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1 WEEK 2 – traditional comparative law method

Traditional Comparative Law Method

- **The process of comparing laws has a long history**
 - Need to consider for today – what is the most appropriate method for comparison?

Note: From a practical perspective what you need to be across is the **typical structure** of a undertaking a comparison – this is the methodology to be used.

TYPICAL STRUCTURE

Step 1 – What is the legal problem you need solved?

- YOU need to ask questions then narrow down
- Drill down and find the functional problem and solve it

Step 2 – Identify which countries are to be compared

- Describe the legal position – the law

Step 3 - Look at the primary and secondary sources

- Important to consider access to material

Step 4 – Comparative analysis

- Identify how the laws are similar and different
- Explain impact of: historical factors, philosophical, cultural, religious, economics, political stability etc

Step 5 – Critical Policy Evaluation

- Looking for the most efficient solution
- Which rule best addresses the functional problem?

Important considerations when comparing

- When comparing legal systems they must not be too similar or too different
 - They must be comparable
- **Neutrality** is important. Why ?
 - You want to present options objectively. This is a problem because we all start from a position of bias? (Think about this)
- Do not compare too early. Identify then explain.
- When undertaking critical policy evaluation
 - Remember context – it is important because what works in one country may not work in another
 - When using foreign law to test domestic law there can issues of bias

Unification – good idea ?

Know the difference between **Functionalism** and **Universalism**

- **Functionalism** – used to identify the topic of comparison
 - There are limitations
- **Universalism** – looks at similarities in law and legal systems – common way of solving problems
 - There are limitations

You should be able to:

Construct an analysis of the answer to a legal problem in two jurisdictions making use of the traditional method of legal comparison.

Step 1: IDENTIFY PROBLEM

Consider laws, choosing different jurisdictions

What you are considering and for whom (yourself, client, law reform)

Secondary sources – opinions of academic writers,

Standard approach - Typically look at one Germanic system, one Romanic system and one CL system that is different to your own.

- quite a limited/conservative view

Choice of jurisdiction/systems may predetermine your conclusions – not a sound result, need to be certain that you have maintained a level of objectivity in planning your research

Group presentation – follow traditional method

Step 2: DESCRIPTION OF LAWS

Describing laws of jurisdictions – hard to do when unfamiliar with laws, culture and language – not living there etc

On translation on foreign legal terms – certain words unique to their description, when translating include original term in your description in italics and brackets so next person reading your research can go back to that term.

Description of laws –

- - give socio context as to the application of that law objectively e.g. there's a rule created however no way of enforcing it, at description plot of foreign law maybe worthwhile to point out. Even though looks good on paper has major flaw and won't work in practice
- - Other context, foreign law description within legal families
- - Institutional structure, looks good but no political rules to enforce it

STEP 3: COMPARATIVE ANALYSIS

Start with home country first – easy to access laws, list laws and relevance

Necessary to inform of potential differences and potential similarities – aim of comparative law to identify these

Many explanations – need to enquire why, might be historical, cultural, religious, state of economy – also main focus of economic (industrial or agricultural), political stability, transplantation, structural explanation (countries laws similar as both members of world trade organisation or EU etc)

Be careful of

- racist bias, especially when comparing systems in developing countries
- generalisations of legal family groupings, cannot assume that two legal systems are from the same family and therefore exactly the same