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Comparative Law – Preparatory Study Group Report

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At the pre-meeting on Monday 23th, 2009, our group discussed the notion of comparative law, the concepts of legal identities and legal families, as well as the issue of altered perspectives of legal knowledge. This was done on the basis of articles which we had read for the meeting, and our previous knowledge of comparative law and comparative research. The discussion in the group was closely connected to the comparative studies, which the participants were going to/were conducting within the frames of their doctoral projects.

Our group has highlighted the following aspects:

1. The importance of comparative law for legal research

Ex.: the concept “torture” can be defined and applied in different ways, depending on whether it belongs to the sphere of humanitarian law or human rights law. Torture can be prohibited in one regime, and it can be permissible in another regime.

This example illustrates the need of comparative law, which helps to distinguish between different interpretations of one and the same concept. The meaning of the concept may be changed depending on the area of its use.

2. Comparative law can be of a descriptive or normative character (or both)

We make a descriptive comparative study when we look at what the rules in another legal system are, or when we use one legal system to describe the rules in another legal system (for example Swedish law can be used as a prism to describe Danish law).

A comparative study has a normative character when a researcher tries with the help of comparison to answer the questions: “How should the best legal system be?” or “How can we improve the existing law?” The latter approach is especially important when we are to create new legislation.

Sometimes both a comparative descriptive analysis and a comparative normative analysis can be combined. In any case it is important for a researcher that he/she is clear in his/her work what he/she is doing.

3. The use of concepts

Translation and understanding of concepts should be done carefully. The legal, historical and possibly cultural context of the whole legal system should be taken into account.

Ex.: the term “government” means different things in Danish law and in the US law.

4. How is the choice of a legal system for comparative analysis made?

- Are there any criteria for our choice?
- Or are we rather flexible?
• Do we look at the language of the legal system we are going to compare with (so that we understand it)?
• Should the chosen legal system have similar legal traditions?
• Which of these criteria has priority?

5. **How much comparative law should we involve in our research?**

   • In what way should we delimit our comparative studies?
   • How many aspects of the foreign legal system do we need to write about in order to do our comparative analysis, for example in regards to the differences between the common and civil law (such aspects as history, traditions, systems, etc.)? Is it sufficient to write a short summary of the differences between the two systems, or is it necessary to do a further analysis of the two legal systems?

6. **What is the position of legal identities today?**

   Due to the processes of harmonization and globalization, boundaries between different legal identities are not so clear today. However, this can differ depending on what area of law we are talking about. For example, legal identities as far as criminal law is concerned are still obvious. This cannot be said about tax law.

7. **Do we perform a comparative study when we analyze the EU law in relation to national law?**

Thank You for Your Attention!