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Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy

Michael P. Waxman

Law students will face a plethora of legal systems as they advise clients in the twenty-first century. The inexorable growth of world trade has multiplied the domestic variations of the common and civil law traditions that lawyers must address. More and more issues that overlap temporal and religious law have arisen in both religious and nonreligious societies. Ultimately, many legal problems are reaching transnational and international proportions such that they must either be addressed within a regional legal system or be hurled into the loose structure of international law.

American law schools have chosen to deal with these issues piecemeal through a loose amalgam of law school courses under an international law heading.¹ None of these courses offers a bridge to the others; each touches upon the others but is studied independently. Comparative Law could effectively serve as a bridge between these courses. But to do this Comparative Law must be restructured from its current American-common-law/European-civil-law myopia into an introduction to the broad diversity of legal systems throughout the world.

Most law faculty agree that Comparative Law is an essential offering in every law school's curriculum. Yet faculty advisers and students often treat it as an unnecessary course for eggheads. This seeming contradiction is due in large part to the conflict between seeing Comparative Law as a primary way for students to think outside the box of American common law and also seeing it as substantively irrelevant to the areas of law in which we expect our students to practice. Oddly, this contradiction may have been fostered by the Americanization of Comparative Law. By turning the course into a comparison of

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1. A basic collection of international courses often includes Comparative Law, International Law, International Business Transactions, International Litigation and Arbitration, and International Human Rights Law. Some law schools offer other courses that address specific domestic law subjects raised to the comparative or international level.

civil and criminal procedure in the common and civil law and teaching it by the standard American law school methods, we have turned it into a dry subject. Not surprisingly, the vast majority of students do not take Comparative Law; they perceive it as irrelevant to their lives beyond law school (or replaceable by foreign law experts, as necessary).

New approaches to teaching Comparative Law must be developed to bridge the relevancy gap while expanding students' legal horizons. Indeed, the inexorable shift to transnational and global legal practice demands a comparable shift in our methods of teaching Comparative Law.²

The goal of this article is to propose an introductory course, Law in Comparative Cultures, which exposes students to a panoply of international legal systems. I have taught such a course twice, beginning in 2000. I take as my starting point the recognition that the amount of material to be covered in most introductory core courses does not leave room to include even bits and pieces of foreign law. Further, most students have little interest in plumbing the depths of civil and criminal procedure, contracts, or torts as applied in European civil law.

My course builds upon four presumptions. First, most students need to know only the basic structure and operation of the civil law system. Second, there are many legal systems beyond the civil law/common law duopoly that need to be compared. Third, there are innumerable current legal issues that can be fodder for comparisons between societies and their legal systems. Fourth, because most American law students have never been out of their own states or regions, much less their country, for more than a few weeks, visual and cultural images are essential to transport them (culturally and legally) beyond the written word. Students taking Law in Comparative Cultures will examine visual and written materials that will stimulate discussion about significant legal issues existing in diverse cultures within and beyond the civil/common law dichotomy and will enter the twenty-first-century realm of sovereign legal systems in the global village.

The Development of Law in Comparative Cultures

My course eschews the traditional comparative law casebook models. The primary casebook is built upon a structural analysis of the European applica-

2. In an article several years ago I argued that we should not continue to shunt Comparative Law to the upper-level general elective curriculum. *The Comparative Legal Process Throughout the Law School Curriculum: A Modest Proposal for Culture and Competence in a Pluralistic Society*, 74 *Marq. L. Rev.* 391 (1991). Treatment of Comparative Law as just another course on an extensive menu of choices undermines its significance in the eyes of students and fails to reflect the faculty's view that diverse legal forces external to the U.S. will play an increasingly important part in the development of our law. In that article I recommended that we forgo the upper-level elective path (or at least turn the upper-level Comparative Law course into an advanced rather than an introductory course) and instead teach comparative law as an integral part of courses throughout the curriculum. In January 1998 the Association of American Law Schools held a full-day session before its annual meeting that addressed globalization of the law school curriculum. At several breakout sessions I raised the idea of integrating comparative law throughout the curriculum. Despite broad support for the idea, the faculty participating in the breakout sessions conceded that they did not have enough time to cover domestic law, much less foreign law, in their courses.

tion of the civil law and an examination of substantive areas of law studied in the first year at most U.S. law schools.³ After laying out the legal structure and operation of European civil law, many authors gravitate to their own area of interest—e.g., civil or criminal procedure, contracts, property, torts, or constitutional and administrative law.⁴ They often use the American-style case-and-statute method (only they substitute codes) instead of applying the mental process used to train civil law students. American law students are comfortable with this “foreign” process precisely because it feels so familiar to them. They don’t really wrestle with the foreign law (much less the culture) in the context of another society. Although they ultimately will gain some technical knowledge, the absence of context makes the knowledge dry and virtually meaningless.

Alternatively, some casebook authors have attempted to expose students to the great legal and cultural differences between American and radically different societies.⁵ Unfortunately, because most students are unfamiliar with the history, culture, and legal practices in those societies, they are unable to bridge the vast divide between that which is familiar to them and the sterile description of the unfamiliar. Not surprisingly, most students are unable to take the next step of relating the substantive issues raised in foreign laws to the context of American law and society.

In contrast with those two methods, the readings in *Law in Comparative Cultures* are drawn from three areas: the laws as written, the laws as implemented, and the laws in the context of the society. The written and visual sources used in the course bridge the gaps in the traditional study of comparative law. Most reading assignments are supplemented by a related visual resource that develops an actual issue that has been confronted or is being confronted in a foreign society as well as ours. Because *Law in Comparative Cultures* uses materials drawn from many other disciplines, the course can complement many “law-and” courses and benefit from seminar-style issue analysis. For instance, I use film (particularly foreign and domestic movies and other video recording), literature, and sociology texts (particularly foreign

3. The overwhelming majority of basic Comparative Law courses in American law schools use Rudolf B. Schlesinger et al., *Comparative Law*, 6th ed. (New York, 1998). It clearly follows the traditional pattern. Other comparative law casebooks follow this example but have introduced some diversity within the civil law area. See, e.g., John H. Merryman et al., *Civil Law Tradition: Europe, Latin America and East Asia, Cases and Materials* (Charlottesville, 1994); Mary Ann Glendon et al., *Comparative Legal Traditions in a Nutshell*, 2d ed. (St. Paul, 1999). There is hope for further expansion. See Vivian Grosswald Curran, *An Introduction to Comparative Law: Theory and Practice* (Durham, forthcoming 2002); H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity of Law* (Oxford, Eng., 2000).
4. Some of the more recent casebooks go immediately to an area of specialized interest. See, e.g., Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (New York, 1999); *Comparative Environmental Law and Regulation*, ed. Nicholas A. Robinson (Dobbs Ferry, 1996); Alexander J. Bolla & Ted L. McDorman, *Comparative Asian Environmental Law Anthology* (Durham, 2000); Damien Gerardin, *Trade and Environment: A Comparative Study of EC and US* (Cambridge, Eng., 1997); Walter Van Gerven et al., *Torts: Scope of Protection* (Oxford, Eng., 1998); Larry C. Backer, *Comparative Corporation Law* (Durham, 2001).
5. See, e.g., John H. Barton et al., *Law in Radically Different Cultures* (St. Paul, 1983); Mary Ann Glendon et al., *Comparative Legal Traditions*, 2d ed. (St. Paul, 1994).

and domestic nonfiction cultural histories). The materials and structure of the course lend themselves to a team-teaching format, and the course is a good preparation for advanced domestic and international law courses.

The Structure of Law in Comparative Cultures

A sample syllabus with reading assignments by subject matter is available through the Internet at <http://www.marquette.edu/law/faculty/waxman/comparative.html>. I suggest that you review the syllabus as you read this section of the article.

Law in Comparative Cultures is divided into four sections. Although each section after the first one can stand alone, the goal is for the student to become increasingly aware of law and culture through a step-by-step development from issues that can be examined across domestic legal systems to issues that require transnational and international legal resolution.

Section I: The Civil Law Tradition

John H. Merryman's *The Civil Law Tradition*⁶ presents the history, principles, and practices that form the foundation of the civil law. Instead of introducing the material with laborious explanations of Roman law and its place in the operation of the civil law as practiced in Europe (primarily France and Germany), Merryman addresses the development of the modern civil law. Indeed, he refers to the civil law *tradition* rather than the civil law *system* because he recognizes the diverse applications of the civil law in the many nations that have adopted it.

Discarding the American case-and-statute (code) approach to civil law, Merryman efficiently and effectively discusses the nature and operation of the civil law. He gives the reader a brief but sound analysis of each of the basic parts of the European civil law and contrasts them with their American common law counterparts. The comparisons between civil and common law that are introduced in the book can be expanded by supplemental materials. Even with the expeditious treatment provided by Merryman, *The Civil Law Tradition* will take a few weeks to teach (especially if supplemented by basic examples of the procedural differences between civil and common law). Interestingly, parts of the discussion in Merryman's book reappear in various forms in the materials that follow it.⁷ I direct the students to these parts when they are reading the Merryman book, and we revisit them as the course progresses, so that the students can understand the interrelation of the course and its materials. Films that can be shown in class (with written legal analyses wherever possible) include *A Man for All Seasons*, *Twelve Angry Men*, and *Rashomon*.⁸

6. Stanford, 1985.

7. For example, I have successfully used the role of the *volk* philosophy in German law and culture to reinforce the use of *volk* in the culture and laws used in German anti-Semitism. *Id.* at 30–32; Lucv S. Dawidowicz, *The War Against the Jews: 1933–45* at 23–45 (New York, 1975).

8. *A Man for All Seasons* (Columbia Pictures 1966) concerns the modern origins of the separation between religious and temporal law. *Twelve Angry Men* (United Artists 1957) addresses perceptions of the value and operation of the jury system in the United States. *Rashomon* (RKO Radio Pictures 1951, English language subtitled version) shows the difficulty in finding truth through judicial procedures.

Section 2: Law in Diverse Cultures

The next set of materials begins by addressing some of the difficulties faced when the civil law is adopted by societies quite different from the European states. By contrasting the history, values, traditions, and societal structure of Japan with those of the European states, students are introduced to the relation of culture to law and its effect upon the application of law.⁹ Through readings about quasi-law and nonlaw powers such as “administrative guidance,”¹⁰ we reexamine the students’ perception of objective and subjective legal power. We take this concept one step further through readings about the untouchables in Japan (*Burakumin*) and India (*Dalit*).¹¹ These materials invite students to wrestle with the use of legal self-help in societies where it is illegal to discriminate and yet de facto governmental discrimination continues. This section concludes with an examination of the American problem of racial profiling.¹² Having established their positions about legal self-help in Japan and India, the students must now consider whether legal self-help may be appropriate in the United States. Films dealing with discrimination against the *Dalit* and with racial profiling are readily available.¹³

Section 3: The Religious/Temporal Law Dichotomy

The third set of materials shifts the focus to contrast religious and temporal law within one state. This contrast is clearest when comparing religious states (such as India, Iran, Israel, Italy, and Thailand) with nonreligious—or superficially religious—states (such as the U.S., England, and Sweden). Family law (marriage, annulment, divorce, child custody) is particularly useful in presenting the contrast. Topics such as the *agunah*¹⁴ and other family law issues in the different religions draw on each student’s personal knowledge of religion and religious diversity. For many societies, the tendency to look to the civil courts and the legislature to resolve such problems runs directly into conflicts with free exercise of religion and separation between church and state (especially in

9. Although it is a Chinese film, *The Story of Qiu Ju* (Columbia/Tristar Pictures 1994, English language subtitled version) is a very good introduction to Asian values practiced in Japan such as hierarchy and dependence. I also use John O. Haley, *Authority Without Power* (New York, 1991) and Frank K. Upham, *Law and Social Change in Postwar Japan* (Cambridge, Mass., 1987).
10. Haley, *supra* note 9, at 160–68.
11. On the *Burakumin*, see Upham, *supra* note 9, at 78–123; Suehiro Kitaguchi, *An Introduction to the Buraku Issue: Questions and Answers*, trans. Alastair McLaughlan (Richmond, 1999). On the *Dalit*, see Human Rights Watch, *Broken People: Caste Violence Against India’s “Untouchables,”* (New York, 1999).
12. David A. Harris, *The Stories, the Statistics and the Law: Why “Driving While Black” Matters*, 84 *Minn. L. Rev.* 265 (1999).
13. *Caste at Birth* (Filmmakers Library 1990) is about the *Dalit*. *America in Black and White: Racial Profiling and Law Enforcement* (ABC News, Films for the Humanities and Sciences, 1998) addresses racial profiling.
14. An *agunah* is an Orthodox Jewish woman whose husband refuses to give her a *get* (bill of divorce). She is still married by religious law although her husband is free to remarry without giving the *get*. Henry Rackman, *Women in Chains: A Sourcebook on the Agunah*, ed. Jack Nusan Porter (New York, 1995).

the U.S.). These legal materials establish a good contrast between the power of religious bodies to resolve family law matters in religious states as against nonreligious states. Family-law-related films such as *Hester Street* and *Two Women* can initiate a discussion of the problems faced in religiously dominated societies and societies with a two-track (religious/temporal) legal system.¹⁵

Section 4: Transcending Sovereign Legal Systems

The last set of materials expands the focus to the international arena. Students should be introduced to the attempts to blend civil and common law (e.g., the European Union and the Convention for the International Sale of Goods) to accommodate matters that transcend sovereign borders. But it is clear that sovereign and even regional legal systems are ill prepared to address many of the human rights abuses by multinational and transnational entities. Worse still, the voluntary nature of the international legal system and its timid and conflicted steps to coordinate its efforts to meet this challenge leave a broad chasm between sovereign and international regulation. Recent cases such as *Bhopal*¹⁶ and *Unocal*¹⁷ can expose students to the tension between harmful acts by or on behalf of global corporations and the inability of those harmed to obtain redress through their own state legal systems or the international system. Students should review some of the recent judicial developments in the U.S. (e.g., the Alien Torts Claims Act of 1790 and its revival since 1980¹⁸) and examine the role the U.S. should play in addressing these types of problems. Should (or even can) the U.S. become the legal system of last resort when other legal systems fail to provide effective remedies? Films depicting some of the labor and environmental problems in these cases are readily available.

It is clear that there is a need to shift some issues to a system of international accountability, especially in the area of human rights. First, students can examine the deprivation of legal and human rights within one country. By reading *The War Against the Jews: 1933-45*¹⁹ and viewing two movies, *Farewell to*

15. *Hester Street* (First Run Features 1974), by Joan Micklin Silver, portrays an immigrant Jewish family around 1900. It addresses the shift in values for immigrants in a new country as well as a religious divorce. *Two Women* (1999), an Iranian film, is a good introduction to some of the problems faced in Islamic divorce, but unfortunately it is not yet available on videotape or DVD.
16. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842 (S.D.N.Y. 1986), *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195 (2d. Cir. 1987).
17. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), 27 F. Supp. 2d 1174 (C.D. Cal. 1998); 110 F. Supp. 2d 1294 (C.D. Cal. 2000).
18. Alien Tort Claims and Torture Victim Protection Act, 28 USCS Sec. 1350 (2001); see also Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 B.Y.U. L. Rev. 1139; Gregory G. A. Tzeuschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 Colum. Human Rights L. Rev. 359 (1999). See generally *The Alien Tort Claims Act: An Analytical Anthology*, eds. Ralph G. Steinhardt & Anthony D'Amato (Ardslev, 1999).
19. Dawidowicz, *supra* note 7.

Manzanar and *Judgment at Nuremberg*,²⁰ the students can observe the inability of states and citizens to police their own excesses. Although America's failure to respect the rights of its Japanese-American citizens does not even begin to approach the genocide of the Holocaust, it is important that American students understand and discuss the denial of rights by the U.S. government upheld by its courts. The first half of *The War Against the Jews* explains the cultural history of Germany as it relates to anti-Semitism and shows how the German government structured its legal system to dismantle the legal rights of Jews and other "non-Aryan" citizens. *Farewell to Manzanar* juxtaposes well with the book's first half by addressing the loss of rights and the internment of Americans of Japanese descent during World War II. These materials lead naturally to a discussion about the difficulty of redressing human rights under domestic legal structures.

After reading the second half of *The War Against the Jews* ("The Holocaust"), the students can view *Judgment at Nuremberg*. Although it is dated and somewhat muted, this film provides an effective basis for the examination of international problems that transcend the legal framework established in our separate societies. From this position, students can consider the evolution of a system that will provide international accountability of corporations and individuals for acts that violate internationally accepted human rights norms.²¹ In this context students should address what role, if any, the differing domestic legal traditions can play in the development of such an international legal system.

Sharing the Wealth

One of the great advantages of this course is its flexibility. First, it is obvious from the descriptions above that the course can be taught easily with innumerable sets of subject variations. It is constructed to adjust as the law evolves and new issues appear (and old issues are resolved). Freed from the specialized structure of traditional comparative law casebooks, students are exposed to a variety of legal systems and the rationale for the distinctions between them. For example, the student can see not only the distinctions between common and civil law, but also the cultural bases for the differences between Japan and Germany despite their both having civil law systems. Ultimately, the student realizes that understanding the disparity between the civil and common law systems does not resolve the problems that arise from conflicts within legal traditions, much less between other legal systems outside the civil/common law dichotomy.

Second, student research papers can focus on a vast number of diverse subjects. An analysis of the historical/cultural roots of a country's legal system can help in understanding how modern legal systems can effectively operate

20. *Farewell to Manzanar* (Universal Studios 1977); *Judgment at Nuremberg* (United Artists 1961). *Farewell to Manzanar* is a made-for-TV movie of the book by the same name. Unfortunately, it is difficult to get copies of this movie. An alternative could be *Snow Falling on Cedars* (Universal Studios 2000).

21. Cf. Tom L. W. Scheirs, ICTY Rendered Its Judgement in the Kordic and Cerkez Case, 17:6 *Int'l Enforcement L. Rep.*, Section XII, June 2001, available at <<http://www.un.org/icty/kordic/trialc/judgement/index.htm>>; *Bosnian Serbs Convicted in Landmark Rape Case* (Reuters, Feb. 22, 2001).

within that society. I had a student who did this type of research for her course paper addressing the recently emerging country of Eritrea. Another student addressed the cultural/legal distinction between the origins and use of the contempt powers in American courts and the absence of such powers in European civil law courts. Another student chose to examine the difficulty in conforming decisions in the courts and under the laws of the state of Louisiana with those of the other forty-nine states. Many other papers drew from topics suggested or discussed in the class materials.

Finally, the opportunity to adapt Law in Comparative Cultures for team teaching, course sharing, or using as an introductory course for other perspectives courses increases its value significantly beyond that of the traditional Comparative Law course. Faculty and students can use this course effectively to bridge to other courses. A group of faculty can teach selective portions of the syllabus (depending on each person's expertise), or the course could be structured to work in tandem with such courses as Law and Literature, Law and Film, Law and Sociology, Legal History, Law and Religion, or even International Law. Indeed, research projects by students can be coordinated among these courses.

* * * * *

Law in Comparative Cultures can play a major role in the restructuring of the law school curriculum. By jettisoning the twentieth-century comparative law notion that students should master the intricacies of the civil law, my course shifts the emphasis to the abundance and diversity of legal systems that should be studied. The course introduces materials, concepts, and analyses that can form the foundation for advanced legal study. Law in Comparative Cultures can help us shift from the parochial focus of twentieth-century comparative law to the global perspective of twenty-first-century legal education.