanations of differences and similarities
5. Evaluate critically discoveries and consider which solution performs better or 'functions better'