1-1-1975

The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparisons

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Recommended Citation

Hugh J. Ault and Mary Ann Glendon. "The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparisons." *Journal of Legal Education* 27, (1975): 599-608.

THE IMPORTANCE OF COMPARATIVE LAW IN LEGAL EDUCATION: UNITED STATES GOALS AND METHODS OF LEGAL COMPARISON

HUGH J. AULT and MARY ANN GLENDON *

Legal education in the United States is in the midst of a period of change and growth. In keeping with common law tradition, there has been no abrupt, violent break with the past. But looking back over the past ten years one can discern that a gradual process has been at work producing profound changes in a system which had been relatively stable for some time. Many of these changes had long been advocated as necessary or desirable and had been implemented to varying degrees at leading law schools. But it is only recently that they have found wide acceptance.

As one aspect of the change, more and more attention is being paid to the contribution which other disciplines, primarily economics and behavioral sciences, can make to a fuller understanding of the legal system. As a related development, it had been recognized in theory for many years that the law in books might be different from the law in action, but only a few law schools actually made efforts to explore the law in action and relate it to the law in books. It is only in the past few years that law schools generally have embarked on serious efforts to investigate the social and economic background of legal rules as well as the social and economic consequences of legal rules in operation. Now, however, nearly every law school is conducting one or more experiments in what is called clinical legal education. The variety of these experiments is such that perhaps the only general description which applies is that they are attempts to provide a real or simulated laboratory experience for law students.

Changes have taken place in the methods of law teaching as well as in the curriculum. The traditional casebook and case method is now routinely supplemented by lectures, written work, work on specially constructed problems, and field work. Teachers are increasingly inventive in finding the technique best adapted to the subject matter.

Perhaps the most pervasive change has been the breaking down of traditional artificial and arbitrary classifications of subject matter. Thus, while torts, contracts, property, crimes and so on, have not been abolished, there is increasing emphasis on how they are related to each other. And stepping back one step, there is emphasis on how civil procedure is related to all of them. Stepping back still further, it is recognized that the techniques and resources of the social sciences are indispensable to the understanding of legal rules in operation. Thus, the doors of the law schools have been opened to the behavioral scientists and economists. Recognizing the need to make arbitrary divisions of subject matter for convenience in teaching, and, at the same time, the need to relate all these subject matter areas to each other, to procedure and to the social sciences, the law schools have increasingly turned to courses which attempt to give the advanced student at least a tentative

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method for organizing his or her knowledge about the legal system. These courses, Legal Process, Legal Method, Elements of Law, and so on, have spread to more and more law schools.

Finally, a number of courses in the law school curriculum have come to try to fulfill a function of stimulating students to think creatively about legal problems by providing new insights into the legal system. Legal history and legal philosophy are increasingly being taught as courses which add a new dimension to the traditional analysis of legal problems. This final step back puts such distance between the student and substantive law that it has often been said that such courses have no place in a law school curriculum. But the hope cherished by those who advocate such courses is that distance will lend perspective and that the so-called perspective courses will enable students to become better lawyers. Sometimes the lines between traditional subject matter areas are erased, and a professor in one course, say in criminal law, attempts to provide the procedural, sociological, historical, philosophical, or economic dimensions. Professors so inclined are increasingly aided by modern casebooks which make available material beyond the traditional cases and notes. But there are difficulties. In many cases a law teacher's recognition of the need for additional information precedes the availability of results of social scientists. And even when results of such investigations are accessible, problems remain of "translating" them into a form which can be understood by law students. Another difficulty is that the great mass of material to be covered and the pressure of time in most substantive courses tends to limit what any ambitious professor can do with historical, economic, or philosophical materials.

When seen as a perspective course, comparative law presents a kind of perspective not found in legal history or in jurisprudence. These latter perspectives are most useful in provoking the student to engage in examining the premises of legal rules and, indeed, of legal institutions. But in times like the present when the law is under constant pressure to adapt to rapid social and economic change, and when the basic assumptions of the system are constantly being challenged and tested, there is also a need for new and alternative models of solutions to social problems. Because comparative law is a source of such models, it can be said that if comparative law did not exist it would have to have been invented.

Comparative law in the curriculum of the American law school has had in the past, and continues to have, a variety of functions. Courses offered under titles including the words "comparative law" may place differing emphasis on any of a number of aims. Some courses may actually attempt to prepare a student for professional work with a foreign legal system. Others specialize in area studies. Since the occupational hazard of the field is facile comparison, much of the effort of comparative law teachers and writers has been directed toward developing methods of teaching and research which avoid this common pitfall.[1]

Whatever the principal emphasis of their courses, most American teachers of comparative law would probably say that at the very least their goal is to

[1] Schlesinger's work has undoubtedly made all teachers of comparative law aware of the importance of procedure for any real understanding of how substantive rules operate.

make the American law student a better lawyer within his or her own legal system. That is, comparative study should enable them to think more precisely and creatively about legal problems which they will encounter in law school and in practice.[2]

Interestingly enough, this seems to be the trend of legal philosophy and legal history courses too. These courses are seen less and less as independent disciplines forming discrete subject matter areas in the law school curriculum, and more and more as courses which deepen the students' understanding of the legal system and the legal process. Indeed, one might say this trend in legal history, legal philosophy, and comparative law, is simply part of the general tendency now to recognize frankly the traditional classification of subject matter in the law school curriculum for what it is—an arbitrary division for convenience in teaching and studying, but which must be reassembled and integrated by the student (with or without help) so that the relationships between the parts are understood.

If comparative law—or legal history, or legal philosophy—is seen as a perspective course, it is easy to see that the perspective it lends to any given aspect of the legal system can be introduced in either or both of two ways. It can be taught as a separate course with the hope that the insights and methods of analysis it affords will be carried over by the student into other areas. It can also be integrated into a course in a particular subject matter area to enrich the study of that area by adding yet another dimension to the particular problem being studied. It is the purpose of this report to describe the techniques and results of experiments with both kinds of courses.

The Comparative Legal Analysis course which has been taught by the authors for five years at Boston College Law School is of the first type. The title of the course was chosen to emphasize that the concern of the course is with a method of analysis rather than with substantive law. The principal emphasis of the course is on the study of the process of growth and change in legal systems and the complex interaction between doctrine and policy in this process.

Comparative law as a perspective course differs from the traditional basic course in comparative law as a matter of emphasis. Comparative law taught as a basic course has as its principal goal to give law students an introduction to comparative method and to the workings of one or more foreign legal systems, and as a by-product to give him or her more understanding of the American legal system. In comparative law as a perspective course these priorities are reversed. The emphasis is on the insight which the study of the foreign "model" can give into the student's own legal system.

This approach has implications for the course materials used. The traditional basic course uses materials and problems selected to facilitate entry into the workings and habits of thought of foreign legal systems. In the perspective course, the organizing principle is quite different and will be de-

[2] One would be hard put to disagree with Kahn-Freund's assertion that "Comparative law . . . is not a topic, but a method. Or better: it is the common name for a variety of methods of looking at law, and especially of looking at one's own law." Kahn-Freund, *Comparative Law as an Academic Subject*, 82 *L.Q.Rev.* 40, 41 (1966). Nor with Hazard's description of the beginning course in comparison of laws as an "awakening of thought." J. Hazard, *Area Studies and Comparison of Law: The Experience with Eastern Europe*, 19 *Am.J.Comp.L.* 645, 653 (1971).

scribed in detail below. The problems are selected to illustrate the process of growth and change. They all involve settled legal doctrine under pressure to adapt to changed social and/or economic conditions. A subsidiary concern of the course has to do with the accurate identification of social and economic context and with the complexities of the relationship between law and social change. None of the concerns of the course are unique to a course in comparative law, but comparative models do afford some unique opportunities to gain new insight into the fundamental tension which exists in every legal system between the need for certainty and predictability on the one hand and the need for a mechanism for growth on the other. Thus, in a sense the goal of the course is extremely modest. It does not aim to give a student a working knowledge of any other legal system. On the other hand, the goal is almost overwhelmingly ambitious, since it is nothing less than to make the student think about all legal problems in an entirely new way, to add an additional layer of perception to his or her analysis of legal problems. In this sense its ambitions are no less than those of a modern legal philosophy or legal history course. The idea is to give new depth to legal analysis by using all the illumination that other disciplines can furnish.

In general the attempt is made to give the students some perspective on the operation of their own legal system by exposing them to a range of legal techniques which differ from those familiar to them from their common law training. When the aim of the course is thus stated, some approaches which have traditionally been used in the teaching of comparative law are clearly eliminated. The course is not intended to be a historical overview of the development of another legal system, or an introduction to problems of dealing with foreign legal systems as a practicing attorney.

In order to use the comparative technique to provide students with a perspective on their own legal system, some important initial decisions must be made as to *what* to compare and the methodology of comparison. As mentioned above, the problems were chosen to illustrate the tension between legal doctrine and broader policy considerations which typifies a legal system during a period of change and transition. Except as noted, we have drawn our materials from the French and German systems—for the two usual reasons and a third. The availability of the materials and the familiarity of the teachers with the languages and techniques would have been determinative.[3] But French and German materials are particularly useful in a course with the aim of illuminating American legal problems, because they present common social problems which appear in countries at broadly comparable stages of social and economic development.

Initially, we spent a substantial amount of time during the first few hours of the course on a general introduction to French and German legal institutions, covering such matters as the reception and influence of Roman law, the development of the codes, court structure, the judicial process, stare decisis, etc.[4] While it would probably be undesirable to thrust the student

[3] As Kahn-Freund and others have observed, the method and subject matter of such a course are inevitably conditioned by the past experience of the teacher. Kahn-Freund, *supra* note 2.

[4] In this connection we assigned readings from *R. Schlesinger, Comparative Law—Cases-Texts-Materials* (3d ed. 1970) [hereinafter cited as *Schlesinger*]; and *A. von Mehren, The Civil Law System—Cases and Materials for the Comparative Study*

into the consideration of problems within a foreign legal system without some such preparation, we found that the material could be handled in large part by outside reading and that it was not necessary to spend as much class time on general background as we had originally thought.

In class we found it helpful to use a "case of first impression" to dramatize differences in the judicial process and in the relations between courts and legislatures. For this purpose we traced the development of the right of privacy in French, German, and American law.

After this (abbreviated) general discussion of the French and German systems, we undertook an examination of a series of selected problems. Since our comparative technique was fundamentally the same in all of the examples, it is perhaps useful to spend some time discussing this approach in general terms before returning to the specific problems. Basically, we would begin our discussion of a given legal problem by attempting to articulate the common social problem which the legal systems under consideration were dealing with or reacting to. Obviously such an inquiry has many facets and can be illuminated by learning and techniques from other disciplines. However, in the beginning, we attempted to select problem areas in which the common social problem was relatively easy to define and then moved on to an examination of the various legal techniques that the systems used to accommodate the competing social interests which had generated the problem. It is a truism that in comparable societies the legal results in a given situation will be substantially similar in a large percentage of cases; however, in cases where the result is similar the interest is in the differing *techniques* which the systems under consideration have used in order to achieve the desired result. Here the discussion centered on the doctrinal starting points, the "authoritative starting points for legal reasoning," [5] available in the systems under consideration, and on the legal institutions (courts, administrative agencies, legislatures) which dealt with the existing legal doctrines and principles. The analysis centered on the problem of the extent to which the system's doctrinal starting point generated the conclusion in a particular situation, and the extent to which non-doctrinal policy considerations could be accommodated in the solution. The problems selected provided examples ranging from cases where the force of doctrine was such that it alone appeared to determine results, to cases where doctrine was merely something which had to be dealt with, while the result appeared to be determined by the pressure of other forces.

One clear danger of such an approach is an inadequate understanding of the functioning of a particular legal doctrine in practice in a foreign system. To what extent, for example, do various procedural devices make the particular legal rule difficult to apply? To what extent do general business or social norms make it practically difficult for a clearly expressed legal sanction to be applied? We recognize the difficulties of this type of analysis but nonetheless believe that some useful general comparative observations can be made.

of Law (1957) [hereinafter cited as *von Mehren*]. *H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law* (Tent. ed. 1958) and *J. Dawson, The Oracles of the Law* (1968) were also most useful in preparing this section.

[5] *von Mehren* 826.

A discussion of four specific topics which we have covered under this general analytical format, will illustrate how the method worked.

1. *Contract Formation.*[6]

We begin with a series of relatively straightforward problems from the law of contracts in order to accustom the students with the method of analysis and to put them at ease in dealing with unfamiliar materials. The warm-up consists of a few pitches right over the plate—enforceability of promises, offer and acceptance, limits on enforceability of promises. First, we consider a problem familiar to all first-year law students—the question of when a promise will be enforced by the legal order. An analysis of the various policies operating in the area leads relatively quickly to a conclusion that all the social orders under consideration are faced with the same fundamental problem—how to structure a legal mechanism for determining what promises will and what promises will not be enforced by the system. A discussion of the agreement theory in the civilian system and the doctrine of consideration in the common law system brings out two points of fundamental importance:

1. In some situations, the doctrinal starting point (for example, consideration) leads to the result that certain promises which have high social utility are not enforced, e. g., the firm offer problem.

2. Some promises which, under strictly doctrinal analysis would be enforceable, are nonetheless not enforced because of overriding policy considerations.

As soon as the students have begun to feel at home in the area of contracts, we introduce a common social problem involving the contractual relationship to which no system has evolved an entirely satisfactory solution—the problem of economic duress. After discussing the difficulties of defining the problem, the many possible doctrinal analyses of the problem, the competing policy considerations, and the tentative efforts the systems have made to deal with it, the student gets or should get a feeling of how comparative analysis can illuminate discussion of the open-ended problems which will form the subject matter of the latter part of the course.

2. *Agency Problems.*[7]

The specific topic covered involves the complex of legal doctrines generally denominated "agency" in common law. Here, as in the problem of contract formation, the initial discussion centers on the common problem faced by all systems which recognize some notion of agency relationship: How to weigh the relative interests of the principal and the third party dealing with the agent in situations where the agent has no authority or exceeds his authority. Here the French and American doctrines of apparent authority which developed to protect the third party are contrasted with the German approach of abstracting the external power to represent from the internal limitations placed on that power by the principal. This topic illustrates nicely

[6] For materials, we relied primarily on *von Mehren* 465–641.

[7] In this topic we assigned readings from *Schlesinger* 394–406, and translated excerpts from *W. Muller-Freienfels, Die Vertretung beim Rechtsgeschäft* (1955). A number of German decisions first used by Professor Helmut Coing in a course in the Harvard Law School in 1966 were also used. Professor Coing's kind permission to use his materials and his helpful comments on the structure of this course are gratefully acknowledged.

the general point that the doctrinal starting point from which a particular problem is approached will in turn determine the points of stress in the actual operation of the legal system. For example, under the abstract approach of German law, the third party's knowledge of internal limitations creates a difficult conceptual problem; if the internal limitations are truly of no effect as a limitation on an agent's authority, then the third party's knowledge of those limitations should be irrelevant. On the other hand, there is clearly no social utility in protecting a third party who is acting in bad faith, and a complex problem of the interaction of doctrine and policy is created. For the French and American systems, starting the analysis from the agent's apparent authority, the existence of limitations known to the third party clearly obviates any appearance of authority and the problem is easily solved within the doctrinal framework of those two systems, without external policy considerations.

From the agency materials, the course moves to a study of the trust and the devices which have been developed in French and German law to fulfill functions performed by the trust in common law.[8] Particular attention in this area is paid to differing policies toward restraints on alienability; the danger of doctrines assuming a life of their own; and the interesting history of the reception of the trust idea in Louisiana.

3. *Matrimonial Property.*[9]

After the trust materials, the course moves on to common social problems with which all of the systems under consideration are currently struggling. Picking up the theme sounded in the economic duress materials, the analysis becomes increasingly difficult and the difficulties are frankly acknowledged. Indeed, part of the perspective function of the course is to develop skill in perceiving these difficulties. The social problem itself is hard to identify—indeed too hastily "naming" the problem may produce the illusion that the problem has been solved. As the analysis becomes more refined, it may be seen that the social and economic contexts of a particular problem are not really comparable, raising questions about the utility of models from one system for another. Also, the policy aims of the systems under consideration may be entirely different. So, in this section, in addition to the difficulties experienced previously at the level of doctrine, the more complex problem of determining the proper subjects for comparison must be faced.

All of these difficulties are present in studying the way in which the law affects the property relationships of spouses in the French, German, English, and American systems. Yet, in this section of the course, the main emphasis is not on the technical difficulties of comparison but rather on two other themes which have been present from the beginning—the relationship be-

[8] Here a number of cases, originally used by Professor Coing at Harvard (*see supra* note 7) were used, as well. Excerpts from Wisdom, *A Trust Code in the Civil Law Based on the Law Restatement and Uniform Acts: The Louisiana Trust Estates Act*, 13 *Tul.L.Rev.* 70 (1938), and *K. Ryan, An Introduction to the Civil Law* 219–31 (1962) were also assigned.

[9] In this topic the students are asked to read *O. Kahn-Freund, Marital Property, Where Do We Go From Here?*, The Joseph Unger Memorial Lecture, delivered at the University of Birmingham, Jan. 29, 1971; and the articles by Colomer and by Graue on French and German law in *Comparative Law of Matrimonial Property* (A. Kiralfy ed. 1972).

tween law and social change, and the relationship between law and behavior. In the first section of the matrimonial property materials, the subject for consideration is traditional systems of matrimonial law and the changes which occurred in them after the Industrial Revolution. After having spent a fair amount of time discussing this process of change which has run its course in the systems under consideration, we examine the way in which all four systems have reacted to changes in the ideology of marriage and the role of the married woman in their particular society. One of many interesting aspects of this subject for the American law student is the role which comparative law studies have in fact played in this area on the continent.

The matrimonial property materials lead naturally into the final problem of the course. Like economic duress and matrimonial property, the last problem involves policy conflicts and social tensions which can never be completely reconciled, but at best are kept in uneasy equilibrium. This is the problem of identification and recognition of the appropriate corporate constituency. Here, the ultimate complicating factor is that the most interesting model comes from Yugoslavia, a society which is not really at a comparable level of economic development with France, Germany, and the United States, and in which the economy is planned.

4. *Problems of Corporate Constituency.*[10]

The contract and agency units were typical of situations in which there is a general consensus in the legal systems being considered as to the outlines of the common problem. Thus they were concerned primarily with analysis of the differing doctrinal responses which give content to the units. The problems in the definition of corporate constituency are much more complex. Here we find no consensus in the systems under consideration as to the appropriate constituency. Should it be limited to shareholders and should the aim of the corporation be simply profit maximization, with other interests being represented by external regulation (either legislative or through litigation, e. g., class actions)? Or should the corporate constituency be internalized and if so, in what form and through what legal institutions? And which of the various competing constituencies should be represented and in what proportion? The analysis of the competing social considerations and the variety of legal techniques available should broaden the student's perception of a threshold area of legal analysis. The hope is, of course, that by this time the student will have been provoked to bring some of the methods of comparative legal analysis to bear on other threshold areas of the law.

The preceding has been a discussion of comparative law taught as a perspective course. Inevitably the methods of the course have affected the way in which the authors teach their other courses and have led to experiments

[10] The diverse considerations that underlie the analysis of the problem of corporate constituency have led to a broad range of readings on this topic. We begin with some doctrinal materials from *Schlesinger* 561–92, followed by excerpts from *A. Berle, The Modern Corporation and Private Property* vii–xxxviii (1968); *A. Chayes, The Modern Corporation and the Rule of Law*, in *The Corporation in Modern Society* 26–45 (E. Mason ed. 1966); Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 *Harv.L.Rev.* 23, 64–75 (1966); Feldesman, *The Lineaments of Yugoslav Labor Relations Law in Practice*, 21 *Syr.L.Rev.* 9, 18–24 (1969); and Dahl, *Power to the Workers?, New York Review of Books*, November 19, 1970.

with comparative law as a dimension of other subject matter areas. The matrimonial property materials have been expanded with the additional materials on marriage and divorce law and will be taught in 1973–74 as a course whose principal emphasis is neither comparative law nor family law but the relationship between law and social change.

Tax law is another area in which we are planning to apply the comparative techniques outlined above. Very little work has been done in the area of comparative tax law so the basic materials are scarce. However, it would seem possible to approach comparative tax problems in the same manner as any other field of law. In the tax area, perhaps more than any other, the basic policy judgments are primarily economic. Whether a country adopts an income tax or a sales tax, and the general form and structure that such taxes take are dictated in large part by the economic policy goals which the country wishes to pursue. However, once the fundamental decision as to the type of tax system to adopt has been made, useful comparative analysis can be done at the level of sub-policy and technical rules. For example, in developed countries which have adopted an income tax, the question arises as to how to deal with income from foreign sources. Should it be exempt from tax? Or should the income be included in tax base but a foreign tax credit allowed for taxes paid to foreign governments? Or should the taxes paid to foreign governments be allowed as a deduction rather than as a credit? All of these issues can be approached from the comparative point of view with an eye towards broadening the students perception of the technical devices available to reach the desired policy result. As indicated, work in this area is in the embryonic stage and we are hoping to develop it more thoroughly next year.

It seems to us that the format we have used is adaptable to the capabilities and interests of many different teachers. Problems involving the dynamics of change can be found in all legal systems and in all subject matter areas. We have found it easy to add and subtract problems as the course has developed and we have been able to successfully integrate the contributions of a number of guest lecturers with our basic themes. We have, of course, had to develop our own materials on all of the problems, but we have relied on the two basic coursebooks for our introductory sections. The most useful book for this purpose would probably be one without cases and problems, a text like Zweigert and Kotz,[11] which the students could read as background for the early discussions.

We should conclude by explaining why we have chosen to confine a paper on the importance of comparative law in legal education in the United States to the description of experiments conducted in one law school. Another approach would have been to collect descriptive data concerning the number of courses taught in the various law schools, their titles, some brief outline of their contents, etc. But it seemed to us more helpful to describe firsthand in some detail the method by which we have attempted to illuminate the fundamental problem which all law courses, regardless of their denomination, are at bottom dealing with: the complex interaction of doctrine and policy in an evolving legal system.

Our reading of the literature indicates that other teachers of comparative law are occupied with concerns similar to the ones which have claimed our

[11] Einführung in die Rechtsvergleichung, Vol. I (1971).

attention.[12] Indeed, we owe an obvious intellectual debt to the authors of the material cited previously[13] and to many others. But it is our hope that we have added something to the discussion of comparative law teaching by integrating some of their ideas into what appears to us to be a novel format.

[12] For example, Cappelletti, *Le droit comparé et son enseignement face à la société moderne*, in *Canadian and Foreign Law Research Centre, Proceedings of the Seventh International Symposium on Comparative Law* 85 (1970), is occupied with the contribution comparative law can make to the process of law reform which he sees as particularly urgent in view of current rapid social and economic changes. Also, Schlesinger, in *The Role of the "Basic Course" in the Teaching of Foreign and Comparative Law*, 19 *Am.J.Comp.L.* 616, 620 (1971), states: "In the future . . . it is likely that teachers and students no longer will be content to limit themselves to a comparison of existing institutions, and that primary attention will be paid to a comparison of the processes by which these institutions change in the various systems." Von Mehren, in *An Acadmic Tradition for Comparative Law*, 19 *Am.J.Comp.L.* 624 (1969), as well as in his course book, is concerned with interactions between the law and the underlying culture, the role of the conceptual apparatus in the law, and the perspective which comparative law can give to law reform efforts. Konrad Zweigert, in a colloquium held at the October, 1970 meeting of the Board of Editors of the American Journal of Comparative Law at Ann Arbor, Michigan, compared comparative law with jurisprudence and legal history as methods of gaining perspective on legal problems. In an interesting recent experiment, the first year course in criminal law was taught in 1971–72 at the University of Southern California as a comparative law course by George Fletcher, Visiting Professor of Law at Harvard, 1973–74.

[13] Beyond many specific debts to individual writers and teachers, the thinking which shaped the course owes much to the teaching and writing of Max Rheinstein, Professor Emeritus of the University of Chicago Law School, and to ideas and discussions provoked by the use, as teachers and students, of *H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law* (Tent. ed. 1958).