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THE COMPARATIVE LEGAL PROCESS THROUGHOUT THE LAW SCHOOL CURRICULUM: A MODEST PROPOSAL FOR CULTURE AND COMPETENCE IN A PLURALISTIC SOCIETY

MICHAEL P. WAXMAN*

I. INTRODUCTION

If law school can be compared to a three-ring circus, comparative law has been seen as a sideshow. Shunted off to the academic sidelines with such “esoteric” subjects as jurisprudence, international law, and admiralty, most students, faculty and practitioners have been more than pleased to leave comparative law to the “eggheads.”¹ Not surprisingly, a survey of law school curricula reveals that comparative law is not specifically required for graduation at most law schools, a selective option from a restricted, required course grouping at only six law schools, merely elective at most law schools, and not even offered at a few law schools.²

We can recognize that comparative law is shabbily treated without conceding that such a view is in the best interests of the law school, its students, or the practicing bar. Rather, a re-examination of comparative law’s place in legal education is essential to meet the needs of America and its legal advisors in the 1990s and beyond.³ The two greatest advances of the twentieth century, transportation and telecommunication, have already brought transnational legal issues to the door of even the “country lawyer.” In the twenty-first century, attorneys will regularly address domestic and foreign legal issues, involving diverse cultures, in differing legal contexts.⁴

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1. M.H. Hoeflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 U. ILL. L. REV. 719, 721 (1984); see also Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 458-59 (1989).

2. A copy of this survey is on file with the *Marquette Law Review*.

3. Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 958-59 (1991); see also Goebel, *supra* note 1, at 458-60.

4. See Goebel, *supra* note 1, at 458-59.

Comparative legal analysis is particularly well suited to transcend the yawning gap between the provincialism of humankind's personal knowledge and prejudices, and modern society's demand to address newly developing and neglected legal issues. If the process of comparative legal analysis is introduced and naturally interwoven throughout the first year curriculum, students will recognize that "foreign" legal concepts may differ from those inherent within mainstream American legal thinking and yet still be valid. Thereafter, students will be much more receptive to an examination of the foundational values and processes which differing cultures, both domestic and foreign, utilize in legal reasoning. Naturally, students should, and will, focus on the mainstream features of our "common law" system and the domestic substantive law, but student acceptance of diversity in procedural and substantive legal thinking will prepare them more effectively to face the new, difficult, and complicated issues of modern legal practice.

This essay will briefly discuss the role comparative law can play in facilitating the analysis of two "cutting edge" issues facing the next generation of lawyers. First, the internationalization of legal interaction has placed new burdens on practitioners: (a) to have familiarity with foreign legal systems, because standards of competence require attorneys appearing before United States courts to be equally conversant with domestic, foreign, and non-state (*i.e.*, international public and private law) legal principles; and (b) to have the ability to assist clients in selecting the best legal path by comparing the effects of selection of laws between diverse legal systems, as well as the domestic applications within those systems.

Second, comparative law is particularly well suited to assist in the legitimization, acceptance, and application of diverse socio-legal cultures in our constantly evolving pluralistic society. As these two examples illustrate, the integration of comparative law into the first year curriculum, and thereafter into virtually every law school course, is essential to the preparation of competent attorneys for the twenty-first century.

II. THE INTERNATIONALIZATION OF LEGAL INTERACTION

A. Legal Competence

Professional responsibility requires that an attorney be prepared to address every legal issue that relates to the client's matter.⁵ This expectation

5. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 and cmt. (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1981). Of course, when a lawyer is not familiar with an area of law, or has only a passing knowledge, it is incumbent upon that lawyer to select a

of competence is reflected by the lack of specialist categories in bar examinations, the restriction many bar associations and professional responsibility codes have against attorneys advertising their specialty or expertise,⁶ and the rise in professional liability insurance claims based on "failure to understand international and foreign substantive law."⁷ Unfortunately, many attorneys do not realize that the same standard of broad competence is expected for matters involving foreign law issues.⁸ Naturally, attorneys lacking familiarity with foreign legal systems, much less the diverse procedural and substantive laws existing under those systems, often fail to inform their clients or even the courts of significant issues, thereby providing ineffective or incompetent legal counsel. Because professional responsibility and legal ethics standards are intended to meet minimal levels likely to assure the correct legal outcome, some courts have been empowered to raise and resolve potential transnational conflict of law issues which have not been raised by the parties.⁹ Although elective judicial intervention may assure the appropriate result in some instances, the nature of our adversarial system requires that attorney competence be vigorously enforced. Thus, while lawyer incompetence may affect individual cases, an overall lack of familiarity with foreign legal systems by virtually the entire bar not only

competent counsel trained in the foreign law and culture. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt; see also Goebel, *supra* note 1, at 447-54.

6. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1983). There are very narrow exceptions that prove the rule (e.g., patent and admiralty practice). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-14 n.22 (1981).

7. Telephone Interview with Alice Hughey, Risk Management Coordinator, American Bar Association (Aug. 12, 1991).

8. See *In re Roel*, 3 N.Y.2d 224, 232, 165 N.Y.S.2d 31, 37, 144 N.E.2d 24, 28 (1957).

When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign state [foreign countries as well as sister states].

See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1981); RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 27-30 (Foundation Press 5th ed. 1988).

9. Cf. FED. R. CIV. P. 44.1; Rudolf B. Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1 (1973); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), where the Court disposed of an argument that foreign arbitrators in Japan would lack experience with, or exposure to, our law and values, stating, "[t]he obstacles confronted by the arbitration panel in this case, however, should be no greater than those confronted by any judicial or arbitral tribunal required to determine foreign law. [See, e.g., FED. R. CIV. P. 44.1.]" *Id.* at 634 n.18. See generally SCHLESINGER, *supra* note 8, at 78-81. But, if the parties fail to raise the issue of choice of law, the court is not obligated to do so. See *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 860 (2d Cir. 1981); see generally Annotation, *Raising and Determining Issue of Foreign Law Under Rule 44.1 of Federal Rules of Civil Procedure*, 62 A.L.R. FED. 521, 524-25, 529-32 (1983).

invites malpractice, but also undermines the validity of our legal system itself.

The issue of competence also arises through the expectation of creative lawyering. Competent lawyers do more than parrot existing law with its many rules and exceptions. Instead, they build upon existing law and explain to the court or legislature how this law may be effectively extended or limited. This process often requires that the attorney relate back to the source of the law. This process includes examining and explaining the English law, civil law, or other law that forms the foundation of United States or foreign law. Due to the absence of legislative history for many statutes, and, the reliance on the happenstance of court discussion for the origins of common law, historical, legal elements necessary to the analysis and effective application of the law are often missing. While this result may be inevitable when examining the origins of foreign law, many attorneys are unprepared to explain the role foreign law has played in framing our law. Beyond statutory law, for example, we have developed a set of our own code laws.¹⁰ These codes are often based on both foreign procedural and substantive law.¹¹ A true reading of these various codes requires an understanding of the role of code law in the civil law system, its adoption and practice in the United States, and the origins of the substantive law (e.g., commercial codes and the guild system).

Finally, because law reform is an inexorable force in the improvement of the law, such reform requires the deft hand of persons knowledgeable about comparable legal practices in other societies. Because previous revisions have often based reform upon the developments in foreign law,¹² thereby integrating the foreign system into the existing domestic law, unless attorneys are cognizant of both the preexisting law, as well as the foreign law, they will be unprepared to provide effective assistance for changes under consideration. Further, courts themselves may be unaware of the reasons for the changes; yet, even if they are aware of the changes, they will not

10. Beyond the well known codes of the State of Louisiana, see A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830. (1980); LOUISIANA'S LEGAL HERITAGE (E.F. Hass ed. 1983), bodies of code law have been created for formal use, see Marta Tarnowsky et al., *Bicentennial Survey of Civil Law Influences on American Legal Development*, 69 LIBR. J. 510 (1976), and informal use, see U.C.C.

11. See, e.g., Michael L. Perlin, *The German and British Roots of American Workers' Compensation Systems: When is an "Intentional Act" "Intentional?"*, 15 SETON HALL L. REV. 849, 860 (1985); see also SCHLESINGER, *supra* note 8, at 12 n.39 ("[L]arge sections of the United States have heritage of Spanish and French law derived from early settlers and conquerors.") (including extensive bibliography); Hoeflich, *supra* note 1, at 724, 726 (citing to David Hoffman and Mr. Justice Story).

12. See Tarnowsky, *supra* note 10.

have the background to implement them properly. Legal counsel, familiar with the changes and the cross fertilization process that led to the revisions, will be prepared to appropriately advise both the client and the court.

B. *Comparative Law and Transnational Business*

As increasing amounts of goods, monies, and people stream across national borders in the inexorable expansion of international trade, legal practitioners must be prepared to provide knowledgeable counsel to clients with legal needs as diverse as the world.¹³ While familiarity with public and private international law would greatly assist practitioners in advising their clients in transnational legal dealings, most attorneys will deal with the internal legal systems of various nations far more often. Concomitant with the increased transnational movement of goods, there has been a shift from unitary economic power in the United States to a sharing of that power among several sovereigns. While some foreign parties will wish to use the United States' legal system despite the ability to demand an alternative, in many cases foreign (as well as domestic) parties are using their power to negotiate the selection of foreign fora and law.¹⁴

Enriching the law school curriculum by integrating foreign legal principles that "parallel" concepts in American common and statutory law will not only expose the law student to the nature of legal practice in foreign societies about particular substantive issues, but it will foster student analysis about the expectations of parties in business and other interactions in those societies. In practice, these students will be able to more effectively counsel clients about the practical solutions to cross-cultural differences, and thereby provide agreements that are more likely to succeed. Even where foreign law is thrust upon the client, counsel can interpret and advise not only on the appropriate course in the proceedings, but they can also assist in "translation" of the advice provided by foreign legal and business consultants.¹⁵

Even greater problems arise in situations where the forum and law are not preselected by the parties. Although some civil, criminal, and procedural laws are based on virtually universal fundamental legal principles, an examination of the origin and application of those principles in each system, much less the domestic law of each sovereignty, shows a vast disparity be-

13. Goebel, *supra* note 1, at 458-60.

14. Jill A. Pietroski, Comment, *Enforcing International Commercial Arbitration Agreements - Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U. L. REV. 57, 57-59 (1986).

15. See Goebel, *supra* note 1, at 449-54.

tween their application in practice, and the interpretation of their meaning.¹⁶ Further, the exemption of the public law from the traditional courts in some legal systems¹⁷ has not only led to a lack of independent judicial review of potential bureaucratic excess, but has resulted in the development of different standards for the application of legal principles in regular and administrative courts.¹⁸

No one can be prepared to examine or be familiar with all the legal systems, much less the diverse nuances practiced by different nations. Clearly, foreign counsel must be selected and utilized as necessary. However, a familiarity with the systems, and well-selected examples of the diverse applications of the law within various nations, will provide a strong background to bridge the expertise of the foreign practitioner and the U.S. based client. Further, communication will be greatly enhanced as to the goals of the client and the different avenues, often unavailable in our society, that may be used to accomplish those goals.

III. CULTURAL FOUNDATIONS

American society is probably the most culturally diverse society in the world. Despite its diversity, mainstream American society expresses the expectation that whatever the ethnic, racial, religious, or sexual nature of those who choose to avail themselves of "our" society, they must play by "our" rules.¹⁹ While such thinking is commonly accepted among the nations of the world, the survival of American society demands a unitary law consistently and universally applied, as well as a respect for, and regular integration of, the diverse legal values among our many cultures.²⁰ The comparative law process of examining the origin, development, and similarity of "parallel" procedural and substantive laws in diverse legal cultures can greatly facilitate the examination of sociocultural differences that are reflected in our legal system.²¹

16. Phillip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 835-36 (1990).

17. See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 59-63 (1982).

18. *Id.*

19. See Jennifer C. Jaff, Note, *Radical Pluralism: A Proposed Theoretical Framework on Critical Legal Studies*, 72 GEO. L.J. 1143, 1144 (1984); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1153 (1986); see also Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

20. See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 10 (1989); see also Finley, *supra* note 19.

21. See generally Matsuda, *supra* note 20; Finley, *supra* note 19.

The nature of comparative law involves an examination of the differences and similarities amongst legal systems. The internal law, procedural and substantive, of particular sovereignties is contrasted with the law of other nations within the legal system "family."²² While few countries approach our heterogeneity, the diversity of laws and their applications by the various member nations of that family invariably provide a practical introduction into the legitimacy of distinct legal and cultural backgrounds. Further, a comparison of the distinctions will reveal the ability to adapt law, even within one legal system, to the special needs of each country's culture.

In the American context, an understanding of the origins of the legal aspects of cultures within our society, and their comparison to mainstream American legal thinking, will assist in the growth of fair and effective development, and application, of our laws. Although the integration of some elements of diverse legal thinking has been the hallmark of our society, the process of domestic legal development requires the melding of legal thinking from cultures beyond traditional middle European societies. Comparative law techniques and experiences can clearly facilitate and expedite this process.

IV. THE CLASSROOM ENVIRONMENT

The preparation and effective presentation of comparative class materials is not difficult, but does require that a special legal and cultural foundation be laid. The key elements for the class materials are: (1) written codes and statutes (including treatises and commentaries based on foreign "law") that parallel a closed universe text of legal issues that would otherwise be discussed in class;²³ (2) background information addressing the roots of both the United States' and foreign law for those issues and the procedure for analyzing law in that other society; and (3) articles contrasting these legal issues in both societies, including the reasons for the outcome and process differentials.

The preparation for classroom presentation may be more arduous than the collection of the materials to be examined. The professor must be familiar, with the history, design, and functioning of the legal systems of different societies under examination, as well as their application in these areas of the

22. See GLENDON, *supra* note 17, at 4-8.

23. Where foreign legal materials are provided in English translation it is essential that the document be verified for both literal and implication accuracy. See Max Rheinstein, *Comparative Law - Its Functions, Methods and Usages*, 22 ARK. L. REV. 415, 423 (1968); see also HENRY P. DE VRIES, CHOICE OF LANGUAGE, IN INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 14, 20 (Willis L. M. Reese ed., 1962).

law. An understanding of the values and needs in each society that caused the creation and continuity of its legal system's structure and its application, as well as the drive to maintain that system, develop new wrinkles, and address future developments, must be compared and examined. Not surprisingly, this is a wonderful opportunity to use team teaching.

The comparative process depends upon the presenter or facilitator to provide far more than a verbatim comparison reading of legal documents. In order to avoid the loss of nuance in translations, despite their literal accuracy, effective comparison requires an examination of the underlying societal influences, historical and cultural, that led to the creation and application of this area of the law in this manner. As a society becomes more pluralistic, effective legal systems facilitate the blending and accommodation of the legal and quasi-legal practices of its diverse communities in order to maintain legitimacy and effectiveness beyond the use of brute force.

V. CONCLUSION

Law school curricula are going through a major reexamination. Comparative legal analysis, of necessity, imbued its process with techniques that may now be invaluable to the needs of traditional as well as radical legal teaching. The overall effect of the inculcation of comparative legal thought throughout the curriculum can be an effective antidote to the rigidity of current law student "rule" discipline. Ultimately, it can foster a broad evolutionary change that will provide a legal community ready to address an incredibly shrinking world.