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WEEK 1 – INTRODUCTION

Int'l use of comparative law

Convergence of Legal Systems: Catalysts, which trigger similarities between different legal systems, e.g. int'l commercial law may encourage development of similar responses to legal problems. Contrarily, divergence of legal systems is what drives legal systems to differ.

Topics of Comparative Law

Pluralism: More than one legal system in one jurisdiction; how they interact; and the ways, in which the laws of these systems could benefit from the others.

Classification

Federal and Unitary political systems
Domestic and International Law
States with Dualist and Monist tradition
Common Law and Civil Law legal systems

Legal Families: Bases of Classification

History, ideology (capitalism, liberalism, communism), structural system of law (is there a constitution, is it a common law country?), codification level (civil codes, common law system where cases are considered), religion, politics (democracy, Monarchy), societal beliefs about law, etc.

Why study comparative law?

- Domestic use
- Legislative examples from foreign law
- Regulatory competition (for instance, favourable tax incentives; strong protection for shareholders and/or creditors of companies)

Judicial use

- Instructive use in novel cases
- Conflict of laws

International commercial law

- Unification of laws
- Regionalisation
- International commercial law through unification agencies
- For instance, Uniform standards of the ICC

Topics of comparative law

- Similarities / Differences: is one law better than the other at resolving certain things?
- Divergence: Why do legal systems differ? Why does the practical effect of similar rules in diff. jurisdictions sometimes differ?
- Convergence: What drives laws to become similar?

Pluralism

- Two, three legal systems in one jurisdiction?
- How do they interact?
- Could they gain from each other?

Legal Families: Bases

- ❖ History
- ❖ Ideology
- ❖ Structural system of law
- ❖ Codification level
- ❖ Religion
- ❖ Politics
- ❖ Societal beliefs about law etc.

Main legal families

- ❖ Common law
- ❖ Civil law
- ❖ Romanic
- ❖ Germanic
- ❖ Nordic
- ❖ Mixed/ hybrid
- ❖ Religious law
- ❖ Confucian
- ❖ Socialist

Criticism of classification

Overemphasis of differences

- Western law have much in common
- Extensive transplantation, e.g. China

Overemphasis of similarities

- England, USA and Botswana are all in common law family, yet their laws differ a lot.
- Difficult to classify Asian and African jurisdictions
- Latin America

Disregards hybrid legal systems

What does the previous slide tell us?

- About 15% of legal systems is common law dominant
- About 55% is civil law dominant
- More than half of legal systems are mixed (the dotted ones)
- Influence of customary (indigenous) law is hard to factor in

Horizontally divided legal systems

- 1 jurisdiction – diff. regions subject to different legal family
- Quebec in Canada
- Scotland in UK
- Nigeria
- Africa – Customary law is still predominant in rural areas

Vertically divided legal system

- Different areas of law belong to different legal families
- South Africa and Sri Lanka
- Islamic law

Parallel legal systems

- Different legal systems apply to different persons
- South Africa – family law choice of customary law
- India

WEEK 2: TRADITIONAL COMPARATIVE LAW METHOD

Four Steps for the Typical Structure of Traditional Method

- I Preliminary considerations, deciding on research question & choice of legal systems for comparison;
- II Describing the laws of these countries;
- III Comparing the laws of these countries, exploring the reasons for unexpected similarities and differences; and
- IV Evaluating findings and making policy recommendations if possible.

I Preliminary Considerations

Topic

- i. In practice, this will usually be determined by your client's needs (see week 1).
- ii. **Functionality:** Starting with a particular legal topic may not be advisable, if for instance in the example above, one of the legal systems shields a manufacturer from liability altogether. It is better to start with a functional question: e.g. How are disputes solved when a consumer is injured or suffers loss due to faulty products?

Countries to be examined

- i. **Primary resources (are they accessible in your language?):** Ensure to choose countries where legislation, cases, regs are available. Sometimes there will be certain resources that will be unavailable.
- ii. **Secondary resources (more important in some systems):** Journal articles, commentary, this provides someone else's analysis of the law and provides the context of the legal area(s). This will provide insight into whether a particular law is still prevalent in the country – how influential are the laws in that country? We may not understand the other countries' cultures as well as someone else who has written journal articles WRT.
- iii. **Number of Countries:** How many countries are going to be examined? Three countries will be more desirable than two – try and examine vastly different countries in terms of legal systems. Why did you decide to study that number of countries?
- iv. **Comparability:** They must be comparable (not too similar; not too different). Maybe you will decide to study two similar countries and one extremely different country.

II Description of Laws

Neutrality

- i. **Own preconceptions:** Stay neutral through the analysis.
- ii. **Unfamiliarity:** Can one ever present another's law as they would? You may not be as familiar with the other countries' legal system and/or culture as a native from those countries.

Translation of foreign legal terms

- i. **Best practice:** Quote a foreign term the first time in the foreign language, with the translation you will use, i.e. good faith (*Treu und Glauben*).

Criticism of foreign law at the point of description?

- i. *Leave this for step 4*

Provide context of the rule

- i. E.g. France – civil law (Codified), inquisitorial system, career judges

Has the law worked as planned?

- i. Secondary sources will guide your exposition

The structural society the law functions in

For instance, state interference in judicial system

III Comparative Analysis

Identification of Variation (Differences v Similarities)

- i. **Comparison:** How do the laws of the compared jurisdictions differ? Are they similar? Why are the differences there? Are there reasons for such differences?
- ii. **Functionality:** How do the laws work?
- iii. **Criticism of Comparison:** It is often contended that comparative law lacks proper comparison; it is often presented as 'meticulously detailed parallel descriptions' (Hantrais) or, 'comparatists often do not compare; they assemble' (Legrand).

Analysis

- Historical factors
- Philosophical, cultural, religious factors
- Economy (developed, industrialised, agricultural, unemployment)
- Political stability
- Transplantation
- Structural explanation (member of EU, member of the WTO)

Be careful of:

- i. Racist biases, especially when comparing with legal systems in developing countries;
- ii. Generalisations of legal family groupings.

IV Critical Policy Evaluation

Efficacy

- Which rule best addresses the functional problem? Are you looking for a certain rule?
- E.g. the rule, which best protects something or the rule, which solves
- Remember to place this in context – what works in one country might not be workable in another
- Might be especially relevant when considered in the sphere of legislative reform
- Use foreign law to test domestic law
- But be careful when advising that foreign law should follow domestic law's suit – bias? Unification?

Functionalism and universalism

Functionalism

- Used to identify the topic of comparison (step 1) – What is the function of the law?
- A socio-economic problem serves as the point of departure (start with the legal problem and then branch out and address the way, in which the comparative jurisdictions deal therewith).

Why?

- Diff. legal systems may address the same problem by means of different areas of their law.
- For instance, liability for injury caused by road accidents may either be found in tort law or in the social security system (Diff. systems will address the same two problems in a diff. way).

Limitations

Requires comparability, limits the systems available for comparison

Western comparatists often only compare with the West

Certain areas of law often not explored, because of their dependence on social/cultural systems

Often restricted to black letter law in tort and contract

Universalism

Seeks the similarity in law and legal systems – ‘Universal principles of natural law’ or ‘principles of justice’.

Does Universalism Make the Comparison Redundant?

- The “Common Core project” [James Gordley, *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001)].
- Gordley starts with a series of scenarios, to which legal experts from each jurisdiction must provide their legal response.