**Submission for the YCC 8th Global Conference**

**Title** : Developing a method for Comparative Law and Economics

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**Abstract**

This paper aims to overcome the chronic methodological weaknesses of Comparative Law by claiming for a concrete manner of introducing Law and Economics (L&E) into the structure of the functional method.

Even if cultural legal studies have not successfully undermined the core of the functional method (*i.e.*, that legal institutions from different legal systems that address the same problems are comparable), some of its criticism can be seen as evidence of two of its structural shortcomings. Once it is accepted that social problems are not universal but contingent upon cultural realities, the method reveals itself as poorly positioned to construe the social problems that constitute its starting point. Second, the incapability of the principle of functionality of engaging in normative discussions makes apparent that, once it has been used as a criterion to identify functional equivalents, it can hardly offer normative standards for the evaluative stage of the method.

Due to the broad causal relations of law and economic performance, the similarity of its method, and its underlying utilitarian moral theory, economic analysis of law has been proposed to cure the shortcomings of the functional method. To be viable, this approach needs to overcome, at least, three potential pitfalls. First, the inherent tension between, on one side, the rich descriptions of the law in action characteristic of functional Comparative Law and, on the other, the aim of L&E to reduce the complexity of the real world by bringing it into stylized models. Second, the risk of inadvertently importing into the method economic biases from the models used by L&E. Third, the general criticisms made against efficiency as a normative standard. The first two problems can be overcome by finding the correct place for Comparative Law and L&E within the traditional framework of the functional method; the third, by acknowledging that efficiency might need to be balanced with other distributive goals.

The key concepts of the functional method are ‘function and context’ and this is what this discipline should concentrate on. First, the functional approach is well-equipped to go beyond black letter rules to find the real-life legal solutions applied in different societies to solve a problem already defined in economic terms. Second, its tendency towards rich description, makes it also suitable for accurately describing each institution and its environment. Taking advantage of this, Comparative Law should be relied upon to avoid economic biases by including in the descriptive stage a macro-comparative account of the different standing that policy arguments have in the compared jurisdictions. For example, in the US, this kind of reasoning is much more internal to the law than in civilian jurisdictions, as American courts openly use policy arguments as normative standards to fill gaps and systemize case law.

In turn, L&E should be used in the stages that need to simplify reality. First, its ability to explain human behavior in a stylized form can be valuable in construing the research problem. For example, models such as the ´tragedy of the commons´ (*e.g.* for property law) or ´Akerlof lemons´ (*e.g*. for sales law) can be fruitfully employed to frame a same problem in a variety of different legal contexts. Similarly, L&E can also offer a common language for the analytical comparison stage. For example, the (assumed) unbridgeable nature of different legal cultures can be overcome by describing them as networks of language, conceptual structures and procedures that, because of the commonality of their use, reduces the cost of interactive behavior. Finally, L&E can also explain differences and similarities across jurisdictions. For example, the high start-ups costs, learning effects and adaptive expectation of property law systems makes them increasingly harder to change once they have been put in place, which explains why, despite their close economic and ideological foundations, common law and civil law have retained property laws that are technically so distant.

The use of L&E in the evaluative stage is less straightforward as, despite the merit of their transparency, efficiency arguments have been fiercely criticized as normative standards. For this purpose, it is sufficient to acknowledge that efficiency is not the only normative reason that can direct a decision, but that it still might be relevant for almost any other normative criteria. In legislation and case law, efficiency competes with other goals that can collectively be seen as ‘distributive justice’, and L&E serves to make the costs of these distributive preferences apparent. The different intensity with which legal systems sacrifice efficiency for these other goals depends on political and cultural considerations which are fascinating for comparative research.